Date and Time: Wednesday, October 25, 2023 12:46:00 PM CST

Job Number: 208875114

Documents (100)

1. Feitelson v. Google Inc., 80 F. Supp. 3d 1019

Client/Matter: -None-

Search Terms: "antitrust law"

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2. Fischer v. Time Warner Cable Inc., 234 Cal. App. 4th 784

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

3. Heartland Payment Sys. v. Mercury Payment Sys., LLC, 2015 U.S. Dist. LEXIS 68662

Client/Matter: -None-

Search Terms: "antitrust law"

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

4. N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

5. Mueller v. Wellmark, Inc., 861 N.W.2d 563

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

6. [Resnick v. Netflix, Inc.(In re Online Dvd-Rental Antitrust Litig.), 779 F.3d 914]

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

7. [Bilinski v. Keith Haring Found., Inc., 96 F. Supp. 3d 35]

Client/Matter: -None-

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Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

8. [Worldwide Travel, Inc. v. Travelmate US, Inc., 2015 U.S. Dist. LEXIS 28517]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
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9. [Ashley Furniture Indus. v. Am. Signature, Inc., 2015 U.S. Dist. LEXIS 194690]

Client/Matter: -None-

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

10. [Golden v. Sound Inpatient Physicians Med. Group, Inc., 93 F. Supp. 3d 1171]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

11. *Collins Inkjet Corp. v. Eastman Kodak Co., 781 F.3d 264*

Client/Matter: -None-

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Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

12. *Driessen v. Royal Bank Int'l, 2015 U.S. Dist. LEXIS 33322*

Client/Matter: -None-

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Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

13. *Cobb Theatres III, LLC v. AMC Entm't Holdings, Inc., 101 F. Supp. 3d 1319*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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14. *Intellectual Ventures I LLC v. Toshiba Corp., 2015 U.S. Dist. LEXIS 35204*

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

15. *In re Aggrenox Antitrust Litig., 94 F. Supp. 3d 224*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

16. [Yastrab v. Apple Inc., 2015 U.S. Dist. LEXIS 37119]

Client/Matter: -None-

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Search Type: Natural Language

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17. [Deborah Heart & Lung Ctr. v. Virtua Health, Inc., 2015 U.S. Dist. LEXIS 36588]

Client/Matter: -None-

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18. [Methodist Health Servs. Corp. v. OSF Healthcare Sys., 2015 U.S. Dist. LEXIS 37887]

Client/Matter: -None-

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19. [Cardoni v. Wells Fargo Bank, N.A., 2015 Cal. App. Unpub. LEXIS 2117]

Client/Matter: -None-

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Content Type	**Narrowed by**
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20. [In re Aluminum Warehousing Antitrust Litig., 95 F. Supp. 3d 419]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

21. [Kleen Prods. LLC v. Int'l Paper, 306 F.R.D. 585]

Client/Matter: -None-

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Content Type	**Narrowed by**
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22. Spinelli v. NFL, 96 F. Supp. 3d 81

Client/Matter: -None-

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Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

23. Fjord v. AMR Corp.(In re AMR Corp.), 527 B.R. 874

Client/Matter: -None-

Search Terms: "antitrust law"

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

24. In re Animation Workers Antitrust Litig., 87 F. Supp. 3d 1195

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Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

25. In re Blood Reagents Antitrust Litig., 783 F.3d 183

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

26. In re Text Messaging Antitrust Litig., 782 F.3d 867

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

27. Ryan v. Microsoft Corp., 2015 U.S. Dist. LEXIS 47753

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

28. Aetna, Inc. v. Blue Cross Blue Shield of Mich., 2015 U.S. Dist. LEXIS 48534

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

29. McWane, Inc. v. FTC, 783 F.3d 814

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

30. Mylan Pharms., Inc. v. Warner Chilcott Pub. Ltd. Co., 2015 U.S. Dist. LEXIS 50026

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

31. Tri State Advanced Surgery Ctr., LLC v. Health Choice, LLC, 2015 U.S. Dist. LEXIS 50164

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

32. [Go Computer v. Microsoft Corp., 2015 Cal. Super. LEXIS 10947]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

33. [Oneok, Inc. v. Learjet, Inc., 575 U.S. 373]

Client/Matter: -None-

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Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

34. [Garrison v. Oracle Corp., 2015 U.S. Dist. LEXIS 53653]

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

35. [Superior Prod. P'ship v. Gordon Auto Body Parts Co., 784 F.3d 311]

Client/Matter: -None-

Search Terms: "antitrust law"

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Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

36. [Netlist, Inc. v. Diablo Techs., Inc., 2015 U.S. Dist. LEXIS 54109]

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

37. *Woodman's Food Mkt., Inc. v. The Clorox Co., 2015 U.S. Dist. LEXIS 54421*

Client/Matter: -None-

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38. *Debjo Sales, LLC v. Houghton Mifflin Harcourt Publ'g Co., 2015 U.S. Dist. LEXIS 56504*

Client/Matter: -None-

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Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

39. *Swanson v. North Carolina, 2015 U.S. Dist. LEXIS 66814*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

40. *United States v. Am. Express Co., 2015 U.S. Dist. LEXIS 56945*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

41. *Sukumar v. Nautilus, Inc., 785 F.3d 1396*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

42. *In re Lidoderm Antitrust Litig., 103 F. Supp. 3d 1155*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

43. *Hemlock Semiconductor Corp. v. Deutsche Solar GmbH, 116 F. Supp. 3d 818*

Client/Matter: -None-

Search Terms: "antitrust law"

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

44. *In re Cipro Cases I & II, 61 Cal. 4th 116*

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

45. *Alcon Labs., Inc. v. Reyes, 2015 U.S. Dist. LEXIS 82734*

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

46. *Am. Hotel & Lodging Ass'n v. City of Los Angeles, 119 F. Supp. 3d 1177*

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

47. *Dutra v. BFI Waste Mgmt. Sys. of N. Am., 2015 U.S. Dist. LEXIS 63631*

Client/Matter: -None-

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

48. [Giuliano v. Sandisk Corp., 2015 U.S. Dist. LEXIS 193817]

Client/Matter: -None-

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Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

49. [Growers 1-7 v. Ocean Spray Cranberries, Inc., 2015 U.S. Dist. LEXIS 192538]

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

50. [CollegenNET, Inc. v. Common Application, Inc., 104 F. Supp. 3d 1137]

Client/Matter: -None-

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

51. [United States ex rel. Blaum v. Triad Isotopes, Inc., 104 F. Supp. 3d 901]

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52. [Gil Ramirez Grp., L.L.C. v. Houston Indep. Sch. Dist., 786 F.3d 400]

Client/Matter: -None-

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53. Trendsettah USA, Inc. v. Swisher Int'l Inc., 2015 U.S. Dist. LEXIS 186835

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

54. Waggoner v. Denbury Onshore, L.L.C., 612 Fed. Appx. 734

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

55. In re Mem'l Hermann Hosp. Sys., 464 S.W.3d 686

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56. Mian v. General Manager, Baltimore-Washington Manheim Auction, 2015 U.S. Dist. LEXIS 67054

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

57. New York v. Actavis PLC, 787 F.3d 638

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

58. [In re Capacitors Antitrust Litig., 106 F. Supp. 3d 1051]

Client/Matter: -None-

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59. [In re Mushroom Direct Purchaser Antitrust Litig., 2015 U.S. Dist. LEXIS 143331]

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

60. [HCF Ins. Agency v. Patriot Underwriters, Inc., 80 Cal. Comp. Cases 522]

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61. [Hanger v. Berkley Grp., Inc., 2015 U.S. Dist. LEXIS 68751]

Client/Matter: -None-

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62. [In re Evanston Northwestern Corp. Antitrust Litig., 2015 U.S. Dist. LEXIS 198712]

Client/Matter: -None-

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63. [Tex. Spine & Joint Hosp., Ltd. v. Blue Cross & Blue Shield of Tex., 2015 U.S. Dist. LEXIS 192514]

Client/Matter: -None-

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64. *Marion HealthCare, LLC v. S. Ill. Healthcare, 2015 U.S. Dist. LEXIS 69749*

Client/Matter: -None-

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65. *Teladoc, Inc. v. Tex. Med. Bd., 112 F. Supp. 3d 529*

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66. *Xtreme Caged Combat v. Cage Fury Fighting Championships, 2015 U.S. Dist. LEXIS 69796*

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67. *In re Auto Body Shop Antitrust Litig., 2015 U.S. Dist. LEXIS 114292*

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

68. *Marshall v. ESPN Inc., 111 F. Supp. 3d 815*

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

69. [Papadopoulos v. United States Gov't, 2015 U.S. Dist. LEXIS 74279]

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

70. [Eastman v. Quest Diagnostics Inc., 108 F. Supp. 3d 827]

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71. [Star Disc. Pharm., Inc. v. Medimpact Healthcare Sys., 614 Fed. Appx. 988]

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72. [Killian Pest Control, Inc. v. HomeTeam Pest Def., Inc., 2015 U.S. Dist. LEXIS 78001]

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

73. [Kissing Camels Surgery Ctr., LLC v. Centura Health Corp., 111 F. Supp. 3d 1180]

Client/Matter: -None-

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74. Dial Corp. v. News Corp., 314 F.R.D. 108

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

75. Surf City Steel, Inc. v. Int'l Longshore & Warehouse Union, 123 F. Supp. 3d 1219

Client/Matter: -None-

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76. Kimble v. Marvel Entm't, LLC, 576 U.S. 446

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

77. Otsuka Pharm. Co. v. Torrent Pharms. Ltd., 118 F. Supp. 3d 646

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

78. FTC v. Sysco Corp., 113 F. Supp. 3d 1

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

79. [In re Cast Iron Soil Pipe & Fittings Antitrust Litig., 2015 U.S. Dist. LEXIS 121620]

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

80. [Precision Assocs. v. Panalpina World Transp. (Holding) Ltd., 2015 U.S. Dist. LEXIS 194073]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

81. [Xitronix Corp. v. Kla-Tencor Corp., 2015 U.S. Dist. LEXIS 82312]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

82. [King Drug Co. of Florence, Inc. v. SmithKline Beecham Corp., 791 F.3d 388]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

83. [In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig., 2015 U.S. Dist. LEXIS 84152]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

84. [InterDigital Tech. Corp. v. Pegatron Corp., 2015 U.S. Dist. LEXIS 85116]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

85. *Ward v. Apple Inc., 791 F.3d 1041*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

86. *United States v. Apple, Inc., 791 F.3d 290*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

87. *Hannah's Boutique, Inc. v. Surdej, 112 F. Supp. 3d 758*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

88. *In re Pre-Filled Propane Tank Antitrust Litig., 2015 U.S. Dist. LEXIS 193932*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

89. *Lupin Pharms., Inc. v. Richards, 2015 U.S. Dist. LEXIS 86208*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

90. [Metro. Reg'l Info. Sys. v. Am. Home Realty Network, Inc., 2015 U.S. Dist. LEXIS 103964]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

91. [Grewal v. Cuneo, 2015 U.S. Dist. LEXIS 87755]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

92. [Kohn v. FirstHealth of the Carolinas, Inc., 242 N.C. App. 252]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

93. [HM Compounding Servs. v. Express Scripts, Inc., 2015 U.S. Dist. LEXIS 89062]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

94. [In re Niaspan Antitrust Litig., 2015 U.S. Dist. LEXIS 92534]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

95. *Evergreen Partnering Grp., Inc. v. Pactiv Corp., 116 F. Supp. 3d 1*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

96. *English & Sons, Inc. v. Straw Hat Rests., Inc., 2015 U.S. Dist. LEXIS 90766*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

97. *United Food & Commer. Workers Local 1776 v. Teikoku Pharma United States, Inc., 2015 U.S. Dist. LEXIS 94220*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

98. *Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

99. *VFM Leonardo Inc. v. Ice Portal, Inc., 2015 U.S. Dist. LEXIS 192993*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

Jul 22, 2013 to Dec 31, 2022

100. *In re Pool Prods. Distrib. Mkt. Antitrust Litig., 2015 U.S. Dist. LEXIS 97578*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 22, 2013 to Dec 31, 2022

Feitelson v. Google Inc.

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

February 20, 2015, Decided; February 20, 2015, Filed

Case No. 14-cv-02007-BLF

Reporter

80 F. Supp. 3d 1019 *; 2015 U.S. Dist. LEXIS 20778 **; 2015-1 Trade Cas. (CCH) P79,080

GARY FEITELSON, et al., Plaintiffs, v. GOOGLE INC., Defendant.

Core Terms

search engine, antitrust, Plaintiffs', allegations, phones, consumers, default, handheld, licenses, users, innovation, products, anticompetitive conduct, injunctive relief, anticompetitive, commodities, tangible, manufacturers, competitors, leave to amend, Sherman Act, pre-load, software, mobile, prices, foreclosure, pleadings, damages, anti trust law, mobile phone

LexisNexis® Headnotes

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

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

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

A motion to dismiss for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)* tests the legal sufficiency of the claims alleged in the complaint. Dismissal under *Rule 12(b)(6)* may be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged. Unless it would be clearly futile, a court granting a motion to dismiss should normally permit leave to amend.

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

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

In assessing the sufficiency of the pleadings, the court accepts factual allegations in the complaint as true and construes the pleadings in the light most favorable to the non-moving party. The court need not and does not accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. To survive a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss for failure to state a claim, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation. The plausibility standard asks for more than a sheer possibility that a defendant has acted unlawfully, and a complaint that pleads facts that are merely consistent with a defendant's liability stops short of the line between possibility and plausibility.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

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

HN3[] Regulated Practices, Private Actions

A well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely. However, as the U.S. Supreme Court has noted precisely in the context of private antitrust litigation, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive. As such, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.

Antitrust & Trade Law > Sherman Act > Claims

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

HN4[] Sherman Act, Claims

Section 1 of the Sherman Act prohibits unreasonable contracts or combinations in restraint of trade. *15 U.S.C.S. § 1*. To state a claim under *§ 1*, a private plaintiff must allege:(1) an agreement, conspiracy, or combination between two or more entities; (2) an unreasonable restraint of trade; (3) anticompetitive effects within the relevant market; and (4) a resulting antitrust injury suffered by the claimant.

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

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN5[] Actual Monopolization, Claims

Section 2 of the Sherman Act prohibits monopolization and attempts to monopolize. *15 U.S.C.S. § 2*. In order to state a claim for monopolization under this provision, a plaintiff must allege: (1) the defendant possesses monopoly power in the relevant market; (2) the defendant has willfully acquired or maintained that power; and (3) the defendant's conduct has caused antitrust injury. A claim for attempted monopolization, requires allegations of the defendant's: (1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct to accomplish the monopolization; (3) dangerous probability of success; and (4) causal antitrust injury.

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

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

HN6[] Standing, Clayton Act

Sections 4 and 16 of the Clayton Act provide complementary vehicles for private enforcement of the federal antitrust laws (including the Sherman Act). Section 4 allows the recovery of monetary damages, while § 16 permits a private party to enjoin anticompetitive conduct. *15 U.S.C.S. §§ 15*, *26*. Acknowledging that Clayton Act § 4 and § 16 are written in broad terms, the U.S. Supreme Court has recognized the importance of determining whether private parties are the appropriate plaintiffs to enforce the antitrust laws by inquiring into their antitrust standing to seek relief under those sections. Factors to consider for § 4 standing include: (1) whether the plaintiff has suffered antitrust injury; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages.

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

HN7[] **Private Actions, Standing**

The four requirements for antitrust injury are: (1) unlawful conduct; (2) causing an injury to the plaintiff; (3) that flows from that which makes the conduct unlawful; and (4) that is of the type the antitrust laws were intended to prevent. The injury must occur in the market where competition is being restrained. Parties whose injuries, though flowing from that which makes the defendant's conduct unlawful, are experienced in another market do not suffer antitrust injury.

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

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

HN8[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

Exclusive dealing is a theory under both *§ 1* and *§ 2* of the Sherman Act. The classic exclusive dealing case involves an agreement between a vendor and a buyer that prevents the buyer from purchasing a given good from any other vendor. Because there are well-recognized economic benefits to exclusive dealing arrangements, such arrangements are not per se violations of *§ 1* and must instead be analyzed under the antitrust rule of reason. Exclusive dealing thus violates *§ 1* only if its effect is to foreclose competition in a substantial share of the line of commerce affected. Substantial share has been quantified as foreclosure of 40 percent to 50 percent of the relevant market.

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

HN9[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

In determining whether an alleged exclusionary arrangement violates the antitrust laws, courts consider a number of factors including the potential amount of foreclosure, the duration of the agreement, and the alternative avenues of distribution available to competitors. The prevailing rule in districts and circuits across the country is that where exclusive or semi-exclusive contracts are short in duration, easily terminable, incentive-based, and leave open alternative channels to competitors, they are not exclusionary.

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

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

HN10[] **Tying Arrangements, Clayton Act**

Section 3 of the Clayton Act prohibits tying and exclusive dealings in the lease, sale, or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities. *15 U.S.C.S. § 14*. Section 16727 of California's Cartwright Act is based on § 3 of the Clayton Act and has a similar scope, including with respect to the definition of "commodities." Courts strictly construe the term "commodity" and hold that it denotes only tangible products of trade.

Counsel: [1]** For Gary Feitelson, a Kentucky resident, on behalf of himself and all others similarly situated, Daniel McKee, an Iowa resident, on behalf of himself and all others similarly situated, Plaintiffs: Jeff D Friedman, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; George W. Sampson, Steve W. Berman, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Patrick Howard, PRO HAC VICE, Saltz Mongeluzzi Barrett & Bendesky, Philadelphia, PA; Robert F Lopez, Hagens Berman Sobol Shapiro LLP, PRO HAC VICE, Seattle, WA; Simon Bahne Paris, PRO HAC VICE, Saltz Mongeluzzi Barrett and Bendesky, Philadelphia, PA.

For Google Inc., a Delaware corporation, Defendant: Benjamin Michael Stoll, PRO HAC VICE, Williams and Connolly LLP, Washington, DC; Brian C. Rocca, Morgan, Lewis & Bockius LLP, Three Embarcadero Center, San Francisco, CA; Gregory Forrest Wells, Hill B Wellford, III, Jon R. Roellke, Morgan, Lewis & Bockius LLP, Washington, DC; James Harris Weingarten, John Edward Schmidtlein, PRO HAC VICE, Williams and Connolly LLP, Washington, DC; Jonathan Bradley Pitt, PRO HAC VICE, Williams and Connolly LLP, Washington, DC; Susan J. Welch, Morgan, Lewis & Bockius LLP, San Francisco, CA. **[**2]**

Judges: BETH LABSON FREEMAN, United States District Judge.

Opinion by: BETH LABSON FREEMAN

Opinion

[*1022] ORDER GRANTING MOTION TO DISMISS FIRST AMENDED COMPLAINT WITH LEAVE TO AMEND

[Re: ECF 38]

In this putative class action antitrust case, plaintiffs Gary Feitelson and Daniel McKee (collectively, "Plaintiffs") allege that defendant Google, Inc. ("Defendant") restrains trade in the market for Internet search through confidential agreements with cell phone manufacturers. Before the Court is Defendant's Motion to Dismiss First Amended Complaint. Def.'s Mot., ECF 38. The Court heard oral argument on the matter on December 18, 2014, after which it deemed the matter submitted. After careful consideration of the parties' respective written submissions and oral argument, the Court hereby GRANTS Defendant's Motion to Dismiss with leave to amend certain claims.

I. BACKGROUND

The following facts are taken from the First Amended Class Action Complaint ("FAC") and are assumed to be true.

A. Parties

Plaintiffs are consumers who purchased mobile phones connected to Defendant's alleged anticompetitive conduct. Mr. Feitelson owns an HTC EVO 3D mobile phone purchased in Louisville, Kentucky. FAC ¶ 15, ECF 31. Mr.

McKee owns a Samsung Galaxy **[**3]** S III mobile phone purchased in Des Moines, Iowa.[1] *Id*. ¶ 16. Both the HTC EVO 3D and Samsung Galaxy S III are devices that use the Android Operating System ("Android OS").

Defendant is a Delaware corporation with its headquarters and principal place of business in Mountain View, CA. Defendant is perhaps best known for Internet search, with which its name has become nearly synonymous. *Id*. ¶ 4. Defendant also owns the Android OS, which it licenses to phone manufacturers for free, as well as a bevy of popular mobile applications including YouTube, Google Maps, Gmail, and the "Google Play (formerly Android Market) client," through which mobile phone users are able to purchase applications, music, movies, and books from the Google Play store. *Id*. ¶¶ 6-8, 17, 35.

B. Relevant Markets

Internet search occurs "when a user goes to a search engine website—Google.com, for example—and executes a query there, or when he enters a query into his browser's search bar and a pre-designated search engine operating in the background executes it." *Id*. ¶ 19. Defendant and its rivals—such as **[**4]** Microsoft's Bing and DuckDuckGo—offer rival search engines, free of charge, for use by the general public. These search engines compete for users, as increased user queries help improve the search engine's effectiveness and also increases advertising revenue from paid search advertising. *See id*. ¶¶ 60-61.

Plaintiffs allege that the Internet search market has a number of barriers to entry. Search engines improve with use, and successful search products must attract a critical mass of users to input queries that, in **[*1023]** turn, aid in improving the algorithm underlying the search product. *Id*. ¶¶ 59-60. Improved search capabilities attract more users, thus iteratively enhancing the search product's capability and appeal. *Id*. This cycle tends to favor the established products over new entrants. Moreover, search engines also require significant infrastructure in the form of physical plants backed by significant financial and computational resources, as well as continuous programming support for the algorithms and software that support the search engine, and the ability to manage search on a global scale, thus also barring new entrants. *Id*. ¶¶ 59, 60 n.22, 63.

Plaintiff defines two relevant markets **[**5]** affected by Defendant's alleged anticompetitive conduct: (1) the "United States market for general search," which is "general Internet search conducted on desktop computers, laptops, and handheld devices via the Google search engine or one of its general search engine rivals, such as Bing," and (2) the submarket for "handheld general search" in the United States, which is "general Internet search conducted on smartphones and tablets. *Id*. ¶¶ 27, 75. Defendant's Google search engine, as of March 2014, accounted for 81.87% of all Internet searches conducted across all devices. *Id*. ¶¶ 20-21. In that same month Defendant's share of Internet searches conducted on mobile phone and table devices was 86.82%. *Id*. ¶ 26.

C. Mobile Application Distribution Agreements and Anticompetitive Conduct

As previously stated, Defendant owns the Android OS, as well as a suite of mobile applications ("Google Apps") that includes YouTube, Google Play, Google Phone-top search, Google Maps, Google Calendar, Gmail, Google Talk, etc. *Id*. ¶¶ 6-8, 35. While Defendant licenses the Android OS to mobile device manufacturers (or, original equipment manufacturers, or "OEMs") for free, it places restrictions on the OEMs' **[**6]** installation of Google Apps on the Android OS devices that they produce.

Specifically, OEMs frequently "pre-load" applications onto their devices because consumers demand access at startup to popular Google Apps such as YouTube and the Google Play store. *Id*. ¶ 36 n.6, n.7. If an OEM wishes to pre-load any of the Google Apps on an Android OS phone, for example, they must enter into a confidential licensing agreement with Defendant called a "Mobile Application Distribution Agreement" ("MADA"). *Id*. ¶¶ 7-8, 35. Through public filings in an unrelated case, Plaintiffs have obtained two such MADAs between Defendant and OEMs HTC

[1] Though not expressly alleged, the Court infers that the named Plaintiffs are residents of Kentucky and Iowa respectively.

and Samsung. *Id*. Exhs. A-B; *see also id*. ¶ 36 n.8 (suggesting that Defendant has entered into MADAs with a panoply of Android OEMs). Among other terms in the representative MADAs, an OEM that wishes to pre-load apps like YouTube and the Play client on an Android OS phone must also agree to make Google the default search engine for all "search access points" on the device. *Id*. ¶ 36, Exh. A at 5; Exh. B at 4. The OEM must also pre-load all of a suite of Google Apps and must give those apps "prime screen real estate."[2] *Id*. at ¶ 36. The MADAs terminate after two years and cover specific device **[**7]** models, which must be approved by Defendant and are identified by addenda to the agreements. *See id*. Exhs. A-B.

Prime placement on device screens and default setting status are important avenues **[*1024]** by which search engines obtain access to users. Handheld device users will generally use the prominently placed search engine app or widget that comes pre-loaded on their phone. *Id*. ¶ 40. Moreover, handheld device users are "unaware of the interaction between their browser . . . and the search engine which happens to be powering it," and will generally simply execute searches by typing queries into a browser's omnibox (the search/address box at the top of each browser) without realizing that the search is being powered by Google, the default search engine on their device. *Id*. Searches improve a search engine's algorithm and can also translate to greater advertising revenue. *See id*. ¶¶ 41, 60-61. Thus, because device users are generally unaware of the default settings, or are not strongly incentivized to change **[**8]** the default setting, Defendant benefits from consumer preference for the status quo. *Id*. ¶¶ 42, 55.

In January 2014, the Android OS's share of the United States smartphone market was estimated to be 51.7%. *Id*. ¶ 24. Additionally, over the years, Defendant has paid Apple—which accounts for the other substantial portion of the smartphone and handheld device market—substantial amounts of money (estimated to reach $1 billion dollars in 2014) to act as the default search engine on Apple iPhones, iPads, and iPods. *Id*. ¶ 49.

D. Harm to Plaintiffs and Claims for Relief

Plaintiffs use their phones for, among other things, Internet searches. At the time they purchased their respective phones, neither Plaintiff was aware that Google search was set as the default search engine on those phones. Further, neither Feitelson nor McKee know if there is a way to change the default search engine setting, nor how to change the default search engine if there is indeed a way to change it. *Id*. ¶¶ 15-16. Both of Plaintiffs' Android-based phones are alleged to be covered by MADAs between HTC and Samsung—the respective phone manufacturers—and Defendant. *Id*. But for Defendant's anticompetitive MADAs, Plaintiffs **[**9]** assert that their phones "would have cost less and had better search capabilities as the result of the competition that would have ensued." *Id*.; *see also id*. ¶¶ 70-73.

Plaintiffs allege that the MADAs "quash competition for default search engine status before it even can begin." *Id*. ¶ 42. This, in turn, forecloses competition in the market for general and handheld Internet search because default search engine status is the most effective and cost-effective distribution channel for search engines. *Id*. ¶¶ 51-58. Search engines improve in quality with greater usage, so the diversion of search users to the Google search engine also permits Defendant to improve its search algorithm, thereby shutting out competition on the merits. *Id*. ¶¶ 50, 59-60, 66-67. Plaintiffs allege that this cycle, if allowed to persist, would have the effect of stifling innovation and diminishing consumer choice in the market for Internet search by forcing Defendant's competitors out of business. *Id*. ¶ 70. Furthermore, the MADAs prevent Defendant's search competitors from competing for default search engine status on Android phones by offering to pay for that status (as Defendant has done with Apple). Because this **[**10]** price competition does not occur for default search engine status on Android OS phones, OEMs cannot pass on subsidies from search engine competitors to consumers and Defendant therefore causes "supra-competitive" pricing in Android phones, which injures consumers. *Id*. ¶¶ 71-73.

Based on the foregoing, Plaintiffs seek to represent a class of similarly situated purchasers of Android OS mobile telephones **[*1025]** or tablets wherein the manufacturer has entered into a similar contract with Defendant "by

[2] Although not expressly alleged, it does not appear that the OEMs pay for the applications. In other words, the Google Apps are free to pre-load, subject to the conditions in the MADAs.

which Google has conditioned the right to pre-load any application from a suite of Google applications . . . on the manufacturer's mandatory acceptance and installation of Google search, or so-called Google Phone-top Search, as the default search engine on that device." *Id*. ¶ 84. Plaintiffs assert six causes of action, seeking injunctive relief under *§ 1* and *§ 2 of the Sherman Act* (First, Second, and Third Causes of Action, or "COAs"), *15 U.S.C. §§ 1-2*; § 3 of the Clayton Act (Fourth COA), *15 U.S.C. § 14*; and the California Unfair Competition Law (Sixth COA), *Cal. Bus. & Prof. Code § 17200 et seq*.; as well as injunctive relief and treble damages based on monetary injuries under California's Cartwright Act (Fifth COA), *Cal. Bus. & Prof. Code § 16727*. *Id*. ¶¶ 95-141.

II. LEGAL STANDARD

HN1[] A motion to dismiss **[**11]** under *Federal Rule of Civil Procedure 12(b)(6)* tests the legal sufficiency of the claims alleged in the complaint. *Ileto v. Glock Inc., 349 F.3d 1191, 1199-200 (9th Cir. 2003)*. Dismissal under *Rule 12(b)(6)* may be based on the "lack of a cognizable legal theory" or "the absence of sufficient facts alleged." *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988)*. Unless it would be clearly futile, a court granting a motion to dismiss should normally permit leave to amend. *Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000)*.

HN2[] In assessing the sufficiency of the pleadings, the court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the non-moving party." *Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008)*. The court need not and does not accept as true allegations that are "merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)*. To survive a *Rule 12(b)(6)* motion, "the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011)*; *see also* *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* ("A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."). The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully," and a complaint that **[**12]** pleads facts that are "merely consistent with" a defendant's liability "stops short of the line between possibility and plausibility." *Iqbal, 556 U.S. at 678* (internal quotations omitted).

HN3[] "[O]f course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (internal quotations omitted). However, as our Supreme Court has noted precisely in the context of private antitrust litigation, "it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive." *Id. at 558-59* (internal citations omitted). As such, "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 528, n.17, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* ("*AGC*") *quoted* ***[*1026]*** *with approval in* *Twombly, 550 U.S. at 559*.

III. SHERMAN ACT CLAIMS (FIRST, SECOND, AND THIRD COA'S)

HN4[] *Section 1 of the Sherman Act* prohibits unreasonable contracts or combinations in restraint of trade. *15 U.S.C. § 1*. To state a claim under *§ 1*, a private plaintiff must allege "(1) an agreement, conspiracy, or combination between two or more entities, (2) an unreasonable restraint **[**13]** of trade, (3) anticompetitive effects within the relevant market, and (4) a resulting antitrust injury suffered by the claimant." *Church & Dwight Co. v. Mayer Labs., Inc., 868 F. Supp. 2d 876, 889 (N.D. Cal. 2012)* (citing *Queen City Pizza v. Domino's Pizza, 124 F.3d 430, 442 (3d Cir. 1997))*, *order vacated in part on reconsideration*, *No. C-10-4429 EMC, 2012 U.S. Dist. LEXIS 68681, 2012 WL 1745592 (N.D. Cal. May 16, 2012)*.

HN5[] Section 2 of the Sherman Act prohibits monopolization and attempts to monopolize. 15 U.S.C. § 2. In order to state a claim for monopolization under this provision, a plaintiff must allege: "(1) the defendant possesses monopoly power in the relevant market; (2) the defendant has willfully acquired or maintained that power; and (3) the defendant's conduct has caused antitrust injury." Cost Mgmt. Servs., Inc. v. Washington Natural Gas Co., 99 F.3d 937, 949 (9th Cir. 1996); Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 998 (9th Cir. 2010). A claim for attempted monopolization, requires allegations of the defendant's "(1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct to accomplish the monopolization; (3) dangerous probability of success; and (4) causal antitrust injury. Cost Mgmt. Servs., 99 F.3d at 949; Cal. Computer Prods., Inc. v. Int'l Bus. Mach. Corp., 613 F.2d 727, 735 (9th Cir. 1979); United States v. Microsoft Corp., 253 F.3d 34, 50, 80, 346 U.S. App. D.C. 330 (2001).

HN6[] Sections 4 and 16 of the Clayton Act provide complementary vehicles for private enforcement of the federal antitrust laws (including the Sherman Act). Section 4 allows the recovery of monetary damages, while § 16 permits a private party to enjoin anticompetitive conduct. 15 U.S.C. §§ 15, 26; Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 109, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986). Acknowledging that Clayton Act § 4 and § 16 are written in broad terms, the Supreme Court has recognized **[**14]** the importance of determining whether private parties are the appropriate plaintiffs to enforce the antitrust laws by inquiring into their "antitrust standing" to seek relief under those sections. *See* AGC, 459 U.S. at 529-535 (factors to consider for § 4 standing include (1) whether the plaintiff has suffered antitrust injury; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages); Cargill, 479 U.S. at 109-113 (addressing standing requirements to pursue § 16 injunctive relief).

The element of causal antitrust injury is common to both the substantive pleading requirements under the Sherman Act and the analysis of antitrust standing. Because Plaintiffs' allegations fall short on this critical element, the Court's analysis begins there, followed by a discussion of the substantive sufficiency of the Sherman Act claims.

A. Antitrust Standing and Antitrust Injury

The Court begins by observing that both parties have briefed the issue of antitrust standing assuming that Plaintiffs are seeking damages under § 4 of the Clayton Act. **[*1027]** *See* Def.'s Mot. 18-23, ECF 38; Pl.'s Opp. 21-23, ECF 39. On the face of the pleadings, it appears that Plaintiffs are seeking **[**15]** damages under the Cartwright Act and that their Sherman Act claims are only for injunctive relief under § 16 of the Clayton Act.[3] *See* FAC ¶¶ 95-135. This distinction matters because the standing requirements for injunctive relief under § 16 are more lenient than those for damages under § 4 of the Clayton Act. *See* Cargill, 479 U.S. at 111 n.6. Regardless, "under both § 16 and § 4 the plaintiff must still allege an injury of the type the antitrust laws were designed to prevent." Id. at 111. Plaintiffs have not adequately done so here.

HN7[] The four requirements for antitrust injury are "(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of California, 190 F.3d 1051, 1055 (9th Cir. 1999). The injury must occur "in the market where competition is being restrained." Id. at 1057. "Parties whose injuries, though flowing from that which makes the defendant's conduct unlawful, are experienced in another market do not suffer antitrust injury." *Id*. Plaintiffs allege two types of injury from Defendant's anticompetitive use of the MADAs: (1) likely loss of innovation **[**16]** and concomitant restriction of consumer choice, FAC ¶ 70, and (2) supracompetitive prices for Android phones, FAC ¶¶ 71-73. Neither of these injuries suffices to maintain the claims asserted here.

The allegations of Plaintiffs' injuries in the FAC are similar to those dismissed by the court in Lorenzo v. Qualcomm Inc., 603 F. Supp. 2d 1291, (S.D. Cal. 2009). There, the plaintiff was a consumer in the market for cell phones and cellular services, whereas the defendant was a leader in the market for mobile phone chip technology. The plaintiff alleged that the defendant's anticompetitive licensing practices with respect to its CDMA chip technology caused

[3] As addressed below, the Court finds that the Cartwright Act claim must be dismissed without leave to amend.

harm in the form of "supracompetitive prices and impaired non-price competition in innovation of CDMA functionality." *Id. at 1301*. The supracompetitive prices were passed down through at least three levels of the supply chain—chipset manufacturers, device manufacturers, and vendors—before ultimately reaching the consumer-plaintiff. *Id*. The court, acknowledging that the plaintiff's "indirect purchaser status alone does not preclude antitrust standing" nevertheless dismissed his claim for *injunctive* relief, finding that the asserted injury incurred by the plaintiff was "too remote" from the defendant's alleged **[**17]** anticompetitive conduct "to support standing" to pursue such relief under the Clayton Act. *Id*. In so doing, the *Lorenzo* court appears to have also implicitly rejected the plaintiff's claim to antitrust injury from threatened harm to innovation. *Id. at 1296* (recounting the plaintiff's allegations of anticompetitive harm including "supracompetitive prices and impaired non-price competition in innovation of CDMA functionality").[4]

Similarly here, Plaintiffs allege that they suffered antitrust injury in the form of supracompetitive pricing in Android **[*1028]** phones, which is not the market in which the alleged anticompetitive conduct occurred. *See* Def.'s Mot. 19-21. Moreover, Plaintiffs elide allegations concerning the number of supply chain levels between OEMs who sign the allegedly anticompetitive MADAs and end consumers like Plaintiffs. Without such allegations, the Court cannot determine whether Plaintiffs' alleged price injury "flows from that which makes [Defendant's] conduct unlawful."[5] *Am. Ad Mgmt., 190 F.3d at 1055*. As such, Plaintiffs have failed **[**18]** to allege that they have suffered "antitrust injury" in the same market as and sufficiently close to the alleged anticompetitive conduct to allow them to pursue private antitrust remedies against Defendant. *See Lorenzo, 603 F. Supp. 2d at 1301*.

Plaintiffs attempt to distinguish *Lorenzo* by arguing that the court there found that the plaintiff had failed to allege "that he was the 'necessary means' by which defendant 'carried out its anticompetitive licensing scheme.'" Pl.'s Opp. 23 n.26 (quoting *Lorenzo, 603 F. Supp. 2d at 1301*). The *Lorenzo* court cited *Ostrofe v. H.S. Crocker Co., 740 F.2d 739, 745 (9th Cir. 1984)*, for the "necessary means" language and Plaintiffs at oral argument urged this Court to consider *Ostrofe*—which is not cited in their papers—when considering whether Plaintiffs' injury is "inextricably intertwined" with Defendant's unlawful conduct. It is not. *Ostrofe*, decided very shortly after *AGC*, interpreted *Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)*, to recognize a narrow exception to *AGC* allowing a dismissed employee to sue to enforce the antitrust laws where that employee was dismissed for refusing to participate **[**19]** in the defendant's price fixing conspiracy. *Ostrofe, 740 F.2d at 746*. Subsequent courts have limited *Ostrofe* to its facts, finding that the exception "is limited to those cases in which a dismissed employee is an 'essential participant' in an antitrust scheme, the dismissal is a 'necessary means' to accomplish the scheme, and the employee has the greatest incentive to challenge the antitrust violation." *Vinci v. Waste Mgmt., Inc., 80 F.3d 1372, 1376 (9th Cir. 1996)*. Similarly, the exceedingly narrow *McCready* exception requires that the plaintiff's injury be inextricably intertwined with the *injury* of the intended victim such that injuring the plaintiff is a necessary part of the anticompetitive scheme. *Exhibitors' Serv., Inc. v. Am. Multi-Cinema, Inc., 788 F.2d 574, 580 (9th Cir. 1986)*; *Datel Holdings Ltd. v. Microsoft Corp., 712 F. Supp. 2d 974, 993 n.1 (N.D. Cal. 2010)*. Neither *Ostrofe* nor *McCready* benefits Plaintiffs here, as their alleged injuries—supracompetitive prices and threatened loss of innovation and consumer choice—are not the necessary means by which Defendant is allegedly accomplishing its anticompetitive ends.[6]

Plaintiffs' alternative theory of antitrust injury supporting their standing **[**20]** to seek injunctive relief—the threatened harm to innovation and consumer choice—is equally deficient. For one, accepting Plaintiffs' argument

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[4] Though granted leave to amend, the *Lorenzo* plaintiff did not renew his federal antitrust (Clayton Act) claim in the subsequent pleading. *See Lorenzo v. Qualcomm Inc., No. 08cv2124 WQH(LSP), 2009 U.S. Dist. LEXIS 69843, 2009 WL 2448375, at *2 (S.D. Cal. Aug. 10, 2009)*.

[5] Similarly, because directness is a factor to consider under *AGC* for purposes of standing for damages, Plaintiffs must also sufficiently allege directness of injury to the extent they intend to pursue a *Clayton Act § 4* remedy. *See AGC, 459 U.S. at 543-44*; *Am. Ad Mgmt., 190 F.3d at 1055*.

[6] To the extent Plaintiffs are the means by which Defendant improves its search engine algorithm and search product, Plaintiffs' relationship to Google search as the unwitting consumer is not an "injury" within the meaning of the antitrust laws.

would permit any consumer of Internet search to have standing to sue for injunctive relief, as the proposed class of Android OS device consumers is no different from the Apple device user or the computer search user when it comes to **[*1029]** innovation and choice in the market for Internet search products. More fundamentally, Plaintiffs' allegations of hypothetical loss of consumer choice and innovation are entirely too conclusory and speculative. Plaintiffs allege that the MADAs—which cover only Android devices—*could* have the ultimate result of "forc[ing] [Defendant's] remaining competition, which are hanging on for dear life, from the general search markets altogether," and that "[i]f Google is the only search engine left standing . . . then it will have no incentive to innovate." Pl.'s Opp. 23. However, the Court agrees with Defendant that there are no facts alleged that would render these threatened injuries more concrete than hypothetical, as there are no facts alleged to indicate that Defendant's conduct has prevented consumers from freely choosing among search **[**21]** products or prevented competitors from innovating. *See* Def.'s Reply 14-15.

Plaintiffs' citations to both *Sullivan v. National Football League, 34 F.3d 1091 (1st Cir. 1994)*, and AGC are unavailing. *See* Pl.'s Opp. 22 n.25. Plaintiffs quote passages concerning parties that were directly precluded from making certain choices by the anticompetitive conduct at issue, but Plaintiffs here are at least one step removed from the preclusive effect of the MADAs that are at the core of Plaintiffs' antitrust claims. Defendant uses the MADAs to capitalize on the preference of consumers (like Plaintiffs) for the status quo, but this does not victimize them or restrict their ability to "mak[e] free choices between market alternatives." *AGC, 459 U.S. at 528*. The threatened loss of innovation is even farther removed, as the Court would have to accept that the MADAs will push competitors out of the market for general Internet search and that, as the sole remaining search product provider, Defendant will not innovate. Such allegations, without more factual enhancement, "stop[] short of the line between possibility and plausibility." *Twombly, 550 U.S. at 557*.

To be sure, the standing requirements for injunctive relief are lower than those for damages, and Plaintiffs may likely have standing to pursue a *Clayton Act § 16* remedy **[**22]** if they are able to successfully allege antitrust injury. In support of their contention that the present pleadings suffice for standing to pursue injunctive relief, however, Plaintiffs place sole reliance on *Axiom Advisers & Consultants, Inc. v. School Innovation & Advocacy, Inc., No. 2:05CV 02395 FCD PAN, 2006 U.S. Dist. LEXIS 11404, 2006 WL 1049997 (E.D. Cal. Mar. 20, 2006)*, wherein the court found adequate the plaintiffs' allegations that the defendant's conduct "has injured competition and consumers and that its acts have an anticompetitive effect of harming the competitive process, limiting consumer choice, and harming consumers." *2006 U.S. Dist. LEXIS 11404, [WL] at *8*. As Defendant points out in reply, *Axiom* was decided before the enunciation of the *Twombly* standard, and subsequent courts have questioned whether Axiom would reach the same result today. *Southern California Inst. of Law v. TCS Educ. Sys., No. CV 10-8026 PSG AJWX, 2011 U.S. Dist. LEXIS 39827, 2011 WL 1296602, at *8 n.6 (C.D. Cal. Apr. 5, 2011)*. As described above, the allegations of antitrust injury fall far short of the plausibility standard set forth in *Twombly* and *Iqbal* and are thus insufficient for standing to pursue either monetary or injunctive relief.

B. Exclusive Dealing

Defendant also challenges the substantive sufficiency of Plaintiffs' allegations of anticompetitive **[**23]** conduct, which focuses on a theory of exclusive dealing. The Court agrees, though the deficiencies here are less significant than those with respect to Plaintiffs' standing to maintain this suit.

HN8[] Exclusive dealing is a theory under both *§ 1* and *§ 2 of the Sherman Act*.[7] **[*1030]** The classic exclusive dealing case "involves an agreement between a vendor and a buyer that prevents the buyer from purchasing a

[7] For purposes of this motion, Defendant has elected not to challenge Plaintiffs' allegations of the relevant market and of its market power in those relevant markets. Def.'s Mot. 17 n.11. As such, the parties' briefing (and this Court's order) focuses on the sufficiency of the allegations with respect to **[**24]** Defendant's exclusionary conduct, and not with respect to any other elements of Plaintiffs' *§ 2* claims for monopolization and attempted monopolization. The Court notes only that the analysis of attempted monopolization is "wholly independent" from the analysis of monopoly maintenance. *Microsoft, 253 F.3d at 81*. To the extent Defendant does not challenge Plaintiffs' allegations of its market power, *see* FAC ¶¶ 19-27 (alleging more than 80% share

given good from any other vendor." *Allied Orthopedic, 592 F.3d at 996*. Because there are "well-recognized economic benefits to exclusive dealing arrangements," such arrangements are not per se violations of *§ 1* and must instead be analyzed under the antitrust rule of reason. *Id*. (quoting *Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1162 (9th Cir. 1997))*. Exclusive dealing thus violates *§ 1* "only if its effect is to 'foreclose competition in a substantial share of the line of commerce affected.'" *Id*. (quoting *Omega, 127 F.3d at 1162*). "Substantial share" has been quantified as foreclosure of 40% to 50% of the relevant market.[8] *Microsoft, 253 F.3d at 70*.

HN9[] In determining whether an alleged exclusionary arrangement violates the antitrust laws, courts consider a number of factors including the potential amount of foreclosure, the duration of the agreement, and the alternative avenues of distribution available to competitors. "The prevailing rule in districts and circuits across the country is that where exclusive or semi-exclusive contracts are short in duration, easily terminable, incentive-based, and leave open alternative channels to competitors, they are not exclusionary." *Church & Dwight, 868 F. Supp. 2d at 903*; *see also* *PNY Techs., Inc. v. SanDisk Corp., No. 11-CV-04689-WHO, 2014 U.S. Dist. LEXIS 90649, 2014 WL 2987322, at *4 (N.D. Cal. July 2, 2014)* **[**26]** ("*SanDisk*"). Defendant contends that the MADAs are short in duration, do not foreclose alternative avenues of distribution, and are not even restrictive because OEMs are welcome to preload other search products onto covered phones. Def.'s Mot. 11-15. Further, because they only cover specific approved phone models, OEMs may set other search products as **[*1031]** the default search on phone models that are not covered by the MADAs. *Id*. at 11.

Plaintiffs contend that the limited duration and reach of the MADAs is not fatal to their exclusive dealing claim, *see* Pl.'s Opp. 14-16, and the Court agrees in a limited respect. As a practical matter, although other distribution channels for Internet search products do exist, the allegations demonstrate that the default search setting on mobile devices is the most effective and cost-efficient method of distribution. FAC ¶¶ 51-58. Taken as true, the allegations suggest that alternative distribution methods are viable but not effective compared to the default search setting status. *See* *United States v. Dentsply Int'l, Inc., 399 F.3d 181, 193 (3d Cir. 2005)* (citing *Microsoft, 253 F.3d at 71*, for proposition that alternative distribution channels must "pose[] a real threat" of competition). Because, by definition, there can only be one default search engine on **[**27]** a given device, Defendant's use of the MADAs has the effect of excluding rival search products from the most effective means of distribution to handheld device users.

Moreover, the short duration and easy terminability of the MADAs does not, within the context of handheld devices, necessarily diminish their exclusivity. Any person who has purchased a handheld device in the last decade knows that new models are introduced nearly annually (if not more frequently), and that older models become obsolete very quickly. This is borne out by the large number of devices covered by the HTC MADA, with the opportunity to add additional devices subject to Defendant's approval. *See* FAC Exh. B (HTC MADA Exh. B). As a practical matter, the fact that each MADA lasts only two years does not preclude the MADAs from being effectively exclusive for the lifetime of the covered models. Furthermore, unlike *SanDisk*, upon which Defendant relies, Plaintiffs have alleged that competitors cannot offer better terms to lure OEMs away from Defendant's MADAs because there is no

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of the relevant markets), the claim of "attempted monopolization" would appear superfluous—if not paradoxical—in the face of those allegations.

[8] It is not clear that there are any pleading differences between exclusive dealing under *§ 1* and *§ 2* with respect to the degree of market foreclosure, and the parties' briefing does not suggest that they believe there is a difference. For purposes of this motion, the Court assumes that at the pleading stage, the degree of market foreclosure required to make out an exclusive dealing claim does not differ under *§ 1* and *§ 2*. *Compare* *Microsoft, 253 F.3d 34, 70, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* ("[A] monopolist's use of exclusive contracts, in certain circumstances, may give rise to a *§ 2* violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish **[**25]** a *§ 1* violation.") *to* *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* (describing the *§ 2* standard as "the more stringent monopoly standard"); *see generally* Areeda & Hovenkamp, Fundamentals of ***Antitrust Law*** § 18.01 (4th ed. 2014) ("As a legal matter, *§ 2* requires that the defendant have either monopoly power or a dangerous probability of achieving it, but when such power is established may find illegality on lower percentages than the *§ 1* law of exclusive dealing requires. By contrast, *§ 1* is sometimes applied to nondominant defendants and where a 'dangerous probability' of monopoly is not in prospect, but in such cases assesses somewhat higher foreclosure requirements.").

other method by which OEMs can obtain licenses to preload Google Apps onto their Android OS devices. FAC ¶ 36; *compare* SanDisk, 2014 U.S. Dist. LEXIS 90649, 2014 WL 2987322, at *6 (competitor plaintiff **[**28]** did not allege that it offered better terms to retailers in short term exclusive contracts with defendant). As a whole, the allegations in the FAC thus plausibly suggest that the MADAs, though limited in duration and in scope, have the practical effect of foreclosing Defendant's search rivals from effective access to handheld Internet search users on covered Android OS devices.[9]

Where Plaintiffs' allegations fail, however, is in **[**29]** tying the effect of the MADAs to the relevant alleged markets—general Internet search and handheld search—to demonstrate substantial foreclosure of competition in those markets. Plaintiffs contend that "[g]iven the uniquely effective channel for the distribution of search engines to mobile device users that Google has coerced for itself, it is reasonable **[*1032]** to infer at the pleadings stage that substantial market foreclosure has occurred." Pl.'s Opp. 16. Plaintiffs have only alleged that the Android OS occupies a 51.7% share of the United States *smartphone* market, FAC ¶ 24, and they fail to explain how the logical leap from that allegation to substantial market foreclosure in the market for general handheld search (which includes all handheld devices such as phones and tablets) is reasonable based upon the existence of MADAs that admittedly only cover a subset of Android devices, FAC ¶ 36 n.8.[10] To be sure, this is a close call. However, the Court must insist on some greater specificity in pleading "before allowing a potentially massive factual controversy to proceed," AGC, 459 U.S. at 528, n.17, and Plaintiffs should have the opportunity to amend in order to more plausibly allege the relationship between the MADAs and **[**30]** competition in the market for handheld general search.

As to the broader market for general Internet search, the inference of substantial foreclosure is significantly less reasonable. The FAC contains no allegations concerning the actual portion of general Internet search that consists of handheld search. Lacking such allegations concerning the relationship between the two markets, the Court is unable to infer that the MADAs, which cover only a portion of the handheld search market, substantially foreclose competition in the market for general Internet search.

Defendant's Motion to Dismiss is accordingly GRANTED with respect to Plaintiffs' Sherman Act claims (First, Second, and Third COAs). Plaintiffs shall have leave to amend in order to adequately allege causal antitrust injury and substantial foreclosure in the relevant alleged markets caused by Defendant's anticompetitive **[**31]** conduct.[11]

IV. CLAYTON AND CARTWRIGHT ACT CLAIMS (FOURTH AND FIFTH COA'S)

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[9] At a higher level of abstraction, this means that those competitors who cannot access users are unable to improve their search algorithms, thereby impairing their ability to compete with Defendant on the merits of their respective search products. *See* FAC ¶¶ 59-60. This is akin to the theory of Sherman Act § 2 monopoly maintenance described in Microsoft, 253 F.3d at 60-62, wherein Microsoft's exclusive licensing terms prevented OEMs from promoting rival Internet browsers, thereby reducing rival browser usage and developer interest in those browsers, with the effect of maintaining developer focus on developing for Microsoft's Windows operating system, which contributed to maintaining Microsoft's monopoly over the market for operating systems. Whether this theory is viable under § 1 is unclear.

[10] Plaintiffs attempt to further atomize the relevant market into not just handheld search, but handheld search on non-Apple devices. That is not the relevant market that Plaintiffs have alleged for § 1 purposes, although the Court acknowledges that Defendant's conduct with respect to Apple devices may be relevant to a § 2 analysis.

[11] Should Plaintiffs successfully amend to allege cognizable antitrust injury, they would also need to demonstrate other factors in support of standing to pursue monetary relief (to the extent they do intend to seek damages under § 4 of the Clayton Act). The Court assumes that Plaintiffs are familiar with the *AGC* factors for § 4 standing, as further elaborated in *American Ad Management. See* AGC, 459 U.S. at 536-46; Am. Ad Mgmt., 190 F.3d at 1055; *see also* Cargill, 479 U.S. at 110 n.5 ("A showing of antitrust injury is necessary, but not always sufficient, to establish standing under § 4, because a party may have suffered antitrust injury but may not be a proper plaintiff under § 4 for other reasons."). Plaintiffs are also encouraged to clearly indicate in their amended pleading whether they are in fact seeking § 4 relief.

The deficiencies in Plaintiffs' allegations of antitrust injury and exclusionary conduct described above equally apply to Plaintiffs' claims under *§ 3 of the Clayton Act* and *§ 16727 of the California Business & Professions Code*, a provision of California's Cartwright Act. These claims furthermore suffer from an even more fatal flaw. Defendant contends that, as a matter of law, Plaintiffs cannot state claims under the Clayton and Cartwright Acts because **[**32]** the subject MADAs are not tangible commodities (nor do they cover tangible commodities) within the narrower scope of the Clayton and Cartwright Acts. Def.'s Mot. 18, 23. The Court agrees.

[*1033] ***HN10***[] *Section 3 of the Clayton Act* prohibits tying and exclusive dealings in the lease, sale, or contract for sale of "goods, wares, merchandise, machinery, supplies, or other *commodities*." *15 U.S.C. § 14* (emphasis added). *Section 16727* of the Cartwright Act is based on *§ 3 of the Clayton Act* and has a similar scope, including with respect to the definition of "commodities." *Suburban Mobile Homes, Inc. v. Amfac Communities, Inc., 101 Cal. App. 3d 532, 549, 161 Cal. Rptr. 811 (1980)*; *see also* *Morrison v. Viacom, 66 Cal. App. 4th 534, 546, 78 Cal. Rptr. 2d 133 (1998)*. Courts have "strictly construed" the term "commodit[y]" and held "that it denotes only tangible products of trade." *Tele Atlas N.V. v. Navteq Corp., 397 F. Supp. 2d 1184, 1192 (N.D. Cal. 2005)* (quoting *Innomed Labs, LLC v. ALZA Corp., 368 F.3d 148, 155 (2d Cir. 2004)*.

Tele Atlas concerned tying and exclusive dealing claims directed at a patent holder's refusal to license its patented navigation display technology unless a licensee also agreed to license map data for use with the licensed technology. *Tele Atlas, 397 F. Supp. 2d at 1187*. In rejecting the plaintiff's *Clayton Act § 3* and Cartwright Act *§ 16727* claims, the Tele Atlas court reasoned that "[a] license is not the sale of a tangible good" and thus could not fall within the ambit of the Clayton and Cartwright Acts. *Id. at 1192*. The court further rejected the plaintiff's arguments that it should apply the "dominant **[**33]** nature" test to the license agreements, as the plaintiff alleged only that the defendant sold a "purely ethereal consideration" and did not allege the sale of any physical item. *Id*.; *accord* *Code Rebel, LLC v. Aqua Connect, Inc., No. CV 13-4539 RSWL MANX, 2014 U.S. Dist. LEXIS 2824, 2014 WL 46696, at *5 (C.D. Cal. Jan. 3, 2014)* (dismissing claim under *Clayton Act § 2*—which also only extends to commodities—because software product at issue was not tangible, and therefore not a "commodity").

Relying on *Tele Atlas*, Defendant characterizes the MADAs as licenses to use the Google Apps, which are not tangible commodities. Def.'s Mot. 18, 23. Plaintiffs disagree with this characterization, cursorily arguing that the "products at issue" are not licenses but the software that the MADAs cover. Pl.'s Opp. 21 n.23. This is a strained reading of the MADAs, which clearly confer nonexclusive *licenses* to reproduce and distribute the Google Apps according to the terms and conditions set forth in the agreements. *See, e.g*., FAC Exh. A § 2.1, ECF 31-1. In any case, even accepting Plaintiffs' interpretation of the MADAs, Plaintiffs identify no authority holding that software products are absolutely within the coverage of the Clayton and Cartwright **[**34]** Acts, regardless of their tangibility.

For the proposition that software products are "commodities" within the meaning of the Clayton and Cartwright Acts, Plaintiffs rely on an implied holding from *Digidyne Corp. v. Data Gen. Corp., 734 F.2d 1336 (9th Cir. 1984)*, wherein the Ninth Circuit concluded that a defendant's refusal to license operating system software except to purchasers of its central processing units was an unlawful tying arrangement under *§ 1 of the Sherman Act* and *§ 3 of the Clayton Act*. *Id. at 1338*. However, the ultimate holding of the *Digidyne* court was that the trial court erred in setting aside a jury verdict for the plaintiffs on the issue of the defendant's economic power in an alleged *per se* tying arrangement; aside from passing mention of the Clayton Act, it does not appear that the court ever considered whether the Clayton Act could apply to completely intangible software products. *See generally, id*. Digidyne thus avails Plaintiffs little, even were the Court to accept the illusory distinction between software and licenses that Plaintiffs proffer.

[*1034] Rather, the Court finds more persuasive the weight of opinion that "commodity," as that term is used in *§ 3* of the Clayton Act, refers to *tangible* goods. *See* *Tele Atlas 397 F. Supp. 2d at 1192-93* (collecting cases); *see also* *May Dep't Store v. Graphic Process Co., 637 F.2d 1211, 1214-15 (9th Cir. 1980)* *and* *Code Rebel, 2013 U.S. Dist. LEXIS 137937, 2013 WL 5405706, at *7-8* (same **[**35]** interpretation of "commodity" in analogous context of Clayton Act *§ 2*). Here, Plaintiffs do not allege that the Google Apps are sold to OEMs in physical form, or even that the Google Apps have any tangible component. Nor does it appear that they can so allege, as the subject matter of the MADAs is the limited conferral of certain incorporeal rights to OEMs to install and distribute Google Apps on the OEMs' Android devices. As such, the MADAs are not sales or contracts for sale of tangible goods. Defendant's

Motion to Dismiss is therefore GRANTED as to these claims, and Plaintiffs' *Clayton Act § 3* and *Cartwright Act § 16727* claims (Fourth and Fifth COAs) are dismissed without leave to amend.

V. UNFAIR COMPETITION (SIXTH COA)

Plaintiffs' UCL claim based on "unfair" competition rises and falls with their Sherman Act claims. *See City of San Jose v. Office of the Comm'r of Baseball, 776 F.3d 686, 2015 U.S. App. LEXIS 675, 2015 WL 178358, at *5 (9th Cir. Jan. 15, 2015)*. As Plaintiffs have been given leave to amend their Sherman Act claims, they shall also have the opportunity to amend the UCL claim, particularly as it relates to antitrust injury and Plaintiffs' loss of money or property due to Defendant's unfair practices. *Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 323, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011)*.

More fundamentally, neither of the named Plaintiffs resides in California, though they seek to enforce California law. **[**36]** Plaintiffs' counsel indicated at oral argument that although they believe it is sufficient for purposes of the UCL claim that Defendant is headquartered in California, they can easily identify and name an additional plaintiff who resides in California. As such, the Court shall GRANT Defendant's Motion to Dismiss the UCL claim (Sixth COA) with leave to amend in order to address the deficiencies identified in this order and to add a named plaintiff from California.

VI. ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that Defendant's Motion to Dismiss is GRANTED. Plaintiffs shall have leave to amend only their Sherman Act and California UCL claims. The amended pleading shall be due **within twenty-one (21) days** of the date of this order.

IT IS SO ORDERED.

Dated: February 20, 2015

/s/ Beth Labson Freeman

BETH LABSON FREEMAN

United States District Judge

[Fischer v. Time Warner Cable Inc.](#)

Court of Appeal of California, Second Appellate District, Division Eight

February 23, 2015, Opinion Filed

B254863

Reporter

234 Cal. App. 4th 784 *; 184 Cal. Rptr. 3d 490 **; 2015 Cal. App. LEXIS 163 ***; 61 Comm. Reg. (P & F) 1685

SHERRY FISCHER et al., Plaintiffs and Appellants, v. TIME WARNER CABLE INC. et al., Defendants and Respondents.

Subsequent History: Time for Granting or Denying Review Extended *Fischer v. Time Warner Cable, 2015 Cal. LEXIS 6820 (Cal., May 14, 2015)*

Review denied by *Fischer v. Time Warner Cable, Inc., 2015 Cal. LEXIS 4160 (Cal., June 10, 2015)*

Prior History: [*1]** APPEAL from a judgment of the Superior Court of Los Angeles County, No. BC512259, Lee Smalley Edmon and Amy D. Hogues, Judge.

Disposition: Affirmed.

Core Terms

cable, channels, preempted, tier, regulation, billing, subscribers, preemption, consumer protection, rates, state law, fundamental change, changes, demurrer, television, unfair, costs, hikes, leave to amend, sports, trial court, programming, enhanced, games, billing practices, rate regulation, federal law, customer, deletion, carte

LexisNexis® Headnotes

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

Governments > Legislation > Interpretation

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

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Demurrers

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

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

In reviewing a judgment of dismissal after a demurrer is sustained without leave to amend, the appellate court assumes the truth of all properly pleaded facts. The appellate court examines the complaint's factual allegations to determine whether they state a cause of action on any available legal theory regardless of the label attached to a cause of action. The appellate court does not assume the truth of contentions, deductions, or conclusions of fact or law, and may disregard allegations that are contrary to the law or to a fact that may be judicially noticed. A demurrer is proper when a ground for objection to the complaint appears on its face or from matters of which the court may or must take judicial notice. To the extent statutory construction issues are raised, the appellate court applies the rules of statutory construction and exercises its independent judgment as to whether the complaint states a cause of action.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Demurrers

Civil Procedure > Appeals > Standards of Review > General Overview

HN2[] **Defenses, Demurrers & Objections, Demurrers**

An appellate court will affirm an order sustaining a demurrer on any proper legal ground whether or not the trial court relied on that theory or it was raised by the defendant.

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

Evidence > Burdens of Proof > Allocation

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

Civil Procedure > ... > Pleadings > Complaints > General Overview

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

Whether leave to amend should have been granted is reviewed under the abuse of discretion standard, although error is shown if there is any reasonable probability an amendment that cures the defect can be made. Appellants bear the burden on appeal of showing a reasonable possibility exists that the complaint can be successfully amended.

Constitutional Law > Supremacy Clause > Federal Preemption

Governments > Federal Government > US Congress

HN4[] **Supremacy Clause, Federal Preemption**

Under the *Supremacy Clause of the United States Constitution*, *U.S. Const., art. VI, cl. 2*, federal law shall be the supreme law of the land. Therefore Congress may preempt state laws to the extent it believes such action is necessary to achieve its purposes. Congress may exercise that power expressly, or the courts may infer preemption under one of three implied preemption doctrines: conflict, obstacle, or field preemption. Express preemption occurs when Congress defines the extent to which a statute preempts state law. Conflict preemption exists when it is impossible to simultaneously comply with both state and federal law. Obstacle preemption occurs when state law stands in the way of full accomplishment and execution of federal law. Field preemption applies when comprehensive federal regulations leave no room for state regulation.

Constitutional Law > Supremacy Clause > Federal Preemption

HN5[] **Supremacy Clause, Federal Preemption**

Preemption may be based either on federal statutes or on federal regulations that are properly adopted in accordance with statutory authorization. As a result, a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation and render unenforceable state or local laws that are otherwise not inconsistent with federal law. When regulatory preemption is at issue, the regulation's force does not depend on express congressional authorization to displace state law. As a result, a narrow focus on Congress's intent to supersede state law is not appropriate. Therefore the focus is on the agency and whether it acted within the bounds of its lawful authority.

Constitutional Law > Supremacy Clause > Federal Preemption

HN6[] **Supremacy Clause, Federal Preemption**

A federal agency's regulations will preempt any state or local laws that conflict with or frustrate the regulations' purpose. Beyond that, in proper circumstances an agency may determine that its authority is exclusive and preempts any state efforts to regulate at all in the forbidden area. Many of the responsibilities conferred on federal agencies include a broad grant of authority to reconcile conflicting policies. Where this is true, the United States Supreme Court has cautioned that even in the area of preemption, if the agency's choice to preempt represents a reasonable accommodation of conflicting policies that were committed to the agency's care by statute, the courts should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one Congress would have sanctioned.

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Cable Television Consumer Protection & Competition Act

HN7[] **Federal Acts, Cable Television Consumer Protection & Competition Act**

The Federal Communication Commission regulates cable television service through the Cable Television Consumer Protection and Competition Act of 1992, *47 U.S.C. § 521 et seq.* *47 U.S.C. § 543(a)(1)* governs the regulation of rates and provides that, with certain exceptions, no federal agency or state may regulate rates. Section 5438(8)(f) also prohibits cable operators from engaging in negative option billing, such that subscribers may not be charged for any service or equipment that the subscriber has not affirmatively requested by name. This section prohibits cable companies from providing a service the customer has not expressly requested and then charging for the service if the customer fails to exercise the negative option of cancelling the subscription or opting out of the service. *Section 543(8)(f)* reinforces the prohibition against negative option billing by providing that a subscriber's failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment.

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Cable Television Consumer Protection & Competition Act

HN8[] **Federal Acts, Cable Television Consumer Protection & Competition Act**

See *47 U.S.C. § 543(8)(f)*.

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Cable Television Consumer Protection & Competition Act

Constitutional Law > Supremacy Clause > Federal Preemption

HN9[] Federal Acts, Cable Television Consumer Protection & Competition Act

47 C.F.R. § 76.981 implements section 47 U.S.C. § 543's prohibition against negative option billing, but carves out an exception. Negative option billing does not include the addition or deletion of a specific program from a service offering, the addition or deletion of specific channels from an existing tier or service, the restructuring or division of existing tiers of service, or the adjustment of rates as a result of the addition, deletion or substitution of channels. § 76.981(b). Under the circumstances just described, negative option billing is permitted. The federal regulation also provides that state and local governments may not enforce consumer protections laws that conflict with this exception to the negative option billing prohibition so long as the changes proposed by the cable operator do not constitute a fundamental change in the nature of an existing service or tier of service and are otherwise consistent with applicable Federal Communications Commission regulations. § 76.981(b), (c).

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Cable Television Consumer Protection & Competition Act

HN10[] Federal Acts, Cable Television Consumer Protection & Competition Act

See 47 C.F.R. § 76.981.

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

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Cable Television Consumer Protection & Competition Act

Constitutional Law > Supremacy Clause > Federal Preemption

HN11[] Deceptive & Unfair Trade Practices, State Regulation

Changes to a service tier that do not amount to a fundamental change in the nature of service do not run afoul of the negative option billing prohibition, meaning that such changes can be made without a subscriber's express advance agreement. State and consumer protection laws are preempted to the extent they target such nonfundamental changes.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

Constitutional Law > Supremacy Clause > Federal Preemption

Governments > Legislation > Interpretation

HN12[] Standards of Review, Deference to Agency Statutory Interpretation

When a statute is silent or ambiguous on the issue of preemption, the courts must defer to an interpretation by the administering agency so long as it is based on a permissible reading of the statute.

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Cable Television Consumer Protection & Competition Act

HN13[] Federal Acts, Cable Television Consumer Protection & Competition Act

47 C.F.R. § 76.981, which carves out an exception to the prohibition against negative option billing, is a proper exercise of the Federal Communications Commission's regulatory authority.

Governments > Courts > Judicial Precedent

HN14[] Courts, Judicial Precedent

A dissent has no precedential value.

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

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Cable Television Consumer Protection & Competition Act

Constitutional Law > Supremacy Clause > Federal Preemption

HN15[] Deceptive & Unfair Trade Practices, State Regulation

The Federal Communication Commission, pursuant to its statutory authority, has made it clear that state consumer protection laws are preempted in regard to negative option billing practices that result in rate hikes due to the addition of a small number of channels because those rate hikes do not represent a fundamental change in service.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

Cable subscribers filed a class action unfair competition complaint against a cable provider and two professional sports teams based on rate hikes for carrying channels that broadcast the teams' games. The trial court sustained defendants' demurrers to the subscribers' complaint without leave to amend and entered a judgment of dismissal. (Superior Court of Los Angeles County, No. BC512259, Lee Smalley Edmon and Amy D. Hogue, Judges.)

The Court of Appeal affirmed the judgment of dismissal. The court concluded that 47 C.F.R. § 76.981 (2014) was a proper exercise of the Federal Communications Commission's regulatory authority and preempted the subscribers' unfair competition law claim. Although the Cable Television Consumer Protection and Competition Act of 1992 (47 U.S.C. § 521 et seq.) generally prohibits cable operators from engaging in negative option billing, literal application of negative option billing to every minor change would be seriously burdensome to cable operators. The Court of Appeal rejected the subscribers' contention that the addition of the three sports channels constituted a fundamental change to the basic service tier that brought it outside the preemptive effect of § 76.891. (Opinion by Rubin, Acting P. J., with Flier and Grimes, JJ., concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1)[] **(1)**

Constitutional Law § 31—Supremacy Clause—Federal Preemption.

Under the supremacy clause of the United States Constitution (U.S. Const., art. VI, cl. 2), federal law is the supreme law of the land. Therefore Congress may preempt state laws to the extent it believes such action is necessary to achieve its purposes. Congress may exercise that power expressly, or the courts may infer preemption under one of three implied preemption doctrines: conflict, obstacle, or field preemption. Express preemption occurs when Congress defines the extent to which a statute preempts state law. Conflict preemption exists when it is impossible to simultaneously comply with both state and federal law. Obstacle preemption occurs when state law stands in the way of full accomplishment and execution of federal law. Field preemption applies when comprehensive federal regulations leave no room for state regulation.

CA(2)[] **(2)**

Constitutional Law § 31—Federal Preemption—Regulations.

Preemption may be based either on federal statutes or on federal regulations that are properly adopted in accordance with statutory authorization. As a result, a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation and render unenforceable state or local laws that are otherwise not inconsistent with federal law. When regulatory preemption is at issue, the regulation's force does not depend on express congressional authorization to displace state law. As a result, a narrow focus on Congress's intent to supersede state law is not appropriate. Therefore the focus is on the agency and whether it acted within the bounds of its lawful authority.

CA(3)[] **(3)**

Constitutional Law § 31—Federal Preemption—Regulations—Conflicting Policies.

A federal agency's regulations will preempt any state or local laws that conflict with or frustrate the regulations' purpose. Beyond that, in proper circumstances an agency may determine that its authority is exclusive and preempts any state efforts to regulate at all in the forbidden area. Many of the responsibilities conferred on federal agencies include a broad grant of authority to reconcile conflicting policies. Where this is true, the United States Supreme Court has cautioned that even in the area of preemption, if the agency's choice to preempt represents a reasonable accommodation of conflicting policies that were committed to the agency's care by statute, the courts should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one Congress would have sanctioned.

CA(4)[] **(4)**

Telecommunications § 18—Cable Television—Negative Option Billing Prohibition.

The Federal Communications Commission regulates **[*786]** cable television service through the Cable Television Consumer Protection and Competition Act of 1992 (47 U.S.C. § 521 et seq.). Title 47 U.S.C. § 543(a)(1) governs the regulation of rates and provides that, with certain exceptions, no federal agency or state may regulate rates. Section 543(f) also prohibits cable operators from engaging in negative option billing, such that subscribers may not be charged for any service or equipment that the subscriber has not affirmatively requested by name. This section prohibits cable companies from providing a service the customer has not expressly requested and then charging for the service if the customer fails to exercise the negative option of cancelling the subscription or opting out of the service. *Section 543(f)* reinforces the prohibition against negative option billing by providing that a subscriber's failure to refuse a cable operator's proposal to provide such service or equipment must not be deemed to be an affirmative request for such service or equipment.

CA(5)[] **(5)**

Telecommunications § 18—Cable Television—Negative Option Billing Prohibition—Exception—Preemption—Fundamental Changes.

Title 47 C.F.R. § 76.981 (2014) implements *47 U.S.C. § 543*'s prohibition against negative option billing, but carves out an exception. Negative option billing does not include the addition or deletion of a specific program from a service offering, the addition or deletion of specific channels from an existing tier or service, the restructuring or division of existing tiers of service, or the adjustment of rates as a result of the addition, deletion or substitution of channels (*§ 76.981(b)*). Under the circumstances just described, negative option billing is permitted. The regulation also provides that state and local governments may not enforce consumer protections laws that conflict with this exception to the negative option billing prohibition so long as the changes proposed by the cable operator do not constitute a fundamental change in the nature of an existing service or tier of service and are otherwise consistent with applicable Federal Communications Commission regulations (*§ 76.981(b)*, *(c)*).

CA(6)[] **(6)**

Telecommunications § 18—Cable Television—Negative Option Billing Prohibition—Nonfundamental Changes—Preemption.

Changes to a service tier that do not amount to a fundamental change in the nature of service do not run afoul of the negative option billing prohibition, meaning that such changes can be made without a subscriber's express advance agreement. State and consumer protection laws are preempted to the extent they target such nonfundamental changes.

CA(7)[] **(7)**

Statutes § 19—Construction—Preemption—Agency's Interpretation—Deference.

When a statute is silent or ambiguous on the **[*787]** issue of preemption, the courts must defer to an interpretation by the administering agency so long as it is based on a permissible reading of the statute.

CA(8)[] **(8)**

Telecommunications § 18—Cable Television—Negative Option Billing Prohibition—Exception—Preemption—Unfair Competition Law.

Title 47 C.F.R. § 76.981 (2014), which carves out an exception to the prohibition against negative option billing, is a proper exercise of the Federal Communications Commission's regulatory authority. Accordingly, in a class action lawsuit brought by cable subscribers against a cable provider and two professional sports teams based on rate hikes for carrying channels that broadcast the teams' games, *§ 76.981* preempted the subscribers' unfair competition law claim.

[Cal. Forms of Pleading and Practice (2014) ch. 126A, Constitutional Law, § 126A.23; 13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, § 123; 7 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 18.]

CA(9)[] **(9)**

Courts § 34—Judicial Precedent—Dissent.

A dissent has no precedential value.

CA(10)[] **(10)**

Telecommunications § 18—Cable Television—Negative Option Billing Practices—State Consumer Protection Laws—Preemption—Rate Hikes—Nonfundamental Changes.

The Federal Communications Commission, pursuant to its statutory authority, has made it clear that state consumer protection laws are preempted in regard to negative option billing practices that result in rate hikes due to the addition of a small number of channels because those rate hikes do not represent a fundamental change in service.

Counsel: Blecher Collins Pepperman & Joye, Maxwell M. Blecher and Courtney A. Palko for Plaintiffs and Appellants.

Gibson, Dunn & Crutcher, Daniel G. Swanson, Jay P. Srinivasan and Brandon J. Stoker for Defendant and Respondent Time Warner Cable Inc. **[*788]**

White & Case, Bryan A. Merryman, Rachel J. Feldman and Lauren M. Mutch for Defendant and Respondent The Los Angeles Lakers, Inc.

Winston & Strawn, David B. Enzminger, Dan K. Webb, Derek J. Sarafa and William C. O'Neil for Defendants and Respondents Los Angeles Dodgers Holding Company and America Media Productions.

Judges: Opinion by Rubin, Acting P. J., with Flier and Grimes, JJ., concurring.

Opinion by: Rubin, Acting P. J.

Opinion

[492] RUBIN, Acting P. J.**—Four subscribers to Time Warner Cable Inc. appeal from the order sustaining without leave to amend the demurrers of Time Warner, the Los Angeles Lakers and the Los Angeles Dodgers to the subscribers' class action unfair competition complaint based on rate hikes for carrying channels that broadcast Dodgers and Lakers games. We affirm because federal regulations implementing federal communications statutes **[***2]** have expressly preempted this action.

FACTS AND PROCEDURAL HISTORY[1]

Time Warner Cable is a significant, if not the primary, provider of cable television throughout several Southern California counties. Typically, Time Warner buys content from programmers (think Fox, Disney, Viacom, and HBO), who require Time Warner to offer each programmer's channels in a single bundle as part of Time Warner's enhanced basic cable programming tier.

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[1] Under the standard of review applicable to demurrers, which we discuss *post*, our recitation of the facts is based on the allegations of the complaint, which we accept as true.

In 2011, Time Warner paid the Lakers $3 billion for the licensing rights to televise Lakers games for 20 years over two channels: TWC SportsNet and TWC Deportes. Time Warner's subscription rates rose by $5 a month as a result of bundling those channels into the enhanced basic cable tier. In 2013, Time Warner paid the Dodgers $8 billion for the licensing rights to televise Dodgers games for 25 years. The new SportsNet LA channel was also added to the enhanced basic cable tier, raising subscribers' monthly rates by another $4. The rate hikes will cost Time Warner subscribers at least $11 billion **[***3]** over the life of the contracts.

[493]** Sherry Fischer, Stewart R. Graham, Todd Crow, and Gavin McKiernan filed a class action lawsuit against Time Warner, the Dodgers, and the Lakers, alleging that this new arrangement violated the state's unfair competition law **[*789]** (UCL) (*Bus. & Prof. Code, § 17200 et seq.*) because (1) Time Warner's acquisition of the licensing rights to Dodgers and Lakers games made it both programmer and distributor; (2) surveys showed that more than 60 percent of the population does not follow sports and would not pay separately to watch Dodgers or Lakers games; (3) there were no valid reasons for bundling these sports stations into the enhanced basic cable tier instead of offering them separately as part of a sports channel package;[2] (4) although a majority of Time Warner subscribers would opt out of those channels if they could, they had no such option and were instead forced to pay an extra $9 per month for unwanted programming; (5) Time Warner expanded the reach of this scheme by selling its rights to Lakers and Dodgers games to other cable and satellite television providers, requiring those providers to also include those channels as part of their enhanced basic tiers; and (6) the Lakers and Dodgers knew **[***4]** the increased costs would be passed on to unwilling subscribers and were the intended beneficiaries of these arrangements.[3]

Time Warner demurred to the complaint on the ground that federal **[***5]** law expressly permitted bundling of channels, thereby providing a "safe harbor" against unfair competition claims. The Dodgers and Lakers filed separate concurrent demurrers, with both contending they could not be liable because they had not committed unfair acts, while the Lakers also joined in Time Warner's demurrer.[4] The trial court sustained without leave to amend Time Warner's demurrer on the safe harbor ground, adding to its analysis a legal issue that had not previously been raised: the express preemption of state unfair competition laws by a federal regulation implementing federal statutes that govern the cable television industry. (*47 C.F.R. § 76.981(c) (2014)*.) The trial court sustained without leave to amend the Lakers' and Dodgers' demurrers because the absence of a claim against Time Warner meant there could be no claim as to them. The trial court then entered judgment for respondents.

[*790]

STANDARD OF REVIEW

HN1[] In reviewing a judgment of dismissal after a demurrer is sustained without leave to amend, we assume the truth of all properly pleaded facts. We examine the complaint's factual allegations to determine whether they state **[***6]** a cause of action on any available legal theory regardless of the **[**494]** label attached to a cause of action. (*Doe v. Doe 1 (2012) 208 Cal.App.4th 1185, 1188 [146 Cal. Rptr. 3d 215]*.) We do not assume the truth of

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[2] By federal statute, which we detail in part 2 of our Discussion, cable service is divided into three parts: (1) a basic service tier of local commercial stations and public access channels that may be supplemented with additional cable channels; (2) cable programming services offered in tiers or groups, for which a separate rate is charged; and (3) video programming offered on a per-channel or per-program basis. (*Time Warner Entertainment Co., L.P. v. F.C.C. (D.C. Cir. 1995) 312 U.S. App.D.C. 187 & fns. 4–6 [56 F.3d 151, 180* & fns. 4–6], (dis. opn. of Randolph, J.) (*Time Warner*); *47 U.S.C. §§ 522(3)*, *(17)*, *543(a)(2)*, *(b)(7)(A)–(B)*, *(c)(1)*, *(c)(2)(D)*, *(l)(2)*.) Time Warner's cable lineup, which the trial court judicially noticed, lists the three disputed sports channels as part of its basic lineup. We assume that the reference in the complaint to an "enhanced basic tier" means that Time Warner added those and other channels to its basic service tier, as allowed by the federal cable act.

[3] We will refer to the four individual plaintiffs collectively as appellants. We will sometimes refer to Time Warner, the Dodgers and Lakers collectively as respondents.

[4] The parties raised other issues in their demurrers that are not relevant on appeal.

contentions, deductions, or conclusions of fact or law, and may disregard allegations that are contrary to the law or to a fact that may be judicially noticed. A demurrer is proper when a ground for objection to the complaint appears on its face or from matters of which the court may or must take judicial notice. (*Id. at pp. 1188–1189*.) To the extent statutory construction issues are raised we apply the rules of statutory construction and exercise our independent judgment as to whether the complaint states a cause of action. (*Id. at p. 1189*.)

HN2[] We will affirm an order sustaining a demurrer on any proper legal ground whether or not the trial court relied on that theory or it was raised by the defendant. (*Rossberg v. Bank of America, N.A. (2013) 219 Cal.App.4th 1481, 1490–1491 [162 Cal. Rptr. 3d 525]*; *Henry v. Associated Indemnity Corp. (1990) 217 Cal.App.3d 1405, 1413, fn. 8 [266 Cal. Rptr. 578]*.)[5]

Finally, ***HN3***[] whether leave to amend should have been granted is reviewed under the abuse of discretion standard, although error is shown if there is any reasonable probability an amendment that cures the defect can **[***7]** be made. Appellants bear the burden on appeal of showing a reasonable possibility exists that the complaint can be successfully amended. (*Rosen v. St. Joseph Hospital of Orange County (2011) 193 Cal.App.4th 453, 458 [122 Cal. Rptr. 3d 87]*.)

DISCUSSION

1. *Regulations of a Federal Agency May Preempt State Law*

HN4[] ***CA(1)***[] **(1)** Under the *supremacy clause of the United States Constitution (U.S. Const., art. VI, cl. 2)*, federal law "shall be the supreme Law of the Land." (See *Brown v. Mortensen (2011) 51 Cal.4th 1052, 1059 [126 Cal. Rptr. 3d 428, **[*791]** 253 P.3d 522]* (*Brown*).) Therefore Congress may preempt state laws to the extent it believes such action is necessary to achieve its purposes. (*City of New York v. FCC (1988) 486 U.S. 57, 63 [100 L. Ed. 2d 48, 108 S. Ct. 1637]* (*City of New York*).)

Congress may exercise that power expressly, or the courts may infer preemption under one of three implied preemption doctrines: conflict, obstacle, or field preemption. (*Brown, supra, 51 Cal.4th at p. 1059*.) Express preemption occurs when Congress defines the extent to which a statute preempts state law. (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc. (2007) 41 Cal.4th 929, 935 [63 Cal. Rptr. 3d 50, 162 P.3d 569]*.) Conflict preemption exists when it is impossible to simultaneously comply with both state and federal law. (*Ibid.*) Obstacle preemption occurs when state law stands in the way of full accomplishment and execution of federal law. (*Ibid.*) Field preemption applies when comprehensive federal regulations leave no room for state regulation. (*Ibid.*)

HN5[] ***CA(2)***[] **(2)** Preemption may be based either on federal statutes or on federal regulations that are properly adopted in accordance with statutory authorization. **[***8]** As a result, a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation and "render unenforceable state or local laws that are otherwise not inconsistent with federal law." (*City of New York, supra, 486 U.S. at p. 64*.) **[**495]** The current appeal presents primarily the question of regulatory, not statutory, preemption.

When regulatory preemption is at issue, the regulation's force does not depend on express congressional authorization to displace state law. As a result, a narrow focus on Congress' intent to supersede state law is not appropriate. (*City of New York, supra, 486 U.S. at p. 64*.) Therefore the focus is on the agency and whether it acted within the bounds of its lawful authority. (*Ibid.*)

HN6[] ***CA(3)***[] **(3)** A federal agency's regulations will preempt any state or local laws that conflict with or frustrate the regulations' purpose. Beyond that, in proper circumstances an agency may determine that its authority is exclusive and preempts any state efforts to regulate at all in the forbidden area. (*City of New York, supra, 486*

[5] Perhaps in recognition of this rule, appellants do not contend that we may not consider the express regulatory preemption issue that was first raised by the trial court.

U.S. at p. 64.) Many of the responsibilities conferred on federal agencies include a broad grant of authority to reconcile conflicting policies. "Where this is true, the [Supreme] Court has cautioned that even in the area of pre-emption, **[***9]** if the agency's choice to pre-empt 'represents a reasonable accommodation of conflicting policies that were committed to the **[*792]** agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'" (*Ibid.*)

2. *Applicable Federal Statutes and Regulations in the Cable Industry*

HN7[] **CA(4)**[] **(4)** The Federal Communications Commission (FCC) regulates cable television service through the Cable Television Consumer Protection and Competition Act of 1992. (47 U.S.C. § 521 et seq.; the Cable Act.)[6] Section 543, part of the Cable Act, governs the regulation of rates and provides that, with certain exceptions, no federal agency or state may regulate rates. (§ 543(a)(1).)[7] Section 543, part of the Cable Act, also prohibits cable operators from engaging in "negative option billing," such that subscribers may not be charged "for any service or equipment that the subscriber has not affirmatively requested by name." (§ 543(f).)[8] **[**496]** This section prohibits cable companies from providing a service the customer has not expressly requested and then charging for the service if the customer fails to exercise the negative option of cancelling the subscription or opting **[***10]** out of the service. (Belton v. Comcast Cable Holdings, LLC (2007) 151 Cal.App.4th 1224, 1236 [60 Cal. Rptr. 3d 631].) The statute reinforces the prohibition against negative option billing by providing that "a subscriber's failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment." (§ 543(f).)[9]
[*793]

CA(5)[] **(5)** Pursuant to its regulatory authority, the FCC promulgated **HN9**[] 47 Code of Federal Regulations part 76.981 (2014) implementing section 543's prohibition against negative option billing, but carved out an exception.[10] Negative option billing does not include "the addition **[***12]** or deletion of a specific program from a

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[6] All further section references are to title 47 of the United States Code.

[7] When a cable provider is subject to "effective competition," its rates are unregulated. (§ 543(a)(1), (2).) Section 543 establishes three separate market share formulas to determine whether effective competition exists. (§ 543(l)(1); Time Warner, supra, 56 F.3d at p. 162.) If a cable provider is not subject to effective competition then the FCC regulates its rates according to a complex set of statutory and regulatory standards. (Time Warner, at pp. 162–163; § 543(c)(2); 47 C.F.R. § 76.922 (2014).)

The parties do not specifically address whether Time Warner is subject to effective competition and therefore exempt from rate regulation. However, while the complaint alleges that Time Warner is either a significant or primary cable provider in the affected areas, it also alleges the existence of alternate providers and does not state that Time Warner is not subject to effective competition. In its trial court points and authorities, Time Warner cited **[***11]** section 543(a) for the proposition that it had "complete discretion" to set its own rates, while appellants said they were not asking the court to regulate rates and instead wanted them determined by "market forces." We take from this that Time Warner is subject to effective competition under the Cable Act and that its rates are therefore unregulated, a fact that appellants' counsel confirmed during oral argument.

[8] Section 543(f) states: **HN8**[] "A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. For purposes of this subsection, a subscriber's failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment."

[9] The manner in which Time Warner effected its decision to add the Dodgers and Lakers channels unilaterally is an example of negative option billing as subscribers were not asked to affirmatively request or agree to the additional channels.

[10] The regulation states: "(a) **HN10**[] A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. A subscriber's failure to refuse a cable operator's proposal to provide such service or equipment is not an affirmative request for service or equipment. A subscriber's affirmative request for service or equipment may be made orally or in **[***13]** writing.

"(b) The requirements of paragraph (a) of this section shall not preclude the adjustment of rates to reflect inflation, cost of living and other external costs, the addition or deletion of a specific program from a service offering, the addition or deletion of specific service offering, the addition or deletion of specific channels from an existing tier or service, the restructuring or division of existing tiers of service, or the adjustment of rates as a result of the addition, deletion or substitution of channels … .” (47 C.F.R. § 76.981(b) (2014).)[11] Under the circumstances just described, negative option billing is permitted. The Regulations also provide that state and local governments may not enforce consumer protection laws that conflict with this exception to the negative option billing prohibition so long as the changes proposed by the cable operator “do not constitute a fundamental change in the nature of an existing service or tier of service and are otherwise consistent with applicable [FCC] regulations.” (Regs., § 76.981(b), (c).)[12]

CA(6)[] **(6)** In sum, **HN11**[] changes to a service tier that *do not* amount to a fundamental change in the nature of service do not run afoul of the negative option billing prohibition, **[**497]** meaning that such changes can be made without a subscriber's express advance agreement. Particularly relevant to this case, **[*794]** state and consumer protection laws are preempted to the extent they target such nonfundamental changes.[13]

The question remains: Was the inclusion of the three sports channels to the basic tier (1) simply the addition of “specific” programs or channels and hence a form of negative option billing that is lawful under the regulations or **[***15]** (2) a fundamental change in the nature of an existing service or tier and hence subject to state consumer protective laws?

3. *Regulations Part 76.981 Preempts the UCL*

The trial court concluded, and respondents contend here, that Time Warner did nothing more than add three sports channels to its enhanced basic service tier and adjust subscribers' rates accordingly, changes that did not fundamentally alter the nature of the existing tier. As a result, respondents contend that appellants' UCL action is expressly preempted by Regulations part 76.981, which authorizes such minor channel lineup changes (Regs., § 76.981(b)), exempts them from the negative option billing prohibition (Regs., § 76.981(a)), and expressly preempts state consumer protection laws that “conflict with or undermine” the negative option billing/fundamental change regulation (Regs., § 76.981(c)).

Appellants contend that Regulations part 76.981 does not apply because (1) Time Warner's unilateral addition of new channels at a higher rate was a negative option billing practice prohibited by section 543(f); (2) the new channels fundamentally changed an existing tier of channels under Regulations part 76.981(b); (3) section 552(d)(1), part of the Cable Act, permits enforcement of state consumer protection laws unless the Cable **[***16]** Act expressly states otherwise; and (4) section 543, part of the Cable Act, does not provide for such preemption in this setting. We disagree.

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channels from an existing tier or service, the restructuring or division of existing tiers of service, or the adjustment of rates as a result of the addition, deletion or substitution of channels pursuant to § 76.922, provided that such changes do not constitute a fundamental change in the nature of an existing service or tier of service and are otherwise consistent with applicable regulations.

“(c) State and local governments may not enforce state and local consumer protection laws that conflict with or undermine paragraph (a) or (b) of this section or any other sections of this Subpart that were established pursuant to Section 3 of the 1992 Cable Act, 47 U.S.C. 543.” (47 C.F.R. § 76.981 (2014).)

[11] All further references to “Regulations” are to title 47 of the Code of Federal Regulations (2014).

[12] The Cable Act itself contains several statutes relating to preemption. Section 556(c) provides generally that any provision of state law “which is inconsistent with this chapter shall be deemed to be preempted and superseded.” Section 552(d)(1) states, “Nothing in this subchapter **[***14]** shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this subchapter.” (See § 552(a), (b), § 557.)

[13] Regulations part 76.981(c) provides: “State and local governments may not enforce state and local consumer protection laws that conflict with or undermine paragraph (a) [(negative option billing)] or (b) [(limiting the prohibition against negative option to ‘fundamental’ changes)] of this section or any other sections of this Subpart that were established pursuant to Section 3 of the 1992 Cable Act, 47 U.S.C. 543.”

The only case to construe Regulations part 76.981, determine the FCC's authority to promulgate it, and consider the regulation's preemptive effect, is Time Warner Cable v. Doyle (7th Cir. 1995) 66 F.3d 867 (*Doyle*).[14]
[*795]

The *Doyle* court considered an unfair trade practices action brought by the State of Wisconsin against Time Warner for claimed negative option billing practices. Time Warner deleted certain channels from its basic and standard service tiers and began offering them on an “a la carte” or per-channel basis. This resulted in a rate decrease for the two existing tiers, coupled with a new charge for the a la carte channels. As a result, those who had already subscribed to both tiers saw no net increase in their monthly bills because the **[***17]** combined effect of the simultaneous rate increases and decreases balanced each other **[**498]** out. Time Warner did not ask its *existing* subscribers whether they wished to receive the a la carte channels and began billing for them. New subscribers were given an affirmative choice whether to receive the a la carte channels. Presumably, subscribers who opted out of the a la carte channels would have the cost of their cable service reduced.

CA(7)[] **(7)** The district court entered summary judgment for the state. The Seventh Circuit reversed, finding the action was preempted by Regulations part 76.981. The *Doyle* court began by noting the rule that ***HN12***[] when a statute is silent or ambiguous on the issue of preemption, the courts must defer to an interpretation by the administering agency so long as it is based on a permissible reading of the statute. (Doyle, supra, 66 F.3d at p. 876.) The negative option billing provision of section 543 was ambiguous because its language standing alone did not “answer the question of whether the unbundling or the mere relabeling of existing services” was sufficient to require affirmative customer consent. (66 F.3d at p. 877.)

The appellate court also observed that a literal interpretation of the “negative option billing” prohibition in section 543(f) would impose the **[***18]** burdensome requirement of cable operators obtaining affirmative customer consent every time a station was substituted, “producing significant compliance costs that would be difficult to reconcile with the contemplated rate regulation scheme.” (Doyle, supra, 66 F.3d at p. 877.)[15] Because section 543(f)'s negative option billing prohibition was placed in the Cable Act's rate regulation section, not the consumer protection section (§ 552), an inference arose that the requirement of an affirmative request for service was at least a factor in the regulatory scheme for rates, and was therefore subject to the bar on rate regulation under section 543(a)(1). (66 F.3d at p. 877.)
[*796]

The Seventh Circuit observed that section 552 permits the enforcement of state **[***19]** consumer protection laws absent their express preemption by the Cable Act.[16] But the court held that the FCC had reasonably interpreted

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[14] The court in Time Warner, supra, 56 F.3d 151, considered a challenge by cable operators to FCC rulemaking opinions that heralded the FCC's interpretation of section 543(c)'s negative option billing provision to permit concurrent enforcement of state consumer protection laws unless they impinged on rate regulation. Regulations part 76.981 was never mentioned and the *Time Warner* court held that the issue was not yet ripe for judicial review. (56 F.3d at pp. 194–195.)

[15] In the context of the present case, if negative option billing were prohibited in every situation, Time Warner would not be able to delete, for example, the Velocity channel (channel 416) or the Oxygen channel (channel 77) from its basic cable lineup without affirmative agreement by subscribers to continue basic cable service without those channels. Regulations part 76.981(b) permits the cable operator to take such action without affirmative subscriber agreement because the deletion of the channels does not constitute a “fundamental change.”

[16] The version of section 552(d)(1) printed in the United States Code Annotated states that the statute's express **[***20]** endorsement of the companion use of state consumer protection laws unless otherwise preempted states that “[n]othing in this subchapter” prevents their enforcement. Based on this, respondents contend that the provision authorizing state consumer actions does not apply to negative option billing practices under section 543(f) because that statute is found in another *subchapter* of the Cable Act. The *Doyle* court clarified that the use of “subchapter” was essentially a typographical error because the Statutes at Large (106 Stat. 1484) uses the word “title” instead of “subchapter,” a conflict that is generally resolved in favor of the language used in the Statutes at Large. (Doyle, supra, 66 F.3d at p. 878 & fn. 11.) As a result, consumer protection in

section 543(f) to preempt state challenges to negative option billing practices that did not fundamentally alter a service tier, as expressly permitted by Regulations part 76.981. (Doyle, supra, 66 F.3d at pp. 878–879.) Although that choice was made clear by **[**499]** the current version of Regulations part 76.981, the *Doyle* court examined a previous version of that regulation that was in effect when Time Warner first implemented the tier restructuring. According to the *Doyle* court, a series of FCC reports showed an evolving awareness that Regulations part 76.981 was always intended to have preemptive effect where state consumer protection laws impinged on rate regulations. (66 F.3d at pp. 878–881.) The *Doyle* court acknowledged that there was long-standing tension between two policy concerns—federal control of matters that affect cable rates and state freedom to enforce consumer protection laws. It concluded that the FCC has consistently reconciled this tension by opting to protect the rate structure whenever it is jeopardized by state consumer protection laws. (Id. at p. 881.)

In short, the Seventh Circuit concluded that, while state consumer protection laws may be enforced generally under the Cable Act, where enforcement is sought in regard to negative option billing practices that concern nonfundamental service changes, they are preempted by Regulations part 76.981. (Doyle, supra, 66 F.3d at pp. 880–881.)

Another factor the *Doyle* court considered was the potential remedy of disgorgement **[***21]** available under Wisconsin's unfair trade practices act. Even though the parties later stipulated that disgorgement would not be sought, the Seventh Circuit held that the initial availability of that remedy impacted rate regulation because, were disgorgement ordered, the net effect would be that Time Warner would have provided the disputed channels for free. (Doyle, supra, 66 F.3d at pp. 881–882.) As a result, enforcement of that state law would have "impact on the rate rules by discouraging the provision of new services at a reasonable cost." (Id. at p. 882.) Accordingly, Regulations part **[*797]** 76.981 was a proper interpretation of section 543's ban on state regulation of rates, and therefore preempted Wisconsin's attempt to enforce its consumer protection law. (66 F.3d at pp. 881–882.)

CA(8)[] **(8)** With Doyle as a guide, we conclude that ***HN13***[] Regulations part 76.981 is a proper exercise of the FCC's regulatory authority and preempts appellants' UCL claim. First, as in *Doyle*, appellants seek restitution of the rate hike fees, thereby retroactively affecting rates Time Warner has already charged its customers. Second, the trial court took judicial notice of the channel lineups as they stood before and after the new sports channels were added. Only three of nearly 100 in the nonbroadcast basic cable **[***22]** tier were affected. An FCC order interpreting Regulations part 76.981 states that tier changes of that nature are minor, not "fundamental," even if they are accompanied by a rate adjustment, and are therefore within the preemptive scope of Regulations part 76.981(c). (*Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation, Sixth Order on Reconsideration, 10 F.C.C.R. 1226*, ¶¶ 109–110, adopted Nov. 10, 1994, released Nov. 18, 1994 (FCC Sixth Order).) By contrast, deleting all existing channels from a particular tier and replacing them with an entirely new set of channels would constitute a fundamental change to a tier of channels. (*Id.*, ¶ 110.) In that hypothetical setting, negative option billing would be implicated and state laws that addressed such changes would not be preempted.

CA(9)[] **(9)** Appellants challenge *Doyle* by citing to the *Doyle* dissent's contention that section 543 was not ambiguous and therefore did not support the FCC's interpretation and concomitant enactment of Regulations part 76.981. Of course, ***HN14***[] a dissent has no **[**500]** precedential value, and we find it unpersuasive here. (Tearlach Resources Limited v. Western States Internat., Inc. (2013) 219 Cal.App.4th 773, 783 [162 Cal. Rptr. 3d 110].) We agree with the *Doyle* court that literal application of negative option billing to every minor change would be seriously burdensome to cable operators, and it **[***23]** was that reality that prompted the FCC to add the "fundamental change" rule to negative option billing in Regulations part 76.981. (Doyle, supra, 66 F.3d at p. 877.) Thus, the regulation was compatible, not inconsistent, with section 543, and hence a proper subject for regulatory promulgation and regulatory preemption. (City of New York, supra, 486 U.S. at pp. 63–64.)

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section 552(d)(1) (formerly found in subsection (c)), applies to the general provisions of the Cable Act as a whole. (66 F.3d at pp. 878 & fn. 11, 881–882.)

Appellants also contend that the FCC Sixth Order actually supports their contention that Time Warner's addition of the three sports channels constituted a fundamental change to the basic service tier that brought it outside the preemptive effect of *Regulations part 76.981*. Because the FCC Sixth Order provides a 20-cent-per-channel cap on the costs of adding new channels, appellants contend that the $9-per-month rate hike for the three new channels did constitute a fundamental change. However, as Time Warner points out, **[*798]** that 20-cent cap was aimed at the “costs of adding a channel” and did not apply to programming costs, which are “the costs of obtaining programming.” Plaintiffs effectively alleged that the rate hikes represent Time Warner's costs of obtaining the programming, meaning that the 20-cent cap does not apply. Furthermore, that price cap was, by its terms, in place only through 1997. (FCC Sixth Order, **[***24]** ¶¶ 8, 9, 66, 72–73, 76.) Therefore, all that remains of the FCC Sixth Order relevant to negative option billing is its statement that state consumer protection laws are preempted in regard to nonfundamental channel additions and concomitant rate hikes. (*Id.*, ¶ 13.)[17]

Appellants also rely on decisions that have allowed enforcement of various state laws against cable operators, but none is applicable. (*Total TV v. Palmer Communications, Inc. (9th Cir. 1995) 69 F.3d 298* [action under the Unfair Practices Act (*Bus. & Prof. Code, § 17204*) by one cable operator against another alleging predatory pricing designed to drive it out of business; no mention of *Regs., § 76.981*]; *Cable Television Assn. v. Finneran (2d Cir. 1992) 954 F.2d 91* [N.Y. state law prohibiting cable operators from charging subscribers a $40 to $100 fee to downgrade to less expensive service not preempted by *§ 543* prohibition against state regulation of rates because the downgrade fee was not a rate; no mention of *Regs., § 76.981*]; *Morrison v. Viacom, Inc. (1997) 52 Cal.App.4th 1514, 1529–1531 [61 Cal. Rptr. 2d 544]* [class action by cable subscribers alleging that cable operator violated state ***antitrust law*** by “tying” purchase of one service to purchase of other service not preempted because it only *indirectly* affected rates; distinguished *Doyle* because *Doyle* concerned “a much different question” **[***25]** of “ ‘minor adjustments in programming’ ” and because the FCC had not preempted state law that only indirectly affects rates].)

CA(10)[] **(10)** In short, ***HN15***[] the FCC, pursuant to its statutory authority, has made it clear that state consumer protection laws are preempted in regard to negative option billing practices that result in rate hikes due to the addition of a small number of channels because those rate hikes do not represent a “fundamental change” in service. The essence of appellants' complaint is to the **[**501]** contrary—nonfundamental changes are not preempted. Even though they seek leave to amend to allege that the three channel additions fundamentally altered the basic cable tier, such an allegation would not eliminate that defect, as the cited authorities indicate that such additions are not fundamental changes. We therefore hold that the action is necessarily preempted as to all respondents.[18]

[*799]

DISPOSITION

The judgment of dismissal based on the order sustaining respondents' demurrers without leave to amend is affirmed. Respondents to recover their appellate costs.

Flier, J., and Grimes, J., concurred.

A petition for a rehearing was denied March 16, 2015, and appellant's petition for review by the Supreme Court was denied June 10, 2015, S225395.

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[17] We asked for and received supplemental briefing from the parties on this issue.

[18] We do so keenly aware of how this issue affects millions of our fellow Southern California residents. With apologies to Bruce Springsteen, we appreciate the lament of cable television subscribers who feel that although they now receive 10 times 57 channels or more, mostly nothing is on that they wish to view. We **[***26]** simply hold that federal preemption principles bar application of state consumer protection laws in this case. Thus, consumers must present their complaints to Congress or the FCC.

Heartland Payment Sys. v. Mercury Payment Sys., LLC

United States District Court for the Northern District of California

February 23, 2015, Decided; February 24, 2015, Filed

No. C 14-0437 CW

Reporter
2015 U.S. Dist. LEXIS 68662 *; 2015 WL 3377662

HEARTLAND PAYMENT SYSTEMS, INC., Plaintiff, v. MERCURY PAYMENT SYSTEMS, LLC, Defendant.

Prior History: Heartland Payment Sys. v. Mercury Payment Sys., LLC, 2014 U.S. Dist. LEXIS 156221 (N.D. Cal., Nov. 4, 2014)

Core Terms

merchants, alleges, cause of action, deceived, sufficient to support, deceptive, consumer, unfair, motion to dismiss, misrepresentations, business practice, false advertising, Lanham Act, pricing, markup, contractual relationship, intentional interference, processing service, statement of facts, previous order, competitors, fraudulent, cost-plus, discloses, documents, acquirer, dealers, induced, monthly statements, third party

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Judges: CLAUDIA WILKEN, United States District Judge.

Opinion by: CLAUDIA WILKEN

Opinion

ORDER GRANTING in part and DENYING in part DEFENDANT'S MOTION TO DISMISS

(Docket No. 67)

Plaintiff Heartland Payment Systems filed its original complaint on January 29, 2014. Defendant Mercury Payment Systems moved to dismiss the complaint and, on November 7, 2014, the Court granted Mercury's motion and granted Heartland leave to amend. In its First Amended Complaint (1AC), Heartland asserts various unfair business practice claims against Mercury. Mercury moves to dismiss the 1AC. (Docket No. 67). Heartland has filed an opposition. Mercury has filed a reply. Having considered the motion on the papers, the Court GRANTS in part and DENIES in part the motion to dismiss.

BACKGROUND

In considering whether the complaint is sufficient to state a claim, the Court will take all material allegations as true and construe them in the light most favorable to Plaintiff. *Metzler Inv. GMBH v. Corinthian Colls., Inc., 540 F.3d 1049, 1061 (9th Cir. 2008)*. The Court's review is limited to the face of the complaint, materials incorporated into the complaint by reference, and facts **[*3]** of which the Court has taken judicial notice. Id. Facts plead in the original complaint and those that are judicially noticed are summarized in the Court's previous order. See November 7, 2014 Order, Docket No. 63 at 1-4; Compl. ¶¶ 1-28. The following is a summary of those facts, noting additional facts as alleged in the 1AC.

Heartland and Mercury are competitors in the payment processing industry. In the 1AC, Heartland alleges that while it is both a merchant acquirer and a payment processor, Mercury is not itself a processor, but only a merchant acquirer. See 1AC ¶ 15. Both companies "acquire" businesses, described as "merchants," to sign up for payment processing services. 1AC ¶ 11.[1] Payment processing systems allow merchants to accept credit and debit cards as payment from their customers. Both Heartland and Mercury serve small-and medium-sized merchants.

Under the pricing model pioneered by Heartland, known as "cost-plus," the merchant pays the fees charged by the card networks (e.g., Visa) and those charged by the banks (e.g., Wells Fargo) "at cost," i.e., with no mark-up by the merchant acquirer. Id. ¶ 28. The "plus" fee is that charged by the merchant acquirer, and it is on that fee that Heartland, Mercury and its competitors compete. Id. Heartland alleges that the term "costplus" is a "term of art" in the industry which means that the "acquirer (1) will pass through at cost the uncontrollable third party-charged interchange fees and assessments to the merchant, and (2) will add a separate **[*5]** markup, usually in some combination of percentage of a transaction and cents-per-transaction, that is supposed to represent the amount the acquirer is paid for its services." Id. ¶¶ 29-30. Heartland alleges that Mercury deceives merchants by purporting to charge "cost-plus" while actually charging other, undisclosed, fees. In addition to marking up fees that Mercury promises to pass through to merchants "at cost," Heartland alleges, Mercury charges "junk fees," or "fee[s] made up by Mercury, represented to be a third party fee, and charged in addition to Mercury's disclosed markup." Id. ¶ 86.

Heartland alleges that Mercury deceives merchants through various documents and written statements, including its Merchant Application, the "Operating Guide" on its website, and oral statements to merchants from Mercury's employees or agents. In the 1AC, Heartland alleges further that, in addition to statements made by Mercury's employees, Mercury's agents make oral statements to merchants to induce them to purchase Mercury's processing services. Id. ¶¶ 19-20. These agents include Point of Sale (POS) dealers and developers, who create, sell, install and maintain POS systems and who recommend Mercury's **[*6]** services to their customers, and Independent Sales Organizations (ISOs). Mercury offers the POS dealers and developers and the ISOs referral fees in return for signing up merchants. Id.

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[1] In its Motion to Dismiss, Mercury argues that Heartland's new allegation that Mercury is a merchant acquirer but not a payment processor, see 1AC ¶ 15, is a new allegation that "directly contradicts" Heartland's original complaint and hence is not authorized by this Court's previous order. See Def.'s Mot. Dismiss, Docket No. 67 at **[*4]** 3. In the original complaint, Heartland asserted that "Mercury, like Heartland, is engaged in the business of payment processing for merchants. Also like Heartland, Mercury provides payment services nationwide." Compl. ¶ 11. Heartland explains that it has since learned new information. In the 1AC, Heartland also states that "Mercury competes directly with Heartland . . . [in] providing payment processing services for small and medium-sized merchants. . ." 1AC ¶ 14. The Court does not find that Heartland has impermissibly changed its allegations.

In the 1AC, Heartland alleges that, beyond the price competition, Mercury has also made it difficult for Heartland to compete directly for partnerships with POS dealers. Id. ¶ 131. Because POS dealers typically receive a portion of the revenue received by the merchant acquirer, Mercury is able to promise greater revenue than Heartland can offer. Id. But, Heartland alleges that the POS dealers are also being deceived; because "those inflated interchange fees are characterized as pass-through costs on merchant statements, rather than as part of Mercury's own markup, they are not included in the revenue shared with the POS dealer, and the POS dealer does not receive the benefits it expected to receive." Id.

Likewise, Heartland alleges, the ISOs are being deceived by Mercury. ISOs purchase processing services from Mercury, and then sell those services to merchants for a mark-up. For example, an ISO will purchase processing services from Mercury for "cost-plus two cents," and then sell those services to a **[*7]** merchant for "costplus five cents," expecting to net three cents for every transaction. See 1AC ¶ 64. Heartland alleges that while the ISO will receive the three cents per transaction, Mercury is inflating the "cost" amount and not sharing the mark-up with the ISO. This allegation is supported by a sworn affidavit from the President of Payment Revolutions, an ISO that contracts with Mercury, that Mercury "was secretly inflating [the interchange and assessment] fees and not sharing any portion of the mark up with" the ISO. 1AC ¶ 66.[2]

In the 1AC, Heartland states facts with regard to six merchants to support its allegations that Mercury charged undisclosed fees. Id. ¶¶ 108-130. Heartland alleges that Mercury promised each of these merchants that it is charging a fee less than it is actually charging. Heartland alleges that this deception occurred through Mercury's Merchant Application and through its agents' oral statements, and it provides detailed allegations on exactly how each merchant was overcharged. Also in the 1AC, Heartland alleges that from 2008 to 2012, due to its deceptive practices, Mercury's processing volume nearly quadrupled. Id. ¶ 22.

Heartland asserts five causes of action against Mercury: (1) false advertising in violation of *15 U.S.C. § 1125(a)(1)(B)* (Lanham Act); (2) unfair competition in violation of California's Unfair Competition Law, Business and Professions Code *section 17200 et seq.* (UCL); (3) false advertising in violation of *California Business and Professions Code section 17500 et seq.* (FAL); (4) intentional interference with contractual relations; and (5) intentional interference with prospective economic advantage.

LEGAL STANDARD

As noted in the Court's November 7, 2014 Order dismissing the original complaint, a complaint must **[*9]** contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)*. The plaintiff must proffer "enough facts to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

However, the court need not accept legal conclusions, including "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal, 556 U.S. at 678* (citing *Twombly, 550 U.S. at 555*).

DISCUSSION

I. *Rule 9(b)*

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[2] In its Motion to Dismiss, Mercury argues that the ISO allegations are new and thus not allowed in Heartland's amended complaint. One ISO allegation is that one of the ways in which Mercury misleads merchants is by using the ISOs to make pricing statements which Mercury knows to be false. This is not a new allegation, but rather provides more detail as to how Mercury communicates misrepresentations to merchants. In addition, Heartland alleges that Mercury is directly deceiving the ISOs. This is a new allegation. However, this allegation is closely related to Heartland's main contention that Mercury is engaging in deceptive business practices. Thus, in the **[*8]** interest of judicial economy, the Court will allow the allegation.

As a threshold matter, Mercury again argues that all of Heartland's causes of action fail because they do not satisfy the heightened pleading requirements of *Rule 9(b)*. "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." *Fed. R. Civ. P. 9(b)*.

As discussed in the previous order, while Heartland may not use the word "fraud" in all of its causes of action, it has alleged "a unified course of fraudulent conduct and rel[ies] entirely on that course of conduct as the basis of [its] claim[s]." See *Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009)*.

The Court finds that Heartland has now plead its causes of action sufficiently to satisfy **[*10]** *Rule 9(b)*. It provides specific details as to which documents Mercury uses to deceive merchants and why the documents are deceptive, as well as details that shed light on the identities of Mercury employees and agents who allegedly made oral misrepresentations to merchants. Accordingly, the Court declines to dismiss Heartland's complaint in its entirety for failure to comply with *Rule 9(b)*.

The Court now turns to each cause of action.

II. First Cause of Action: False Advertising in Violation of *15 U.S.C. § 1125(a)(1)(B)*(Lanham Act)

> The elements of a Lanham Act . . . false advertising claim are: (1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a lessening of the goodwill associated with its products.

Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997) (citing *15 U.S.C. § 1125(a)(1)(B)*).

Heartland alleges that Mercury **[*11]** "has made and will continue to make, in commercial advertising or promotion throughout the United States including in California, false and/or misleading statements of fact that misrepresent the nature, characteristics and/or qualities of Defendant's and Plaintiff's services" in violation of the Lanham Act. 1AC ¶ 135.

Heartland alleges that Mercury's false advertising takes two forms: (1) its written documents (i.e., Merchant Application, Operating Guide and monthly statements) and (2) oral statements made by its employees or agents (i.e., POS dealers, POS developer partners, and ISOs.) Mercury counters that (1) the Merchant Application and monthly statements disclose that mark-ups may be added, and (2) the alleged oral misrepresentations are not plead with the required particularity.

In its previous Order dismissing the original complaint, the Court found that while Heartland had sufficiently plead that the written documents were commercial speech, Heartland

> has not stated facts sufficient to support the inference that 1) Mercury discloses its pricing in the way Heartland alleges, or that 2) Mercury has actually charged something other than what it discloses. It fails to allege any facts **[*12]** -- such as specific language or terms in the monthly statements, Operating Guide or Merchant Application -- to support the inference that the documents do not contain truthful "detailed terms and conditions . . . that make clear disclosures about Mercury's pricing and fees."

November 7, 2014 Order at 14.

In the 1AC, Heartland has stated, with particularity, facts sufficient to support its allegations that Mercury's written representations are false and why they are false. For example, Heartland alleges that the following statement, found in Mercury's Merchant Application, is false: "Merchant will also be assessed per transaction access fees for Visa, MasterCard and Discover transactions, which will be displayed as a separate item on Merchant's monthly statement and may include fees by both the applicable card association and Member or Global Direct." 1AC ¶ 41. Heartland alleges that this statement is false because

> Mercury, not the third parties Mercury identifies, marks up "access" fees. Mercury pads these fees and retains the markup for itself, but misrepresents that those fee markups are unavoidable costs imposed by third parties. Mercury falsely represents that such third parties "may" **[*13]** increase these fees, when in fact Mercury intends to, and does, inflate these fees.

Id. ¶ 43. Heartland supports the allegation by comparing the Merchant Application language with specific monthly statements which show (1) marked-up interchange fees and assessment fees, and (2) fees that are not clearly disclosed. See id. ¶¶ 108-130.

For example, Heartland alleges that, in one Merchant Application, Mercury states its fee will be six and one-half cents per transaction. Heartland alleges that merchants

> reasonably understand Mercury's fee schedule to mean that Mercury is proposing to charge the merchant cost-plus pricing . . . i.e., actual interchange rates and assessments plus the margin quoted in the fee schedule . . . [and] that Mercury's fees will be limited to the margins quoted in [its] fee schedule.

1AC ¶ 38. Even if Mercury discloses that additional fees may be assessed, and that additional fees are possible for some transactions, see id. ¶ 33, the implication is that these are unavoidable pass-through fees. Heartland points to a monthly statement where Mercury charged almost one hundred dollars more than what Heartland believes the merchant should have been charged if it were being **[*14]** charged "cost-plus." See id. ¶¶ 73-76.

Heartland also bases its allegations on a comparison of the Merchant Applications and monthly statements of six merchants who were deceived by Mercury. For three of these merchants, Heartland states facts that support the inference that Mercury charged something other than what was originally disclosed to the merchant in its Merchant Application. For example, Heartland alleges that Schat's, a California merchant, "discovered that, contrary to Mercury's representations [in its Merchant Application], Mercury had not been passing through 'actual' third party charged fees at cost." 1AC ¶ 108. Instead, "Mercury was inflating certain card network assessments, including the APF and NABU fees described above, by several cents per transaction." Id. ¶ 109.

Accordingly, Heartland has stated facts sufficient to support the allegation that Mercury charges something other than what it discloses in its written documents.

With regard to Heartland's allegations based on oral statements, in its previous Order the Court stated,

> Heartland alleges that it has the name of at least one merchant it believes was a victim of Mercury's deception. Yet it fails to disclose the **[*15]** name of that merchant, or any other merchant who it claims was deceived. It also fails to allege any facts to support that it was a Mercury employee or representative who made false statements to current or potential merchants.

November 7, 2014 Order at 11.

In the 1AC, Heartland discloses the names of three merchants it alleges were deceived by Mercury's employees or its agents, and states facts to support that it was a Mercury employee or agent who made false statements to these merchants. For example, Heartland alleges that,

> Mercury's sales representative told [Nothing Bundt Cake] franchisees they would be charged cost plus 5 cents and a $5 monthly service charge, and provided Merchant Applications that reflected that pricing. The franchises discovered in or around February 2014, however, that although their account statements separately listed interchange fees and assessments, their APF and NABU fees were each being inflated 4 cents, plus they were being charged junk fees, including a $15.95 monthly "maintenance fee" and a $24.95 monthly "membership fee," neither of which were disclosed in their Merchant Applications.

1AC ¶ 115.

Heartland also alleges that another merchant, Arena Softball, **[*16]** was told by a Mercury sales representative that "it would save money by switching from Heartland to Mercury." Id. ¶ 110.[3] Instead, Heartland alleges, Mercury inflated the fees and the merchant was charged more than what it would have been charged by Heartland.

Thus, the Court finds that Heartland has stated facts sufficient to support the allegation that Mercury charges something other than what its agents disclose in their oral representations. Accordingly, the Court DENIES Mercury's motion to dismiss the Lanham Act cause of action.

III. Second Cause of Action: Unfair Competition in Violation of *California Business and Professions Code section 17200 et seq.* (UCL)

The UCL prohibits "any unlawful, unfair or fraudulent business act." *Cal. Bus. & Prof. Code § 17200 et seq.* Because *section 17200* is written in the disjunctive, it establishes three types of unfair competition. *Davis v. Ford Motor Credit Co., 179 Cal. App. 4th 581, 593, 101 Cal. Rptr. 3d 697 (2009)*. Therefore, a practice may be prohibited as unfair or deceptive even if it is not unlawful and vice versa. *Podolsky v. First Healthcare Corp., 50 Cal. App. 4th 632, 647, 58 Cal. Rptr. 2d 89 (1996)*. Heartland alleges claims under all three prongs.

A. Unlawful business practices

[*17] An unlawful business practice includes anything that can be called a business practice and that is forbidden by law. *Ticconi v. Blue Shield of Cal. Life & Health Ins., 160 Cal. App. 4th 528, 539, 72 Cal. Rptr. 3d 888 (2008)*. Any federal, state or local law can serve as a predicate for an unlawful business practice action. *Smith v. State Farm Mut. Auto. Ins. Co., 93 Cal. App. 4th 700, 718, 113 Cal. Rptr. 2d 399 (2001)*. Thus, the UCL incorporates violations of other laws and treats them as unlawful practices independently actionable under the UCL. Id.; *Chabner v. United of Omaha Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000)*; *Cel-Tech Communs., Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*.

In its previous order, the Court found that, because Heartland's allegations failed to comply with *Rule 9(b)* and failed to state a claim upon which relief could be granted, Heartland had also failed to state a claim under the unlawful prong of the UCL. See November 7, 2014 Order at 17. As discussed elsewhere in this order, in its 1AC Heartland has plead facts sufficient to support its Lanham Act and FAL causes of action. Accordingly, the Court DENIES Mercury's motion to dismiss this UCL cause of action for unlawful business practices.

B. Unfair business practices

"When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes *section 17200*, the word 'unfair' in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, Inc., 20 Cal. 4th at 187*.

In its previous order, the Court found that,

> Heartland alleges that Mercury's actions threaten a violation **[*18]** of ***antitrust law***, "including but not limited to *Section 5* of the Federal Trade Commission Act, violate the policy or spirit of such law, and/or otherwise significantly threaten or harm competition." Compl. ¶ 48. Heartland fails to state facts to support the allegation that Mercury's conduct violates or threatens to violate *§ 5* of the Federal Trade Commission Act, or any anti-trust law.

November 7, 2014 Order at 17-18.

"*Section 5* of the Federal Trade Commission Act prohibits 'deceptive acts or practices in or affecting commerce'. . . . [A] practice falls within this prohibition (1) if it is likely to mislead consumers acting reasonably under the

[3] Heartland has not, however, plead any facts to support its allegations that Mercury's agents made "Best Rate" or "Rate Match" guarantees. Accordingly, Heartland may not rely on those allegations as evidence of Mercury's deception.

circumstances (2) in a way that is material." *FTC v. Cyberspace.Com LLC, 453 F.3d 1196, 1199 (9th Cir. 2006)* (citing *FTCA § 5(a)(1)*, *15 U.S.C. § 45(a)*).

As discussed above, Heartland has plead facts sufficient to support its allegation that Mercury represents that it is charging merchants "cost-plus" while actually marking fees up and charging fees that are not clearly disclosed. The Court finds that, if these allegations are true, these actions are likely to deceive in a way that is material. Thus, Heartland has alleged facts sufficient to support an unfair business practices claim due to "deceptive acts or practices" and an incipient violation of *§ 5* of the FTCA.

Accordingly, **[*19]** the Court DENIES Mercury's motion to dismiss this UCL cause of action for unfair business practices.

C. Fraudulent business practices

"A fraudulent business practice is one in which members of the public are likely to be deceived." *Morgan v. AT&T Wireless Servs., Inc., 177 Cal. App. 4th 1235, 1254, 99 Cal. Rptr. 3d 768 (2009)*. In its previous order, the Court dismissed this cause of action for failure to comply with *Rule 9(b)*. See November 7, 2014 Order at 18. In the 1AC, Heartland has stated facts sufficient to support its Lanham Act and FAL causes of action and these facts are likewise sufficient to support its fraudulent business practices claim under *section 17200*. If Heartland's allegations are true, Mercury's actions likely deceived the public.

Mercury contends that Heartland has not plead facts sufficient to support the reliance element of its fraud claim because it does not allege that it relied on Mercury's misrepresentations.

In *In re Tobacco II Cases, 46 Cal. 4th 298, 326-28, 93 Cal. Rptr. 3d 559, 207 P.3d 20 & n.17 (2009)*, the California Supreme Court found that the amended UCL "imposes an actual reliance requirement on plaintiffs" who bring a UCL action "based on a fraud theory involving false advertising and misrepresentations to consumers" because "reliance is the causal mechanism of fraud."

> Reliance is proved by showing that the defendant's misrepresentation or nondisclosure was **[*20]** "an immediate cause" of the plaintiff's injury-producing conduct. A plaintiff may establish that the defendant's misrepresentation is an "immediate cause" of the plaintiff's conduct by showing that in its absence the plaintiff "in all reasonable probability" would not have engaged in the injury-producing conduct.

In re Tobacco II Cases, 46 Cal. 4th at 326 (citations omitted).

No California court has addressed, however, if competitor plaintiffs must plead their own reliance or whether pleading consumer reliance is sufficient for fraudulent business practices claims brought by competitors. Furthermore, federal courts sitting in California disagree on this issue. For example, in *U.S. Legal Support, Inc. v. Hofioni, 2013 U.S. Dist. LEXIS 179282, 2013 WL 6844756, at *15 (E.D. Cal.)*, a court ruled that competitors do not have standing under the UCL fraudulent prong because they cannot plead their own reliance. ("As Plaintiff is not a consumer of Defendants' services, it cannot demonstrate reliance on Defendants' fraudulent statements in order to establish standing under the UCL's fraud prong.") See also *O'Connor v. Uber Techs., Inc., 58 F. Supp. 3d 989, 2014 U.S. Dist. LEXIS 124136, 2014 WL 4382880, at *9 (N.D. Cal.)* ("However, Plaintiffs have not alleged their own reliance on Uber's misrepresentations. Rather, the clear import of the FAC is that Uber's customers relied on the alleged misrepresentations. This third-party reliance is insufficient **[*21]** to establish standing under the fraud prong of the UCL.") On the other hand, in *VP Racing Fuels, Inc. v. Gen. Petroleum Corp., 2010 U.S. Dist. LEXIS 47453, 2010 WL 1611398, at *2 (E.D. Cal.)*, a court found that pleading customer reliance was sufficient to state a competitor's claim under the fraudulent prong of the UCL ("Plaintiff has been injured by consumer reliance upon Defendant's misrepresentations which have resulted in competitive harm and diverted sales.")

Here, Heartland pleads both its own reliance and consumer reliance. It alleges that, if not for Mercury's fraudulent conduct, it would not have engaged in injury-producing conduct such as lowering its fees in order to compete. Heartland argues that this is adequate to plead its own reliance as a direct competitor:

> Because Mercury falsely represents the actual prices it will charge merchants, Heartland and other payment processors are unable to accurately and effectively compete with Mercury's deceptive prices. Heartland has had to reduce its prices and therefore reduce its profit margin, in order to retain merchants who have been quoted deceptively low and false pricing by Mercury.

1AC ¶ 103.

The Court agrees that Heartland's allegations are sufficient. Heartland has also stated facts sufficient to plead consumer reliance. It alleges **[*22]** that at least six merchants were deceived by Mercury's fraudulent representations. Accordingly, the Court declines to dismiss Heartland's UCL cause of action for fraudulent business practices for failure to allege reliance.

IV. Third Cause of Action: False Advertising in Violation of *California Business and Professions Code section 17500 et seq.* (FAL)

> California's False Advertising Law makes it unlawful for any person to induce the public to enter into any obligation based on a statement that is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading. Whether an advertisement is misleading must be judged by the effect it would have on a reasonable consumer. . . . A reasonable consumer is the ordinary consumer acting reasonably under the circumstances. To prevail under this standard, [Plaintiff] must show that members of the public are likely to be deceived by the advertisement.

Davis v. HSBC Bank Nev., N.A., 691 F.3d 1152, 1162 (9th Cir. 2012) (citations omitted).

Heartland relies on the same set of facts to support its FAL claims as it does its Lanham Act claim. Thus, as discussed above, Heartland has stated facts sufficient to support its allegation that Mercury made misrepresentations, in both in its written documents and oral statements, **[*23]** which induced merchants to use its payment processing services. It has also plead sufficient facts to support its own reliance and consumer reliance on Mercury's false advertising. Accordingly, the Court DENIES Mercury's motion to dismiss this cause of action.

V. Fourth Cause of Action: Intentional Interference with Contractual Relations (IICR)

> Under California law, the elements for the tort of intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.

United Nat. Maint., Inc. v. San Diego Convention Ctr., Inc., 766 F.3d 1002, 1006 (9th Cir. 2014) (citing *Pac. Gas & Elec. Co. v. Bear Stearns & Co., 50 Cal. 3d 1118, 270 Cal. Rptr. 1, 791 P.2d 587 (1990))*. However, "an interference with an at-will contract properly is viewed as an interference with a prospective economic advantage, a tort that similarly compensates for the loss of an advantageous economic relationship but does not require the existence of a legally binding contract." *Reeves v. Hanlon, 33 Cal. 4th 1140, 1152, 17 Cal. Rptr. 3d 289, 95 P.3d 513 (2004)*.

In its previous order, the Court found,

> While Heartland asserts that it has "identified nearly thirty merchants who have left Heartland for Mercury within **[*24]** the last six months prior to filing the Complaint," it admits it does not know "why every merchant who leaves Heartland has chosen to do so," and cannot know without discovery. Docket No. 25 at 24. Be that as it may, Heartland does not allege that any of its contracts with any former merchant have actually been breached, much less breached because of interference by Mercury.

November 7 , 2014 Order at 20.

In the 1AC, Heartland alleges that at least two California merchants -- Arena Football, 1AC ¶¶ 110-113, and Submarina, id. ¶¶ 123-130 -- used Heartland's payment processing services and were induced to sever their relationships with Heartland and contract with Mercury due to Mercury's interference. Heartland does not, however, plead that it had actual term contracts with these merchants such that it could satisfy Reeves' definition of a cause of action for an intentional interference with contractual relations.

For example, Heartland alleges that Arena Softball "left Heartland and switched to Mercury," because "Mercury's sales representative, knowing that the merchant was using Heartland's services, expressly represented to the merchant that it would save money by switching from Heartland **[*25]** to Mercury." Id. ¶ 110. Heartland does not allege, however, that it had a valid binding term contract with Arena Softball that was breached due to Mercury's interference.

Similarly, Heartland alleges that, in late 2008, Submarina, a California merchant to whom Heartland had been providing payment processing services, "decided to bid out [its business] to various payment processing companies." Id. ¶ 123. Heartland alleges that Mercury induced Submarina into contracting with it through underbidding Heartland. Heartland alleges that Submarina "switched [its] preferred credit processing company from Heartland . . . to Mercury . . . [because] Mercury by far provided the best rates." Id. ¶ 124. Yet, again Heartland fails to allege the existence of a valid binding contract that was not terminable atwill. Rather, Heartland alleges that "Mercury's false and deceptive advertising has disrupted Heartland's contractual relationships because it has caused merchants to terminate or not renew contracts with Heartland and to contract with Mercury instead." 1AC ¶ 105. As discussed below, these allegations support an intentional interference with prospective economic advantage cause of action because **[*26]** they claim that Mercury lost out on future business with these merchants.

Thus, the Court finds that Heartland has not plead facts sufficient to support its allegations that Mercury intentionally interfered with contractual relationships between Heartland and various merchants. Accordingly, the Court GRANTS Mercury's motion to dismiss Heartland's IICR cause of action. Because Heartland has already been granted leave to amend this cause of action, the Court need not grant leave to amend a second time. See *Arroyo v. Chattem, Inc., 926 F. Supp. 2d 1070, 1081 (N.D. Cal. 2012)*. Accordingly, dismissal is without leave to amend.

VI. Fifth Cause of Action: Intentional Interference with Prospective Economic Advantage (IIPEA)

Heartland alleges that it has "developed . . . prospective opportunities which are likely to benefit [it] in the future," but that Mercury, "with knowledge of these . . . future economic opportunities, engaged in wrongful and intentional actions to interfere with them by inducing . . . prospective merchants to sever their . . . prospective business relationships with Heartland and instead engage the services of" Mercury. 1AC ¶¶ 156-160.

Under California law, a plaintiff must plead the following five elements to state a claim for intentional **[*27]** interference with prospective economic advantage:

> [1] the existence of an economic relationship with some third party that contains the probability of future economic benefit to the plaintiff . . . [2] a defendant must have knowledge of the plaintiff's economic relationship . . . [3] the defendant must have engaged in intentionally wrongful acts designed to disrupt the plaintiff's relationship . . . [4] actual disruption of the[economic relationship . . . [and] [5] . . . that the economic harm . . . suffered was proximately caused by the acts of the defendant.

Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1165, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003). "[A] plaintiff seeking to recover for alleged interference with prospective economic relations has the burden of pleading and proving that the defendant's interference was wrongful by some measure beyond the fact of the interference itself." *Della Penna v. Toyota Motor Sales, USA, Inc., 11 Cal. 4th 376, 392-93, 45 Cal. Rptr. 2d 436, 902 P.2d 740 (1995)*. Furthermore, as noted above, "an interference with an at-will contract properly is viewed as an interference with a prospective economic advantage, a tort that similarly compensates for the loss of an advantageous economic relationship but does not require the existence of a legally binding contract." *Reeves, 33 Cal. 4th at 1152*.

As discussed above, Heartland's allegations with regard to Mercury's interference with **[*28]** its relationships with Arena Softball and Submarina are sufficient to support a claim for IIEPA. Also, in the 1AC, Heartland alleges that

Schat's, 1AC ¶¶ 108-109, and five Nothing Bundt Cake franchises, id. ¶¶ 114-116, considered using Heartland's payment processing services but were induced to contract with Mercury due to Mercury's fraudulent conduct. In addition, as discussed above, Heartland states facts sufficient to support its Lanham Act and FAL causes of action; hence it has also stated facts sufficient to allege that the interference was "wrong beyond measure of the interference itself."

Accordingly, the Court DENIES Mercury's motion to dismiss Heartland's IIPEA cause of action.

CONCLUSION

For the reasons stated above, the Court GRANTS in part and DENIES in part Mercury's motion to dismiss (Docket No. 67). The parties are directed to appear for a case management conference at 2:00 p.m. on Wednesday, April 1, 2015 in order to schedule further pretrial and trial proceedings. The parties shall submit a joint case management statement on or before March 25, 2015. If either party is unavailable on April 1, 2015, then the parties may submit a stipulation to continue the case management **[*29]** conference.

IT IS SO ORDERED.

Dated: February 23, 2015

/s/ Claudia Wilken

CLAUDIA WILKEN

United States District Judge

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N.C. State Bd. of Dental Exam'rs v. FTC

Supreme Court of the United States

October 14, 2014, Argued; February 25, 2015, Decided

No. 13-534

Reporter
574 U.S. 494 *; 135 S. Ct. 1101 **; 191 L. Ed. 2d 35 ***; 2015 U.S. LEXIS 1502 ****; 83 U.S.L.W. 4110; 2015-1 Trade Cas. (CCH) P79,072; 25 Fla. L. Weekly Fed. S 85

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, Petitioner v. FEDERAL TRADE COMMISSION

Notice: The Lexis pagination of this document is subject to change pending release of the final published version.

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

N.C. State Bd. of Dental Examiners v. FTC, 717 F.3d 359, 2013 U.S. App. LEXIS 11006 (4th Cir., 2013)

Disposition: *717 F. 3d 359*, affirmed.

Core Terms

immunity, supervision, active market, state agency, regulation, Sherman Act, whitening, dentists, teeth, municipality, sovereign, anti trust law, anticompetitive, state-action, licensing, entity, nondentists, antitrust, anticompetitive conduct, practice of dentistry, nonsovereign, Dental, agencies, state policy, articulated, dentistry, state law, Ethics, profession, delegates

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Constitutional Law > State Sovereign Immunity > General Overview

HN1[] **Exemptions & Immunities, Parker State Action Doctrine**

Judicial precedent interprets the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity. That ruling recognizes Congress's purpose to respect the federal balance and to embody in the Sherman Act, *15 U.S.C.S. § 1 et seq.*, the federalism principle that the States possess a significant measure of sovereignty under the United States Constitution.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN2[] **Exemptions & Immunities, Parker State Action Doctrine**

A non-sovereign actor controlled by active market participants enjoys Parker immunity only if it satisfies two requirements: first that the challenged restraint be one clearly articulated and affirmatively expressed as state policy, and second that the policy be actively supervised by the State.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN3[] **Exemptions & Immunities, Parker State Action Doctrine**

Although state-action immunity exists to avoid conflicts between state sovereignty and the Nation's commitment to a policy of robust competition, Parker immunity is not unbounded. Given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, state action immunity is disfavored, much as are repeals by implication.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN4[] **Exemptions & Immunities, Parker State Action Doctrine**

An entity may not invoke Parker immunity unless the actions in question are an exercise of the State's sovereign power. State legislation and decisions of a state supreme court, acting legislatively rather than judicially, will satisfy this standard, and ipso facto are exempt from the operation of the antitrust laws because they are an undoubted exercise of state sovereign authority.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN5[] **Exemptions & Immunities, Parker State Action Doctrine**

While the Sherman Act, *15 U.S.C.S. § 1 et seq.*, confers immunity on the States' own anticompetitive policies out of respect for federalism, it does not always confer immunity where a State delegates control over a market to a non-sovereign actor. For purposes of Parker immunity, a non-sovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself. State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity. Immunity for state agencies, therefore, requires more than a mere facade of state involvement, for it is necessary in light of Parker's rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Constitutional Law > Supremacy Clause > General Overview

HN6[] **Exemptions & Immunities, Parker State Action Doctrine**

Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability. Indeed, prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy. So it follows that, under Parker immunity and the *Supremacy Clause*, the States' greater power to attain an end does not include the lesser power to negate the congressional judgment embodied in the Sherman Act, *15 U.S.C.S. § 1 et seq.*, through unsupervised delegations to active market participants.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN7[] **Exemptions & Immunities, Parker State Action Doctrine**

Parker immunity requires that the anticompetitive conduct of non-sovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own. The question is not whether the challenged conduct is efficient, well-functioning, or wise. Rather, it is whether anticompetitive conduct engaged in by non-sovereign actors should be deemed state action and thus shielded from the antitrust laws.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN8[] **Exemptions & Immunities, Parker State Action Doctrine**

A state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear policy to allow the anticompetitive conduct, and second, the State provides active supervision of the anticompetitive conduct.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN9[] **Parker State Action Doctrine, Local Governments & Private Parties**

The Midcal clear articulation requirement for state action immunity is satisfied where the displacement of competition is the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals. The active supervision requirement demands, inter alia, that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN10[] **Parker State Action Doctrine, Local Governments & Private Parties**

The two Midcal requirements provide a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement, clear articulation, rarely will achieve that goal by itself, for a policy may satisfy this test yet still be defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated. Entities purporting to act under state authority might diverge from the State's considered definition of the public good. The resulting asymmetry between a state policy and its implementation can invite private self-dealing. The second Midcal requirement, active supervision, seeks to avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

HN11[] **Parker State Action Doctrine, Local Governments & Private Parties**

The Midcal supervision rule stems from the recognition that where a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. Concern about the private incentives of active market participants animates the Midcal supervision mandate, which demands realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN12[] **Parker State Action Doctrine, Local Governments & Private Parties**

In determining whether anticompetitive policies and conduct are indeed the action of a State in its sovereign capacity, there are instances in which an actor can be excused from the Midcal active supervision requirement. Municipalities are subject exclusively to the Midcal clear articulation requirement. That rule is consistent with the objective of ensuring that the policy at issue be one enacted by the State itself. Where the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals. Municipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market. Critically, the municipality in judicial precedent exercised a wide range of governmental powers across different economic spheres, substantially reducing the risk that it would pursue private interests while regulating any single field. That the precedent excuses municipalities from the Midcal supervision rule for these reasons all but confirms the rule's applicability to actors controlled by active market participants, who ordinarily have none of the features justifying the narrow exception precedent identifies.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN13[] **Exemptions & Immunities, Parker State Action Doctrine**

There is no conspiracy exception to Parker immunity.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN14[] **Exemptions & Immunities, Parker State Action Doctrine**

Recipients of Parker immunity will not lose it on the basis of ad hoc and ex post questioning of their motives for making particular decisions.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN15[] **Parker State Action Doctrine, Local Governments & Private Parties**

The Midcal limits on delegation must ensure that actual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law. The Midcal active supervision requirement, in particular, is an essential condition of state-action immunity when a non-sovereign actor has an incentive to pursue its own self-interest under the guise of implementing state policies. The lesson is clear: the Midcal active supervision test is an essential prerequisite of Parker immunity for any non-sovereign entity, public or private, controlled by active market participants.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

HN16[] **Parker State Action Doctrine, Local Governments & Private Parties**

Private trade associations must satisfy the Midcal active supervision standard to be entitled to Parker immunity.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN17[] **Parker State Action Doctrine, Local Governments & Private Parties**

The similarities between agencies controlled by active market participants and private trade associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. Parker immunity does not derive from nomenclature alone. When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. A state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy the Midcal active supervision requirement in order to invoke state-action antitrust immunity.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN18[] **Exemptions & Immunities, Parker State Action Doctrine**

States can ensure Parker immunity is available to agencies by adopting clear policies to displace competition; and, if agencies controlled by active market participants interpret or enforce those policies, the States may provide active supervision.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN19[] **Exemptions & Immunities, Parker State Action Doctrine**

Active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision in order to qualify for Parker immunity. Rather, the question is whether the State's review mechanisms provide realistic assurance that a non-sovereign actor's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN20[] **Exemptions & Immunities, Parker State Action Doctrine**

Judicial precedent identifies only a few constant requirements of active supervision for purposes of Parker immunity: (1) the supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; (2) the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; and (3) the mere potential for state supervision is not an adequate substitute for a decision by the State. Further, the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case.

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

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN21[] **Sherman Act, Scope**

The Sherman Act, *15 U.S.C.S. § 1 et seq.*, protects competition while also respecting federalism. It does not authorize the States to abandon markets to the unsupervised control of active market participants, whether trade associations or hybrid agencies. If a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity is to be invoked.

Lawyers' Edition Display

Decision

[*35]** State dental examiners board created by state law held not allowed to invoke state-action antitrust immunity, as (1) controlling number of board's decisionmakers were active dental-market participants; and (2) board was not subject to active state supervision.

Summary

Overview: HOLDINGS: [1]-The Midcal active supervision test was an essential prerequisite of Parker immunity for any non-sovereign entity, public or private, controlled by active market participants; [2]-A state board on which a controlling number of decisionmakers were active market participants in the occupation the board regulated had to satisfy the Midcal active supervision requirement in order to invoke state-action antitrust immunity; [3]-The North Carolina State Board of Dental Examiners was not entitled to state-action antitrust immunity where, even assuming that the clear articulation standard was satisfied, the Board did not receive active supervision by the State when it interpreted the Dental Practice Act as addressing teeth whitening and when it enforced that policy by issuing cease-and-desist letters to non-dentist teeth whiteners.

Outcome: Judgment affirmed. 6-3 decision, 1 dissent.

Headnotes

[*36]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION IMMUNITY -- SOVEREIGN CAPACITY > Headnote:
LEdHN[1][] [1]

Judicial precedent interprets the antitrust laws to confer immunity on anticompetitive conduct by the states when acting in their sovereign capacity. That ruling recognizes Congress's purpose to respect the federal balance and to embody in the Sherman Act, *15 U.S.C.S. § 1 et seq.*, the federalism principle that the states possess a significant measure of sovereignty under the United States Constitution. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > NON-SOVEREIGN ACTOR -- STATE-ACTION IMMUNITY > Headnote:
LEdHN[2][] [2]

A non-sovereign actor controlled by active market participants enjoys Parker immunity only if it satisfies two requirements: first that the challenged restraint be one clearly articulated and affirmatively expressed as state policy, and second that the policy be actively supervised by the state. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION IMMUNITY -- LIMITS > Headnote:
LEdHN[3][] [3]

Although state-action immunity exists to avoid conflicts between state sovereignty and the nation's commitment to a policy of robust competition, Parker immunity is not unbounded. Given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, state action immunity is disfavored, much as are repeals by implication. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION IMMUNITY-- SOVEREIGN POWER > Headnote:
LEdHN[4][] [4]

An entity may not invoke Parker immunity unless the actions in question are an exercise of the state's sovereign power. State legislation and decisions of a state supreme court, acting legislatively rather than judicially, will satisfy this standard, and ipso facto are exempt from the operation of the antitrust laws because they are an undoubted exercise of state sovereign authority. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION IMMUNITY -- NON-SOVEREIGN ACTOR > Headnote:
LEdHN[5][] [5]

While the Sherman Act, *15 U.S.C.S. § 1 et seq.*, confers immunity on the states' own anticompetitive policies out of respect for federalism, it does not always confer immunity where a state delegates control over a market to a non-sovereign actor. For purposes of Parker immunity, a non-sovereign actor is one whose conduct does not automatically qualify as that of the sovereign state itself. State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity. Immunity for state agencies, therefore, requires more than a mere facade of state involvement, for it is necessary in light of Parker's rationale to ensure the states accept political accountability for anticompetitive conduct they permit and control. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

[*37]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION IMMUNITY -- MARKET PARTICIPANTS > Headnote:
LEdHN[6][] [6]

Limits on state-action immunity are most essential when the state seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability. Indeed, prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy. So it follows that, under Parker immunity and the *supremacy clause*, the states' greater power to attain an end does not include the lesser power to negate the congressional judgment embodied in the Sherman Act, *15 U.S.C.S. § 1 et seq.*, through unsupervised delegations to active market participants. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION IMMUNITY -- NON-SOVEREIGN ACTORS > Headnote:
LEdHN[7][] [7]

Parker immunity requires that the anticompetitive conduct of non-sovereign actors, especially those authorized by the state to regulate their own profession, result from procedures that suffice to make it the state's own. The question is not whether the challenged conduct is efficient, well-functioning, or wise. Rather, it is whether anticompetitive conduct engaged in by non-sovereign actors should be deemed state action and thus shielded from the antitrust laws. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > ANTITRUST IMMUNITY -- STATE LAW > Headnote:
LEdHN[8][] [8]

A state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the state has articulated a clear policy to allow the anticompetitive conduct, and second, the state provides active supervision of the anticompetitive conduct. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION IMMUNITY -- DELEGATION OF AUTHORITY > Headnote:
LEdHN[9][] [9]

The Midcal clear articulation requirement for state action immunity is satisfied where the displacement of competition is the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the state must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals. The active supervision requirement demands, inter alia, that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

[*38]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION IMMUNITY -- POLICY -- SUPERVISION > Headnote:
LEdHN[10][] [10]

The two Midcal requirements provide a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a state. The first requirement, clear articulation, rarely will achieve that goal by itself, for a policy may satisfy this test yet still be defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated. Entities purporting to act under state authority might diverge from the state's considered definition of the public good. The resulting asymmetry between a state policy and its implementation can invite private self-dealing. The second Midcal requirement, active supervision, seeks to avoid this harm by requiring the state to review and approve interstitial policies made by the entity claiming immunity. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION EXEMPTION -- PRIVATE PARTY -- STATE POLICY > Headnote:
LEdHN[11][] [11]

The Midcal supervision rule stems from the recognition that where a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the state. Concern about the private incentives of active market participants animates the Midcal supervision mandate, which demands realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

[*39]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION IMMUNITY -- MUNICIPALITIES > Headnote:
LEdHN[12][] [12]

In determining whether anticompetitive policies and conduct are indeed the action of a state in its sovereign capacity, there are instances in which an actor can be excused from the Midcal active supervision requirement. Municipalities are subject exclusively to the Midcal clear articulation requirement. That rule is consistent with the objective of ensuring that the policy at issue be one enacted by the state itself. Where the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals. Municipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market. Critically, the municipality in judicial precedent exercised a wide range of governmental powers across different economic spheres, substantially reducing the risk that it would pursue private interests while regulating any single field. That the precedent excuses municipalities from the Midcal supervision rule for these reasons all but confirms the rule's applicability to actors controlled by active market participants, who ordinarily have none of the features justifying the narrow exception precedent identifies. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §10 > STATE-ACTION IMMUNITY -- CONSPIRACY > Headnote:
LEdHN[13][] [13]

There is no conspiracy exception to Parker immunity. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION IMMUNITY -- MOTIVES > Headnote:
LEdHN[14][] [14]

Recipients of Parker immunity will not lose it on the basis of ad hoc and ex post questioning of their motives for making particular decisions. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION IMMUNITY -- NON-SOVEREIGN ENTITY -- SUPERVISION > Headnote:
LEdHN[15][] [15]

The Midcal limits on delegation must ensure that actual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law. The Midcal active supervision requirement, in particular, is an essential condition of state-action immunity when a non-sovereign actor has an incentive to pursue its own self-interest under the guise of implementing state policies. The lesson is clear: the Midcal active supervision test is an essential prerequisite of Parker immunity for any non-sovereign entity, public or private, controlled by active market participants. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION IMMUNITY -- TRADE ASSOCIATIONS > Headnote:
LEdHN[16][] [16]

Private trade associations must satisfy the Midcal active supervision standard to be entitled to Parker immunity. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION IMMUNITY -- MARKET PARTICIPANTS > Headnote:
LEdHN[17][] [17]

The similarities between agencies controlled by active market participants and private trade associations are not eliminated simply because the former are given a formal designation by the state, vested with a measure of government power, and required to follow some procedural rules. Parker immunity does not derive from nomenclature alone. When a state empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. A state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy the Midcal active supervision requirement in order to invoke state-action antitrust immunity. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

[*40]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION IMMUNITY -- COMPETITION > Headnote:
LEdHN[18][] [18]

States can ensure Parker immunity is available to agencies by adopting clear policies to displace competition; and, if agencies controlled by active market participants interpret or enforce those policies, the states may provide active supervision. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION IMMUNITY -- ACTIVE SUPERVISION > Headnote:
LEdHN[19][] [19]

Active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision in order to qualify for Parker immunity. Rather, the question is whether the state's review mechanisms provide realistic assurance that a non-sovereign actor's anticompetitive conduct promotes state policy, rather than merely the party's individual interests. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION IMMUNITY -- ACTIVE SUPERVISION > Headnote:
LEdHN[20][] [20]

Judicial precedent identifies only a few constant requirements of active supervision for purposes of Parker immunity: (1) the supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; (2) the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; and (3) the mere potential for state supervision is not an adequate substitute for a decision by the state. Further, the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION EXEMPTION -- MARKET PARTICIPANTS -- SUPERVISION > Headnote:
LEdHN[21][] [21]

The Sherman Act, *15 U.S.C.S. § 1 et seq.*, protects competition while also respecting federalism. It does not authorize the states to abandon markets to the unsupervised control of active market participants, whether trade associations or hybrid agencies. If a state wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity is to be invoked. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

Syllabus

[*494] **[**1104]** **[***41]** North Carolina's Dental Practice Act (Act) provides that the North Carolina State Board of Dental Examiners (Board) is "the agency of the State for the regulation of the practice of dentistry." The Board's principal duty is to create, administer, and enforce a licensing system for dentists; and six of its eight members must be licensed, practicing dentists.

The Act does not specify that teeth whitening is "the practice of dentistry." Nonetheless, after dentists complained to the Board that nondentists were charging lower prices for such services than dentists did, the Board issued at least 47 official cease-and-desist letters to nondentist teeth whitening service providers and product manufacturers, often warning that the unlicensed practice of dentistry is a crime. This and other related Board actions led nondentists to cease offering teeth whitening services in North Carolina.

The Federal Trade Commission (FTC) filed an administrative complaint, alleging that the Board's concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive **[****2]** and unfair method of competition under the Federal Trade Commission Act. An Administrative Law Judge (ALJ) denied the Board's motion to dismiss on the ground of state-action immunity. The FTC sustained that ruling, reasoning that even if the Board had acted pursuant to a clearly articulated state policy to displace competition, the Board must be actively supervised by the State to claim immunity, which it was not. After a hearing on the mer- **[***42]** its, the ALJ determined that the Board had unreasonably restrained trade in violation of ***antitrust law***. The FTC again sustained the ALJ, and the Fourth Circuit affirmed the FTC in all respects.

Held: Because a controlling number of the Board's decisionmakers are active market participants in the occupation the Board regulates, the Board can invoke state-action antitrust immunity only if it was subject to active supervision by the State, and here that requirement is not met. *Pp. 502-516, 191 L. Ed. 2d, at 47-55, 135 S. Ct. 1101*.

(a) Federal ***antitrust law*** is a central safeguard for the Nation's free market structures. However, requiring States to conform to the mandates **[*495]** of the Sherman Act at the expense of other values a State may deem fundamental would impose an impermissible burden on the States' **[****3]** power to regulate. Therefore, beginning with *Parker v. Brown, 317 U. S. 341, 63 S. Ct. 307, 87 L. Ed. 315*, this Court interpreted the antitrust laws to confer immunity on the anticompetitive conduct of States acting in their sovereign capacity. *Pp. 502-503, 191 L. Ed. 2d, at 47*.

(b) The Board's actions are not cloaked with *Parker* immunity. A nonsovereign actor controlled by active market participants--such as the Board--enjoys *Parker* immunity only if " 'the challenged restraint . . . [is] clearly articulated and **[**1105]** affirmatively expressed as state policy,' and . . . 'the policy . . . [is] actively supervised by the State.' " *FTC v. Phoebe Putney Health System, Inc., 568 U. S. 216, 225, 133 S. Ct. 1003, 1010, 185 L. Ed. 2d 43, 53* (quoting *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U. S. 97, 105, 100 S. Ct. 937, 63 L. Ed. 2d 233)*. Here, the Board did not receive active supervision of its anticompetitive conduct. *Pp. 503-514, 191 L. Ed. 2d, at 47-54*.

(1) An entity may not invoke *Parker* immunity unless its actions are an exercise of the State's sovereign power. See *Columbia v. Omni Outdoor Advertising, Inc., 499 U. S. 365, 374, 111 S. Ct. 1344, 113 L. Ed. 2d 382*. Thus, where a State delegates control over a market to a nonsovereign actor, the Sherman Act confers immunity only if the State accepts political accountability for the anticompetitive conduct it permits and controls. Limits on state-action immunity are most essential when a State seeks to delegate its regulatory power to active market participants, for dual allegiances are not always apparent to an actor and prohibitions against anticompetitive **[****4]** self-regulation by active market participants are an axiom of federal antitrust policy. Accordingly, *Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own. *Midcal*'s two-part test provides a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement--clear articulation--rarely will achieve that goal by itself, for entities purporting to act under state authority might diverge from the State's considered definition of the public good and engage in private self-dealing. The second *Midcal* requirement--active supervision--seeks to avoid this harm by requiring the State to review and approve interstitial policies made by **[***43]** the entity claiming immunity. *Pp. 504-507, 191 L. Ed. 2d, at 48-50*.

(2) There are instances in which an actor can be excused from *Midcal*'s active supervision requirement. Municipalities, which are electorally accountable, have general regulatory powers, and have no private price-fixing agenda, are subject exclusively to the clear articulation **[****5]** requirement. See *Hallie v. Eau Claire, 471 U. S. 34, 35, 105 S. Ct. 1713, 85 L. Ed. 2d 24*. That *Hallie* excused municipalities from *Midcal*'s supervision rule for these reasons, **[*496]** however, all but confirms the rule's applicability to actors controlled by active market participants. Further, in light of *Omni*'s holding that an otherwise immune entity will not lose immunity based on ad hoc and *ex post* questioning of its motives for making particular decisions, *499 U. S., at 374, 111 S. Ct. 1344, 113 L. Ed. 2d 382*, it is all the more necessary to ensure the conditions for granting immunity are met in the first place, see *FTC v. Ticor Title Ins. Co., 504 U. S. 621, 633, 112 S. Ct. 2169, 119 L. Ed. 2d 410*, and *Phoebe Putney, supra, at 226, 133 S. Ct. 1003, 185 L. Ed. 2d 43*. The clear lesson of precedent is that *Midcal*'s active supervision test is an essential prerequisite of *Parker* immunity for any nonsovereign entity--public or private--controlled by active market participants. *Pp. 507-510, 191 L. Ed. 2d, at 50-52*.

(3) The Board's argument that entities designated by the States as agencies are exempt from *Midcal*'s second requirement cannot be reconciled with the Court's repeated conclusion that the need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade. State agencies controlled by active market participants pose the very risk of self-dealing *Midcal*'s supervision **[****6] [**1106]** requirement was created to address. See *Goldfarb v. Virginia State Bar, 421 U. S. 773, 791, 95 S. Ct. 2004, 44 L. Ed. 2d 572*. This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals. While *Hallie* stated "it is likely that active state supervision would also not be required" for agencies, *471 U. S., at 46, n. 10, 105 S. Ct. 1713, 85 L. Ed. 2d 24*, the entity there was more like prototypical state

agencies, not specialized boards dominated by active market participants. The latter are similar to private trade associations vested by States with regulatory authority, which must satisfy *Midcal*'s active supervision standard. 445 U. S., at 105-106, 100 S. Ct. 937, 63 L. Ed. 2d 233. The similarities between agencies controlled by active market participants and such associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. See *Hallie, supra, at 39, 105 S. Ct. 1713, 85 L. Ed. 2d 24*. When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. Thus, the Court holds today that a state board on which a controlling number of decisionmakers are active market **[****7]** participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action anti- **[***44]** trust immunity. Pp. 510-512, 191 L. Ed. 2d, at 52-53.

(4) The State argues that allowing this FTC order to stand will discourage dedicated citizens from serving on state agencies that regulate their own occupation. But this holding is not inconsistent with the idea that those who pursue a calling must embrace ethical standards **[*497]** that derive from a duty separate from the dictates of the State. Further, this case does not offer occasion to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability. Of course, States may provide for the defense and indemnification of agency members in the event of litigation, and they can also ensure *Parker* immunity is available by adopting clear policies to displace competition and providing active supervision. Arguments against the wisdom of applying the antitrust laws to professional regulation absent compliance with the prerequisites for invoking *Parker* immunity must be rejected, see *Patrick v. Burget, 486 U. S. 94, 105-106, 108 S. Ct. 1658, 100 L. Ed. 2d 83*, particularly in light of the risks licensing boards dominated by market participants **[****8]** may pose to the free market. Pp. 512-514, 191 L. Ed. 2d, at 53-54.

(5) The Board does not contend in this Court that its anticompetitive conduct was actively supervised by the State or that it should receive *Parker* immunity on that basis. The Act delegates control over the practice of dentistry to the Board, but says nothing about teeth whitening. In acting to expel the dentists' competitors from the market, the Board relied on cease-and-desist letters threatening criminal liability, instead of other powers at its disposal that would have invoked oversight by a politically accountable official. Whether or not the Board exceeded its powers under North Carolina law, there is no evidence of any decision by the State to initiate or concur with the Board's actions against the nondentists. P. 514, 191 L. Ed. 2d, at 54.

(c) Here, where there are no specific supervisory systems to be reviewed, it suffices to note that the inquiry regarding active supervision is flexible and context dependent. The question is whether the State's review mechanisms provide “realistic assurance” that a nonsovereign actor's **[**1107]** anticompetitive conduct “promotes state policy, rather than merely the party's individual interests.” *Patrick, 486 U. S., 100-101, 108 S. Ct. 1658, 100 L. Ed. 2d 83*. The Court has identified only a few **[****9]** constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, see *id., at 102-103, 108 S. Ct. 1658, 100 L. Ed. 2d 83*; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy, see *ibid.*; and the “mere potential for state supervision is not an adequate substitute for a decision by the State,” *Ticor, supra, at 638, 112 S. Ct. 2169, 119 L. Ed. 2d 410*. Further, the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case. Pp. 515, 191 L. Ed. 2d, at 55.

717 F. 3d 359, affirmed.

Counsel: Hashim M. Mooppan argued the cause for petitioner.

Malcolm L. Stewart argued the cause for respondent.

Judges: Kennedy, J., delivered the opinion of the Court, in which Roberts, C. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. **[*498]** Alito, J., filed a dissenting opinion, in which Scalia and Thomas, JJ., joined, *post*, p. 516.

Opinion by: Kennedy

Opinion

[*499] **[***45]** Justice **Kennedy** delivered the opinion of the Court.

This case arises from an antitrust challenge to the actions of a state regulatory board. A majority of the board's members are engaged in the active practice of the profession it regulates. The question is whether the board's actions are protected from Sherman Act regulation under the doctrine of state-action antitrust immunity, as defined and applied in **[****10]** this Court's decisions beginning with *Parker v. Brown, 317 U. S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*.

I

A

In its Dental Practice Act (Act), North Carolina has declared the practice of dentistry to be a matter of public concern requiring regulation. *N. C. Gen. Stat. Ann. §90-22(a)* (2013). Under the Act, the North Carolina State Board of Dental Examiners (Board) is "the agency of the State for the regulation of the practice of dentistry." *§90-22(b)*.

The Board's principal duty is to create, administer, and enforce a licensing system for dentists. See *§§90-29 to 90-41*. To perform that function it has broad authority over licensees. See *§90-41*. The Board's authority with respect to unlicensed persons, however, is more restricted: Like "any resident citizen," the Board may file suit to "perpetually enjoin any person from . . . unlawfully practicing dentistry." *§90-40.1*.

[1108]** The Act provides that six of the Board's eight members must be licensed dentists engaged in the active practice of dentistry. *§90-22*. They are elected by other licensed dentists in North Carolina, who cast their ballots in elections conducted by the Board. *Ibid.* The seventh member must **[*500]** be a licensed and practicing dental hygienist, and he or she is elected by other licensed hygienists. *Ibid.* The final member is referred to by the Act as a "consumer" and is appointed **[****11]** by the Governor. *Ibid.* All members serve 3-year terms, and no person may serve more than two consecutive terms. *Ibid.* The Act does not create any mechanism for the removal of an elected member of the Board by a public official. See *ibid.*

Board members swear an oath of office, *§138A-22(a)*, and the Board must comply with the State's Administrative Procedure Act, *§150B-1 et seq.*, Public Records Act, *§132-1 et seq.*, and open-meetings law, *§143-318.9 et seq.* The Board may promulgate rules and regulations governing the practice of dentistry within the State, provided those mandates are not inconsistent with the Act and are approved by the North Carolina Rules Review Commission, whose members are appointed by the state legislature. See *§§90-48*, *143B-30.1*, *150B-21.9(a)*.

B

In the 1990's, dentists in North Carolina started whitening teeth. Many of those who did so, including 8 of the Board's 10 members during the period at issue in this case, earned substantial fees for that service. By 2003, nondentists arrived on the scene. They charged lower prices for their services than the dentists did. Dentists soon began to complain to the Board about their new competitors. Few complaints warned of possible harm to consumers. Most expressed **[***46]** a principal concern with the low prices charged **[****12]** by nondentists.

Responding to these filings, the Board opened an investigation into nondentist teeth whitening. A dentist member was placed in charge of the inquiry. Neither the Board's hygienist member nor its consumer member participated in this undertaking. The Board's chief operations officer remarked that the Board was "going forth to do battle" with nondentists. App. to Pet. for Cert. 103a. The Board's concern **[*501]** did not result in a formal rule or regulation reviewable by the independent Rules Review Commission, even though the Act does not, by its terms, specify that teeth whitening is "the practice of dentistry."

Starting in 2006, the Board issued at least 47 cease-and-desist letters on its official letterhead to nondentist teeth whitening service providers and product manufacturers. Many of those letters directed the recipient to cease "all activity constituting the practice of dentistry"; warned that the unlicensed practice of dentistry is a crime; and strongly implied (or expressly stated) that teeth whitening constitutes "the practice of dentistry." App. 13, 15. In early 2007, the Board persuaded the North Carolina Board of Cosmetic Art Examiners to warn cosmetologists against **[****13]** providing teeth whitening services. Later that year, the Board sent letters to mall operators, stating that kiosk teeth whiteners were violating the Act and advising that the malls consider expelling violators from their premises.

These actions had the intended result. Nondentists ceased offering teeth whitening services in North Carolina.

C

In 2010, the Federal Trade Commission (FTC) filed an administrative complaint charging the Board with violating §5 of **[**1109]** the Federal Trade Commission Act, 38 Stat. 719, as amended, *15 U. S. C. §45*. The FTC alleged that the Board's concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition. The Board moved to dismiss, alleging state-action immunity. An Administrative Law Judge (ALJ) denied the motion. On appeal, the FTC sustained the ALJ's ruling. It reasoned that, even assuming the Board had acted pursuant to a clearly articulated state policy to displace competition, the Board is a "public/private hybrid" that must be actively supervised by the State to claim immunity. App. to Pet. for Cert. 49a. **[*502]** The FTC further concluded the Board could not make that showing. **[****14]**

Following other proceedings not relevant here, the ALJ conducted a hearing on the merits and determined the Board had unreasonably restrained trade in violation of ***antitrust law***. On appeal, the FTC again sustained the ALJ. The FTC rejected the Board's public safety justification, noting, *inter alia*, "a wealth of evidence . . . suggesting that non-dentist provided teeth whitening is a safe cosmetic procedure." *Id.,* at 123a.

The FTC ordered the Board to stop sending the cease-and-desist letters or other communications that stated nondentists may not offer teeth whitening services and products. It further ordered the Board to issue notices to all earlier recipients of the Board's cease-and-desist orders advising them of the Board's proper sphere **[***47]** of authority and saying, among other options, that the notice recipients had a right to seek declaratory rulings in state court.

On petition for review, the Court of Appeals for the Fourth Circuit affirmed the FTC in all respects. *717 F. 3d 359, 370 (2013)*. This Court granted certiorari. *571 U. S. 1236, 134 S. Ct. 1491, 188 L. Ed. 2d 375 (2014)*.

II

Federal ***antitrust law*** is a central safeguard for the Nation's free market structures. In this regard it is "as important to the preservation of economic freedom and our free-enterprise system **[****15]** as the *Bill of Rights* is to the protection of our fundamental personal freedoms." *United States v. Topco Associates, Inc., 405 U. S. 596, 610, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*. The antitrust laws declare a considered and decisive prohibition by the Federal Government of cartels, price fixing, and other combinations or practices that undermine the free market.

The Sherman Act, 26 Stat. 209, as amended, *15 U. S. C. §1 et seq.*, serves to promote robust competition, which in turn empowers the States and provides their citizens with opportunities to pursue their own and the public's welfare. See **[*503]** *FTC v. Ticor Title Ins. Co., 504 U. S. 621, 632, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992)*. The States, however, when acting in their respective realm, need not adhere in all contexts to a model of unfettered competition. While "the States regulate their economies in many ways not inconsistent with the antitrust laws," *id., at 635-636, 112 S. Ct. 2169, 119 L. Ed. 2d 410*, in some spheres they impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives. If every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal ***antitrust law*** would impose an impermissible burden on the States' power to regulate. See *Exxon Corp. v. Governor of Maryland, 437 U. S. 117,* 133, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978); see also Easterbrook, **[**1110]** Antitrust and **[****16]** the Economics of Federalism, 26 J. Law & Econ. 23, 24 (1983).

For these reasons, ***HN1***[] ***LEdHN[1]***[] [1] the Court in *Parker* v. *Brown* interpreted the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity. See 317 U. S., at 350-351, 63 S. Ct. 307, 87 L. Ed. 315 . That ruling recognized Congress' purpose to respect the federal balance and to "embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution." Community Communications Co. v. Boulder, 455 U. S. 40, 53, 102 S. Ct. 835, 70 L. Ed. 2d 810 (1982). Since 1943, the Court has reaffirmed the importance of *Parker*'s central holding. See, *e.g.,* Ticor, supra, at 632-637, 112 S. Ct. 2169, 119 L. Ed. 2d 410; Hoover v. Ronwin, 466 U. S. 558, 568, 104 S. Ct. 1989, 80 L. Ed. 2d 590 (1984); Lafayette v. Louisiana Power & Light Co., 435 U. S. 389, 394-400, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978).

III

In this case the Board argues its members were invested by North Carolina with the power of the State and that, as a result, the Board's **[***48]** actions are cloaked with Parker immunity. This argument fails, however. ***HN2***[] ***LEdHN[2]***[] [2] A nonsovereign actor controlled by active market participants — such as the **[*504]** Board — enjoys *Parker* immunity only if it satisfies two requirements: "first that 'the challenged restraint . . . be one clearly articulated and affirmatively expressed as state policy,' and second that 'the policy . . . be actively supervised by the State.'" FTC v. Phoebe Putney Health System, Inc., 568 U. S. 216, 225, 568 U.S. 216, 133 S. Ct. 1003, 1010, 185 L. Ed. 2d 43, 53 (2013) (quoting California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U. S. 97, 105, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)). The parties have assumed that the clear articulation requirement is satisfied, and we do the same. **[****17]** While North Carolina prohibits the unauthorized practice of dentistry, however, its Act is silent on whether that broad prohibition covers teeth whitening. Here, the Board did not receive active supervision by the State when it interpreted the Act as addressing teeth whitening and when it enforced that policy by issuing cease-and-desist letters to nondentist teeth whiteners.

A

HN3[] ***LEdHN[3]***[] [3] Although state-action immunity exists to avoid conflicts between state sovereignty and the Nation's commitment to a policy of robust competition, *Parker* immunity is not unbounded. "[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state-action immunity is disfavored, much as are repeals by implication.'" Phoebe Putney, supra, at 225, 133 S. Ct. 1003, 1010, 185 L. Ed. 2d 43, 53) (quoting Ticor, supra, at 636, 112 S. Ct. 2169, 119 L. Ed. 2d 410).

HN4[] ***LEdHN[4]***[] [4] An entity may not invoke *Parker* immunity unless the actions in question are an exercise of the State's sovereign power. See Columbia v. Omni Outdoor Advertising, Inc., 499 U. S. 365, 374, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991). State legislation and "decision[s] of a state supreme court, acting legislatively rather than judicially," will satisfy this standard, and "*ipso facto* are exempt from the operation of the antitrust laws" because they are an undoubted exercise of state sovereign authority. Hoover, supra, at 567-568, 104 S. Ct. 1989, 80 L. Ed. 2d 590.

But ***HN5***[] ***LEdHN[5]***[] [5] while the **[****18]** Sherman Act confers immunity on the States' own anticompetitive policies out of respect for federalism, **[*505]** it does not always confer immunity where, as here, a State delegates control over a market to a nonsovereign actor. See Parker, supra, at 351, 63 S. Ct. 307, 87 L. Ed. 315 **[**1111]** ("[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful"). For purposes of *Parker*, a nonsovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself. See Hoover, supra, at 567-568, 104 S. Ct. 1989, 80 L. Ed. 2d 590 . State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity. See Goldfarb v. Virginia State Bar, 421 U. S. 773, 791, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975) ("The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members"). Immunity for state agencies, therefore, requires more than a mere facade of state involvement, for it is necessary in light of *Parker*'s rationale to ensure

[*49]** the States accept political accountability for anticompetitive conduct they permit and control. See *Ticor, supra, at 636, 112 S. Ct. 2169, 119 L. Ed. 2d 410*.

HN6[] ***LEdHN[6]***[] [6] Limits on state-action immunity are most essential when the State seeks to delegate **[****19]** its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability. See *Midcal, supra, at 106, 100 S. Ct. 937, 63 L. Ed. 2d 233* ("The national policy in favor of competition cannot be thwarted by casting . . . gauzy cloak of state involvement over what is essentially a private price-fixing arrangement"). Indeed, prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy. See, *e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U. S. 492, 501, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988)*; *Hoover, supra, at 584, 104 S. Ct. 1989, 80 L. Ed. 2d 590* (Stevens, J., dissenting) ("The risk that private regulation of market entry, prices, or output may be **[*506]** designed to confer monopoly profits on members of an industry at the expense of the consuming public has been the central concern of . . . our antitrust jurisprudence"); see also Elhauge, The Scope of Antitrust Process, *104 Harv. L. Rev. 667, 672 (1991)*. So it follows that, under *Parker*and the *Supremacy Clause*, the States' greater power to attain an end does not include the lesser power to negate the congressional judgment **[****20]** embodied in the Sherman Act through unsupervised delegations to active market participants. See Garland, Antitrust and State Action: Economic Efficiency and the Political Process, *96 Yale L. J. 486, 500 (1986)*.

HN7[] ***LEdHN[7]***[] [7] *Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own. See *Goldfarb, supra, at 790, 95 S. Ct. 2004, 44 L. Ed. 2d 572*; see also 1A P. Areeda & H. Hovenkamp, ***Antitrust Law*** ¶226, p. 180 (4th ed. 2013) (Areeda & Hovenkamp). The question is not whether the challenged conduct is efficient, well functioning, or wise. See *Ticor, 504 U. S., at 634-635, 112 S. Ct. 2169, 119 L. Ed. 2d 410*. Rather, it is "whether anticompetitive conduct engaged in by [nonsovereign actors] should be deemed state action and thus shielded from the antitrust laws." *Patrick v. Burget, 486 U. S. 94, 100, 108 S. Ct. 1658, 100 L. Ed. 2d 83 (1988)*.

To answer this question, the Court applies the two-part test set forth in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U. S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233*, a case arising from California's delegation of price-fixing authority **[**1112]** to wine merchants. Under *Midcal*, ***HN8***[] ***LEdHN[8]***[] [8] "[a] state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear . . . policy to allow the anticompetitive conduct, and second, the State provides active supervision of [the] **[****21]** anticompetitive conduct." *Ticor, supra, at 631, 112 S. Ct. 2169, 119 L. Ed. 2d 410* (citing *Midcal, supra, at 105, 100 S. Ct. 937, 63 L. Ed. 2d 233*.

[*50]** ***HN9***[] ***LEdHN[9]***[] [9] *Midcal*'s clear articulation requirement is satisfied "where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the **[*507]** state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." *Phoebe Putney, 568 U. S., at 229, 133 S. Ct. 1003, 185 L. Ed. 2d 43, 56*). The active supervision requirement demands, *inter alia*, "that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick, supra, at 101, 108 S. Ct. 1658, 100 L. Ed. 2d 83*.

HN10[] ***LEdHN[10]***[] [10] The two requirements set forth in *Midcal* provide a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement — clear articulation — rarely will achieve that goal by itself, for a policy may satisfy this test yet still be defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated. See *Ticor, supra, at 636-637, 112 S. Ct. 2169, 119 L. Ed. 2d 410*. Entities purporting to act under state authority might diverge from the State's considered definition **[****22]** of the public good. The resulting asymmetry between a state policy and its implementation can invite private self-dealing. The second *Midcal* requirement —

active supervision — seeks to avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity.

HN11[] **LEdHN[11]**[] [11] *Midcal*'s supervision rule "stems from the recognition that '[w]here a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.'" *Patrick, supra, at 100, 108 S. Ct. 1658, 100 L. Ed. 2d 83*. Concern about the private incentives of active market participants animates *Midcal*'s supervision mandate, which demands "realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Patrick, supra, at 101, 108 S. Ct. 1658, 100 L. Ed. 2d 83*.

B

HN12[] **LEdHN[12]**[] [12] In determining whether anticompetitive policies and conduct are indeed the action of a State in its sovereign capacity, **[*508]** there are instances in which an actor can be excused from *Midcal*'s active supervision requirement. In *Hallie v. Eau Claire, 471 U. S. 34, 45, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)*, the Court held municipalities are subject exclusively to *Midcal*'s "'clear articulation'" requirement. That rule, the Court observed, is **[****23]** consistent with the objective of ensuring that the policy at issue be one enacted by the State itself. *Hallie* explained that "[w]here the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals." *471 U. S., at 47, 105 S. Ct. 1713, 85 L. Ed. 2d 24* (emphasis deleted).*Hallie* further observed that municipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market. See *id., at 45, n. 9, 105 S. Ct. 1713, 85 L. Ed. 2d 24*. Critically, the municipality in *Hallie* exercised a wide range of governmental **[**1113]** powers **[***51]** across different economic spheres, substantially reducing the risk that it would pursue private interests while regulating any single field. See *ibid.* That *Hallie* excused municipalities from *Midcal*'s supervision rule for these reasons all but confirms the rule's applicability to actors controlled by active market participants, who ordinarily have none of the features justifying the narrow exception *Hallie* identified. See *471 U. S., at 45, 105 S. Ct. 1713, 85 L. Ed. 2d 24*.

Following *Goldfarb*, *Midcal*, and *Hallie*, which clarified the conditions under which *Parker* immunity attaches to the conduct of a nonsovereign **[****24]** actor, the Court in *Columbia v. Omni Outdoor Advertising, Inc., 499 U. S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382*, addressed whether an otherwise immune entity could lose immunity for conspiring with private parties. In *Omni*, an aspiring billboard merchant argued that the city of Columbia, South Carolina, had violated the Sherman Act—and forfeited its *Parker* immunity—by anticompetitively conspiring with an established local company in passing an ordinance restricting new billboard construction. *499 U. S., at 367-368, 111 S. Ct. 1344, 113 L. Ed. 2d 382*. The **[*509]** Court disagreed, holding **HN13**[] **LEdHN[13]**[] [13] there is no "conspiracy exception" to Parker. *Omni, supra, at 374, 111 S. Ct. 1344, 113 L. Ed. 2d 382*.

Omni, like the cases before it, recognized the importance of drawing a line "relevant to the purposes of the Sherman Act and of *Parker*: prohibiting the restriction of competition for private gain but permitting the restriction of competition in the public interest." *499 U. S., at 378, 111 S. Ct. 1344, 113 L. Ed. 2d 382*. In the context of a municipal actor which, as in *Hallie*, exercised substantial governmental powers, *Omni* rejected a conspiracy exception for "corruption" as vague and unworkable, since "virtually all regulation benefits some segments of the society and harms others" and may in that sense be seen as "'corrupt.'" *499 U. S., at 377, 111 S. Ct. 1344, 113 L. Ed. 2d 382*. *Omni* also rejected subjective tests for corruption that would force a "deconstruction of the governmental process and probing of the official **[****25]** 'intent' that we have consistently sought to avoid." *Ibid.* Thus, whereas the cases preceding it addressed the preconditions of *Parker* immunity and engaged in an objective, *ex ante* inquiry into nonsovereign actors' structure and incentives, *Omni* made clear that **HN14**[] **LEdHN[14]**[] [14] recipients of immunity will not lose it on the basis of ad hoc and *ex post* questioning of their motives for making particular decisions.

Omni's holding makes it all the more necessary to ensure the conditions for granting immunity are met in the first place. The Court's two state-action immunity cases decided after *Omni* reinforce this point. In *Ticor,* the Court affirmed that **HN15**[] **LEdHN[15]**[] [15] *Midcal*'s limits on delegation must ensure that "[a]ctual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law." *504 U. S., at 633, 112 S. Ct. 2169, 119 L. Ed. 2d 410*. And in *Phoebe Putney,* the Court observed that *Midcal*'s active supervision requirement, in particular, is an essential condition of state-action immunity when a nonsovereign actor has "an incentive to pursue [its] own self-interest under the guise of implementing state policies." **[*510]** *568 U. S., at 226, 133 S. Ct. 1003, 1011, 185 L. Ed. 2d 43, 54*) (quoting *Hallie, supra, at 46-47, 105* ***[***52]*** *S. Ct. 1713, 85 L. Ed. 2d 24*). The lesson is clear: *Midcal*'s active supervision **[****26]** test is an essential prerequisite of *Parker* immunity for any nonsovereign entity — public or private — controlled by active market participants.

C

The Board argues entities designated by the States as agencies are exempt from *Midcal*'s second requirement. **[**1114]** That premise, however, cannot be reconciled with the Court's repeated conclusion that the need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade.

State agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing *Midcal*'s supervision requirement was created to address. See Areeda & Hovenkamp ¶227, at 226. This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals. See *Patrick, 486 U. S., at 100-101, 108 S. Ct. 1658, 100 L. Ed. 2d 83*.

The Court applied this reasoning to a state agency in *Goldfarb*. There the Court denied immunity to a state agency (the Virginia State Bar) controlled by market participants (lawyers) because the agency had "joined in what is essentially **[****27]** a private anticompetitive activity" for "the benefit of its members." *421 U. S., at 791, 792, 95 S. Ct. 2004, 44 L. Ed. 2d 572*. This emphasis on the Bar's private interests explains why *Goldfarb*, though it predates *Midcal*, considered the lack of supervision by the Virginia Supreme Court to be a principal reason for denying immunity. See *421 U. S., at 791, 95 S. Ct. 2004, 44 L. Ed. 2d 572*; see also *Hoover, 466 U. S., at 569, 104 S. Ct. 1989, 80 L. Ed. 2d 590* (emphasizing lack of active supervision in *Goldfarb*); *Bates v. State Bar of Ariz., 433 U. S. 350, 361-362, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977)* (granting the Arizona Bar state-action immunity partly because **[*511]** its "rules are subject to pointed re-examination by the policymaker").

While *Hallie* stated "it is likely that active state supervision would also not be required" for agencies, *471 U. S., at 46, n. 10, 105 S. Ct. 1713, 85 L. Ed. 2d 24*, the entity there, as was later the case in *Omni*, was an electorally accountable municipality with general regulatory powers and no private price-fixing agenda. In that and other respects the municipality was more like prototypical state agencies, not specialized boards dominated by active market participants. In important regards, agencies controlled by market participants are more similar to private trade associations vested by States with regulatory authority than to the agencies *Hallie*considered. And as the Court observed three years after *Hallie*, "[t]here is no doubt that the members of such associations **[****28]** often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm." *Allied Tube, 486 U. S., at 500, 108 S. Ct. 1931, 100 L. Ed. 2d 497* . For that reason, ***HN16***[] ***LEdHN[16]***[] [16] those associations must satisfy *Midcal*'s active supervision standard. See *Midcal, 445 U. S., at 105-106, 100 S. Ct. 937, 63 L. Ed. 2d 233*.

HN17[] ***LEdHN[17]***[] [17] The similarities between agencies controlled by active market participants and private trade associations **[***53]** are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. See *Hallie, supra, at 39, 105 S. Ct. 1713, 85 L. Ed. 2d 24* (rejecting "purely formalistic" analysis). *Parker* immunity does not derive from nomenclature alone. When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. See Areeda & Hovenkamp ¶227, at 226. The Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal's* active **[*512]** supervision requirement in order to invoke state-action antitrust immunity.

[1115]** D

The State argues that allowing this FTC order to stand will discourage dedicated **[****29]** citizens from serving on state agencies that regulate their own occupation. If this were so — and, for reasons to be noted, it need not be so — there would be some cause for concern. The States have a sovereign interest in structuring their governments, see *Gregory v. Ashcroft, 501 U. S. 452, 460, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991)*, and may conclude there are substantial benefits to staffing their agencies with experts in complex and technical subjects, see *Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U. S. 48, 64, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1985)*. There is, moreover, a long tradition of citizens esteemed by their professional colleagues devoting time, energy, and talent to enhancing the dignity of their calling.

Adherence to the idea that those who pursue a calling must embrace ethical standards that derive from a duty separate from the dictates of the State reaches back at least to the Hippocratic Oath. See generally S. Miles, The Hippocratic Oath and the Ethics of Medicine (2004). In the United States, there is a strong tradition of professional self-regulation, particularly with respect to the development of ethical rules. See generally R. Rotunda & J. Dzienkowski, Legal Ethics: The Lawyer's Deskbook on Professional Responsibility (2014); R. Baker, Before Bioethics: A History of American Medical Ethics From the Colonial Period to the Bioethics **[****30]** Revolution (2013). Dentists are no exception. The American Dental Association, for example, in an exercise of "the privilege and obligation of self-government," has "call[ed] upon dentists to follow high ethical standards," including "honesty, compassion, kindness, integrity, fairness and charity." American Dental Association, Principles of Ethics and Code of Professional Conduct 3-4 (2012). **[*513]** State laws and institutions are sustained by this tradition when they draw upon the expertise and commitment of professionals.

Today's holding is not inconsistent with that idea. The Board argues, however, that the potential for money damages will discourage members of regulated occupations from participating in state government. Cf. *Filarsky v. Delia, 566 U. S. 377, 390, 566 U.S. 377, 132 S. Ct. 1657, 1666, 182 L. Ed. 2d 662, 672 (2012)*) (warning in the context of civil rights suits that "the most talented candidates will decline public engagements if they do not receive the same immunity enjoyed by their public employee counterparts"). But this case, which does not present a claim for money damages, does not offer occasion **[***54]** to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability. See *Goldfarb, 421 U. S., at 792, n. 22, 95 S. Ct. 2004, 44 L. Ed. 2d 572*; see also Brief for Respondent **[****31]** 56. And, of course, the States may provide for the defense and indemnification of agency members in the event of litigation.

HN18[] ***LEdHN[18]***[] [18] States, furthermore, can ensure *Parker* immunity is available to agencies by adopting clear policies to displace competition; and, if agencies controlled by active market participants interpret or enforce those policies, the States may provide active supervision. Precedent confirms this principle. The Court has rejected the argument that it would be unwise to apply the antitrust laws to professional regulation absent compliance with the prerequisites for invoking *Parker* immunity:

> "[Respondents] contend that effective peer review is essential to the provision of quality medical care and that any threat of antitrust liability will prevent physicians from participating openly and **[**1116]** actively in peer-review proceedings. This argument, however, essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such is properly directed to the legislative branch. To the extent that Congress **[*514]** has declined to exempt medical peer review from the reach of the antitrust laws, peer review is immune from antitrust scrutiny only if the State effectively **[****32]** has made this conduct its own." *Patrick, 486 U. S., at 105-106, 108 S. Ct. 1658, 100 L. Ed. 2d 83* (footnote omitted).

The reasoning of *Patrick v. Burget* applies to this case with full force, particularly in light of the risks licensing boards dominated by market participants may pose to the free market. See generally Edlin & Haw, Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny? *162 U. Pa. L. Rev. 1093 (2014)*.

E

The Board does not contend in this Court that its anticompetitive conduct was actively supervised by the State or that it should receive *Parker* immunity on that basis.

By statute, North Carolina delegates control over the practice of dentistry to the Board. The Act, however, says nothing about teeth whitening, a practice that did not exist when it was passed. After receiving complaints from other dentists about the nondentists' cheaper services, the Board's dentist members — some of whom offered whitening services — acted to expel the dentists' competitors from the market. In so doing the Board relied upon cease-and-desist letters threatening criminal liability, rather than any of the powers at its disposal that would invoke oversight by a politically accountable official. With no active supervision by the State, North Carolina officials may well **[****33]** have been unaware that the Board had decided teeth whitening constitutes "the practice of dentistry" and sought to prohibit those who competed against dentists from participating in the teeth whitening market. Whether or not the Board exceeded its powers under North Carolina law, cf. *Omni, 499 U. S., at 371-372, 111 S. Ct. 1344, 113 L. Ed. 2d 382*, there is no evidence here of any decision by the State to initiate or concur with the Board's actions against the nondentists.

[*515] **[***55]** IV

The Board does not claim that the State exercised active, or indeed any, supervision over its conduct regarding nondentist teeth whiteners; and, as a result, no specific supervisory systems can be reviewed here. It suffices to note that the inquiry regarding active supervision is flexible and context dependent. ***HN19***[] ***LEdHN[19]***[] [19] Active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision. Rather, the question is whether the State's review mechanisms provide "realistic assurance" that a nonsovereign actor's anticompetitive conduct "promotes state policy, rather than merely the party's individual interests." *Patrick, supra, at 100-101, 108 S. Ct. 1658, 100 L. Ed. 2d 83*; see also *Ticor, 504 U. S., at 639-640, 112 S. Ct. 2169, 119 L. Ed. 2d 410*.

HN20[] ***LEdHN[20]***[] [20] The Court has identified only a few constant requirements of active supervision: The supervisor must **[****34]** review the substance of the anticompetitive decision, not merely the procedures followed to produce it, see *Patrick, 486 U. S., at 102-103, 108 S. Ct. 1658, 100 L. Ed. 2d 83*; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy, see *ibid.*; and the "mere potential for state supervision is not an adequate substitute for a decision by the State," *Ticor, supra, at 638, 112 S. Ct. 2169, 119 L. Ed. 2d 410*. Further, **[**1117]** the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case.

* * *

HN21[] ***LEdHN[21]***[] [21] The Sherman Act protects competition while also respecting federalism. It does not authorize the States to abandon markets to the unsupervised control of active market participants, whether trade associations or hybrid agencies. If a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity under *Parker* is to be invoked.

[*516] The judgment of the Court of Appeals for the Fourth Circuit is affirmed.

It is so ordered.

Dissent by: Alito

Dissent

Justice **Alito**, with whom Justice **Scalia** and Justice **Thomas** join, dissenting.

The Court's decision in this case is based on a serious misunderstanding of the doctrine of state-action **[****35]** antitrust immunity that this Court recognized more than 60 years ago in *Parker v. Brown, 317 U. S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*. In *Parker*, the Court held that the Sherman Act does not prevent the States from continuing their age-old practice of enacting measures, such as licensing requirements, that are designed to protect the public health and welfare. *Id., at 352, 63 S. Ct. 307, 87 L. Ed. 315*. The case now before us involves precisely this type of state regulation—North Carolina's laws governing the practice of dentistry, which are administered by the North Carolina State Board of Dental Examiners (Board).

Today, however, the Court takes the unprecedented step of holding that *Parker* does not apply to the North Carolina Board because the Board is **[***56]** not structured in a way that merits a good-government seal of approval; that is, it is made up of practicing dentists who have a financial incentive to use the licensing laws to further the financial interests of the State's dentists. There is nothing new about the structure of the North Carolina Board. When the States first created medical and dental boards, well before the Sherman Act was enacted, they began to staff them in this way.[1] Nor is there anything new about the suspicion that the North Carolina Board — in attempting to prevent **[****36]** persons other than dentists from performing teeth whitening procedures — was serving the interests of dentists and not the public. Professional and occupational licensing requirements have often been **[*517]** used in such a way. [2] But that is not what *Parker* immunity is about. Indeed, the very state program involved in that case was unquestionably designed to benefit the regulated entities, California raisin growers.

The question before us is not whether such programs serve the public interest. The question, instead, is whether this case is controlled by *Parker*, and the answer to that question is clear. Under *Parker*, the Sherman Act (and the Federal Trade Commission Act, see **[**1118]** *FTC v. Ticor Title Ins. Co., 504 U. S. 621, 635, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992))* do not apply to state agencies; the Board **[****37]** is a state agency; and that is the end of the matter. By straying from this simple path, the Court has not only distorted *Parker*; it has headed into a morass. Determining whether a state agency is structured in a way that militates against regulatory capture is no easy task, and there is reason to fear that today's decision will spawn confusion. The Court has veered off course, and therefore I cannot go along.

I

In order to understand the nature of *Parker* state-action immunity, it is helpful to recall the constitutional landscape in 1890 when the Sherman Act was enacted. At that time, this Court and Congress had an understanding of the scope of federal and state power that is very different from our understanding today. The States were understood to possess the exclusive authority to regulate "their purely internal affairs." *Leisy v. Hardin, 135 U. S. 100, 122, 10 S. Ct. 681, 34 L. Ed. 128, 12 Ky. L. Rptr. 123 (1890)*. In exercising their police power in this area, the States had long **[*518]** enacted measures, such as price controls and licensing requirements, that had the effect of restraining trade. [3]

The Sherman Act was enacted pursuant to Congress' power to regulate interstate commerce, **[****38]** and in passing the Act, Congress wanted to exercise that power "to the utmost extent." *United States v. South-Eastern Underwriters Assn., 322 U. S. 533, 558, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944)*. **[***57]** But in 1890, the understanding of the commerce power was far more limited than it is today. See, *e.g., Kidd v. Pearson, 128 U. S. 1, 17-18, 9 S. Ct. 6, 32 L. Ed. 346 (1888)*. As a result, the Act did not pose a threat to traditional state regulatory activity.

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[1] S. White, History of Oral and Dental Science in America 197-214 (1876) (detailing earliest American regulations of the practice of dentistry.)

[2] See, e.g., R. Shrylock, Medical Licensing in America 29 (1967) (Shrylock) (detailing the deteriorations of licensing regimes in the mid-19th century, in part out of concerns about restraints on trade); Gellhorn, The Abuse of Occupational Licensing, 44 U. Chi. L. Rev. 6 (1976); Shepard, Licensing Restrictions and the Cost of Dental Care, 21 J. Law & Econ. 187 (1978).

[3] See Handler, The Current Attack on the Parker v. Brown State Action Doctrine, 76 Colum. L., Rev. 1, 4-6 (1976) (collecting cases).

By 1943, when *Parker* was decided, however, the situation had changed dramatically. This Court had held that the commerce power permitted Congress to regulate even local activity if it "exerts a substantial economic effect on interstate commerce." *Wickard v. Filburn, 317 U. S. 111, 125, 63 S. Ct. 82, 87 L. Ed. 122 (1942)*. This meant that Congress could regulate many of the matters that had once been thought to fall exclusively within the jurisdiction of the States. The new interpretation of the commerce power brought about an expansion of the reach of the Sherman Act. See *HospitalBuilding Co. v. Trustees of Rex Hospital, 425 U. S. 738, 743, n. 2, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976)* ("[D]ecisions by this Court have permitted the reach of the Sherman Act to expand along with expanding notions of congressional power"). And the expanded reach of the Sherman Act raised an important question. The Sherman Act does not expressly exempt States from its scope. Does that mean that the Act applies to the States and that it potentially outlaws many traditional state regulatory measures? The Court confronted that question **[****39]** in *Parker.*

In *Parker*, a raisin producer challenged the California Agricultural Prorate Act, an agricultural price support program. The California Act authorized the creation of an Agricultural Prorate Advisory Commission (Commission) to **[*519]** establish marketing plans for certain agricultural commodities within the State. *317 U. S., at 346-347, 63 S. Ct. 307, 87 L. Ed. 315*. Raisins were among the regulated commodities, and so the Commission **[**1119]** established a marketing program that governed many aspects of raisin sales, including the quality and quantity of raisins sold, the timing of sales, and the price at which raisins were sold. *Id., at 347-348, 63 S. Ct. 307, 87 L. Ed. 315*. The *Parker* Court assumed that this program would have violated "the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons," and the Court also assumed that Congress could have prohibited a State from creating a program like California's if it had chosen to do so. *Id., at 350, 63 S. Ct. 307, 87 L. Ed. 315*. Nevertheless, the Court concluded that the California program did not violate the Sherman Act because the Act did not circumscribe state regulatory power. *Id., at 351, 63 S. Ct. 307, 87 L. Ed. 315*.

The Court's holding in *Parker* was not based on either the language of the Sherman Act or anything in the legislative history **[****40]** affirmatively showing that the Act was not meant to apply to the States. Instead, the Court reasoned that "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Ibid.*. For the Congress that enacted the Sherman Act in 1890, it would have been a truly radical and almost certainly futile step to attempt to prevent the States from exercising their traditional regulatory authority, and the **[***58]** *Parker* Court refused to assume that the Act was meant to have such an effect.

When the basis for the *Parker* state-action doctrine is understood, the Court's error in this case is plain. In 1890, the regulation of the practice of medicine and dentistry was regarded as falling squarely within the States' sovereign police power. By that time, many States had established medical **[*520]** and dental boards, often staffed by doctors or dentists, [4] and had given those boards the authority to confer and revoke licenses.[5] This was quintessential police power legislation, and although state laws **[****41]** were often challenged during that era under the doctrine of substantive due process, the licensing of medical professionals easily survived such assaults. Just one year before the enactment of the Sherman Act, in *Dent v. West Virginia, 129 U. S. 114, 128, 9 S. Ct. 231, 32 L. Ed. 623 (1889)*, this Court rejected such a challenge to a state law requiring all physicians to obtain a certificate from the state board of health attesting to their qualifications. And in *Hawker v. New York, 170 U. S. 189, 192, 18 S. Ct. 573, 42 L. Ed. 1002 (1898)*, the Court reiterated that a lawspecifying the qualifications to practice medicine was clearly a proper exercise of the police power. Thus, the North Carolina statutes establishing and specifying the powers of the State Board of Dental Examiners represent precisely the kind of state regulation that the *Parker* exemption was meant to immunize.

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[4] Shrylock 54-55: D. Johnson and H. Chaudry, Medical Licensing and Discipline in America 23-24 92012).

[5] In *Hawker v. New York, 170 U.S. 189, 18 S. Ct. 573, 42 L. Ed. 1002 (1989)*, the Court cited state laws authorizing such boards to refuse or revoke medical licenses. *Id., at 191-193, n. 1, 18 S. Ct. 573, 42 L. Ed. 1002*. See also *Douglas v. Noble, 261 U.S. 165, 166, 43 S. Ct. 303, 67 L. Ed. 590 (1923)* ("In 1893 the legislature of Washington provided that only licensed persons should practice dentistry" and "vested the authority to license in a board of examiners, consisting of five practicing dentists").

II

As noted above, the only question in this case is whether **[****42]** the Board **[**1120]** is really a state agency, and the answer to that question is clearly yes.

•The North Carolina Legislature determined that the practice of dentistry "affect[s] the public health, safety and welfare" of North Carolina's citizens and that therefore the profession should be "subject to regulation and control in the public interest" in order to ensure "that **[*521]** only qualified persons be permitted to practice dentistry in the State." *N. C. Gen. Stat. Ann. §90-22(a)* (2013).

•To further that end, the legislature created the Board "as the agency of the State for the regulation of the practice of dentistry in th[e] State." *§90-22(b)*.

•The legislature specified the membership of the Board. *§90-22(c)*. It defined the "practice of dentistry," *§90-29(b)*, and it set out standards for licensing practitioners, *§90-30*. The legislature also set out standards under which the Board can initiate disciplinary proceedings against licensees who engage in certain improper acts. *§90-41(a)*.

[*59]** •The legislature empowered the Board to "maintain an action in the name of the State of North Carolina to perpetually enjoin any person from . . . unlawfully practicing dentistry." *§90-40.1(a)*. It authorized the Board to conduct investigations and **[****43]** to hire legal counsel, and the legislature made any "notice or statement of charges against any licensee" a public record under state law. *§§ 90-41(d)-(g)*.

•The legislature empowered the Board "to enact rules and regulations governing the practice of dentistry within the State," consistent with relevant statutes. *§90-48*. It has required that any such rules be included in the Board's annual report, which the Board must file with the North Carolina secretary of state, the state attorney general, and the legislature's Joint Regulatory Reform Committee. *§93B-2*. And if the Board fails to file the required report, state law demands that it be automatically suspended until it does so. *Ibid*.

As this regulatory regime demonstrates, North Carolina's Board is unmistakably a state agency created by the state legislature to serve a prescribed regulatory purpose and to do so using the State's power in cooperation with other arms of state government.

[*522] The Board is not a private or "nonsovereign" entity that the State of North Carolina has attempted to immunize from federal antitrust scrutiny. *Parker* made it clear that a State may not "'give immunity to those who violate the Sherman Act by authorizing them to **[****44]** violate it, or by declaring that their action is lawful.'" *Ante, at 505, 135 S. Ct. 1101, 191 L. Ed. 2d, at 48* (quoting *Parker, 317 U. S., at 351, 63 S. Ct. 307, 87 L. Ed. 315*). When the *Parker* Court disapproved of any such attempt, it cited *Northern Securities Co. v. United States, 193 U. S. 197, 24 S. Ct. 436, 48 L. Ed. 679 (1904)*, to show what it had in mind. In that case, the Court held that a State's act of chartering a corporation did not shield the corporation's monopolizing activities from federal ***antitrust law***. *Id., at 344-345, 63 S. Ct. 307, 87 L. Ed. 315*. Nothing similar is involved here. North Carolina did not authorize a private entity to enter into an anticompetitive arrangement; rather, North Carolina *created a state agency* and gave that agency the power to regulate a particular subject affecting public health and safety.

Nothing in *Parker* supports the type of inquiry that the Court now prescribes. The Court crafts a test under which state agencies that are "controlled by active **[**1121]** market participants," *ante, at 510, 135 S. Ct. 1101, 191 L. Ed. 2d, at 52*, must demonstrate active state supervision in order to be immune from federal ***antitrust law***. The Court thus treats these state agencies like private entities. But in *Parker*, the Court did not examine the structure of the California program to determine if it had been captured by private interests. If the Court had done so, the case would certainly have come out differently, because California **[****45]** conditioned its regulatory measures on the participation and approval of market actors in the relevant industry.

Establishing a prorate marketing plan under California's law first required the petition of at least 10 producers of the particular commodity. *Parker, 317 U. S., at 346, 63 S. Ct. 307, 87 L. Ed. 315*. If the Commission then agreed that a marketing plan was **[***60]** warranted, the Commission would "select a program committee *from among nominees chosen by the qualified producers*." **[*523]** *Ibid.* (emphasis added). That committee would then formulate the proration marketing program, which the Commission could modify or approve. But even after Commission approval, the program became law (and then, automatically) only if it gained the approval of 65 percent of the relevant producers, representing at least 51 percent of the acreage of the regulated crop. *Id., at 347, 63 S. Ct. 307, 87 L. Ed. 315*. This scheme gave decisive power to market participants. But despite these aspects of the California program, *Parker* held that California was acting as a "sovereign" when it "adopt[ed] and enforc[ed] the prorate program." *Id., at 352, 63 S. Ct. 307, 87 L. Ed. 315*. This reasoning is irreconcilable with the Court's today.

III

The Court goes astray because it forgets the origin of the*Parker* doctrine and is misdirected by subsequent cases that extended that doctrine **[****46]** (in certain circumstances) to private entities. The Court requires the North Carolina Board to satisfy the two-part test set out in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U. S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)*, but the party claiming *Parker* immunity in that case was not a state agency but a private trade association. Such an entity is entitled to *Parker* immunity, *Midcal* held, only if the anticompetitive conduct at issue was both "'clearly articulated'" and "'actively supervised, by the State itself." *445 U. S., at 105, 100 S. Ct. 937, 63 L. Ed. 2d 233*. Those requirements are needed where a State authorizes private parties to engage in anticompetitive conduct. They serve to identify those situations in which conduct *by private parties* can be regarded as the conduct of a State. But when the conduct in question is the conduct of a state agency, no such inquiry is required.

This case falls into the latter category, and therefore *Midcal* is inapposite. The North Carolina Board is not a private trade association. It is a state agency, created and empowered by the State to regulate an industry affecting public health. It would not exist if the State had not created it. **[*524]** And for purposes of *Parker*, its membership is irrelevant; what matters is that it is part of the government of the sovereign State of North Carolina. **[****47]**

Our decision in *Hallie v. Eau Claire, 471 U. S. 34, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)*, which involved Sherman Act claims against a municipality, not a state agency, is similarly inapplicable. In *Hallie,* the plaintiff argued that the two-pronged *Midcal* test should be applied, but the Court disagreed. The Court acknowledged that municipalities "are not themselves sovereign." *471 U. S., at 38, 105 S. Ct. 1713, 85 L. Ed. 2d 24*. But recognizing that a municipality is "an arm of the State," *id., at 45, 105 S. Ct. 1713, 85 L. Ed. 2d 24*, the Court held that a municipality **[**1122]** should be required to satisfy only the first prong of the *Midcal* test (requiring a clearly articulated state policy), *471 U. S., at 46, 105 S. Ct. 1713, 85 L. Ed. 2d 24*. That municipalities are not sovereign was critical to our analysis in *Hallie*, and thus that decision has no application in a case, like this one, involving a state agency.

[*61]** Here, however, the Court not only disregards the North Carolina Board's status as a full-fledged state agency; it treats the Board less favorably than a municipality. This is puzzling. States are sovereign, *Northern Ins. Co. of N. Y. v. Chatham County, 547 U. S. 189, 193, 126 S. Ct. 1689, 164 L. Ed. 2d 367 (2006)*, and California's sovereignty provided the foundation for the decision in *Parker, supra, at 352, 63 S. Ct. 307, 87 L. Ed. 315*. Municipalities are not sovereign. *Jinks v. Richland County, 538 U. S. 456, 466, 123 S. Ct. 1667, 155 L. Ed. 2d 631 (2003)*. And for this reason, federal law often treats municipalities differently from States. Compare *Will v. Michigan Dept. of State Police, 491 U. S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989)* ("[N]either a State nor its officials acting in their official capacities are 'persons' **[****48]** under [*42 U. S. C.] §1983*"), with *Monell v. New York City Dept. of Social Servs., 436 U. S. 658, 694, 8 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)* (municipalities liable under *§1983* where "execution of a government's policy or custom . . . inflicts the injury").

The Court recognizes that municipalities, although not sovereign, nevertheless benefit from a more lenient standard for state-action immunity than private entities. Yet under the Court's approach, the Board, a full-fledged state agency, **[*525]** is treated like a private actor and must demonstrate that the State actively supervises its actions.

The Court's analysis seems to be predicated on an assessment of the varying degrees to which a municipality and a state agency like the North Carolina Board are likely to be captured by private interests. But until today, *Parker* immunity was never conditioned on the proper use of state regulatory authority. On the contrary, in *Columbia v.*

Omni Outdoor Advertising, Inc., 499 U. S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991), we refused to recognize an exception to *Parker* for cases in which it was shown that the defendants had engaged in a conspiracy or corruption or had acted in a way that was not in the public interest. 499 U.S., at 374, 111 S. Ct. 1344, 113 L. Ed. 2d 382. The Sherman Act, we said, is not an anticorruption or good-government statute. Id., at 398, 111 S. Ct. 1344, 113 L. Ed. 2d 382. We were unwilling in *Omni* to rewrite *Parker* in order to reach the allegedly abusive **[****49]** behavior of city officials. 499 at 374-379, 111 S. Ct. 1344, 113 L. Ed. 2d 382. But that is essentially what the Court has done here.

IV

Not only is the Court's decision inconsistent with the underlying theory of *Parker*; it will create practical problems and is likely to have far-reaching effects on the States' regulation of professions. As previously noted, state medical and dental boards have been staffed by practitioners since they were first created, and there are obvious advantages to this approach. It is reasonable for States to decide that the individuals best able to regulate technical professions are practitioners with expertise in those very professions. Staffing the State Board of Dental Examiners with certified public accountants would certainly lessen the risk of actions that place the well-being of dentists over those of the public, but this would also compromise the State's interest in sensibly regulating a technical profession in which lay people have little expertise.

[*62]** As a result of today's decision, States may find it necessary to change the composition **[**1123]** of medical, dental, and other **[*526]** boards, but it is not clear what sort of changes are needed to satisfy the test that the Court now adopts. The Court faults the structure **[****50]** of the North Carolina Board because "active market participants" constitute "a controlling number of [the] decisionmakers," ante, at 511, 135 S. Ct. 1101, 191 L. Ed. 2d, at 53, but this test raises many questions.

What is a "controlling number"? Is it a majority? And if so, why does the Court eschew that term? Or does the Court mean to leave open the possibility that something less than a majority might suffice in particular circumstances? Suppose that active market participants constitute a voting bloc that is generally able to get its way? How about an obstructionist minority or an agency chair empowered to set the agenda or veto regulations?

Who is an "active market participant"? If Board members withdraw from practice during a short term of service but typically return to practice when their terms end, does that mean that they are not active market participants during their period of service?

What is the scope of the market in which a member may not participate while serving on the board? Must the market be relevant to the particular regulation being challenged or merely to the jurisdiction of the entire agency? Would the result in the present case be different if a majority of the Board members, though practicing dentists, **[****51]** did not provide teeth whitening services? What if they were orthodontists, periodontists, and the like? And how much participation makes a person "active" in the market?

The answers to these questions are not obvious, but the States must predict the answers in order to make informed choices about how to constitute their agencies.

I suppose that all this will be worked out by the lower courts and the Federal Trade Commission (FTC), but the Court's approach raises a more fundamental question, and that is why the Court's inquiry should stop with an examination of the structure of a state licensing board. When the **[*527]** Court asks whether market participants control the North Carolina Board, the Court in essence is asking whether this regulatory body has been captured by the entities that it is supposed to regulate. Regulatory capture can occur in many ways.[6] So why ask only whether the members of a board are active market participants? The answer may be that determining when regulatory

[6] See, e.g., R. Noll, Reforming Regulation 40-43, 46 (1971); J. Wilson, The Politics of Regulation 357-394 (1980). Indeed, it has even been charged that the FTC, which brought this case, has been captured by entities over which it has jurisdiction. See E. Cox, "the Nader Report" on the Federal Trade Commission vii-xiv (1969); Posner, Federal Trade Commission, Chi, L. Rev. 47, 82-84 (1969).

capture has occurred is no simple task. That answer provides a reason for relieving courts from the obligation to make such determinations at all. It does not explain why it is appropriate for the Court to adopt **[****52]** the rather crude test for capture that constitutes the holding of today's decision.

V

The Court has created a new standard for distinguishing between private and state actors for purposes of **[***63]** federal antitrust immunity. This new standard is not true to the *Parker* doctrine; it diminishes our traditional respect for federalism and state sovereignty; and it will be difficult to apply. I therefore respectfully dissent.

References

15 U.S.C.S. § 1 et seq.

3 Antitrust Laws and Trade Regulations §§49.01-49.03 (Matthew Bender)

10 Federal Antitrust Laws §§76.5, 76.7-76.9 (Matthew Bender)

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices § 9.5

L Ed Index, Restraints of Trade, Monopolies, and Unfair Trade Practices

What constitutes vertical price fixing in violation of *§ 1* of Sherman Act (*15 U.S.C.S. § 1*)--Supreme Court cases. *168 L. Ed. 2d 847*.

Applicability of "state action" doctrine granting **[****53]** immunity from federal antitrust laws for activities of, or directed by, state governments--Supreme Court cases. *119 L. Ed. 2d 641*.

Supreme Court's views as to what constitutes per se illegal "price fixing" under the Sherman Act (*15 U.S.C.S. § 1 et seq.*). *64 L. Ed. 2d 997*.

Applicability of federal antitrust laws as affected by other federal statutes or by Federal Constitution--Supreme Court cases. *45 L. Ed. 2d 841*.

End of Document

Mueller v. Wellmark, Inc.

Supreme Court of Iowa

February 27, 2015, Filed

No. 13-1872

Reporter

861 N.W.2d 563 *; 2015 Iowa Sup. LEXIS 21 **; 2015-1 Trade Cas. (CCH) P79,093

STEVEN A. MUELLER, BRADLEY J. BROWN, MARK A. KRUSE, KEVIN D. MILLER, and LARRY E. PHIPPS, on Behalf of Themselves and Those Like Situated, Appellants, vs. WELLMARK, INC. d/b/a WELLMARK BLUE CROSS AND BLUE SHIELD OF IOWA, an Iowa Corporation, and WELLMARK HEALTH PLAN OF IOWA, INC., an Iowa Corporation, Appellees.

Subsequent History: Rehearing overruled by, Rehearing denied by *Mueller v. Wellmark, Inc., 2015 Iowa Sup. LEXIS 54 (Iowa, Apr. 21, 2015)*

Decision reached on appeal by *Wellmark, Inc. v. Iowa Dist. Court for Polk Cnty., 890 N.W.2d 636, 2017 Iowa Sup. LEXIS 15 (Iowa, Feb. 17, 2017)*

Prior History: [*564] [1]** Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge. Plaintiff chiropractors appeal from a summary judgment entered by the district court in favor of defendant health insurers on per se antitrust claims under the Iowa Competition Law.

Mueller v. Wellmark, Inc., 818 N.W.2d 244, 2012 Iowa Sup. LEXIS 83 (Iowa, July 27, 2012)

Disposition: AFFIRMED.

Core Terms

self-insured, conspiracy, purchasing, network, rule of reason, Iowa Competition Law, antitrust, out-of-state, Pharmacy, per se rule, prices, reimbursement rate, negotiated, licensees, provider, anticompetitive, price-fixing, Sponsors, prescription drug, price fixing, functions, rates, per se violation, summary judgment, district court, health insurer, plaintiffs', practices, insurer, naked

LexisNexis® Headnotes

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

HN1[] **Appellate Review, Standards of Review**

The appellate court reviews grants of summary judgment for correction of errors at law. Whether the per se rule or the rule of reason applies to a given practice is a question of law.

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

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

HN2[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Under Iowa ***antitrust law***, whether the per se rule or the rule of reason applies to a given practice is a question of law.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

Governments > Legislation > Interpretation

Governments > State & Territorial Governments > Legislatures

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

The general assembly has directed that the Iowa Competition Law shall be construed to complement and be harmonized with the applied laws of the United States which have the same or similar purpose. *Iowa Code § 553.2*. This construction shall not be made in such a way as to constitute a delegation of state authority to the federal government, but shall be made to achieve uniform application of the state and federal laws prohibiting restraints of economic activity and monopolistic practices. *Iowa Code § 553.2*.

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

Governments > Legislation > Interpretation

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

HN4[] **Sherman Act, Scope**

Section 553.4 of the Iowa Competition Law provides that a contract, combination, or conspiracy between two or more persons shall not restrain or monopolize trade or commerce in a relevant market. *Iowa Code § 553.4 (2007)*. This provision of the Iowa Competition Law is the counterpart to *section 1* of the Sherman Act, which states, every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. *15 U.S.C.S. § 1*. The wording of the two provisions is notably similar. If anything, the Iowa Competition Law tilts more in the direction of an economics-based approach to antitrust, since it condemns only those contracts, combinations, and conspiracies that restrain trade "in a relevant market"—a distinctly economic concept. *Iowa Code § 553.4*.

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

HN5[] **Per Se Rule & Rule of Reason, Per Se Violations**

Under the federal antitrust laws, challenged agreements or conspiracies are presumptively analyzed through the rule of reason. This requires plaintiffs to demonstrate that a particular arrangement is in fact unreasonable and anticompetitive before it will be found unlawful. Per se liability is reserved for only those agreements that are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality. Some types of restraints have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful per se.

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

HN6[ ] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

In applying the rule of reason, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. By contrast, when a practice falls under the per se rule, there is no need for case-by-case evaluation. The per se rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work.

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

HN7[ ] Per Se Rule & Rule of Reason, Per Se Violations

It is only after considerable experience with certain business relationships that courts classify them as per se violations. Price-fixing agreements between competitors have been viewed as per se violations.

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

Copyright Law > ... > Assignments & Transfers > Licenses > General Overview

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

The United States Supreme Court has held that the per se rule did not govern agreements among copyright holders to join together and issue blanket licenses at fixed rates. This is not a question simply of determining whether two or more potential competitors have literally "fixed" a "price." As generally used in the antitrust field, "price fixing" is a shorthand way of describing certain categories of business behavior to which the per se rule has been held applicable. The literal approach does not alone establish that this particular practice is one of those types or that it is "plainly anticompetitive" and very likely without "redeeming virtue." Literalness is overly simplistic and often overbroad. When two partners set the price of their goods or services they are literally "price fixing," but they are not per se in violation of the Sherman Act.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN9[ ] Regulated Practices, Monopolies & Monopolization

Monopsonistic conduct can create economic dislocation by forcing supplier prices down below the competitive level, just as monopolistic conduct can lead to dislocation by driving consumer prices above a competitive level.

Counsel: Glenn L. Norris of Hawkins & Norris, P.C., Des Moines; Harley C. Erbe of Erbe Law Firm, Des Moines; Steven P. Wandro, Michael R. Keller, and Shayla L. McCormally of Wandro & Associates, P.C., Des Moines, for appellants.

Hayward L. Draper and Ryan G. Koopmans of Nyemaster Goode, P.C., Des Moines, for appellees.

Judges: MANSFIELD, Justice. All justices concur except Hecht and Appel, JJ., who take no part.

Opinion by: MANSFIELD

Opinion

MANSFIELD, Justice.

Wellmark, Inc. is an Iowa-based health insurer that belongs to the national Blue Cross and Blue Shield (BCBS) network. Wellmark has contracted with health care providers in Iowa to provide services at certain reimbursement rates. By agreement, Wellmark makes those rates available both to self-insured Iowa plans that it administers and to out-of-state BCBS affiliates when those entities provide coverage for services provided in Iowa.

[*565] This appeal presents the question whether the foregoing agreements between **[**2]** Wellmark and self-insuring employers and between Wellmark and out-of-state BCBS affiliates amount to per se violations of Iowa ***antitrust law***. We conclude they do not. These arrangements are not the simple horizontal conspiracies that historically have qualified for per se treatment. Accordingly, and recognizing that the plaintiffs stipulated they were proceeding *only* under a per se theory and not under the rule of reason, we affirm the district court's grant of summary judgment to Wellmark.

I. Background Facts and Proceedings.

This case comes before us for the second time. *See* *Mueller v. Wellmark, Inc., 818 N.W.2d 244 (Iowa 2012)*.

Approximately seven years ago, a number of Iowa chiropractors sued Wellmark, the largest health insurer in Iowa, in the Polk County District Court. The suit challenged Wellmark's reimbursement rates and practices for chiropractic services and asked for class action certification. One count of the plaintiffs' petition sought relief under a variety of Iowa insurance statutes. *Mueller, 818 N.W.2d at 249* (noting plaintiffs sought relief based upon allegations Wellmark engaged in discriminatory practices in violation of *Iowa Code sections 509.3(6)*, *514.7*, *514.23(2)*, *514B.1(5)(c)*, *514F.2 (2007)*). Another count pled that Wellmark had entered into a contract, combination, or conspiracy in violation of *section 553.4* of the **[**3]** Iowa Competition Law, the counterpart to *section 1* of the Federal Sherman Antitrust Act. *Id.*; *see also* *15 U.S.C. § 1 (2006)*. A third count alleged that Wellmark had abused monopoly power in violation of *section 553.5* of the Iowa Competition Law, the counterpart to *section 2* of the Sherman Act. *Mueller, 818 N.W.2d at 249*; *see also* *15 U.S.C. § 2*.

On Wellmark's motion, the district court dismissed the claims based on the insurance statutes. *Mueller, 818 N.W.2d at 250*. It found no private cause of action was available under those laws. *Id*. The district court later granted summary judgment to Wellmark on the antitrust claims. *Id. at 252*. This ruling was primarily based on the "state action" exemption in the Iowa Competition Law. *Id.*; *see also* *Iowa Code § 553.6(4)* (providing that the Iowa Competition Law "shall not be construed to prohibit . . . activities or arrangements expressly approved or regulated by any regulatory body or officer acting under authority of this state"). Plaintiffs appealed. *Mueller, 818 N.W.2d at 253*.

On appeal, we affirmed the dismissal of the claims under Iowa insurance law. As we explained,

> [O]ur legislature chose to provide the Iowa Insurance Commissioner with exclusive powers to regulate health insurance practices under these statutes. For these reasons, we hold *Iowa Code sections 509.3(6)*, *514.7*, *514.23(2)*, *514B.1(5)(c)*, and *514F.2*, enacted as part of H.F. 2219, do not create a private **[**4]** cause of action.

Id. at 258.

However, we found that the state action exemption did not insulate Wellmark's reimbursement rates from antitrust review. We noted,

> These regulations [cited by Wellmark] are not directed to the regulation of rate differentials for particular services. Their purpose, rather, is to insure that health insurers do not abuse their overall relationship with patients and providers through the use of preferred provider plans. Thus, if a clinic decided to sue Wellmark under the Iowa Competition Law alleging that Wellmark had **[*566]** engaged in prohibited *section 553.5* monopolization by excluding it from a preferred provider arrangement, the *section 553.6(4)* state action exemption might well apply. But, it does not appear that the legislature has decided generally to remove the setting of reimbursement rates by health insurance companies from the operations of the marketplace or from claims under the Iowa Competition Law.

Id. at 262 (footnote omitted). Yet, we affirmed the dismissal of some of the chiropractors' antitrust claims, including the *Iowa Code section 553.5* monopolization claim, on alternate grounds that had been raised by Wellmark. *Id. at 264-66*. Still, with respect to the *section 553.4* conspiracy claim, "we reverse[d] the district court's summary judgment granting Wellmark **[**5]** a blanket exemption under *section 553.6(4)* from charges that it engaged in anticompetitive price-fixing or term-fixing schemes." *Id. at 264*.

On remand, the plaintiffs stipulated that their only remaining antitrust claims—alleging conspiracies between Wellmark and out-of-state BCBS affiliates and between Wellmark and self-funding employers that hired Wellmark to administer their plans—were being asserted on a per se theory. As the plaintiffs stated,

> Plaintiffs hereby agree and stipulate that the only violation of *Iowa Code § 553.4* alleged in the Fourth Amended and Substituted Petition for Damages is for a contract, combination or conspiracy between the Defendants and (1) out-of-state Blues and (2) in-state self-funded employers through administration contracts, to price fix by establishment of a maximum price for services of Iowa chiropractors in Wellmark's provider network or through the use of a restrictive or capitated payment system in Wellmark's HMO; and those alleged price fixing conspiracies are alleged to violate *Iowa Code § 553.4* based on Plaintiffs' contention that they constitute *per se* violations of the Iowa Competition Act. Plaintiffs' allegations exclude a contention that a rule of reason analysis is applicable to the violation **[**6]** of *Iowa Code § 553.4* alleged in the Fourth Amended and Substituted Petition.

Thereafter, Wellmark moved for summary judgment again, this time on the ground that neither of these alleged conspiracies was subject to *per se* treatment. As Wellmark put it, "Sharing a provider network does not amount to naked price fixing and is not subject to the *per se* rule." Wellmark urged that plaintiffs' claims were potentially viable, if at all, only under the rule of reason.

The summary judgment record revealed that employers wanting to provide group health insurance to their employees can contract with Wellmark in one of two ways. Either way, Wellmark makes its provider network available at established reimbursement rates and handles claims administration. However, if the employer self-insures, then the employer is financially responsible for claims. On the other hand, when Wellmark acts as an insurer in addition to a claims administrator, then the employer pays premiums to Wellmark, and Wellmark must bear the financial risk of the resulting claims.

The record also disclosed that Wellmark, which is the BCBS licensee in Iowa and South Dakota, has a BlueCard® program with BCBS licensees in other states. Under this arrangement, **[**7]** those out-of-state licensees have access to Wellmark's provider network in Iowa at the rates negotiated by Wellmark whenever they have to pay Iowa claims. Likewise, Wellmark has access to the other licensees' negotiated provider networks in their respective states at their rates whenever Wellmark **[*567]** has to pay claims in those states. *See* *Steward Health Care Sys., LLC v. Blue Cross & Blue Shield of R.I., 997 F. Supp. 2d 142, 150 n.3 (D.R.I. 2014)* (describing the BlueCard® program); *Solomon v. Blue Cross & Blue Shield Ass'n, 574 F. Supp. 2d 1288, 1289 (S.D. Fla. 2008)* (same).

The plaintiffs maintained that Wellmark had engaged in per se price-fixing when it entered into agreements with self-insuring Iowa employers to make its network and claims administration available to them. Similarly, the plaintiffs urged that Wellmark had engaged in per se price-fixing when it participated in the national BlueCard® program under which BCBS entities agreed to make their in-state networks available to each other when their respective customers needed out-of-state services.

After hearing the parties' arguments, the district court rejected plaintiffs' per se theories and entered summary judgment for Wellmark. This appeal followed.

II. Standard of Review.

HN1[] This court reviews grants of summary judgment for correction of errors at law. *Mueller, 818 N.W.2d at 253*. ***HN2***[] Whether the per se rule or the rule of reason applies to a given **[**8]** practice is a question of law. *See* *California ex rel. Harris v. Safeway, Inc., 651 F.3d 1118, 1124 (9th Cir. 2011)* (citing XI Phillip Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 1909b, at 279 (2d ed. 2005)); *Nat'l Bancard Corp. v. Visa U.S.A., Inc., 779 F.2d 592, 596 (11th Cir. 1986)*.

III. Legal Analysis.

A. The Iowa Competition Law. ***HN3***[] The general assembly has directed that the Iowa Competition Law "shall be construed to complement and be harmonized with the applied laws of the United States which have the same or similar purpose." *Iowa Code § 553.2*. As the legislature has stated,

> This construction shall not be made in such a way as to constitute a delegation of state authority to the federal government, but shall be made to achieve uniform application of the state and federal laws prohibiting restraints of economic activity and monopolistic practices.

Id.

Accordingly, in the past, when interpreting the Iowa Competition Law, we have generally adhered to federal interpretations of federal ***antitrust law***. *See* *Next Generation Realty, Inc. v. Iowa Realty Co., 686 N.W.2d 206, 208 (Iowa 2004)* (per curiam); *Max 100 L.C. v. Iowa Realty Co., 621 N.W.2d 178, 181-82 (Iowa 2001)*; *Fed. Land Bank of Omaha v. Tiffany, 529 N.W.2d 294, 296-97 (Iowa 1995)*; *Neyens v. Roth, 326 N.W.2d 294, 297 (Iowa 1982)*; *State v. Cedar Rapids Bd. of Realtors, 300 N.W.2d 127, 128 (Iowa 1981)*. In *Comes v. Microsoft Corp*., we declined to follow federal precedent on whether indirect purchasers had standing to sue under the Iowa Competition Law. *646 N.W.2d 440, 445-49 (Iowa 2002)*. We did so because: (1) the language of the relevant provision (*Iowa Code section 553.12 (1997)*) supported indirect purchaser standing; (2) uniformity only requires a uniform standard of conduct under state and federal law, not a uniform **[**9]** rule as to who may sue; and (3) most federal courts allowed indirect purchasers to sue at the time the Iowa Competition Law was enacted in 1976. *See id*.

This case involves *section 553.4* of the Iowa Competition Law. It provides, ***HN4***[] "A contract, combination, or conspiracy between two or more persons shall not restrain or monopolize trade or commerce in a relevant market." *Iowa Code § 553.4 (2007)*. This provision of the Iowa Competition **[*568]** Law is the counterpart to *section 1* of the Sherman Act, which states, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*.

The wording of the two provisions is notably similar. If anything, the Iowa Competition Law tilts more in the direction of an economics-based approach to antitrust, since it condemns only those contracts, combinations, and conspiracies that restrain trade "in a relevant market"—a distinctly economic concept. Iowa Code § 553.4; *see, e.g.,* United States v. Grinnell Corp., 384 U.S. 563, 587, 86 S. Ct. 1698, 1712, 16 L. Ed. 2d 778, 795 (1966) (Fortas, J., dissenting) (noting that "the search for 'the relevant market' must be undertaken and pursued with relentless clarity" and "is, in essence, an economic task put to the uses of the law"); United States v. Phila. Nat'l Bank, 374 U.S. 321, 362, 83 S. Ct. 1715, 1741, 10 L. Ed. 2d 915, 944 (1963) (noting that a prediction **[**10]** of anticompetitive effects "is sound only if it is based upon a firm understanding of the structure of the relevant market [and that] the relevant economic data are both complex and elusive").

B. The Per Se Rule vs. the Rule of Reason. ***HN5***[] Under the federal antitrust laws, challenged agreements or conspiracies are presumptively analyzed through the "rule of reason." Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 1279, 164 L. Ed. 2d 1, 7 (2006). This requires plaintiffs to demonstrate that a particular arrangement "is in fact unreasonable and anticompetitive before it will be found unlawful." *Id*. "*Per se* liability is reserved for only those agreements that are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." *Id*. (internal quotation marks omitted). "Some types of restraints . . . have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se*." State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 279, 139 L. Ed. 2d 199, 206 (1997).

HN6[] In applying the rule of reason, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723, 108 S. Ct. 1515, 1519, 99 L. Ed. 2d 808, 816 (1988) (internal quotation marks omitted). By contrast, when a practice falls **[**11]** under the per se rule, there is no need for "case-by-case evaluation." *Id*. "The *per se* rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work . . . ." Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886, 127 S. Ct. 2705, 2713, 168 L. Ed. 2d 623, 634 (2007).

Thus, ***HN7***[] "'[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations . . . .'" Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 9, 99 S. Ct. 1551, 1557, 60 L. Ed. 2d 1, 10 (1979) [hereinafter *BMI*] (alteration in original) (quoting United States v. Topco Assocs., Inc., 405 U.S. 596, 607-08, 92 S. Ct. 1126, 1133, 31 L. Ed. 2d 515, 525 (1972)). Price-fixing agreements between competitors have been viewed as per se violations. Texaco, 547 U.S. at 5, 126 S. Ct. at 1279, 164 L. Ed. 2d at 7.

But not all agreements on price are governed by the per se rule. When Texaco and Shell formed a joint venture known as "Equilon" to collaborate in the refining and marketing of gasoline in the western United States, the fact that the resulting gas was sold under the Texaco and Shell **[*569]** names at a single price did not amount to per se illegal price fixing. *See* id. at 5-8, 126 S. Ct. at 1279-81, 164 L. Ed. 2d at 7-9. As the United States Supreme Court explained,

> Texaco and Shell Oil did not compete with one another in the relevant market—namely, the sale of gasoline to service stations in the western United States—but instead participated in that market jointly through their investments in Equilon. **[**12]** . . . [T]hough Equilon's pricing policy may be price fixing in a literal sense, it is not price fixing in the antitrust sense.

Id. at 5-6, 126 S. Ct. at 1279-80, 164 L. Ed. 2d at 7-8.

Similarly, in the *BMI* case, ***HN8***[] the Court held that the per se rule did not govern agreements among copyright holders to join together and issue blanket licenses at fixed rates. BMI, 441 U.S. at 16, 99 S. Ct. at 1560, 60 L. Ed. 2d at 14. As the Court said,

> [T]his is not a question simply of determining whether two or more potential competitors have literally "fixed" a "price." As generally used in the antitrust field, "price fixing" is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable. The Court of Appeals' literal approach

> does not alone establish that this particular practice is one of those types or that it is "plainly anticompetitive" and very likely without "redeeming virtue." Literalness is overly simplistic and often overbroad. When two partners set the price of their goods or services they are literally "price fixing," but they are not *per se* in violation of the Sherman Act.

Id. at 8-9, 99 S. Ct. at 1556-57, 60 L. Ed. 2d at 9-10. The Court emphasized that the blanket license was not a "'naked restrain[t] of trade with no purpose except stifling of competition,'" but instead "accompanies the integration of sales, monitoring, **[**13]** and enforcement against unauthorized copyright use." Id. at 20, 99 S. Ct. at 1562, 60 L. Ed. 2d at 16 (alteration in original) (quoting White Motor Co. v. United States, 372 U.S. 253, 263, 83 S. Ct. 696, 702, 9 L. Ed. 2d 738, 746 (1963)). The Court noted that the costs of individual sales transactions would be "prohibitive" and thus some form of blanket license was a necessity. Id. at 20-21, 99 S. Ct. at 1562-63, 60 L. Ed. 2d at 16-17.

C. Monopsony vs. Monopoly. As the plaintiffs point out, the present case does not involve cooperation on *sales* but rather collaboration on *purchases*—specifically, purchases of health care services. Thus, the concern is about potential monopsony power, not monopoly power. *See* Mueller, 818 N.W.2d at 249 n.3 (noting that the issue in the case is Wellmark is an alleged monopsonist rather than an alleged monopolist).

Still, **HN9**[] monopsonistic conduct can create economic dislocation by forcing supplier prices down *below* the competitive level, just as monopolistic conduct can lead to dislocation by driving consumer prices *above* a competitive level. *See id*. (citing Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* § 1.2(b), at 14 (4th ed. 2011)). In *Mandeville Island Farms, Inc. v. American Crystal Sugar Co*., the Supreme Court reversed the dismissal of a complaint brought by sugar beet growers, alleging that three sugar refiners had entered into an agreement to pay uniform **[**14]** prices for beets. 334 U.S. 219, 221, 246, 68 S. Ct. 996, 999, 1011, 92 L. Ed. 1328, 1333, 1345 (1948). As the Court put it, this arrangement "deprived the beet growers of any competitive opportunity for disposing of their crops by the immediate operation of the uniform price provision." Id. at 242, 68 S. Ct. at 1009, **[*570]** 92 L. Ed. at 1343; *see also* W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 104 (3d Cir. 2010) (citing Mandeville Island Farms, 334 U.S. 219, 68 S. Ct. 996, 92 L. Ed. 1328) (noting that a conspiracy to depress reimbursement rates to medical providers can "pose[] competitive threats similar to those posed by conspiracies among buyers to fix prices and other restraints that result in artificially depressed payments to suppliers—namely, suboptimal output, reduced quality, allocative inefficiencies, and (given the reductions in output) higher prices for consumers in the long run" (citation omitted)).

D. Is This a Per Se Case? Having said this, we nevertheless agree with the district court that Wellmark's arrangements with self-insured employers and out-of-state BCBS affiliates are governed by the rule of reason, not the per se rule. We reach this conclusion for several reasons.

To begin with, these arrangements are not naked price-fixing arrangements but are more akin to joint ventures. The self-insureds are not entering into bare agreements to refrain from competing on price with Wellmark—they are buying claims-administration service **[**15]** from Wellmark. Part of that service consists of Wellmark's negotiated pricing. As in BMI, the record indicates that it would be highly impractical for the vast majority of participants in the alleged conspiracy (i.e., the vast majority of the self-insured employers) to engage in the numerous individual transactions that would be needed if they could not latch on to Wellmark's pricing.[1] *Cf.* BMI, 441 U.S. at 20-21, 99 S. Ct. at 1563, 60 L. Ed. 2d at 17.

Wellmark's health care provider network is analogous to the blanket license in BMI. It provides a mechanism by which an otherwise unavailable product (self-financed health coverage) can be offered. *Cf. id*. If the only lawful choice for a self-insured employer were the time-consuming process of negotiating **[**16]** individual rates with

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[1] The plaintiffs have included numerous pages of Wellmark reimbursement rates in the record. For example, for chiropractic services alone, Wellmark has approximately forty-eight different reimbursement rates in a given year, including twenty-one different rates for examination of X-rays. It seems implausible that a typical employer would have enough information about the value of chiropractic services to be able to negotiate with chiropractors on appropriate pricing for all these different procedures.

health care providers, the record indicates that almost all employers would avoid self-insuring. This would eliminate one possible way to render the health care market more efficient and reduce the costs of health care coverage—by allowing employers to bear the financial risk of health claims themselves.

Insurance involves both claims-handling and risk-spreading. A large number of Iowa employers, according to the summary judgment record, want some of the package but not all of it. That is, they do not wish to go into the health insurance business themselves but instead desire to purchase typical health insurance services from an outside entity like Wellmark. At the same time, those employers apparently have enough financial wherewithal to assume the ultimate risk that workforce claims will exceed workforce premiums.[2] Why should this additional option for employers be a per se violation of the antitrust laws?

Similar efficiency-related observations can be made about Wellmark's reciprocal arrangements with out-of-state BCBS licensees. **[*571]** Iowans insured by Wellmark **[**17]** occasionally need health care services outside Iowa. Rather than attempt to negotiate its own rates in all fifty states, Wellmark has a reciprocal arrangement with the BCBS affiliates in those states. Under that arrangement, Wellmark can utilize the other licensees' negotiated rates in their respective states, and they can use Wellmark's negotiated rates in Iowa (and South Dakota, where Wellmark also operates). This enables Wellmark to offer a fifty-state product that meets the needs of its customers while saving Wellmark from the expense of having to maintain a network and rate structure in states where it has relatively few claims.[3]

In a somewhat different context, the Supreme Court has recognized that joint buying can "achieve economies of scale . . . that would otherwise be **[**18]** unavailable." *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 286-87, 105 S. Ct. 2613, 2615, 86 L. Ed. 2d 202, 206 (1985)*. In *Northwest Wholesale Stationers*, the Court declined to apply a per se analysis to a member's claim that it had been wrongfully expelled from a nonprofit wholesale purchasing cooperative, noting that "such cooperative arrangements would seem to be 'designed to "increase economic efficiency and render markets more, rather than less, competitive."'" *Id. at 295, 105 S. Ct. at 2620, 86 L. Ed. 2d at 212* (quoting *BMI, 441 U.S. at 20, 99 S. Ct. at 1562, 60 L. Ed. 2d at 16*); *see also All Care Nursing Serv., Inc. v. High Tech Staffing Servs., Inc., 135 F.3d 740, 744, 747-49 (11th Cir. 1998)* (declining to apply a per se analysis to an arrangement whereby competing hospitals agreed to seek bids as a group for temporary nursing services); *Kartell v. Blue Shield of Mass., Inc., 749 F.2d 922, 925 (1st Cir. 1984)* (rejecting antitrust claims and contrasting a legitimate, independent medical cost insurer with a "'sham' organization seeking only to combine otherwise independent buyers in order to suppress their otherwise competitive instinct to bid up price").

Furthermore, neither of these types of Wellmark arrangements truly represents a horizontal agreement between competitors. *Cf. Texaco, 547 U.S. at 5, 126 S. Ct. at 1279, 164 L. Ed. 2d at 7*. Wellmark does not really compete with its self-insured clients. While a self-insured might elect not to use Wellmark's services, plaintiffs cite no example of a self-insured that markets those kinds of services to anyone else *in competition with* Wellmark. Nor does Wellmark compete with **[**19]** the out-of-state BCBS licensees. Its customers are in Iowa and South Dakota; the other licensees are licensed to sell health insurance in other states.[4]

Additionally, we agree with Wellmark that a decision of the United States District Court for the Northern District of Illinois is helpful and on point. *See N. Jackson Pharmacy, Inc. v. Caremark Rx, Inc., 385 F. Supp. 2d 740 (N.D. Ill.*

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[2] Or they believe they can buy a different, cheaper form of protection against that risk, such as a stop-loss.

[3] If the plaintiffs were right, then an Iowa bank and a Florida bank could not reach an agreement on what they would charge each other's customers for use of their ATMs, for example, when a customer of the Iowa bank travels to Florida or a Florida customer travels to Iowa. *See In re ATM Fee Antitrust Litig., 554 F. Supp. 2d 1003, 1007, 1017 (N.D. Cal. 2008)* (finding that an agreement among banks concerning an ATM interchange fee should be governed by the rule of reason, not the per se rule).

[4] The plaintiffs make a passing assertion that Wellmark and the other out-of-state BCBS affiliates have entered into an illegal horizontal market division agreement not to sell health insurance in each other's territories. This theory is not alleged in the petition nor supported by evidence in the record, and hence we will not consider it.

2005). In *North Jackson*, a retail pharmacy sued a **[*572]** pharmacy benefits manager that "administer[ed] prescription drug benefit plans on behalf of employers, health insurers and other third-party payors of prescription drug costs ('Plan Sponsors')." *Id. at 744*. As the court stated, "By negotiating prescription drug reimbursement rates on behalf of the 1,200 Plan Sponsors it represents, Caremark acts on behalf of what is essentially a cooperative purchasing group." *Id. at 746*. The pharmacy alleged a per se violation of *section 1* of the Sherman Act on the theory that the plan sponsors were engaged **[**20]** in a horizontal conspiracy to fix prescription drug prices. *Id. at 744-46*.

The district court rejected the per se categorization. *Id. at 747-51*. The arrangement in question was not a "naked restraint," but one which was "ancillary" to a broader venture with procompetitive potential. *See id. at 747-48*. The court elaborated,

> Any alleged agreement between Plan Sponsors to set the price paid for prescription drugs thus cannot be viewed in a vacuum, but must instead be looked at as a corollary of the cooperative arrangement between Caremark and the Plan Sponsors under which Caremark performs a variety of functions in the administration of Plan Sponsors' drug benefit plans. Those functions include not only the negotiation of reimbursement rates with retail pharmacies but also the processing of reimbursement claims, maintenance of patient records, design and management of drug formularies, negotiation of manufacturer rebates and maintenance of a mail order pharmacy. According to Caremark, those functions contribute to increased efficiency and a reduction in the cost of prescription drugs delivered to Plan Subscribers.
>
> . . . .
>
> As described by the [complaint] and the parties' submissions on the current motion, the arrangement **[**21]** between Plan Sponsors and Caremark clearly has efficiency-enhancing potential. Caremark specializes in various functions of benefit plan administration and is likely able to achieve economies of scale in the performance of those functions that would otherwise be unavailable to Plan Sponsors. And the creation of retail pharmacy networks, which necessarily involves the setting of reimbursement rates, undoubtedly contributes to the success of that larger endeavor.
>
> . . . .
>
> . . . That is of particular relevance here, where (as North Jackson itself alleges) PBMs [Pharmacy Benefits Managers] such as Caremark administer the prescription drug benefits of "approximately 210 million Americans; 70% of the U.S. population". Any premature ruling that one of the primary functions performed by PBMs is per se illegal would have particularly far-reaching consequences for the delivery of affordable prescription drugs to a large portion of the population, a consideration that further supports thorough rule of reason analysis.
>
> What has been said to this point should not be read as expressing an ultimate view as to the lawfulness of the alleged conspiracy between Plan Sponsors. If the required rule of reason **[**22]** inquiry were to reveal that the anticompetitive consequences of any such conspiracy sufficiently outweigh its procompetitive benefits so that the restraint is ultimately judged unreasonable under *Section 1*, this Court would not hesitate to rule accordingly. But because no authority even suggests that all cooperative purchasing agreements run afoul of *Section 1*, and because the agreement at **[*573]** issue here is part of a larger and potentially procompetitive enterprise, the rule of reason must be applied to North Jackson's Claim I.

Id. at 748-51.

Another and related factor arises from a concern explained by *Kartell v. Blue Shield of Massachusetts, Inc., 749 F.2d 922, 931 (1st Cir. 1984)*:

> [T]he subject matter of the present agreement—medical costs—is an area of great complexity where more than solely economic values are at stake. How to provide affordable, high quality medical care is much debated. And, many different solutions—ranging from stricter regulation to greater reliance on competing service organizations—have been proposed. This fact, too, warrants judicial hesitancy to interfere.

The conditions that were present in *North Jackson Pharmacy* prevail here as well. The arrangements here are not bare price-fixing agreements; indeed, unlike in *North Jackson Pharmacy*, there is not even an allegation that **[**23]** the various self-insureds have entered into agreements with *each other*. Rather, the self-insured employers have entered into significant relationships with Wellmark under which Wellmark provides much more than a price list—i.e., a network of providers; rules for eligibility, limitations, copays, and deductibles; and claims administration and processing. From the employee's standpoint, Wellmark appears to be providing traditional health insurance. The only difference is that the employer and not Wellmark is the ultimate financial backstop.

Also, similar to the situation in *North Jackson Pharmacy*, the record here indicates that there are potential efficiencies and economies of scale when employers rely on Wellmark to perform these functions, in which it has experience and expertise. The vast majority of employers could not realistically perform these duties on their own. There are also potential efficiencies and economies of scale when out-of-state insurers collaborate with Wellmark instead of trying to set up their own network for a relatively small number of Iowa claims.

Additionally, as in *North Jackson Pharmacy*, there are reasons for "judicial hesitancy" in classifying the challenged **[**24]** practices as per se violations of ***antitrust law***. The plaintiffs themselves admit the practices are widespread. A large percentage of Iowans are covered by self-insured employer plans administered by Wellmark. The BlueCard® network is a national program used by health insurers and clients across the country. We should be reluctant to declare these arrangements flatly illegal, without considering their relative procompetitive or anticompetitive effects.

Plaintiffs seek to distinguish *North Jackson Pharmacy* on the ground that Wellmark is not a "mere independent third-party 'administrator'" but a "major competitor in the market for Iowa healthcare provider services." Yet we fail to see how this distinction helps the plaintiffs' cause. It is true that Wellmark provides a higher level of service than a "mere administrator." It is also true that Wellmark's health care provider network was set up at least in part for its own purposes, not merely as a device to enable group purchasing of health care services. But these factors, if anything, take the challenged arrangements even further out of the realm of naked restraints. The self-insured employers are purchasing a bundle of preexisting services **[**25]** from Wellmark that most of them could not provide themselves.

Plaintiffs analogize this case to *Arizona v. Maricopa County Medical Society*, but we think the analogy is imperfect. *See* *457 U.S. 332, **[*574]** 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*. That case involved naked price-fixing: The physician members of a trade association were agreeing to abide by fee schedules. *Id. at 340-41, 102 S. Ct. at 2471, 73 L. Ed. 2d at 56*. There was no joint product or service being developed or sold. *See* *id. at 339-40, 102 S. Ct. at 2470, 73 L. Ed. 2d at 55-56*. The two wrinkles in the case were that the agreed-upon fees were *maximum* prices and the price-fixers were professionals. *Id. at 348-49, 102 S. Ct. at 2475, 73 L. Ed. 2d at 61-62*. Yet the Court found that neither of these considerations mattered and that the per se rule still applied. *Id*. It took note of Arizona's contention that so-called maximum prices can have the effect of stabilizing and enhancing the level of actual charges. *Id. at 341-42, 102 S. Ct. at 2471-72, 73 L. Ed. 2d at 57*.

This case might be comparable to *Maricopa County Medical Society* if the plaintiffs were claiming that Wellmark and other Iowa health insurers had simply agreed they would pay the same reimbursements to health care providers, without exchanging any meaningful services. Under *Maricopa County Medical Society*, it would not be a defense that the health insurers had agreed on minimum rather than maximum reimbursement rates.[5] *457 U.S. at 348-49, 102 S. Ct. at 2475, 73 L. Ed 2d at 61-62*. But that is not the **[**26]** situation here. We do not have a naked price-fixing agreement among competitors.

The plaintiffs also argue at some length that Wellmark has market power in health insurance in Iowa. This may be true, but it is not relevant to a per se claim. If plaintiffs' per se argument were correct, then it would be illegal for *any* insurer to make its insurance network pricing available to a self-insured that used the insurer's administrative and claims services even if the insurer had only a miniscule market share.

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[5] Note again that the ultimate concern relates to monopsony rather than monopoly effects.

Additionally, the plaintiffs rely on Department of Justice and Federal Trade Commission guidance on health care. However, we believe the line that those agencies have drawn between per se and rule of reason conduct is consistent with the decision in this case. Consider the following passage from the 1996 *Statements of Antitrust Enforcement Policy in Health Care*:

> An agreement among purchasers that simply fixes the price that each purchaser will pay or offer to pay for a product or service is not a legitimate joint purchasing arrangement and is a per se antitrust violation. Legitimate joint purchasing arrangements **[**27]** provide some integration of purchasing functions to achieve efficiencies.

U.S. Dep't of Justice & Fed. Trade Comm'n, *Statements of Antitrust Enforcement Policy in Health Care* 67 n.17 (1996), *available at* *http://www.justice.gov/atr/public/guidelines/0000.pdf*. The challenged arrangements here are not simply agreements among purchasers to fix a price, which would be subject to per se treatment. To the contrary, both the self-insureds and the out-of-state BCBS licensees are obtaining a block of Iowa claims-related services from Wellmark. In other words, there is "integration of purchasing [and other related] functions to achieve efficiencies." *Id*.

We are not today foreclosing a rule of reason claim against Wellmark if it were shown that the anticompetitive consequences of its practices exceeded their procompetitive benefits.[6] We simply uphold **[*575]** the district court's ruling that Wellmark's arrangements with self-insured employers and out-of-state BCBS licensees are not subject to the per se rule. Because the plaintiffs by stipulation limited themselves to a per se claim, we affirm the district court's grant of summary judgment.

IV. Conclusion.

For the foregoing reasons, the district court's judgment is affirmed.

AFFIRMED.

All justices concur except Hecht and Appel, JJ., who take no part.

End of Document

[6] As the court put it in *North Jackson Pharmacy*,

> If the required rule of reason inquiry were to reveal that the anticompetitive **[**28]** consequences of any such conspiracy sufficiently outweigh its procompetitive benefits so that the restraint is ultimately judged unreasonable under *Section 1* [of the Sherman Act], this Court would not hesitate to rule accordingly. But because no authority even suggests that all cooperative purchasing agreements run afoul of *Section 1*, and because the agreement at issue here is part of a larger and potentially procompetitive enterprise, the rule of reason must be applied to North Jackson's Claim I.

385 F. Supp. 2d at 750-51.

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Resnick v. Netflix, Inc.(In re Online Dvd-Rental Antitrust Litig.)

United States Court of Appeals for the Ninth Circuit

February 13, 2014, Argued and Submitted, San Francisco, California; February 27, 2015, Filed

No. 11-18034, No. 12-16160, No. 12-16183

Reporter

779 F.3d 914 *; 2015 U.S. App. LEXIS 3095 **; 2015-1 Trade Cas. (CCH) P79,082

IN RE ONLINE DVD-RENTAL ANTITRUST LITIGATION, ANDREA RESNICK; BRYAN EASTMAN; AMY LATHAM; MELANIE MISCIOSCIA; STAN MAGEE; MICHAEL OROZCO; LISA SIVEK; MICHAEL WIENER, Plaintiffs-Appellants, v. NETFLIX, INC.; WAL-MART STORES, INC.; WALMART.COM USA LLC, Defendants-Appellees.IN RE ONLINE DVD-RENTAL ANTITRUST LITIGATION, ANDREA RESNICK; BRYAN EASTMAN; AMY LATHAM; MELANIE MISCIOSCIA; STAN MAGEE; MICHAEL OROZCO; LISA SIVEK; MICHAEL WIENER, Plaintiffs-Appellants, v. NETFLIX, INC., Defendant-Appellee, and WAL-MART STORES, INC.; WALMART.COM USA LLC, Defendants.IN RE ONLINE DVD-RENTAL ANTITRUST LITIGATION, ANDREA RESNICK; AMY LATHAM; MELANIE MISCIOSCIA; STAN MAGEE; MICHAEL OROZCO; LISA SIVEK; MICHAEL WIENER; BRYAN EASTMAN, Plaintiffs-Appellees, v. NETFLIX, INC., Defendant-Appellant, and WAL-MART STORES, INC.; WALMART.COM USA LLC, Defendants.

Subsequent History: Motion denied by *In re Online DVD Rental Antitrust Litig., 2018 U.S. Dist. LEXIS 88468 (N.D. Cal., May 25, 2018)*

Prior History: **[**1]** Appeal from the United States District Court for the Northern District of California. D.C. No. 4:09-md-02029-PJH. Phyllis J. Hamilton, District Judge, Presiding.

In re Online DVD Rental Antitrust Litig., 2011 U.S. Dist. LEXIS 150312 (N.D. Cal., Nov. 22, 2011)
Pierson v. Walmart.com USA LLC (In re : Online DVD Rental Antitrust Litig.), 2012 U.S. Dist. LEXIS 55951 (N.D. Cal., Apr. 20, 2012)

Disposition: AFFIRMED IN PART; VACATED IN PART; REMANDED.

Core Terms

Subscribers, costs, documents, district court, online, copies, antitrust, electronically, upload, discovery, charges, make a copy, injury-in-fact, tasks, summary judgment, processes, invoice, stored, vendor, production of documents, award costs, costs award, format, prices, declaration, customers, subscription, duplication, recoverable, conversion

LexisNexis® Headnotes

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

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

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

The appellate court reviews de novo the district court's grant of summary judgment.

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

HN2[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is appropriate when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*. A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the nonmoving party.

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

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

HN3[] **Standing, Burdens of Proof**

A plaintiff must establish U.S. Const. art. III standing, which requires proof of (1) injury-in-fact, (2) causation, and (3) redressability. For Article III purposes, an antitrust plaintiff establishes injury-in-fact when he has suffered an injury which bears a causal connection to the alleged antitrust violation.

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

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

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

HN4[] **Standing, Requirements**

In addition to U.S. Const. art. III standing, private antitrust plaintiffs must also demonstrate antitrust injury, which is (1) injury of the type the antitrust laws were intended to prevent that also (2) flows from that which makes defendants' acts unlawful. This can be established by showing that consumers paid higher prices for a product due to anticompetitive actions of a defendant, such as a horizontal market allocation scheme.

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

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

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN5[] **Standing, Requirements**

As a general rule, summary judgment is inappropriate where an expert's testimony supports the nonmoving party's case. However, the mere proffering of unsupported expert testimony does not create a triable issue as to antitrust injury-in-fact. In the context of ***antitrust law***, if there are undisputed facts about the structure of the market that render the inference economically unreasonable, the expert opinion is insufficient to support a jury verdict. Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them, and it has little probative value in comparison with the economic factors that may dictate a particular conclusion.

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

HN6[] **Complaints, Requirements for Complaint**

A disclosure made during discovery is unlikely to cure lack of notice, which generally must be provided by a well-pled complaint.

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

HN7[] **Costs & Attorney Fees, Costs**

The appellate court reviews a cost award under the abuse of discretion standard A district court abuses its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact. However, the appellate court reviews the threshold question of whether the district court has the authority to award costs de novo.

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

HN8[] **Costs & Attorney Fees, Costs**

Taxable costs are limited to relatively minor, incidental expenses as is evident from *28 U.S.C.S. § 1920*.

Civil Procedure > ... > Costs > Costs Recoverable > Reproduction Costs

HN9[] **Costs Recoverable, Reproduction Costs**

Electronic production of documents can constitute making copies under *28 U.S.C.S. § 1920(4)*.

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

HN10[] **Costs & Attorney Fees, Costs**

Costs and fees should be awarded to the prevailing party. *Fed. R. Civ. P. 54(d)(1)* provides that unless a federal statute, these rules, or court order provides otherwise, costs, other than attorney's fees, should be allowed to the prevailing party. However, a district court's discretion to award costs is limited to particular types of costs enumerated in *28 U.S.C.S. § 1920*. *Section 1920* defines the term "costs" as used in *Rule 54(d)*.

Governments > Legislation > Interpretation

HN11[] **Legislation, Interpretation**

As with all statutory construction questions, the court begins with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.

Civil Procedure > ... > Costs > Costs Recoverable > Reproduction Costs

Governments > Legislation > Interpretation

HN12[] **Costs Recoverable, Reproduction Costs**

28 U.S.C.S. § 1920(4) provides that a judge or clerk may tax the costs of making copies of any materials where the copies are necessarily obtained for use in the case. Because the phrase "making copies" is not defined in the statute, the court applies its ordinary meaning.

Civil Procedure > ... > Costs > Costs Recoverable > Reproduction Costs

HN13[] **Costs Recoverable, Reproduction Costs**

28 U.S.C.S. § 1920(4) speaks narrowly of fees for exemplification and copies of papers, suggesting that fees are permitted only for the physical preparation and duplication of documents, not the intellectual effort involved in their production.

Civil Procedure > ... > Costs > Costs Recoverable > Reproduction Costs

HN14[] **Costs Recoverable, Reproduction Costs**

28 U.S.C.S. § 1920(4) further defines the awarding of costs for making copies, requiring that recoverable costs be restricted to the making of copies necessarily obtained for use in the case.

Civil Procedure > ... > Costs > Costs Recoverable > Reproduction Costs

HN15[] **Costs Recoverable, Reproduction Costs**

Costs can be incurred in litigation for making copies that are not necessarily obtained for use in the case, and such costs are not taxable.

Civil Procedure > ... > Costs > Costs Recoverable > Reproduction Costs

HN16[] **Costs Recoverable, Reproduction Costs**

28 U.S.C.S. § 1920(4) is not so restrictive as to specifically require that the copied document be introduced into the record to be an allowable cost. *Section 1920(4)* allows for the recovery of costs where the copies were obtained to be produced pursuant to *Fed. R. Civ. P. 34* or other discovery rules.

Civil Procedure > ... > Costs > Costs Recoverable > Reproduction Costs

HN17[] **Costs Recoverable, Reproduction Costs**

To the extent that a party is obligated to produce (or obligated to accept) electronic documents in a particular format or with particular characteristics intact (such as metadata, color, motion, or manipulability), the costs to make duplicates in such a format or with such characteristics preserved are recoverable as the costs of making copies necessarily obtained for use in the case. *28 U.S.C.S. § 1920(4)*.

Civil Procedure > ... > Costs > Costs Recoverable > Reproduction Costs

HN18[] **Costs Recoverable, Reproduction Costs**

That *28 U.S.C.S. § 1920(4)* restricts the award of costs to those incurred for copies necessarily obtained for use in the case is not, in itself, a justification permitting the award of costs for any task necessary to the prosecution or defense of a case. *Section 1920(4)* does not state that all steps that lead up to the production of copies of materials are taxable. Only the costs of creating the produced duplicates are included as recoverable, not a number of preparatory or ancillary costs commonly incurred leading up to, in conjunction with, or after duplication. It may be that extensive processing of electronically stored information is essential. But that does not mean that the services leading up to the actual production constitute making copies.

Civil Procedure > ... > Costs > Costs Recoverable > Reproduction Costs

HN19[] **Costs Recoverable, Reproduction Costs**

The proper application of a narrowly construed *28 U.S.C.S. § 1920(4)* requires that the tasks and services for which an award of costs is being considered must be described and established with sufficient specificity, particularity, and clarity as to permit a determination that costs are awarded for making copies. Document production and other similarly generic statements on the invoices are unhelpful in determining whether those costs are taxable. Further, a description of a task is useful only to the extent it accurately reflects the task for which copying costs are sought.

Civil Procedure > ... > Costs > Costs Recoverable > Reproduction Costs

HN20[] **Costs Recoverable, Reproduction Costs**

Consideration of whether certain tasks are taxable pursuant to *28 U.S.C.S. § 1920(4)* calls for some common-sense judgments guided by a comparison with the paper-document analogue.

Civil Procedure > ... > Costs > Costs Recoverable > Reproduction Costs

HN21[] **Costs Recoverable, Reproduction Costs**

The cost of making the copy is not rendered non-taxable merely because it was created by using fax machines rather than a photo-copier. Conversely, *28 U.S.C.S. § 1920(4)* does not award costs merely because a process resulted in the creation of a copy. That the fax process creates a copy does not, by itself, establish that the cost is taxable under *§1920(4)*. Rather, a further determination is required: whether the copy was necessarily obtained for use in the case. Like any other copy, if the faxed copy was created to be produced in discovery, the cost of making the fax would be taxable under *§ 1920(4)*. However, if the faxed copy was created solely for the convenience of counsel, the cost of making the copy would not be taxable.

Civil Procedure > ... > Costs > Costs Recoverable > Reproduction Costs

HN22[] **Costs Recoverable, Reproduction Costs**

A narrow construction of *28 U.S.C.S. § 1920(4)* requires recognition that the circumstances in which a copy will be deemed necessarily obtained for use in a case will be extremely limited. That a chosen document production process requires the creation of a copy does not establish that the copy is necessarily obtained for use in the case. A lawyer may review electronically stored information for privilege either by viewing the original documents on the client's computer or, alternatively, by viewing copies uploaded to the lawyer's computer. Although the latter method of review requires the creation of a copy, the ability to conduct the review by looking at the original document establishes that the uploaded copy was not necessarily obtained for use in the case.

Civil Procedure > Appeals > Appellate Briefs

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

HN23[] **Appeals, Appellate Briefs**

Where matters are not specifically and distinctly argued in the open briefing, the appellate court will not consider them.

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

HN24[] **Costs & Attorney Fees, Costs**

A district court need not give affirmative reasons for awarding costs; instead, it need only find that the reasons for denying costs are not sufficiently persuasive to overcome the presumption in favor of an award.

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

HN25[] **Costs & Attorney Fees, Costs**

A district court must specify reasons for its decision to abide the presumption and tax costs to the losing party.

Civil Procedure > ... > Costs > Costs Recoverable > Reproduction Costs

HN26[] **Costs Recoverable, Reproduction Costs**

Fees for exemplification and copying are permitted only for the physical preparation and duplication of documents, not the intellectual effort involved in their production. However, there is no authority for the proposition that the title of the person doing the work is relevant to classifying the type of work actually done. In fact, courts have held otherwise. Neither the degree of expertise necessary to perform the work nor the identity of the party performing the work of making copies is a factor that can be gleaned from *28 U.S.C.S. § 1920(4)*.

Summary:

SUMMARY**

Antitrust

The panel affirmed the district court's summary judgment and affirmed in part and reversed in part its award of costs in consolidated antitrust actions arising out of a promotion agreement whereby Walmart transferred its online DVDrental subscribers to Netflix, and Netflix agreed to promote Walmart's DVD sales business.

The plaintiffs, individuals representing a class of Netflix subscribers, contended that this arrangement violated *§§ 1* and *2 of the Sherman Act* by illegally allocating and monopolizing the online DVD-rental market. The panel held that the subscribers did not raise a triable issue of fact as to whether they suffered antitrust injury-in-fact on a theory that they paid supracompetitive prices for one of Netflix's subscription plans because Netflix would have reduced the price of that plan but for its allegedly anticompetitive conduct. **[**2]**

In light of *Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997, 182 L. Ed. 2d 903 (2012)*, which underscored the narrow scope of taxable costs under *28 U.S.C. § 1920*, the panel affirmed in part and reversed in part the district court's cost award. Finding persuasive the reasoning of the Third, Fourth, and Federal Circuits, the panel held that certain charges for "data upload" and "keywording" were not recoverable as costs for making copies under *§ 1920(4)*. The panel remanded for consideration of whether costs were properly awarded for "professional services." The panel concluded that of the costs challenged as non-taxable under *§ 1920(4)*, only those costs attributable to optical character recognition, converting documents to TIFF, and "endorsing" activities—all of which were explicitly required by the plaintiffs—were recoverable on the record before it. The panel held that the district court did not abuse its discretion in awarding costs for preparation of visual aids, for TIFF conversions, and for copying of paper documents. The district court also did not abuse its discretion in declining to award Netflix costs for production of certain PowerPoint documents.

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Judges: Before: Sidney R. Thomas, Chief Judge, Stephen Reinhardt, Circuit Judge, and Lloyd D. George, Senior District Judge.* Opinion by Chief Judge Thomas.

Opinion by: Sidney R. Thomas

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

* The Honorable Lloyd D. George, Senior District Judge for the U.S.District Court for the District of Nevada, sitting by designation.

Opinion

[*918] THOMAS, Chief Judge:

These consolidated antitrust actions arise out of an agreement ("Promotion Agreement") between Netflix and Walmart[1] whereby Walmart transferred its online DVD-rental subscribers to Netflix, and Netflix agreed to promote Walmart's DVD sales business. The plaintiffs, individuals representing a class of Netflix subscribers ("Subscribers"), contend that this arrangement violated *§§ 1* and *2 of the Sherman Act* by illegally allocating and monopolizing the online DVD-rental market. The Subscribers' theory of injury is that they paid supracompetitive prices for one of Netflix's subscription plans because Netflix would have reduced the price of that plan but for its allegedly anticompetitive conduct.

We agree with the district court that the Subscribers **[**5]** have not raised a triable issue of fact as to whether they suffered antitrust injury-in-fact, and we affirm the district court's grant of summary judgment. We vacate in part the district court's cost award, and remand for consideration in light of this opinion.

I

In 1997, Reed Hastings and Marc Randolph co-founded Netflix, the first internet-based DVD rental service. Netflix **[*919]** commenced operations in 1998, offering customers through its website the option to rent or buy DVDs by mail. Netflix initially offered DVD rentals on a pay-per-rental basis, but soon replaced that system with a monthly subscription model. In 2000, it discontinued its DVD sales business altogether. Several Netflix subscription plans permitted customers to rent an unlimited number of DVDs, differing in how many DVDs a customer could borrow at a given time. For example, in 2003, Netflix offered its "3U" plan, which permitted three DVDs to be rented at a time, for $19.95 per month, while its "4U" plan cost $24.95 per month and allowed four DVDs at a time. Netflix's DVD-rental business flourished under the new model, and by 2005 it had a 77.8% share of the online DVD-rental market, rising to 92.3% by 2010.

Netflix faced **[**6]** no serious competition in its early years. However, in 2003, Walmart, one of the nation's largest retail companies, launched its own online DVD-rental service. Walmart initially offered its 3U plan for $18.76 a month. Although Walmart's 3U plan was cheaper than Netflix's ($19.95 per month), Netflix did not alter its 3U plan price for a full year. When Netflix eventually did change its 3U price, in June 2004, it *increased* the price to $21.99 per month.

Two months later, in August 2004, Blockbuster, the largest store-based DVD rental company, launched its own online DVD rental service, becoming the third major competitor in the market. Blockbuster offered its 3U plan at $19.99 per month and included with it two free coupons per month for in-store rentals.

In October 2004, in apparent response to rumors that Amazon planned to enter the online DVD-rental market as well, Netflix announced that it would lower the price of its 3U plan from $21.99 to $17.99 per month. Blockbuster responded the next day by announcing that it would cut its 3U price to $17.49 per month. In November 2004, Walmart reduced its 3U price to $17.36 per month. In December 2004, Blockbuster again reduced the price of its **[**7]** 3U plan, this time to $14.99 per month—the lowest 3U plan price in the market. Netflix maintained its $17.99 price until August 2007, when it lowered the price to $16.99.

During this period, Walmart's online DVD-rental business performed poorly. Walmart never had more than 60,000 subscribers. In contrast, in mid-2004 Netflix had over 2 million subscribers, and Blockbuster had 400,000 subscribers. From June 2003, when Walmart opened its online DVD-rental business, until it signed the Promotion Agreement with Netflix in March 2005, Walmart gained an average of 5,000 subscribers per quarter. Netflix added 250,000 subscribers per quarter over the same period. Walmart's subscriber share peaked at 2.4% in early 2004

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[1] For ease of reference, "Wal-Mart Stores, Inc." and "walmart.com USA LLC" shall be collectively referred to as "Walmart" throughout this opinion.

and declined from that point. By February 2005, Walmart had only a 1.4% market share. In contrast, Netflix controlled 77.8% of the market in 2005. Walmart lost 7,000 subscribers during the final quarter of 2004.

In October 2004, Netflix's CEO Reed Hastings sought a meeting with Walmart CEO John Fleming. Hastings testified that he requested the meeting because he hoped to form a partnership with Walmart that would strengthen Netflix's position before Amazon entered the market. Hastings **[**8]** was aware that Walmart's online DVD-rental service was performing poorly, and hoped that Walmart might therefore be open to a partnership. The two CEOs met on October 27, 2004. Hastings recounts that Walmart seemed uninterested in a deal at the time and that there was no discussion about Netflix selling new **[*920]** DVDs. Fleming provided a similar account. No agreement was reached at the meeting.

Unbeknownst to Hastings, Walmart was entertaining other suitors. Walmart considered a potential partnership with Yahoo!, and a draft partnership agreement to that effect was prepared as early as December 1, 2004. Walmart considered a similar deal with Microsoft.

Walmart began considering alternative strategic options for its online DVD-rental business, and ultimately looked in depth at four possibilities: (1) continuing to run the business with a low subscriber amount, (2) aggressively building the business, (3) partnering with Yahoo!, and (4) exiting the online DVD-rental business. After carefully analyzing each option, Walmart concluded that none would be profitable and that, in fact, it would probably suffer multi-million dollar financial losses under all four scenarios.

Walmart made the final decision **[**9]** to exit the market by early January 2005. It established an impairment reserve to cover any losses incurred from the closure and stopped accepting new subscribers for its 3U and 4U plans. By February 2005, Walmart had incurred $3 million of costs associated with shuttering its online DVD-rental business. By March 2005, Netflix had 3 million subscribers. Walmart had 52,000. Walmart employees speculated that Walmart's online DVD-rental business did not succeed because Walmart devoted insufficient resources to marketing, could not match Netflix's guaranteed one- to two-day delivery, had a poorly designed website, and offered a relatively limited selection of DVDs.

Aware of Walmart's market share decline, but unaware of its plan to discontinue its online DVD-rental business, Hastings renewed his efforts to meet with Fleming. The two CEOs met on February 9, 2005. Fleming did not inform Hastings that Walmart had decided to leave the online DVD-rental business. Although no agreement was reached at the meeting, Hastings's efforts did eventually bear fruit. By March 17, 2005, Hastings and Fleming had reached a verbal agreement, the key terms of which were that: (1) Walmart DVD-rental subscribers **[**10]** and their rental queues would be transferred to Netflix, for those customers who so chose, free of charge, and customers would be offered the same subscription price for one year; (2) Walmart would promote on its website Netflix's online DVD-rental business; (3) Netflix would pay Walmart a 10% revenue share for each subscriber who transferred, as well as a $36 bounty for each new Netflix subscriber gained from Walmart's referrals; and (4) Netflix would promote Walmart's DVD sales business.

These key terms were incorporated into the Promotion Agreement. The Promotion Agreement did not include a covenant not to compete, did not prohibit Netflix from selling new DVDs, and explicitly *permitted* Walmart to offer an online DVD-rental service.[2] The Promotion Agreement was publically announced May 19, 2005.

Despite the earlier rumors, Amazon did not initiate an online DVD-rental service. Thus, after Walmart's exit in mid-2005, Netflix and Blockbuster remained as the two major competitors in the market. Blockbuster eventually **[**11]** filed for bankruptcy in September 2010, leaving Netflix as the sole major competitor, with over 90% of the online DVD-rental market.

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[2] In fact, in February 2010, Walmart acquired the streaming video service VuDu, which competes directly with Netflix by offering rentals to consumers through Internet streaming.

Netflix kept its 3U price at $17.99 from November 2004 to August 2007, when it **[*921]** reduced the price to $16.99, which is where it remained through the end of the class period. During the class period, Netflix began offering video streaming over the Internet, and Netflix has since focused on developing that aspect of its business.

The Subscribers filed several actions, alleging antitrust violations by Netflix, Walmart Stores, and Walmart.com, and seeking to represent a class of Netflix subscribers. The actions were consolidated and an amended complaint filed. The thrust of the Subscribers' complaint is that the Promotion Agreement reflected an illegal allocation of the online DVD-rental market. The Subscribers assert four causes of action: (1) a *§ 1 Sherman Act* violation for unlawful market allocation of the online DVD-rental market (against all defendants); (2) a *§ 2 Sherman Act* claim for monopolization of the online DVD-rental market (against Netflix); (3) a *§ 2 Sherman Act* claim for attempted monopolization of the online DVD-rental market (against Netflix); and (4) **[**12]** a *§ 2 Sherman Act* claim for conspiracy to monopolize the online DVD-rental market (against all defendants).

The district court granted the Subscribers' motion for certification of a litigation class, defining the class as "[a]ny person or entity in the United States that paid a subscription fee to Netflix on or after May 19, 2005 up to and including [December 23, 2010,] the date of class certification." The district court subsequently approved Walmart's settlement with the class.

Netflix moved for summary judgment pursuant to *Federal Rule of Civil Procedure 56* as to all claims asserted against it. The district court granted the motion, concluding that there was no *per se* antitrust violation, and that the Subscribers had failed to raise a triable issue as to antitrust injury-in-fact. The district court also excluded tendered evidence of agreements Netflix had with Amazon, Best Buy, and Musicland, because the agreements raised new theories of liability that were not expressly pleaded in the complaint.

The district court entered final judgment against the Subscribers, after which Netflix filed a bill of costs seeking $744,740.11 in discovery costs. The district court subsequently awarded Netflix $710,194.23 in costs. The Subscribers **[**13]** filed a timely notice of appeal, and Netflix cross-appealed.

We have jurisdiction pursuant to *28 U.S.C. § 1291*. ***HN1***[] "We review de novo the district court's grant of summary judgment." *Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 912 (9th Cir. 2008)*. ***HN2***[] Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. Until recently, "[s]ummary judgment [was] disfavored in antitrust cases," *High Tech. Careers v. San Jose Mercury News, 996 F.2d 987, 989 (9th Cir. 1993)*, but "any presumption against the granting of summary judgment in complex antitrust cases has now disappeared," *In re ATM Fee Antitrust Litig., 554 F. Supp. 2d 1003, 1010 (N.D. Cal. 2008)* (citing Philip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 308c2 (3d ed. 2007)).

II

The district court properly concluded that the Subscribers failed to raise a triable issue of fact as to antitrust injury-in-fact, and that Netflix was thus entitled to summary judgment. As with all federal claims, ***HN3***[] a plaintiff must establish Article III standing, which requires proof of (1) **[*922]** injury-in-fact, (2) causation, and (3) redressability. *Gerlinger v. Amazon.com Inc., 526 F.3d 1253, 1255 (9th Cir. 2008)*. "For Article III purposes, an antitrust plaintiff establishes injury-in-fact when he has suffered an injury which bears a causal connection to the **[**14]** alleged antitrust violation." *Id.* (internal quotation marks and citation omitted).

HN4[] In addition to Article III standing, private antitrust plaintiffs must also demonstrate antitrust injury, which is (1) "injury of the type the antitrust laws were intended to prevent" that also (2) "flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. This can be established by showing that consumers paid higher prices for a product due to anticompetitive actions of a defendant, such as a horizontal market allocation scheme. *See In re Cardizem CD Antitrust Litigation, 332 F.3d 896, 910-11 (6th Cir. 2003)*.

The Subscribers' injury-in-fact theory is that Netflix subscribers paid supracompetitive prices for their DVD-rental subscriptions once Walmart exited the online DVD-rental market pursuant to the allegedly anticompetitive Promotion Agreement. Specifically, the Subscribers contend that Netflix would have reduced its 3U subscription price to $15.99 per month but for Netflix's allegedly anticompetitive conduct. Free from the competitive threat of Walmart, the Subscribers allege, Netflix was able to maintain this artificially high price point.

Applying the standards applicable to antitrust cases, the district court properly concluded that the Subscribers had not raised a genuine **[**15]** issue of material fact as to antitrust injury-in-fact. The Subscribers failed to adduce evidence raising a triable issue of fact that if Walmart remained in the market, Netflix would have reduced its prices.

The undisputed record belies this assertion. Netflix never lowered its 3U price at any time in response to Walmart. Even though Walmart entered the market with a lower price ($18.76 to Netflix's $19.95) for a comparable 3U plan, Netflix did not alter its 3U plan price for a full year after Walmart entered the market. When Netflix eventually did change the price, a year later, it *increased* the price to $21.99 per month. Netflix also did not reduce its price when Blockbuster offered a 3U plan for $14.99 (while Netflix's was $17.99), even though Blockbuster had a much greater share of the market than Walmart, and even though Netflix rightfully viewed Blockbuster as a competitive threat. Thus, the district court properly determined that no reasonable juror could conclude that Netflix was going to lower its 3U price to $15.99 in response to Walmart when (1) Netflix had never lowered its prices in response to Walmart at any time and (2) Netflix did not lower its price in the face of the **[**16]** $14.99 price cut by Blockbuster, which was objectively a greater competitive threat.

Walmart never had more than 60,000 subscribers, in contrast to Netflix's two million subscribers in mid-2004. Moreover, Walmart gained an average of just 5,000 subscribers per quarter between when it entered the online DVD-rental market in June 2003 and when the Promotion Agreement was announced in March 2005; during this same time period, Netflix was adding 250,000 subscribers per quarter. Thus, Walmart's subscriber market share peaked at 2.4% in early 2004 and declined from there, hitting 1.4% in February 2005. This subscriber decline was most prevalent during the final quarter of 2004, when Walmart lost 7,000 subscribers. Walmart.com's director of entertainment **[*923]** and photo opined that, in mid-2004, it had become clear that Walmart's venture would fail. Walmart attributed this selfdescribed "increased rate[] of attrition" from an already anemic subscriber base to a host of factors, including Walmart's inability to match Netflix's guaranteed 1- to 2-day delivery and Walmart's confusing, poorly designed website.

Not only was Walmart's online DVD-rental business lagging, it was perceived as such by Netflix, **[**17]** Blockbuster, and Amazon. For example, Blockbuster's senior Vice President testified that Blockbuster was not surprised that Walmart exited the business, in part because Walmart was unable to be "the low-cost provider" and received negative reviews from consumers. He concluded that Walmart's exit was "logical." Amazon held similar views. As one Amazon employee stated, he and his colleagues "spent next to no time thinking about Wal-mart" because Walmart wasn't "taking it seriously; they had one distribution center; they had limited selection; they had faulty systems that didn't really work."

The Subscribers' evidence consists of some internal documents produced by Netflix and Walmart employees that purportedly indicate that Walmart was regarded and treated and as a true competitor. For example, the Subscribers note that in November 2003 Walmart described its expectations of growth in the online DVD-rental market over the coming months, and that Hastings said in October 2002 that Walmart's entrance into the DVD-rental market was "unsettling." However, these communications pre-dated Walmart's entry into the market and subsequent poor performance.

The Subscribers also cite a number of documents **[**18]** in which Walmart claimed that its service was successful, such as a "talking points" memo. However, these documents were meant for promotional and motivational purposes, not performance analysis, and the memos do not contain any hard market data. Rather, the documents contain language best described as puffery. The Subscribers also rely on certain news articles that purportedly show that outside observers also considered Walmart a threat. However, many of the documents pre-date Walmart's entry into the market, and others refer to the market challenges posed by Blockbuster, not Walmart. Indeed, Netflix's internal documents indicate that it was analyzing a potential price cut to $15.99 in response to

Blockbuster, not Walmart. Further, as the district court emphasized, any Netflix price decrease was "(1) in response to Blockbuster (not Walmart); (2) always couched in terms of possibility; and (3) never actually occurred." Netflix's internal documents show that by late 2004, Netflix treated Walmart as a negligible threat. Indeed, much of the Subscribers' documentary evidence actually supports Netflix's position and convincingly reveals that Walmart did not view itself and was not viewed **[**19]** by others as a competitive threat in late 2004 and early 2005.

The Subscribers also rely on expert testimony. ***HN5***[] "As a general rule, summary judgment is inappropriate where an expert's testimony supports the nonmoving party's case." *Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1144 (9th Cir. 1997)* (internal quotation marks and citation omitted). *See also* *Dolphin Tours, Inc. v. Pacifico Creative Serv., Inc., 773 F.2d 1506, 1511 (9th Cir. 1985)* (anticompetitive injury could be inferred from an expert's conclusion that the plaintiff would have attained "a market share of roughly twenty percent" instead of the two percent it did reach). However, the mere proferring of unsupported expert testimony does not create a triable issue as to antitrust injury-in-fact. "In the context of ***antitrust*** **[*924]** ***law***, if there are undisputed facts about the structure of the market that render the inference economically unreasonable, the expert opinion is insufficient to support a jury verdict." *Rebel Oil Co., Inc. v. Atl. Richfield Co., 51 F.3d 1421, 1435-36 (9th Cir. 1995)*. "Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them," and it "has little probative value in comparison with the economic factors that may dictate a particular conclusion." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 242, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)* (internal quotation marks and citation omitted). We agree with the district court that the Subscribers' experts' testimony is contrary to the undisputed **[**20]** market facts. The opinions are founded on speculation about Walmart's potential to remain in the market based on its general retail strength, untethered to its actual performance in this particular market. The testimony also ignores the fact that the Promotion Agreement allowed Walmart to rent DVDs.[3]

Gerlinger confirms the conclusion that, as a matter of law, the Subscribers have failed to raise a triable issue of antitrust injury-in-fact. In *Gerlinger*, Amazon.com and Borders book store entered into an agreement pursuant to which Borders' website directed customers to a site hosted by *Amazon.com. 526 F.3d at 1255*. In return for referring its online customers to Amazon, Borders received a commission for each book sold and agreed to abandon the online book sales market during the term of the agreement. *Id*. The plaintiff alleged that the agreement was an unlawful market allocation and that **[**21]** he paid supracompetitive prices as a result of it. *Id*. Like the Netflix Subscribers, Gerlinger's theory of injury-in-fact was that, if Borders continued competing in the market, book prices would have fallen. *Id*. But, as here, defendants presented evidence that prices in fact remained the same or even went down following the agreement. *Id*. This Court concluded that the plaintiff had not raised a triable issue as to whether he would have paid less for a book absent the allegedly anticompetitive agreement. *Id. at 1256*.

Thus, even considering the facts in the light most favorable to the plaintiffs, the district court properly concluded that the Subscribers did not raise a genuine issue of material fact as to antitrust injury-in-fact. Accordingly, we affirm the district court's summary judgment as to the four Sherman Act claims. Because the Subscribers have not shown injury-in-fact, we need not—and do not—reach the merits of their antitrust claims. *See* *Gerlinger, 526 F.3d at 1256* ("We do not reach the merits, however, because the plaintiff has not shown any injury-in-fact caused by the agreement, and he therefore lacks Article III standing to bring this claim . . . .").

III

Both parties contest the district court's cost award. **[**22]** ***HN7***[] We review a cost award under the abuse of discretion standard. *Arakaki v. Lingle, 477 F.3d 1048, 1069 (9th Cir. 2007)*. "A district court abuses its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact." *Jeff D. v. Otter, 643 F.3d 278, 283 (9th Cir. 2011)* (internal quotation marks and citation omitted). However, we review **[*925]**

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[3] The district court also did not abuse its discretion in excluding evidence at summary judgment that supported new, unpled liability theories, even though the evidence had been adduced in discovery. *See* *Oliver v. Ralphs Grocery Co., 654 F.3d 903, 908-09 (9th Cir. 2011)* (***HN6***[] a disclosure made during discovery is unlikely to cure lack of notice, which generally must be provided by a well-pled complaint).

the threshold question of whether the district court has the authority to award costs de novo. *Russian River Watershed Protection Comm. v. City of Santa Rosa, 142 F.3d 1136, 1144 (9th Cir. 1998)*.

During discovery, the Subscribers sought production of electronically stored information. The Subscribers required that electronic information other than spreadsheets be produced in the static Tagged Image File Format ("TIFF").[4] The Subscribers also requested that these images contain searchable text and relevant metadata,[5] and that the produced documents be numbered sequentially and include certain identifying information. Netflix enlisted electronic discovery vendors to assist with responding to the Subscribers' discovery requests.

As can be expected from a case of this magnitude, discovery was extensive, and Netflix ultimately produced almost 15 million pages in response to the Subscribers' discovery requests. After summary judgment was granted, Netflix requested $744,740.11 as costs for discovery-related tasks, and was ultimately awarded $710,194.23 by the district court. The Subscribers appeal portions of that award, and Netflix cross-appeals.

The Subscribers argue that the district court (1) erred by broadly construing *§ 1920(4)* in its taxing of e-discovery and data management costs totaling $317,616.69, and (2) abused its discretion in taxing consulting fees, TIFFs, and copying costs totaling $245,471.31. Netflix cross appeals, arguing that the district court abused its discretion in disallowing $21,000 in costs to copy certain PowerPoint files.

A

The district court's decision rested upon a "broad construction of *section 1920* with respect **[**24]** to electronic discovery production costs." That determination was largely founded on our decision in *Taniguchi v. Kan Pacific Saipan, Ltd., 633 F.3d 1218, 1221 (9th Cir. 2011)*, which was subsequently reversed by the Supreme Court, *132 S. Ct. 1997, 182 L. Ed. 2d 903 (2012)*. In light of the intervening Supreme Court precedent, we vacate the award of some of the costs the Subscribers have challenged as "non-recoverable" and remand for further consideration of some of those costs pursuant to a narrow construction of *§ 1920(4)*.

1

In awarding costs, the district court explicitly adhered to a broad interpretation of *§ 1920(4)* pursuant to our decision in *Taniguchi*. After the Supreme Court's reversal of *Taniguchi*, we must reassess what electronic discovery costs may be properly taxed as costs of "making copies of any materials where the copies are necessarily obtained for use in the case" under *28 U.S.C. § 1920(4)*. In conducting this assessment, we find persuasive the reasoning of the Third Circuit in *Race Tires*, the Fourth Circuit in *Country Vintner*, and the Federal Circuit in *CBT Flint Partners, LLC v. Return Path, Inc., 737 F.3d 1320* ***[*926]*** *(Fed. Circ. 2013)*. We are also guided by the Supreme Court's reiteration, in *Tanaguchi*, of the limited reach of *§ 1920*. In that decision, the Supreme Court reversed our determination that costs of a translator of written documents can constitute the costs of an "interpreter" under *§ 1920(6)*. *132 S. Ct. at 2005*. In doing so, the Court underscored "the narrow scope of taxable costs" and reminded us that ***HN8***[] "[t]axable costs **[**25]** are limited to relatively minor, incidental expenses as is evident from *§ 1920*." *Id. at 2006*.

In establishing the boundaries that must be given to *§ 1920(4)*, some historical perspective is useful. "Although the taxation of costs was not allowed at common law, it was the practice of federal courts in the early years to award costs in the same manner as the courts of the relevant forum State." *Taniguchi, 132 S. Ct. at 2001* (citing *Alyeska*

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[4] TIFF is a "widely used and supported graphic file format for storing bit-mapped images, with many different compression formats and resolutions. TIFF images are stored in tagged fields, and programs use the tags to accept or ignore fields, depending on the application." *Race Tires America, Inc. v. Hoosier Racing Tire Corp., 674 F.3d 158, 161 n.2 (3d Cir. 2012)* (internal **[**23]** quotation marks, citations, and alterations omitted).

[5] "Metadata is simply data that provides information about other data." *Country Vintner of N.C., LLC v. E. & J. Gallo Winery, Inc., 718 F.3d 249, 253 n.4 (4th Cir. 2013)* (internal quotation marks and citation omitted). It is "[s]econdary data that organize, manage, and facilitate the use of primary data." *Black's Law Dictionary* 1141 (10th ed. 2014).

Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247-48, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975)). This diversity of rules led to a great diversity of awards, which in turn led to some losing litigants being "unfairly saddled with exorbitant fees." Alyeska, 421 U.S. at 251.

"In 1853, Congress undertook to standardize the costs allowable in federal litigation." *Id*. In doing so, they sought to "simplify the taxation of fees, by prescribing a limited number of definite items to be allowed." Country Vintner, 718 F.3d at 255 (quoting Cong. Globe, 32nd Cong., 2d Sess. App. 207 (1853) (statement of Sen. Bradbury)). The result was the Fee Act of 1853, ch. 80, 10 Stat. 161, which was a predecessor to *§ 1920*. The Fee Act "depart[ed] from the English practice of attempting to provide the successful litigant with total reimbursement." Race Tires, 674 F.3d at 164 (quoting 10 Charles Alan Wright, Arthur R. Miller, Mary Kay Kane & Richard L. Marcus, *Federal Practice and Procedure* § 2665 (3d ed. 1998)). The Supreme Court has since held **[**26]** that Congress intended with the Fee Act to "impose rigid controls on cost-shifting in federal courts." Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 444, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987). Thus, *§ 1920* "define[s] the full extent of a federal court's power to shift litigation costs absent express statutory authority to go further." W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 86, 111 S. Ct. 1138, 113 L. Ed. 2d 68 (1991).

The language of *§ 1920(4)* first appeared in § 3 of the Fee Act, stating that "lawful fees for exemplifications and copies of papers necessarily obtained for use on trial . . . shall be taxed by a judge or clerk of the court." 10 Stat. at 168. The language was altered over the years to apply to "cases," not just trials, and courts were later given discretion to award the costs, rather than being mandated to do so. Race Tires, 674 F.3d at 165. The statute originally applied to making only "copies of paper," but now applies to the "costs of making copies of any materials." Judicial Administration and Technical Amendments Act of 2008, *Pub. L. No. 110-406, § 6, 122 Stat. 4291, 4292*; *see also* In re Ricoh Co., Ltd. Patent Litig., 661 F.3d 1361, 1365 (Fed. Cir. 2011) (**HN9**[] "[E]lectronic production of documents can constitute . . . 'making copies' under *section 1920(4)*.").

As a general rule, **HN10**[] costs and fees should be awarded to the prevailing party. Fed. R. Civ. P. 54(d)(1) ("Unless a federal statute, these rules, or court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party."). However, a district court's discretion to award costs is limited to particular types of costs enumerated in *28 U.S.C. § 1920*. *See* Crawford Fitting, 482 U.S. at 441 ("*[Section] 1920* defines **[**27]** the term 'costs' as used in Rule 54(d).").

[*927] **HN11**[] As with all statutory construction questions, we "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." FMC Corp. v. Holliday, 498 U.S. 52, 57, 111 S. Ct. 403, 112 L. Ed. 2d 356 (1990) (internal quotation marks omitted). **HN12**[] *Section 1920(4)* provides that a judge or clerk may tax "the costs of making copies of any materials where the copies are necessarily obtained for use in the case." We first focus on the phrase "making copies." *28 U.S.C. § 1920(4)*. Because this language is not defined in the statute, we apply "its ordinary meaning." Taniguchi, 132 S. Ct. at 2002.

As the Fourth Circuit explained in *Country Vintner*, "'[c]opies' has appeared in the taxation statute since its enactment in 1853, when 'copy' meant a 'transcript,' a 'writing like another writing,' or an 'imitation.'" 718 F.3d at 258 (footnotes omitted). The noun retains an almost identical meaning today."[6] The definitions for the verb "make" relevant to the context of *§ 1920(4)* include "to cause to exist, occur, or appear" and "to bring (a material thing) into being by forming, shaping, or altering material."[7] These definitions are consistent with our previous observation that **HN13**[] "*[s]ection 1920(4)* speaks narrowly of '[f]ees for exemplification and copies of papers,' suggesting that fees **[**28]** are permitted only for the physical preparation and duplication of documents, not the intellectual effort involved in their production." Romero v. City of Pomona, 883 F.2d 1418, 1428 (9th Cir. 1989), *abrogated in part on*

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[6] *See* Webster's Third New International Dictionary of the English Language Unabridged 504 (1993) (defining "copy" as "an imitation, transcript, or reproduction of an original work").

[7] Id. at 1363.

other grounds by Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1363 (9th Cir.1991) (en banc); *see also Zuill v. Shanahan, 80 F.3d 1366, 1371 (9th Cir.1996)*.

HN14[] *Section 1920(4)* further defines the awarding of costs for making copies, requiring that recoverable costs be restricted to the making of copies "necessarily obtained for use in the case." Applying the statutory construction maxim *expressio unius est exclusio alterius* (the express mention of a thing implicitly excludes others in its class), we presume that Congress recognized that ***HN15***[] costs can also be incurred in litigation for making copies that are not necessarily obtained for use in the case, and that such costs are not taxable.

Nevertheless, ***HN16***[] the statute is not so restrictive as to "specifically require that the copied document be introduced into the record to be an allowable cost." *Haagen-Dazs Co., Inc. v. Double Rainbow Gourmet Ice Creams, Inc., 920 F.2d 587, 588 (9th Cir. 1990)*. *Section 1920(4)* allows for the recovery of costs where the copies were obtained to be produced pursuant to *Rule 34* or other discovery rules. *See Country Vintner, 718 F.3d at 257 n.9* (noting decisions **[**29]** of the Federal Circuit—applying the law of this circuit—as well as the Fifth, Seventh, and Eleventh Circuits recognizing that costs are recoverable under *§ 1920(4)* for copying costs for document production).

The faithful production of electronically stored information may require processes such as optical character recognition (which renders material text-searchable), preservation of metadata, and conversion to a non-editable file format. Parties might agree to employ a particular file format or methodology for electronically stored information production, or the court might order them to produce electronically **[*928]** stored information with certain characteristics. *See In re Ricoh, 661 F.3d at 1365* (parties agreed that a third party vendor would process and store e-mails in a secure document review database). The Federal Circuit held in *CBT Flint Partners* that

> ***HN17***[] To the extent that a party is obligated to produce (or obligated to accept) electronic documents in a particular format or with particular characteristics intact (such as metadata, color, motion, or manipulability), the costs to make duplicates in such a format or with such characteristics preserved are recoverable as "the costs of making copies . . . necessarily obtained **[**30]** for use in the case." *28 U.S.C. § 1920(4)*.

737 F.3d at 1328. *See also Country Vintner, 718 F.3d at 260 n.19* ("If, for instance, a case directly or indirectly required production of [electronically stored] unique information such as metadata, we assume, without deciding, that taxable costs would include any technical processes necessary to copy [electronically stored information] in a format that includes such information."). When copies are made in a fashion necessary to comply with obligations such as these, costs are taxable so long as the copies are also "necessarily obtained for use in the case."

HN18[] That *§ 1920(4)* restricts the award of costs to those incurred for copies necessarily obtained for use in the case is not, in itself, a justification permitting the award of costs for any task necessary to the prosecution or defense of a case. As noted by the Third Circuit in *Race Tires*, "*[s]ection 1920(4)* does not state that all steps that lead up to the production of copies of materials are taxable." *674 F.3d at 169*; *see also CBT Flint Partners, 737 F.3d at 1328* ("[O]nly the costs of creating the produced duplicates are included [as recoverable], not a number of preparatory or ancillary costs commonly incurred leading up to, in conjunction with, or after duplication."). The Third Circuit further explained, again in the context of **[**31]** producing electronically stored information, that "[i]t may be that extensive 'processing' of [electronically stored information] is essential . . . . But that does not mean that the services leading up to the actual production constitute 'making copies.'" *674 F.3d at 169*.

HN19[] The proper application of a narrowly construed *§ 1920(4)* requires that the tasks and services for which an award of costs is being considered must be described and established with sufficient specificity, particularity, and clarity as to permit a determination that costs are awarded for making copies. "'Document production' and other similarly generic statements on the invoices are unhelpful in determining whether those costs are taxable." *In re Ricoh, 661 F.3d at 1368*. Further, a description of a task is useful only to the extent it accurately reflects the task for which copying costs are sought.

2

In support of its opposition to the Subscribers' motion for the district court to review costs, Netflix submitted the declaration of Vivian Liu-Somers, a project manager for Esquire Litigation Solutions, a vendor that provided litigation support services to Netflix. In her declaration, Liu-Somers identified 44 different charges appearing on Esquire Litigation's invoices, and combines **[**32]** those charges into 21 groups. For each of the 21 groups, Liu-Somers provided a brief description of the services to which the charges refer.

The Subscribers challenge certain of these groups of charges as not taxable under *§ 1920(4)*, further combining them into four broader task categories: (1) "data upload," (2) "endorsing," (3) "keyword," and (4) "professional services." **[*929]** The Subscribers also challenge a charge invoiced by SFL Data, a different litigation support vendor providing services to Netflix, for "Electronic Data Discovery" tasks. We review each of the five challenged categories of charges asserted by the Subscribers in turn.

a

As challenged by the Subscribers, the "data upload" category of charges refers to two different groups of charges described by Liu-Somers in her declaration. She grouped the charges of "Data Upload," and "Catalyst Data Upload," and indicated that these charges referred "to the reproduction of documents for potential production into a database where they could be viewed." Separately, Liu-Somers described the charge of "Upload Production Documents" as referring "to the process of reproducing the collection of the documents actually being produced for viewing after **[**33]** all the processes necessary to prepare the documents in the required formats and with the required labels have been completed."

The Subscribers' challenge to these costs rests on the use of the word "upload" in the description of the charge. They note that an "upload" of electronically stored information is the movement of data from one location to another, and indicates the data is being transmitted.[8] The Subscribers argue that the costs incurred for such a task are not recoverable under *§ 1920(4)* because the task is "akin to the costs of moving boxes of information from client site to law firm to the room where reviewers would review them." Focusing on the word "reproduction" in both of Liu-Somers' descriptions of the services performed, Netflix responds that the task of uploading data was not merely for moving data, but necessarily involved "making copies." Neither argument fully responds to the question of whether the charges are taxable under *§ 1920(4)*.

HN20[↑] Consideration of whether certain tasks are taxable pursuant to *§ 1920(4)* "calls for some common-sense judgments guided by a comparison with the paper-document analogue." *CBT Flint Partners, 737 F.3d at 1331*. Instead of moving boxes of information, an upload of data is more akin to the paper-document analogue of faxing a document from the client site to the law firm, a process which involves the transmitting of data from location to location and which also results in a facsimile copy of the original document.

HN21[↑] The cost of making the copy is not rendered non-taxable merely because it was created by using fax machines rather than a photo-copier. Conversely, *§ 1920(4)* does not award costs merely because a process resulted in the creation of a copy. That the fax process creates a copy does not, by itself, establish that the cost is taxable under *§1920(4)*. Rather, a further determination is required: whether the copy was necessarily obtained for use in the case. Like any other copy, if the faxed copy was created to be produced in discovery, the cost of making the fax would be taxable under *§ 1920(4)*. However, if the faxed copy was created solely **[**35]** for the convenience of counsel, the cost of making the copy would not be taxable.

Liu-Somers' description of the "data upload" and "catalyst data upload" charges indicates the uploading process created new copies of documents inside a database. **[*930]** Assuming, without deciding, that the specific uploading task constituted "making copies," the further determination is required whether the copies were necessarily obtained for use in the litigation. Liu-Somers declared that "the reproduction of documents was a

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[8] "Upload: To move data from one location to another in any manner, such as via modem, network, serial cable, internet connection or wireless signals; indicates that data is being transmitted to a location from a location." The Sedona Conference, *The* ***[**34]*** *Sedona Conference Glossary: E-Discovery & Digital Information Management* 48 (Sherry B. Harris et al. Eds., 4th ed. 2014).

necessary step in the document production process because it facilitated a selection of documents for production from the set of documents for potential production." This description establishes only that the copies were essential to the document production process, and fails to establish the copies were necessarily obtained for use in the litigation.

HN22[] A narrow construction of *§ 1920(4)* requires recognition that the circumstances in which a copy will be deemed "necessarily obtained" for use in a case will be extremely limited. That a chosen "document production process" requires the creation of a copy does not establish that the copy is necessarily obtained for use in the case. A lawyer may review **[**36]** electronically stored information for privilege either by viewing the original documents on the client's computer or, alternatively, by viewing copies uploaded to the lawyer's computer. Although the latter method of review requires the creation of a copy, the ability to conduct the review by looking at the original document establishes that the uploaded copy was not necessarily obtained for use in the case.

Similarly, Liu-Somers' description of the charges for "Upload Production Documents" indicates that the copies were created as a "necessary step in the document production process in order to view the documents as they appeared in the actual production being made." As with Netflix's description of the other "uploading" charges, this description establishes only that the copy is essential to the document production process that Netflix (or its litigation support vendor) elected to employ, and fails to establish the copies were necessarily obtained for use in the case. Accordingly, these charges are non-taxable under *§ 1920(4)*.

b

The Subscribers also challenge what they describe as "endorsing" activities. However, the only indication in the Subscribers' opening brief that they have even challenged **[**37]** the award costs for "endorsing" activities is the cursory mention, in their Statement of Facts, that "Netflix incurred $21,134.82 for 'Endorsing' tasks, which included the 'branding of image files with unique sequential production numbers and confidentiality designations." ***HN23***[] Because these matters were not "specifically and distinctly argued" in the open briefing, we will not consider them. *Christian Legal Soc'y Chapter of Univ. of Cal. v. Wu, 626 F.3d 483, 487 (9th Cir. 2010)*.

c

The Subscribers challenge the cost award for what they term "keywording" activities. As described by Liu-Somers in her declaration, Esquire Litigation used a variety of terms to charge Netflix "for the use of automated software processes to reproduce the set of documents for potential production into a reduced set of documents that did not include certain types of documents that did not need to be produced." Netflix attempts to shoehorn the filtering process into the ordinary meaning of "making copies" by arguing that filtering is "simply a mechanical process of making a copy of all documents that fit the supplied criteria." The argument reveals its own flaw, disclosing that the charge was incurred for two separate tasks: (a) identifying the documents that fit the supplied criteria, and then (b) **[**38]** making copies of those documents. The former task is akin to a person (lawyer, paralegal, or otherwise) mechanically reviewing **[*931]** a stack of documents and (based upon criteria supplied by a lawyer) separating them into two piles: one consisting of documents that might be potentially be produced, and the other consisting of documents that will not be produced. Netflix argues that its vendor "simply performed the mechanical process of applying the criteria it received from Netflix's attorneys to the documents being *reproduced for production* in the required formats" (emphasis added). The argument is contradicted by Netflix's implicit acknowledgment that the filtering process was also applied to documents that were not copied. As such, the application of automated software filtering processes to identify which documents to copy and which documents to not copy is not taxable.[9]

d

The Subscribers challenge the cost award **[**39]** for "professional services." Absent from Liu-Somers' declaration are descriptions for any charges titled "Professional Services," indicating the Subscribers' label for this category

[9] While the second task of making copies of the documents arguably falls within the ordinary meaning of "making copies," the record suggests that the charges invoiced by Esquire Litigation for the various keywording tasks were not for making the copies, but for the filtering process.

amounts to a generic statement "unhelpful in determining whether those costs are taxable." *In re Ricoh, 661 F.3d at 1368*. In their opening brief, the Subscribers further describe this category as including "activities like processing, native review, data analysis, project management, and production services." Liu-Somers' declaration demonstrates that the Subscribers have grouped an extremely broad range of activities into a single category. The declaration includes descriptions for a variety of narrower categories, ranging from "the imaging of the documents to create an electronic 'page' ready for bates and confidentiality branding and redactions" through "prepar[ing] the documents for production in the required formats." Netflix's response is equally generic and unhelpful, asserting that "these are all costs required in order to make copies of the information being produced" and "are akin to the costs of copy center employees, photocopy technicians, copier repairmen, and other overhead costs included with the flat per page rate charged by traditional **[**40]** outside photocopy vendors—costs which have always been deemed recoverable." The record before us leaves us unable to resolve whether any of the large variety of specific charges that the Subscribers broadly challenge as "professional services" are taxable under a narrow construction of *§ 1920(4)*. Thus, we must remand the issue to the district court for its determination in the first instance.

e

Finally, the Subscribers challenge a specific item on one invoice from SFL Data, asserting the charge was for "native review processing." Netflix counters that the invoice actually states that the "cost involved the copying of nearly 80GB of data for production constituting 167,311 documents." The $10,000 cost appears to have been incurred (at a flat rate per agreement with Netflix) for a variety of different tasks, including native review processing, optical character recognition, exporting documents, converting documents to TIFF, populating custom fields, and prepping for further processing. Although the cost incurred for some of these tasks appears to be taxable, the present record does not permit a conclusion that all of the tasks for which SFL charged Netflix a flat rate of $10,000 are taxable. To **[**41]** the extent the invoiced tasks exceeded optical character recognition, conversion to **[*932]** TIFF, and other activities essential to the making of copies necessary to the case, they are not taxable.

3

In summary, we conclude that of the $317,616.69 challenged by the Subscribers as non-taxable under *§ 1920(4)*, only those costs attributable to optical character recognition, converting documents to TIFF, and "endorsing" activities—all of which were explicitly required by Subscribers—are recoverable on the record before us. We therefore affirm the cost award in part, and vacate it in part. We remand for taxing of costs in accordance with this opinion.

B

The district court did not abuse its discretion in awarding $245,471.31 in consulting fees, TIFF images, and copying costs.

1

The Subscribers first complain that the district court failed to explain its findings adequately. However, ***HN24***[] "a district court need not give affirmative reasons for awarding costs; instead, it need only find that the reasons for denying costs are not sufficiently persuasive to overcome the presumption in favor of an award." *Save Our Valley v. Sound Transit, 335 F.3d 932, 945 (9th Cir. 2003)*.

Here, the district court explained in its order that it "read the parties' papers and carefully considered their arguments **[**42]** and the relevant legal authority." Further, the order specifically identified the Subscribers' arguments concerning "TIFF conversion costs; copying/'blowback' costs . . . documents productions purportedly not delivered; professional fees re visual aids." Under our deferential standard of review, the district court's explanation was sufficient. *See Save Our Valley, 335 F.3d at 945* ("[W]e have never held that ***HN25***[] a district court must specify reasons for its decision to abide the presumption and tax costs to the losing party." (emphasis in original)).

2

The Subscribers next contend that the costs claimed for preparing visual aids were actually unrecoverable consulting fees, relying on invoice descriptions of the title of the person performing the work. To be sure, *HN26*[] "[f]ees for exemplification and copying are permitted only for the physical preparation and duplication of documents, *not the intellectual effort involved in their production." Zuill v. Shanahan, 80 F.3d 1366, 1371 (9th Cir. 1996)* (emphasis added) (internal quotation marks and citation omitted). However, there is no authority for the proposition that the title of the person doing the work is relevant to classifying the type of work actually done. In fact, courts have held otherwise. *See* *Race Tires, 674 F.3d at 169* ("Neither the degree of expertise necessary **[**43]** to perform the work nor the identity of the party performing the work of 'making copies' is a factor that can be gleaned from *§ 1920(4)*."). In addition, evidence was presented by Netflix that the vendors were only paid to perform the tasks associated with production and not for creating the substantive content of the visual aids. Thus, the record supports the district court's conclusion that the tasks done by the consultants were not "intellectual effort," regardless of the job title listed on the invoices. The district court did not abuse its discretion in awarding $14,355.50 in costs for preparation of visual aids.

3

The district court did not abuse its discretion in awarding costs for TIFF conversions. The Subscribers argue that they were taxed $167,399.70 in excessive TIFFing **[*933]** costs because Netflix paid an unreasonable amount per TIFF page. The Subscribers' expert concluded that the rate of seven cents per page of TIFF conversion was unreasonable because it was above market and because Netflix's first invoice from its ediscovery vendor charged only two cents per page. Netflix's expert testified that the costs Netflix charged were reasonable. He testified that Netflix reviewed proposals from **[**44]** six electronic discovery vendors and that the firm that Netflix eventually went with offered the lowest prices to convert documents to TIFF images out of the six solicited firms. Netflix's expert further explained that the two-cent rate was charged only for a certain type of conversion—PDF to TIFF—and that the total bill for this batch was a mere $54.08.

The district court fully considered the two expert opinions and decided in favor of Netflix. Given our deferential standard of review, there is no basis to disturb that conclusion.

The Subscribers also contend that Netflix was awarded costs for documents unnecessarily produced, resulting in an overcharge of $46,773.71. However, the record does not support that conclusion, and the district court did not abuse its discretion in awarding these TIFF-related costs.

The district court did not abuse its discretion in awarding $16,942.40 for copying paper documents. The Subscribers contend that the documentation for these costs was inadequate. However, the invoices at issue indicate the purpose of the charge, such as printing exhibits and copying deposition transcripts, as well as the dates the work was done. Moreover, Netflix supported its bill **[**45]** of costs with a declaration from one of Netflix's attorneys, who clarified that certain documents were produced as "exhibits to depositions" and "disclosure or formal discovery documents." Netflix provided sufficient information for the district court to identify the documents being reproduced and, ultimately, to determine which costs were taxable. The district court did not abuse its discretion in awarding these costs.

C

The district court also did not abuse its discretion in declining to award Netflix $21,000 for producing certain black and white PowerPoint documents. The Subscribers had requested "single-page Group IV TIFF files," which is a black and white version, and separately requested that all documents "be produced in the same order as they are kept or maintained by you in the ordinary course of your business." In the usual course of business, Netflix maintained the PowerPoint in color. However, throughout discovery, Netflix produced black and white PowerPoint presentations. At some point during the litigation, Netflix submitted to the court a color version of a PowerPoint presentation. When the Subscribers learned that were colored slides available, they requested them, arguing **[**46]** that Netflix's failure to do so previously violated the instruction to produce documents as they were normally kept by Netflix. Because Netflix maintained colored slides in the ordinary course of business, the district court concluded that the Subscribers were entitled to production of the documents under their previous discovery requests. Although production of color slides was in some sense duplicative of the previously-produced black and white slides, the district court did not abuse its discretion in denying the cost award given the separate discovery requests, and the fact that Netflix likely could have avoided the duplicative production by first producing the color documents maintained in the usual course of business. The district court was not confused about **[*934]** the issue, as Netflix claims. To the contrary, the record reflects that the district court understood the issue and decided under the circumstances that a cost award was appropriately denied. The district court did not abuse its discretion in doing so.

IV

In sum, we affirm the district court's grant of summary judgment on the antitrust claims, for lack of antitrust injury-in-fact. We affirm the cost award in part and reverse **[**47]** it in part. We need not, and do not, reach any other issue urged by the parties.

AFFIRMED IN PART; **VACATED IN PART**; **REMANDED**.

Each party shall bear its own costs on appeal.

Bilinski v. Keith Haring Found., Inc.

United States District Court for the Southern District of New York

March 6, 2015, Decided; March 6, 2015, Filed

14cv1085 (DLC) (Consolidated)

Reporter

96 F. Supp. 3d 35 *; 2015 U.S. Dist. LEXIS 27811 **; 2015-1 Trade Cas. (CCH) P79,102

ELIZABETH BILINSKI, et al., Plaintiffs, -v- THE KEITH HARING FOUNDATION, INC., et al., Defendants.

Subsequent History: Affirmed by *Bilinski v. Keith Haring Found., Inc., 2015 U.S. App. LEXIS 20835 (2d Cir. N.Y., Dec. 2, 2015)*

Core Terms

authentication, press release, artwork, defamation, Exhibition, conspiracy, plaintiffs', motion to dismiss, special damage, defendants', auction, Collection, lawsuit, fake, business relationship, privileged, sanctions, dealer, state law claim, defamatory, organizers, antitrust, unjust enrichment, disparagement, advertising, customers, Gallery, houses, intellectual property rights, tortious interference

LexisNexis® Headnotes

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

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

When deciding a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), a court must accept all allegations in the complaint as true and draw all inferences in the non-moving party's favor. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A complaint must do more than offer naked assertions devoid of further factual enhancement. A court is not bound to accept as true a legal conclusion couched as a factual allegation.

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

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

For purposes of a motion to dismiss for failure to state a claim, a court deems a complaint to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference, as well as documents that the plaintiffs either possessed or knew about and upon which they relied in bringing the suit.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN3[] Sherman Act, Claims

Section 1 of the Sherman Act declares illegal every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations. *15 U.S.C.S. § 1*. Although the language is capacious, it has been interpreted to outlaw only unreasonable restraints on trade. In order to state a claim under *§ 1*, a plaintiff must allege: (1) a contract, combination, or conspiracy between two legally distinct entities; (2) in restraint of trade; (3) affecting interstate commerce. The ultimate existence of an agreement under ***antitrust law*** is a legal conclusion, not a factual allegation. At the motion to dismiss stage, a plaintiff must allege enough facts to support the inference that a conspiracy actually existed. This can be accomplished by alleging direct evidence of an agreement, or by presenting circumstantial facts supporting the inference that a conspiracy existed.

Antitrust & Trade Law > Sherman Act > Claims

HN4[] Sherman Act, Claims

Generally, a claim under *Section 1 of the Sherman Act* requires concerted action between separate legal entities. In some instances, a conspiracy may exist among persons within a single organization when it joins together separate economic actors pursuing separate economic interests such that the agreement deprives the marketplace of independent centers of decisionmaking and therefore of a diversity of entrepreneurial interests and thus of actual or potential competition. Courts look at the competitive reality rather than the legal organization to determine if a conspiracy may exist within one legal entity.

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

Copyright Law > Scope of Copyright Protection > Ownership Rights

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

HN5[] Actual Monopolization, Claims

To state a claim for monopolization under *Section 2 of the Sherman Act*, *15 U.S.C.S. § 2*, a plaintiff must allege: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. The core element of a monopolization claim is market power, which is defined as the ability to raise price by restricting output. To prove a monopolization claim, plaintiffs may demonstrate market power in one of two ways: either through direct evidence that the defendant can control prices or exclude competition, or through defendants' share of the relevant market. The possession of a copyright interest in property is a limited grant of monopoly privileges. The holder of intellectual property rights may enforce these rights, even in circumstances where it is not clear that conduct is actually infringing.

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

HN6[] False Advertising, Lanham Act

To constitute commercial advertising or promotion under the *Lanham Act*, a statement must be: (1) commercial speech; (2) made for the purpose of influencing consumers to buy defendant's goods or services; and (3) although representations less formal than those made as part of a classic advertising campaign may suffice, they must be disseminated sufficiently to the relevant purchasing public.

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

HN7[] **Supplemental Jurisdiction, Pendent Claims**

Where no federal claims remain in an action, and diversity jurisdiction is lacking, a district court is not required to retain jurisdiction of remaining state law claims. *28 U.S.C.S. § 1367(c)(3)*. A district court may, however, at its discretion, exercise supplemental jurisdiction over state law claims even where it has dismissed all claims over which it had original jurisdiction. The court must consider and weigh in each case, at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over pendent claims.

Torts > ... > Defenses > Privileges > Absolute Privileges

HN8[] **Privileges, Absolute Privileges**

Under New York law, statements made in the course of legal proceedings are absolutely privileged if pertinent to the litigation. This privilege is not lost even in the presence of actual malice. Furthermore, while statements must be pertinent to the litigation to be privileged, this is the broadest of possible privileges and any matter which, by any possibility, under any circumstances, at any stage of the proceeding, may be or may become material or pertinent is protected by an absolute privilege even though such matter may be ineffectual as a defense.

Torts > Intentional Torts > Defamation > Elements

Torts > Intentional Torts > Defamation > Libel

HN9[] **Defamation, Elements**

Defamation or libel require a plaintiff to show: (1) a written defamatory factual statement concerning the plaintiff; (2) publication to a third party; (3) fault; (4) falsity of the defamatory statement; and (5) special damages or per se actionability. A plaintiff in a libel action must identify a plausible defamatory meaning of the challenged statement. If the statement is susceptible of only one meaning the court must determine, as a matter of law, whether that one meaning is defamatory.

Torts > Intentional Torts > Defamation > Libel

HN10[] **Defamation, Libel**

New York law distinguishes between defamation of a person and defamation of a product. The bare accusation that a product does not conform to its advertised quality does not, without more, defame the owner of the product. Where a statement impugns the basic integrity or creditworthiness of a business, an action for defamation lies. Where, however, the statement is confined to denigrating the quality of the business's goods or services, it could support an action for disparagement, but will do so only if the additional elements for trade libel are proven.

Torts > ... > Business Relationships > Intentional Interference > Elements

HN11[] **Intentional Interference, Elements**

To prevail on a tortious interference with business relations claim, a plaintiff must demonstrate that: (1) it had a business relationship with a third party; (2) the defendant knew of that relationship and intentionally interfered with it; (3) the defendant acted solely out of malice, or used dishonest, unfair, or improper means; and (4) the defendant's interference caused injury to the relationship.

Torts > Intentional Torts > Defamation > Elements

Torts > Intentional Torts > Defamation > Libel

HN12[] **Defamation, Elements**

Defamation of a product or good, rather than a person, constitutes a distinct cause of action under New York law. To recover for disparagement of goods, the plaintiff must show that the defendant published a defamatory statement directed at the quality of a business's goods and must prove that the statements caused special damages. Generally, special damages means the loss of something having economic or pecuniary value. Where loss of customers constitutes the alleged special damages, the individuals who ceased to be customers, or who refused to purchase, must be named and the exact damages itemized. Pleading damages as a round number with no attempt at itemization alleges general rather than special damages.

Torts > Intentional Torts > Prima Facie Tort > Elements

HN13[] **Prima Facie Tort, Elements**

Under New York law there are four elements to a prima facie tort claim: (1) an intentional infliction of harm; (2) without excuse or justification and motivated solely by malice; (3) resulting in special damages; (4) by an act that would otherwise be lawful.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

HN14[] **Types of Contracts, Quasi Contracts**

The basic elements of an unjust enrichment claim in New York require proof that: (1) a defendant was enriched; (2) at the plaintiff's expense; and (3) equity and good conscience militate against permitting the defendant to retain what plaintiff is seeking to recover. The benefit acquired by the defendant must be specific and directly related to the loss suffered by the plaintiff.

Counsel: **[**1]** For Plaintiffs: Brian C. Kerr, Brower Piven, A Professional Corporation, New York, NY.

For Defendants: Margaret Antinori Dale, Qian Jennifer Yang, Sarah Schrank Gold, Proskauer Rose LLP (NY), New York, NY.

Judges: DENISE COTE, United States District Judge.

Opinion by: DENISE COTE

Opinion

[*39] OPINION & ORDER

DENISE COTE, District Judge:

Plaintiffs assert that they are owners of Keith Haring artwork and that the actions the Keith Haring Foundation ("Foundation") and related defendants interfered with the exhibition and sale of their artwork, reducing the value of their property. Keith Haring ("Haring"), who died in 1990, was a prolific artist and social activist whose work responded to the New York City street culture of the 1980s. Plaintiffs bring federal and state antitrust claims, as well as a false advertising claim under the *Lanham Act*. Plaintiffs also seek relief under New York law for defamation, conspiracy to defame, tortious interference with prospective business relations, trade libel, intentional infliction of economic harm/prima **[*40]** facie tort, and unjust enrichment. Defendants have moved to dismiss the complaint in its entirety. For the following reasons, defendants' motion to dismiss is granted.

BACKGROUND

This motion **[**2]** to dismiss is addressed to a consolidated amended complaint ("Complaint") filed on August 13, 2014. This is the third motion to dismiss the claims in this action, the plaintiffs having been given an opportunity to amend in response to the two prior motions.[1]

The following facts are asserted in the Complaint and taken from documents integral to it. This case principally concerns the authentication and sale of Haring artwork. Defendants **[**3]** include the Foundation, a New York not-for-profit corporation established by Haring to continue his philanthropic legacy, and individual officers and directors of the Foundation Julia Gruen ("Gruen"), Kristen Haring, Gilbert Vazquez ("Vazquez"), Allen Haring, Tom Eccles, and Judith Cox. The Complaint also names as defendants Studio LLC, the entity that formally operated an authentication committee for the Foundation, as well as the Estate of Keith Haring ("Estate") and David Stark ("Stark"), the president of Artestar, a company that represents the Foundation in licensing and consulting. Gruen and Stark are compensated by the Foundation; Gruen receives a salary and Stark receives fees for licensing and consulting work.

Haring bequeathed the majority of his works to the Foundation, as well as "any copyrights relating hereto" and trademarks.[2] The Foundation has maintained a collection of Haring works since his death, valued at approximately $25 million as of 2011. The Foundation earns income by selling pieces from its collection.

Haring's work is valuable. From 2008 to 2011, the Foundation sold an unspecified number **[**4]** of Haring works for a total of $4,598,697. In May 2014, three Harings were sold through the auction house Sotheby's. Two of these pieces were sold for $9,458,000 by Jeffrey Deitch ("Deitch"), who the Complaint describes as an "ally" of the defendants.

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[1] Two separate actions were filed by two groups of plaintiffs on February 21, 2014, and March 7, and joined in a consolidated complaint filed on June 24. On August 13, the plaintiffs amended that pleading in response to a motion to dismiss filed on July 25. The plaintiffs who filed suit on February 21 are Elizabeth Bilinski ("Bilinski"), George Lathqouras, Lisa Cubisino, Jacqueline Petruzzelli, Anthony Petruzzelli, Arthur Canario, Geraldine Biehl, Jesus Ramos, and Lucas Schoormans. The plaintiffs who filed suit on March 7 are Tami Sturm, Maxine Kobley, Stephen Kobley, Dianne Duncan, Randy Nichols, Inez Strysick, Beverly Costello, Brendan Costello, Khristos Karastathis, Eva Karastathis, and Geri Berman. The first motion to dismiss was filed on May 9, 2014.

[2] Haring also bequeathed works to defendants Gruen, Kristen Haring, and Vazquez.

Until 2012, the Foundation operated an Authentication Committee ("Committee") to review artwork attributed to Haring and issue opinions regarding the authenticity of submitted works. Although the Committee was formally operated by Studio LLC, it was controlled by the Foundation. The dissolution of the Committee in 2012 has increased the value of previously-authenticated works.

Many auction houses require a certificate of authentication as a condition of sale, but will sell Haring artwork without a certificate with the tacit approval of the Foundation. Haring artwork may also be sold privately at reduced prices without authentication or the Foundation's approval.

[*41] The plaintiffs own 111 pieces of Haring work they believe to be authentic.[3] All of this artwork came to the plaintiffs through Angelo Moreno ("Moreno"), who was a personal friend of Haring. Delta Cortez ("Cortez"), who also knew Haring, acted on behalf of Moreno to sell a number of **[**5]** Moreno's Harings to plaintiff Elizabeth Bilinski ("Bilinski Collection").

In January 2007, Bilinski showed the Bilinski Collection to an art dealer, plaintiff Lucas Schoormans ("Schoormans"). Working on Bilinski's behalf, Schoormans submitted photographic transparencies for thirteen works on March 28, 2007, and transparencies for an additional twenty-eight works on May 4, to the Foundation. Schoormans also submitted letters of provenance from Cortez and Moreno. On May 7, 2007, the Foundation rejected the works as "not authentic." The letter of rejection did not provide a reason for the rejection, and stated that the determination by the Committee could "change by reason of circumstances arising or discovered . . . after the date of this opinion." Following the Foundation's rejection, Bilinski gathered additional evidence of authenticity. This evidence included a signed statement of origin from Moreno, in which he explained that he had received the works as gifts from Haring. An attorney for Bilinski and Schoormans deposed Moreno and Cortez.[4]

On May 8, 2008, the Foundation accused Bilinski in writing of selling or making "available for sale items you are representing to be original works by Keith Haring when you have been duly warned they are not," and warned Bilinski that legal action could follow if she did not cease this activity. Despite Bilinski's efforts to address the matter with the Foundation in 2008, the Foundation refused to respond.

In 2010, Bilinski resumed her efforts to sell her collection. In the spring or summer of 2010, Bilinski brought the Bilinski Collection to Sotheby's. A Sotheby's representative indicated his belief that the works were authentic, but reported that he could not do anything to help her because of Gruen. Bilinski then brought the works to Gagosian Gallery on May 26, 2010. After conferring with Gruen and others, the gallery refused to offer the works for sale.

Bilinski then sought to resubmit the pieces to the Foundation for authentication. In July **[**7]** 2010, Bilinski's representative, Petruzzelli,[5] wrote to the Foundation that Bilinski now had the necessary information to authenticate her collection. Gruen asked that Bilinski provide a written Power of Attorney or notarized letter authorizing Petruzzelli to speak on her behalf, and that she resubmit the Bilinski Collection through her attorneys on account of Bilinski's previous threats to sue. In response to Petruzzelli's inquiry, on February 7, 2011, the Foundation informed Bilinski that it would not reconsider its judgment about the authenticity of the Bilinski Collection.

In 2012, Bilinski received further confirmation that her Haring works were authentic. The auction house Guernsey's told Bilinski that the works appeared to be authentic and it would be willing to produce an auction of the Bilinski Collection. Bilinski commissioned a forensic analysis of two of the works. The analysis concluded **[*42]** that the two paintings "could be considered as having been produced in the mid-1980s."

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[3] A list of the works owned by plaintiffs is attached as Exhibit A to the Complaint. Plaintiffs do not identify which plaintiffs own which works.

[4] The **[**6]** Complaint states that Bilinski contacted the Foundation in 2010 seeking to resubmit the entire Bilinski Collection to the Committee for authentication. It does not indicate whether this additional material was also submitted to the Foundation.

[5] The Complaint identifies Bilinski's representative by a last name only.

In early 2013, the plaintiffs participated in an exhibition organized by Michael Rosen ("Rosen") and Colored Thumb Corp. ("Colored Thumb") **[**8]** featuring the plaintiffs' Haring works ("Miami Exhibition"). The Miami Exhibition had a VIP opening on March 6, and was scheduled to run from March 7-10. Stark went to the exhibition to ascertain the authenticity of the works shown.

On March 8, the Foundation filed suit against Rosen and Colored Thumb ("Miami Complaint") and sought a temporary restraining order. The Miami Complaint described the works shown in the Miami Exhibition as "fakes, forgeries, counterfeits and/or infringements." The motion for a temporary restraining order referred to the show as "fraudulent." That same day, the Foundation and the organizers of the Miami Exhibition agreed to the removal of all but ten works from the Miami Exhibition, and to remove and destroy all copies of the brochure and/or catalog for the Miami Exhibition ("Agreement"). In a press release of March 8 ("Press Release"), the Foundation described the lawsuit as an "effort to stop the display of fake Haring works at the exhibition." The Press Release reports that the organizers of the Miami Exhibition "agreed to remove all fake Haring works from the exhibition immediately and to destroy the offending catalogue that illustrated most of the fake **[**9]** works." The Press Release also stated that the Foundation "plans to continue to pursue this lawsuit, carrying the message that it will enforce the Foundation's rights and protect the artist's legacy in every case of suspected fraud." Plaintiff Arthur Canario ("Canario") lost the sale of artwork to an unidentified museum in London as a result of the Press Release and Miami litigation.

DISCUSSION

HN1[] When deciding a motion to dismiss under *Rule 12(b)(6), Fed. R. Civ. P.*, a court must "accept all allegations in the complaint as true and draw all inferences in the non-moving party's favor." *LaFaro v. New York Cardiothoracic Group, PLLC, 570 F.3d 471, 475 (2d Cir. 2009)*. To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citation omitted). A complaint must do more than offer "naked assertions devoid of further factual enhancement." Id. (citation omitted). A court is "not bound to accept as true a legal conclusion couched as a factual allegation." Id.

HN2[] "For purposes of a motion to dismiss, we have deemed a complaint to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference, as well as . . . documents that the plaintiffs either **[**10]** possessed or knew about and upon which they relied in bringing the suit." *Rothman v. Gregor, 220 F.3d 81, 88 (2d Cir. 2000)* (citation omitted). Plaintiffs have attached images and descriptions of their artwork to the Complaint. The Complaint also relies upon the Miami Complaint and Press Release. These materials may be considered in deciding the motion to dismiss.

I. The Antitrust Claims

Two of the nine claims raised in the Complaint assert violations of *Sections 1* and *2 of the Sherman Act*, and the corresponding New York State antitrust statute, the Donnelly Act.[6] The defendants **[*43]** have raised several grounds to support dismissal. It is unnecessary to discuss each of them. Assuming without deciding that the plaintiffs have antitrust standing, their claims are timely, and the Noerr-Pennington doctrine does not immunize the

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[6] Except when state policy or legislative history dictates otherwise, the Donnelly Act is generally coextensive with the *Sherman Act*. See *Gatt Commc'ns, Inc. v. PMC Assoc., LLC, 711 F.3d 68, 81 (2d Cir. 2013)* (citing *X.L.O. Concrete Corp. v. Rivergate Corp., 83 N.Y.2d 513, 518, 634 N.E.2d 158, 611 N.Y.S.2d 786 (1994))*. No party has identified, and the Court has not found, any state policy or legislative history that would require a different interpretation of the Donnelly Act in **[**11]** this case. This Opinion thus analyzes the *Sherman Act* and Donnelly Act claims collectively.

filing of the Miami Complaint,[7] the defendants' motion to dismiss is granted as to the *Sherman Act* and Donnelly Act claims.

A. Conspiracy in Restraint of Trade

The Complaint alleges a violation of *Section 1 of the Sherman Act*. ***HN3***[] *Section 1 of the Sherman Act* declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations." *15 U.S.C. § 1*. Although the language is capacious, it has been interpreted to "outlaw only unreasonable restraints" on trade. *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)* (citation omitted). In order to state a claim under *Section 1*, a plaintiff must allege (1) a contract, combination or conspiracy between two **[**12]** legally distinct entities, (2) in restraint of trade, (3) affecting interstate commerce. See *E & L Consulting, Ltd. V. Doman Indus. Ltd., 472 F.3d 23, 29 (2d Cir. 2006)*; *Maric v. Saint Agnes Hosp. Corp., 65 F.3d 310, 313 (2d Cir. 1995)*.

"The ultimate existence of an agreement under ***antitrust law*** . . . is a legal conclusion, not a factual allegation." *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc., 709 F.3d 129, 135-36 (2d Cir. 2013)*. At the motion to dismiss stage, a plaintiff must allege enough facts to support the inference that a conspiracy actually existed. *Id. at 136*. This can be accomplished by alleging direct evidence of an agreement, or by presenting circumstantial facts supporting the inference that a conspiracy existed. Id.

Plaintiffs essentially allege a group boycott between the defendants and "their allies" in the art world who sell Haring works. This boycott excluded the plaintiffs from that market, resulting in supracompetitive prices for Haring artwork.

The Complaint fails to state a claim under *Section 1 of the Sherman Act*. Even assuming that the market for the sale of Haring artwork constitutes a valid product market, the plaintiffs have failed to allege sufficient information about the conspiracy to give the defendants fair notice of the claim, or sufficient facts that would support the inference of interdependent, rather than independent, conduct by the alleged conspirators.

Plaintiffs describe the conspiracy, **[**13]** formed sometime in the early 90s, as being **[*44]** between "Defendants and their allies," specifically art galleries, dealers, and major auction houses who "severely restrict the supply of Haring artwork in the marketplace." All named defendants are employees of, or associated with, the Foundation. The only "ally" identified by name is Deitch, an art dealer who sold two Harings at a Sotheby's auction in 2014. Under the theory advanced in the Complaint, any refusal by an auction house, dealer, or gallery to sell a Haring without authentication by the Foundation could be a conspiratorial act. Such broad allegations do not give the defendants fair notice of the claim against them. See *In re Elevator Antitrust Litig., 502 F.3d 47, 50-52 (2d Cir. 2007)*.

Furthermore, the Complaint's allegations regarding the refusals of auction houses and others to accept plaintiffs' works can be explained by unilateral decisions motivated by entirely lawful goals. The decision by any individual entity not to sell artwork that may not be authentic is an act consistent with lawful, independent action. "[A]lleging parallel conduct alone is insufficient, even at the pleading stage." *Mayor & City Council of Baltimore, Md., 709 F.3d at 136*. After all, an art dealer may be liable under the law if it sells counterfeit work. See, e.g., *N.Y. Arts & Cult. Aff. Law § 13.01*; *U.C.C. § 2-313*.

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[7] Antitrust standing, because it is intertwined with the merits of the antitrust claim, is not jurisdictional in nature but rather relates to the merits of a claim addressed through a *12(b)(6), Fed. R. Civ. P.*, motion to dismiss. See *Lerner v. Fleet Bank, N.A., 318 F.3d 113, 128-29 (2d Cir. 2003)* (analogizing RICO's proximate cause standing requirement to antitrust standing and holding that it was not jurisdictional); *In re Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98, 107-08, 351 U.S. App. D.C. 223 (D.C. Cir. 2002)*. Similarly, issues of timeliness and Noerr-Pennington immunity are also decided as part of 12(b)(6) motion to dismiss. See *Ortiz v. Cornetta, 867 F.2d 146, 149 (2d Cir. 1989)*; *Primetime 24 Joint Venture v. Nat'l Broad., Co., 219 F.3d 92, 98 (2d Cir. 2000)*. Accordingly, the Court may reach the merits of the antitrust claims without first addressing these threshold issues.

Moreover, **[**14]** the Complaint admits that a market for unauthenticated work exists, albeit at reduced prices. Furthermore, the Complaint does not assert that the defendants provide the only means to obtain authentication of Haring works. That the Foundation is the sole source of the Foundation's authentication certificate is stating the obvious and does not bridge this gap.

In support of their claim, the plaintiffs emphasize the refusals to deal by Sotheby's and Gagosian Gallery after initial expressions of interest. The plaintiffs contend that this supports an inference of illegal collusion since it is against an art dealer's self-interest to refuse to sell artwork it believes is authentic. A refusal to sell, however, is consistent with both independent and interdependent conduct as the decision to sell artwork turns on an assessment of a number of factors. Moreover, the plaintiffs have not stated in a non-conclusory fashion any facts indicating what benefit the auction houses derive from participating in a group boycott of works they believe to be authentic but that have not been authenticated by the Foundation.[8] At its core, the Complaint asserts that auction houses and other sellers of art do not **[**15]** sell Haring works without the Foundation's approval because they fear legal retribution from the Foundation. This is an argument for monopolization, not conspiracy, and is addressed below.

Plaintiffs attempt to save the *Section 1* claim by arguing that the Complaint sufficiently alleges an intra-enterprise conspiracy within the Foundation because some directors, as owners of Haring artwork, have a personal interest in restraining the market for Haring works. Plaintiffs have also suggested that defendants Stark and Gruen, who are compensated by the Foundation, have independent economic interests in the conspiracy. This argument lacks merit.

HN4[] **[*45]** Generally, a *Section 1* claim requires concerted action between separate legal **[**16]** entities. *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*. In some instances, a conspiracy may exist among persons within a single organization when it joins together "separate economic actors pursuing separate economic interests such that the agreement deprives the marketplace of independent centers of decisionmaking and therefore of a diversity of entrepreneurial interests and thus of actual or potential competition." *Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 195, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)* (citation omitted). American Needle directs courts to look at the "competitive reality" rather than the legal organization to determine if a conspiracy may exist within one legal entity. *Id. at 196*.

The participation in the Foundation of three or more directors alleged to own Haring artwork does not "deprive the marketplace of independent centers of decisionmaking" in any sense. There is no allegation that these directors are art dealers or play a role akin to the other institutions alleged to be co-conspirators with the Foundation. The directors named as owners of Haring works acquired their artwork as bequests in Haring's will.

Nor is there any basis for asserting that, because some defendants are compensated by the Foundation, these defendants are separate competitors in the market for the sale of Haring art. The mere **[**17]** fact that a director is paid does not make a director a separate competitor in the market, even if the compensation gives the director an interest in perpetuating anticompetitive conduct.

In opposition to the defendants' motion to dismiss, the plaintiffs primarily rely on *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988)*, and *Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc., 07cv6423(LTS), 2009 U.S. Dist. LEXIS 44242, 2009 WL 1457177 (S.D.N.Y. May 26, 2009)*. Plaintiffs cite Allied Tube for the general proposition that "standard-setting" organizations are ripe for antitrust abuse, and argue that the Foundation is a "standard-setting" organization that has abused its authority. Reliance on *Allied Tube* is misplaced. The Foundation is not a standard-setting authority. It does not purport to create industry standards for competitors in the market. *Allied Tube, 486 U.S. at 500*. In any event, the existence of

[8] Plaintiffs make a single, general allegation that unnamed co-conspirators benefit from their participation in the boycott by being permitted to exhibit and display the Foundation's own collection. But, as plaintiffs acknowledge in the Complaint, they own $40 million worth of Haring artwork, and the Foundation only owns $25 million. It is not a credible inference that co-conspirators would forego the benefits of selling the plaintiffs' art solely for the privilege of selling the Foundation's.

standard-setting authority does not create a free-standing antitrust claim absent a Section 1 conspiracy or Section 2 monopoly. See id. at 509.

Simon-Whelan, though not binding on this Court, also arises from a dispute in the art world. Despite this surface similarity, however, reliance on Simon-Whelan in inapt. There, the Andy Warhol Foundation for the Visual Arts ("Warhol Foundation") was alleged to have conspired with the Andy Warhol Authentication **[**18]** Board ("Board") to restrain the market for Andy Warhol ("Warhol") artwork. Simon-Whelan, 2009 U.S. Dist. LEXIS 44242, 2009 WL 1457177, at *2. The plaintiff in Simon-Whelan alleged a conspiracy between the Warhol Foundation, which published a catalogue raisonné[9] of Warhol's work, and the Board, which authenticated or declined to authenticate submitted works. Id. By controlling both the catalogue raisonné and the Board, the defendants were alleged to exercise **[*46]** complete control over the authentication of Warhol's work, which they used to create scarcity in the market for Warhol's work.

Since the factual context in the two cases are so dissimilar, the Simon-Whelan legal analysis provides little guidance here. No catalogue raisonné exists for Haring's works, and the plaintiffs here do not premise their claim on an agreement between the Foundation and the Committee, but on an agreement between the Foundation and art dealers, auction houses, and galleries. As significantly, the defendants here ceased their authentication activities in 2012 and could not be plausibly alleged to control authentication of Haring's work. The Section 1 claim and corresponding claim under the **[**19]** Donnelly Act are dismissed.

B. Monopolization

Plaintiffs also bring a claim under Section 2 of the Sherman Act. ***HN5***[] To state a claim for monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2, a plaintiff must allege "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." Pepsico, Inc. v. Coca-Cola Co., 315 F.3d 101, 105 (2d Cir. 2002) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1996)) (summary judgment decision); see also Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 61 (2d Cir. 1997).

"The core element of a monopolization claim is market power, which is defined as the ability to raise price by restricting output." Pepsico, 315 F.3d at 107 (citation omitted). To prove a monopolization claim, plaintiffs may demonstrate market power in one of two ways: either through direct evidence that the defendant can control prices or exclude competition, or through defendants' share of the relevant market. Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 98 (2d Cir. 1998). The possession of a copyright interest in property is a "limited grant of monopoly privileges." Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 64, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993) (citation omitted). The holder of intellectual property rights may enforce these rights, even in circumstances where it is not clear that conduct is actually infringing. Id. at 65.

Plaintiffs have defined the relevant market for their **[**20]** Section 2 claim as the worldwide market for the sale of Haring works. Plaintiffs do not allege any facts regarding the defendants' market share or even that the defendants have participated in the market more recently than 2011. Rather, the Complaint essentially claims that the Foundation continues to act as an informal market regulator by threatening or initiating pretexual lawsuits to preclude authentic Haring works from being exhibited or sold. Plaintiffs contend that the defendants, as the final standard-setting authority in the authentication market and the owner of "virtually all intellectual property rights relating to Keith Haring," are able to exclude any given Haring work from the relevant market through the use of lawsuits to enforce its intellectual property rights.

Assuming that the market for the sale of Haring works constitutes a valid submarket in the art market, the plaintiffs have failed to plausibly allege a claim under Section 2. The Complaint does not provide any factual basis for the

[9] A catalogue raisonné is a comprehensive, scholarly compilation of an artist's known body of work.

contention that the defendants possess monopoly power in the relevant market. Plaintiffs do not allege that defendants have participated in the market more recently than 2011, and allege no facts regarding **[**21]** the defendants' market share. The Committee was dissolved **[*47]** in 2012 and no longer offers authentication services. As the Complaint acknowledges, there are others in the art world that provided authentication services in the past and that do so today.

The only fact alleged in support of the claim that the defendants have monopoly power is that defendants possess intellectual property rights in Haring works, and the defendants initiate lawsuits asserting those rights. Even assuming that some of these lawsuits were brought in bad faith, this does not establish unlawful monopoly power. "Regardless of whether [a copyright holder] intended any monopolistic or predatory use, [it] acquired this [copy]right . . . [and] to condition a copyright upon a demonstrated lack of anticompetitive intent would upset the notion of copyright as a limited grant of monopoly privileges." *Id. at 64* (citation omitted).

In opposition to the motion to dismiss, the plaintiffs essentially abandon their *Section 2* claim.[10] The failure to allege facts to suggest that the defendants possess unlawful monopoly power requires dismissal of the *Section 2* claim and corresponding claim under the Donnelly Act.

II. The *Lanham Act* Claim

Plaintiffs also bring a claim under the *Lanham Act*, *15 U.S.C. § 1125*, on the theory that the Miami Complaint and Press Release constitute false advertising. The *Lanham Act* provides:

> Any person who, on or in connection with any goods or services, . . . uses in commerce any . . . false or misleading description of fact, or false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1)(B) (emphasis added). ***HN6***[] To constitute commercial advertising or promotion under the *Lanham Act*, a statement must be: "(1) commercial speech, (2) made for the purpose of influencing consumers to buy defendant's goods or services, and (3) although representations less formal than those made as part of a classic advertising campaign may suffice, they must be disseminated sufficiently to the relevant purchasing public." *Gmurzynska v. Hutton, 355 F.3d 206, 210 (2d Cir. 2004)* (citation omitted). Core commercial speech is "speech which does no more than **[**23]** propose a commercial transaction." *City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 422, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993)* (citation omitted). In some instances, "commercial speech" may also include "expression related solely to the economic interests of the speaker and its audience." Id. (citation omitted).

Plaintiffs have failed to plead a claim under the *Lanham Act*. Plaintiffs allege that the Press Release and Miami Complaint were commercial in nature because they were published "with the intent of preventing sales of the [the plaintiffs'] works . . . and of increasing the value of Defendants' artworks at their expense." (Emphasis added.) This fails to allege a sufficient connection between either the Press Release or Miami Complaint and a proposed commercial transaction and thus fails to allege the essential elements of a *Lanham Act* violation.[11] The plaintiffs' **[*48]** claims under the *Lanham Act* are dismissed.

III. State Law Claims

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[10] Plaintiffs make only one reference -- in a footnote -— to **[**22]** the *Section 2* claim.

[11] The parties dispute whether a pleading could ever be considered commercial speech. It is unnecessary to reach this issue in order to resolve this motion.

Plaintiffs have also brought six separate tort claims under New York law stemming from the defendants' filing of the Miami Complaint and the issuance of the Press Release. ***HN7***[] Where no federal claims **[**24]** remain in an action, and diversity jurisdiction is lacking, a district court is not required to retain jurisdiction of remaining state law claims. *28 U.S.C. § 1367(c)(3)*; *Rocco v. New York State Teamsters Conference Pension & Retirement Fund, 281 F.3d 62, 72 (2d Cir. 2002)*. A district court may, however, "at its discretion, exercise supplemental jurisdiction over state law claims even where it has dismissed all claims over which it had original jurisdiction." *Parker v. Della Rocco, 252 F.3d 663, 666 (2d Cir. 2001)* (citation omitted). The court must "consider and weigh in each case, at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity" in order to decide whether to exercise jurisdiction over pendent claims. *Itar-Tass Russian News Agency v. Russian Kurier, Inc., 140 F.3d 442, 445 (2d Cir. 1998)*; see also *Mauro v. Southern New England Telecomm., Inc., 208 F.3d 384, 388 (2d Cir. 2000)*.

On balance, these factors weigh in favor of exercising supplemental jurisdiction over the plaintiffs' state law claims. While the federal claims have been dismissed and this motion is brought at an early stage in the litigation, the state law claims may be resolved without considering any novel or complex questions of state law. Convenience and judicial economy weigh heavily in favor of resolving these straightforward tort claims as part of this motion. Thus, the Court will exercise supplemental jurisdiction over the plaintiffs' remaining state law claims. The defendants' motion to dismiss as to the **[**25]** plaintiffs' tort claims is granted.

A. Privilege

Defendants contend that the plaintiffs' state law claims are entirely barred by the absolute privilege afforded to statements made during judicial proceedings and the statutory privilege accorded to anyone who makes a "fair report" of a lawsuit. ***HN8***[] Under New York law, statements made in the course of legal proceedings are absolutely privileged if pertinent to the litigation. *Kelly v. Albarino, 485 F.3d 664, 666 (2d Cir. 2007)* (citation omitted) (applying New York law). This privilege is not lost even in the presence of actual malice. Id. Furthermore, while statements must be pertinent to the litigation to be privileged, "this is the broadest of possible privileges and any matter which, by any possibility, under any circumstances, at any stage of the proceeding, may be or may become material or pertinent is protected by an absolute privilege even though such matter may be ineffectual as a defense." Id.

The statements in the Miami Complaint are privileged. The core issue in the Miami litigation was whether the organizers of the Miami Exhibition falsely claimed that the displayed works were created by Haring, thereby infringing on the Foundation's intellectual property rights. The statements **[**26]** in the Miami Complaint alleged to be tortious -- namely, statements describing the plaintiffs' works as fakes or counterfeits -- are directly relevant to that central dispute. The statements in the Miami Complaint are therefore privileged and may not be the basis for a tort claim.

The statements in the Press Release, however, are not privileged. New York law provides that "[a] civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding . . . ." *N.Y. Civ. Rights Law § 74*. Whether or not the fair reporting privilege **[*49]** applies requires a determination of whether or not the report is "substantially accurate." *Karedes v. Ackerley Grp., 423 F.3d 107, 119 (2d Cir. 2005)* (citation omitted). Application of the fair reporting privilege is inappropriate at the motion to dismiss stage if a reasonable jury could conclude that the report "suggest[ed] more serious conduct than that actually suggested in the" judicial proceeding. Id. (citation omitted).

The Press Release characterized the Agreement between the parties as an agreement to remove "fake" Haring works.[12] The Agreement, however, does not contain any admission by the organizers of the Miami Exhibition that the removed works were inauthentic, and proffers **[**27]** no reason for the removal of the disputed works.

[12] The Miami litigation was later settled on February 28, 2014, through a stipulation of dismissal. This stipulation did not contain any agreement about the authenticity of the works displayed at the Miami Exhibition.

Accordingly, a reasonable jury could find that the Press Release stated that the parties had agreed that the works were inauthentic, a conclusion not warranted by the terms of the Agreement. For the purposes of this motion, it is therefore assumed that the fair reporting privilege does not apply to statements made in the Press Release.[13]

B. Defamation and Conspiracy to Defame

HN9[] Defamation or libel require a plaintiff to show: "(1) a written defamatory factual statement concerning the plaintiff; (2) publication to a third party; (3) fault; (4) falsity of the defamatory statement; and (5) special damages or per se actionability." *Chau v. Lewis, 771 F.3d 118, 126-27 (2d Cir. 2014)* (citation omitted) (applying New York law). "A plaintiff in a libel action must identify a plausible defamatory meaning of the challenged statement . . . . If the statement is susceptible of only one meaning the court must determine, as a matter of law, whether that one meaning is defamatory." *Celle v. Filipino Reporter Enterprises Inc., 209 F.3d 163, 178 (2d Cir. 2000)* (citation omitted) (applying New York law).

HN10[] New York law distinguishes between defamation of a person and defamation of a product. *Ruder & Finn Inc. v. Seaboard Sur. Co., 52 N.Y.2d 663, 670-71, 422 N.E.2d 518, 439 N.Y.S.2d 858 (1981)*. The bare accusation that a product does not conform to its advertised quality does not, without more, defame the owner of the product.

> Where a statement impugns the basic integrity or creditworthiness of a business, an action for defamation lies . . . . Where, however, the statement is confined to denigrating **[**29]** the quality of the business' goods or services, it could support an action for disparagement, but will do so only if [the additional elements for trade libel] are proven.

Id. at 670-71; see also *El Meson Espanol v. NYM Corp., 521 F.2d 737, 739-40 (2d Cir. 1975)* (applying New York law and finding **[*50]** that an article stating that a restaurant was a good place to meet for drug deals did not defame the owner, when it did not state that the owner knew or participated in the illegal activity); *Harwood Pharmacal Co. v. Nat'l Broad. Co., 9 N.Y.2d 460, 462-63, 174 N.E.2d 602, 214 N.Y.S.2d 725 (1961)* (noting that mere disparagement of the quality of a product does not defame the owner but statement that the plaintiff's product was "full of habit-forming drugs" and would require "a hospital cure to stop" defamed the owner because it accused him of putting an "unwholesome and dangerous" product on the market (citation omitted)); *Drug Research Corp. v. Curtis Pub. Co., 7 N.Y.2d 435, 440, 166 N.E.2d 319, 199 N.Y.S.2d 33 (1960)* (holding that article concerning the deceptive business activities of a corporation did not defame the integrity and business methods of the owner).

Even viewing the Press Release in the context of the Miami litigation, the plaintiffs have failed to allege sufficient facts that would allow a reasonable jury to conclude that the Press Release concerns them. The Press Release specifically states that the lawsuit is against the organizers of the Miami Exhibition. **[**30]** The Press Release also describes the lawsuit as an "effort to stop the display of fake Haring works at the exhibition," and the stipulation as an agreement "to remove all fake Haring works from the exhibition immediately and to destroy the offending catalogue that illustrated most of the fake works." No plaintiff is named as a defendant in the Miami litigation, and only Bilinski is mentioned by name in the Miami Complaint. The Miami Complaint was not disseminated with the Press Release. Assuming arguendo that the statements in the Press Release are defamatory, they are defamatory only in that they accuse the organizers -- not the owners of Haring works -- of misconduct. To the extent that the plaintiffs are referenced by implication, the disparagement only relates to their property and thus cannot constitute the basis for defamation. *El Meson Espanol, 521 F.2d at 739-40*.

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[13] Plaintiffs also contend that the Williams exception to the fair reporting privilege applies. *Williams v. Williams, 23 N.Y.2d 592, 599, 246 N.E.2d 333, 298 N.Y.S.2d 473 (1969)*. In Williams, the New York Court of Appeals established an exception to the statutory fair reporting privilege that applies when a person maliciously institutes a judicial proceeding alleging false and defamatory charges, and then circulates a press release or other communication based on the judicial proceeding. Id. Plaintiffs suggest that if the Williams exception applies, it would permit tort claims against defendants for statements made in the judicial proceedings themselves. Even assuming that the **[**28]** Williams exception applies, it is an exception to the statutory fair reporting privilege, not the absolute privilege afforded to statements made in judicial proceedings.

Relying on *Kelly v. Schmidberger, 806 F.2d 44 (2d Cir. 1986)*, the plaintiffs argue that the Press Release defames them personally, rather than their property. In Kelly, a statement that the plaintiffs had placed church property "in their own names" sufficiently concerned the plaintiffs rather than their property. *Id. at 48*. That statement, however, addresses the plaintiffs' actions rather than the nature and **[**31]** quality of the property. In contrast, the statements at issue in the Press Release concern the quality of property. Because the plaintiffs have failed to demonstrate that the Press Release concerned them, it is unnecessary to resolve the parties' disputes over the other elements of a defamation claim and whether the Complaint adequately pleads those elements. The claims for defamation and conspiracy to commit defamation are dismissed.[14]

C. Tortious Interference with Business Relationships

The plaintiffs assert that the Miami litigation and Press Release tortiously interfered with a sale of Haring art by one of the plaintiffs to a London buyer. ***HN11***[] To prevail on a tortious interference with business relations claim, a plaintiff must demonstrate that: (1) it had a business relationship with a third party; (2) the defendant knew of that relationship and intentionally interfered with it; (3) the defendant acted solely out of malice, or used **[*51]** dishonest, unfair, or improper means; and (4) the defendant's interference caused injury to the relationship. *Carvel Corp. v. Noonan, 350 F.3d 6, 17 (2d Cir. 2003)* (New York law); see also *534 E. 11th St. Hous. Dev. Fund Corp. v. Hendrick, 90 A.D.3d 541, 935 N.Y.S.2d 23, 24 (App. Div. 2011)* (requiring the defendant to have knowledge of the business **[**32]** relationship); *Amaranth LLC v. J.P. Morgan Chase & Co., 71 A.D.3d 40, 888 N.Y.S.2d 489, 494 (App. Div. 2009)* (same); *Caprer v. Nussbaum, 36 A.D.3d 176, 825 N.Y.S.2d 55, 78 (App. Div. 2006)* (same).

This claim must be dismissed since the Complaint does not identify the London buyer or allege that the defendants knew of the business relationship at the time they filed their lawsuit or issued the Press Release. *Brill Physical Therapy, P.C. v. Leaf, 2011 N.Y. Slip Op. 33903(U) (Sup. Ct. Aug. 4, 2011)*, cited by the plaintiffs in support of their tortious interference claim, stands at most for the proposition that a plaintiffs need not identify the name of the buyer in this pleading. It does not excuse the plaintiff from pleading that the defendants actually knew of the business relationship. The tortious interference with business relations claim is dismissed.

D. Trade Libel

HN12[] Defamation of a product or good,[15] rather than a person, constitutes a distinct cause of action under New York law. *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc., 314 F.3d 48, 59 (2d Cir. 2002)* (citing *Ruder & Finn, 52 N.Y.2d at 670—71*). "To recover for disparagement of goods, the plaintiff must show that the defendant published a[] . . . defamatory statement directed at the quality of a business's goods and must prove that the statements caused special damages." *Id.* Generally, special damages means "the loss of something having economic or pecuniary value." *Albert v. Loksen, 239 F.3d 256, 271 (2d Cir. 2001)* (citation omitted). "Where loss of customers constitutes the alleged special damages, the individuals who ceased **[**33]** to be customers, or who refused to purchase, must be named and the exact damages itemized." *Fashion Boutique, 314 F.3d at 59* (citation omitted) (New York law). Pleading damages as a round number with no attempt at itemization alleges general rather than special damages. *Drug Research Corp., 7 N.Y.2d at 441—42*.

Assuming that the plaintiffs have sufficiently alleged that the statements in the Press Release defamed their goods, the plaintiffs have failed to allege special damages. The Complaint only attempts to itemize damages for one plaintiff, alleging that Canario "lost the sale of artwork" to a London museum as a result of the Miami litigation, but does not name the museum or the sales price. As special damages are an element of a trade libel claim, the failure

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[14] New York law does not recognize an independent tort of conspiracy. *Kirch v. Liberty Media Corp., 449 F.3d 388, 401 (2d Cir. 2006)*.

[15] This tort is described interchangeably as trade libel, injurious falsehood, and product disparagement.

to allege special damages is fatal to the claim. Defendants' motion to dismiss is granted as to the claim of trade libel.

Plaintiffs argue that they have alleged special damages because the requirement that the lost customers be identified may be relaxed when disparaging comments are disseminated widely and the nature of the plaintiffs' business prevents the identification of lost **[**34]** customers. This argument lacks merit. None of the authorities cited by plaintiffs excuse their failure to identify the amount of lost sales in connection with the sale to the London museum. Moreover, of the two cases cited by the plaintiffs **[*52]** in support of this argument, one was reversed on appeal as the plaintiffs had failed to plead special damages by not identifying lost customers or sales amounts. *Prince v. Fox Tel. Stas., Inc., 93 A.D.3d 614, 941 N.Y.S.2d 488, 488 (App. Div. 2012)* ("Plaintiffs' product disparagement claim should have been dismissed to the extent it seeks damages in connection with lost customers, as Plaintiffs failed to plead such special damages with the requisite specificity."). *Charles Atlas, Ltd. v. Time-Life Books, Inc., 570 F. Supp. 150 (S.D.N.Y. 1983)*, the other case cited by the plaintiffs, predates Prince and is also factually distinguishable as the plaintiff was able to identify an exact number of lost sales even if the identities of the would-be purchasers were unknown. *Id. at 155-56*.

E. Intentional Infliction of Economic Harm/Prima Facie Tort

HN13[] "Under New York law there are four elements to a prima facie business tort claim: (1) an intentional infliction of harm; (2) without excuse or justification and motivated solely by malice; (3) resulting in special damages; (4) by an act that would otherwise be lawful." *U.S. for Use & Benefit of Evergreen Pipeline Const. Co. v. Merritt Meridian Const. Corp., 95 F.3d 153, 161 (2d Cir. 1996)*. As the plaintiffs **[**35]** have failed to plead special damages, the prima facie tort claim is dismissed.

F. Unjust Enrichment

HN14[] "The basic elements of an unjust enrichment claim in New York require proof that (1) defendant was enriched, (2) at plaintiff's expense, and (3) equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover." *Briarpatch Ltd., L.P v. Phoenix Pictures, Inc., 373 F.3d 296, 306 (2d Cir. 2004)*. The benefit acquired by the defendant must be "specific" and directly related to the loss suffered by the plaintiff. *Kaye v. Grossman, 202 F.3d 611, 616 (2d Cir. 2000)* (reversing a jury verdict where benefit acquired by the defendant was indirectly related to plaintiff's loss).

Plaintiffs allege that the defendants were enriched because the value of their own Haring works was increased by preventing others from selling works. Plaintiffs also allege that Stark and Gruen were enriched through the salaries and fees paid by the Foundation. These facts fail to plead a claim for unjust enrichment. The benefit acquired by the Foundation -- the alleged increase in value of Haring works owned by the Foundation -- is not a benefit flowing directly to the defendants at plaintiffs' expense. Rather, it is an indirect and hypothetical benefit. Also, the connection between the alleged harm to the **[**36]** plaintiffs and the compensation paid to individual defendants is too attenuated to support an unjust enrichment claim. Plaintiffs' claim for unjust enrichment is dismissed.[16]

CONCLUSION

Defendants' August 29 motion to dismiss is granted. The Clerk of Court shall close the case. A separate order addresses the defendants' motion for sanctions.

Dated: New York, New York

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[16] Because all tort claims have been dismissed, the defendants' argument that claims against uncompensated directors are barred as a matter of law need not be considered.

March 6, 2015

/s/ Denise Cote

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United States District Judge

ORDER

DENISE COTEDENISE COTEDenise CoteDENISE COTE, District Judge:

On March 6, 2014, the amended consolidated complaint was dismissed following a motion filed by the defendants. The March 6 Opinion addressed the third motion to dismiss in this action, the plaintiffs having been given an opportunity to amend in response to two prior motions. On November 10, 2014, defendants moved for sanctions on the basis of the tort claims and *Lanham Act* claim pled in all three complaints. Plaintiffs responded on December 5. The motion for sanctions was fully submitted on December **[**37]** 12.

Defendants request sanctions under *Rule 11, Fed. R. Civ. P.*, and *28 U.S.C. § 1927*. When *Rule 11* sanctions are initiated by motion, the challenged papers are judged by a standard of objective unreasonableness. *ATSI Comm., Inc. v. Shaar Fund, Ltd., 579 F.3d 143, 150 (2d Cir. 2009)*. In other words, *Rule 11* is violated if a pleading is submitted for "any improper purpose, or where, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." *Kropelnicki v. Siegel, 290 F.3d 118, 131 (2d Cir. 2002)* (citation omitted).

Section 1927 only applies to attorneys or those authorized to practice before the courts. *Salovaara v. Eckert, 222 F.3d 19, 35 n.13 (2d Cir. 2000)*. A court may sanction counsel pursuant to *Section 1927* "only when there is a finding of conduct constituting or akin to bad faith." *State Street Bank & Trust Co. v. Inversiones Errazuriz Limitada, 374 F.3d 158, 180 (2d Cir. 2004)* (citation omitted). The standard for sanctioning counsel pursuant to *Section 1927* is: a finding of "clear evidence that (1) the offending party's claims were entirely without color, and (2) the claims were brought in bad faith -- that is, motivated by improper purposes such as harassment or delay." *Eisemann v. Greene, 204 F.3d 393, 396 (2d Cir. 2000)* (citation omitted).

The defendants have failed to demonstrate that the plaintiffs' claims were so objectively unreasonable that sanctions are warranted under either *Rule 11, Fed. R. Civ. P.*, or *Section 1927*. The plaintiffs' **[**38]** claims, though subject to dismissal, were not so meritless that no competent attorney could form a reasonable belief that the pleading was warranted by existing law. The only basis for finding an improper motive or bad faith is the fact that the plaintiffs pled these claims three times, and did not sufficiently amend the complaint to survive dismissal or withdraw the claims. This is not sufficient to show bad faith or an improper motive. Accordingly, it is hereby

ORDERED that the defendants' November 10 motion for sanctions is denied.

Dated: New York, New York

March 6, 2015

/s/ DENISE COTEDENISE COTEDenise CoteDENISE COTE

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United States District Judge

Worldwide Travel, Inc. v. Travelmate US, Inc.

United States District Court for the Southern District of California

March 9, 2015, Decided; March 9, 2015, Filed

Case No. 14-cv-00155-BAS(DHB)

Reporter
2015 U.S. Dist. LEXIS 28517 *; 2015 WL 1013704

WORLDWIDE TRAVEL, INCORPORATED, et al., Plaintiffs, v. TRAVELMATE US, INC., et al., Defendants.

Subsequent History: Motion granted by, in part, Motion denied by, in part, Dismissed by, in part *Worldwide Travel, Inc. v. Travelmate US, Inc., 2016 U.S. Dist. LEXIS 43942 (S.D. Cal., Mar. 30, 2016)*

Core Terms

Defendants', accounting, allegations, advertising, charges, keywords, unfair, motion to dismiss, cause of action, consumers, credit card, clicks, fraudulent, prong, shareholder, conversion, practices, invoiced, records, funds, card, parties, courts, business practice, leave to amend, billing, travel, alter ego, documentation, competitors

Counsel: **[*1]** For World Wide Travel Incorporated, doing business as Worldwide Travel, Inc., Usha Chand, Laxmi Chand, Plaintiffs: Nathan Lyons Low, LEAD ATTORNEY, The Watkins Firm, La Jolla, CA; Anne Marie Barker, Environmental Research Center, Fort Oglethorpe, GA.

For Ms. Ritu Singla, doing business as Travelmate, Travelmate US, INC., doing business as Travelmate agent of TMI agent of TMI Web Services, Defendants: Erich Joseph Lidl, LEAD ATTORNEY, Liedle, Lounsbery, Larson & Lidl, LLP, San Diego, CA.

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

Opinion by: Cynthia Bashant

Opinion

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

(ECF No. 40)

On June 12, 2013, Plaintiffs World Wide Travel Incorporated dba Worldwide Travel, Inc. ("WWT"), Laxmi Chand, and Usha Chand (collectively, "Plaintiffs") commenced this action against Defendants Travelmate US, Inc. dba TMI, dba TMI Web, dba TMI Web Services, dba Travelmate ("TMI") and Ritu Singla (collectively, "Defendants") in Superior Court for the District of Columbia. Defendants removed the case to the United States District Court for the District of Columbia on September 4, 2013 on the basis of diversity jurisdiction. The case was transferred to the Southern **[*2]** District of California on January 7, 2014.

On March 11, 2014, Plaintiffs filed a First Amended Complaint ("FAC") alleging (1) breach of contract, (2) fraud, (3) money had and received, (4) conversion, (5) breach of the implied covenant of good faith and fair dealing, (6) violation of *California Business and Professions Code Section 17200, et seq*. (the "UCL") and (7) accounting. Defendants now move to dismiss Plaintiffs' causes of action for fraud, conversion, accounting, and the UCL pursuant to *Federal Rule of Civil Procedure 12(b)(6)*.

The Court finds this motion suitable for determination on the papers submitted and without oral argument. *See* Civ. *L.R. 7.1(d)(1)*. For the reasons set forth below, Defendants' motion to dismiss is **GRANTED IN PART** with leave to amend and **DENIED IN PART**.

I. BACKGROUND

Plaintiffs Laxmi Chand and Usha Chand are the shareholders and officers of plaintiff WWT, a corporation in the business of selling overseas travel arrangements. (FAC at ¶ 1.) In 2004, Plaintiffs sponsored defendant Ritu Singla to move from India to the United States in order to work for WWT. (*Id*. at ¶ 9.) In 2005, Ms. Singla left WWT and allegedly moved to Texas. (*Id*. at ¶ 11.)

Plaintiffs allege that, while in Texas, Ms. Singla formed TMI, a business designed to sell the same type of overseas travel arrangements **[*3]** sold by Plaintiffs. (*Id*. at ¶ 12.) Plaintiffs further allege that Ms. Singla moved to California in 2009 and began to operate TMI in the City of San Diego. (*Id*. at ¶¶ 23, 13.) Plaintiffs also allege that Ms. Singla is TMI's sole officer, director, and shareholder. (*Id*. at ¶ 6.)

Due to the increase in online travel arrangements, Plaintiffs began seeking assistance to advertise WWT's website on Google. (FAC at ¶ 14.) Plaintiffs allege that, in or about February 2009, TMI, through its agent, "Tanya," solicited Laxmi Chand to use TMI's advertising services on Google. (*Id*. at ¶ 15, Ex. A.) In February 2009, Laxmi Chand and WWT entered into a written contract ("Contract") with TMI for "guaranteed 'first page placement'" of Plaintiffs' website on Google. (*Id*. at ¶ 15; Ex. A.) Ms. Singla was not a party to the Contract. Usha Chand was also not a party to the Contract. The Contract authorized TMI to charge its billings directly to Plaintiffs' American Express accounts. (*Id*. at ¶ 16; Ex. A.) Usha Chand was jointly liable with WWT for amounts charged to those accounts. (*Id*. at ¶ 16.)

The Contract authorized charges of $3,225 for the period of February 2, 2009 to March 1, 2009, and then subsequent **[*4]** monthly charges "based on hits on keyword phrases specified in . . . the Contract." (*Id*.) The parties allegedly orally modified the Contract in June 2009, "by basing charges on a 'per click' basis, that is, the number of times visitors 'clicked' on Plaintiffs' advertising appearing on Google." (*Id*.) Defendants allegedly made charges to Plaintiffs' credit card accounts from May 2009 through December 2009, and from February 2010 through November 2010. (*Id*. at ¶ 17.)

Plaintiffs allege that, "[w]ithout Plaintiffs' knowledge or consent, in about July 2010, Defendants returned to keyword rather than 'per click' invoicing[,]" and that "[i]n 2010, Defendants inexplicably began invoicing Plaintiffs for greatly increased amounts." (*Id*. at 18, 19.) In December 2010, Plaintiffs requested that Defendants provide documentation to justify the "unusually large charges." (*Id*. at ¶ 19.) Defendants refused Plaintiffs' request, and Plaintiffs subsequently notified them that no further charges were authorized to Plaintiffs' credit cards until the documentation was provided. (*Id*.)

In January 2011, Plaintiffs disputed Defendants' charges directly with American Express, and Defendants opposed the dispute. (*Id*. at ¶ 20.) In apparent **[*5]** response to the dispute, Defendants sent Plaintiffs "a few highly redacted Google account records" on February 22, 2011. (*Id*. at ¶ 21.) Plaintiffs allege the records "showed that Defendants had systematically lied to Plaintiffs about the number of 'clicks' and keyword hits realized, thus grossly overcharging Plaintiffs for services, and charging for services never provided and results never obtained." (*Id*.) Specifically, Plaintiffs allege the records "showed that Defendants diverted Plaintiffs' funds to their own Google advertising, billing Plaintiffs for Defendants' own Google keywords and clicks, thereby doubling, tripling or even quadrupling the charges Defendants invoiced to Plaintiffs taken by direct credit card charging." (*Id*. at ¶ 23.)

Plaintiffs allege, for example, that Defendants' records for May 2010 show that Plaintiffs were charged for thirty-two keywords, when only five of those keywords appeared on Plaintiffs' price list, and only one of them was used; and that Plaintiffs were charged for seventeen keywords in September 2010, when only six of those keywords appeared on Plaintiffs' price list, and again only one of them was used. (*Id*. at ¶ 24.) Defendants charged Plaintiffs' **[*6]** American Express card $12,865 in May and $8,680 in September, when, according to Plaintiffs, only $400 was actually justified and authorized for each month. (*Id*.)

In April 2011, Plaintiffs hired a "Google advertising expert" to analyze Defendants' records. (*Id*. at ¶ 25.) According to Plaintiffs, the expert determined that "the number of 'clicks' reported by Defendants was unsubstantiated and impossible[,]" and that the web logs from Plaintiffs' web server showed a routing from Plaintiffs' website to websites in Texas and California, states in which Plaintiffs believe Defendants formerly or now reside. (*Id*. at ¶¶ 25, 26.) Plaintiffs allege that they have suffered damages in excess of $160,000. (*Id*. at ¶ 30; Prayer.)

Finally, Plaintiffs allege on information and belief that there exists a unity of interest and ownership between Ms. Singla and TMI such that Ms. Singla is the alter ego of TMI. (*Id*. at ¶ 7.) Ms. Singla is described as TMI's sole officer, director, and shareholder, and both TMI and Ms. Singla are described in the FAC as residing and doing business at 13565 Lavender Way, San Diego, California. (*Id*. at ¶¶ 2-3, 6.) Plaintiffs further allege that Ms. Singla used TMI to misappropriate **[*7]** Plaintiffs' advertising funds and then used those funds to advertise her own business, TMI. (*Id*. at ¶ 7.) Plaintiffs also allege that adherence to TMI's corporate existence would sanction fraud and promote injustice, as TMI is insolvent and unable to pay Plaintiffs' damages. (*Id*.)

In the FAC, Plaintiffs assert claims for (1) breach of contract; (2) fraud; (3) money had and received; (4) conversion; (5) breach of the implied covenant of good faith and fair dealing; and (6) violation of *California Business and Professions Code Section 17200, et seq*. (*Id*. at ¶¶ 27-52, 57-61.) Plaintiffs also seek declaratory relief for accounting. (*Id*. at ¶¶ 53-56.) Defendants now move to dismiss the FAC in its entirety under *Rule 12(b)(6)*. Plaintiffs oppose.

II. STATEMENT OF LAW

A motion to dismiss pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* tests the legal sufficiency of the claims asserted in the complaint. *Fed. R. Civ. P. 12(b)(6)*; *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)*. The court must accept all allegations of material fact pleaded in the complaint as true and must construe them and draw all reasonable inferences from them in favor of the nonmoving party. *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996)*. To avoid a *Rule 12(b)(6)* dismissal, a complaint need not contain detailed factual allegations, rather, it must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility **[*8]** when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citing *Twombly, 550 U.S. at 556*). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id. at 678* (quoting *Twombly, 550 U.S. at 557*) (internal quotations omitted).

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

Generally, courts may not consider material outside the complaint when ruling on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990)*; *Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994)* (overruled on other grounds by *Galbraith v. Cnty of Santa Clara, 307 F.3d 1119, 1121 (9th Cir. 2002))*. "However, material which is properly submitted as part of the complaint may be considered." *Hal Roach Studios, Inc., 896 F.2d at 1555, n. 19*. Documents specifically **[*9]** identified in the complaint whose authenticity is not questioned by the parties may also be considered. *Fecht v. Price Co., 70 F.3d 1078, 1080 n.1 (9th Cir. 1995)* (superseded by statute on other grounds); *see also* *Branch, 14 F.3d at 453-54*. Such documents may be considered, so long as they are referenced in the complaint, even if they are not physically attached to the pleading. *Branch, 14 F.3d at 453-54*; *see also* *Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001)* (rule extends to documents upon which the plaintiff's complaint "necessarily relies" but which are not explicitly incorporated in the complaint). Moreover, the court may consider the full text of those documents even when the complaint quotes only selected portions. *Fecht, 70 F.3d at 1080 n. 1*. Additionally, the court may consider materials which are judicially noticeable. *Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir. 1994)*.

As a general rule, a court freely grants leave to amend a complaint which has been dismissed. *Fed. R. Civ. P. 15(a)*; *Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986)*. However, leave to amend may be denied when "the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Schreiber Distrib. Co., 806 F.2d at 1401* (citing *Bonanno v. Thomas, 309 F.2d 320, 322 (9th Cir. 1962))*.

III. DISCUSSION

A. Standing

Defendants argue that Plaintiff Usha Chand lacks standing to pursue any of the claims asserted in the FAC, and, therefore, must be dismissed from this action. (Mot. at pp. 6-7.) In order to satisfy Article III standing,

> a plaintiff **[*10]** must show (1) [s]he has suffered an "injury in fact" that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Braunstein v. Ariz. Dept. of Transp., 683 F.3d 1177, 1184 (9th Cir. 2012) (citing *Bernhardt v. Cnty. of L.A., 279 F.3d 862, 868-69 (9th Cir. 2002))*. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Maya v. Centex Corp., 658 F.3d 1060, 1068 (9th Cir. 2011)* (quoting *Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)* (alteration in original) (internal quotations omitted)).

"[A] shareholder must assert more than personal economic injury resulting from a wrong to the corporation" to have standing to maintain an individual action. *Shell Petroleum N.V. v. Graves, 709 F.2d 593, 595 (9th Cir. 1983)*; *see e.g., Von Brimer v. Whirlpool Corp., 536 F.2d 838, 846 (9th Cir. 1976)* (shareholder lacks standing to sue on the basis he suffered monetary loss when defendants caused the corporation to lose income and the value of his stock to decline). Rather, "[a] shareholder must be injured directly and independently of the corporation." *Id.; see also* *Sutter v. Gen. Petroleum Corp., 28 Cal. 2d 525, 530, 170 P.2d 898 (1946)* ("[A] stockholder may sue as an individual where he is directly and individually injured although the corporation **[*11]** may also have a cause of action for the same wrong."). The Supreme Court of California expressed this rule as follows:

> Generally, a (shareholder) may not maintain an action in his own behalf for a wrong done by a third person to the corporation on the theory that such wrong devalued his stock and the stock of other shareholders, for such an action would authorize multitudinous litigation and ignore the corporate entity. Under proper circumstances a shareholder may bring a representative action or derivative action on behalf of the corporation.

Von Brimer v. Whirlpool Corp., 536 F.2d 838, 846 (9th Cir. 1976) (citing Sutter, 28 Cal. 2d at 530). The rule "is a salutary one which avoids multitudinous litigation and recognizes the corporate entity." *Id*. "[I]t is the gravamen of the wrong alleged in the pleadings, not simply the resulting injury, which determines whether an individual action lies." Nelson v. Anderson, 72 Cal. App. 4th 111, 124, 84 Cal. Rptr. 2d 753 (1999).

Here, Defendants argue Usha Chand has no standing to pursue any claims in the FAC because she is not identified as an individual party on the Contract and Plaintiffs have failed to allege that she ever "personally paid the charges assessed on the American Express accounts." (Mot. at p. 7.) In response, Plaintiffs argue the allegations stating Usha Chand "was required to be jointly liable **[*12]** with [WWT] for amounts charged" on the American Express card accounts, and charges were in fact made on the accounts, are sufficient to allege standing. (Opp. at p. 3.)

Construing the allegations in the light most favorable to Plaintiffs, the Court finds that Plaintiffs have failed to sufficiently allege Usha Chand has standing to pursue this action. The gravamen of the wrong alleged in the pleadings is that Defendants breached a contract entered into between TMI, Laxmi Chand, and WWT by charging WWT a substantial amount of money under the contract for services not rendered to the corporation, and disguised that breach through fraudulent misrepresentations and the creation of fictitious reports. Thus, the gravamen of the alleged wrong is injury to the corporation.

The Court acknowledges the rule "is susceptible to an exception when the injury is to the plaintiff individually, as where the action is based on a contract to which he is a party, or on a right belonging severally to him, or on a fraud affecting him directly." Id. (internal quotations omitted) (citing Sutter, 28 Cal.2d at 530). However, Usha Chand is not a party to the Contract, and the allegation that Usha Chand was jointly liable on the charged American Express **[*13]** account listed in the Contract is not, without more, sufficient to allege standing. *See* Sparling v. Hoffman Constr. Co., 864 F.2d 635, 641 (9th Cir. 1988) (holding that the plaintiff-shareholders did not have standing on the basis they were guarantors on the corporation's bonds); Sherman v. British Leyland Motors, Ltd., 601 F. 2d 429, 439-40 & n. 10 (9th Cir. 1979) (finding the plaintiff-shareholder did not have standing to sue in his individual capacity, even when he, as the guarantor of certain corporate obligations to third parties, was required to repay loans on behalf of the corporation).

Accordingly, Defendants' motion to dismiss Usha Chand for lack of standing is **GRANTED** with leave to amend.

B. Alter Ego[1]

Defendants move to dismiss the FAC against Ms. Singla, arguing the FAC fails to state sufficient facts supporting the theory that Ms. Singla is the alter ego of TMI. (Mot. at pp. 7-9.) "Alter-ego liability allows a plaintiff to 'pierce the corporate veil' and hold a corporate actor . . . liable for the conduct of the corporation." Pacific Maritime Freight, Inc. v. Foster, No. 10-cv-0578, 2010 U.S. Dist. LEXIS 87205, 2010 WL 3339432, at *6 (S.D. Cal. Aug. 24, 2010) (citing Stark v. Coker, 20 Cal.2d 839, 845, 129 P.2d 390 (1942)); *see also* Sandoval v. Ali, 34 F. Supp. 3d 1031, 1040 (N.D. Cal. 2014) (citing RRX Indus., Inc. v. Lab-Con, Inc., 772 F.2d 543, 545-46 (9th Cir. 1985)) ("The equitable alter ego doctrine governs whether two separate entities **[*14]** may be treated as the same entity.") The doctrine applies where "(1) such a unity of interest and ownership exists that the personalities of the corporation and individual are no longer separate, and (2) an inequitable result will follow if the acts are treated as those of the corporation alone." RRX Indus., 772 F.2d at 545; *see also* Doe v. Unocal Corp., 248 F.3d 915, 926 (9th Cir. 2001).

"In assessing alter ego, courts consider the commingling of funds and other assets of the entities, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership of the entities, use of the same offices and employees, use of one as a mere shell or conduit for the affairs of the other, inadequate capitalization, disregard of corporate formalities, lack of segregation of corporate records, and identical directors and officers."

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[1] This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332, and thus it applies California's substantive law and federal procedural law. ***Freund v. Nycomed Amersham, 347 F.3d 752, 761 (9th Cir. 2003)*** (citing Gasperini v. Center for Humanities., 518 U.S. 415, 427, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996)).

Sandoval, 34 F. Supp. at 1040. No single factor is determinative; instead a court must examine all the circumstances to determine whether to apply the doctrine. Virtualmagic Asia, INc. v. Fil-Cartoons, Inc., 99 Cal. App. 4th 228, 245, 121 Cal. Rptr. 2d 1 (2003). Common ownership alone, however, is insufficient to disregard the corporate form. Sandoval, 34 F. Supp. at 1040.

"Conclusory allegations of 'alter ego' status are insufficient to state a claim." Neilson v. Union Bank of Cal., N.A., 290 F. Supp. 2d 1101, 1116 (C.D. Cal. 2003). "Rather, a plaintiff must allege specifically both the elements of alter ego liability, as well as facts supporting **[*15]** each." *Id*.

1. Unity of Interest

Defendants argue that Plaintiffs' allegations regarding Ms. Singla's connection to TMI are "baseless assumptions." (Mot. at pp. 7-9.) Defendants also argue that Plaintiffs' alter ego allegations are a mere conclusory recitation of the factors courts use to analyze alter ego. (*Id*.)

Courts have held that the pleading of at least two factors in support of a unity of interest satisfies this element. Daewoo Elecs. Am., Inc. v. Opta Corp., No. C 13-1247, 2013 U.S. Dist. LEXIS 104603, 2013 WL 3877596, at *5 (N.D. Cal. July 25, 2013); Pacific Mar. Freight, Inc., 2010 U.S. Dist. LEXIS 87205, 2010 WL 3339432, at *6. Here, Plaintiffs allege at least two of the factors showing that unity of interest exists between Ms. Singla and TMI. Plaintiffs allege in the FAC that Ms. Singla is TMI's sole officer, director, and shareholder, and that Ms. Singla and TMI both reside and do business in the same location. (FAC at ¶¶ 2-3, 6.) Plaintiffs further allege Ms. Singla "dominated, influenced and controlled the affairs" of TMI as well as the business, property, and affairs of TMI. (FAC at P7.) Plaintiffs also allege, among other things, that TMI was a "mere shell and naked framework[]" which Ms. Singla used "as a device and conduit for the conduct of [her] individual and personal business, property and affairs." (FAC at ¶ 7.) In addition, Plaintiffs allege Ms. Singla diverted assets from TMI **[*16]** to the detriment of creditors, and commingled funds and assets with her own. (*Id*.) Thus, the Court finds Plaintiffs' "unity of interest" allegations are sufficient. *See* Daewoo Elecs. Am., Inc., 2013 U.S. Dist. LEXIS 104603, 2013 WL 3877596, at *5; Lacey v. Malandro Commc'n, No. CV-09-01429, 2009 U.S. Dist. LEXIS 113993, 2009 WL 4755399, at *6 (D. Ariz. Dec. 8, 2009); Fund Raising, Inc. v. Alaskans for Clean Water, Inc., No. CV 09-4106, 2009 U.S. Dist. LEXIS 106549, 2009 WL 3672518, at *4 (C.D. Cal. Oct. 29, 2009).

2. Inequitable Result

"Inequitable results flowing from the recognition of the corporate form include the frustration of a meritorious claim, perpetuation of a fraud, and the fraudulent avoidance of personal liability." Pac. Mar. Freight, Inc., 2010 U.S. Dist. LEXIS 87205, 2010 WL 3339432, at *7 (citing Hennessey's Tavern, Inc. v. Am. Air Filter Co., 204 Cal. App. 3d 1351, 1359, 251 Cal. Rptr. 859 (1988)). An inequitable result may also follow "if the complained of acts are treated as those of an undercapitalized corporation;" however, allegations that a plaintiff would face difficulty collecting a judgment from a corporation are insufficient. RRX Indus., 772 F.2d at 546 (citing Automotriz Del Golfo De Cal. S.A. De C.V. v. Resnick, 47 Cal.2d 792, 797, 306 P.2d 1 (1957)); Sandoval, 34 F. Supp. at 1041; Neilson, 290 F. Supp. 2d at 1117-18.

In general, California courts "require evidence of some bad-faith conduct to fulfill the second prong of alter-ego liability, [and] that bad faith must make it inequitable to recognize the corporate form." Daewoo, 2013 U.S. Dist. LEXIS 104603, 2013 WL 3877596, at *5 (quoting Smith v. Simmons, 638 F. Supp. 2d 1180, 1192 (E.D. Cal. 2009) (alteration in original)); *but see* RRX Indus., 772 F.2d at 546 ("A finding of bad faith, however, is not prerequisite to the application of the alter ego doctrine under California law."). A party alleging bad faith conduct must state how the corporate form was abused to perpetrate it. Pac. Mar. Freight, Inc., 2010 U.S. Dist. LEXIS 87205, 2010 WL 3339432, at *8.

Here, Plaintiffs allege **[*17]** that Ms. Singla failed to adequately capitalize TMI, a company she formed, and diverted assets from the company. (FAC at ¶¶ 7, 13.) Plaintiffs further allege TMI was created and continued, "pursuant to a fraudulent scheme, plan and device whereby [its] income, revenue and profits were diverted to [Ms. Singla], whereby [TMI was] fraudulently used by [Ms. Singla] and obligors for the assumption of obligations and liabilities, . . . which obligations were incapable of performance by TMI." (*Id.*) Plaintiffs also allege Ms. Singla "misappropriated Plaintiffs' advertising funds to instead pay for advertising for her business, done in the name of TMI and Travelmate—a travel agency directly competing with the business of Plaintiffs." (*Id.*) Lastly, Plaintiffs allege that Defendants produced Google records showing Plaintiffs were overcharged and that their funds were diverted to Defendants' own Google advertising. (FAC at ¶¶ 19, 23-24)

Unlike the plaintiffs in the cases cited by Defendants, Plaintiffs here go beyond mere conclusory allegations. (Mot. at pp. 8-9.) Assuming the facts are true, the Court finds the allegations in the FAC sufficient to raise the facial plausibility an inequitable result **[*18]** will follow if the acts are treated as those of the corporation alone. *See Lacey, 2009 U.S. Dist. LEXIS 113993, 2009 WL 4755399, at *6*. Moreover, "a complaint is sufficient if it gives the defendant 'fair notice of what the . . . claim is and the grounds upon which it rests.'" *Laguna v. Coverall N. Am., Inc., No. 09cv2131, 2009 U.S. Dist. LEXIS 118098, 2009 WL 5125606, at *3 (S.D. Cal. Dec. 18, 2009)* (citing *Twombly, 550 U.S. at 555-56*)). The Court finds that Plaintiffs' allegations in the FAC sufficiently identify the contours of an alter ego claim such that Defendants are able to prepare a response and conduct discovery. *2009 U.S. Dist. LEXIS 118098, [WL] at *3*. Accordingly, the Court finds that dismissal of Ms. Singla is not appropriate at this time.

C. Failure to State a Claim

1. Fraud

Defendants argue that Plaintiffs have failed to adequately plead facts sufficient to meet the heightened pleading requirements for fraud. (Mot. at pp. 10-13.) To state a claim for fraud in California, a plaintiff must allege "[1] a false representation, [2] knowledge of its falsity, [3] intent to defraud, [4] justifiable reliance, and [5] damages." *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)* (quoting *Moore v. Brewster, 96 F.3d 1240, 1245 (9th Cir. 1996))* (internal quotations omitted). Under *Federal Rule of Civil Procedure Rule 9(b)*, "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *Fed. R. Civ. P. 9(b)*; *see also Vess, 317 F.3d at 1103* ("*Rule 9(b)*'s particularity requirement applies to state-law causes of action."). The **[*19]** heightened particularity standard requires allegations of fraud to include the "who, what, when, where, and how" of the alleged misconduct, so as to be specific enough to give defendants notice "so that they can defend against the charge and not just deny that they have done anything wrong." *Vess, 317 F.3d at 1106* (citations omitted).

However, "the general rule that allegations of fraud based on information and belief do not satisfy *Rule 9(b)* may be relaxed with respect to matters within the opposing party's knowledge. In such situations, plaintiffs can not be expected to have personal knowledge of the relevant facts." *Neubronner v. Milken, 6 F.3d 666, 672 (9th Cir. 1993)* (citing *Wool v. Tandem Computers Inc., 818 F.2d 1433, 1439 (9th Cir. 1987)*; *Moore v. Kayport Package Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989))*. But, a plaintiff who alleges fraud based "on information and belief must state the factual basis for the belief." *Id*.

Plaintiffs allege that Defendants made the following misrepresentations to Plaintiffs: (1) "Plaintiffs were being billed on a keyword basis, and only on keywords actually approved by Plaintiffs and utilized in the campaigns"; and (2) "Defendants' representation of the number of 'clicks' and keywords invoiced to Plaintiffs was true and accurate[.]" (FAC at ¶ 33.) Plaintiffs further allege that these misrepresentations were made by Defendants and TMI's agent, "Tanya," who **[*20]** is identified on the Contract as a TMI salesperson, during the period from February 2009 to February 2011. (*Id.)* The Court finds that these allegations satisfy the "who, what, when, where, and how" of the matter, and are "specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge[.]" *Vess, 317 F.3d at 1106* (quoting *Bly-Magee v. Cal., 236 F.3d at 1019*).

Plaintiffs further allege that Defendants knew and intended to defraud Plaintiffs "to allow Defendants to charge monthly invoiced amounts directly to Plaintiffs' credit cards, while Defendants used such funds to fund their own Google advertising campaigns in direct competition with Plaintiffs' business." (FAC at ¶ 34.) In support of these allegations, Plaintiffs allege Defendants "created and gave to Plaintiffs fictitious reports and statistics to justify overbilling Plaintiffs for services purportedly rendered, and billing Plaintiffs for services never performed or results never obtained." (*Id*. at ¶ 33.) Plaintiffs further allege that the Google records they received for the May 2010 and September 2010 Google advertising campaigns reflect Plaintiffs were being charged for keywords they did not approve and were not utilized. (*Id*. **[*21]** at ¶ 24.)[2] Plaintiffs further allege the Google records show that "Defendants diverted Plaintiffs' funds to their own Google advertising, billing Plaintiffs for Defendants' own Google keywords and clicks." (*Id*. at ¶ 23.) Plaintiffs also contend Ms. Singla was a travel agent at the time specializing in travel to Central Asia and Africa and operated a business that directly competed with WWT. (*Id*. at ¶¶ 1, 13, 22, 34.) Lastly, Plaintiffs allege justifiable reliance, alleging a prior relationship and noting the "complex nature of Google advertising and accounting," and damages which are "believed to exceed $160,000." (*Id*. at ¶¶ 9-10, 35-37.) Based on these allegations, the Court finds that Plaintiffs have sufficiently identified the circumstances surrounding the alleged fraud so that Defendants can prepare an adequate answer. *See* *Moore, 885 F.2d at 540*; *Vess, 317 F.3d at 1106*.

Given the foregoing, the Court finds Plaintiffs' allegations in the FAC are sufficient to state a claim for fraud and further meet *Rule 9(b)*'s heightened pleading standard. The alleged fraud is alleged with enough particularity such that Defendants can defend against the charge. Defendants' motion to dismiss Plaintiffs cause of action for fraud is therefore **DENIED**.[3]

2. Conversion

Defendants argue that Plaintiffs' conversion claim must be dismissed because it is based on a mere overcharge. (Mot. at pp. 13-14.) In California, "[t]he elements of conversion are (1) the plaintiff's ownership or right to possession of the property; **[*23]** (2) the defendant's conversion by wrongful act inconsistent with the property rights of the plaintiff; and (3) damages." *In re Emery, 317 F.3d 1064, 1069 (9th Cir. 2003)* (citing *Burlesci v. Petersen, 68 Cal. App. 4th 1062, 1065, 80 Cal. Rptr. 2d 704 (1998))*. A conversion claim for money is not stated "unless there is a specific, identifiable sum involved, such as where an agent accepts a sum of money to be paid to another and fails to make the payment." *Kim v. Westmoore Partners, Inc., 201 Cal. App. 4th 267, 284, 133 Cal. Rptr. 3d 774 (2011)* (citing *McKell v. Wash. Mut., Inc., 142 Cal. App. 4th 1457, 1491, 49 Cal. Rptr. 3d 227 (2006))*. "There is no requirement that the [specific sum of] money have been held in trust—only that it be misappropriated." *Welco Elec.'s, Inc. v. Mora, 223 Cal. App. 4th 202, 216, 166 Cal. Rptr. 3d 877 (2014)*. A failure to pay money owed or claims arising out of an alleged simple overcharge cannot be the basis for a conversion claim. *Id. at 214* (citing *Kim, 201 Cal. App. 4th at 284*; *McKell, 142 Cal. App. 4th at 1467*).

Plaintiffs rely on *Welco* to support their claim of conversion. In *Welco*, the defendant worked for the plaintiff company, and without the plaintiff's knowledge or consent, used plaintiff's credit card to pay for defendant's services. *Id. at 205-07*. The defendant transferred over $370,000 into a bank account set up with a fictitious name

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[2] Defendants contend Plaintiffs' misrepresentations are vague and ambiguous because the contract allegedly changed over the course of the nearly two year business relationship. (Mot. at pp. 11-12.) However, Plaintiffs allege that the Contract was orally modified "[i]n about June 2009," to reflect an agreed upon change to the method of billing. (FAC at ¶ 16.) Initially, **[*22]** charges were to be based on hits on approved keyword phrases; after June 2009, they were to be based on a "per click" basis. (*Id*.) Defendants further allege that "[w]ithout Plaintiffs' knowledge or consent, in about July 2010, Defendants returned to keyword rather than 'per click' invoicing." (*Id*. at ¶ 18.) These allegations are date specific enough to allow Defendants to defend against Plaintiffs' allegation of fraud.

[3] Because Plaintiffs state a cause of action for fraud, the Court also declines to dismiss Plaintiffs' prayer for punitive damages. *See* *Cal. Civ. Code § 3294(a)*; *TJRK, Inc. v. Waage, No. 08cv1140, 2008 U.S. Dist. LEXIS 86921, 2008 WL 4748179, at *3 (S.D. Cal. 2008)*.

using the plaintiff's credit card. *Id. at 205*. The defendant leased a swiping machine credit card terminal, which was used to make the transactions. *Id. at 206*. After discussing the evolution of the tort of conversion, the court held that, along with credit card information, a credit card **[*24]** balance is an intangible property right that can be converted. *Id. at 211-16*. The court explained:

> Plaintiff had a property right in its credit card account because plaintiffs interest was specific, control over its credit card account, and an exclusive claim to the balance. [] Defendant obtained the money from the credit card company. As a result, plaintiff became indebted to the credit card company. Thus, when defendant . . . for defendants benefit, misappropriated plaintiffs credit card and used it, part of plaintiffs credit balance with the credit card company was taken by defendant and what resulted was an unauthorized transfer to defendant of plaintiffs property rights—i.e., in money from the available credit line belonging to plaintiff with the credit card company.

Id. at 211.

In so holding, the *Welco* court distinguished case law finding that conversion claims fail if based on an overcharge because in those cases there was no taking of intangible property. *Id. at 214*. In addressing the defendant's argument that allowing the conversion claim to proceed would invite a conversion claim over any credit card dispute, the *Welco* court stated that

> [a] person's willing use of a credit card to pay for goods or services **[*25]** has no relationship to what occurred here. Plaintiff did not consent to its credit card or its information being used by or on behalf of defendant. This case does not . . . concern a simple overcharge, which [] does not constitute a conversion.

Id. at 215 (citing *McKell, 142 Cal. App. 4th at 1467*). Thus, the court distinguished between a situation where a defendant's action was akin to theft, and situations involving a dispute over a bill, *e.g*., disputes arising regarding the quality of goods purchased, fault concerning medical treatment, or the appropriateness of legal bills. *Id*. In determining that what occurred in *Welco* was theft, the *Welco* court placed significance on the fact that the defendant used the plaintiff's credit card without consent.

Here, Plaintiffs consented to Defendants' use of their credit card. Plaintiffs authorized Defendants to make monthly charges as payment for Defendants' advertising services. (FAC at ¶ 16, Ex. A.) The parties now dispute the amount and appropriateness of the charges. (*See id*. at ¶ 24.) Given the presence of consent, the Court finds the present dispute is more akin to a dispute over a bill than it is to outright theft. Accordingly, Defendants' motion to dismiss Plaintiffs' cause of **[*26]** action for conversion is **GRANTED** with leave to amend.

3. Business and Professions Code *Section 17200, et seq*.

Section 17200 defines unfair competition as "any unlawful, unfair or fraudulent business act or practice . . . ." *Cal. Bus. & Prof. Code § 17200*. "[T]he UCL's coverage is sweeping, embracing anything that can properly be called a business practice and that at the same time is forbidden by law." *Wilson v. Hewlett-Packard Co., 668 F.3d 1136, 1140 (9th Cir. 2012)* (quoting *CelTech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999))* (internal quotations omitted). There are three substantive prongs of the UCL: acts or business practices that are (1) unlawful, (2) unfair, or (3) fraudulent. *Id*. Under the UCL, a person has standing if that person "suffered injury in fact and has lost money or property as a result of the unfair competition." *Cal. Bus. & Prof. Code § 17204*.

In the FAC's seventh cause of action, Plaintiffs reincorporate every allegation in the FAC and generally state that "Defendants' acts constituted unlawful, unfair and fraudulent business acts or practices and directly harmed and damaged Plaintiffs." (FAC at P 59.) The Court addresses each prong in turn.

a. "*Unlawful" Acts or Practices*

"*Section 17200*'s unlawful prong borrows violations of other laws . . . and makes those unlawful practices actionable under the UCL." *Klein v. Chevron U.S.A., Inc., 202 Cal. App. 4th 1342, 1383, 137 Cal. Rptr. 3d 293 (2012)* (quoting *Lazar v. Hertz Corp., 69 Cal. App. 4th 1494, 1505, 82 Cal. Rptr. 2d 368 (1999))* (internal quotations omitted). Violations of almost any law, federal or state, may **[*27]** serve as a sufficient predicate for a claim under the UCL's "unlawful" prong. *Id*. However, violations of the common law (e.g., breach of contract, common law fraud) are insufficient to satisfy the unlawful prong. *See Shroyer v. New Cingular Wireless Servs., Inc., 622 F.3d 1035, 1044 (9th Cir. 2010)*; *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc., 319 F. Supp. 2d 1059, 1074-75 (C.D. Cal. 2003)*. Accordingly, Plaintiffs have failed to state a claim under the unlawful prong of the UCL.

b. "*Fraudulent" Acts or Practices*

"A fraudulent business practice [under the UCL] is one which is likely to deceive the public." *McKell, 142 Cal. App. 4th at 1471* (citing *Mass. Mut. Life Ins. Co. v. Super. Ct., 97 Cal. App. 4th 1282, 1290, 119 Cal. Rptr. 2d 190 (2002))*. "The determination as to whether a business practice is deceptive is based on the likely effect such practice would have on a reasonable consumer." *Id*. (citing *Lavie v. Procter & Gamble Co., 105 Cal. App. 4th 496, 507, 129 Cal. Rptr. 2d 486 (2003))*. The heightened pleading requirements of *Federal Rule of Civil Procedure 9(b)* apply to UCL "fraud" claims brought in federal court. *Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009)* (citing *Vess v. Ciba-Geigy Corp. U.S.A., 317 F. 3d 1097, 1102-05 (9th Cir. 2003))*.

As the Court has determined Plaintiffs have sufficiently alleged a cause of action for common law fraud, the Court finds Plaintiffs have adequately pleaded a *section 17200* claim under the fraudulent prong. *See Boschma v. Home Loan Center, 198 Cal. App. 4th 230, 253, 129 Cal. Rptr. 3d 874 (2011)*; *State Farm Fire & Cas. Co. v. Super. Ct., 45 Cal. App. 4th 1093, 1105-07, 53 Cal. Rptr. 2d 229 (1996)*, abrogated on other grounds by *Cel-Tech Commc'ns, Inc., 20 Cal. 4th at 185*.

c. *"Unfair" Acts or Practices*

The definition of an "unfair" business practice depends on whether the plaintiff is a competitor or consumer. A claim of unfairness to competitors must "be tethered to some legislatively declared policy or proof of some actual **[*28]** or threatened impact on competition." *Cel—Tech Commc'ns, Inc., 20 Cal. 4th at 186-87*. Therefore, when the plaintiff is a direct competitor of the defendant and invokes *Section 17200*'s "unfair" prong, "the word 'unfair' . . . means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Id. at 187*.

California courts are split on how to define "unfair" practices in consumer actions. *See Bardin v. Daimlerchrysler Corp., 136 Cal. App. 4th 1255, 1273-74, 39 Cal. Rptr. 3d 634 (2006)* (discussing the split between California Courts of Appeal); *Yanting Zhang v. Super. Ct., 57 Cal. 4th 364, 380 n. 9, 159 Cal. Rptr. 3d 672, 304 P.3d 163 (2013)* (acknowledging "[t]he standard for determining what business acts or practices are 'unfair' in consumer actions under the UCL is currently unsettled"). Some courts apply the *Cel-Tech* standard to consumer actions. *See Belton v. Comcast Cable Holdings, LLC, 151 Cal. App. 4th 1224, 1239-40, 60 Cal. Rptr. 3d 631 (2007)*. Other courts apply a balancing test in which the utility of the defendants' practices is weighed against the practices' impact on the plaintiff. *McKell, 142 Cal. App. 4th at 1473*. Finally, some courts apply a three-pronged test contained in the Federal Trade Commission Act, under which a business practice is "unfair" if (1) the consumer's injury is substantial; (2) the injury is not outweighed by any countervailing benefits of **[*29]** the practice to consumers or competition; and (3) the injury is such that consumers could not have reasonably avoided it. *Camacho v. Auto. Club of S. Cal., 142 Cal. App. 4th 1394, 1403-06, 48 Cal. Rptr. 3d 770 (2006)*.

In *Lozano v. AT&T Wireless Servs.., 504 F.3d 718, 736 (9th Cir. 2007)*, the Ninth Circuit endorsed the tethering test or the balancing test and declined "to apply the FTC standard in the absence of a clear holding from the California Supreme Court." *See also Ferrington v. McAfee, Inc., No. 10-cv-01455, 2010 U.S. Dist. LEXIS 106600, 2010 WL*

*3910169, at *12 (N.D. Cal. Oct. 5, 2010)* ("Pending resolution of this issue by the California Supreme Court, the Ninth Circuit has approved the use of either the balancing or the tethering tests in consumer actions, but has rejected the FTC test.") (citation omitted); *I.B. ex rel. Fife v. Facebook, Inc., 905 F.Supp.2d 989, 1010-11 (N.D. Cal. 2012)* (applying the tethering test).

There is disagreement between the parties as to whether Plaintiffs are "competitors" of TMI or whether they are "consumers." Defendants argue that Plaintiffs have failed to plead facts sufficient to support the contention that TMI is Plaintiffs' competitor, and also appear to take the stance that Plaintiffs are not consumers. (Mot. at pp. 16-17; Reply at p. 11.) Arguably, Plaintiffs fall under both categories. Plaintiffs allege that TMI and WWT are direct competitors and "instead of promoting Plaintiffs' business on Google, Defendants instead used Plaintiffs' payments to fund **[*30]** Defendants' own Google advertising campaigns." (FAC at ¶¶ 12, 26, 29, 34; Opp. at pp. 8-9.) Plaintiffs also allege they are consumers, in that Plaintiffs sought a service, and TMI agreed to provide that service in exchange for payment. (FAC at ¶¶ 15-16.)

To the extent Plaintiffs are pursuing their UCL claim under the unfair prong on the basis the parties are direct competitors, the Court finds that Plaintiffs have failed to sufficiently allege a cause of action, as Plaintiffs have not alleged that Defendants violated any legislatively declared policy, violated antitrust principles, or significantly threatened or harmed the competition. Plaintiffs' claim on the basis they are consumers fails on the same grounds if the Court applies the *Cel-Tech* test.

Under the balancing test, however, the question is whether the alleged business practice "is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers" and the court must "weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *Drum v. San Fernando Valley Bar Ass'n, 182 Cal. App. 4th 247, 257, 106 Cal. Rptr. 3d 46 (2010)* (citations omitted); *S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861, 886, 85 Cal. Rptr. 2d 301 (1999)*.

Here, Plaintiffs allege Defendants "systematically lied to Plaintiffs about the number of 'clicks' and keyword hits realized, thus grossly **[*31]** overcharging Plaintiffs for services, and charging for services never provided and results never obtained." (FAC at ¶ 21.) Plaintiffs further allege that Defendants switched from "per click" invoicing to keyword invoicing without Plaintiffs' knowledge or consent, and then began to invoice Plaintiffs for a large number of keywords that did not appear on Plaintiffs' original price list, and clicks that never occurred. (*See id*. at ¶¶ 18, 21, 23-25.) Plaintiffs also allege "[t]he redacted Google account records showed that Defendants diverted Plaintiffs' funds to their own Google advertising, billing Plaintiffs for Defendants' own Google keywords and clicks, thereby doubling, tripling or even quadrupling the charges Defendants invoiced to Plaintiffs taken by direct credit card charging." (*Id*. at ¶ 23.) Plaintiffs further allege they have been damaged in an amount exceeding $160,000. At this stage, these allegations are sufficient to state a claim that Plaintiffs have been harmed and Defendants' business practice is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers."[4] Thus, the Court finds Plaintiffs have sufficiently stated a claim under the UCL's unfair prong. **[*32]**

For the reasons discussed above, Defendants' motion to dismiss Plaintiffs' cause of action under *Section 17200, et seq*. is **GRANTED IN PART**, that is, to the extent Plaintiffs have alleged Defendants' acts constituted unlawful practices, with leave to amend, and **DENIED IN PART** to the extent Plaintiffs have alleged Defendants' acts constituted fraudulent or unfair practices.

4. Declaratory Relief for Accounting

In the FAC, Plaintiffs seek declaratory relief for accounting. (FAC at ¶¶ 53-56.) Defendants move to dismiss arguing that declaratory relief operates only prospectively, and thus Plaintiffs' claim is improper because it seeks to redress past wrongs. (Mot. at p. 14.) In their opposition, Plaintiffs argue that a cause of action for "declaratory relief for

[4] "[T]he determination [of] whether [a practice] is unfair is one of fact which requires a review of the evidence from both parties[,]" and is therefore a determination that cannot typically be made on a motion to dismiss. *See* *McKell, 49 Cal. Rptr. at 240*.

accounting" is appropriate under *California Code of Civil Procedure section 1060*. (Opp. at p. 6.) However, regardless of the use of the phrase "declaratory relief" in the title of the cause of action in the FAC, Plaintiffs clearly seek an accounting. In **[*33]** the FAC, they do not request a declaration of their rights or duties under the Contract. *See* *Cal. Civ. Proc. Code § 1060*; *Jolley v. Chase Home Fin., LLC, 213 Cal. App. 4th 872, 909, 153 Cal. Rptr. 3d 546 (2013)*; FAC at ¶¶ 53-56 & Prayer). Rather, they seek an accounting because "[t]he precise sum due . . . cannot be ascertained without an accounting." (FAC at ¶ 55).

"An accounting action 'is a proceeding in equity for the purpose of obtaining a judicial settlement of the accounts of the parties in which proceeding the court will adjudicate the amount due, administer full relief and render complete justice.'" *Flores v. EMC Mortg. Co., 997 F. Supp. 2d 1088, 1119-20 (E.D. Cal. 2014)* (quoting *Verdier v. Super. Ct. in & for City & Cnty. of San Francisco, 88 Cal. App. 2d 527, 531, 199 P.2d 325 (1948))*. "An accounting cause of action is equitable and may be sought where the accounts are so complicated that an ordinary legal action demanding a fixed sum is impracticable." *Id. at 1120* (citing *Civic W. Corp. v. Zila Indus., Inc., 66 Cal. App. 3d 1, 14, 135 Cal. Rptr. 915 (1977))*. "An accounting will not be accorded with respect to a sum that a plaintiff seeks to recover and alleges in his complaint to be a sum certain." *Id*. A right to an accounting is derivative and must be based on other claims. *Id*. (citing *Janis v. Cal. St. Lottery Comm'n, 68 Cal. App. 4th 824, 833-34, 80 Cal. Rptr. 2d 549 (1998))*.

"An accounting claim need only state facts showing the existence of the relationship which requires an accounting and the statement that some balance is due the plaintiff." *Flores, 997 F. Supp. 2d at 1120* (internal citations and quotations omitted). An action for accounting is appropriate where there is a **[*34]** fiduciary relationship or where "the accounts are so complicated that an ordinary legal action demanding a fixed sum is impracticable." *Civic. W. Corp., 66 Cal. App. 3d at 14*; *Glue-Fold, Inc. v. Slautterback Corp., 82 Cal. App. 4th 1018, 1023 n. 3, 98 Cal. Rptr. 2d 661 (2000)*; *Jolley, 213 Cal. App. 4th at 910*.

Here, there is no suggestion the parties are fiduciaries; they are simply two parties to a contract. A mere contract or debt does not create a fiduciary relationship. *Id*. at 33-34 (citing *Waverly Prods., Inc. v. RKO Gen., Inc., 217 Cal. App. 2d 721, 32 Cal. Rptr. 73, (1963))*. Plaintiffs do allege the "complex nature of Google advertising and accounting" and assert that "[t]he precise sum due from cannot be ascertained without an accounting of the true and complete documentation regarding the purported billing basis including but not limited to invoices, reports, statistics substantiating the sums charged to Plaintiffs." (FAC at ¶¶ 36, 55.) However, a "suit for an accounting will not lie where it appears from the complaint that none is necessary or that there is an adequate remedy at law." *Flores, 997 F. Supp. 2d at 1120*. Here, there is nothing to suggest that the accounting is so complicated that Plaintiffs cannot ascertain the true sum owed through discovery in this action. *See* *Cnty of Santa Clara v. Astra USA, Inc., No. C-05-03740, 2006 U.S. Dist. LEXIS 57176, 2006 WL 2193343, at *6 (N.D. Cal. July 28, 2006)*. Accordingly, the Court finds that Plaintiffs have failed to allege a cause of action for accounting and Defendants' motion to dismiss Plaintiffs' **[*35]** cause of action for accounting is **GRANTED** with leave to amend.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss the FAC is **GRANTED IN PART** with leave to amend and **DENIED IN PART** (ECF No. 40). If Plaintiffs choose to file a Second Amended Complaint, they must do so no later than March 30, 2015.

IT IS SO ORDERED.

DATED: March 9, 2015

/s/ Cynthia Bashant

Hon. Cynthia Bashant

United States District Judge

[Ashley Furniture Indus. v. Am. Signature, Inc.](#)

United States District Court for the Southern District of Ohio, Eastern Division

March 12, 2015, Filed

Case No. 2:11-cv-427

Reporter

2015 U.S. Dist. LEXIS 194690 *; 2015 WL 12999664

Ashley Furniture Industries, Inc., Plaintiff, -v- American Signature, Inc., Defendant.

Subsequent History: Motion denied by *Ashley Furniture Indus. v. Am. Signature, Inc., 2016 U.S. Dist. LEXIS 206332, 2016 WL 8135283 (S.D. Ohio, Mar. 22, 2016)*

Prior History: *Ashley Furniture Indus. v. Am. Signature, Inc., 2011 U.S. Dist. LEXIS 106703 (S.D. Ohio, Sept. 19, 2011)*

Core Terms

advertisements, lawsuit, false advertising, baseless, unfair competition, prices, counterclaim, furniture, literally, allegations, immunity, Lanham Act, asserts, motion to dismiss, common law, discovery, pleaded, argues, sham, limited quantity, misrepresentations, representations, consumer, summary judgment motion, common law claim, sham exception, regular price, federal law, misleading, contends

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Judges: MICHAEL H. WATSON, UNITED STATES DISTRICT JUDGE.

Opinion by: MICHAEL H. WATSON

Opinion

OPINION AND ORDER

The parties, who are competitors, make and sell sofas. This case involves, *inter alia*, Defendant's **[*3]** use, in its own advertising, of Plaintiff's trademarks and copyrighted photographic images of Plaintiff's sofas. Plaintiff asserts claims for trademark infringement, and false advertising under federal law, as well as a state law claim for false advertising. Am. Compl., ECF No. 58. Defendant filed an amended counterclaim that includes claims for unfair competition under Ohio common law, violation of the *Ohio Deceptive Trade Practices Act ("ODTPA")*, and false advertising under the federal *Lanham Act*. Am. Counterclaim, ECF No. 72. Plaintiff moves to dismiss Defendant's amended counterclaim. ECF No. 118. For the following reasons, the Court grants Plaintiff's motion to dismiss.

I. BACKGROUND

Plaintiff Ashley Furniture Industries, Inc. ("Ashley") sells its furniture through 400 of its own retail stores in addition to 6,000 independent retailers in the United States. Defendant American Signature, Inc., dba Value City Furniture ("Value City") operates 128 retail furniture stores in which it sells other companies' furniture. Defendant Value City sold Ashley furniture in the past but no longer does so.

In 2010 and 2011, Value City obtained the copyrighted images of Ashley's furniture from Ashley's **[*4]** website. Value City then used those photographs in its own advertisements. Some of the advertisements contained one of Ashley's copyrighted photographs alongside a photograph of a purportedly comparable item of furniture that Value City sells in its own stores. This is referred to as "comparative advertising." Value City displayed the comparative advertisements on websites, in newspapers, and in store handouts. It also emailed the advertisements to potential customers.

In 2010, Ashley brought a lawsuit against Value City based on the above factual allegations in federal district court in Chicago, Illinois. In the Chicago action, Ashley asserted claims against Value City for false advertising, unfair competition, and trademark infringement under the Lanham Act as well as analogous state law. The case was drawn by Senior Judge Milton I. Shader. Judge Shader expressed scepticism about Ashley's claims in his orders and on the record during a conference and a hearing. Those expressions never ripened to a final decision on the merits, however, and Ashley dismissed the Chicago action without prejudice.

Ashley filed the present action in May 2011. The original complaint set forth a single claim **[*5]** for copyright infringement. Compl., ECF No. 1. Less than one month later, and prior to discovery, Value City responded to the complaint by filing a motion for summary judgment. ECF No. 17. Ashley moved to defer ruling on Value City's summary judgment motion under *Federal Rule of Civil Procedure 56(d)*. ECF No. 29. The Magistrate Judge granted that motion and ordered discovery to proceed. ECF No. 36. After discovery was complete, Value City reified its motion for summary judgment. ECF No. 87. In June 2014, the Court issued an Opinion and Order granting Value City's motion for summary judgment on Ashley's federal copyright claim. ECF No. 121. Although the Court ruled in Value City's favor, Ashley's copyright claim was at the very least colorable.

Value City brings a counterclaim against Ashley alleging claims for: (1) unfair competition under Ohio common law; (2) violations of the ODTPA; and (3) false advertising in violation of *15 U.S.C. § 1125(a)*.

In Count One of its counterclaim, Value City asserts that Ashley has engaged in unfair competition in violation of Ohio common law. Count One relates to Ashley's attempts to litigate its claims against Value City. Value City alleges that Ashley engaged in unfair competition by filing a lawsuit against **[*6]** Value City in August 2010 in the United States District Court for the Northern District of Illinois, Chicago, by arguing in the present lawsuit that it needed discovery to respond to Value City's motion for summary judgment on Ashley's copyright claim, and by filing the instant lawsuit when Ashley knew its claims were baseless. In large part, the allegations supporting this claim consist of accusations that Ashley made misrepresentations to this Court.

Value City also brings claims for alleged violations of the ODTPA and the Lanham Act. Specifically, Value City asserts that advertisements for Ashley's furniture contain false and misleading information about the prices for that furniture. Value City provides seven examples of purportedly false advertisements. Amend. Counterclaim, ¶¶ 93-99, ECF No. 72. All of the examples involve items of furniture offered at a "sale" price along with one or more higher prices for comparison. In several of the examples, the item of furniture was featured several months later in one or more advertisements with different "regular" and "compare" prices. In addition, Ashley's advertisements included "one day" sales and "limited quantity" sales, but the items **[*7]** in those sales were offered on multiple occasions. Several advertisements also contain a statement that the items were discounted by a specific amount or percentage, but the advertisements do not identify the nature of the higher price, such as whether the higher price was Ashley's regular price or a competitor's price. Value City alleges, "upon information and belief," that the "sale" prices in the advertisements are in reality Ashley's regular prices, and the "regular" prices are artificially inflated prices created for the purpose of claiming a discounted price in the advertisements.

Ashley moves to dismiss Value City's counterclaims for failure to state a claim. ECF No. 118.

II. MOTION TO DISMISS

A claim survives a motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)* if it "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* A complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all of the complaint's allegations **[*8]** are true." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (internal citations omitted).

A court must also "construe the complaint in the light most favorable to the plaintiff." *Inge v. Rock Fin. Corp., 281 F.3d 613, 619 (6th Cir. 2002)*. In doing so, however, a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555*; *see also* *Iqbal, 556 U.S. at 678* ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); *Ass'n of Cleveland Fire Fighters v. City of Cleveland, Ohio, 502 F.3d 545, 548 (6th Cir. 2007)*. "[A] naked assertion . . . gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility . . . ." *Twombly, 550 U.S. at 557*. Thus, "something beyond the mere possibility of [relief] must be alleged, lest a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." *Id. at 557-58* (internal citations omitted).

III. DISCUSSION

A. Ohio Common Law Unfair Competition

Value City asserts that Ashley engaged in unfair competition in violation of Ohio common law by filing the prior lawsuit against Value City in Chicago, by seeking discovery to respond to Value City's motion for summary judgment, **[*9]** and by filing the present lawsuit. The allegations supporting these claims consist of remarks made by the district judge in the prior action and alleged misrepresentations Ashley made to the Court in the course of the present litigation.

Ashley contends Value City's unfair competition claim fails because Value City fails to plausibly plead that Ashley's initiation of litigation was objectively baseless. It further argues that Value City's counterclaim is barred by the *Noerr Pennington* doctrine, which provides immunity against claims that might chill exercise of the First Amendment right to seek redress of grievances through litigation. In addition, Ashley argues Value City's state law claim based on Ashley's conduct in federal court is preempted by federal law.

Value City maintains that it has plausibly pleaded that Ashley's legal actions were objectively baseless. In addition, it contends that the *Noerr-Penntington* defense cannot be determined on the pleadings. Value City also argues federal law does not preempt its unfair competition claim.

"Ohio common law recognizes a claim for unfair competition based on malicious litigation." All Metal Sales, Inc. v. All Metal Source, LLC, No. 1:10-cv-2343, 2011 U.S. Dist. LEXIS 25019, 2011 WL 867020, at *2 (N.D. Ohio Mar. 11, 2011) (citing **[*10]** Water Mgmt. Inc. v. Stayanci, 15 Ohio St. 3d 83, 15 Ohio B. 186, 472 N.E.2d 715, 715 (Ohio 1984); Microsoft Corp. v. Action Software, 136 F. Supp. 2d 735, 740 (N.D. Ohio 2001)). "Unfair competition may include 'unfair commercial practices such as malicious litigation, circulation of false rumors, or publication of statements, all designed to harm the business of another.'" Hua-Cheng Pan v. Kohl's Dept. Stores, Inc., No. 2:12-cv-1063, 2013 U.S. Dist. LEXIS 130616, 2013 WL 5181144, at *8 (S.D. Ohio Sept. 12, 2013) (quoting Water Mgmt., 15 Ohio St. 3d at 85). "To successfully establish an unfair competition claim based upon legal action, a party must show that the legal action is objectively baseless and that the opposing party had the subjective intent to injure the party's ability to be competitive." Am. Chem. Soc. v. Leadscope, Inc., 133 Ohio St. 3d 366, 367, 2012- Ohio 4193, 978 N.E.2d 832 (2012) (syllabus ¶ 1). Thus, in order to succeed on its unfair competition claim, Value City must plausibly plead (1) that Ashley engaged in litigation against Value City that was objectively baseless, and (2) that Ashley did so with the subjective intent to injure Value City's ability to compete. *Id.*

Ashley also seeks dismissal based on *Noerr-Pennington* immunity.

> Under the Petition Clause of the First Amendment to the U.S. Constitution, private actors have the right to petition the government for action. U.S. Const. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."). Where private actors petition the government for action that would violate ***antitrust law***, the **[*11]** Petition Clause immunizes the actors from litigation in connection with their petitioning. Under these circumstances, private immunization from alleged violations of the Sherman Act is known as the *Noerr-Pennington* doctrine.

VIBO Corp., Inc. v. Conway, 669 F.3d 675, 683-84 (6th Cir. 2012). "Although the *Noerr-Pennington* doctrine was initially recognized in the antitrust field, the federal courts have by analogy applied it to claims brought under both state and federal laws, including common law claims of tortious interference." Campbell v. PMI Food Equip. Gp., Inc., 509 F.3d 776, 790 (6th Cir. 2007). Value City does not dispute that *Noerr-Pennington* applies to its Ohio common law claim for unfair competition.

The *Noerr-Pennington* immunity doctrine contains a narrow exception insofar as the immunity does not apply to sham lawsuits filed for the purpose of interfering with competition. Static Control Components, Inc. v. Lexmark Intern., Inc., 697 F.3d 387, 408 (6th Cir. 2012). To constitute sham litigation,

> [f]irst, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine **[*12]** the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals "an attempt to interfere directly with the business relationships of a competitor," through the

"use [of] the governmental process—as opposed to the outcome of that process—as an anti competitive weapon."

Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60-61, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993) (quoting Noerr, 365 U.S. at 144; City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)).

An Ohio common law claim of unfair competition based on the filing of a sham lawsuit requires the party advancing the claim to plausibly plead that the lawsuit was objectively baseless. Leadscope, Inc., 133 Ohio St. 3d at 367. Similarly, a claimant must show the lawsuit against it was objectively baseless in order to defeat *Noerr-Pennington* immunity under the sham litigation exception to that doctrine. Prof'l Real Estate Investors, 508 U.S. at 60-61. Hence, in this case, the Court must examine whether Value City has adequately pleaded Ashley's lawsuits are objectively baseless in connection with both grounds for dismissal.

The Court agrees with Ashley that Value City has failed to plausibly plead that the two lawsuits Ashley filed against Value City were objectively baseless. First, the Court rejects Value City's suggestion that *Noerr-Pennington* immunity can never be addressed at the pleading stage. Courts **[*13]** in the Sixth Circuit have routinely dismissed claims under the *Noerr-Pennington* doctrine for failure to adequately plead the sham litigation exception. *See* Agema v. City of Allegan, No. 1:12-cv-417, 2014 U.S. Dist. LEXIS 7570, 2014 WL 249374 (W.D. Mich. Jan. 22, 2014); GMA Cover Corp. v. Saab Barracuda LLC, No. 4:10-CV-12060, 2012 U.S. Dist. LEXIS 25543, 2012 WL 642739 (E.D. Mich. Feb. 08, 2012); New Day Farms, LLC v. Board of Trustees of York Tp., Ohio, No. 2:08-cv-01107, 2009 U.S. Dist. LEXIS 107790, 2009 WL 4016480 (S.D. Ohio Nov. 17, 2009); MSC.Software Corp. v. Altair Engineering, Inc., No. 07-12807, 2009 U.S. Dist. LEXIS 82298, 2009 WL 2923075 (E.D. Mich. Sept. 10, 2009).

In support of its argument that *Noerr-Pennington* immunity cannot be addressed on a motion to dismiss, Value City relies primarily on a single decision by another branch of this Court. The Scooter Store, Inc. v. Spinlife.Com, LLC, 777 F. Supp. 2d 1102, 1115 (S.D. Ohio 2011) ("[W]hether a party's conduct is a genuine attempt to avail itself of the judicial process or is merely a sham is a question of fact that is inappropriate for a motion to dismiss."). Nonetheless, the decision *The Scooter Store* cites for that proposition examined the sham exception in the context of summary judgment. Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1252-53 (9th Cir. 1982). Indeed, in *Clipper Exxpress*, the party asserting the sham exception had sufficiently demonstrated the protest at issue was baseless, and the intent of the party asserting immunity was "assumed." *Id.* The court indicated that whether protest was genuinely intended to influence the government is a question of fact. Id. at 1253. Thus, the question of fact in *Clipper* ***[*14]*** *Exxpress* concerned the subjective *intent* prong of the sham exception. In contrast, whether a lawsuit is objectively baseless may be decided as a question of law. Regional Multiple Listing Serv. of Minnesota, Inc. v. Am. Home Realty Network, Inc., 960 F. Supp. 2d 958, 979 (D. Minn. 2013). Therefore, the reluctance to grant the motion to dismiss in The Scooter Store likely pertained to the subjective intent element of the sham litigation exception. Here, in contrast, the Court's inquiry is focused on whether Ashley's lawsuits were objectively baseless.

Value City also makes much of the fact that Ashley's attorneys, representing a different client, opposed the dismissal of the claim in *The Scooter Store* by successfully arguing that the sham exception to *Noerr-Pennington* could not be determined in that case on the pleadings. That fact has no legal significance whatsoever to the present lawsuit. This is not a case where judicial estoppel or similar legal principle applies to Ashley's *Noerr-Pennington* defense. Irony, if it can even be called that, is not a ground for denying a Rule 12(b)(6) motion.

The Court finds Value City has not plausibly pleaded that Ashley's lawsuits were objectively baseless. Rather than attempt to plead facts showing that Ashley's lawsuits were objectively baseless, Value City focuses on comments made **[*15]** by Judge Shader in the Chicago lawsuit and alleged misrepresentations Ashley has made to this Court.

Indeed, the first several pages of Ashley's counterclaim are devoted to Judge Shader's expressions of doubt about the merits of Ashley's copyright claim. Value City goes so far as to represent that Judge Shader "held" that Ashley's claim had no merit. Amend. Counterclaim ¶ 18, ECF No. 72. Not so. Judge Shader never "held" Ashley's claim lacked merit. At most, Judge Shader expressed skepticism but never reached the merits of Ashley's claim. Judge Shader's incredulity simply does not remotely give rise to a plausible inference that Ashley's lawsuit was objectively baseless. Moreover, even if Judge Shader had reached the merits, an adverse ruling does not establish that a claim is objectively baseless. *Prof'l Real Estate Investors, 508 U.S. at 60*.

Value City's counterclaim goes on to aver that Ashley deceived this Court in connection with discovery. Even assuming that is true, it falls far short of giving rise to an inference that the present lawsuit was objectively baseless. Value City cites no authority for the proposition that discovery abuses are actionable through an Ohio common law claim for unfair competition. Further, for **[*16]** purposes of demonstrating the sham exception to *Noerr-Pennington* immunity, Value City must show that the *entire* lawsuit was baseless, not merely one claim or action. *MSC.Software, 2009 U.S. Dist. LEXIS 82298, 2009 WL 2923075, at *1-2*. Value City does not even attempt to plead that Ashley's lawsuits were objectively baseless in their entirety.

The remainder of Value City's unfair competition claim focuses on Ashley's alleged deceptive representations made in connection with its motion for leave to amend, including Ashley's representation that discovery provided the bases for new claims. Value City also alleges that a consumer survey Ashley conducted was flawed, and that Ashley misrepresented to the Court that the survey could not have been undertaken earlier. These purported misrepresentations, while potentially sanctionable, do not give rise to a plausible inference that the present lawsuit is objectively baseless in its entirety. *See id.*

In short, Value City utterly fails to plausibly plead that the lawsuits Ashley filed against it were objectively baseless. For that reason, Ashley is entitled to dismissal of Value City's Ohio common law claim for unfair competition.

In the alternative, the Court holds that federal law preempts Value City's common law **[*17]** unfair competition counterclaim. Value City's unfair competition counterclaim consists largely of Ashley's alleged misrepresentations to this Court. *Federal Rule of Civil Procedure 11* expressly governs the kind of representations Ashley made to the Court and provides for sanctions in the case of misrepresentations concerning claims or defenses. *Fed. R. Civ. P. 11(b)(2)*. *Rule 11* also contains a safe harbor provision that allows a litigant to withdraw a representation within twenty-one days. *Fed. R. Civ. P. 11(c)(1)(A)*. Ohio common law unfair competition does not contain such a safe harbor provision. It therefore directly conflicts with federal law and is preempted. *First Bank of Marietta v. Hartford Underwriters Ins. Co., 307 F.3d 501, 529-30 (6th Cir. 2002)*. For this additional reason, the Court dismisses Value City's Ohio common law claim for unfair competition based on Ashley's conduct in federal court.

B. Ohio Deceptive Trade Practices Act and Lanham Act

Value City also brings claims under the ODTPA and Lanham Act for alleged false advertising. Value City maintains that Ashley's advertisements contained false and misleading representations about the prices of Ashley's furniture.

Ashley argues that Value City has failed to plead facts to support a plausible inference that any of the advertisements featuring Ashley's furniture were literally false or misleading. In **[*18]** addition, Ashley argues ASI failed to plausibly plead the essential elements of a false advertising claim.

The ODTPA states in relevant part:

> A person engages in a deceptive trade practice when, in the course of the person's business, vocation, or occupation, the person does any of the following:
>
> . . .
>
> Makes false statements of fact concerning the reasons for, existence of, or amounts of price reductions; . . . .

Ohio Revised Code § 4165.02(A)(12).

Ashley also asserts a claim under the Lanham Act, which states:

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—
>
> . . .
>
> in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, . . .
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. §1125(a).

A claim under the ODTPA is treated the same as a claim for false advertising under the Lanham Act. **[*19]** *Stilson & Associates, Inc. v. Stilson Consulting Grp., LLC, 129 F. App'x 993, 994 (6th Cir. 2005)* ("The standard applicable to Lanham Act claims governs Plaintiffs' . . . claims under the Ohio Deceptive Trade Practices Act . . . .") (internal citations omitted). Under either statute, to prevail a plaintiff must prove: (1) the defendant made false or misleading statements of fact concerning either its own or another's product; (2) the statements actually or tend to deceive a substantial portion of the intended audience; (3) the statements are material in that they will likely influence the deceived consumer's purchasing decisions; (4) the advertisements were introduced into interstate commerce; (5) there is some causal link between the challenged statements and harm to the plaintiff. *Am. Council of Certified Podiatric Physicians and Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 185 F.3d 606, 613 (6th Cir. 1999)*.

Value City provides seven examples of purportedly false advertisements that appeared in central Ohio newspapers. Amend. Counterclaim ¶¶ 93-99, ECF No. 72. The examples describe advertisements for furniture offered at a "sale" price with one or more higher prices for the consumer to compare. Value City alleges that the same items of furniture were depicted in later advertisements with different "regular" and "compare" prices, and that those prices were sometimes higher or lower than the "regular" and **[*20]** "compare" prices stated in earlier advertisements.[1] Other advertisements contained a statement that the item was discounted by a specific amount or percentage, but those advertisements did not indicate the nature of the higher comparison price, such as whether the higher price was Ashley's regular price or a competitor's price.[2] In addition, some advertisements offered the same item for sale on a "one day only" or "limited quantity" basis on multiple occasions. Furthermore, Value City asserts, "upon

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[1] Paragraph 93 of Value City's Amended Counterclaim states:

> For example, the Ashley Counterclaim Defendants caused, approved, permitted, authorized, and/or ratified placement of an advertisement in November 2011 that offered for sale a particular sofa combined with a "free loveseat with purchase of sofa" for a total price of $397 and represented that the "compare" price was $1,159.98. The advertisement represented that the offer was for "1 DAY — FRIDAY ONLY" and that there were "ONLY 100 SETS TO SELL" and "limit **[*21]** 1 per household." In January 2012, the Ashley Counterclaim Defendants caused, approved, permitted, authorized, and/or ratified placement of an advertisement offering for sale the same sofa with the same "free loveseat with purchase of sofa" for the same price of $397 and represented that there was a "LIMITED QUANTITY" and that the "compare" price was $1,959.98 — or $800 higher than the previous "compare" price.

Amend. Counterclaim ¶ 93, ECF No. 72.

[2] Paragraph 94 of Value City's Amended Counterclaim states:

> As another example, over a time period extending at least from June 2010 through January 2012, the Ashley Counterclaim Defendants caused, approved, permitted, authorized, and/or ratified placement of numerous advertisements offering for sale a particular sofa at offering prices of $399, $398, or $388, depending on the advertisement, and making various additional representations, stating in some advertisements that the "compare" price for the item was $899.99 while in other advertisements that the "compare" price was $999.99. During this time frame and depending on the advertisement, the purported "compare" price seesawed between $899.99 and $999.99. One advertisement placed in June 2010 offered this sofa for $398 and stated "Save $132," without identifying the nature of the price **[*22]** that was $132 higher, such as whether it referred to a former Ashley price or another retailer's price.

Amend. Counterclaim ¶ 94, ECF No. 72.

information and belief," that the "sale" prices in the advertisements are in reality the regular prices, and the "regular" prices are artificially inflated prices created for the purpose of claiming a discounted price in the advertisements. *Id.* ¶ 100.

Ashley contends that the above factual allegations are insufficient and at most give rise to a mere possibility that Ashley's advertisements are literally false. It argues that Value City's ODTPA and Lanham Act false advertising claims therefore fail to meet the pleading standard established by *Twombly* and *Iqbal* and must be dismissed.

Value City maintains that it has plausibly pleaded its false advertising claims. It contends that

> It is reasonable to infer, for example, that serial offers of a "one day only" "limited quantity" sale on the same item are false and deceiving. It is reasonable to infer that "compare" prices that yo-yo up and down are not actual prices of comparable items at a competing retailer. It is also reasonable to infer that a "compare" price that suddenly zooms up by $800 is not based on bona fide sales of a comparable item at a competing retailer.

Mem. Opposition 18-19, ECF No. 119.

The Court finds that Value City has failed to plausibly plead a claim for false advertising based on literal falseness. Ashley is correct that Value City's allegations give rise to an **[*23]** inference that Ashley *possibly* engaged in false advertising, but the claim falls short of meeting the plausibility standard. First, Value City's core argument is that prices in the advertisements changed over time. But there are myriad possible explanations for price changes that do not involve false advertising. Businesses routinely adjust the prices of their products. The same is true of the allegedly successive one-day and limited quantity sales. Supplies might be limited at one point in time but not at a later date. Consequently, Value City's allegations do no more than raise a suspicion that Ashley engaged in false advertising.

Ashley's failure to identify the nature of the comparison price renders the advertisements ambiguous in that respect. If a consumer does not understand the nature of the higher comparison price, it follows the representation of that price is ambiguous. Similarly, the meaning and significance of "one-day" and "limited quantity" are ambiguous. The meaning of those terms is unclear. Does "one day" mean never again or not for a long time or just that the sale lasts one day? Does "limited quantity" mean limited temporarily or forever? As such, Ashley's alleged **[*24]** failure to identify the nature of the comparison price and its advertisements of successive one-day or limited quantity sales do not plausibly meet the standard for literal falsehood. *See* *Innovation Ventures, LLC v. N.V.E, Inc., 694 F.3d 723, 737 (6th Cir. 2012)* (only an unambiguous message can be literally false). When a claimant shows literal falsity, it is entitled to a presumption that the representation was material. *Id.* If the representation is ambiguous, however, the materiality element must be satisfied. *Id.*

One of the alleged misrepresentations could constitute literal falsity: the representation that Ashley's advertised prices are sales prices when in fact they are its regular prices. And the Court agrees with Value City that allegations based upon "information and belief' do not necessarily fail the *Twombly/Iqbal* standard. Nonetheless, in this instance, Value City's bald assertion that Ashley's sale prices are actually its regular prices is conclusory and speculative. Value City's counterclaim does not include any additional factual assertions that would indicate this particular allegation is plausible.

Furthermore, the Court rejects Value City's suggestion that additional facts are not required because the evidence that might support its allegations **[*25]** is uniquely in the possession of Ashley. Since *Iqbal*, the Sixth Circuit Court of Appeals has flatly rejected the notion that insufficient pleading may be excused because the specific facts are solely in the possession of the defendant. *New Albany Tractor, Inc. v. Louisville Tractor, Inc., 650 F.3d 1046, 1051 (6th Cir. 2011)* (rejecting argument that complaint should not have been dismissed as deficient because pricing information was solely in possession of the defendant). In sum, Value City has failed to plead a plausible claim of false advertising based on literal falsity.

Ashley also contends that Value City has failed to plead all of the elements of its ODTPA and Lanham Act false advertising claims with respect to the representations that are not literally false. Specifically, Ashley argues that Value City has failed to plausibly plead facts to support the essential element of materiality, i.e., that the purportedly false advertisements were material and influenced consumers' purchasing decisions. Moreover, Ashley contends

Value City has not pleaded a causal link between the alleged false statements and any harm suffered by Value City.

Value City maintains that because Ashley's advertisements were literally false, Value City is not required to plead materiality, that **[*26]** the advertisements deceived consumers, or a causal connection between the allegedly false statements and injury to Value City. The Court, however, has found that Value City has failed to plausibly plead literal falsity. The one category of representations about price that could arguably be literally false is pleaded in an entirely conclusory fashion. The remaining representations are not literally false.

Consequently, Value City was required to plead facts to plausibly support the other elements of its false advertising claims. *Aquashield, Inc. v. Sonitec Vortisand, Inc., No. 1:13-cv-119, 2013 U.S. Dist. LEXIS 143611, 2013 WL 5524598, at *7 (E.D. Tenn. Oct. 4, 2013)* (Lanham Act plaintiff must plausibly plead elements of consumer deception and materiality although it need not plead specific dates of advertisements).

Value City suggests that Ashley improperly seeks to require Value City to plead "magic words" or satisfy a heightened pleading requirement. Value City's suggestion mischaracterizes Ashley's argument. Rather, Ashley argues that Value City has failed to plausibly plead essential elements of its false advertising claim. Although Value City appears to deny that pleading requirement, it is in fact well-established. "To state a valid claim, a complaint must **[*27]** contain either direct or inferential allegations respecting *all the material elements* to sustain recovery under some viable legal theory." *League of United Latin Am. Citizens v. Bredesen, 500 F.3d 523, 527 (6th Cir. 2007)* (emphasis added) (citing *Twombly, 550 U.S. at 562*).

Here, Value City makes no effort to plausibly plead the essential element of materiality in connection with the representations in the advertisements that were not literally false. It likewise fails to plead any facts to plausibly support an inference of a causal link between Ashley's advertisements and an injury to Value City. Its false advertising claims therefore fail.

In sum, Value City's conclusory allegation is insufficient to support a false advertising claim based on literal falsity. In addition, Value City's failure to plead any facts supporting the essential elements of materiality and causality preclude a false advertising claim based on statements in Ashley's advertisements that are not literally false. Ashley is therefore entitled to dismissal of Value City's false advertising claims.

IV. DISPOSITION

For the above reasons, the Court **GRANTS** Ashley's motion to dismiss Value City's amended counterclaim. The Court **DISMISSES** Value City's counterclaim in its entirety **WITH PREJUDICE**.

IT IS SO ORDERED.

/s/ Michael H. **[*28]** Watson

MICHAEL H. WATSON, JUDGE

UNITED STATES DISTRICT COURT

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Golden v. Sound Inpatient Physicians Med. Group, Inc.

United States District Court for the Eastern District of California

March 13, 2015, Decided; March 17, 2015, Filed

No. 2:14-cv-00497-TLN-EFB

Reporter

93 F. Supp. 3d 1171 *; 2015 U.S. Dist. LEXIS 33024 **

Otashe Golden, M.D., Plaintiff, v. SOUND INPATIENT PHYSICIANS MEDICAL GROUP, INC., and DOES 1-10, inclusive, Defendants.

Prior History: *Golden v. Sound Inpatient Physicians Med. Group, Inc., 2014 U.S. Dist. LEXIS 101126 (E.D. Cal., July 22, 2014)*

Core Terms

profession, right to practice, alleges, economic relations, amended complaint, third party, patients, unfair, cause of action, leave to amend, prospective economic advantage, hospitalist, probability, argues, future economic, intentional interference, speculative, fraudulent, unfair competition, motion to dismiss, anti trust law, grounds, notice

LexisNexis® Headnotes

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

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

Fed. R. Civ. P. 8(a) requires that a pleading contain a short and plain statement of the claim showing that the pleader is entitled to relief. Under notice pleading in federal court, a complaint must give the defendant fair notice of what the claim is and the grounds upon which it rests. This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.

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

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

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

On a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, the factual allegations of a complaint must be accepted as true. A court is bound to give plaintiff the benefit of every reasonable inference to be drawn from the well-pleaded allegations of the complaint. A plaintiff need not allege specific facts beyond those necessary to state his claim and the grounds showing entitlement to relief. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Nevertheless, a court need not assume the truth of legal conclusions cast in the form of factual allegations. While *Fed. R. Civ. P. 8(a)* does not require detailed factual allegations, it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation. A pleading is insufficient if it offers mere labels and conclusions or a formulaic recitation of the elements of a cause of action. Moreover, it is inappropriate to assume that the plaintiff can prove facts that it has not alleged or that the defendants have violated the laws in ways that have not been alleged.

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

HN3[] **Motions to Dismiss, Failure to State Claim**

A court may not dismiss a complaint in which the plaintiff has alleged enough facts to state a claim to relief that is plausible on its face. Only where a plaintiff fails to nudge his or her claims across the line from conceivable to plausible is the complaint properly dismissed. While the plausibility requirement is not akin to a probability requirement, it demands more than a sheer possibility that a defendant has acted unlawfully. This plausibility inquiry is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.

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

Evidence > Judicial Notice > Adjudicative Facts

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

In ruling upon a motion to dismiss, a court may consider only the complaint, any exhibits thereto, and matters which may be judicially noticed pursuant to *Fed. R. Evid. 201*.

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

HN5[] **Amendment of Pleadings, Leave of Court**

If a complaint fails to state a plausible claim, a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts. Although a district court should freely give leave to amend when justice so requires under *Fed. R. Civ. P. 15(a)(2)*, the court's discretion to deny such leave is particularly broad where the plaintiff has previously amended its complaint.

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

HN6[] **Intentional Interference, Elements**

The elements for a claim of interference with a prospective economic advantage under California law are as follows: (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant.

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

HN7[] **Intentional Interference, Elements**

In order to establish intentional interference with a prospective economic advantage based upon a contract, a party is required to: (1) set out the written contract in verbatim in the complaint; (2) attach the contract as an exhibit; or (3) plead in full in accordance with the contract's legal effect.

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

HN8[] **Intentional Interference, Elements**

Interference with a prospective economic advantage, a tort that similarly compensates for the loss of an advantageous economic relationship, does not require the existence of a legally binding contract.

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

HN9[] **Intentional Interference, Elements**

A party cannot maintain a claim for intentional interference with a prospective economic advantage where the existing relationship is speculative.

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

HN10[] **Intentional Interference, Elements**

With respect to a claim for intentional interference with a prospective economic advantage, a defendant's tortious conduct must interfere with a specific existing relationship, not simply with the formation of one in the future.

Evidence > Burdens of Proof > Allocation

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

Evidence > Inferences & Presumptions > Inferences

HN11[] **Burdens of Proof, Allocation**

With respect to a claim for intentional interference with a prospective economic advantage, a plaintiff has the burden of proving that there was the probability of economic benefit with a third party. The law precludes recovery for overly speculative expectancies by initially requiring proof the business relationship contained the probability of future economic benefit to the plaintiff. Although it is necessary to infer that there would have been some benefit to the plaintiff but for defendant's interference, the chance the expectancy otherwise would have occurred is necessarily a matter of some uncertainty.

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

HN12[] Intentional Interference, Elements

The act of interference with prospective economic advantage is not tortious in and of itself. To state a claim for intentional interference under California law, a plaintiff must allege that the defendant engaged in an independently wrongful act that is wrongful by some legal measure other than the act of interference itself. This is understood as an act proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.

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

HN13[] Intentional Interference, Elements

An act of interference with prospective economic advantage must be wrongful by some legal measure, rather than merely a product of an improper, but lawful, purpose or motive.

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

HN14[] Intentional Interference, Elements

The tort of intentional interference with prospective economic advantage is not intended to punish individuals or commercial entities for their choice of commercial relationships or their pursuit of commercial objectives, unless their interference amounts to independently actionable conduct. Interference based on lawful competition is not actionable.

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

HN15[] State Regulation, Claims

California's Unfair Competition Law (UCL) prohibits any unlawful, unfair or fraudulent business act. *Cal. Bus. & Prof. Code § 17200*. To bring a UCL claim, a plaintiff must show either an (1) unlawful, unfair, or fraudulent business act or practice, or (2) unfair, deceptive, untrue or misleading advertising. A practice is prohibited as unfair or deceptive even if not unlawful or vice versa.

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

HN16[] State Regulation, Claims

By proscribing "any unlawful" business practice, *Cal. Bus. & Prof. Code § 17200* borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable. A violation of another law is a predicate for stating a cause of action under the unlawful prong of the Unfair Competition Law (UCL). Where a plaintiff cannot state a claim under the "borrowed" law, it cannot state a UCL claim either.

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

HN17[] State Regulation, Claims

A defendant is not liable under *Cal. Bus. & Prof. Code § 17200* for committing unlawful business practices without having violated another law.

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

HN18[] **Heightened Pleading Requirements, Fraud Claims**

Under *Fed. R. Civ. P. 9(b)*, a plaintiff pleading a claim of fraud, or any claim that is grounded in fraud must state with particularity the circumstances constituting fraud or mistake. That is, the plaintiff must set forth with particularity the who, what, when, where, and how of the misconduct charged. The plaintiff must also allege the misrepresentations themselves with particularity. A pleading is sufficient under *Rule 9(b)* if it identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations.

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

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

When a plaintiff who claims to have suffered injury from a direct competitor's "unfair" act or practice invokes *Cal. Bus. & Prof. Code § 17200*, the word "unfair" in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

Torts > ... > Commercial Interference > Employment Relationships > Elements

HN20[] **Employment Relationships, Elements**

A cause of action for interference with the right to practice a profession exists when the right to pursue a lawful business, calling, trade, or occupation is intentionally interfered with either by unlawful means or by means otherwise lawful when there is a lack of sufficient justification. A cause of action for intentional interference with the right to practice one's profession requires intentional and malicious acts designed to prevent the plaintiff from practicing her profession. There must be a complete prohibition on the right to practice a profession to allege interference with the right to practice a profession.

Torts > ... > Commercial Interference > Employment Relationships > Elements

HN21[] **Employment Relationships, Elements**

In order to successfully claim interference with the right to practice a profession there must be a complete prohibition on the right to practice a profession.

Counsel: [1]** For Otashe Golden, M.D., Plaintiff: Gregory Martin Finch, LEAD ATTORNEY, Signature Law Group, Sacramento, CA.

For Sound Inpatient Physicians Medical Group, Inc., Defendant: Marcia A. Washkuhn, PHV, LEAD ATTORNEY, PRO HAC VICE, Kutak Rock LLP, Omaha, NB; Matthew C. Sgnilek, LEAD ATTORNEY, Kutak Rock LLP, Irvine, CA.

Judges: Troy L. Nunley, United States District Judge.

Opinion by: Troy L. Nunley

Opinion

[*1173] ORDER GRANTING DEFENDANT'S MOTIONS TO DISMISS

This matter is before the Court pursuant to Defendant Sound Inpatient Physicians Medical Group, Inc.'s ("Defendant") Motion to Dismiss. (ECF No. 34.) Plaintiff Otashe Golden, M.D. ("Plaintiff") filed an Opposition to Defendant's motion. (ECF No. 44.) The Court has reviewed and considered the arguments in Defendant's **[*1174]** Motion to Dismiss and Reply, along with Plaintiff's Opposition. The Court hereby GRANTS Defendant's Motion to Dismiss with leave to amend.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff is the majority shareholder in California Hospitalist Physicians, Inc. ("CHP"). (ECF No. 34 at 6.) In 2009 CHP contracted with Dameron Hospital Association ("DHA") to provide hospitalist services. (ECF No. 34 at 6.) The contract expired on April 4, 2012. (ECF No. 34 at 6.) Defendant **[**2]** was chosen to replace Plaintiff as the new hospitalist group for DHA. (ECF No. 34 at 6.) DHA asked community physicians to work with Defendant. (ECF No. 34 at 6.)

In the Second Amended Complaint ("SAC") Plaintiff alleges that on April 4, 2012, she entered into agreements with several doctors to provide hospitalist services for their patients. (ECF No. 33 at ¶ 7.)

Plaintiff allegedly provided a list to Defendant that contained the doctors that designated Plaintiff as the hospitalist for their patients. (ECF No. 33 at ¶ 8.) This list was posted in the Emergency Room. (ECF No. 33 at ¶ 9.) Plaintiff alleges that Defendant's Medical Director, Case Manager, and Hospitalist routinely instructed hospital staff to ignore the designation list and admit Plaintiff's patients as Defendant's patients. (ECF No. 33 at ¶ 10.)

Plaintiff initially filed a complaint on February 18, 2014. (ECF No. 1.) The aforementioned complaint was dismissed because Plaintiff failed to specify proper jurisdiction. (ECF No. 13.) Plaintiff then filed the First Amended Complaint on April 28, 2014. (ECF No. 14.) The First Amended Complaint again failed to plead Plaintiff's citizenship and was dismissed. (ECF No. 32.)

Plaintiff **[**3]** filed the Second Amended Complaint and Demand for a Jury Trial on July 29, 2014, alleging interference with a prospective economic advantage, violation of *California Business and Professions Code section 17200*, and interference with the right to practice a profession. (ECF No. 33.)

Defendant contends that Plaintiff's Second Amended Complaint is both factually and legally deficient, and thus moves this Court to dismiss Plaintiff's Second Amended Complaint with prejudice, pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. (ECF No. 34.)

II. STANDARD OF LAW

HN1[] *Federal Rule of Civil Procedure 8(a)* requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *See Ashcroft v. Iqbal, 556 U.S. 662, 678—79, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. Under notice pleading in federal court, the complaint must "give the defendant fair notice of what the claim . . . is and the grounds upon which it rests." *Bell Atlantic v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (internal quotations omitted). "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)*.

HN2[] On a motion to dismiss, the factual allegations of the complaint must be accepted as true. *Cruz v. Beto, 405 U.S. 319, 322, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972)*. A court is bound to give plaintiff the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of the complaint. **[**4]** *Retail Clerks Int'l Ass'n v. Schermerhorn, 373 U.S. 746, 753 n.6, 83 S. Ct. 1461, 10 L. Ed. 2d 678 (1963)*. A **[*1175]** plaintiff need not allege "'specific facts' beyond those necessary to state his claim and the grounds showing entitlement to relief." *Twombly, 550 U.S. at 570*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678* (citing *Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*.

Nevertheless, a court "need not assume the truth of legal conclusions cast in the form of factual allegations." *United States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th Cir. 1986)*. While *Rule 8(a)* does not require detailed factual allegations, "it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Iqbal, 556 U.S. at 678*. A pleading is insufficient if it offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Twombly, 550 U.S. at 555*; *see also* *Iqbal, 556 U.S. at 678* ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Moreover, it is inappropriate to assume that the plaintiff "can prove facts that it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged[.]" *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 526, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*.

Ultimately, ***HN3***[] a court may not dismiss a complaint in which the plaintiff has alleged "enough facts to state a claim to relief that is plausible on its **[**5]** face." *Iqbal, 556 U.S. at 697* (quoting *Twombly, 550 U.S. at 570*). Only where a plaintiff fails to "nudge[] [his or her] claims . . . across the line from conceivable to plausible[,]" is the complaint properly dismissed. *Id. at 680*. While the plausibility requirement is not akin to a probability requirement, it demands more than "a sheer possibility that a defendant has acted unlawfully." *Id. at 678*. This plausibility inquiry is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id. at 679*.

HN4[] In ruling upon a motion to dismiss, the court may consider only the complaint, any exhibits thereto, and matters which may be judicially noticed pursuant to *Federal Rule of Evidence 201*. *See* *Mir v. Little Co. of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988)*; *Isuzu Motors Ltd. v. Consumers Union of United States, Inc., 12 F. Supp. 2d 1035, 1042 (C.D. Cal. 1998)*.

HN5[] If a complaint fails to state a plausible claim, "'[a] district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.'" *Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000)* (en banc) (quoting *Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995))*; *see also* *Mt. Hood Polaris, Inc. v. Martino (In re Gardner), 563 F.3d 981, 990 (9th Cir. 2009)* (finding no abuse of discretion in denying leave to amend when amendment would be futile). Although a district court should freely give leave to amend when justice so requires under *Rule 15(a)(2)*, "the court's discretion to deny such leave is 'particularly broad' where the plaintiff **[**6]** has previously amended its complaint[.]" *Ecological Rights Found. v. Pac. Gas & Elec. Co., 713 F.3d 502, 520 (9th Cir. 2013)* (quoting *Miller v. Yokohama Tire Corp., 358 F.3d 616, 622 (9th Cir. 2004))*.

III. ANALYSIS

Plaintiff alleges interference with a prospective economic advantage (Count I), a **[*1176]** violation of *California Business and Professions Code section 17200* (Count II), and interference with the right to practice a profession (Count III). (ECF No. 33.) The Court dismisses Count I, Count II, and Count III with leave to amend. The Court addresses each of Plaintiff's Causes of Action separately below.

a. Interference with a Prospective Economic Advantage (Count I)

Plaintiff's first cause of action alleges interference with a prospective economic advantage. ***HN6***[] The elements for such a claim are as follows: (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant. *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1153, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)*; *Buckaloo v. Johnson, 14 Cal. 3d 815, 827, 122 Cal. Rptr. 745, 537 P.2d 865 (1975)*. Defendant asserts that: (1) Plaintiff failed to establish an economic relationship between herself and a third party with the probability of future economic benefit; (2) Defendant **[**7]** has not alleged to have nor has committed any intentional act; and (3) Defendant has not interfered with any existing relationship between Plaintiff and a third party. (ECF No. 34 at 2.)

The Court finds that Plaintiff has met elements (2), (4) and (5)[1] and thus, focuses its analysis on elements (1) and (3).

i. Economic relationship between plaintiff and some third party with the probability of future economic benefit to the plaintiff

Defendant alleges that Plaintiff has not established an economic relationship or probability of future relationship. (ECF No. 34 at 2). Plaintiff bases her claim upon agreements she alleges she entered into with several doctors. (ECF No. 33 at ¶ 7.)

Defendant argues that Plaintiff's claim for interference with a prospective economic advantage fails because Plaintiff failed to establish intentional **[**8]** interference based upon a contract and because Plaintiff failed to attach or allege the substance of the contract. (ECF No. 34 at 10.) ***HN7***[] In order to establish intentional interference based upon a contract, a party is required to: (1) set out the written contract in verbatim in the complaint; (2) attach the contract as an exhibit; or (3) plead in full in accordance with the contract's legal effect. *Staples v. Arthur Murray, 253 Cal. App. 2d 507, 513, 61 Cal. Rptr. 103 (1967)*. Defendant incorrectly argues that Plaintiff was required to have a legally binding contract. However, ***HN8***[] interference with a prospective economic advantage, a tort that similarly compensates for the loss of an advantageous economic relationship, does not require the existence of a legally binding contract. *Reeves v. Hanlon, 33 Cal. 4th 1140, 1152, 17 Cal. Rptr. 3d 289, 95 P.3d 513 (2004)*. Thus, Plaintiff was not required to have a legally binding contract to bring this particular claim.

Further, Defendant argues that Plaintiff failed to establish an economic relationship between herself and an identifiable third **[*1177]** party. (ECF No. 34 at 10.) However, Plaintiff specifically pleaded that she entered into a relationship with several doctors, who were third parties to Plaintiff's relationship with Defendant. (ECF No. 33 at ¶ 7.) Defendant relies on the reasoning in *Roth v. Rhodes, 25 Cal. App. 4th 530, 546, 30 Cal. Rptr. 2d 706 (1995)*. In *Roth* the **[**9]** court explained that***HN9***[] a party cannot maintain a claim where the existing relationship is speculative. *Id*. However, Plaintiff alleged that she entered into a relationship with several named doctors, which was more than the speculative nature of the unknown patients in *Roth*. Plaintiff is not required to allege "'specific facts' beyond those necessary to state [her] claim." *Twombly, 550 U.S. at 570*. By stating that she entered into agreements with doctors, Plaintiff met the burden of providing the necessary facts to allege that she had an economic relationship between herself and the doctors.

Defendant relies on *Westside Ctr. Assoc. v. Safeway Stores 23, Inc., 42 Cal. App. 4th 507, 525, 49 Cal. Rptr. 2d 793 (1996)* to argue that Plaintiff did not demonstrate "the existence of a specific economic relationship." (ECF No. 34 at 9.) In *Westside*, the court described how the defendant's tortious conduct must interfere with a specific existing relationship using the precedent set forth in *Rickards v. Canine Eye Registration Fdtn., Inc., 704 F.2d 1449 (9th Cir. 1983)*. *Westside, 42 Cal. App. 4th at 525*. In *Rickards*, the plaintiffs were veterinarians who could not acquire the certification necessary to perform eye examinations in order to list dogs in the defendant's registry of canine eye diseases. *Rickards, 704 F.2d at 1452*. The plaintiffs alleged that the defendant's establishment of the registry disrupted the veterinarians' economic relationship with dog **[**10]** owners. *Id*. The court affirmed a directed verdict for the defendants stating that the evidence failed to establish "the *existence of a specific economic*

[1] The Court finds that Plaintiff has properly pleaded the following: (2) that there was knowledge of the relationship (ECF No. 33 at 13); (4) there was an actual disruption of the relationship (ECF No. 33 at ¶ 15); and (5) that Plaintiff suffered economic harm as a result of Defendant allegedly instructing staff to ignore the designation list. (ECF No. 33 at ¶¶ 10 &16.)

relationship between [the plaintiff] and third parties . . . ." *Id. at 1456* (emphasis added). The court concluded that the veterinarians had no specific relationship with potential registry clients, and their lack of certification did not interfere with an "ongoing business relationship" between the veterinarians and their regular clients, who continued to see them for other purposes. *Id*. According to the *Rickards* court, ***HN10***[] a defendant's tortious conduct must interfere with a specific existing relationship, not simply with the formation of one in the future. *Id.; see also Westside Ctr. Assoc., 42 Cal. App. 4th at 525*.

Plaintiff specifically claimed that she had an economic relationship with the specified doctors. (ECF No. 33 at ¶ 12.) Plaintiff's claim is distinguishable from an unknown group of speculative future patients with no actual agreement in place. The plaintiffs in the cases that Defendant cites only speculated about future economic relationships. *See Westside Ctr. Assoc. v. Safeway Stores 23, Inc., 42 Cal. App. 4th 507, 525, 49 Cal. Rptr. 2d 793 (1996)* (Plaintiff did not succeed where the economic relationship was purely hypothetical). However, here Plaintiff is alleging specific, **[**11]** current economic relationships with named doctors.

HN11[] Plaintiff also has the burden of proving that there was the probability of economic benefit with a third party. *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1153, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)*; *Buckaloo v. Johnson, 14 Cal. 3d 815, 827, 122 Cal. Rptr. 745, 537 P.2d 865 (1975)*. Defendant argues that Plaintiff failed to identify a future economic benefit. (ECF No. 24 at 11.) The law precludes recovery for overly speculative expectancies by initially requiring proof the business relationship contained "'the probability of future economic benefit to the plaintiff.'" *Westside, 42 Cal. App. 4th* ***[*1178]*** *at 522* (citing *Youst v. Longo, 43 Cal. 3d 64, 71, 233 Cal. Rptr. 294, 729 P.2d 728 (1987))*. Though it is necessary to infer that there would have been some benefit to the Plaintiff but for Defendant's interference, "the chance the expectancy otherwise would have occurred is necessarily a matter of some uncertainty." *Westside, 42 Cal. App. 4th at 522*.

Plaintiff stated that she entered into agreements with a group of doctors that would allow her to provide hospitalist services to their patients. (ECF No. 33 at ¶ 7.) Plaintiff further alleges that Defendant explicitly instructed hospital staff to ignore the designation list that provided that the specific doctors' patients would be directed to Plaintiff. (ECF No. 33 at ¶ 10.) The Court could infer that but for Defendant's alleged interference, Plaintiff would have had the opportunity to work with the **[**12]** doctors that she had entered into agreements with, thus receiving the economic advantage of more patients. However, this is not readily apparent. Plaintiff does not provide any details about what the agreements entail, such as whether they were exclusive or not. Furthermore, it is unclear whether the economic benefit would have resulted from the relationship with the third party doctors, or the speculative relationship with unknown future patients.

Therefore, given the facts presented by Plaintiff, the Court notes that it is unclear whether Plaintiff has met her burden of establishing that she has an economic relationship with a third party with the probability of a future economic benefit.

ii. Intentional acts on the part of the defendant designed to disrupt the relationship

Defendant alleges that Plaintiff has not proven that Defendant has committed any intentional wrongful act. (ECF No. 34 at 11.) The Court agrees.

HN12[] "[T]he act of interference with prospective economic advantage is not tortious in and of itself." *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1159, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)*. To state a claim for intentional interference under California law, a plaintiff must allege that "the defendant engaged in an independently wrongful act," that is "wrongful by some **[**13]** legal measure other than the act of interference itself." *Korea Supply Co., 29 Cal. 4th at 1153* (citing *Della Penna v. Toyota Motor Sales, U.S.A., Inc., 11 Cal. 4th 376, 393, 45 Cal. Rptr. 2d 436, 902 P.2d 740 (1995))*. This is understood as an act "proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Korea Supply Co., 29 Cal. 4th at 1159*. In *Korea Supply Co*., Korea Supply Company satisfied the independent wrongfulness requirement by alleging that the defendant engaged in bribery and offered sexual favors to key Korean officials in order to obtain a contract from the Republic of Korea. *Id*. The specific bribery alleged was independently unlawful under the Foreign Corrupt Practices Act. *Id*. Here, Plaintiff has not alleged any independently unlawful act.

Plaintiff claims that certain individuals were instructed to ignore the designation list in favor of Defendant. (ECF No. 33 at ¶ 7.) However, ***HN13***[] "an act must be wrongful by some legal measure, rather than merely a product of an improper, but lawful, purpose or motive." *Korea Supply Co., 29 Cal. 4th at 1159, n. 11*. Plaintiff has not alleged that Defendant's conduct was independently wrongful by a legal measure beyond the interference. For example, Plaintiff has not alleged that Defendant **[*1179]** violated any constitutional, statutory, regulatory, common law, or other determinable legal standard. *See* *Korea Supply Co., 29 Cal. 4th at 1159*.

Further, ***HN14***[] "[t]he tort of **[**14]** intentional interference with prospective economic advantage is not intended to punish individuals or commercial entities for their choice of commercial relationships or their pursuit of commercial objectives, unless their interference amounts to independently actionable conduct." *Id. at 1158-59*. Interference based on lawful competition is not actionable. *See generally* *Bed Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners, 52 Cal. App. 4th 867, 60 Cal. Rptr. 2d 830 (1997)* (finding that plaintiff did not have a claim for intentional interference with prospective advantage when defendant competitor competed successfully for a lease). As Defendant correctly argues, Plaintiff has not alleged that her agreement with the doctors was exclusive so as to prevent any lawful competition. (ECF No. 34 at 12—13.)

Defendant operated competing hospitalist services. Plaintiff has not alleged any contract or *exclusive* agreement that would preclude Defendant from participating in lawful competition. Thus, because Plaintiff has not stated an independently wrongful act beyond that of tortious interference, her claim must be dismissed with leave to amend.

b. Violation of *California Business and Professions Code Section 17200 et seq.* (Count II)

Plaintiff's second cause of action alleges violation of California's Unfair Competition Law ("UCL") pursuant to *California Business and Professions Code Section 17200*. (ECF No. 33 at ¶ 17—20.) **[**15]** Defendant asserts that the claim is derivative of the other claims made in the Complaint, and as the other claims fail, this claim fails as a matter of law. (ECF No. 34 at 2.) Defendant argues that this Claim must be dismissed because Plaintiff has failed to establish any independently actionable act to base the unfair competition claim upon. (ECF No. 34 at 14.)

HN15[] The UCL prohibits "any unlawful, unfair or fraudulent business act." *Cal. Bus. & Prof. § 17200*. "To bring a UCL claim, a plaintiff must show either an (1) unlawful, unfair, or fraudulent business act or practice, or (2) unfair, deceptive, untrue or misleading advertising." *Lippitt v Raymond James Fin. Servs., Inc., 340 F.3d 1033, 1043 (9th Cir. 2003)* (internal quotations omitted); *Gardner v. Am. Home Mortgage Servicing, Inc., 691 F. Supp. 2d 1192, 1201 (E.D. Cal. 2010)*. "[A] practice is prohibited as 'unfair' or 'deceptive' even if not 'unlawful' or vice versa." *Cel-Tech Communs., Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*.

i. "Unlawful" under the UCL

HN16[] "By proscribing 'any unlawful' business practice, '*section 17200* "borrows" violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable." *Belton v. Comcast Cable Holdings, LLC, 151 Cal. App. 4th 1224, 1233, 60 Cal. Rptr. 3d 631 (2007)* (citing *Cel-Tech Communs., Inc., 20 Cal. 4th at 180*). "[A] violation of another law is a predicate for stating a cause of action under the UCL's unlawful prong." *Berryman v. Merit Prop. Mgmt., Inc., 152 Cal. App. 4th 1544, 1554, 62 Cal. Rptr. 3d 177 (2007)*. Where a plaintiff cannot state a claim under the "borrowed" law, it cannot state a UCL claim either. **[**16]** *See, e.g.,* *Ingels v. Westwood One Broadcasting Servs., Inc., 129 Cal. App. 4th 1050, 1060, 28 Cal. Rptr. 3d 933 (2005)*.

HN17[] **[*1180]** Defendant is not liable under *Bus. and Prof. Code section 17200* for committing 'unlawful business practices' without having violated another law. *Ingels, 129 Cal. App. 4th 1050 at 1060, 28 Cal. Rptr. 3d*

933. In *Ingels* the plaintiff's underlying Unruh Act claim was dismissed, so there was no 'unlawful' act upon which to base the derivative Unfair Competition claim. *Id*. Here, Plaintiff has not alleged any 'unlawful' act to base the Unfair Competition claim upon. Thus, Plaintiff's UCL claim cannot rest upon the UCL's unlawful component.

ii. "Fraudulent" under the UCL

Additionally, Plaintiff has not shown that Defendant engaged in any fraudulent conduct. ***HN18***[] "Under *Federal Rule of Civil Procedure 9(b)*, a plaintiff pleading a claim of fraud, or any claim that is 'grounded in fraud' must 'state with particularity the circumstances constituting fraud or mistake.'" *Tuck Beckstoffer Wines LLC v. Ultimate Distribs., 682 F. Supp. 2d 1003, 1019 (N.D. Cal. 2010)* (citing *Fed. R. Civ. P. 9(b)*). "That is, the plaintiff must set forth with particularity the 'who, what, when, where, and how of the misconduct charged.'" *Tuck Beckstoffer Wines LLC, 682 F. Supp. 2d at 1019* (quoting *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003))*. The plaintiff must also allege the misrepresentations themselves with particularity. *Moore v. Kayport Package Exp., Inc., 885 F.2d 531, 540 (9th Cir. 1989)*. "A pleading is sufficient under *rule 9(b)* if it identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations." *Id*. Here, Plaintiff has not stated with **[**17]** particularity any circumstances constituting fraud. Plaintiff did not allege fraud and therefore did not satisfy *rule 9(b)*. Therefore, Plaintiff's UCL claim cannot succeed on the basis of fraudulent conduct.

iii. "Unfair" under the UCL

HN19[] "When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes *section 17200*, the word 'unfair' in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Comm'cns, Inc., 20 Cal. 4th at 187*.

Here, Plaintiff alleges that Defendant's conduct "violated the prohibitions of *Business and Professions Code section 17200 et seq.*" (ECF No. 33 ¶ at 19.) Even with the Court liberally construing the facts that Plaintiff has alleged, these facts do not amount to unfair conduct. Plaintiff has not alleged that Defendant acted "unfairly" under the UCL. Further, Plaintiff has not alleged any conduct that approaches a violation of an ***antitrust law*** or the policy or spirit of antitrust laws. *See also* *Stevenson Real Estate Services, Inc. v. CB Richard Ellis Real Estate Services, Inc., 138 Cal. App. 4th 1215, 1225, 42 Cal. Rptr. 3d 235 (2006)* (holding that the plaintiff's pleading was insufficient when he failed to allege conduct **[**18]** approaching a violation of an ***antitrust law*** or the policy or spirit of antitrust laws). By failing to allege the grounds for which Plaintiff brought her UCL claim, Plaintiff has failed to give Defendant fair notice of what the claim is and the grounds upon which it rests. Therefore, Plaintiff cannot succeed under the "unfair" prong of the UCL.

Plaintiff's claim for violations of the UCL cannot stand because Plaintiff has not alleged that Defendant has engaged in any unfair, fraudulent, or unlawful acts. Therefore, this claim is dismissed with leave to amend.

[*1181] c. Interference with the Right to Practice a Profession (Count III)

Plaintiff's third cause of action alleges Interference with the Right to Practice a Profession. In opposition, Defendant argues that (1) no such cause of action exists absent a complete prohibition on the right to practice a profession, and this cannot be alleged; and (2) Defendant has not and is not alleged to have committed any act that could be interpreted as interfering with Plaintiff's right to practice in the medical profession. (ECF No. 34 at 2.)

i. There must be a complete prohibition on the right to practice a profession to allege interference with the right ***[**19]*** *to practice a profession*

It is well established that*HN20*[] a cause of action exists when "the right to pursue a lawful business, calling, trade, or occupation is intentionally interfered with either by unlawful means or by means otherwise lawful when there is a lack of sufficient justification." *Willis v. Santa Ana Cmty Hosp. Ass'n, 58 Cal. 2d 806, 810, 26 Cal. Rptr. 640, 376 P.2d 568 (1962)*. A cause of action for intentional interference with the right to practice one's profession "requires intentional and malicious acts designed to prevent the plaintiff from practicing her profession." *Love v. Permanente Med. Group, 2013 U.S. Dist. LEXIS 49750, at *8 (N.D. Cal. Apr. 5, 2013)*. There must be a complete prohibition on the right to practice a profession to allege interference with the right to practice a profession. *See Love v. Permanente Med. Group, 2013 U.S. Dist. LEXIS 49750, at *9-10 (N.D. Cal. Apr. 5, 2013)* (holding that a motion to dismiss was appropriate when the plaintiff did not allege that the defendant had deprived her of other opportunities in her field); *Feather River Anesthesia Med. Group v. Fremont-Rideout Med. Group, 2007 Cal. App. Unpub. LEXIS 7004 (Cal. App. 3d Dist. Aug. 29, 2007)* (holding that a claim for interference with the right to practice a profession can prevail where plaintiffs were unable to work in an entire geographical area).

Plaintiff relies on the unpublished case *Feather River Anesthesia Med. Group v. Fremont-Rideout Med. Group*, to argue that the claim of interference with the right to practice a profession is recognized as an independent claim in California. (ECF **[**20]** No. 44 at 5.) Defendant, however, correctly argues that *Feather River* is inapplicable because ***HN21***[] in order to successfully claim interference with the right to practice a profession there must be a complete prohibition on the right to practice a profession. (ECF No. 34 at 2.)

The court in *Feather River* acknowledged that plaintiffs' claim for interference with the right to practice a profession was sufficient. *Feather River Anesthesia Med. Group v. Fremont-Rideout Med. Group at *40*. However, *Feather River* is distinguishable from this case. The plaintiffs in *Feather River* claimed that the defendants' unlawful anticompetitive conduct caused them actual injury by preventing them from working in the entire citywide market. *Id. at *40*. Here, Plaintiff alleges that she was only prevented from practicing her profession at the named hospital.

Further, in *Love v. Permanente Med. Group*, a motion to dismiss with leave to amend was warranted when the plaintiff did not allege that the defendants deprived her of another opportunity to become employed in her field. *Love, 2013 U.S. Dist. LEXIS 49750, at *9-10*. In *Love*, similar to here, the plaintiff's allegations related solely to being deprived of the opportunity to work for her specific former employer. In the instant case, Plaintiff does not allege that Defendant interfered **[**21]** with Plaintiff's right **[*1182]** to practice medicine beyond the scope of the specific hospital in this case. Thus, this claim is dismissed with leave to amend.

IV. CONCLUSION

For the reasons set forth above, the Court hereby GRANTS Defendant's Motion to Dismiss Plaintiff's Complaint as follows:

1. COUNTS I, II, and III are DISMISSED with leave to amend.
2. Plaintiff is granted 30 days from the date on which this Order is filed to file an amended complaint.
3. Defendant shall file their responsive pleading within 21 days of service of the Third Amended Complaint.

4. Plaintiff is further notified that this action may be dismissed with prejudice under *Rule 41(b)* if she fails to file an amended complaint within the prescribed time period.
5. If Plaintiff does not submit any amendments, this case will be closed.
6. Plaintiff is notified that if the Third Amended Complaint cannot survive a 12(b)(6) motion, it will be dismissed with prejudice.

IT IS SO ORDERED.

Dated: March 13, 2015

/s/ Troy L. Nunley

Troy L. Nunley

United States District Judge

Collins Inkjet Corp. v. Eastman Kodak Co.

United States Court of Appeals for the Sixth Circuit

October 1, 2014, Argued; March 16, 2015, Decided*; March 16, 2015, Filed*

File Name: 15a0045p.06

No. 14-3306

Reporter

781 F.3d 264 *; 2015 U.S. App. LEXIS 4843 **; 2015 FED App. 0045P (6th Cir.) ***; 2015-1 Trade Cas. (CCH) P79,116

COLLINS INKJET CORPORATION, Plaintiff-Appellee, v. EASTMAN KODAK CO., Defendant-Appellant.

Subsequent History: Motion granted by *Eastman Kodak Co. v. Collins Inkjet Corp., 136 S. Ct. 284, 193 L. Ed. 2d 13, 2015 U.S. LEXIS 5330 (U.S., 2015)*

US Supreme Court certiorari dismissed by *Eastman Kodak Co. v. Collins Inkjet Corp., 136 S. Ct. 498, 193 L. Ed. 2d 362, 2015 U.S. LEXIS 7162 (U.S., 2015)*

Prior History: [1]** Appeal from the United States District Court for the Southern District of Ohio at Cincinnati. No. 1:13-cv-00664—Michael R. Barrett, District Judge.

Collins Inkjet Corp. v. Eastman Kodak Co., 2014 U.S. Dist. LEXIS 188283 (S.D. Ohio, Mar. 21, 2014)

Core Terms

customers, pricing, ink, printheads, discount, costs, tying product, tied product, preliminary injunction, market power, printers, buyers, tying arrangement, refurbished, differential, buy, pricing policy, seller, district court, aftermarket, competitors, attribution, switching, coercion, bundled, tie, injunction, Sherman Act, anticompetitive, selling

LexisNexis® Headnotes

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

HN1[] **Tying Arrangements, Sherman Act Violations**

In a tying arrangement, a seller requires buyers of a product over which it has market power—the "tying product"—also to purchase a product over which it seeks to gain market power—the "tied product." A tying arrangement can

* This opinion was filed under seal on March 16, 2015 to allow the parties the opportunity to request redactions. On March 25, 2015 the court released the opinion to the public pursuant to notification from the parties that no redactions were requested.

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be prohibited under *§ 1* of the Sherman Act even if the tie is not explicit in the seller's contracts, but instead is enforced through informal constraints or pricing policies.

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

HN2[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Two of the central elements of a tying claim are market power in the tying product market and coercion of buyers of the tying product to buy the tied product.

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

HN3[] **Tying Arrangements, Sherman Act Violations**

Tying doctrine in ***antitrust law*** aims to prohibit a defendant from leveraging monopolistic market power in one market to monopolize another. A tying arrangement exists when the defendant agrees to sell one product only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. The tie falls foul of ***antitrust law*** if the seller has appreciable economic power in the tying product market and the arrangement affects a substantial volume of commerce in the tied market. Tying arrangements meeting these conditions are condemned under *§ 1* of the Sherman Act as a contract, combination or conspiracy in the restraint of trade or commerce among the several States or with foreign nations, language that has been interpreted to prohibit unreasonable restraints on trade, *15 U.S.C.S. § 1*.

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

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

The "appreciable economic power" and "substantial volume of commerce" conditions seek to ensure that only those tying arrangements that restrict competition over the tied product market are prohibited. If the seller lacks economic power in the tying product market, customers who do not wish to purchase the seller's brand of the tied product face little pressure to buy anything from the seller at all, since they have other options to obtain the tying product. And if the arrangement does not affect a substantial volume of commerce in the tied product market, then clearly the defendant is not significantly affecting competition in that market. In fact, even if the two conditions are met, the defendant is still permitted to argue as a sort of affirmative defense that its tying arrangement has procompetitive effects, or, alternatively, has a valid business justification.

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

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

A tying arrangement that falls foul of these criteria and lacks a valid business justification is anticompetitive because it tends to force more efficient competitors out of the tied product market. Because of the defendant's power in the tying product market, customers who want to buy both the tying and tied product can buy the tying product only from the defendant. The defendant then additionally requires them to buy the tied product from it, meaning that they have no need to buy it from anyone else. This restrains competition in the tied product market because a competing seller of the tied product—in particular one who does not also produce the tying product—is unable to attract customers who additionally require the tying product even if the competing seller's product is superior in price or quality to the defendant's tied product. From the customer's point of view, the practical cost of the competing seller's product is the price the competing seller charges plus the cost of forgoing the tying product. With such a thumb on the scale, a competing seller may lose market share even if it can produce the tied product more efficiently than the defendant; the defendant's market power in the tying product, rather than its ability to produce the tied product efficiently, shapes the market for the tied product.

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

HN6[] **Tying Arrangements, Sherman Act Violations**

Unlawful ties need not be explicit contractual provisions preventing buyers from purchasing the tied product from third parties. The existence of a tying arrangement depends on the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When a defendant adopts a policy that makes it unreasonably difficult or costly to buy the tying product (over which the defendant has market power) without buying the tied product from the defendant, it "forces" buyers to buy the tied product from the defendant and not from competitors.

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

HN7[] **Tying Arrangements, Sherman Act Violations**

In the special case of a tie enforced solely through differential pricing, the tie is not unlawful unless the differential pricing is the economic equivalent of selling the tied product below the defendant's cost. This is because differential pricing, unlike other forms of indirect coercion, can be employed legitimately without illegal anticompetitive influence from the defendant's control over the tying product market. In general, the ability of the defendant to impose the threat that creates the "forcing" depends on buyers' not being able to turn elsewhere for the tying product.

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

HN8[] **Tying Arrangements, Sherman Act Violations**

An explicit tie has a coercive effect so long as buyers cannot turn elsewhere for the tying product because buyers who need the tying product may have no option but to purchase the tied product from the defendant. But if the defendant merely offers a discount on the tying good to buyers who also purchase the tied good, then buyers are only "forced" to buy the tied good from the defendant if they cannot purchase the tied good elsewhere at a price low enough to offset the forgone discount for the tying product. The defendant uses its market power over the tying good to shift the discount from the tied good to the tying good, but this in itself does not "force" buyers to purchase the tied product any more than a discount on the tied product would. It follows that a discount on the tied product amounts to unfair competition only if the defendant is selling below cost.

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

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

HN9[] **Scope, Monopolization Offenses**

In a bundled discount, the seller offers two products together (the bundle) at a price lower than the sum of the prices of the two products sold separately. It is the equivalent in economic terms to a tie enforced entirely through differential pricing, since in both cases customers pay less for the tied and tying products if they buy both from the defendant seller. The Ninth Circuit has adopted a "discount attribution" standard to determine whether a bundled discount is an unlawful attempt to monopolize under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*: The full amount of the discounts given by the defendant on the bundle are allocated to the competitive product or products. If the resulting price of the competitive product or products is below the defendant's incremental cost to produce them, the trier of fact may find that the bundled discount is exclusionary for the purpose of *§ 2*. This standard makes the defendant's bundled discounts legal unless the discounts have the potential to exclude a hypothetical equally efficient producer of the competitive product. A bundled discount is only equivalent to an unlawful tie when the discount attribution standard is met.

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

HN10[] **Tying Arrangements, Sherman Act Violations**

In setting prices, it is important for companies to have clear guidelines. Every company knows its own cost of production, but the cost of production of its competitors may be less clear. Further, because competitors often do not sell exactly the same product, using the plaintiff's costs may ignore differences in the competitors' products' value to consumers that might affect the analysis.

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

HN11[] **Tying Arrangements, Sherman Act Violations**

The availability of information about aftermarket pricing in the primary market (information costs) and the difficulty of switching to a different primary market supplier (switching costs) can both serve to insulate a primary market from the effects of aftermarket price increases, thus increasing the seller's market power in the aftermarket. There may also be other "actual market realities" serving either to restrict or protect market power in an aftermarket.

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ON BRIEF: Marc G. Schildkraut, COOLEY LLP, Washington, D.C., Celia Goldwag Barenholtz, COOLEY LLP, New York, New York, James E. Burke, KEATING MUETHING & KLEKAMP PLL, Cincinnati, Ohio, for Appellant.

W.B. Markovits, Christopher D. Stock, Paul M. DeMarco, MARKOVITS, STOCK & DEMARCO, LLC, Cincinnati, Ohio, for Appellee.

Judges: Before: DAUGHTREY, ROGERS, and DONALD, Circuit Judges. ROGERS, J., delivered the opinion of the court in which DONALD, J., joined. DAUGHTREY, J., delivered a separate concurring opinion.

Opinion by: ROGERS

Opinion

[*267] [*2]** ROGERS, Circuit Judge. ***HN1***[] In a tying arrangement, a seller requires buyers of a product over which it has market power—the "tying product"— also to purchase a product over which it seeks to gain market power—the "tied product." A tying arrangement can be prohibited under *§ 1* of the Sherman Act even if the tie is not explicit in the seller's contracts, but instead is enforced through **[**2]** informal constraints or pricing policies. This appeal primarily concerns the question of when differential pricing—charging more for the tying product when the customer does not also purchase the tied product—in itself constitutes an unlawful tying arrangement. In short, the answer is that it does so only when the price differential in effect discounts the tied product below the seller's cost. In this case, the possibility that such a showing could be made warranted a preliminary injunction.

Eastman Kodak Company appeals the district court's grant of Collins Inkjet Corporation's motion for a preliminary injunction requiring Kodak to cease charging customers at different rates for Kodak's refurbished printer components depending on whether the customers buy Kodak ink. Collins is Kodak's competitor for selling ink for Versamark printers manufactured by Kodak. Users of Versamark printers must periodically replace a printer component called a printhead; Kodak is the only provider of replacement "refurbished printheads" for such printers. In July 2013, Kodak adopted a pricing policy that raised the cost of replacing Versamark printheads, but only for customers not purchasing Kodak ink. Collins **[**3]** filed suit, arguing that this amounts to a tying arrangement prohibited under *§ 1* of the Sherman Act, *15 U.S.C. § 1*, because it is designed to monopolize the Versamark ink market. Collins sought a preliminary injunction barring Kodak from charging Collins' customers a higher price for refurbished printheads. The district court issued the preliminary injunction, finding a **[*268]** strong likelihood that Kodak's pricing policy was a non-explicit tie that coerced Versamark owners into buying Kodak ink and that Kodak possessed sufficient market power in the market for refurbished printheads to make the tie effective.

[*3]** On appeal, Kodak challenges both the legal standard the district court applied to find whether customers were coerced into using Kodak ink and the district court's preliminary factual findings. In evaluating the likelihood of success on the merits, the district court applied a standard that unduly favored Collins to determine whether customers were coerced into buying Kodak ink. The court examined whether the policy made it likely that all or almost all customers would switch to Kodak ink, but did not examine whether this would be the result of unreasonable conduct on Kodak's part. A tying arrangement **[**4]** enforced entirely through differential pricing of the tying product contravenes the Sherman Act only if the pricing policy is economically equivalent to selling the tied product below cost. The record makes it difficult to determine conclusively Kodak's ink production costs, but the available evidence suggests that Kodak was worse off when customers bought both products, meaning that it was in effect selling ink at a loss. Thus, Collins was likely to succeed on the merits even under the correct standard. Furthermore, the district court was correct in its consideration of the other factors for a preliminary injunction. Accordingly, the preliminary injunction was not an abuse of discretion.

I. Kodak's pricing policy for Versamark refurbished printheads and ink

A. Versamark Printers, Kodak, and Collins

Kodak is a printing and imaging company that offers a wide range of products and services, including Versamark printers. Collins is a business that manufactures inkjet ink for industrial printing systems. Versamark printers are used by commercial printing companies and can cost in excess of $200,000; a full printing system using Versamark printers can cost ten times that. Kodak sold its last **[**5]** Versamark printer in 2009. It has since introduced a new line of printers under the name "Prosper," intended to replace Versamark. Users of Versamark printers must periodically purchase ink specially formulated for use in Versamark printers and replace specialized printer components, called printheads, through which the ink flows onto the page. Printheads are available in multiple sizes, and ink must be formulated specifically for each type of printhead. Prices for both printheads and ink vary based on the printhead's type, and also (in the ink's case) on the ink's composition. Kodak and Collins both manufacture Versamark ink, but Kodak is the only source of replacement "refurbished" printheads. Customers send old printheads to Kodak, which then refurbishes them and sends them back. Customers are highly **[***4]** sensitive to the total cost of printing, and take into account both the initial purchase price and subsequent costs in making decisions about printers.

B. The history of cooperation and competition between Kodak and Collins

Until 2001, Collins and Kodak's predecessor Scitex competed to sell Versamark ink. From 2001 until 2011, Collins and Kodak operated together in the Versamark ink **[**6]** market under a series of Supply and Reseller Agreements. Under these agreements, Collins manufactured ink under both its own name and Kodak's brand, and Kodak sold Collins ink on Collins' **[*269]** behalf. Collins attempted to terminate the last such agreement in 2011 due to concerns about Kodak's financial situation, but was prevented by a court injunction from doing so. The agreement terminated as scheduled in May 2012.

As soon as the agreement terminated in May 2012, Kodak announced that Collins was no longer an approved Versamark ink supplier and that it was implementing a new pricing policy with higher refurbished printhead prices, and no equipment warranty, for Collins ink users. Kodak never actually implemented the policy, apparently because of customer complaints.

C. The pricing policy at issue

In July 2013, Kodak announced a new pricing policy that is the subject of Collins' present tying claim. Under this policy, the difference between what Collins ink customers and Kodak ink customers would pay for refurbished printheads decreased relative to the May 2012 policy, but did not disappear. Kodak ink customers ("matched customers") received a discount on refurbished printheads, while non-Kodak **[**7]** ink customers ("unmatched customers") paid more. Kodak's refurbishment pricing structure used a base charge followed by a calculation based on hourly rates for "run hours" in different amounts, making calculation of the exact price difference difficult. However, in two of the three policy announcements sent to customers in the record, Kodak offered "matched" customers a 4% discount, while raising prices for "unmatched" customers by roughly 30%. In the third announcement, the discount for matched customers appeared to be slightly over 6%, while the price increase for unmatched customers appeared to be over 5%. Kodak delayed implementation until November 1, 2013, and even then some large customers received rebates making up for the price increases in the unmatched rates. In at least **[***5]** some cases, these rebates were granted because the customers made a verbal commitment to switch to Kodak ink. Collins sued, seeking to enjoin the enforcement of this policy.

D. Procedural history

On September 19, 2013, Collins brought suit against Kodak, alleging a violation of *§ 1* of the Sherman Act, *15 U.S.C. § 1* (for tying), a violation of *§ 43(a)* of the Lanham Act, *15 U.S.C. § 1125* (for false statements about the quality of Collins ink made **[**8]** in justification of its pricing policies), a violation of state deceptive trade practices law (for the same), defamation (for the same), and tortious interference with prospective contractual relations (for both the anticompetitive conduct and the false statements). At the same time, Collins moved for a preliminary injunction preventing Kodak from charging Collins ink customers higher prices for refurbished printheads and from making false statements about Collins. After expedited discovery and a three-day evidentiary hearing, the district court found that Collins had not demonstrated a likelihood of success on the merits on the claims relating to Kodak's alleged false statements, but that it had demonstrated a likelihood of success on the merits on the tying claim and, by extension, the tortious interference claim.

The court first considered whether Kodak had in fact tied ink to refurbished printheads by conditioning access to printheads on purchases of Kodak ink. Relying on *Virtual Maintenance v. Prime Computer, 957 F.2d 1318, 1323 (6th Cir. 1992)* ("*Virtual Maintenance I*"), *vacated and remanded on other grounds*, *506 U.S. 910, 113 S. Ct. 314, 121 L. Ed. 2d 235 (1992)*, the court assumed that if Kodak's pricing would cause "all rational buyers" to switch to Kodak ink, then Kodak's pricing was **[*270]** sufficiently coercive **[**9]** to be a non-explicit tying arrangement. The court found that Kodak's policy had been adopted too recently to determine whether most of Collins' customers would actually be forced to switch to Kodak ink. However, Collins had presented sufficient evidence to suggest that the additional cost of not switching to Kodak ink would be so great that all rational buyers of Versamark ink would choose Kodak. The court declined Kodak's suggestion that the court take into account Collins' manufacturing costs and ability to compete with Kodak's pricing policy.

The district court next found a strong likelihood that refurbished printheads were a market over which Kodak had monopolistic control. In support of this conclusion the court noted that Kodak controls one hundred percent of the market for refurbished printheads, that **[***6]** high information costs and switching costs for customers reduce the influence of the competitive primary market for printers on Kodak's pricing, and that the barriers to entry to the refurbished printhead market are high. The court also found that a substantial volume of commerce in the tied market was affected, and that Kodak's asserted legitimate business justifications were **[**10]** not convincing.

Having found a likelihood of success on the merits of Collins' tying claim, the court also found that the irreparable harm and public interest factors in the preliminary injunction standard weighed in Collins' favor, while the substantial harm to others factor was roughly evenly balanced or favored Kodak. In particular, the court found that the potential loss of market share, employees, and ink customers would do irreparable and unquantifiable damage to Collins' "goodwill and reputation." The court's conclusion on the public interest favoring a preliminary injunction essentially followed from its analysis of the tie; because ***antitrust law*** ensures fair competition, enjoining Kodak's likely antitrust violation would protect consumers.

Kodak appeals the grant of the preliminary injunction, challenging the court's conclusions with regard to tying, Kodak's market power, the likelihood of irreparable harm to Collins, and the public interest served by a preliminary injunction. Kodak does not challenge the court's holding on the (un)likelihood of success on Kodak's legitimate business purpose argument.

II. Likelihood of proving an anticompetitive tie by price differentiation

HN2[] Two **[**11]** of the central elements of a tying claim, both at issue in this appeal, are market power in the tying product market and coercion of buyers of the tying product to buy the tied product. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 11—12, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*. Collins has shown a sufficient likelihood of success on the merits of each. We address the coercion element first.

[***7] A. The discount attribution standard for coercion in claims of non-explicit tying via differential pricing

It appears likely that Kodak's pricing policy was a tying arrangement involving unlawful coercion, although the district court applied a standard that was unduly generous to Collins in this regard. That Kodak appeared to be offering a better deal to customers than Collins does not in itself constitute an unlawful tying arrangement; Kodak's differential pricing was unlawful only if it might have forced a more efficient competitor out of business. By relying solely on its finding that Kodak's prices made buying Collins ink significantly more expensive than buying Kodak ink, the district court adopted a standard that **[*271]** could too easily treat fair price competition as per se illegal under ***antitrust law***. Competitive sellers generally aim to make their products significantly cheaper than their **[**12]** competitors', and there is nothing inherently wrong with doing so via differential pricing. However, differential pricing becomes equivalent to an unlawful tying arrangement when the price discount, as applied to the original price of the tied product, in effect lowers the price of the tied product below the seller's cost. In that case, differential pricing becomes a predatory investment of monopoly profits from one market aimed at creating a monopoly in another; the seller's monopoly power in the tying product market, rather than its ability to offer the tied product at a competitive price, drives the differential pricing. When differential pricing satisfies this test, it is functionally equivalent to the coercion present in an unlawful tying arrangement. Although the evidence is far from conclusive, it appears that Kodak's profits decreased whenever a customer switched to Kodak ink, which in turn suggests that Kodak's pricing policy was predatory. Therefore there is a likelihood that Collins will succeed on the coercion prong of its tying claim, albeit under a stricter standard than the one applied by the district court.

1. Tying in general

HN3[] Tying doctrine in ***antitrust law*** aims to prohibit **[**13]** a defendant from leveraging monopolistic market power in one market to monopolize another. A tying arrangement exists when the defendant agrees "to sell one product . . . only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5—6, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*. The tie falls foul of ***antitrust law*** if "the seller has 'appreciable economic power' in the tying product market and . . . the **[***8]** arrangement affects a substantial volume of commerce in the tied market." *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 462, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* (quoting *Fortner Enters., Inc. v. U. S. Steel Corp., 394 U.S. 495, 503, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969))*. Tying arrangements meeting these conditions are condemned under *§ 1* of the Sherman Act as a "contract, combination . . . or conspiracy in the restraint of trade or commerce among the several States or with foreign nations," language that has been interpreted to prohibit "unreasonable" restraints on trade. *15 U.S.C. § 1*; *N. Pac. Ry. Co., 356 U.S. at 5*.

HN4[] The "appreciable economic power" and "substantial volume of commerce" conditions seek to ensure that only those tying arrangements that restrict competition over the tied product market are prohibited. If the seller lacks economic power in the tying product market, customers who do not wish to purchase the seller's brand of the tied product **[**14]** face little pressure to buy anything from the seller at all, since they have other options to obtain the tying product. And if the arrangement does not affect a substantial volume of commerce in the tied product market, then clearly the defendant is not significantly affecting competition in that market. In fact, even if the two conditions are met, the defendant is still permitted to argue as a sort of affirmative defense that its tying arrangement has procompetitive effects, or, alternatively, has a valid business justification. *PSI Repair Servs., Inc. v. Honeywell, Inc., 104 F.3d 811, 815 n.2 (6th Cir. 1997)*; *Virtual Maintenance I, 957 F.2d at 1323*.

HN5[] A tying arrangement that falls foul of these criteria and lacks a valid business justification is anticompetitive because it tends **[*272]** to force more efficient competitors out of the tied product market. Because of the defendant's power in the tying product market, customers who want to buy both the tying and tied product can buy the tying product only from the defendant. The defendant then additionally requires them to buy the tied product from it, meaning that they have no need to buy it from anyone else. This restrains competition in the tied product market because a competing seller of the tied product—in particular one who does not also produce the tying **[**15]** product—is unable to attract customers who additionally require the tying product even if the competing seller's product is superior in price or quality to the defendant's tied product. From the customer's point of view, the practical cost of the competing seller's product is the price the competing seller charges *plus* the cost of forgoing the tying product. With such a **[***9]** thumb on the scale, a competing seller may lose market share even if it can produce the tied product more efficiently than the defendant; the defendant's market power in the tying product, rather than its ability to produce the tied product efficiently, shapes the market for the tied product. *See Fortner Enters., 394 U.S. at 498—99*.

2. The proper standards for non-explicit tying

HN6[] Unlawful ties need not be explicit contractual provisions preventing buyers from purchasing the tied product from third parties. The existence of a tying arrangement depends on the "the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Jefferson Parish Hosp., 466 U.S. at 12*. When a defendant adopts a policy that makes it unreasonably **[**16]** difficult or costly to buy the tying product (over which the defendant has market power) without buying the tied product from the defendant, it "forces" buyers to buy the tied product from the defendant and not from competitors. *Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1180 (1st Cir. 1994)*; *Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483, 1500 (8th Cir. 1992)*.

HN7[] In the special case of a tie enforced solely through differential pricing, the tie is not unlawful unless the differential pricing is the economic equivalent of selling the tied product below the defendant's cost. This is because differential pricing, unlike other forms of indirect coercion, can be employed legitimately without illegal anticompetitive influence from the defendant's control over the tying product market. In general, the ability of the defendant to impose the threat that creates the "forcing" depends on buyers' not being able to turn elsewhere for the tying product. For example, ***HN8***[] an explicit tie has a coercive effect so long as buyers cannot turn elsewhere for the tying product because buyers who need the tying product may have no option but to purchase the tied product from the defendant. But if the defendant merely offers a discount on the tying good to buyers who also purchase the tied good, then buyers are only "forced" to buy the tied **[**17]** good from the defendant if they cannot purchase the tied good elsewhere at a price low enough to offset the forgone discount for the tying product. The defendant uses its market power over the tying good to shift the discount from the tied good to the tying good, but this in itself does not "force" buyers to purchase the tied product any more than a discount on the **[***10]** tied product would. It follows that a discount on the tied product amounts to unfair competition only if the defendant is selling below cost. **[*273]** *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*.

This analysis is the same as the Ninth Circuit's analysis of bundled discounts, an analogous pricing policy governed by *§ 2* rather than *§ 1* of the Sherman Act. ***HN9***[] In a bundled discount, the seller offers two products together (the bundle) at a price lower than the sum of the prices of the two products sold separately. It is the equivalent in economic terms to a tie enforced entirely through differential pricing, since in both cases customers pay less for the tied and tying products if they buy both from the defendant seller. The Ninth Circuit has adopted a "discount attribution" standard to determine whether a bundled discount is an unlawful "attempt to monopolize" under *§ 2* of the Sherman **[**18]** Act, *15 U.S.C. § 2*:

> [T]he full amount of the discounts given by the defendant on the bundle are allocated to the competitive product or products. If the resulting price of the competitive product or products is below the defendant's incremental cost to produce them, the trier of fact may find that the bundled discount is exclusionary for the purpose of *§ 2*. This standard makes the defendant's bundled discounts legal unless the discounts have the potential to exclude a *hypothetical* equally efficient producer of the competitive product.

Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 906 (9th Cir. 2008) (emphasis in original). The court justified the rule—which is identical to the one we find applicable here—by noting that a bundled discount is only equivalent to an unlawful tie when the discount attribution standard is met. *Id. at 900—01* (citing 3 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 749b2, at 332 (Supp. 2006)).

The *Cascade Health* analysis of bundled discounting logically applies to the tying arrangement at issue here—where the only tying mechanism is differential pricing—even though the *Cascade Health* court did not explicitly apply the discount attribution standard to tying. The plaintiff in *Cascade Health* alleged both tying under *§ 1* and unlawful bundled discounting **[**19]** under *§ 2*. In its analysis of the district court's grant of summary judgment for the defendant on the tying claim, the Ninth Circuit did not directly apply the discount attribution standard, but instead ruled that there was sufficient "evidence of economic coercion" to withstand summary judgment. *Id. at 915*. The court noted, in part, evidence that one of the defendant's sales "made no **[***11]** economic sense," which suggested that the buyer was "coerc[ed]," or did "something that he would not do in a competitive market." *Id*. When differential pricing is the only means of coercion, results other than what a competitive, unbundled market would achieve are possible only if the discount attribution standard is met and the defendant is in effect selling the tied good below cost. Otherwise, the discount on the bundle of the tied and tying products is equivalent to fair price competition in the tied product market. Without this result, economically identical behavior would be treated differently under *§§ 1* and *2* of the Sherman Act, even though both portions of the legislation prohibit anticompetitive conduct.

The Ninth Circuit's analysis in *Cascade Health* is more compelling than that of the Third Circuit in *LePage's, Inc. v. 3M, 324 F.3d 141, 154—57 (3d Cir. 2003)* (en banc). **[**20]** In that case, the court declined to apply a cost-based analysis because competitors may be unable to "compensate [buyers] for the foregone [tying product] discount" even when the bundled pricing scheme "yield[s] aggregate prices above cost." *Id. at 155* (quoting Phillip E. Areeda & Herbert **[*274]** Hovenkamp, ***Antitrust Law*** ¶ 794, at 83 (Supp. 2002)). But a bundled pricing scheme may be unlawful under the discount attribution standard even if the bundle's aggregate price is above cost, so long as the discount is significant enough to take the competitive (or tied) product's price below cost. And when the discount attribution standard is met, an equally efficient competitor will be unable to compensate buyers for the forgone tying product discount. Thus the discount attribution standard addresses the concerns that prevented the Third Circuit from applying a cost-based analysis.

The reasoning in our en banc decision in *NicSand, Inc. v. 3M Co., 507 F.3d 442 (6th Cir. 2007)* (en banc), further supports applying a discount attribution standard for ties enforced purely through differential pricing. In *NicSand*, the defendant 3M entered the automotive sandpaper manufacturing market, in which the plaintiff NicSand had until then been **[**21]** the dominant player, by offering a variety of pricing and contract incentives to retailers to carry its product, often exclusively. These did not include tying or bundled discounts, but instead consisted of rebates and long-term exclusive contracts. *Id. at 448*. NicSand sued, alleging that 3M's contracting practices constituted an unlawful attempt to monopolize the automotive sandpaper market under *§ 2* of the Sherman Act. *Id. at 449*. NicSand never alleged that 3M's **[***12]** pricing was predatory or below cost. *Id. at 458*. The en banc court held that NicSand had failed to plead an antitrust injury. *Id. at 459*. Although NicSand was obviously injured by competition from 3M, the point was that it was injured by *competition*, not by anticompetitive pricing or conduct. *Id. at 455*. The various incentives and contract structures 3M offered the retailers were in fact typical of the terms required by retailers, so 3M's pricing was simply fair competition. *Id. at 452—54*. This analysis suggests that for Collins to have a case, it must have suffered the type of injury that "the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Id. at 450* (*quoting* *Brunswick Corp. v. Pueblo Bowl—O—Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*. This will be the case if it **[**22]** suffers harm not just "as a competitor in the marketplace," but also "as a defender of marketplace competition." *Id. at 455* (quoting *Indeck Energy Servs. v. Consumers Energy Co., 250 F.3d 972, 977 (6th Cir. 2000))*. But so long as Kodak's pricing policy is the equivalent of offering an above-cost discount on ink, equally efficient competitors will not be forced out of the market. The discount attribution standard thus provides the test for determining whether a plaintiff challenging a competitor's tie that is enforced through differential pricing has antitrust standing under *NicSand*.

Relying in part on *NicSand*, Kodak argues that the relevant measure of costs is Collins' costs, not Kodak's. That is, so long as Collins can compete with Kodak, Kodak's pricing structure is not anticompetitive. This position would have unfortunate consequences and misreads *NicSand*. The correct measure of cost is the defendant's—Kodak's—cost. It is true that, in *NicSand*, we referred repeatedly to NicSand's high profit margins and likely ability to compete with 3M. *See* *id. at 452—55, 457*. However, we implicitly defined predatory pricing as pricing "below cost with the goal of recouping [the defendant's] losses by charging monopolistic prices later." *Id. at 452*. This definition makes no sense if "cost" refers to the plaintiff's **[**23]** cost, because then it is not certain that the defendant would have a loss to recoup. The defendant suffers a loss in this context if and only if it sells below its **[*275]** own cost. The better reading of *NicSand* is that we referred to NicSand's profit margins in order to illustrate the point that 3M's pricing policy opened the door for healthy price competition benefitting consumers. Kodak suggests that Collins' costs be used on the assumption that Collins has a lower cost of production than Kodak, in which case selling below Collins' cost would always leave Kodak with a loss. But this finds no support in *NicSand* (or other caselaw), which never considers whether the **[***13]** plaintiff or the defendant is in fact the more efficient producer. Rather, Supreme Court precedent on predatory pricing explicitly states a requirement that a plaintiff suing its rival "must prove that the prices complained of are below an appropriate measure of its rival's costs." *Brooke Grp., 509 U.S. at 222*.

Worse, relying on the plaintiff's costs, or the more efficient competitor's costs, would produce an unclear standard that might permit anticompetitive conduct. ***HN10***[] In setting prices, it is important for companies to have clear guidelines. *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 453, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009)*. Every company **[**24]** knows its own cost of production, but the cost of production of its competitors may be less clear. *See Cascade Health, 515 F.3d at 908 n.16*. Further, because competitors often do not sell exactly the same product, using the plaintiff's costs may ignore differences in the competitors' products' value to consumers that might affect the analysis. For example, suppose that Collins has lower ink manufacturing costs than Kodak, but its ink gives off fumes during printing that necessitate increased ventilation in printing facilities. In that case, if Kodak can use a bundled discount to effectively sell its ink at a price equal to Collins' incremental cost, Collins will have to sell ink at a loss to maintain market share because it will have to offset buyers' increased ventilation costs. It would be difficult for courts to determine the hidden costs of a slightly inferior but cheaper product, particularly when, because of idiosyncratic customer preferences, these costs may be different for each customer. When the defendant effectively sells below its own costs, it puts pressure on its competitors to lower prices without actually lowering its own costs or otherwise creating a market efficiency. This is sufficient for the competitors **[**25]** to have antitrust standing.

Applying the discount attribution standard to the present case, there is a likelihood that Collins will be able to prove coercion because the record suggests (though it does not at present prove) that Kodak was in effect selling ink below its incremental cost. Kodak appears to have admitted in its appellate brief and provided proof before the district court that it stood to make more money if customers bought ink from Collins and paid Kodak's unmatched printhead refurbishment price than if they bought Kodak ink and paid the matched printhead refurbishment **[***14]** price. On its face, this suggests, at least as a matter of formal logic,[1] that **[*276]** Kodak's pricing is coercive under the discount attribution standard. Of course, such reasoning must yield to any actual evidence of Kodak's ink costs; the record at a preliminary injunction stage is not complete, and conclusions reached at this stage "are not binding at trial." *Univ. of Texas v. Camenisch, 451 U.S. 390, 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981)*. But the evidence presently in the record suggests that Collins will be able to prove the coercion element of its tying claim.

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[1] Kodak's apparent admission is, in effect, that its profit from an unmatched customer is greater than its profit from a matched **[**26]** customer, or that its profit when it is not selling ink is greater than when it is. Treating profit as the price of a good less its cost, the profit from an unmatched customer is the difference between the unmatched price of refurbished printheads (*UPR*) and the cost of refurbished printheads (*CR*):

$UPR - CR$

The profit from a matched customer (who buys both ink and refurbished printheads) is the sum of the difference between the matched price of refurbished printheads (*MPR*) and the cost of refurbished printheads (*CR*) and the difference between the price of ink (*PI*) and the cost of ink (*CI*):

$(MPR - CR) + (PI - CI)$

Kodak's admission can therefore be expressed as an inequality stating that the latter expression—profit from a matched customer—is less than the former—profit from an unmatched customer:

$(MPR - CR) + (PI - CI) < UPR - CR$

This is equivalent to

$PI - (UPR - MPR) < CI$

[This is achieved by adding $CR + CI$ to each side and subtracting UPR from each side.]

Under the discount attribution standard, Kodak's pricing is coercive if it is in effect selling ink below cost, that is, if the price of ink less the total discount (*D*) is less than the cost of ink:

$PI - D < CI$

Since the difference between the **[**27]** unmatched price of refurbishment and the matched price of refurbishment ($UPR - MPR$) is the total discount (*D*) in Kodak's scheme, the above two expressions are identical. Kodak's admission thus logically implies that the pricing structure is coercive under the discount attribution standard. The above analysis is general and may ignore salient features of the Versamark printer aftermarket (for example, the fact that different customers may require different amounts and types of ink per refurbished printhead). But at this preliminary stage, Kodak's statements about its own business provide some evidence that Kodak's pricing policy fails the discount attribution test.

Use of the discount attribution test is neither contradicted nor controlled by our analysis of coercion in *Virtual Maintenance I, 957 F.2d 1318*. In *Virtual Maintenance I*, we stated that the enormous difference in price between the tying product sold on its own and the tying product sold with the tied product was sufficient to establish a tying arrangement because "all rational buyers" of the tying product would also choose to buy the tied product. *Id. at 1323*. But this does not amount to a holding that there is coercion whenever there is a significant price difference, **[**28]** for two reasons.

[*15]** First, under the facts of *Virtual Maintenance I*, the pricing structure was so obviously coercive that there was no need to consider exactly how much of a price differential would constitute coercion giving rise to a tying arrangement. The cost of the tying product on its own ranged from $80,000 to $160,000, whereas the tied and tying product together cost $16,000; it was between five and ten times more expensive not to buy the tied product, even leaving aside the separate cost of the competitor's tied product. *Id. at 1322*. This pricing policy would self-evidently fail the discount attribution standard. Under such circumstances, there was little need to determine exactly when a pricing structure "coerces" buyers to buy the package of the tied and tying products rather than the tying product alone. We also made no attempt to do so, as our analysis on this point consisted of a single sentence with no supporting authority: "A tying arrangement clearly exists here because the large price differential between software support alone and the software support/hardware maintenance package induces all rational buyers of Prime's software support to accept its hardware maintenance." *Id* **[**29]** .

Second, in the logical framework of the decision, this analysis was dicta, unnecessary to determining the outcome of the **[*277]** appeal. The bulk of our opinion focused on the definition of the relevant market and the question of whether the defendant had sufficient market power in the tying product market to enforce a tie. *Id. at 1323—29*. We concluded that the defendant lacked market power, *id at 1329*, meaning that the defendant was entitled to judgment notwithstanding a general jury verdict against it regardless of whether it had attempted to impose a tying arrangement. The Supreme Court vacated our decision and remanded for reconsideration in light of the market power analysis in *Eastman Kodak Co. v. Image Technical Services Inc., 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. *Virtual Maint., Inc. v. Prime Computer, Inc., 506 U.S. 910, 113 S. Ct. 314, 121 L. Ed. 2d 235 (1992)*. On remand, we found that the plaintiff had made a sufficient showing of market power, meaning that a jury could find in its favor *provided that the other elements of an illegal tying arrangement could also be proved. Virtual Maint., Inc. v. Prime Computer, Inc., 11 F.3d 660, 667 (6th Cir. 1993)* (*Virtual Maintenance II*). We did not revisit our analysis of conditioning from *Virtual Maintenance I*, instead "reaffirm[ing] and reinstat[ing]" that portion of the opinion. *Id*. Thus our one-sentence analysis of conditioning in *Virtual Maintenance I* was technically part of the holding in *Virtual Maintenance II*, but in neither opinion did we **[**30]** seriously consider exactly what the standard should be or articulate a clear test.

[*16]** Thus, although our legal analysis differs from that of the district court, there is a likelihood that Collins can meet the coercion part of a claim for anticompetitive tying.

B. Kodak's market power over printheads

There is also a strong likelihood of Collins' success on a finding that Kodak had sufficient market power over printheads to sustain a tying arrangement with ink. Without substantial market power over refurbished printheads, Kodak would be unable to use a threatened printhead price increase to "force" buyers to buy its ink; buyers could simply choose not to buy its printheads. *See generally Jefferson Parish Hosp., 466 U.S. at 17—18*. Kodak concedes that it has a one-hundred-percent share of the refurbished printhead market. However, Kodak argues that it lacks market power over refurbished printheads because competition in the primary printer market and the possibility of customers' ending their use of Versamark printers restrain its ability to raise prices for printheads, while information costs for Kodak's sophisticated Versamark customers are not so high that customers could be unfairly locked in to Kodak's pricing **[**31]** policy. Finally, Kodak also points to the recent history of its printhead and ink pricing in an attempt to argue that it was not able to raise prices. The district court correctly rejected these arguments; none of the facts Kodak points to reflects clear restraint on its market power over Versamark printheads.

The classic indicators of market power in an aftermarket—high information costs and switching costs—are present here. ***HN11***[] The availability of information about aftermarket pricing in the primary market (information costs) and the difficulty of switching to a different primary market supplier (switching costs) can both serve to insulate a primary market from the effects of aftermarket price increases, thus increasing the seller's market power in the aftermarket. *Kodak, 504 U.S. at 477*. There may also be other "actual market realities" (in the words of the *Kodak* Court) serving either to restrict or protect market power in an aftermarket. *Id. at 466*.

[*278] Even though Kodak's customers are sophisticated, information costs here are still high because the customers have been locked in to high aftermarket prices without prior warning. Kodak argues that since its customers were sophisticated businesses intensely concerned with **[**32]** limiting total printing costs, these customers would be able to gather the information about aftermarket pricing they would need to make fully informed decisions. While it is true that the **[***17]** *Kodak* Court emphasized the fact that Kodak's customers in that case were not all sophisticated and that less sophisticated customers would be particularly unable to make decisions that incorporated aftermarket prices, *id. at 475—76*, that does not prevent information costs from being high even for sophisticated customers. Under a fair interpretation of *Kodak*, aftermarket price increases are problematic in particular when they are introduced after customers have been "locked in" to the primary market product. *PSI Repair Servs., 104 F.3d at 820*. The increases are problematic because in that case information about aftermarket costs is hard to come by precisely because of the change in price; the customers do not know and have no way of knowing that the seller will increase aftermarket prices. *Id*. When relevant information is simply unavailable, it is fair to say that information costs are high. This is true even when customers are otherwise sophisticated. Of course if there is a strong suggestion that aftermarket prices may vary in the future, **[**33]** sophisticated customers will be able to negotiate stable prices via contract or else will willingly accept the risk that prices may increase. But there is no indication that Kodak's Versamark customers had any reason to expect sharp variations in aftermarket prices. In particular, as the district court noted, customers had no reason to expect the particular pricing policy Kodak adopted; when the last Versamark printer sold in 2009, Collins and Kodak were not even in direct competition. Thus the district court's finding of likely significant information costs was reasonable.

The district court's finding that the cost of switching from Versamark printers to a competitor was high enough to dampen pressure on aftermarket pricing was also reasonable. The record suggests that a full Versamark system could cost in excess of $2 million, and Collins' expert's report provided analysis indicating that switching costs, including but not limited to the price of a new printing system, could be a significant insulating factor for the aftermarket. Versamark systems typically function for 10-20 years, and users would prefer not to replace them until necessary. It thus appears that Collins will have **[**34]** a strong argument that switching costs might dampen primary market reactions to an increase in printhead costs.

It is far from clear that Kodak's plan to sell its new printer, Prosper, to former Versamark customers significantly disciplines its behavior in the Versamark aftermarket. It is not clear why price increases in *Versamark* printheads would affect the market for *Prosper* printers. The **[***18]** lifecycle pricing analysis of the Supreme Court in *Kodak* under which, when consumers are informed of service market prices, "the service-market price . . . affect[s] equipment demand" applies to a situation in which the equipment whose service cost is increasing is still being sold. *Kodak, 504 U.S. at 473*. That is, if Kodak increases the price of Prosper printheads, potential Prosper printer buyers will know that Prosper printheads are expensive and account for this in their decisionmaking. On the other hand, increasing the price of Versamark printheads at worst hurts Kodak's reputation in the marketplace and hints that **[*279]** something similar might be possible in the future with Prosper printheads, but it certainly does not directly affect the price of Prosper printers or printheads. With the notice provided by the Versamark printhead **[**35]** policy, Prosper customers (who are presumably as sophisticated as Versamark customers) should be able to negotiate guarantees of fair aftermarket pricing. If some evidence suggests that Kodak was concerned about Versamark customers' not buying Prosper printers, that does not in itself prove a lack of market power. The Versamark printhead market thus appears to have been insulated from Kodak's primary markets.

The district court was also correct to place little weight on Kodak's "natural experiments" showing a lack of market power; these are simply inconclusive as to Kodak's market power over Versamark printheads. Kodak's first such "experiment," the fact that its first attempt at a differential pricing policy had failed due to customer resistance, is undercut by its decision to try a similar, though toned-down policy a second time. And the failure itself can be explained by Kodak's marketing department's fear of harming Kodak's reputation—a significant concern, but not one that necessarily reflects a limit on market power. Kodak's second "experiment," the suggestion that Kodak did not raise ink prices after Kodak and Collins began cooperating in the ink market in 2001, also does not **[**36]** show a lack of market power. It is not clear that Kodak's incentives changed when it began cooperating formally. Even without formal agreement, the players in a two-party market may realize that their interests are not served by aggressive price competition, and indeed this might explain why they agreed to cooperate formally. These facts may be relevant to whether Kodak has market power, but on their own they do little to undermine the conclusion that Kodak's one-hundred-percent control of an aftermarket with high information and switching costs constitutes market power.

[*19]** Because Collins appears to have a relatively strong likelihood of success on the two elements of unlawful tying challenged in this appeal, the district court's finding of likelihood of success on the merits—though not its reasoning as to coercion—was correct.

III. The remaining preliminary injunction factors

Turning to the other factors for granting the preliminary injunction at issue in this appeal, the balance of equities supports granting a preliminary injunction in favor of Collins.

A. The harm to Collins

First, absent a preliminary injunction, Collins faces a realistic prospect of irreparable harm. *See* *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati, 363 F.3d 427, 432 (6th Cir. 2004)* (quoting *Blue Cross & Blue Shield Mut. of Ohio v. Blue Cross & Blue Shield Ass'n, 110 F.3d 318, 322 (6th Cir. 1997))* **[**37]** (listing the preliminary injunction factors). Kodak claims that Collins' claim of irreparable harm is speculative at best, because Collins could cut prices to maintain market share, and lost profits are fairly easily calculated and remedied through damages. However, to the extent there is a realistic prospect of lost sales and market share, these losses would harm Collins' goodwill and competitive position in ways that would be hard to compensate and that would support a preliminary injunction. It is appropriate to use a preliminary injunction to avoid harms to goodwill and competitive position. *Basicomputer Corp. v. Scott, 973 F.2d 507, 512 (6th Cir. 1992)*. On the other hand, the record does not conclusively **[*280]** show that, in the early days of the policy, Collins lost a significant amount of sales or market share. Kodak alleges that it had significant difficulty implementing the policy and that relatively few customers switched from Collins to Kodak ink. But Collins need not suffer harm in order to justify a preliminary injunction, so long as there is a realistic prospect of harm in the immediate future. Whether Kodak's policy was ill-conceived or simply a slow starter is difficult to tell, but it was designed in part to encourage customers to switch **[**38]** to Kodak. Given Kodak's significant power in the printhead market, it is at least a reasonable prospect that its policy would eventually have succeeded in cutting into Collins' market share.

[*20] B. Threat of harm to others**

Second, though the factor is not explicitly addressed on appeal, we consider the threat of harm to others, in particular Kodak, posed by the preliminary injunction. Although the injunction as issued by the district court does not perfectly reflect the legal analysis we apply, it is an appropriate interim measure under the circumstances and does not unduly threaten Kodak's interests.

The injunction presently "requires non-differential pricing of Kodak's Versamark printhead refurbishment services for Collins-brand Versamark ink and Kodak-brand Versamark ink customers." Under our analysis, Kodak should be permitted to offer a lower matched price, so long as the pricing policy is not coercive under the discount attribution standard. However, without a measure of Kodak's incremental costs, it is not possible to ascertain whether that standard is complied with. The present injunction, assuming it permits Kodak to negotiate individually with customers so long as Kodak does not **[**39]** condition a lower price on purchases of Kodak ink, prevents Kodak from using an unlawful tying arrangement against Collins but does not prevent it from competing with Collins on a fair playing field. The injunction does not prevent Kodak from discounting its ink across the board to compete with Collins, and Kodak is free (as far as the injunction is concerned) to reap a monopoly profit from its refurbished printhead sales as well, by maintaining high prices across the board for refurbished printheads. Thus it is highly unlikely that the injunction will have the effect of preventing Kodak from competing with Collins.

C. The public interest

Finally, the public interest will be served by the injunction exactly to the extent that Collins ought to prevail on the merits. The public interest is served by the injunction if the injunction is itself pro-competitive; neither side identified additional factors affecting the public interest. This is the case if the behavior the injunction prevents is anticompetitive, which is essentially the question posed by the tying analysis.

The district court accordingly did not abuse its discretion in balancing the equities to grant Collins a preliminary injunction. **[**40]** Collins has shown that it is sufficiently likely to succeed **[***21]** on the merits of its tying claim and that it faces a realistic possibility of irreparable harm absent a preliminary injunction. Further, it has shown that Kodak and others will not be unduly harmed by the injunction. Lastly, the preliminary injunction is in the public interest. The preliminary injunction order of the district court is **AFFIRMED**.

Concur by: MARTHA CRAIG DAUGHTREY

Concur

[*22] CONCURRENCE**

MARTHA CRAIG DAUGHTREY, Circuit Judge, concurring. I concur in the majority's determination that the district court did not abuse its **[*281]** discretion in granting Collins Inkjet Corporation a preliminary injunction in this matter. I write separately, however, to express my belief that the majority's discussion expounds upon considerations not necessary to resolve the dispute now before us. Rather than subscribe to the majority's formulation of a decisional framework applicable to *all* tying arrangements—a broader sweep than is required—I would simply hold that where a defendant, like Eastman Kodak Company, has a 100-percent monopolistic share of the market for a tying product, it may not price a tied product, for which it does not control the relevant market, **[**41]** below its costs without running afoul of the provisions of the Sherman Act. We have been asked to resolve nothing more than that question raised by the unique facts of this case, and I would venture no further in our analysis.

Driessen v. Royal Bank Int'l

United States District Court for the District of Connecticut

March 18, 2015, Decided; March 18, 2015, Filed

Case No. 3:14-cv-1300 (VAB)

Reporter

2015 U.S. Dist. LEXIS 33322 *; 2016-1 Trade Reg. Rep. (CCH) P79,492; 2015 WL 1245575

ROCHELLE DRIESSEN, Plaintiff, v. ROYAL BANK INTERNATIONAL, a brand of the Royal Bank of Scotland Group, Defendant.

Subsequent History: Affirmed by *Driessen v. Royal Bank of Scot., 691 Fed. Appx. 21, 2017 U.S. App. LEXIS 9079 (2d Cir. Conn., May 25, 2017)*

Prior History: *Driessen v. Royal Bank Int'l, 2014 U.S. Dist. LEXIS 200391 (D. Conn., Dec. 17, 2014)*

Core Terms

amended complaint, original complaint, Recommended, antitrust, allegations, concerted action, leave to amend, purported

Counsel: **[*1]** Rochelle Driessen, Plaintiff, Pro se, Surfside, FL.

Judges: Victor A. Bolden, United States District Judge.

Opinion by: Victor A. Bolden

Opinion

RULING OF DISMISSAL

Plaintiff, Rochelle Driessen, filed an Amended Complaint on January 30, 2015 in response to the Court's dismissal of this action without prejudice pursuant to *28 U.S.C. § 1915(e)(2)(B)*. Because the Amended Complaint does nothing to remedy the fatal defect of her original Complaint, the action is now dismissed with prejudice.

The plaintiff initiated this action *pro se* by filing a Complaint [Doc. No. 1] on September 9, 2014 against "Royal Bank International" and moving for leave to proceed *in forma pauperis* [Doc. No. 2]. The case was referred to Magistrate Judge Martinez, who reviewed the plaintiff's filings pursuant to *28 U.S.C. § 1915*. Judge Martinez granted the *in forma pauperis* motion, but recommended that the Complaint be dismissed without prejudice [Doc. No. 6], issuing a Recommended Ruling of Dismissal [Doc. No. 7] on December 17, 2014. The plaintiff timely objected to the Recommended Ruling [Doc. No. 8], but the District Court approved and adopted the Recommended Ruling on January 6, 2015, ordering that if no amended complaint were filed by January 26, 2015, "a judgment will enter dismissing **[*2]** the action with prejudice" [Doc. No. 9]. Even though the plaintiff failed to comply with this Court's January 6 order and filed her Amended Complaint four days after the specified deadline, the Court will entertain the plaintiff's late filing in light of her *pro se* status.

The statute that authorizes the court to grant *in forma pauperis* relief to a plaintiff contains the following protection against abuse of such status: "Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that . . . the action . . . (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." *28 U.S.C. § 1915(e)(2)(B)*.

The plaintiff's Amended Complaint [Doc. No. 11] is nearly identical to her original Complaint. The only substantive difference is the addition of conclusory allegations that the defendant's previously alleged actions also violated *Section 1* of the Sherman Antitrust Act, *15 U.S.C. § 1*. *See* Amended Complaint [Doc. No. 11] ¶¶ 6, 14, 15. The plaintiff's original Complaint had been dismissed with leave to amend on the grounds that it failed to **[*3]** "plausibly allege that the defendant had any actual involvement with the purported emails or lottery winnings." Recommended Ruling of Dismissal [Doc. No. 7], at 5. The Amended Complaint contains no new factual allegations against the defendant of any type, including those that would purport to connect the defendant to the purported emails or lottery winnings, and thus does nothing to address the fatal defect in the original Complaint, which was clearly identified and articulated in the Recommended Ruling.

Instead, the plaintiff has alleged an additional violation, of a completely different statutory scheme, predicated on the ***same*** alleged set of facts, which necessarily means that this claim, too, possesses the same fatal pleading defect—there has been no plausible allegation that the defendant was involved in any of the activity alleged.[1] Therefore, this new claim must be dismissed for the same reasons articulated in the Recommended Ruling and the January 6 Order.

The Recommended Ruling noted that the plaintiff's original Complaint "is virtually identical to another complaint the plaintiff filed in this court." Recommended Ruling of Dismissal [Doc. No. 7], at 4. Indeed, there have been numerous cases filed by the plaintiff in which she sued commercial banks implausibly alleging, as she does in this case, that she was entitled to a large sum of money that a bank failed to transfer to her in violation of *15 U.S.C. § 1693(b)* of the Electronic Funds Transfer Act ("EFTA").[2] Adding a claim, unsupported by factual allegations that federal ***antitrust law*** was violated, does not differentiate the complaint in this action from these other complaints in such manner so that it now states a plausible claim on which relief may be granted. All claims in this action shall therefore be dismissed with prejudice.

When faced with a *pro se* plaintiff who is proceeding *in forma pauperis*, a court "must liberally construe his pleadings, and must interpret his complaint to raise the strongest arguments it suggests," *Abbas v. Dixon, 480 F.3d 636, 639 (2d Cir. 2007)*, and further "should not dismiss without granting leave to amend at least once when a

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[1] Furthermore, the plaintiff has failed to allege any facts that would constitute a violation of *Section 1* of the Sherman Antitrust Act. Setting the price of a service (*see* Amended Complaint [Doc. No. 11] ¶¶ 14-15) does not constitute **[*4]** the type of "price-fixing" that is contemplated by federal ***antitrust law***. *See infra*.

[2] *See, e.g., Driessen v. Natwest Bank PLC*, No. 3:13-cv-00217-MPS (alleging that two banks, including The Royal Bank of Scotland, violated the EFTA by failing to transfer her purported European lottery winnings to her bank account); *Driessen v. United Nations*, No. 1:12-cv-08289-LAP (S.D.N.Y), transferred, **[*5]** No. 1:13-cv-20065-CMA (S.D. Fla.) (claiming that the defendant bank was liable under EFTA for failing to transfer her $1.2 million inheritance check to her bank account after she refused to pay the transfer fee); *Driessen v. Citibank, N.A.*, No. 4:13-cv-04018-LLP (D.S.D.) (alleging that the defendant bank violated EFTA by failing to remit her winnings to her bank account both times that she won the UK National Lottery); *Driessen v. Home Loan State Bank*, No. 1:12-cv-02220-MSK-KLM (D. Colo.) (alleging that the defendant bank violated EFTA by failing to transfer a £ 3.5 million prize to her); *Driessen v. Woodforest Nat'l Bank*, No. 3:12-cv-00091 (S.D. Ohio) (alleging that the defendant bank violated EFTA by failing to transmit $8.3 million allegedly deposited with the defendant bank by the United Nations for her benefit); *Driessen v. S. African Reserve Bank*, No. 4:12-cv-00309-RAS-DDB (E.D. Tex.) (claiming that the defendant bank wrongfully withheld $30.5 million in violation of EFTA); *see also Driessen v. Clinton*, No. 4:12-cv-00227-RC-ALM (E.D. Tex.) (claiming that U.S. Secretary of State Hillary Rodham Clinton informed her that she had inherited $10.5 million from a Nigerian relative but **[*6]** then unlawfully prevented the transfer of funds on the grounds that the funds were terrorist- and drug-related). The Court may take judicial notice of Plaintiff's other lawsuits. *See* ***Kavowras v. N.Y. Times Co., 328 F.3d 50, 57 (2d Cir. 2003)*** ("Judicial notice may be taken of public filings[.]").

liberal reading of the complaint gives any indication that a valid claim might be stated," Gomez v. USAA Fed. Sav. Bank, 171 F.3d 794, 795 (2d Cir. 1999) (quoting Branum v. Clark, 927 F.2d 698, 705 (2d Cir. 1991)). Generally, however, an action may be dismissed with prejudice "where it appears that granting leave to amend is unlikely to be productive." Preston v. New York, 223 F. Supp. 2d 452, 463 (S.D.N.Y. 2002). For example, where amendment would be futile, "denial of an opportunity to amend is within the discretion of the District Court," Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962), and "the standard for denying leave to amend based on futility is the same as the standard for granting a motion to dismiss," Delollis v. Friedberg, No. 13-1628-cv, 600 Fed. Appx. 792, 2015 U.S. App. LEXIS 2140, *5 (2d Cir. Feb. 9, 2015).

In this action, the plaintiff's original Complaint was given a liberal reading and the plaintiff was granted leave to amend. The plaintiff **[*7]** subsequently failed to amend her Complaint in a manner that addressed the Court's clearly-expressed basis for dismissal. There is no basis to believe that granting leave to amend a second time would induce the plaintiff to add the kind of allegations needed to establish a facially-plausible claim when she took no steps to do so with her first opportunity to amend. *See, e.g.,* Brown v. Coach Stores, Inc., 163 F.3d 706, 712 n.4 (2d Cir. 1998) (denying leave to replead because "the district court already gave [plaintiff] an opportunity to file an amended complaint designed to cure the very defect that remains"); Cellular Technical Servs. Co. v. TruePosition, Inc., 609 F. Supp. 2d 223, 246-47 (D. Conn. 2009) (dismissing case with prejudice and without leave to amend because plaintiffs had already been given an opportunity to replead to cure identified deficiencies "and since they did not take advantage of that opportunity, the Court sees no reason to provide yet a third chance to plead [the same element]"). Under these circumstances, the Court determines that further amendment would be futile with respect to all claims in the plaintiff's Amended Complaint that were repeated from her original Complaint.

The new antitrust claim fails because of the same lack of facial plausibility. There are no new factual allegations regarding the defendant. The **[*8]** plaintiff's antitrust allegations amount, in their entirety, to the following:

> Defendant is in violation of 15 USC § 1 . . . by price fixing the cost of transfer fee of £ 650, and price fixing the cost of transfer fee of £ 650 for international transfers that exceeds the sum of one hundred thousand United States dollars under its Anti-Money Laundering Decree. . . . The anti-money laundering programs to guard against money laundering through financial institutions do not provide a fixed price for the international transfer of money pursuant to 31 USC § 5318(h)(1).

Amended Complaint [Doc. No. 11] ¶¶ 14-15. All the conduct alleged here, as throughout the Amended Complaint, was already alleged in the original Complaint, and thus the plaintiff asserts this purported antitrust violation against the defendant based solely on facts previously pleaded. Just as in the original Complaint, there is absolutely nothing in the Amended Complaint connecting the defendant to the conduct alleged to have occurred.

Even construing the Amended Complaint in the most liberal manner imaginable, the plaintiff has also wholly failed to allege a violation of Section 1 of the Sherman Antitrust Act. The statute is by its terms limited to collusive conduct—to **[*9]** contracts, combinations, and conspiracies that restrain the nation's domestic or foreign trade or commerce. *See* 15 U.S.C. § 1. The key inquiry therefore in any case brought under Section 1 is whether the challenged conduct consists of concerted action between separate entities or "conduct that is 'wholly unilateral.'" Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984) (quoting Albrecht v. Herald Co., 390 U.S. 145, 149, 88 S. Ct. 869, 19 L. Ed. 2d 998 (1968)); *see also* VI Phillip Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 1402a, at 10 (3d ed. 2010) ("A sharp distinction between unilateral and concerted action is apparent from the structure of the basic antitrust statute. Sherman Act § 1 reaches concerted action in unreasonable restraint of trade[.]").

A business unilaterally setting the price of a service it provides is not the type of "price fixing" contemplated by federal antitrust prohibitions. In fact, "setting one's own profitmaximizing price is entirely lawful under the antitrust laws." VI Areeda & Hovenkamp ¶ 1402a, at 10. Therefore, in addition to curing the previously-identified defects in this action, the plaintiff would also have had to add plausible allegations of concerted action by the defendant with others in order for this claim to survive. *See* Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 190, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010) ("Section 1 applies only to concerted action that restrains trade. . . . And because **[*10]** concerted action is discrete and distinct, a limit on such activity leaves untouched a vast amount of business conduct."); *Copperweld, 467 U.S. at 775 (1984)* (holding that "the Sherman Act does not prohibit unreasonable restraints of trade as such—but only restraints effected by a contract, combination, or conspiracy—it leaves untouched a single firm's anticompetitive conduct").

In any event, as discussed *supra* with respect to the claims repeated from the original Complaint, allowing the plaintiff to replead concerning the antitrust claim would likewise be futile because the plaintiff has demonstrated no inclination to attempt to plead the necessary facts plausibly tying the defendant to the existing allegations, even when explicitly prompted to do so by the Court. *See* Recommended Ruling of Dismissal [Doc. No. 7], at 5 ("the complaint in this case does not plausibly allege that the defendant bank had any actual involvement with the purported emails or lottery winnings"); *see also* *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.").

For the reasons set forth above, the Court **DISMISSES [*11] WITH PREJUDICE** this action pursuant to *28 U.S.C. § 1915(e)(2)(B)* on the ground that the Amended Complaint fails to state a claim upon which relief may be granted.

IT IS SO ORDERED.

/s/ Victor A. Bolden

Victor A. Bolden

United States District Judge

Dated at Bridgeport, Connecticut, this 18th day of March, 2015.

Cobb Theatres III, LLC v. AMC Entm't Holdings, Inc.

United States District Court for the Northern District of Georgia, Atlanta Division

March 20, 2015, Decided; March 20, 2015, Filed

1:14-CV-00182-ELR

Reporter

101 F. Supp. 3d 1319 *; 2015 U.S. Dist. LEXIS 52668 **; 2015-1 Trade Cas. (CCH) P79,113

COBB THEATRES III, LLC and COBB THEATRES IV, LLC, Plaintiffs, v. AMC ENTERTAINMENT HOLDINGS, INC.; AMC ENTERTAINMENT, INC.; and AMERICAN MULTI-CINEMA, INC., Defendants.

Subsequent History: Motion granted by *Cobb Theatres III, LLC v. AMC Entm't Holdings, Inc., 2015 U.S. Dist. LEXIS 178282 (N.D. Ga., Nov. 6, 2015)*

Motion granted by *Cobb Theatres III, LLC v. AMC Entm't Holdings, Inc., 2016 U.S. Dist. LEXIS 120718 (N.D. Ga., Feb. 25, 2016)*

Core Terms

theatres, film, clearances, allegations, distributors, Defendants', motion to dismiss, monopoly power, competitors, monopolization, relevant market, geographic, antitrust, consumers, landlords, license, Maps, judicial notice, zone, Sherman Act, markets, courts, restraint of trade, predatory, monopoly, space, market power, market share, conspiracy, Notice

LexisNexis® Headnotes

Evidence > Judicial Notice > Adjudicative Facts > Facts Generally Known

Evidence > Judicial Notice > Scientific & Technical Facts

Evidence > Judicial Notice > Adjudicative Facts > Verifiable Facts

HN1[] **Adjudicative Facts, Facts Generally Known**

Pursuant to *Fed. R. Evid. 201(b)*, the court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Of note, the court may take judicial notice at any stage of the proceeding. *Fed. R. Evid. 201(d)*. The Eleventh Circuit has noted that the kinds of things about which courts ordinarily take judicial notice are (1) scientific facts: for instance, when does the sun rise or set; (2) matters of geography: for instance, what are the boundaries of a state; or (3) matters of political history: for instance, who was president in 1958. This process is highly limited because taking judicial notice bypasses the safeguards which are involved with the usual process of proving facts by competent evidence in district court.

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

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

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

When considering a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss, the court must accept as true the allegations set forth in the complaint drawing all reasonable inferences in the light most favorable to the plaintiff. Even so, a complaint offering mere labels and conclusions or a formulaic recitation of the elements of a cause of action is insufficient.

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

Evidence > Inferences & Presumptions > Inferences

HN3[] **Complaints, Requirements for Complaint**

A complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. Put another way, a plaintiff must plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. This so-called plausibility standard is not akin to a probability requirement; rather, the plaintiff must allege sufficient facts such that it is reasonable to expect that discovery will lead to evidence supporting the claim.

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

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

Even if it is extremely unlikely that a plaintiff will recover, a complaint may nevertheless survive a motion to dismiss for failure to state a claim, and a court reviewing such a motion should bear in mind that it is testing the sufficiency of the complaint and not the merits of the case.

Evidence > Judicial Notice > Adjudicative Facts > Verifiable Facts

HN5[] **Adjudicative Facts, Verifiable Facts**

Courts do, on occasion, take judicial notice of maps. In fact, courts in other circuits commonly take judicial notice of information obtained specifically from Google Maps.

Antitrust & Trade Law > Sherman Act > Scope

HN6[] **Antitrust & Trade Law, Sherman Act**

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

Antitrust & Trade Law > Sherman Act > Scope

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

HN7[] Antitrust & Trade Law, Sherman Act

Although the language of *Section 1* of the Sherman Antitrust Act, *15 U.S.C.S. § 1*, seems to create a blanket prohibition on concerted restraint of trade, the Supreme Court has clarified that many forms of concerted action should be evaluated using the rule of reason. Pursuant to that rule, the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.

Antitrust & Trade Law > Sherman Act > Claims

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

HN8[] Sherman Act, Claims

A plaintiff attempting to state a claim under *Section 1* of the Sherman Antitrust Act, *15 U.S.C.S. § 1*, must sufficiently plead the existence of an agreement to restrain trade.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN9[] Sherman Act, Claims

Stating a claim under *Section 1* of the Sherman Antitrust Act, *15 U.S.C.S. § 1*, requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. Put another way, the Court is tasked with determining if the complaint contains enough factual heft to plausibly suggest the existence of a conspiracy or agreement. Moreover, although the plaintiff must allege more than a mere opportunity to conspire, courts in the 11th Circuit recognize that most conspiracies are inferred from the behavior of the alleged conspirators.

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

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

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

HN10[] Per Se Rule & Rule of Reason, Per Se Violations

Despite the broad language of *Section 1* of the Sherman Antitrust Act, *15 U.S.C.S. § 1*, that provision prohibits only unreasonable restraints on trade. In most cases, the reasonableness of a particular practice is weighed by the fact finder in light of the circumstances surrounding the case. A number of factors are relevant to this inquiry, including specific information about the relevant businesses as well as the restraint's history, nature and effect. In a limited class of cases, however, certain restraints on trade are considered unlawful per se. Such rules are necessary when conduct would always or almost always tend to restrict competition and decrease output. Vertical agreements are scrutinized using the rule of reason.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

HN11[] **Vertical Restraints, Nonprice Restraints**

Film industry clearance agreements are reasonable when used for the proper purpose if they are not unduly extended in area or duration. There are seven factors a court should consider when evaluating the reasonableness of a clearance agreement: (1) the admission prices of the theatres involved, as set by the exhibitors; (2) the character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.; (3) the policy of operation of the theatres involved, such as the showing of double features, gift nights, give-aways, premiums, cut-rate tickets, lotteries, etc.; (4) the rental terms and license fees paid by the theatres involved and the revenues derived by the distributor-defendant from such theatres; (5) the extent to which the theatres involved compete with each other for patronage; (6) the fact that a theatre involved is affiliated with a defendant-distributor or with an independent circuit of theatres should be disregarded; and (7) there should be no clearance between theatres not in substantial competition.

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

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

HN12[] **Per Se Rule & Rule of Reason, Sherman Act**

Interbrand competition is the competition among the manufacturers of the same generic product and is the primary concern of ***antitrust law***. The extreme example of a deficiency of interbrand competition is monopoly, where there is only one manufacturer. In contrast, intrabrand competition is the competition between the distributors wholesale or retail of the product of a particular manufacturer. The degree of intrabrand competition is wholly independent of the level of interbrand competition confronting the manufacturer. Thus, there may be fierce intrabrand competition among the distributors of a product produced by a monopolist and no intrabrand competition among the distributors of a product produced by a firm in a highly competitive industry. But when interbrand competition exists, it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product. Importantly, courts sustaining vertical agreements under the rule of reason have done so by recognizing that such restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products. In regard to film industry clearance agreements specifically, courts have made this same observation.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

HN13[] **Vertical Restraints, Nonprice Restraints**

Film industry clearance agreements force theatres that are denied a license to certain movies to show alternatives, thereby increasing movie choices for consumers.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

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

HN14[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

In order to consider a rule of reason claim based on a vertical restraint, a court must conduct a systematic comparison of the negative effects of the restraint on competition and compare that with the positive effects on competition stemming from the restraint.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN15[] **Sherman Act, Claims**

To state a claim under *Section 1* of the Sherman Antitrust Act, *15 U.S.C.S. § 1*, a plaintiff must allege antitrust injury, i.e. an injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants acts unlawful. Further, because antitrust laws are not intended to protect competitors, a plaintiff asserting antitrust violations must allege actual or potential injury to the competition. In other words, the conduct at issue must impact the market rather than the competitors therein.

Antitrust & Trade Law > Sherman Act > Claims

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

HN16[] **Sherman Act, Claims**

Actual anticompetitive effects include, but are not limited to, reduction of output, increase in price, or deterioration in quality. The quintessential harm is not higher prices; rather, consumer welfare, understood in the sense of allocative efficiency, is the animating concern of the Sherman act. Therefore, a plaintiff alleging actual harm to competition should point to the specific damage done to consumers in the market.

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

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

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

Even assuming a plaintiff shows actual or potential harm to competition, he must identify the relevant market in which the harm occurs. Importantly, the relevant market has both product and geographic components. The parameters of these markets are considered questions of fact, but antitrust plaintiffs must nevertheless present enough information in their complaint to plausibly suggest the contours of the relevant geographic and product markets.

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

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

Geographically, the relevant market is defined as the area in which the product or its reasonably interchangeable good is traded. When determining the geographic market, such economic and physical barriers to expansion as transportation costs, delivery limitations and customer convenience and preference must be considered. Moreover, markets involving services that can only be offered from a particular location, like those provided by hospitals, theaters, and ski areas, will often be defined by how far consumers are willing to travel.

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

HN19[] **Relevant Market, Product Market Definition**

The relevant product market is determined by the availability of substitutes to which consumers can turn in response to price increases and other existing or potential producer's ability to expand output. In addition to examining the uses to which the product is put by consumers in general, the court should give special consideration to evidence of the cross-elasticity of demand and reasonable substitutability of the products.

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

HN20[] **Relevant Market, Product Market Definition**

The cross-elasticity of demand measures the change in the quantity demanded by consumers of one product relative to the change in price of another. A high cross-elasticity of demand (that is, consumers demanding proportionately greater quantities of Product X in response to a relatively minor price increase in Product Y) indicates that the two products are close substitutes for each other—that is, consumers derive comparable utility from equivalent consumption of either one. For purposes of the relevant product market analysis, a high cross-elasticity of demand indicates that the two products in question are reasonably interchangeable substitutes for each other and hence are part of the same market.

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

HN21[] **Relevant Market, Product Market Definition**

The test for a relevant product market is not commodities reasonably interchangeable by a particular plaintiff, but commodities reasonably interchangeable by consumers for the same purpose.

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

HN22[] **Standing, Requirements**

Standing is a question of law. Importantly, antitrust standing is not simply a search for an injury in fact; it involves an analysis of prudential considerations aimed at preserving the effective enforcement of the antitrust laws. To conduct this analysis, a court must evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them.

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

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

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

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

HN23[] **Actual Monopolization, Anticompetitive & Predatory Practices**

To state a prima facie case for monopolization, a plaintiff must plead sufficient facts to infer: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. In this context, monopoly power is the power to control prices in or exclude competition from the relevant market. Further, to satisfy the second element of a monopolization claim, the plaintiff must allege predatory or exclusionary acts or practices that have the effect of preventing or excluding competition within the relevant market.

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

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

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

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

HN24[] **Attempts to Monopolize, Elements**

A plaintiff states a claim for attempted monopolization by alleging sufficient facts to suggest predatory or anticompetitive conduct, specific intent to monopolize, and a dangerous probability of achieving monopoly power in the relevant market. As with claims under *Section 1* of the Sherman Antitrust Act, *15 U.S.C.S. § 1*, the relevant market has both product and geographic components.

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

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

HN25[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The predatory or anticompetitive conduct criterion captures the critical antitrust idea of harm to competition, rather than to competitors. This requirement is perhaps the single most important aspect of attempted monopolization.

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

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

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

HN26[] **Relevant Market, Geographic Market Definition**

To state a claim for monopolization, a plaintiff must first plead sufficient facts to infer the defendant possesses monopoly power in the relevant market. Defining the relevant market is therefore a necessary component of analyzing market power.

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

HN27[] Actual Monopolization, Monopoly Power

Monopoly power is the power to control prices in or exclude competition from the relevant market. Further, market share is frequently used in litigation as a surrogate for market power. High market share, coupled with sufficient barriers to market entry, can result in a finding of market power.

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

HN28[] Actual Monopolization, Monopoly Power

Although a market share of less than 50% is inadequate as a matter of law to constitute monopoly power, the analysis is somewhat fluid. In fact, the Supreme Court has noted that, in some circumstances, over two-thirds of the market is a monopoly. Companies that have been found to possess monopoly power usually have enjoyed market shares greater than seventy per cent, but whether such power actually exists is a quintessential question of fact.

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

HN29[] Actual Monopolization, Monopoly Power

Allegations of market share alone are insufficient to establish monopoly power. In fact, even a market share of 100% is not determinative. Relevant determinants of the market power of a prospective predator include its absolute and relative market shares, and those of competing firms; the strength and capacity of current competitors; the potential for entry; the historic intensity of competition; and the impact of the legal or natural environment.

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

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

HN30[] Exclusive & Reciprocal Dealing, Exclusive Dealing

"Circuit dealing" is not specifically defined by case law, but it occurs when a defendant pools the purchasing power of an entire circuit to eliminate the possibility of bidding for films on a theatre by theatre basis. In Paramount Pictures, the Supreme Court addressed circuit dealing in the context of film licensing agreements that cover exhibition in two or more theatres in a particular circuit. Notably, the Court found such agreements to be unlawful because they eliminate the opportunity for the small competitor to obtain the choice first-run films, and put a premium on the size of the circuit thereby undermining the competitive process. Certain circuit deals constitute unlawful monopoly leveraging, a form of anticompetitive conduct which involves a monopolist using its monopoly power in one market to gain a competitive advantage in another. Such conduct is unlawful because the pooling of the purchasing power of an entire circuit in bidding for films is a misuse of monopoly power insofar as it combines the theatres in closed towns with competitive situations.

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

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

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

HN31[] **Scope, Monopolization Offenses**

A man with a monopoly of theatres in any one town commands the entrance for all films into that area. If he uses that strategic position to acquire exclusive privileges in a city where he has competitors, he is employing his monopoly power as a trade weapon against his competitors. It may be a feeble, ineffective weapon where he has only one closed or monopoly town. But as those towns increase in number throughout a region, his monopoly power in them may be used with crushing effect on competitors in other places. Though he makes no threat to withhold the business of his closed or monopoly towns unless the distributors give him the exclusive film rights in the towns where he has competitors, the effect is likely to be the same where the two are joined. When the buying power of the entire circuit is used to negotiate films for his competitive as well as his closed towns, he is using monopoly power to expand his empire. And even if we assume that a specific intent to accomplish that result is absent, he is chargeable in legal contemplation with that purpose since the end result is the necessary and direct consequence of what he did. Both forms of circuit dealing are considered per se violations of the Sherman Act.

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

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

HN32[] **Scope, Monopolization Offenses**

When a film exhibitor uses the buying power of its entire circuit to negotiate films for its competitive and closed markets, it is guilty of circuit dealing. This is true even when the exhibitor does not expressly threaten distributors that it will withhold the business of its closed or monopoly markets unless it is given preferential treatment.

Torts > ... > Business Relationships > Intentional Interference > Elements

HN33[] **Intentional Interference, Elements**

To state a claim for tortious interference with business relations under Georgia law, the plaintiff must show that the defendant: (1) acted improperly and without privilege; (2) acted purposefully and maliciously with the intent to injure; (3) induced a third party not to enter into or continue a business relationship with the plaintiff; and (4) caused the plaintiff some financial injury. In this context, improper actions constitute conduct wrongful in itself; thus, improper conduct means wrongful action that generally involves predatory tactics such as physical violence, fraud or misrepresentation, defamation, use of confidential information, abusive civil suits, and unwarranted criminal prosecutions.

Contracts Law > Defenses > Illegal Bargains

Torts > Business Torts > Unfair Business Practices

HN34[] **Defenses, Illegal Bargains**

Ga. Const. art. III, § 6, para. 5 and *O.C.G.A. § 13-8-2* declare contracts in restraint of trade void as against public policy. Although these provisions merely render such agreements unenforceable and provide no cause of action for damages to those who are parties thereto, Georgia recognizes a common law tort action in favor of third parties who are injured by a conspiracy in restraint of trade.

Contracts Law > Defenses > Illegal Bargains

Torts > ... > Commercial Interference > Business Relationships > Intentional Interference

HN35[] **Defenses, Illegal Bargains**

Courts in the 11th Circuit allow plaintiffs to state claims for both tortious interference and for violations of Georgia law prohibiting contracts in restraint of trade.

Antitrust & Trade Law > Procedural Matters

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

HN36[] **Antitrust & Trade Law, Procedural Matters**

The 11th Circuit disfavors *Fed R. Civ. P. 12(b)(6)* dismissals in fact-intensive antitrust disputes.

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Judges: Eleanor L. Ross, United States District Judge.

Opinion by: Eleanor L. Ross

Opinion

[*1325] ORDER

Plaintiffs Cobb Theatres III, LLC and Cobb Theatres IV, LLC (hereinafter "Plaintiffs" or "Cobb") brought this action against AMC Entertainment Holdings, Inc., AMC Entertainment, Inc., and American Multi-Cinema, Inc., (collectively "Defendants" or "AMC") for alleged violations of the Sherman Antitrust Act and various state laws. The case is presently before the Court on Defendants' **[**2]** Motion to Dismiss for Failure to State a Claim (Doc. No. 19), Plaintiffs' Notice of Objection and Motion to Strike (Doc. No. 24), and Plaintiffs' Motion for Leave to File Response to

Defendants' Second Notice of Supplemental Authority (Doc. No. 42). For the reasons that follow, the Court grants Plaintiffs' Motion for Leave to File Response, denies Plaintiffs' Motion to Strike, and denies Defendants' Motion to Dismiss.

I. BACKGROUND

A. Factual Background

As it must, the Court accepts as true the factual allegations set forth in the Complaint and draws all reasonable inferences in the light most favorable to Plaintiffs.

Cobb operates seven upscale movie theatres throughout the country—known as **[*1326]** "CinéBistros"—that combine the experience of fine dining with film exhibition. (Compl. ¶ 37, Doc. No. 1.) One such venue, the CinéBistro at Town Brookhaven (the "Brookhaven CinéBistro"), is located in Brookhaven, Georgia. (Id. ¶ 6.) The Brookhaven CinéBistro features seven screens and has the capacity to seat 758 patrons. (Id. at 37.) AMC, on the other hand, is one of the largest theatre companies in the United States. (Id. ¶¶ 10, 11.) Relevant to this case, AMC operates two theatres in Buckhead, a neighborhood **[**3]** in Atlanta, Georgia adjacent to the City of Brookhaven. (Id. ¶¶ 35, 36.) The first theatre, the AMC Phipps Plaza 14, boasts fourteen screens and 1,046 seats. (Id. ¶ 35.) The second, a smaller venue known as the AMC Fork & Screen Buckhead, has just six screens and 650 seats. (Id. ¶ 36.) Together, the Brookhaven CinéBistro and AMC's two Buckhead theatres comprise "the Buckhead-Brookhaven zone." (Id. ¶ 39.) In the film industry, a "zone" is a geographic area identified by a distributor for purposes of licensing films.[1] (Id. ¶ 27.) Theatres within each zone compete with one another to exhibit films to the public. (Id.)

As a general matter, the Complaint alleges considerable distinctions between the respective movie viewing experiences offered by Cobb and AMC. (Id. ¶¶ 38, 47.) On the one hand, Plaintiffs highlight the amenities offered at their theatres, including "valet parking on weekends and holidays, reserved seating, elegant and sophisticated auditoriums and lounges, high-back leather rocking chairs, in-theatre, full-service **[**4]** dining prior to the start of the film, a freshly prepared and seasonal American bistro menu and full bar (in addition to traditional movie theatre snacks), 100% digital cinema and theatre technology, 3-D capabilities, and no on-screen advertisements." (Id. ¶ 38.) Plaintiffs also point out that CinéBistros offer an adults-only environment after 6:00 P.M. (Id.) In contrast, the Complaint alleges Defendants deter theatre patrons "with on-screen advertising, harsh neon lighting, limited food and beverage offerings (and distracting food and beverage service throughout the entire film-play period at the AMC Fork & Screen Buckhead), accommodation of loud children and young people who can destroy the movie-going experience for others, and generally less pleasant atmosphere." (Id. at 47.)

Despite the alleged superior quality of their theatres, Plaintiffs contend several major film distributors have given Defendants preferential treatment thus depriving the Brookhaven CinéBistro of a fair opportunity to compete with AMC's Buckhead theatres. (Id. ¶ 48.) According to Plaintiffs, Defendants have ensured such treatment by engaging in the type of anti-competitive conduct prohibited by the Sherman Antitrust **[**5]** Act and various Georgia laws. (Id. ¶¶ 100-53.)

The events underlying this suit began shortly after Cobb and AMC competed to lease the space where the Brookhaven CinéBistro is currently located. (Id. ¶ 54.) Unhappy after losing that battle to Plaintiffs, AMC began requesting "clearances" for its nearby Buckhead theatres. (Id. ¶¶ 54-79.) The term "clearance" refers to a practice in the film industry whereby a distributor agrees to license a particular film to only one theatre in a given geographic area rather than engaging in a "day-and-date" release, i.e. allowing multiple theatres within a region to exhibit the same film on the same day. (Id. ¶ 29.) Prior to 2009, AMC did not request clearances over its nearby competitors. (Id. ¶ 55.) However, after a significant restructuring **[*1327]** of management, the theatre chain purportedly changed

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[1] A "distributor" is an entity that markets, promotes, and licenses films. (Compl. ¶ 21.) Sony Pictures and Warner Brothers are examples of film distributors. (Id. ¶ 61.)

its policy and began a nationwide campaign to demand clearances over film exhibitors to "[insulate] itself from competition on the merits." (Id. ¶¶ 1, 54-79.)

More specifically, Plaintiffs contend the Senior Vice President and Head Film Buyer for AMC's Buckhead theatres sent a letter to "the major film distributors" in 2010 stating:

> [The Brookhaven CinéBistro] **[**6]** is 1.9 miles northeast of our AMC PHIPPS 14 and 2.5 miles northeast of our AMC FORK & SCREEN BUCKHEAD 6, and thus we will not play day-and-date with a venue at this location . . . . We have played 100% of your wide commercial releases and look forward to continuing that arrangement going forward.

(Id. ¶ 58.) The Complaint alleges this letter operated as a demand by AMC that distributors refuse to license certain films to the Brookhaven CinéBistro or, alternatively, risk damaging their relationships with one of the nation's largest film exhibitors. (Id. ¶ 59.) Plaintiffs further contend that, as a direct result of the letter, several major distributors began to honor AMC's demand for preferential treatment and allocated the Brookhaven CinéBistro fewer high-grossing, popular films.[2] (Id. ¶ 62.)

Plaintiffs also assert Defendants have interfered with their attempts to lease new space near existing AMC theatres. (Id. ¶ 87.) Specifically, Plaintiffs allege that AMC threatens landlords it will request clearances for its nearby theatres if the landlord decides to lease space to one of AMC's competitors, including Cobb. (Id.) Landlords are thus deterred from leasing to those competitors out of fear that the threatened clearances would make it difficult for the new theatre to license films thereby reducing customer traffic to the landlord's property. (Id.)

Despite their purported ability to offer moviegoers an overall better film viewing experience, Plaintiffs argue they have been deprived of a fair opportunity to compete with AMC's Buckhead theatres. Interestingly, Plaintiffs allege Defendants' conduct is not unique to the specific theatres at issue in this case but is instead a part of nationwide strategy to employ anticompetitive tactics to gain an unfair advantage in the marketplace.[3] As necessary, the Court will discuss additional facts in its analysis below. **[**8]**

B. Procedural Background

On January 22, 2014, Cobb filed suit in this Court seeking relief for AMC's alleged violations of the Sherman Antitrust Act and various Georgia laws. The Complaint alleges: 1) Defendants violated *sections 1* and/or *2* of the Sherman Act by engaging in "circuit dealing" (Count I); 2) Defendants violated *section 2* of the Sherman Act by engaging in monopolization and/or unlawful exercise of monopoly power (Count II); 3) Defendants violated *section 2* of the Sherman Act by attempting to engage in monopolization; 4) Defendants violated *section 1* of the Sherman Act by engaging **[*1328]** in "exclusive dealing" (Count IV); and 5) Defendants violated various Georgia laws (Counts V and VI). Defendants subsequently filed the present Motion to Dismiss for Failure to State a Claim (Doc. No. 19) on April 1, 2014.

In addition to filing a response, Plaintiffs filed a Notice of Objection and Motion to Strike (Doc. No. 24) Exhibit A to Defendants' Motion to Dismiss and all arguments relying **[**9]** thereon. The exhibit at issue is a Google map printout showing the location of various theatres in the Atlanta area. Citing the map, Defendants ask the Court to take judicial notice of the fact that "[t]he Regal Hollywood 24, Regal Perimeter Point Stadium 10, Regal Atlantic

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[2] To support this contention, Plaintiffs cite the time period between January 1, 2013 and October 27, 2013, during which Sony Pictures licensed Elysium and Captain Phillips to the Brookhaven CinéBistro. (Compl. ¶ 61.) During those same dates, "Sony Pictures licensed to one or both of AMC's Buckhead theatres After Earth, The Amazing Spider-Man, Battle of the Year, The Call, Carrie, Evil Dead, Grown **[**7]** Ups 2, The Mortal Instruments, One Direction: This Is Us, This is the End, White House Down, and Zero Dark Thirty." (Id.)

[3] Concerning a space located in Miami, Florida, Plaintiffs allege the President and CEO of AMC told the President and CEO of Cobb that AMC would use its "full weight and power" to prevent a CinéBistro from opening in that location. (Compl. ¶ 91.)

Station Stadium 16, and United Tara Cinemas 4 are all approximately 15 minutes away [from the Brookhaven CinéBistro], according to the 'Directions' feature on Google Maps." (Mem. of Law in Supp. of Defs.' Mot. to Dismiss 2-3, Doc. No. 19-1.)

On January 15, 2015, the parties appeared for oral argument regarding the motions before the Court. Three weeks later, Defendants filed a Notice of Supplemental Authority (Doc. No. 41) to which Plaintiffs seek leave to file a response (Doc. No. 42). For good cause shown, the Court **GRANTS** Plaintiffs' Motion for Leave to File Response to Defendants' Second Notice of Supplemental Authority (Doc. No. 42). The Court notes that Plaintiffs have already submitted their response, and the Court has considered the arguments therein.

II. STANDARDS OF REVIEW

A. Judicial Notice

HN1[] Pursuant to *Federal Rule of Evidence 201(b)*, "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally **[**10]** known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Of note, "[t]he court may take judicial notice at any stage of the proceeding." *Fed. R. Evid. 201(d)*. The Eleventh Circuit has noted that "the kinds of things about which courts ordinarily take judicial notice are (1) scientific facts: for instance, when does the sun rise or set; (2) matters of geography: for instance, what are the boundaries of a state; or (3) matters of political history: for instance, who was president in 1958." *Shahar v. Bowers, 120 F.3d 211, 214 (11th Cir. 1997)*. This process is highly limited because "taking judicial notice bypasses the safeguards which are involved with the usual process of proving facts by competent evidence in district court." Id. These standards guide the Court's inquiry as to whether Exhibit A should be stricken from Defendants' Motion to Dismiss.

B. Motion to Dismiss

HN2[] When considering a 12(b)(6) motion to dismiss, the Court must accept as true the allegations set forth in the complaint drawing all reasonable inferences in the light most favorable to the plaintiff. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*; *U.S. v. Stricker, 524 F. App'x 500, 505 (11th Cir. 2013)* (per curiam). Even so, a complaint offering mere "labels and conclusions" or "a formulaic **[**11]** recitation of the elements of a cause of action" is insufficient. *Ashcroft v. Iqbal, 556 U.S 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 555*); accord *Fin. Sec. Assurance, Inc. v. Stephens, Inc., 500 F.3d 1276, 1282-83 (11th Cir. 2007)*.

Further, ***HN3***[] the complaint must "contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" Id. (citing *Twombly, 550 U.S. at 570*). Put another way, **[*1329]** a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. This so-called "plausibility standard" is not akin to a probability requirement; rather, the plaintiff must allege sufficient facts such that it is reasonable to expect that discovery will lead to evidence supporting the claim. Id.

HN4[] Even if it is extremely unlikely that a plaintiff will recover, a complaint may nevertheless survive a motion to dismiss for failure to state a claim, and a court reviewing such a motion should bear in mind that it is testing the sufficiency of the complaint and not the merits of the case. *Twombly, 550 U.S. at 556*; see *Wein v. Am. Huts, Inc., 313 F. Supp. 2d 1356, 1359 (S.D. Fla. 2004)*. With these principles in mind, the Court considers Defendants' Motion to Dismiss.

III. ANALYSIS

Before considering Defendants' Motion to Dismiss, the Court must first address Plaintiffs' Notice of Objection and Motion to Strike (Doc. No. 42).

A. Motion to [12] Strike**

As mentioned briefly above, Defendants attached a Google map printout to their Motion to Dismiss purporting to show the geographic location of various theatres around Atlanta, including the Brookhaven CinéBistro and AMC's Buckhead theatres. (Mem. in Supp. of Defs.' Mot. to Dismiss Ex. A, Doc. No. 19-2.) Relying on this exhibit, Defendants argue the Court should take judicial notice of the geographic proximity of certain theatres to the Brookhaven CinéBistro. Taking it one step further, Defendants specifically aver that these other theatres are "approximately 15 minutes away [from the Brookhaven CinéBistro], according to the 'Directions' feature on Google Maps." (Id. 3.)

Plaintiffs acknowledge that ***HN5***[] courts do, on occasion, take judicial notice of maps. *United States v. Proch, 637 F.3d 1262, 1266 n.1 (11th Cir. 2011)*. In fact, courts in other circuits commonly take judicial notice of information obtained specifically from Google Maps. E.g., *Pahls v. Thomas, 718 F.3d 1210, 1216 n.1 (10th Cir. 2013)* (taking judicial notice of a Google map to show the general location of events relevant to the litigation); *Global Control Sys., Inc. v. Luebbert, No. 4:14-CV-657-DGK, 2015 U.S. Dist. LEXIS 20949, 2015 WL 753124, *1 n.1 (W.D. Mo. Feb. 23, 2015)* (taking judicial notice of a Google Maps search to establish the approximate distance between two locations). Plaintiffs do, however, contest the use **[**13]** of Defendants' exhibit to establish that the driving time between the Brookhaven CinéBistro and certain other theatres is approximately fifteen minutes.

As Plaintiffs note in their Motion to Strike, the exhibit in question does not purport to show the driving time between any two locations. Rather, it is simply a map showing the geographic locations of various theatres in the area surrounding Atlanta. In fact, the map does not provide a scale from which the Court could determine the distance in miles between any two points. Defendants, without demonstrating how they used Google Maps to make such a determination, cite the exhibit in question for the proposition that there are four theatres, other than AMC's Buckhead locations, within a fifteen minute drive of the Brookhaven CinéBistro. The Court declines to take judicial notice of this "fact." Defendants have not submitted evidence establishing the drive time between the Brookhaven CinéBistro and any other location. Further, the Court is skeptical as to whether driving times are facts that "can be accurately and readily determined" using Google Maps. *Fed. R. Evid. 201(b)(2)*; But see *Rindfleisch v. Gentiva Health Sys., Inc., 752 F. Supp. 2d 246, 259 n.13 (E.D.N.Y. 2010)* ("The Court **[*1330]** takes judicial notice of the fact that . . . the estimated driving **[**14]** time from Auburn to Central Islip [calculated using Google Maps] is approximately five and one-half hours.").

Even so, the exhibit in question does not purport to establish driving times between two places but rather shows the geographic location of various theatres in Atlanta. For that reason, Plaintiffs' Notice of Objection and Motion to Strike (Doc. No. 42) is **DENIED**. The Court will take judicial notice of the fact that there are other theatres in the Atlanta area besides the Brookhaven CinéBistro, AMC Phipps Plaza 14, and AMC Fork & Screen Buckhead. The Court will not, however, take judicial notice of the purported driving time between the Brookhaven CinéBistro and any other theatre.

B. Motion to Dismiss for Failure to State a Claim

Plaintiffs' claims in this action are brought pursuant to the Sherman Antitrust Act and various Georgia laws. The Court addresses Defendants' Motion to Dismiss as it relates to each of Plaintiffs' claims.

i. Exclusive Dealing: Sherman Antitrust Act § 1 Claim (Count IV)

Plaintiffs argue the clearance agreements in question violate ***HN6***[] *section 1* of the Sherman Antitrust Act, which declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in **[**15]** restraint of trade or commerce among the several States, or with foreign nations . . . ." *15 U.S.C. § 1*. The Complaint also alleges Defendants violated this statute by entering into agreements with landlords pursuant to which those landlords agreed not to lease theatre space to AMC's competitors. ***HN7***[] Although the language of *section 1* seems to create a blanket prohibition on concerted restraint of trade, the Supreme Court has clarified that many forms of concerted action should be evaluated using the "rule of reason." *Standard Oil Co. v. United States, 221 U.S. 1, 58-62, 31 S. Ct. 502, 55 L. Ed. 619 (1911)*; *Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1333 (11th Cir. 2010)*. Pursuant to that rule, "the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*.

Here, the Complaint alleges AMC coerced distributors to enter into clearance agreements which have deprived Cobb of the opportunity to compete with AMC for film licenses and theatre customers. (Compl. ¶ 124.) In response, Defendants argue Plaintiffs' exclusive dealing claim must fail because the Complaint does not adequately allege the existence of a conspiracy, an unreasonable restraint on trade, or harm to the competition. For the reasons that follow, Defendants' Motion to Dismiss is denied **[**16]** as to Plaintiffs' exclusive dealing claim.

a. The Existence of a Conspiracy

HN8[] A plaintiff attempting to state a claim under *section 1* of the Sherman Act must sufficiently plead the existence of an agreement to restrain trade. *City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 569 (11th Cir. 1998)* ("It is settled law that a threshold requirement of every antitrust conspiracy claim, whether brought under *section 1* or *section 2* of the Sherman Act, is 'an agreement to restrain trade.'"). Here, Defendants argue Plaintiffs' conspiracy allegations fail to establish the existence of an actual agreement because the Complaint does not identify which specific film distributors had clearance agreements with Plaintiffs. Defendants contend the Complaint refers to "distributors" and "the major film distributors" **[*1331]** but never identifies these entities by name. In response, Plaintiffs assert that there are fewer than ten "major film distributors," all of whom are known to Defendants. Further, Plaintiffs point out that the Complaint identifies Sony Pictures as one of the film distributors AMC allegedly coerced into giving it special treatment.

In *Twombly, 550 U.S. at 556*, the Supreme Court held ***HN9***[] stating a claim under *section 1* of the Sherman Act "requires a complaint with enough factual matter (taken as true) to suggest that an agreement **[**17]** was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." Put another way, the Court is tasked with determining if the Complaint contains enough factual heft to plausibly suggest the existence of a conspiracy or agreement. *Id. at 557*; *Jacobs, 626 F.3d at 1332-33*. Moreover, although the plaintiff must allege more than a mere opportunity to conspire, courts in this circuit recognize that "most conspiracies are inferred from the behavior of the alleged conspirators." *Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1573-74 (11th Cir. 1991)*.

The Complaint alleges Defendants sent a letter to "the major film distributors" demanding clearances for its Buckhead theatres. (Compl. ¶ 58.) Although Plaintiffs set forth the specific contents of that letter, they do not identify "the major film distributors" by name. (Id.) Plaintiffs assert that, as a direct result of the letter, distributors began allocating the Brookhaven CinéBistro fewer high-grossing, popular films. (Id. ¶ 60.) Further, the Complaint specifically identifies Sony Pictures as one of the distributors that honored AMC's request for preferential **[**18]** treatment.[4] (Id. ¶ 61.) According to Plaintiffs, AMC forced distributors to enter into these agreements by threatening, at least implicitly, that the refusal to grant clearances would result in adverse economic consequences. (Id. ¶ 126.) Drawing all reasonable inferences in favor of Plaintiffs, these allegations provide enough factual matter to suggest

[4] Defendants contend Plaintiffs' allegations in reference to Sony are insufficient because Plaintiffs concede "that Sony exclusively licensed to Cobb two of its most successful films of the last year: the award-winning Captain Phillips and Elysium." (Mem. in Supp. of Defs.' Mot. to Dismiss 8 n.4.) This argument is without merit. Defendants cannot seriously contend dismissal is warranted by pointing out that Cobb was given crumbs when the Complaint alleges AMC was given the rest of the pie.

an agreement was made. *Twombly, 550 U.S. at 556*. Further, Plaintiffs have sufficiently identified Defendants' alleged co-conspirators using more than mere labels and conclusions. Dismissal is thus not warranted on this ground.

b. An Unreasonable Restraint on Trade

HN10[] Despite the broad language of *section 1* of the Sherman Act, that provision prohibits only "unreasonable" restraints on trade. **[**19]** *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)* (citing *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997))*. In most cases, the reasonableness of a particular practice is weighed by the fact finder in light of the circumstances surrounding the case. Id. (citing *Cont'l T.V., Inc., 433 U.S. at 49*). A number of factors are relevant to this inquiry, including "specific information about the relevant businesses" as well as "the restraint's history, nature and effect." *Id.* (citing *Khan, 522 U.S. at 10*).

[*1332] In a limited class of cases, however, certain restraints on trade are considered unlawful *per se.* Id. Such rules are necessary when conduct "would always or almost always tend to restrict competition and decrease output." *Id. at 886* (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (2001))*. For example, "horizontal price fixing among competitors, group boycotts, and horizontal market division" are *per se* violations of the Sherman Act. *Jacobs, 626 F.3d at 1333*. In this case, Plaintiffs have alleged a conspiracy exists "between businesses operating at different levels of the same product's production chain or distribution chain, known as 'vertical' agreements." *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'ns, Inc., 376 F.3d 1065, 1071 (11th Cir. 2004)*. These vertical agreements are scrutinized using the rule of reason. Id.

Defendants argue Plaintiffs' exclusive dealing claim must be dismissed because the Complaint does not allege an unreasonable restraint on trade. More specifically, Defendants contend the **[**20]** clearance agreements at issue are procompetitive as a matter of law. To support this proposition, Defendants cite *Reading Int'l, Inc. v. Oaktree Capital Mgmt., No. 03 Civ. 1895(PAC), 2007 U.S. Dist. LEXIS 504, 2007 WL 39301 (S.D.N.Y. 2003)*, a case from the Southern District of New York in which the owner, operator, and landlord of an independent movie theatre in lower Manhattan brought an antitrust action against the operators and principle investors of multiple large theatre chains. In that case, the court noted that "the Supreme Court has long held that [clearance agreements] are reasonable as long as they are not unduly extended as to area or duration." *Reading Int'l, Inc., 2007 U.S. Dist. LEXIS 504, 2007 WL 39301 at *15* (quoting *United States v. Paramount Pictures, Inc., 334 U.S. 131, 145, 68 S. Ct. 915, 92 L. Ed. 1260 (1948))* (internal quotations omitted). Here, Defendants argue, Plaintiffs have completely failed to allege that the clearances in question are unduly extended in any manner.

Moreover, Defendants point out that many "[c]ourts have found clearances . . . to be reasonable restraints of trade under certain conditions: when the theatres are in substantial competition, and the clearances are used to assure the exhibitor that the distributor will not license a competitor to show the movie at the same time or so soon thereafter that the exhibitor's expected income will be greatly diminished." *Theee Movies of Tarzana v. Pac. Theatres, Inc., 828 F.2d 1395, 1399 (9th Cir. 1987)* (citing *Paramount Pictures, 334 U.S. at 145-46*). **[**21]** Defendants contend the Complaint is totally void of allegations that the Brookhaven CinéBistro is not in substantial competition with AMC's Buckhead theatres; to the contrary, the Complaint acknowledges that the three theatres "compet[e] to exhibit films to the public in the Buckhead-Brookhaven zone." (Compl. ¶ 49.)

In response to Defendants' arguments, Plaintiffs first take issue with the assertion that clearances are procompetitive as a matter of law. The Court agrees that Defendants' stance on the presumptive legality of such agreements is too strong. The Supreme Court, in Paramount Pictures, held that ***HN11***[] clearances are reasonable when used for the proper purpose if they are not unduly extended in area or duration. *334 U.S. at 145-46*. Further, that case sets forth seven factors a court should consider when evaluating the reasonableness of a clearance agreement.[5] In the Court's view, such an inquiry **[*1333]** can hardly be said to imply that clearances are procompetitive as a matter of law. See also *Schine Chain Theatres v. United States, 334 U.S. 110, 124, 68 S. Ct. 947, 92 L. Ed. 1245 (1948)* (finding clearances obtained through the exercise of monopoly power to be unlawful).

Plaintiffs have not directly responded to Defendants' argument that the Complaint fails to state a claim for exclusive dealing because the Brookhaven CinéBistro and AMC's Buckhead theatres are in "substantial competition." Moreover, the Complaint does not specifically allege that the scope and duration of the clearance agreements in question are unduly extended. As discussed above, courts generally uphold the legality **[**23]** of clearances between theatres in "substantial competition" as long as those agreements are not "unduly extended as to area or duration." *Paramount Pictures, 334 U.S. at 145*. Rather than addressing these issues head on, Plaintiffs attack clearance agreements as no longer providing procompetitive benefits in the modern film industry. Specifically, Plaintiffs contend the "blanket clearances" at issue here restrict intrabrand competition while doing nothing to enhance interbrand competition. As explained by the Supreme Court,

> ***HN12***[] Interbrand competition is the competition among the manufacturers of the same generic product . . . and is the primary concern of ***antitrust law***. The extreme example of a deficiency of interbrand competition is monopoly, where there is only one manufacturer. In contrast, intrabrand competition is the competition between the distributors wholesale or retail of the product of a particular manufacturer. The degree of intrabrand competition is wholly independent of the level of interbrand competition confronting the manufacturer. Thus, there may be fierce intrabrand competition among the distributors of a product produced by a monopolist and no intrabrand competition among the distributors of a product **[**24]** produced by a firm in a highly competitive industry. But when interbrand competition exists . . . , it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product.

Cont'l T.V., Inc., v. GTE Sylvania, 433 U.S. 36, 51 n.19, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977). Importantly, courts sustaining vertical agreements under the rule of reason have done so by recognizing that such restrictions "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." *Id. at 54*. In regard to clearances specifically, courts have made this same observation. E.g., *Movies of Tarzana, 828 F.2d at 1399-1400* (finding clearances that promoted interbrand competition without overly restricting intrabrand competition to be reasonable). Plaintiffs, however, contend the clearances at issue here severely restrict **[*1334]** intrabrand competition without providing counterbalancing enhancements to interbrand competition. In Plaintiffs' view, courts approving of clearances in the past did so "because each distributor used clearances as a tool for incentivizing the promotion of its own films" thus increasing interbrand competition. (Pls.' Resp. in Opp'n to Defs.' Mot. to Dismiss 16, Doc. No. 25.) Because **[**25]** distributors no longer rely on exhibitors to promote their films at a local level but instead run national advertising campaigns, Plaintiffs argue this rationale is outdated.[6] (Id.)

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[5] The Court found the following factors relevant when considering whether a clearance is unreasonable: "(1) [t]he admission prices of the theatres **[**22]** involved, as set by the exhibitors; (2) [t]he character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.; (3) [t]he policy of operation of the theatres involved, such as the showing of double features, gift nights, give-aways, premiums, cut-rate tickets, lotteries, etc.; (4) [t]he rental terms and license fees paid by the theatres involved and the revenues derived by the distributor-defendant from such theatres; (5) [t]he extent to which the theatres involved compete with each other for patronage; (6) [t]he fact that a theatre involved is affiliated with a defendant-distributor or with an independent circuit of theatres should be disregarded; and (7) there should be no clearance between theatres not in substantial competition." *Paramount Pictures, 334 U.S. at 145-46*.

[6] Even so, the Court is not convinced by Plaintiffs' argument that clearances serve *no* procompetitive purpose. As the Ninth Circuit noted in Movies of Tarzana, ***HN13***[] clearances force theatres that are denied a license to certain movies to show alternatives, thereby increasing movie choices for consumers. *828 F.2d at 1399-1400*. This logic may apply notwithstanding recent advancements in the film industry.

Although Defendants note courts routinely find clearances reasonable, they have not cited a single case in which that determination was made on a motion to dismiss.[7] *Movies of Tarzana, 828 F.2d at 1400* (agreeing with the district court's summary judgment finding that certain clearances were reasonable); *Reading Int'l, Inc., 2007 U.S. Dist. LEXIS 504, 2007 WL at 39301 *15* (finding certain clearances reasonable on a motion for summary judgment). In fact, the Court has been unable to find a single Eleventh Circuit case addressing clearances, and both parties have been forced to rely on opinions, many unpublished, from other circuits. Although Defendants are correct that courts generally find clearance agreements reasonable when theatres are **[**26]** in substantial competition, the Paramount Pictures court set forth several other factors that are relevant to the reasonableness inquiry. *334 U.S. at 145-46*. Further, as the Eleventh Circuit has noted, ***HN14***[] "in order to consider a rule of reason claim based on a vertical restraint . . . , a court must conduct a 'systematic comparison' of the negative effects of the restraint on competition and compare that with the positive effects on competition stemming from the restraint." *Maris Distrib. Co. v. Anheuser-Busch, Inc., 302 F.3d 1207, 1213 (11th Cir. 2002)* (citing *Graphic Prods. Distribs. v. Itek Corp., 717 F.2d 1560, 1571 (11th Cir. 1983))*.

Here, the Court concludes Plaintiffs have alleged sufficient facts to suggest the clearances **[**27]** in question are unreasonable. Accordingly, dismissal of Plaintiffs' exclusive dealing claim is not justifiable on this ground. Although Defendants may prove after discovery that the clearances at issue were justified, Plaintiffs' allegations are sufficient to withstand a motion to dismiss.

c. Injury to Competition

HN15[] To state a claim under *section 1* of the Sherman Act, a plaintiff must allege "antitrust injury," i.e. an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. Further, because antitrust laws are not intended to protect competitors, a plaintiff asserting antitrust violations must allege actual or potential injury to the *competition*. *Spanish Broad.* ***[*1335]*** *Sys., 376 F.3d at 1074*. In other words, the conduct at issue must impact the market rather than the competitors therein. Id. (citing *Dickson v. Microsoft Corp., 309 F.3d 193, 206 (4th Cir. 2002))*.

Here, Defendants argue Plaintiffs' only assertion regarding actual harm is that the clearances in question have the effect of limiting moviegoers' theatre choices in the Buckhead-Brookhaven zone. Citing Reading, Defendants contend this allegation is insufficient as a matter of law to constitute harm to competition. *2007 U.S. Dist. LEXIS 504, 2007 WL at 39301 *14* ("[T]he mere possibility that a consumer might have to **[**28]** see his or her first choice movie at his or her second choice theatre . . . is not an actionable restraint on trade . . . [and] does not mean that there has been an actionable harm to consumer choice or competition."). Defendants also argue Plaintiffs' failure to define a relevant market precludes them from alleging potential harm to competition.

As the Eleventh Circuit noted in Jacobs, ***HN16***[] "[a]ctual anticompetitive effects include, but are not limited to, reduction of output, increase in price, or deterioration in quality." *626 F.3d at 1339* (citing *United States v. Brown Univ., 5 F.3d 658, 668 (3d Cir. 1993))*. The quintessential harm is not higher prices; "[r]ather, consumer welfare, understood in the sense of allocative efficiency, is the animating concern of the Sherman act." Id. Therefore, a plaintiff alleging actual harm to competition "should point to the specific damage done to consumers in the market." Id. (quoting *Spanish Broad Sys., 376 F.3d at 1072*) (internal quotations omitted). Here, the Court disagrees that Plaintiffs' only assertion regarding actual harm is that moviegoers in the Buckhead-Brookhaven zone simply have fewer theatre choices. Instead, as Plaintiffs point out in their brief opposing Defendants' Motion to Dismiss, the

[7] In their Second Notice of Supplemental Authority (Doc. No. 41), Defendants cite the Court to Starlight Cinemas v. Regal Entertainment Group, a case in which the court dismissed a complaint based on allegedly unlawful clearances. No. 2:14-cv-05463 (C.D. Cal. Feb. 2, 2015) (order denying plaintiff's motion for leave to file a first amended complaint). Unlike here, the plaintiff in that case did not "allege the necessary facts detailing a specific time, place, or person involved in the alleged conspiracies." Id. Finding the complaint failed to allege an agreement, the court in Starlight had no reason to conduct a reasonableness inquiry.

Complaint alleges in detail how Plaintiffs believe Defendants' conduct **[**29]** is reducing the quality of movie theatres offered to the public. Specifically, the Complaint compares and contrasts the various amenities that Cobb Theatres and AMC respectively offer consumers, often drawing stark differences. In the Court's view, these allegations are adequate to plausibly suggest Defendants' conduct has substantially diminished the quality of a good offered to the public thereby causing actual harm to competition. Id. Defendants cite *Spanish Broad. Sys., 376 F.3d at 1076*, and a string of other cases for the proposition that "use of unfair means resulting in the substitution of one competitor for another without more does not violate the antitrust laws." Plaintiffs have, however, alleged *more* than a mere substitution of competitors. Specifically, the Complaint alleges consumers are being forced to purchase a product that is less desirable and of inferior quality. Importantly, Defendants may be able disprove Plaintiffs' allegations regarding harm to competition after discovery, but, at the very least, this dispute cannot be resolved on a motion to dismiss.[8]

HN17[] Even assuming a plaintiff shows actual or potential harm to competition, "he must identify the relevant market in which the harm occurs." *Jacobs, 626 F.3d at 1336*. Importantly, the "relevant market" has both product and geographic components. Id. (citing *Rossi v. Standard Roofing, Inc., 156 F.3d 452, 464 (3d Cir. 1998))*. The parameters of these markets are considered questions of fact, *Thompson v. Metro. Multi-List, Inc., 934 F.2d 1566, 1573 (11th Cir. 1991)*, but antitrust **[*1336]** plaintiffs must nevertheless "present enough information in their complaint to plausibly suggest the contours of the relevant geographic and product markets." *Jacobs, 626 F.3d at 1336*. In this case, Defendants argue Plaintiffs' exclusive dealing claim should be dismissed because the Complaint's geographic and product market allegations are insufficient. The Court disagrees.

HN18[] Geographically, the relevant market is defined as "the area in which the product or its reasonably interchangeable good is traded." *L.A. Draper & Son v. Wheelabrator-Frye, Inc., 735 F.2d 414, 423 (11th Cir. 1984)*. Here, the Complaint alleges the relevant geographic market is the "Buckhead-Brookhaven film licensing zone," which is comprised of "moviegoers who reside in or around Buckhead and Brookhaven." (Compl. ¶ 39.) Defendants, however, argue this definition is self-serving **[**31]** and does not comport with market realities. To support this contention, Defendants point to Exhibit A, a Google map showing the location of various theatres around Atlanta. According to Defendants, Plaintiffs have not demonstrated why the market should be so narrowly drawn so as to exclude these theatres. This argument is not persuasive. When determining the geographic market, "such economic and physical barriers to expansion as transportation costs, delivery limitations and customer convenience and preference must be considered." *Id.* (quoting *Hornsby Oil Co. v. Champion Spark Plug Co., 714 F.2d 1384, 1394 (5th Cir. 1983))* (internal quotations omitted). Moreover, "[m]arkets involving services that can only be offered from a particular location, like those provided by hospitals, theaters, and ski areas, will often be defined by how far consumers are willing to travel . . . ." Earl W. Kintner, Federal ***Antitrust Law*** § 10.15 (2013). Significantly, the Complaint alleges moviegoers in the Buckhead-Brookhaven film zone are not willing to travel outside of the area to watch movies because of significant population density and heavy traffic congestion. All of these factors are relevant to the fact intensive inquiry of determining the geographic market. The Court therefore concludes Plaintiffs **[**32]** have alleged sufficient facts to survive a motion to dismiss in this regard.

HN19[] The relevant product market, on the other hand, is "determined by the availability of substitutes to which consumers can turn in response to price increases and other existing or potential producer's ability to expand output." *L.A. Draper, 735 F.2d at 423*. In addition to examining "the uses to which the product is put by consumers in general," *Jacobs, 626 F.3d 1327, 1337* (quoting *Maris Distrib. Co., 302 F.3d at 1221*), the court should give special consideration "to evidence of the cross-elasticity of demand and reasonable substitutability of the products . . . ."[9] *Id. at 1337-38*. In the Complaint, Plaintiffs identify the relevant product markets as **[*1337]** "the market . . . to

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[8] Defendants also argue that Plaintiffs' failure to properly define the relevant market precludes them from alleging potential harm to competition. However, **[**30]** as discussed *infra*, the Court concludes the Complaint sufficiently pleads the contours of the relevant geographic and product markets.

[9] As explained by the Eleventh Circuit in Jacobs,

license films from distributors for exhibition to the public in the Buckhead-Brookhaven zone" and "the market for exhibition of films to patrons." (Compl. ¶¶ 41, 49.) Defendants argue the product markets identified in the Complaint are insufficient because they fail to allege cross-elasticity of demand. According to Defendants, Plaintiffs are asking the Court to assume, based on conclusory statements, that consumers do not perceive watching the same movie on DVD or pay-per-view in their home to be "a reasonable substitute for viewing films in **[**33]** theatre." (Compl. ¶ 18.)

To support their argument, Defendants cite *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997)*, a case in which the Third Circuit held a motion to dismiss may be granted when "the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences **[**34]** are granted in plaintiff's favor . . . ." In that case, the plaintiffs alleged "ingredients, supplies, materials, and distribution services used by and in the operation of Domino's pizza stores" constituted a relevant product market. *Queen City Pizza, 124 F.3d at 437*. The court, however, disagreed because "the dough, tomato sauce, and paper cups that meet Domino's Pizza, Inc. standards and are used by Domino's stores are interchangeable with dough, sauce and cups available from other suppliers and used by other pizza companies." *Id. at 438*. The facts here are entirely distinguishable from that case.

As the court in *Queen City Pizza* recognized, ***HN21***[] "the test for a relevant [product] market is not commodities reasonably interchangeable by a particular plaintiff, but commodities reasonably interchangeable by consumers for the same purpose." Id. (quoting *United States v. E.I. du Pont de Nemours & Co. (Cellophane), 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956))*. In regard to the relevant product market in this case, the Complaint alleges:

> When consumers watch motion pictures in their homes, they typically lose several advantages of the theater experience, including the size of screen, the sophistication of sound systems, the opportunity to watch in 3-D, and the social experience of viewing a film with other patrons. Additionally, the most **[**35]** popular, newly released or "first run" motion pictures (films) are not available for home viewing.
> Differences in the pricing of various forms of entertainment also reflect their lack of substitutability in the eyes of the consumers . . . . Renting a motion picture DVD for home viewing is usually significantly less expensive than viewing a film in a theater.
> [A] modern picture's theatrical exhibition life generally is no more than a few weeks, approximately 90-120 days after which it is released in other entertainment formats (e.g., DVD and pay-per-view television).

(Compl. ¶¶ 18, 19, and 23.) These allegations are sufficient to plausibly suggest the contours of a relevant product market. Unlike the plaintiffs in *Queen City Pizza,* Plaintiffs have alleged facts tending to show consumers might not consider watching a movie in a theatre and watching it at home to be "reasonably interchangeable" experiences. In contrast to the evident interchangeability of pizza ingredients, the Court is not convinced, as Defendants suggest, that there is such a high cross-elasticity of demand between home-viewing and watching a film in theatres that Plaintiffs' **[*1338]** exclusive dealing claim must fail on a motion **[**36]** to dismiss.

In their reply brief, Defendants also suggest that Plaintiffs have improperly disjoined the product at issue from their theory of competitive harm. More precisely, Defendants contend Plaintiffs have not alleged deterioration in the quality of first run, feature-length motion pictures, but instead alleged the quality of movie theatres has declined.

> ***HN20***[] [t]he cross-elasticity of demand measures the change in the quantity demanded by consumers of one product relative to the change in price of another. A high cross-elasticity of demand (that is, consumers demanding proportionately greater quantities of Product X in response to a relatively minor price increase in Product Y) indicates that the two products are close substitutes for each other—that is, consumers derive comparable utility from equivalent consumption of either one. For purposes of the relevant product market analysis, a high cross-elasticity of demand indicates that the two products in question are reasonably interchangeable substitutes for each other and hence are part of the same market.

626 F.3d at 1337 n.13 (citing *United States v. E.I. du Pont de Nemours & Co. (Cellophane), 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956))*.

This is important, Defendants argue, because the Complaint identifies the former product as the relevant market. The Court disagrees. The Complaint does not allege the relevant product market is "first run, feature-length motion pictures;" rather, Plaintiffs identify the relevant product markets as the market to *license* films from distributors and the *market* to exhibit films to the public. (Compl. ¶¶ 41, 49.) Having considered Defendants' arguments, the Court concludes Plaintiffs have alleged a relevant market and, accordingly, antitrust injury.[10]

For the foregoing reasons, and in consideration of the Eleventh Circuit's disfavor of Rule 12(b)(6) dismissals in fact-intensive antitrust cases, the Court denies Defendants' Motion to Dismiss as to Plaintiffs' claim for exclusive dealing. *Spanish Broad. Sys., 376 F.3d at 1070* (citing *Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp., S.A., 711 F.2d 989, 994-95 (11th Cir. 1983))*.

ii. Monopolization: Sherman Antitrust Act § 2 Claims (Counts II and III)

The Complaint also alleges AMC has monopolized and attempted to monopolize markets for film licenses and theatre patrons in violation of *section 2* of the Sherman Antitrust Act. ***HN23***[] To state a prima facie case for monopolization, a plaintiff must plead sufficient facts to infer: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition **[**38]** or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. In this context, "monopoly power" is the "power to control prices in or exclude competition from the relevant market." *Morris Commc'n Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1294 (11th Cir. 2004)* (citing *Cellophane, 351 U.S. at 391 (1956))*. Further, to satisfy the second element of a monopolization claim, the plaintiff must allege "predatory or exclusionary acts or practices that have the effect of preventing or excluding competition within the relevant market." Id. (citing *United States v. Microsoft, 253 F.3d 34, 58, 346 U.S. App. D.C. 330 (D.C. Cir. 2001))*.

Comparatively, ***HN24***[] a plaintiff states a claim for *attempted* monopolization by alleging sufficient facts to suggest "predatory or anticompetitive conduct," **[*1339]** "specific intent to monopolize," and "a dangerous probability of achieving monopoly power" in the relevant market. *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*; *Spanish Broad. Sys., 376 F.3d at 1074*. As with section 1 claims, the "relevant market" has both product and geographic components. *Gulf States Reorganization Group, Inc. v. Nucor Corp., 721 F.3d 1281, 1285 (11th Cir. 2013)*.

In large part, Plaintiffs' *section 2* claims rely on the same allegations of anticompetitive behavior as their section 1 claims. Specifically, the Complaint alleges AMC has used its monopoly power to: 1) coerce distributors into denying Cobb the opportunity to fairly compete for film licenses and theatre customers; and 2) coerce landlords **[**39]** to enter into agreements pursuant to which those landlords agree not to lease theatre space to AMC's competitors. In their Motion to Dismiss, Defendants argue Plaintiffs' *section 2* claims fail for multiple reasons. First, Defendants contend the Complaint does not allege predatory or exclusionary conduct and therefore fails to state a claim for attempted monopolization. Second, Defendants argue Plaintiffs' failure to plead a relevant market forecloses any allegation that AMC has monopoly power.

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[10] Defendants half-heartedly suggest that Plaintiffs' lack standing to bring this suit given their purported failure to allege antitrust injury. ***HN22***[] Standing is a question of law. *Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1448 (11th Cir. 1991)*. Importantly, "antitrust standing is not simply a search for an injury in fact; it involves an analysis of prudential **[**37]** considerations aimed at preserving the effective enforcement of the antitrust laws." Id. To conduct this analysis, a court must "evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *Associated Gen. Contractors of Calif., Inc. v. Calif. State Council of Carpenters, 459 U.S. 519, 535, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. Having considered the record and arguments from the parties, the Court concludes that Plaintiffs have alleged an injury "of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Brunswick Corp., 429 U.S. at 489*. Plaintiffs therefore have standing to bring this suit.

a. Exclusionary or Predatory Conduct

As discussed above, a claim for attempted monopolization involves three distinct elements. *Spectrum Sports, 506 U.S. at 456* (noting that a plaintiff claiming attempted monopolization must show "(1) the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power"). Here, Defendants argue Plaintiffs have failed to state a claim for attempted monopolization because they do not allege AMC has engaged in predatory or anticompetitive conduct. More precisely, Defendants contend "AMC's alleged actions in requesting clearances cannot, as a matter of law, constitute exclusionary or predatory acts of monopolization **[**40]** when the clearances, even if granted, would be lawful." (Mem. of Law in Supp. of Defs.' Mot. to Dismiss 17, Doc. No. 19-1.) The Court has already addressed this argument in analyzing Plaintiffs' section 1 claims.

HN25[] The "[predatory or] anticompetitive conduct criterion captures the critical antitrust idea of harm to competition, rather than to competitors." *Spanish Broad Sys., 376 F.3d at 1075*. This requirement is perhaps "the single most important aspect of attempted monopolization." Id. (citing *Northeastern Tel. Co. v. Am. Tel. & Tel. Co., 651 F.2d 76, 85 (2d Cir. 1981))*. In this case, the Complaint does not allege mere injury to a single competitor or that an unfair practice has resulted in a simple substitution of one competitor for another. See Id. Instead, Plaintiffs allege Defendants' conduct is causing harm to competition by substantially diminishing the quality of a good offered to the public. (Compl. ¶¶ 38, 47, 66-68, 79, 85, and 94.) Defendants may eventually prove otherwise, but Plaintiffs have alleged sufficient facts to suggest exclusionary or predatory conduct, and Defendants' Motion to Dismiss Plaintiffs' claim for attempted monopolization is therefore denied.

b. Allegations of Monopoly Power

HN26[] To state a claim for monopolization, a plaintiff must first plead sufficient facts to infer the defendant **[**41]** possesses monopoly power in the relevant market. *Grinnell Corp., 384 U.S. at 570-71*. Defining the relevant market is therefore a necessary component of analyzing market power. *U.S. Anchor Mfg. v. Rule Indus., 7 F.3d 986, 994 (11th Cir.* ***[*1340]*** *1993)*. In reference to Plaintiffs' section 2 claims, Defendants raise identical arguments regarding the sufficiency of Plaintiffs' geographic and product market allegations as those discussed in the Court's analysis above. The Court will not needlessly readdress these issues, but instead reiterates that the Complaint contains enough factual matter concerning the contours of the relevant market to survive at motion to dismiss.

Defendants also argue, even assuming the Buckhead-Brookhaven zone is a relevant geographic market, that Plaintiffs' monopolization claim fails because the Complaint does not allege Defendants have monopoly power in that market. ***HN27***[] Monopoly power is the "power to control prices in or exclude competition from the relevant market." *Morris Commc'n Corp, 364 F.3d at 1294*. Further, "market share is frequently used in litigation as a surrogate for market power . . . ." *Jacobs, 626 F.3d at 1339-40* (quoting *Graphic Prods. Distribs., 717 F.2d at 1570*). Here, Plaintiffs allege AMC has market power in the Buckhead-Brookhaven zone because it owns a 69% share of that market as calculated using the number of theatre seats Cobb and AMC respectively control.[11] **[**42]** Furthermore, Plaintiffs argue high entry barriers to the market make it reasonable to presume AMC has monopoly power. *Bailey v. Allgas, Inc., 284 F.3d 1237, 1250 (11th Cir. 2002)* (noting that high market share, coupled with sufficient barriers to market entry, can result in a finding of market power).

As an initial matter, Defendants assert the percentage of theatre seats is not a competent measure of monopoly power because it reflects potential capacity, not actual sales in the marketplace. The Court agrees that such a statistic may not be *the best* indicator of market power; it is, however, a relevant factor suggesting AMC controls a substantial share of the market. Moreover, Defendants argue the allegations in the Complaint preclude a finding of

[11] Plaintiffs made this calculation using the seating capacities of the Brookhaven CinéBistro and AMC's Buckhead theatres. According to the Complaint, Defendants own 1,696 of the 2,454 theatre seats in the Buckhead-Brookhaven zone. (Compl. ¶¶ 35-37.)

monopoly power because Plaintiffs concede there is extensive competition between the Brookhaven CinéBistro and AMC's Buckhead theatres in the alleged geographic market. This argument has no merit. The allegations in the Complaint do not describe a "sharply **[**43]** competitive" marketplace as Defendants suggest. Cf. *U.S. Ring Binder L.P. v. World Wide Stationary Mfg. Co., 804 F. Supp. 2d 588, 595 (N.D. Ohio 2011)* ("Coupled with the Complaint's description of a sharply competitive marketplace, the allegation that monopoly power does or could exist in the [relevant market] is not plausible."). Rather, Plaintiffs repeatedly accuse Defendants of engaging in conduct that has stifled competition. The mere existence of a competitor in the marketplace does not eliminate the potential for monopoly power. If it were otherwise, monopoly power could only exist if a defendant controlled 100% of the market.

Defendants also question whether a 69% share of market is high enough to infer market power. ***HN28***[] Although a market share of less than 50% is inadequate as a matter of law to constitute monopoly power, the analysis is somewhat fluid. *Bailey, 284 F.3d at 1250*. In fact, the Supreme Court has noted that, in some circumstances, "over two-thirds of the market is a monopoly." *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 480, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* (citing *Am. Tobacco Co. v. United States, 328 U.S. 781, 797, 66 S. Ct. 1125, 90 L. Ed.* ***[*1341]*** *1575 (1946))*. The Court concedes that whether a 69% share of the market supports a finding of monopoly power is a borderline issue. However, resolving all doubt in favor of Plaintiffs, the allegation at least withstands Defendants' motion to dismiss. See e.g., *Moore U.S.A., Inc. v. Std. Register Co., 139 F. Supp. 2d 348, 357 (W.D.N.Y. 2001)* (finding allegation of 65% product market share sufficient **[**44]** to survive a motion to dismiss); *Michael Anthony Jewelers, Inc. v. Peacock Jewelry, Inc., 795 F. Supp. 639, 646 (S.D.N.Y. 1992)* (finding 70% market share sufficient to support finding of market power); *Brager & Co. v. Leumi Sec. Corp., 429 F. Supp. 1341, 1347 (S.D.N.Y. 1977)* ("Concededly, companies that have been found to possess monopoly power usually have enjoyed market shares greater than seventy per cent, but whether such power actually exists is a quintessential question of fact."); *Pac. Eng'g & Prod. Co. v. Kerr-McGee Corp., No. C-40-70, 1974 U.S. Dist. LEXIS 12022, at *61 (D. Utah March 4, 1974)* (finding a 67% share of the market, although borderline, "probably supports the inference [of a monopoly]") rev'd in part on other grounds, *551 F.2d 790 (10th Cir. 1977)*.

Even so, ***HN29***[] allegations of market share alone are insufficient to establish monopoly power. *Jacobs, 626 F.3d at 1340*. In fact, even a market share of 100% is not determinative. See Id. "Relevant determinants of the market power of a prospective predator . . . include its absolute and relative market shares, and those of competing firms; the strength and capacity of current competitors; the potential for entry; the historic intensity of competition; and the impact of the legal or natural environment." *U.S. Anchor, 7 F.3d at 994* (quoting *Int'l Tel. & Tel. Corp., 104 F.T.C. 280, 412 (1984))*. Relevantly, the Complaint alleges Defendants have created high entry barriers to the market in order to perpetuate their monopoly. According to Plaintiffs, AMC has established a system **[**45]** of threatening landlords that it will request clearance agreements over competitors that are allowed to lease space near an existing AMC theatre. In short, AMC allegedly threatens that the new entrant will "have a hard time getting film product." (Compl. ¶ 87.) Consequently, landlords are often unwilling to rent space to AMC's competitors for fear that doing so will result in "reduc[ed] customer traffic to the landlord's shopping mall, plaza, or development." (Id. ¶ 88.) Further, Plaintiffs argue that film distributors are actually complying with AMC's clearance demands thereby securing preferential treatment over competing theatres and further suggesting AMC has monopoly power in the Buckhead-Brookhaven zone. By establishing a nationwide policy of bullying competitors with clearances, Plaintiffs argue, AMC has created high entry barriers to markets across the nation, including the one defined in the Complaint.

Conversely, Defendants assert that the allegations in the Complaint suggest any barriers to entering the Buckhead-Brookhaven market—to the extent they even exist—are low because Cobb admits it entered the market in 2011 and shortly thereafter gained a 30% market share. However, such an **[**46]** argument ignores the allegations in the Complaint that AMC erected barriers that Cobb had to overcome to open the Brookhaven CinéBistro. Specifically, Plaintiffs contend Defendants sent a letter to major film distributors setting forth AMC's expectation that it would play "100% of [the distributors'] wide commercial releases" rather than playing day-and-dates with the Brookhaven CinéBistro. (Compl. P 58.) Further, the Complaint alleges AMC has since begun threatening landlords that if they lease space to AMC's competitors, those competitors will have a hard time licensing **[*1342]** movies. (Id. 87.) Whether these barriers actually show AMC has monopoly power is a question for another day.

Based on the foregoing analysis, the Court concludes Plaintiffs have satisfied their burden of alleging market power. Accordingly, Defendants' Motion to Dismiss Plaintiffs' monopolization claim is denied.

iii. Circuit Dealing (Count I)

Plaintiffs also argue Defendants violated the Sherman Act by engaging in a practice known as "circuit dealing." ***HN30***[] That term is not specifically defined by case law, but it occurs when a defendant pools the purchasing power of an entire circuit to "eliminate the possibility of bidding **[**47]** for films [on a] theatre by theatre [basis]." *Paramount Pictures, 334 U.S. at 154* (discussing "formula deals" and "master agreements"). In Paramount Pictures, the Supreme Court addressed circuit dealing in the context of film licensing agreements "that cover exhibition in two or more theatres in a particular circuit . . . ." Id. Notably, the Court found such agreements to be unlawful because they "eliminate the opportunity for the small competitor to obtain the choice [first-run films], and put a premium on the size of the circuit" thereby undermining the competitive process. Id. Likewise, in *United States v. Griffith, 334 U.S. 100, 68 S. Ct. 941, 92 L. Ed. 1236 (1948)*, the Supreme Court held that certain circuit deals constitute unlawful monopoly leveraging, a form of anticompetitive conduct which involves a monopolist using "its monopoly power in one market to gain a competitive advantage in another." *Aquatherm Indus., Inc. v. Fla. Power & Light Co., 145 F.3d 1258, 1262 (11th Cir. 1998)* (quoting *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 275 (2d Cir. 1979))*. Such conduct is unlawful because "the pooling of the purchasing power of an entire circuit in bidding for films is a misuse of monopoly power insofar as it combines the theatres in closed towns with competitive situations."[12] *Paramount Pictures, 334 U.S. at 154-55*.

In Griffith, the Court set forth the circumstances in which circuit dealing amounts to unlawful monopoly leveraging:

> ***HN31***[] A man with a monopoly of theatres in any one town commands the entrance for all films into that area. If he uses that strategic position to acquire exclusive privileges in a city where he has competitors, he is employing his monopoly power as a trade weapon against his competitors. It may be a feeble, ineffective weapon where he has only one closed or monopoly town. But as those towns increase in number throughout a region, his monopoly power in them may be used with crushing effect on competitors in other places. He need not be as crass as the exhibitors in [*United States v. Crescent Amusement Co., 323 U.S. 173, 65 S. Ct. 254, 89 L. Ed. 160 (1944)]* in order to make his monopoly power effective in his competitive situations. Though he makes no threat to withhold the business of his closed or monopoly towns unless the distributors give him the exclusive film rights in the towns where he has competitors, the effect is likely to be the same where the two are joined. When the buying power of the entire circuit is used to negotiate films for his competitive **[**49]** as well as his closed towns, he is using monopoly power to expand his empire. And even if we assume that a specific intent to accomplish that result is absent, he is chargeable in legal contemplation with that purpose since the end result is the necessary **[*1343]** and direct consequence of what he did.

334 U.S. at 107. Of note, both forms of circuit dealing are considered *per se* violations of the Sherman Act. *Paramount Pictures, 334 U.S. at 153-55*; *Griffith, 334 U.S. at 106-09*. In their reply brief, Defendants suggest that circuit dealing should be scrutinized under the rule of reason. Even if that were true, the Court's analysis here would not change.

As to the circuit dealing arrangements prohibited by Paramount, Plaintiffs contend the letter AMC sent to distributors is evidence of a film licensing agreement that "cover[s] exhibition in two or more theatres in a particular circuit." *334 U.S. at 153-55*. In response to this claim, Defendants argue that there is "not a single fact alleged in the Complaint that any circuit deal, with any distributor, for any film, was ever accepted, implemented, or even proposed." (Mem. of Law in Supp. of Defs.' Mot. to Dismiss 9.) This is simply not true. There are numerous allegations in the Complaint regarding the letter purportedly sent to major film distributors, **[**50]** and additional

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[12] A "closed" town or market is an area that has only a single theatre. Importantly, that theatre "faces no competition in the market for (1) exhibiting films to **[**48]** the public in that zone and (2) licensing films from distributors for exhibition in that zone." (Compl. ¶ 27.)

allegations regarding the conduct of those distributors after receiving the letter. (Compl. ¶¶ 58-62.) These allegations are sufficient to plausibly suggest the existence of an unlawful circuit dealing arrangement pursuant to which AMC simultaneously negotiated clearances for both of its Buckhead theatres.

Plaintiffs also allege Defendants have engaged in the type of circuit dealing that amounts to monopoly leveraging. Specifically, the Complaint accuses AMC of "using or attempting to use its circuit power and its monopoly power in a substantial number of non-competitive [closed] zones to drive high-quality theatres out of markets in which they compete with AMC . . . ." (Compl. P 85.) In Defendants' view, this claim must fail because "Cobb has not alleged any threats or agreements that amount to a 'circuit deal' and because Cobb has not alleged that AMC possesses the requisite monopoly power in a leveraging market in the first place." (Mem. of Law in Supp. of Defs.' Mot. to Dismiss 17.) These arguments are unavailing.

As to the sufficiency of Plaintiffs' allegations regarding a leveraging market, the Complaint states that AMC operates theatres in non-competitive zones **[**51]** across the United States. (Compl. ¶ 28.) The Complaint also alleges that AMC is the second-largest theatre circuit in the country. (Id. ¶ 11.) Although Defendants fault Plaintiffs for not citing a specific non-competitive market in which AMC owns a theatre, such criticism is unnecessary. Plaintiffs are alleging AMC is using the power of its *entire* nationwide circuit—including its theatres in closed markets—to acquire exclusive privileges in markets where it has competitors. Identifying specific closed markets used for leveraging is therefore unnecessary to state a claim for relief. Moreover, the Court is not persuaded by the argument that the Complaint fails to allege AMC made any agreements or threats that amount to a circuit deal. For instance, Plaintiffs specifically contend the letter Defendants sent to film distributors operated as a demand that those distributors grant AMC preferential treatment or, alternatively, "risk being denied the grossing potential of AMC's Buckhead theaters and, implicitly, *some or all of the theaters in its entire circuit* . . . ." (Compl. ¶ 59 (emphasis added).) ***HN32***[] When a film exhibitor uses the buying power of its entire circuit to negotiate films for **[**52]** its competitive and closed markets, it is guilty of circuit dealing. *Griffith, 334 U.S. at 107-09*. This is true even when the exhibitor does not expressly threaten distributors that it will withhold the business of its closed or monopoly markets unless it is given preferential treatment. Id. Accordingly, **[*1344]** Plaintiffs have stated a claim for circuit dealing and Defendants' Motion to Dismiss must be denied on this count.

iv. State Law Claims (Counts V and VI)

Plaintiffs rely on the same allegations of misconduct discussed above to support their state law claims for tortious interference with business relations and violations of the Georgia Constitution and *O.C.G.A. § 13-8-2*, which declare contracts in restraint of trade void as against public policy. The Court will address each of these claims in turn.

a. Tortious Interference

HN33[] To state a claim for tortious interference with business relations under Georgia law, the plaintiff must show that "the defendant: (1) acted improperly and without privilege; (2) acted purposefully and maliciously with the intent to injure; (3) induced a third party not to enter into or continue a business relationship with the plaintiff; and (4) caused the plaintiff some financial injury." *Meadow Springs, LLC v. IH Riverdale, LLC, 323 Ga. App. 478, 480, 747 S.E.2d 47 (2013)* (quoting *NationsBank, N.A. v. Southtrust Bank, N.A., 226 Ga. App. 888, 892, 487 S.E.2d 701 (1997))*. In this **[**53]** context, "[i]mproper actions constitute conduct wrongful in itself; thus, improper conduct means wrongful action that generally involves predatory tactics such as physical violence, fraud or misrepresentation, defamation, use of confidential information, abusive civil suits, and unwarranted criminal prosecutions." *Culpepper v. Thompson, 254 Ga. App. 569, 572, 562 S.E.2d 837 (2002)* (citations and internal quotations omitted).

First, Defendants argue Plaintiffs' tortious interference claim should be dismissed because the Complaint does not allege facts that would make the requested clearances improper or unlawful. The Court has considered and rejected this argument in its analysis above. Plaintiffs allege AMC sent a letter to film distributors threatening, at least implicitly, that the refusal to grant certain clearances would result in adverse consequences. Moreover, Plaintiffs also allege that Defendants have threatened landlords that they will make it difficult for AMC's competitors to license films if those competitors are allowed to lease space near an existing AMC theatre. Although Defendants attempt to characterize their conduct as harmless and in accordance with common business practices, the Court is not yet convinced that AMC's policies and procedures **[**54]** regarding clearances are beyond reproach. It is not entirely clear whether Defendants' alleged conduct comes within the ambit of predatory and improper behavior proscribed by Georgia tort law, but the Court nevertheless finds Plaintiffs' allegations sufficient to endure a motion to dismiss.

Defendants also argue for dismissal of Plaintiffs' tortious inference claim on the grounds that the Complaint does not identify which entities AMC induced not to do business with Cobb. Once again, the Court must reject Defendants' argument. The Complaint refers to "the major film distributors" and specifically identifies Sony Pictures as one of the distributors that reacted to Defendants' letter by giving AMC preferential treatment. These allegations standing alone satisfy Plaintiffs' burden. Even so, Plaintiffs go even further and allege they attempted to rent space in Miami, Florida, at the Dadeland Mall only to be told by AMC's President and CEO that AMC would use its full weight and power to prevent Plaintiffs from opening a CinéBistro at that location. Although the Complaint does not identify the landlord of that space by name, these allegations are also sufficient to support Plaintiffs' claim **[**55]** for tortious interference with business relations. Accordingly, Defendants' Motion to Dismiss is denied as to Count V of the Complaint.

[*1345] *b. Contract in Restraint of Trade*

Plaintiffs also allege Defendants are liable for violations of ***HN34***[] article III, § 6, ¶ 5 of the Georgia Constitution and *O.C.G.A. § 13-8-2*, which declare contracts in restraint of trade void as against public policy. Although "these provisions merely render such agreements unenforceable and provide no cause of action for damages to those who are parties thereto, . . . Georgia recognizes a common law tort action in favor of third parties who are injured by a conspiracy in restraint of trade." *U.S. Anchor, 7 F.3d at 1003* (citations and internal quotations omitted). Defendants first argue this claim should be dismissed because Georgia courts have clarified that "a contract may be upheld if the restraint is reasonable and the contract is valid in other respects." *Wedgewood Carpet Mills, Inc. v. Color-Set, Inc., 149 Ga. App. 417, 421, 254 S.E.2d 421 (1979)*. However, this argument is irrelevant given the Court's previous finding that Plaintiffs have alleged the existence of unreasonable agreements.

Next, Defendants cite U.S. Anchor to support their contention that a plaintiff's sole remedy to challenge a contract in restraint of trade under Georgia law is through a tortious **[**56]** interference claim. *7 F.3d at 1003* ("We also have some doubt as to whether intentional interference with business relations is a distinct cause of action from the tort of conspiracy in restraint of trade, or whether there is only a single theory of relief."). Other than citing that court's "doubt," Defendants do not direct the Court to additional authority to support their argument. Moreover, ***HN35***[] courts in this Circuit have continued to allow Plaintiffs to state claims for both tortious interference and for violations of Georgia law prohibiting contracts in restraint of trade. See *Atl. Fiberglass USA, LLC v. KPI, Co., Ltd., 911 F. Supp. 2d 1247 (N.D. Ga. 2012)*. Having disposed of these arguments, the Court must deny Defendants' Motion to Dismiss as to Count VI.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss for Failure to State a Claim (Doc. No. 19) is **DENIED**; Plaintiffs' Notice of Objection and Motion to Strike (Doc. No. 24) is **DENIED**; and Plaintiffs' Motion for Leave to File Response to Defendants' Second Notice of Supplemental Authority (Doc. No. 42) is **GRANTED**. The Court notes that its ruling is in keeping with ***HN36***[] this Circuit's disfavor of Rule 12(b)(6) dismissals in fact-intensive antitrust disputes. *Spanish Broad. Sys., 376 F.3d at 1070*. After Defendants file their Answer, the parties are directed to **[**57]** comply with the Court's previous order regarding deadlines for initial discovery related activities (Doc. No. 23).

SO ORDERED, this 20th day of March, 2015.

/s/ Eleanor L. Ross

Eleanor L. Ross

United States District Judge

Northern District of Georgia

Intellectual Ventures I LLC v. Toshiba Corp.

United States District Court for the District of Delaware

March 20, 2015, Filed

Civ. No. 13-453-SLR

Reporter
2015 U.S. Dist. LEXIS 35204 *; 2015 WL 1476708

INTELLECTUAL VENTURES I LLC, et al, Plaintiffs and Counterclaim-Defendants, v. TOSHIBA CORPORATION, et al., Defendants and Counterclaim-Plaintiffs.

Prior History: *Intellectual Ventures I LLC v. Toshiba Corp., 66 F. Supp. 3d 495, 2014 U.S. Dist. LEXIS 124401 (D. Del., 2014)*

Core Terms

patents, counterclaims, portfolio, antitrust, patent misuse, invalid, patents-in-suit, unlawfully, defenses, alleges, Sherman Act, monopolization, semiconductor, aggregating, monopoly, hold-up, monopoly power, combined, infringe, summed

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For Toshiba America Inc., Toshiba America Electronic Components Inc., Toshiba America Information Systems Inc., Defendants: Denise Seastone Kraft, LEAD ATTORNEY, DLA Piper LLP, Wilmington, DE; Brian A. Biggs, DLA Piper LLP, Wilmington, DE.

Judges: Sue L. Robinson, United States District Judge.

Opinion by: Sue L. Robinson

Opinion

MEMORANDUM ORDER

At Wilmington this 20th day of March, 2015, having considered plaintiffs' motion to stay and the papers filed in connection therewith;

IT IS ORDERED that said motion (D.I. 56) is granted in part and denied in part, for the reasons that follow: **[*2]**

1. Plaintiffs Intellectual Ventures I LLC and Intellectual Ventures II LLC (collectively, "IV") filed the above captioned lawsuit alleging that defendants Toshiba Corporation, Toshiba America, Inc., Toshiba America Electronic Components, Inc., and Toshiba America Information Systems, Inc. (collectively, "Toshiba") infringe multiple claims often asserted patents ("the asserted patents") ("IV's case"). In response, Toshiba filed, *inter alia*, a patent misuse defense and antitrust counterclaims. Rather than answer or otherwise respond by filing a pleading, IV filed the instant motion to stay consideration of such defense and counterclaims.

2. With respect to Toshiba's patent misuse defense,

> Toshiba alleges that IV is using the patents-in-suit to, among other things, (1) unlawfully force Toshiba to pay for many other irrelevant patents, (2) unlawfully force Toshiba to pay for many other invalid patents, and (3) unlawfully monopolize a market for its portfolio by aggregating thousands of patents into a hold-up portfolio and using the patents-in-suit to make Toshiba pay monopoly prices for "licenses."

(D.I. 61 at 5)

3. With respect to Toshiba's antitrust counterclaim under Section I of the Sherman **[*3]** Act, *15 U.S.C. § 1*, Toshiba generally alleges that IV "combined and conspired with others, including Talon Research, LLC, to restrain trade and competition in the relevant market and to engage in patent hold-up in violation of *Section 1* of the Sherman Act." More specifically, "IV agreed with Talon and others to take patents from IV's 'Semiconductor Portfolio' and assert them against companies that refused to succumb to IV's direct hold-up demands." (*Id*. at 7)

4. With respect to Toshiba's antitrust counterclaim under Section 7 of the Clayton Act, *15 U.S.C. § 18*, Toshiba alleges that

> IV's semiconductor patents carried little or no market power until IV acquired and integrated them into an enormous portfolio. Now, after IV has created a patent-licensing monopoly, they bestow power on IV beyond the summed value of the individual patents.

(*Id*. at 8)

5. Finally, in connection with its monopolization and attempted monopolization claims under *Section 2* of the Sherman Act, *15 U.S.C. § 2*,

> Toshiba's claims rest on IV unlawfully aggregating its claimed 3,700+ semiconductor patents to secure monopoly power that far exceeds the summed value of those patents when disaggregated. That acquisition and maintenance of monopoly power is illegal because IV acquired and is maintaining it willfully, **[*4]** rather than by means of superior product, business acumen or historic accident. IV combines large numbers of patents regardless of their validity precisely so that it can attach products existing in the marketplace and extract monopoly rents through the threat of endless litigation.

(*Id*. at 9)

6. In most cases, patent misuse defenses and antitrust counterclaims are related to, and co-extensive with, the scope of the patent litigation in which they are asserted. It makes sense under those circumstances to stay consideration of such defenses and counterclaims, as they are based in large measure on the efficacy of the patent litigation itself; e.g., if the patents are deemed valid by the fact-finder, there is no basis for a patent misuse defense or antitrust remedies.

7. Toshiba asserts that the above reasoning is not applicable to its defenses and counterclaims at bar because the ten patents-in-suit are just a small sampling of Toshiba's focus, that is, IV's "3,700+" patent portfolio. I agree to a point and, in an effort to be consistent with my past practice of staying such defense and counterclaims until the traditional patent claims of infringement and invalidity have been decided, will have **[*5]** Toshiba's defenses and counterclaims proceed as follows:

a. I will stay the defense of patent misuse and all aspects of the antitrust counterclaims that involve the validity of IV's patent portfolio.[1] More specifically, in the given context of a 3,700+ patent portfolio, I conclude that there is no reasonable way to determine how many of such patents are invalid and, if so, how many such "invalid" patents it takes to tip the balance between a legal and an illegal business practice, particularly if a jury has found one or more of the asserted patents valid. Moreover, there is potential for much mischief if the patent misuse defense were tried with IV's case, the possible inference being that the ten patents-in-suit are invalid by association with the remaining portfolio patents.

b. To the extent Toshiba relies in its antitrust counterclaims on the numerosity and value (i.e., presuming validity) of IV's patent portfolio **[*6]** and IV's allegedly improper leveraging of such, I agree that a stay is not warranted, as there are no overlapping issues with IV's case. Although I recognize the discovery and evidentiary challenges associated with Toshiba's allegations as to the market value of IV's individual patents versus the aggregate value of IV's patent portfolio,[2] these are issues that sound in ***antitrust law*** and may proceed, albeit on a bifurcated schedule from IV's case.

/s/ Sue L. Robinson

United States District Judge

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[1] *See*, **for example**, D.I. 61 at 9 ("IV combines large numbers of patents regardless of their validity"); *id*. at 10 (IV's "strategy of litigating regardless of merit is irrational as to each individual lawsuit, but is rational in pursuit of [IV's] overall anticompetitive hold-up strategy.").

[2] *See, e.g*., D.I. 61 at 8 ("IV's semiconductor patents carried little or no market power until IV acquired and integrated them into an enormous portfolio.").

In re Aggrenox Antitrust Litig.

United States District Court for the District of Connecticut

March 23, 2015, Decided; March 23, 2015, Filed

No. 3:14-md-2516 (SRU)

Reporter

94 F. Supp. 3d 224 *; 2015 U.S. Dist. LEXIS 35634 **; 2015-1 Trade Cas. (CCH) P79,115

IN RE AGGRENOX ANTITRUST LITIGATION. THIS DOCUMENT RELATES TO: ALL ACTIONS

Subsequent History: Clarified by, Certificate of appealability granted *In re Aggrenox Antitrust Litig., 2015 U.S. Dist. LEXIS 94516 (D. Conn., July 21, 2015)*

Motion denied by *In re Aggrenox Antitrust Litig., 199 F. Supp. 3d 662, 2016 U.S. Dist. LEXIS 104270 (D. Conn., Aug. 8, 2016)*

Dismissed by, in part, Dismissed without prejudice by, in part *In re Aggrenox Antitrust Litig., 2016 U.S. Dist. LEXIS 104647 (D. Conn., Aug. 9, 2016)*

Class certification granted by, Settled by, Motion granted by *In re Aggrenox Antitrust Litig., 2017 U.S. Dist. LEXIS 165155 (D. Conn., Sept. 19, 2017)*

Costs and fees proceeding at, Motion denied by *In re Aggrenox Antitrust Litig., 2017 U.S. Dist. LEXIS 172231 (D. Conn., Oct. 18, 2017)*

Motion granted by, in part, Motion denied by, in part *In re Aggrenox Antitrust Litig., 2017 U.S. Dist. LEXIS 196151 (D. Conn., Nov. 29, 2017)*

Settled by, Judgment entered by, Dismissed by *In re Aggrenox Antitrust Litig., 2018 U.S. Dist. LEXIS 138982 (D. Conn., July 19, 2018)*

Motion denied by *In re Aggrenox Antitrust Litig., 2019 U.S. Dist. LEXIS 28934 (D. Conn., Feb. 25, 2019)*

Prior History: *FTC v. Boehringer Ingelheim Pharms., Inc., 286 F.R.D. 101, 2012 U.S. Dist. LEXIS 138854 (D.D.C., Sept. 27, 2012)*

Core Terms

patent, settlement, generic, purchasers, indirect, antitrust, overcharges, invalidation, anti trust law, indirect-purchaser, anticompetitive, motion to dismiss, allegations, manufacturer, plaintiffs', unjustified, monopoly, defendants', personal jurisdiction, Pharmaceuticals, pleadings, effects, challenger, courts, patent-holder, quotation, prices, settlement agreement, brand-name, complaints

LexisNexis® Headnotes

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > In Personam Actions

Evidence > Burdens of Proof > Allocation

HN1[] In Rem & Personal Jurisdiction, In Personam Actions

A plaintiff bears the burden of showing that the court has personal jurisdiction over each defendant. Where there has been no discovery on jurisdictional issues and the court is relying solely on the parties' pleadings and affidavits, the plaintiff need only make a prima facie showing that the court possesses personal jurisdiction over the defendant.

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

HN2[] Motions to Dismiss, Failure to State Claim

A motion to dismiss for failure to state a claim pursuant to *Fed. R. Civ. P. 12(b)(6)* is designed merely to assess the legal feasibility of a complaint, not to assay the weight of evidence which might be offered in support thereof. When deciding a motion to dismiss pursuant to *Rule 12(b)(6)*, the court must accept the material facts alleged in the complaint as true, draw all reasonable inferences in favor of the plaintiffs, and decide whether it is plausible that plaintiffs have a valid claim for relief.

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

HN3[] Complaints, Requirements for Complaint

Under Twombly, factual allegations must be enough to raise a right to relief above the speculative level, and assert a cause of action with enough heft to show entitlement to relief and enough facts to state a claim to relief that is plausible on its face. The plausibility standard set forth in Twombly and Iqbal obligates the plaintiff to provide the grounds of his entitlement to relief through more than labels and conclusions, and a formulaic recitation of the elements of a cause of action. Plausibility at the pleading stage is nonetheless distinct from probability, and a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the claims is improbable, and recovery is very remote and unlikely.

Antitrust & Trade Law > Sherman Act > Defenses

HN4[] Sherman Act, Defenses

The statute of limitations for Sherman Act claims is four years from when the cause of action accrued, *15 U.S.C.S. § 15b*, and an antitrust cause of action generally accrues when a defendant commits an act that injures a plaintiff's business.

Antitrust & Trade Law > Sherman Act > Defenses

HN5[] Sherman Act, Defenses

For purposes of Sherman Act violations, a purchaser suing a monopolist for overcharges paid within the previous four years may satisfy the conduct prerequisite to recovery by pointing to anticompetitive actions taken before the limitations period. If a party commits an initial unlawful act that allows it to maintain market control and overcharge purchasers for a period longer than four years, purchasers maintain a right of action for any overcharges paid within the four years prior to their filings.

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

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

HN6[] Actual Monopolization, Anticompetitive & Predatory Practices

In the context of settlements in Hatch-Waxman Act patent cases, large and unjustified reverse payments that can bring with them the risk of significant anticompetitive effects can bring those effects regardless of the particular form the transfer of value takes and thus are not limited to cash payments. A settlement agreement may be very simple or tremendously complex, and it may involve all manner of consideration; and if, when viewed holistically, it effects a large and unexplained net transfer of value from the patent-holder to the alleged patent-infringer, it may fairly be called a reverse-payment settlement. Such a settlement, under the Supreme Court's Actavis decision, is not ipso facto unlawful: the parties to the settlement might be able to explain the apparent "missing" value for the patent-holder in a procompetitive way—and they will have an opportunity to do so under the rule-of-reason framework—in which case the reverse payment may turn out to be justified, or to be entirely illusory. But if otherwise unexplained, it likely seeks to prevent the risk of competition. And that consequence constitutes the relevant anticompetitive harm.

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

HN7[] Actual Monopolization, Anticompetitive & Predatory Practices

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

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

HN8[] Actual Monopolization, Anticompetitive & Predatory Practices

In the context of settlements in Hatch-Waxman Act patent cases, payments smaller than avoided litigation costs are presumptively not large and unexplained under the Supreme Court's Actavis decision, and represent a de facto safe harbor, and also payments exceeding avoided litigation costs are not automatically deemed unlawful for that reason alone. Even if the payments exceed avoided litigation costs, the Actavis factors—the size of the payments, their scale in relation to litigation costs, their independence from other services for which they might be fair consideration, and any other convincing justification—still matter. But it cannot be concluded that the size of the reverse payments in relation to the anticipated value of the patent is dispositive of the lawfulness of the agreement. Large reverse payments that are not particularly large in relation to the value of the patent may show confidence in the patent, but if they represent payment to avoid the risk of invalidation, then they still run afoul of Actavis.

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

Evidence > Burdens of Proof > Burden Shifting

HN9[] Per Se Rule & Rule of Reason, Sherman Act

Rule-of-reason analysis proceeds in three steps: First, the plaintiff bears the initial burden of showing that the defendant's conduct had an actual adverse effect on competition as a whole in the relevant market. If plaintiff satisfies this burden, the burden then shifts to defendant to offer evidence that its conduct had pro-competitive effects. If defendant is able to offer such proof, the burden shifts back to plaintiff, who must prove that any legitimate competitive effects could have been achieved through less restrictive alternatives.

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

HN10[] Actual Monopolization, Monopoly Power

Monopoly power is a necessary element of Sherman Act claims, and the Supreme court has defined that power as the power to control prices or exclude competition. It is correct, however, that when direct evidence is available that a party profitably charges supra-competitive prices, the existence of market power can be established from that fact alone.

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

HN11[] Market Definition, Relevant Market

In antitrust analysis, as a general rule, the process of defining the relevant product market requires consideration of cross-elasticity of demand, because the boundaries of a particular product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. This is usually a fact-intensive inquiry, and for that reason courts hesitate to grant motions to dismiss for failure to plead a relevant product market. The Supreme Court has been clear that market definitions can sometimes only be determined after a factual inquiry into the commercial realities faced by consumers, and that in some instances one brand of a product can constitute a separate market. Perhaps because of the peculiar features of pharmaceutical markets, the Second Circuit has even held that the relevant market can sometimes be limited to the generic of a particular drug, excluding the chemically-identical brand-name version.

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

HN12[] Attempts to Monopolize, Elements

It is clearly the law in the Second Circuit that anticompetitive intent can be inferred from anticompetitive conduct. If a settlement included a large and unjustified reverse payment that was made in order to avoid the risk of patent invalidation, then antitrust liability may attach under the Supreme Court's Actavis decision; and that particular anticompetitive harm is necessarily intentional (even if intent is proved by inference).

Antitrust & Trade Law > Sherman Act > Defenses

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraud

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

HN13[] **Sherman Act, Defenses**

An antitrust plaintiff may prove fraudulent concealment sufficient to toll the running of the statute of limitations if he establishes (1) that the defendant concealed from him the existence of his cause of action, (2) that he remained in ignorance of that cause of action until some point within four years of the commencement of his action, and (3) that his continuing ignorance was not attributable to lack of diligence on his part. Concealment can be shown in one of two ways: either by demonstrating that the defendant took affirmative steps to prevent discovery of the claim or injury, or by demonstrating that the violation itself was "self-concealing"—that is, by showing that it is the type of violation that by its very nature is designed to appear innocent, essentially establishing fraud-by-omission. As a claim of fraud, the allegations that provide the factual basis for fraudulent concealment must meet *Fed. R. Civ. P. 9(b)*'s heightened pleading standard.

Civil Procedure > ... > Class Actions > Class Members > Absent Members

Civil Procedure > Preliminary Considerations > Justiciability > Standing

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN14[] **Class Members, Absent Members**

The Supreme Court acknowledged in Gratz that when there is "variation" between the claims of named plaintiffs and absent class members, there is a question whether the relevance of this variation is a matter of Article III standing at all or whether it goes to the propriety of class certification pursuant to *Fed. R. Civ. P. 23(a)*, and that there is tension in prior cases in this regard. The issue appears straightforward and one would expect it to be well settled; however, neither assumption is entirely true.

Civil Procedure > ... > Class Actions > Class Members > Absent Members

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Preliminary Considerations > Justiciability > Standing

HN15[] **Class Members, Absent Members**

The Second Circuit in NECA-IBEW announced a broad standard for class standing, consonant with the Supreme Court's Gratz decision, that turns on whether the "same set of concerns" is implicated by the defendants' allegedly injurious conduct toward the named plaintiffs and toward the absent class members. Still, there is a fundamental analytical distinction between class standing and Article III standing. And Article III standing, as a fundamental constitutional requisite of federal judicial power, presents a threshold question in every federal case.

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

HN16[] **Standing, Injury in Fact**

A federal rule cannot alter a constitutional requirement, and therefore with respect to each asserted claim, a plaintiff must always have suffered a distinct and palpable injury to herself.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN17[] **Purchasers, Indirect Purchasers**

Utah has passed an Illinois Brick repealer, and its antitrust statute therefore does grant indirect purchasers the right to bring antitrust damages claims, but only if they are citizens or residents of Utah. *Utah Code Ann. § 76-10-3109*.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Governments > Legislation > Interpretation

HN18[] **Purchasers, Indirect Purchasers**

Puerto Rico has not passed an Illinois Brick repealer, and its territorial courts have apparently not directly addressed the issue, but its ***antitrust law*** is generally construed as essentially embodying the jurisprudence relevant to the parallel federal law. In the absence of a clear decision—by either the legislature or by the jurisdiction's own courts—to allow indirect-purchaser recovery, the antitrust laws of a state (or territory) are interpreted as presumptively consistent with federal law. Therefore, Puerto Rico follows the rule of Illinois Brick.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Governments > Legislation > Effect & Operation > Prospective Operation

HN19[] **Purchasers, Indirect Purchasers**

Rhode Island was an Illinois Brick state until its legislature enacted a repealer on July 15, 2013. *R.I. Gen. Laws § 6-36-7(d)*. In Rhode Island as elsewhere, statutes and their amendments are presumed to apply prospectively. Indeed, it is very widely recognized as an almost universal rule that statutes are addressed to the future, not to the past. In the absence of evidence of the Rhode Island legislature's intent to the contrary, it is fair to conclude that the law applies only prospectively.

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

HN20[] **Deceptive & Unfair Trade Practices, State Regulation**

Hawaii's antitrust statute has an unfair or deceptive acts or practices prong, and an unfair methods of competition prong. *Haw. Rev. Stat. § 480-2*. Claims under the unfair or deceptive acts or practices prong can only be brought by consumers, the attorney general or the director of the office of consumer protection, *Haw. Rev. Stat. § 480-2(d)*. Claims under the "unfair methods of competition" prong are not limited in that way, but class actions brought under that prong require pre-suit notice to the state attorney general, who has a right of first refusal to bring claims. *Haw. Rev. Stat. § 480-13.3*.

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

HN21[] **Deceptive & Unfair Trade Practices, State Regulation**

From the language of Hawaii's antitrust statute itself, it does not appear, for instance, to create a substantive right to recovery that only "vests" after some action or inaction of the state attorney general. Rather, it creates a right to "bring an action based on unfair methods of competition" in *Haw. Rev. Stat. § 480-2*, without any reference to notice, and delineates procedural prerequisites for class actions under the chapter in *Haw. Rev. Stat. § 480-13.3*. It cannot be concluded that the *Haw. Rev. Stat. § 480-13.3* procedural prerequisites are sufficiently a "part of a State's framework of substantive rights or remedies" to be controlling in federal court.

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

HN22[] **Complaints, Requirements for Complaint**

A pleading that offers labels and conclusions or formulaic recitation of the elements of a cause of action will not do. The bald assertion that the alleged antitrust conduct violates dozens of non-antitrust laws, or the implication that there are no consequential differences between those laws, is not entitled to deference, because the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Substantial Contacts

HN23[] **In Personam Actions, Substantial Contacts**

The authority of a court to subject a particular defendant to personal jurisdiction has been analyzed as a constitutional question for well over a century. The statutory authority for jurisdiction, though a necessary condition of it, is not a sufficient one. A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State. Being "essentially at home" in a place is a very high bar, almost never found for corporations where they are neither incorporated nor headquartered. Even a company's engagement in a substantial, continuous, and systematic course of business is alone insufficient to render it at home in a forum.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > In Personam Actions

HN24[] **In Rem & Personal Jurisdiction, In Personam Actions**

Specific jurisdiction depends on an affiliation between the forum and the underlying controversy. Importantly, in contrast to general, all-purpose jurisdiction, specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction. Pleading specific jurisdiction does not present nearly so high a bar as pleading general jurisdiction, but unlike general jurisdiction, it depends on case-specific contacts. Even frequent, substantial contacts cannot confer jurisdiction in this case unless the contacts were made in connection with the specific controversy being litigated.

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For A.F. of L. - A.G.C. Buildings Trade Welfare Plan, on behalf of itself and all others similarly situated, Plaintiff: Mathew P. Jasinski, LEAD ATTORNEY, William H. Narwold, Motley Rice LLC, Hartford, CT; Michael M. Buchman, LEAD ATTORNEY, Motley Rice LLC-NY, New York, NY.

For Painters District Council No. 30 Health & Welfare Fund, on behalf of itself and all others similarly situated, Plaintiff: Derek Y. Brandt, Sarah S. Burns, LEAD ATTORNEYS, PRO HAC VICE, Simmons Browder Gianaris Angelides & Barnerd LLC, Alton, IL; Mathew P. Jasinski, LEAD ATTORNEY, William H. Narwold, Motley Rice LLC, Hartford, CT; Mitchell M. Breit, LEAD ATTORNEY, PRO HAC VICE, Simmons Hanly Conroy, LLP, New York, NY; Lori Ann Fanning, Marvin A. Miller, Miller Law LLC, Chicago, IL.

For Miami-Luken, Inc., Plaintiff: David C. Raphael , Jr., Erin R. Leger, LEAD ATTORNEY, Smith Segura & Raphael, LLP, Alexandria, LA; Ephraim R. Gerstein, LEAD ATTORNEY, Bruce E Gerstein, Jonathan Michael Gerstein, Joseph Opper, Garwin Gerstein & Fisher, LLP, New York, NY; **[**2]** Keith J. Verrier, LEAD ATTORNEY, Levin, Fishbein, Sedran & Berman, Philadelphia, PA; Gerald C. Pia, Jr., LEAD ATTORNEY, Roche Pia LLC, Shelton, CT.

For International Union of Operating Engineers Local 132 Health and Welfare Fund, on its own behalf and on behalf of all others similarly situated, Plaintiff: Christina H.C. Sharp, Daniel C. Girard, Scott M. Grzenczyk, LEAD ATTORNEY, Girard Gibbs, LLP, San Francisco, CA; Natalie Finkelman Bennett, LEAD ATTORNEY, PRO HAC VICE, Shepherd, Finkelman, Miller & Shah, LLP - PA, Media, PA.

For Plumbers & Pipefitters Local 178 Health & Welfare Trust Fund, on Behalf of Itself and All Others Similarly Situated, Plaintiff: Lee Albert, LEAD ATTORNEY, PRO HAC VICE, Glancy Binkow & Goldberg LLP, New York, NY.

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For Rochester Drug Co-Operative, Inc., on behalf of itself and all others similarly situated, **[**3]** Plaintiff: Andrew Coyne Curley, David F. Sorensen, Nicholas Urban, LEAD ATTORNEY, Berger & Montague, P.C., Philadelphia, PA; Archana Tamoshunas, LEAD ATTORNEY, Taus Cebulash & Landau LLP, New York, NY; Joseph T. Lukens, Peter R. Kohn, LEAD ATTORNEY, Faruqi & Faruqi - PA, Jenkintown, PA; Gerald C. Pia , Jr., LEAD ATTORNEY, Roche Pia LLC, Shelton, CT; Joseph Opper, Garwin Gerstein & Fisher, LLP, New York, NY; Sarah A. Westby, Faruqi & Faruqi, LLP-NY, New York, NY.

For Fraternal Order Of Police Miami Lodge 20, Insurance Trust Fund, on its own behalf and on behalf of all others similarly situated, Plaintiff: Jayne A. Goldstein, LEAD ATTORNEY, PRO HAC VICE, Pomeranz LLP - FL, Weston, FL; Adam Giffords Kurtz, Pomerantz LLP, New York, NY.

For Man-U Service Contract Trust Fund, on behalf of itself and all others similarly situated, Plaintiff: Jacob Alexander Goldberg, Michael Coren, Stewart Lee Cohen, LEAD ATTORNEY, Cohen Placitella & Roth, P.C., Philadelphia, PA.

For IAFF Local 22 Health & Welfare Fund, on behalf of itself and all others similarly situated, International Union of Painters and Allied Trades, District Council 21 Health and Welfare Fund, on behalf of itself and all others similarly **[**4]** situated, Plaintiffs: David R. Woodward, Renae D. Steiner, LEAD ATTORNEY, PRO HAC VICE, Heins Mills & Olson, PLC-MN, Minneapolis, MN.

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For School Cafeteria Employees Local 634 Health and Welfare Fund, on behalf of itself and all others similarly situated, Plaintiff: David R. Woodward, **[**5]** Renae D. Steiner, LEAD ATTORNEY, PRO HAC VICE, Heins Mills & Olson, PLC-MN, Minneapolis, MN; Krishna B. Narine, LEAD ATTORNEY, Meredith & Narine, Philadelphia, PA.

For Newspaper And Magazine Employees Health And Welfare Fund, on behalf of itself and all others similarly situated, Plaintiff: Noah Axler, LEAD ATTORNEY, PRO HAC VICE, Donovan Searles, Philadelphia, PA.

For Afscme District Council 47 Health & Welfare Fund, on behalf of itself and all others similarly situated, Plaintiff: LEAD ATTORNEY,Stephen E. Connolly, LEAD ATTORNEY, Connolly Wells & Gray, LLP, King of Prussia, PA.

For Neca-Ibew Welfare Trust Fund, Individually and on Behalf of All Others Similarly Situated, Plaintiff: Brian O. O'Mara, LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd LLP-SD,CA, San Diego, CA; Marc S. Henzel, LEAD ATTORNEY, Law Offices of Marc S. Henzel, Merion Station, PA.

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For Humana, Inc, on behalf of itself and on behalf of all others similarly situated, Plaintiff: Barbara J. Hart, Noelle-Kristen F. Ruggiero, LEAD ATTORNEY, PRO HAC VICE, Lowey Dannenberg Cohen & Hart, P.C.-NY, White Plains, NY; Peter D St. Phillip , Jr, LEAD ATTORNEY, Richard W. Cohen, Uriel Rabinovitz, Lowey Dannenberg Cohen & Hart, P.C.-NY, White Plains, NY; Gerald Lawrence, Lowey Dannenberg Cohen & Hart, P.C.-PA, West Conshohocken, PA.

For Welfare Plan of the International Union of Operation Engineers Locals 137, 137A, 137B, 137C, 137R, on behalf of itself and all others similarly situated, Plaintiff: J. Douglas Richards, Cohen Milstein Sellers & Toll-NY, New York, NY; Sharon K. Robertson, Cohen Milstein Sellers & Toll PLLC-NY, New York, NY.

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For International Union of Operating Engineers Local 49 Health and Welfare Fund, Plaintiff: Heidi M. Drewes-Silton, Karen Hanson Riebel, Lockridge Grindall Nauen PLLP, Minneapolis, MN.

For Eric J. Belfi, LEAD ATTORNEY, Labaton Sucharow LLP-NY, New York, NY; Gregory Asciolla, Jay L. Himes, Matthew J. Perez, LEAD ATTORNEY, PRO HAC VICE, Labaton Sucharow LLP-NY, New York, NY; Mathew P. Jasinski, LEAD ATTORNEY, William H. Narwold, Motley Rice LLC, Hartford, CT.Pipefitters Union Local NO 537 Health & Welfare Fund, on Behalf of Itself and All Others Similarly Situated, Plaintiff: Eric J. Belfi, LEAD ATTORNEY, Labaton Sucharow LLP-NY, New York, NY; Gregory Asciolla, Jay L. Himes, Matthew J. Perez, LEAD ATTORNEY, PRO HAC VICE, Labaton Sucharow LLP-NY, New York, NY; Mathew P. Jasinski, LEAD ATTORNEY, William H. Narwold, Motley Rice LLC, Hartford, CT.

For Barr Pharmaceuticals Inc, a Delaware corporation **[**8]** Now known as Barr Pharmaceuticals, LLC, Duramed Pharmaceuticals Inc, a Delaware corporation Now known as Teva Women's Health, Inc., Teva Pharmaceuticals USA, Inc., a Delaware corporation, Duramed Pharmaceuticals Sales Corp., a Delaware corporation, Defendants: Brigid M. Carpenter, LEAD ATTORNEY, Baker, Donelson, Berman, Caldwell & Berkowitz, P.C.- Nash, Nashville, TN; Robert D. Carroll, Sarah K. Frederick, LEAD ATTORNEY, PRO HAC VICE, Goodwin Procter, LLP - MA, Boston, MA; Assaf Ze'ev Ben-Atar, Pullman & Comley - Bpt, Bridgeport, CT; Christopher T Holding, Goodwin Procter, LLP - MA, Boston, MA; James T. Shearin, Pullman & Comley, Bridgeport, CT.

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For Boehringer Ingelheim International GmbH, a German limited liability company, Defendant: Alison Hanstead, Jack E. Pace, III, Robert A. Milne, White & Case - NY - Ave Americas, New York, NY; J. Mark Gidley, Matthew S. Leddicotte, Peter J. Carney, White & Case - 13th DC, Washington, DC.

For Boehringer Ingelheim Pharmaceuticals **[**9]** Inc, a Delaware corporation, Defendant: Alison Hanstead, Jack E. Pace, III, Robert A. Milne, White & Case - NY - Ave Americas, New York, NY; J. Mark Gidley, Matthew S.

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For Barr Lab Inc, a Delaware corporation, Defendants: Brigid M. Carpenter, LEAD ATTORNEY, Baker, Donelson, Berman, Caldwell & Berkowitz, P.C.- Nash, Nashville, TN; Robert D. Carroll, Sarah K. Frederick, LEAD ATTORNEY, PRO HAC VICE, Goodwin Procter, LLP - MA, Boston, MA; Assaf Ze'ev Ben-Atar, Pullman & Comley - Bpt, Bridgeport, CT; Christopher T Holding, Goodwin Procter, LLP - MA, Boston, MA; James T. Shearin, Pullman & Comley, Bridgeport, CT.

For Boehringer Ingelheim Pharma GMBH & Co. KG, a German limited partnership, Defendant: Alison Hanstead, Jack E. Pace, III, Robert A. Milne, White & Case - NY - Ave Americas, New York, **[**10]** NY; J. Mark Gidley, Matthew S. Leddicotte, Peter J. Carney, White & Case - 13th DC, Washington, DC.

Judges: Stefan R. Underhill, United States District Judge.

Opinion by: Stefan R. Underhill

Opinion

[*231] **MEMORANDUM OF DECISION AND ORDER**

This case aggregates numerous antitrust actions brought by numerous plaintiffs in various districts against several interrelated pharmaceutical companies, all transferred to this Court by the Judicial Panel on Multidistrict Litigation. Under a Practice and Procedure Order (doc. # 37), the actions are consolidated into two groups: all direct-purchaser actions, and all indirect-purchaser actions (the indirect purchasers also style themselves "end payors"). Two consolidated, putative class-action complaints have accordingly been filed. One of the indirect purchasers (or end payors), Humana, Inc. ("Humana"), which alleges that it has the greatest economic interest of any such plaintiff (and that it alone has standing in every state), is pursuing its claims individually. There are thus three current complaints: (1) the direct-purchaser plaintiffs' putative class complaint (doc. # 109); (2) the indirect-purchaser plaintiffs' (or end-payor plaintiffs') putative class complaint (doc. # 120); and **[**11]** (3) the Humana complaint (doc. # 93).

The defendants are also divisible into several groups: (1) Boehringer Ingelheim **[*232]** Pharma GmbH & Co. KG and Boehringer Ingelheim International GmbH, which are organized under German law, and Boehringer Ingelheim Pharmaceuticals, Inc., which is a Delaware corporation (collectively "Boehringer"); (2) Teva Pharmaceutical Industries, Ltd. ("Teva Israel"), which is organized under Israeli law, and Teva Pharmaceuticals USA, Inc. ("Teva USA"), which is a Delaware corporation; (3) Barr Pharmaceuticals, Inc. and Barr Laboratories, Inc., which are both Delaware corporations (collectively "Barr"); and (4) Duramed Pharmaceuticals Inc. and Duramed Pharmaceuticals Sales Corp., which are both Delaware corporations (collectively "Duramed"). In 2008, Teva USA acquired Barr Pharmaceuticals. Duramed was, in turn, a subsidiary of Barr, and thus also became a subsidiary of Teva USA. Teva USA is a subsidiary of Teva Israel, making all non-Boehringer defendants at least indirect subsidiaries of Teva Israel.

There are four pending motions to dismiss, three of them filed collectively by all defendants except Teva Israel, and one filed by Teva Israel alone. Those motions are: **[**12]** (1) Teva Israel's motion to dismiss all complaints against it under *Rule 12(b)(2)* and *Rule 12(b)(6)* (doc. # 150); (2) the defendants' motion to dismiss the direct-purchaser complaint under *Rule 12(b)(6)* (doc. # 149; sealed mem., doc.168); (3) the defendants' motion to dismiss the indirect-purchaser complaint under *Rule 12(b)(6)* (doc. # 151); and (4) the defendants' motion to dismiss the Humana complaint under *Rule 12(b)(6)* (doc. # 152).

I. Standards of Review

A. Rule 12(b)(2)

HN1[] A plaintiff bears the burden of showing that the court has personal jurisdiction over each defendant. *Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 566 (2d Cir. 1996)*. Where, as here, there has been no discovery on jurisdictional issues and the court is relying solely on the parties' pleadings and affidavits, the plaintiff need only make a prima facie showing that the court possesses personal jurisdiction over the defendant. *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 171 F.3d 779, 784 (2d Cir. 1999)*.

B. Rule 12(b)(6)

HN2[] A motion to dismiss for failure to state a claim pursuant to *Rule 12(b)(6)* is designed "merely to assess the legal feasibility of a complaint, not to assay the weight of evidence which might be offered in support thereof." *Ryder Energy Distribution Corp. v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984)* (quoting *Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980))*.

When deciding a motion to dismiss pursuant to *Rule 12(b)(6)*, the court must accept the material facts alleged in the complaint as true, draw all reasonable inferences in favor of the plaintiffs, and decide whether it is plausible **[**13]** that plaintiffs have a valid claim for relief. *Ashcroft v. Iqbal, 556 U.S. 662, 678-79, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*; *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*; *Leeds v. Meltz, 85 F.3d 51, 53 (2d Cir. 1996)*.

HN3[] Under *Twombly*, "[f]actual allegations must be enough to raise a right to relief above the speculative level," and assert a cause of action with enough heft to show entitlement to relief and "enough facts to state a claim to relief that is plausible on its face." *550 U.S. at 555, 570*; *see also* *Iqbal, 556 U.S. at 679* ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."). The plausibility standard set forth in *Twombly* and *Iqbal* obligates **[*233]** the plaintiff to "provide the grounds of his entitlement to relief" through more than "labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Twombly, 550 U.S. at 555* (quotation marks omitted). Plausibility at the pleading stage is nonetheless distinct from *probability*, and "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of [the claims] is improbable, and . . . recovery is very remote and unlikely." *Id. at 556* (quotation marks omitted).

II. Discussion

A. Factual and Legal Background

This case arises at the intersection of two areas of law that would seem to be naturally at odds with one another: ***antitrust law***—procompetitive by design—which prohibits **[**14]** certain forms of anticompetitive conduct, and patent law—anticompetitive by design—which seeks to encourage innovation by rewarding innovators with limited legal monopolies. The question at the heart of this case is whether a patent-litigation settlement—that is, an agreement to settle litigation that had put the legitimacy of a patent's grant of monopoly at issue—constituted a violation of ***antitrust law***. Two features dominate the background: (1) the incentives to undertake patent litigation under the Drug Price Competition and Patent Term Restoration Act, commonly known as the Hatch-Waxman Act, and (2) the uncertain but disruptive effect on such litigation of the Supreme Court's recent decision in *FTC v. Actavis, Inc., 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*. I discuss each in turn below, followed by a brief recitation of the central facts of this case.

1. *The Hatch-Waxman Act and "Pay for Delay" Settlements*

A pharmaceutical manufacturer seeking to introduce a new prescription drug to market must first obtain the approval of the FDA by filing a New Drug Application and undertaking an extensive and expensive testing process to demonstrate that the drug is safe and effective for its intended purpose. Under the Hatch-Waxman Act, a later manufacturer **[**15]** of a generic equivalent drug need not duplicate that effort, but may instead submit an Abbreviated New Drug Application that relies on the earlier scientific findings related to the already-approved brand-name drug. The abbreviated Hatch-Waxman process benefits consumers by expediting the introduction of low-cost generics to the market.

Hatch-Waxman also establishes special procedures relating to patent disputes and contains provisions that encourage patent challenges. A drug manufacturer filing a New Drug Application must list the number and expiration date of any relevant patent, and a manufacturer filing an Abbreviated New Drug Application must indicate the relationship of its generic drug to any such previously-listed patent in one of several ways. The manufacturer of the generic must certify either that no such patent has been filed, that such patent has expired, the date on which such patent will expire, or "that such patent is invalid or will not be infringed by ... the new drug." *21 U.S.C. § 355(j)(2)(A)(vii)(IV)*. That assertion of invalidity or non-infringement is known as "Paragraph IV certification," and insofar as it is inaccurate, it statutorily constitutes infringement, *see 35 U.S.C. § 271(e)(2)(A)*, and may therefore provoke **[**16]** litigation; it thus provides a procedure for challenging drug patents without starting production and sales of a possibly-infringing drug and potentially accruing damages. After Paragraph IV certification, the brand-name manufacturer may bring an infringement suit within 45 days and trigger an automatic stay of FDA approval of **[*234]** the generic for 30 months or, if it requires less time than that, until adjudication of the validity of the challenged patent in a district court.[1] *See 21 U.S.C. § 355(j)(5)(B)(iii)*.

As an incentive to make such challenges, Hatch-Waxman provides an exclusivity period of 180 days (from the first marketing of the generic) to the first manufacturer to file an Abbreviated New Drug Application with Paragraph IV certification, during which time no other Abbreviated New Drug Application will be approved. *See § 355(j)(5)(B)(iv)*. The Supreme Court in *Actavis* observed that the 180-day exclusivity period **[**17]** can be tremendously valuable, possibly worth hundreds of millions of dollars and a majority of the potential profits for a generic drug. *133 S. Ct. at 2229* (citing scholarship and a statement of the Generic Pharmaceutical Association).

Manufacturers of generic drugs have obvious motivation to bring Paragraph IV challenges to patents they believe are vulnerable; and because brand-name drugs sell at such high premiums, their manufacturers have obvious motivation to meet those challenges with infringement suits. But defending patents can be expensive, so brand-name manufacturers may also be motivated to settle the suits—all the more so if they suspect their challenged patents may indeed be vulnerable. Such settlements result in unusual dynamics. For instance, it sometimes happens that the parties settle under terms that require *the plaintiff patent-holder* to pay *the defendant infringer*—sometimes called a "reverse payment" settlement agreement—and to permit the defendant to begin producing a generic at a future date, but a date that is earlier than the expiration of the patent, in exchange for the defendant dropping its patent challenge. Assuming the patent is valid, and that the patent-holder would ultimately **[**18]** prevail, such a settlement means that the patent-holder is avoiding the cost of litigation by agreeing to shorten the length of its legal monopoly and to share some of its monopoly profits with the challenger. Consumers benefit by enjoying the lower prices of generics sooner than they otherwise would under the patent. Assuming, however, that the patent is invalid, and that the challenger would ultimately prevail, then such a settlement amounts to a "pay to delay" agreement: the patent-holder's monopoly is illegitimate, and it is paying a would-be competitor to delay its entry into the market. Consumers who should enjoy competitive prices now will instead pay monopoly prices until the end of the term of the anticompetitive collusion. The availability of such settlements allows manufacturers of brand-name drugs to avoid the invalidation of potentially weak patents and keep prices high by sharing their monopoly profits with manufacturers of generics.

Is that an antitrust violation? Several courts of appeals, including the Second Circuit, have said no, at least absent fraud in obtaining the patent and so long as the settlement terms are within its scope (*i.e.*, consumers will not face a **[**19]** longer period of monopoly under the settlement than they would have faced under the patent, implicitly presuming the patent's validity). *See, e.g., In re Tamoxifen Citrate Antitrust Litig., 466 F.3d 187 (2d Cir. 2006)*; *In re*

[1] If the validity of the patent has not yet been determined after 30 months, the FDA can give approval to the generic irrespective of possible infringement, but the manufacturer who then begins production of the generic does so at risk of an unfavorable judgment and the accrual of damages to the vindicated patent-holder.

Ciprofloxacin Hydrochloride Antitrust Litig., 544 F.3d 1323 (Fed. Cir. 2008). Other courts of appeals have said yes, at least **[*235]** unless a presumption of unlawful restraint of trade is rebutted. *See, e.g., In re K-Dur Antitrust Litig., 686 F.3d 197 (3d Cir. 2012)*; *In re Cardizem CD Antitrust Litig., 332 F.3d 896 (6th Cir. 2003)*. The Supreme Court in *Actavis*, abrogating those decisions, said "sometimes."

2. *The Actavis Decision*

The facts of *Actavis* in most essentials follow the discussion above: Solvay Pharmaceuticals filed a New Drug Application for a brand-name drug, obtained approval, and later a patent. Actavis, Inc. (among others) filed an Abbreviated New Drug Application for a generic equivalent and certified under Paragraph IV that Solvay's patent was invalid and the proposed generic would not infringe it. Solvay responded with litigation, which later settled, and the terms of the settlement guaranteed Actavis millions of dollars in annual payments from Solvay and allowed it to bring its generic to market at some time before the disputed patent expired, but not immediately. Actavis also agreed to provide some services, such as promoting the brand-name drug, and the companies described the payments as compensation for those services. **[**20]** The FTC sued, alleging that the services had little value and that the purpose of the payments was to compensate a would-be competitor for agreeing to delay competition. The district court held that the FTC failed to set forth an antitrust violation, *In re Androgel Antitrust Litigation (No. II), 687 F. Supp. 2d 1371, 1379 (N.D. Ga. 2010)*, and the Eleventh Circuit affirmed, writing that "absent sham litigation or fraud in obtaining the patent, a reverse payment settlement is immune from antitrust attack so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent."*FTC v. Watson Pharmaceuticals, Inc., 677 F.3d 1298, 1312 (11th Cir. 2012)*.

In a 5—3 opinion, the Supreme Court reversed the Eleventh Circuit, holding that such settlement agreements "can sometimes violate the antitrust laws," *Actavis, 133 S. Ct. at 2227*, and that the plaintiff "should have been given the opportunity to prove its antitrust claim." *Id. at 2234*. The Court reasoned that referring "simply to what the holder of a valid patent could do does not by itself answer the antitrust question," because *invalidated* patents confer no right to exclude competition, and the Paragraph IV certification "put the patent's validity at issue, as well as its actual preclusive scope." *Id. at 2230—31*. It cited legislative history from prior to the enactment of the 2003 amendments—specifically, statements **[**21]** of Senator Hatch and Representative Waxman—that clearly condemns reverse-payment settlements, and went on to conclude that "a reverse payment, where large and unjustified, can bring with it the risk of significant anticompetitive effects." *Id. at 2237*. It declined to adopt the "quick look" approach, which would make such settlements presumptively illegal, because "the likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification." *Id*. The Court instead adopted the "rule of reason" approach, but as for more specific guidance on how to analyze "the basic question—that of the presence of significant unjustified anticompetitive consequences," the Court "leave[s] to the lower courts the structuring of the present rule-of-reason antitrust litigation." *Id. at 2238*.

Several district courts have already applied *Actavis*, with not entirely consistent results. *See King Drug Co. of Florence v. Cephalon, Inc., No. 2:06-CV-1797, 88 F. Supp. 3d 402, 2015 U.S. Dist. LEXIS 9545, 2015 WL 356913 (E.D. Pa. Jan. 28, 2015)*; **[*236]** *United Food & Commercial Workers Local 1776 & Participating Emp'rs Health & Welfare Fund v. Teikoku Pharma USA, Inc., No. 14-MD-02521-WHO, 74 F. Supp. 3d 1052, 2014 U.S. Dist. LEXIS 161069, 2014 WL 6465235 (N.D. Cal. Nov. 17, 2014)*; **[**22]** *In re Effexor XR Antitrust Litig., No. CIV. 11-5479 PGS, 2014 U.S. Dist. LEXIS 142206, 2014 WL 4988410 (D.N.J. Oct. 6, 2014)*; *In re Niaspan Antitrust Litig., 42 F. Supp. 3d 735, 2014 WL 4403848 (E.D. Pa. 2014)*; *In re Loestrin 24 Fe Antitrust Litig., No. 1:13-MD-2472-S-PAS, 45 F. Supp. 3d 180, 2014 U.S. Dist. LEXIS 123322, 2014 WL 4368924 (D.R.I. Sept. 4, 2014)*; *In re Lamictal Direct Purchaser Antitrust Litig., 18 F. Supp. 3d 560, 2014 WL 282755 (D.N.J. 2014)*; *In re Nexium (Esomeprazole) Antitrust Litig., 968 F. Supp. 2d 367 (D. Mass. 2013)*; *In re Lipitor Antitrust Litig., No. 3:12-CV-2389 PGS, 2013 U.S. Dist. LEXIS 126468, 2013 WL 4780496 (D.N.J. Sept. 5, 2013)*. As of the date of this writing, at least one case applying *Actavis* has been argued before a federal Court of Appeals—*In re Lamictal* was argued at the Third Circuit in November 2014—but none of the circuits has yet issued an opinion interpreting it. There are some questions that arise in the application of *Actavis* that the district courts may answer in divergent ways—questions like what constitutes a reverse "payment," and what makes one "large" and "unjustified." Some of those questions will surely end up in the Courts of Appeals, and perhaps eventually back again at the Supreme Court. As one of the courts above observed, "[w]e are confronting this issue early in a law refinement process that will take some time to shake out." *In re Loestrin 24 Fe Antitrust Litig., 2014 U.S. Dist. LEXIS 123322, 2014 WL 4368924, at *13*.

3. *Aggrenox*

The facts of the Aggrenox litigation, as they appear in the pleadings, are virtually identical in essential respects to **[**23]** those of *Actavis*. Aggrenox is a brand-name prescription medication consisting of a particular combination of dipyridamole and aspirin. In January 2000, Boehringer obtained U.S. Patent No. 6,015,577 on the composition ("the '577 patent"), after having obtained FDA approval in November 1999 for its use to lower the risk of stroke in patients who have already had a stroke or transient ischemic attack. Boehringer listed the patent with the FDA and brought Aggrenox to market, where it has been a commercial success.

In January 2007—ten years before patent '577 is set to expire—Barr filed an Abbreviated New Drug Application seeking approval to market a generic equivalent of Aggrenox, with Paragraph IV certification challenging the '577 patent. Boehringer brought suit in the District of Delaware. At the same time, Barr also intended to introduce a generic of another Boehringer product, Mirapex, and separate litigation on that issue was pending in the District of Delaware. In August 2008, Boehringer and Barr settled all patent litigation between them, with respect to both Aggrenox and Mirapex. They contemporaneously entered a settlement agreement, an Aggrenox license, a Mirapex license, and a Co-Promotion Agreement. Among other things, Barr agreed **[**24]** to drop its patent challenge and not market generic Aggrenox until July 2015 (eighteen months prior to the expiration of the patent), and that Duramed (a Barr subsidiary) would use its specialized sales force to educate obstetricians and gynecologists about Aggrenox. Barr would be compensated based on several factors, including net sales of Aggrenox, regardless of whether its co-promotion generated any additional sales (the FTC estimated that the deal would cost Boehringer over $120 million in royalties). The agreements were announced publicly in a press release. The FTC commenced an inquiry in January 2009, which is apparently ongoing.

In August 2009, at least some of the same parties and lawyers in the present **[*237]** litigation brought suit against Boehringer in the Western District of Pennsylvania, alleging that the 2008 settlement was intended to delay entry of generic Mirapex in violation of ***antitrust law***. When the Federal Circuit upheld the validity of the Mirapex patent, the plaintiffs in that case dropped their suit. In 2013, the various suits consolidated here began to be filed, now alleging that the 2008 settlement was intended to delay entry of generic Aggrenox in violation of ***antitrust*** **[**25]** ***law***.

B. Federal Antitrust Claims

1. *Statute of Limitations*

The defendants argue in all of their motions to dismiss (most extensively in their motion to dismiss the direct-purchaser complaint, and that discussion is incorporated by reference in the other motions) that the 2013 claims are time-barred. There is no dispute that ***HN4***[] the statute of limitations for Sherman Act claims is four years from when "the cause of action accrued," *15 U.S.C. § 15b*, and that an antitrust cause of action generally accrues "when a defendant *commits* an act that *injures* a plaintiff's business," *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)* (emphasis added), but the parties differently emphasize the commission of the act itself and the consummation of the act in an injury, taking different positions on the applicability of *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979)*.

The defendants offer two possibilities: the claims accrued in August 2008, when the Aggrenox settlement was reached and publicly announced; or in August 2009, when the FDA approved Barr's Abbreviated New Drug Application for a generic equivalent to Aggrenox. If the defendants committed some discrete anticompetitive act, then surely—as the complaints allege—it was the 2008 agreement. If injury was only speculative at that date, because Barr did not yet **[**26]** have approval to begin production of the generic, then surely it would become real in August 2009 when that approval was obtained. Both dates put the November 2013 filing of the first direct-purchaser complaint outside of the four-year window. The defendants also argue that the end of the automatic 30-month stay of FDA approval of a generic that was triggered by the filing of Boehringer's infringement suit—though falling just within four years of the filing of the first complaint—should not be taken as the accrual date. They argue that under the plaintiffs' theory of the case (at least as the defendants understand it), the invalidity of Boehringer's patent would have been determined in court (and the avoidance of this inevitability was the motivation for the settlement), and thus the stay would have ended prior to the 30-month period. The plaintiffs cannot be permitted, the defendants insist, to argue for an earlier date when arguing that the settlement caused the specific harm of delayed entry of a generic, but to argue for a later date for purposes of the statute of limitations.

The plaintiffs, however, believe the defendants are attempting to dodge *Berkey Photo*, which distinguishes **[**27]** injured rivals from injured purchasers in antitrust actions. "Although the business of a monopolist's rival may be injured at the time the anticompetitive conduct occurs," the Second Circuit reasoned, "a purchaser, by contrast, is not harmed until the monopolist actually exercises its illicit power to extract an excessive price. . . . So long as a monopolist continues to use the power it has gained illicitly to overcharge its customers, it has no claim on the repose that a statute of limitations is intended to provide. . . . The purchaser's cause of action, therefore, accrues only on the date damages **[*238]** are suffered . . . ." *603 F.2d at 295* (internal quotation marks omitted).

The defendants argue that *Berkey Photo* does not apply, because its analysis relied on circumstances in which plaintiffs might not yet have reason to believe they were injured within the limitations period. The case as they see it therefore stands for a narrow "speculative damages" exception, and more expansive language is mere dicta. Moreover, the defendants insist, this case and others that the plaintiffs cite rely on *ongoing* instances of discrete anticompetitive conduct within the limitations period, not merely carrying out the **[**28]** terms of an earlier agreement. They argue that the Second Circuit has distinguished between the new and independent acts needed to maintain a conspiracy and inertial consequences flowing from a discrete act. The defendants rely most heavily on *United States v. Grimm, 738 F.3d 498 (2d Cir. 2013)*, a criminal case dismissing a conspiracy-to-commit-wire-fraud indictment on grounds of a lapsed limitations period. The defendants also cite various other cases in addition to *Grimm* for the proposition that courts in the Second Circuit very strongly disfavor the "continuing violation" doctrine, and for the narrowness of the exception that the doctrine purportedly represents. *See, e.g., Pressley v. City of N.Y., 2013 U.S. Dist. LEXIS 5374, 2013 WL 145747 (E.D.N.Y. Jan. 14, 2013)*; *Trinidad v. N.Y. City Dept. of Corr., 423 F. Supp. 2d 151 (S.D.N.Y. 2006)*; *In re Ciprofloxacin Hydrochloride Antitrust Litig., 261 F. Supp. 2d 188 (E.D.N.Y. 2003)*; *Schultz v. Texaco Inc., 127 F. Supp. 2d 443 (S.D.N.Y. 2001)*. But the cited decisions are either not antitrust cases, or they do not examine the issue pertinent here of purchasers alleging ongoing overcharges. None of them abrogates or otherwise casts doubt on the authority or reasoning of *Berkey Photo*, and none of them so squarely meets the allegations in this case as *Berkey Photo* does.

The defendants are correct that the *Berkey Photo* Court discusses speculative damages and the potential of anticompetitive conduct to harm even businesses that do not yet exist at the time of the conduct. It is inaccurate, however, **[**29]** to suggest that the court used any such limiting language in its holding, or that the plaintiffs have misplaced reliance on its dicta. On the contrary, cutting through any dispute about what is and is not mere dictum, the court expressly flags its holding: "We hold, therefore, that ***HN5***[] a purchaser suing a monopolist for overcharges paid within the previous four years may satisfy the conduct prerequisite to recovery by pointing to anticompetitive actions taken before the limitations period." *603 F.2d at 296*. That is precisely the scenario that the plaintiffs allege. They allege, in fact, not just overcharges paid within the previous four years, but overcharges that are ongoing. Even if, as defendants argue, the prerequisite anticompetitive conduct occurred wholly outside of the four-year limitations period, the plaintiffs' claims still fall clearly and squarely under the holding of *Berkey Photo*.

Courts in other districts and circuits have used the same reasoning applied in *Berkey Photo*—a purchaser suing a monopolist for overcharges is injured anew by each overcharge—and have come to the same result. *See, e.g., In re Niaspan Antitrust Litig., 42 F. Supp. 3d 735, 2014 WL 4403848, at *7 (E.D. Pa. Sept. 5, 2014)* ("Every court to have considered this issue in the pay-for-delay context has held that a new **[**30]** cause of action accrues to purchasers upon each overpriced sale of the drug.") (*citing In re K-Dur Antitrust Litig., 338 F. Supp. 2d 517, 549 (D.N.J. 2004)* ("Plaintiffs' claims are not barred by the statute of limitations to the extent that they bought and overpaid for K—Dur within the applicable time limitations."); **[*239]** *In re Buspirone Patent Litig., 185 F. Supp. 2d 363, 378 (S.D.N.Y. 2002)* ("[I]f a party commits an initial unlawful act that allows it to maintain market control and overcharge purchasers for a period longer than four years, purchasers maintain a right of action for any overcharges paid within the four years prior to their filings."); *In re Skelaxin (Metaxalone) Antitrust Litig., No. 12-md-2343, 2013 U.S. Dist. LEXIS 70968, 2013 WL 2181185 (E.D. Tenn. May 20, 2013)* (holding that the plaintiffs' claims were timely because they were "overcharged for metaxalone well into the limitations period")).

I conclude that the federal antitrust claims are timely for all overcharges alleged to have been incurred within the four years preceding the filing of the claims.

2. *Antitrust Injury Under Actavis*

The defendants argue that the plaintiffs do not plausibly allege antitrust injury, because any injury at all is predicated upon the assumption that Barr would have prevailed in its patent challenge, and because the plaintiffs make only the conclusory allegation that the patent was weak. The **[**31]** plaintiffs, they say, simply make no allegation meeting the plausibility standard on a motion to dismiss that the '577 patent would have been found invalid, or that a generic would have been introduced "at-risk," if only the defendants had not entered into the challenged settlement agreement. There is thus no plausible allegation of actual injury, the argument goes, because there is no plausible allegation of actual delay of the entry of a generic. That argument, however logically compelling it might be in isolation, fails to engage seriously with the Supreme Court's reasoning in *Actavis*, which poses an insurmountable obstacle to it.

The essential problem with the divergent rules for the treatment of reverse-payment patent-litigation settlements before *Actavis* is that they made (likely unjustifiable) presumptions about the validity of the underlying patents, which was the very issue disputed in the underlying patent litigation. Under the old "scope of the patent" test, which was rejected in *Actavis*, any settlement less restrictive than the patent was immune from antitrust scrutiny. But "to refer . . . simply to what the holder of a valid patent could do does not by itself answer the antitrust **[**32]** question," the Court held, because the patent "may or may not be valid, and may or may not be infringed. A *valid* patent excludes all except its owner from the use of the protected process or product . . . . But an *invalidated* patent carries with it no such right." *Actavis, 133 S. Ct. at 2230—31* (internal quotations and citation omitted). The patent's validity was precisely the disputed issue in the litigation, and the settlement ended that litigation. Taking the patent's exclusionary scope as the baseline does indeed make procompetitive any settlement that reflects any lesser exclusion; but that baseline presumes the validity of the patent. The opposite presumption—taking the invalidity of the patent as the baseline—would make any period of excluded competition that is agreed to in a settlement, no matter how much shorter than the patent's period of exclusion, necessarily anticompetitive. Both presumptions are impermissible.

The defendants, by expecting the plaintiffs to plead with specificity reasons to infer that the '577 patent would ultimately have been invalidated, appear to presume that the Supreme Court in *Actavis* favored a rule that required litigating the patent's merits, at least in some abbreviated fashion, **[**33]** in order to determine whether a settlement violates ***antitrust law***. That would be a logical (however impractical) way to avoid presuming either the patent's validity **[*240]** or invalidity, but the Supreme Court expressly disclaimed it:

> [I]t is normally not necessary to litigate patent validity to answer the antitrust question . . . . An unexplained large reverse payment itself would normally suggest that the patentee has serious doubts about the patent's survival. And that fact, in turn, suggests that the payment's objective is to maintain supracompetitive prices to be shared among the patentee and the challenger rather than face what might have been a competitive market—the very anticompetitive consequence that underlies the claim of antitrust unlawfulness.

Id. at 2236. The "unexplained large reverse payment" serves as a proxy for the weakness of the patent, which thus need not be proved (or pleaded) directly. Moreover, the Court identified the pertinent "anticompetitive consequence," which does not appear to depend on the conclusive invalidity of the patent. The antecedent of the appositive clause identifying the anticompetitive consequence contains a telling subjunctive: "to maintain supracompetitive prices **[**34]** to be shared among the patentee and the challenger rather than face what *might have been* a competitive market" (emphasis added). The Court was still clearer a few sentences later:

> The owner of a particularly valuable patent might contend, of course, that even a small risk of invalidity justifies a large payment. But, be that as it may, the payment (if otherwise unexplained) likely *seeks to prevent the risk*

> of competition. And, as we have said, *that consequence constitutes the relevant anticompetitive harm*. In a word, the size of the unexplained reverse payment can provide a workable surrogate for a patent's weakness, all without forcing a court to conduct a detailed exploration of the validity of the patent itself.

Id. at 2236—37 (emphasis added). The anticompetitive harm is *not* that the patent surely would have been invalidated if not for the settlement, and that a generic therefore surely would have entered the market sooner; if that were the anticompetitive harm, a determination of a patent settlement's lawfulness under ***antitrust law*** would require the very same patent litigation that the settlement avoided. The anticompetitive harm, under *Actavis*, is that the reverse-payment settlement "seeks **[**35]** to *prevent the risk* of competition" (emphasis added). The plaintiffs thus need not plead (or prove) the weakness of the '577 patent, because the patent's ultimate validity is not at issue. Rather, they must plead facts sufficient to infer (and they must ultimately prove, within the rule-of-reason framework) that a large and otherwise unjustified reverse-payment was made as part of the settlement in order to shore up some perceived *risk* of the '577 patent's invalidity.

The rule of *Actavis* might seem unusual or counterintuitive given the typical settlement context. The value of a lawsuit is traditionally estimated as the expected value of judgment multiplied by the probability of liability, less litigation costs. The probabilities are of course always rough estimates, but the parties evaluate the favorability of potential settlements by their respective estimation of risk and the allocation of that value between them. In the Hatch-Waxman context, however, where litigation was provoked by Paragraph IV certification (and production of allegedly infringing product need not have begun), there may be no actual damages, and the adverse outcome for the patent-holder is measured not by the size of a potential judgment **[**36]** but by the forgone monopoly profits in the event of patent invalidation. Any settlement that takes the risk of patent invalidation into account will tacitly reflect the value of continuing the patent **[*241]** monopoly. Of course it will generally be in the interest of both patent-holder and patent-challenger to share the monopoly profits rather than compete:

> Indeed, there are indications that patentees sometimes pay a generic challenger a sum even larger than what the generic would gain in profits if it won the paragraph IV litigation and entered the market. The rationale behind a payment of this size cannot in every case be supported by traditional settlement considerations. The payment may instead provide strong evidence that the patentee seeks to induce the generic challenger to abandon its claim with a share of its monopoly profits that would otherwise be lost in the competitive market.

Id. at 2235 (citation omitted). In such cases, the *ex ante* probability of patent invalidation will factor only into the allocation of monopoly profits between patent-holder and patent-challenger, while the consumer bears the cost of monopoly prices irrespective of the patent's strength or weakness.

Of course, the *actual* ***[**37]*** expected cost of litigation for the patent-holder necessarily includes the risk of invalidation and forgone monopoly profits, whether or not that is a permissible settlement consideration. It is thus no surprise if pre-*Actavis* settlements in the Hatch-Waxman context frequently included large payments flowing from patent-holders to patent-challengers (that is, large "reverse" payments), and we might therefore expect *Actavis* to discourage many patent settlements, especially where the patent in question is very valuable. That may impose a cost on the judicial system, which, as the Supreme Court acknowledged in *Actavis*, prefers "a general legal policy favoring the settlement of disputes," *id. at 2234*, but it is consistent with what the Court observed were the purposes of the Hatch-Waxman Act and Paragraph IV certification. *Id*. (observing "the general procompetitive thrust of the statute," and "its specific provisions facilitating challenges to a patent's validity").

In sum, though the defendants are correct that the several complaints in the present case plead relatively bare allegations of the '577 patent's vulnerability and the hypothetical earlier entry of a generic if not for the settlement agreement, **[**38]** the sparsity of those allegations does not fatally undermine the claims of antitrust injury under *Actavis*. The salient question is not whether the fully-litigated patent would ultimately be found valid or invalid—that may never be known—but whether the settlement included a large and unjustified reverse payment leading to the inference of profit-sharing to avoid the risk of competition.

3. *"Large" and "Unjustified" Reverse "Payment" Under Actavis*

In *Actavis*, a brand-name manufacturer and a generic manufacturer settled a lawsuit provoked by Paragraph IV certification, and the settlement terms required the generic manufacturer to drop the patent challenge and provide promotional services for the brand-name drug. In exchange, the generic manufacturer received large payments and an entry date for the competing generic that was not immediate but still earlier than the expiration of the patent. The subsequent antitrust complaint alleged that the services were mere pretext for the payment, which was in truth a payment to delay competition. Nearly identical allegations are presented here. The Court in *Actavis* held that large and unjustified reverse payments bring with them the risk of significant **[**39]** anticompetitive effects, that the plaintiffs should have been allowed to present their antitrust case, and that rule-of-reason analysis should be applied, but it did not **[*242]** discuss in any detail whether or why the reverse payment alleged in that case was "large" or "unjustified." District courts applying *Actavis* have thus had relatively little guidance on the question of what constitutes a "large" and "unjustified" reverse payment, and have diverged even on the issue of what constitutes "payment." The defendants here dispute the plaintiffs' characterization of their settlement agreement on all three grounds. The disputed "agreement" was in fact a complicated transaction involving a series of agreements settling separate litigation over two drug patents, and the defendants argue that nothing in any of it constitutes a reverse payment, but only compensation for services; and that even if some part of it does constitute a reverse payment, it is neither large nor unjustified.

The defendants emphasize that every settlement necessarily involves consideration on both sides, and that it therefore cannot be the case that a "reverse payment" of the sort contemplated in *Actavis* is present merely **[**40]** because an alleged patent infringer may be said to have received consideration as part of a settlement. That is doubtless correct—even a promise to stop litigating has value and may constitute consideration in a settlement agreement—but the defendants go altogether too far the other way in their attempt to read a maximally restrictive sense of "payment" into the *Actavis* decision. They make much of the fact that *Actavis* contains repeated examples and references to payments of money, and not to payments of some other form of consideration, and they dispute whether "payment" under *Actavis* comprises transfers of value in any form other than cash. As of the date of this writing, two courts have agreed with that view, *see* *In re Loestrin 24 Fe Antitrust Litig., No. 1:13-MD-2472-S-PAS, 2014 U.S. Dist. LEXIS 123322, 2014 WL 4368924 (D.R.I. Sept. 4, 2014)*; *In re Lamictal Direct Purchaser Antitrust Litig., 18 F. Supp. 3d 560, 2014 WL 282755 (D.N.J. Jan. 24, 2014)*, though one of them did so with "significant reservations" and called that conclusion "vexing." *In re Loestrin, 2014 U.S. Dist. LEXIS 123322, 2014 WL 4368924, at *11*. A majority of courts to have examined the issue take the opposite position, that "payment" is not limited to cash transfers. *See, e.g.,* *United Food & Commercial Workers Local 1776 & Participating Emp'rs Health & Welfare Fund v. Teikoku Pharma USA, Inc., No. 14-MD-02521-WHO, 2014 U.S. Dist. LEXIS 161069, 2014 WL 6465235 (N.D. Cal. Nov. 17, 2014)*; **[**41]** *In re Effexor XR Antitrust Litig., No. CIV. 11-5479 PGS, 2014 U.S. Dist. LEXIS 142206, 2014 WL 4988410 (D.N.J. Oct. 6, 2014)*; *In re Niaspan Antitrust Litig., 42 F. Supp. 3d 735, 2014 WL 4403848 (E.D. Pa. Sept. 5, 2014)*; *In re Nexium (Esomeprazole) Antitrust Litig., 968 F. Supp. 2d 367 (D. Mass. 2013)*. I must agree with the latter group.

Black's Law Dictionary defines "payment" as the "[p]erformance of an obligation by the delivery of money *or some other valuable thing* accepted in partial or full discharge of the obligation." (10th ed. 2014) (emphasis added). The Oxford English Dictionary defines it as a "sum of money (*or equivalent*) paid or payable, esp. in return for goods or services or in discharge of a debt." (3d ed. 2005) (emphasis added). Those definitions quite sensibly recognize the substitutability of value, because the distinction between transfers of money and transfers of things that are worth money is, in the words of the *Actavis* dissent, "a distinction without a difference." *Actavis, 133 S. Ct. at 2243* (Roberts, C.J., dissenting). Indeed, if antitrust scrutiny can be avoided simply by making one's large and unjustifiable reverse-payment settlement in gold bullion rather than dollars, then *Actavis* stands for nothing but an arbitrary restriction on the form such payments can take. To read the decision that way is to cabin its reasoning to the point of meaninglessness. I must conclude that ***HN6***[] large and unjustified **[**42]** **[*243]** reverse payments that "can bring with [them] the risk of significant anticompetitive effects," *id. at 2237* (majority opinion), can bring those effects regardless of the particular form the transfer of value takes and thus are not limited to cash payments. A settlement agreement may be very simple or tremendously complex, and it may involve all manner of consideration; and if, when viewed holistically, it effects a large and unexplained net transfer of value from the patent-holder to the alleged patent-infringer, it may fairly be called a reverse-payment settlement. Such a settlement, under *Actavis*, is not *ipso facto* unlawful: the parties to the settlement might be able to explain the apparent "missing" value for the patent-holder in a procompetitive way—and they will have an opportunity to do so under the rule-of-reason framework—in which case the reverse payment may turn out to be justified, or to be entirely illusory. But if otherwise unexplained, it "likely seeks to prevent the risk of competition. And . . . that consequence constitutes the relevant anticompetitive harm." *Id. at 2236*.

HN7[] Under *Actavis*, "the likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, **[**43]** its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification." *Id. at 2237*. The plaintiffs here allege that the reverse payment was quite large, including a $4 million upfront cash payment and approximately $120 million in guaranteed royalties over time even in the absence of co-promotion efforts—and that being in addition to the up-to-$2.5 million per year of payments for those co-promotion efforts, which the plaintiffs also suggest exceeds the value of the services. The defendants argue that even those sums are small in relation to the value of the patent. That relation, by the logic of *Actavis*, may suggest confidence in the patent, but it does not mean that the alleged reverse payment is not "large." On the contrary, as the Supreme Court suggested in *Actavis, id. at 2236—37*, a patent-holder who has a high degree of confidence in a patent's strength may nevertheless be willing to share some portion of the monopoly profits in order to avoid even a small risk of invalidation if the patent is especially valuable, and even a small portion of the profits on an especially **[**44]** valuable patent might indeed be quite large in absolute terms. I agree with the defendants that ***HN8***[] payments smaller than avoided litigation costs are presumptively not large and unexplained under *Actavis*, and represent a *de facto* safe harbor, and also that payments exceeding avoided litigation costs are not automatically deemed unlawful for that reason alone. Even if the payments exceed avoided litigation costs, the *Actavis* factors—the size of the payments, their scale in relation to litigation costs, their independence from other services for which they might be fair consideration, and any other convincing justification—still matter. But I cannot conclude that the size of the reverse payments in relation to the anticipated value of the patent is dispositive of the lawfulness of the agreement. Large reverse payments that are not particularly large in relation to the value of the patent may show confidence in the patent, but if they represent payment *to avoid the risk of invalidation*, then they still run afoul of *Actavis*.

The plaintiffs allege that the total payment is far greater than the fair value of the services falling under the Co-Promotion Agreement, and therefore constitutes a large **[**45]** and unjustifiable reverse payment, which they allege is especially clear since payment is guaranteed even without the generation of additional sales. They **[*244]** also allege that Boehringer agreed not to launch its own "authorized generic" during Barr's 180-day exclusivity period under the Hatch-Waxman Act, which further enlarged the reverse payment by constituting an additional unexplained transfer of value to Barr. The defendants dispute those allegations, and the sufficiency of the pleading, with several arguments: They argue that the Co-Promotion Agreement, as part of a complex transaction that settled litigation over two drugs, was somehow separate from the Aggrenox settlement, and that the plaintiffs have failed to sufficiently plead that it was made as consideration for that settlement (or they cannot so plead) because they argued in prior litigation that it was made as consideration for delaying generic entry of the other drug. They argue that the plaintiffs fail to plead with sufficient specificity the fair value of the services, the excess of the payments over that value, or in some other way the total value of the alleged reverse payment. And they argue that any agreement not to **[**46]** introduce an authorized generic should not be considered part of a reverse payment because exclusive licenses are authorized by the Patent Act and are the kind of traditional form of settlement that *Actavis* permits, or because they only result in "payment" in the form of affirmative sales, or because they are otherwise procompetitive insofar as they represent an increase in competition compared to what competition otherwise would have been under the patent. I find none of those arguments persuasive.

First, and quite notably, the defendants do not agree among themselves whether the challenged settlement agreement actually does prevent Boehringer from introducing an authorized generic: by Boehringer's interpretation, it does not; but by Barr's reckoning it does. That disagreement is consonant with the plaintiffs' theory: Barr (the alleged infringer, and would-be generic manufacturer) sees a "no—authorized generic" agreement as a thing of value it received in the settlement and wishes to preserve it in this litigation, while Boehringer (the patent-holder and brand-name manufacturer) sees such an agreement as a cost it prefers not to incur and would happily disclaim. I need not determine **[**47]** now who is correct by ruling on the construction of the agreement, but the plaintiffs allege that there is such a provision and that it is very valuable, and at least on the latter point the defendants clearly agree.

The defendants are correct that the plaintiffs have not attempted to assign dollar values with significant precision or very obvious methodological justification to the various provisions of the settlement, and that is among the stronger of the defendants' arguments. Some other courts interpreting *Actavis*, while holding that reverse "payments" are not limited to cash transfers, have observed the importance of the court's ability to calculate the value of any nonmonetary payments or have held that pleading an estimate of the total monetary value and a reliable foundation for that value are necessary to establish the plausibility required by *Rule 12(b)(6)*. *See, e.g., In re Effexor XR Antitrust Litig., No. 3:11-CV-5479 PGS, 2014 U.S. Dist. LEXIS 142206, 2014 WL 4988410 (D.N.J. Oct. 6, 2014)*; *In re Lipitor Antitrust Litig., No. 3:12-CV-2389 PGS, 46 F. Supp. 3d 523, 2014 U.S. Dist. LEXIS 127877, 2014 WL 4543502 (D.N.J. Sept. 12, 2014)*. While I share the concerns expressed by those courts, it is also clear that very precise and particularized estimates of fair value and anticipated litigation costs may require evidence in the exclusive possession of the defendants, **[**48]** as well as expert analysis, and that these issues are sufficiently factual to require discovery. I cannot conclude simply from the absence of precise figures that the pleadings represent formulaic recitations of elements and allegations that fail to rise **[*245]** above the speculative; on the contrary, the complaints make specific allegations about the terms of the settlement and their relative value that are plausible on their face. Whether the plaintiffs can substantiate those allegations may be an issue for summary judgment or trial, but for purposes of the motions to dismiss, I must accept the allegations as true and draw all reasonable inferences in the plaintiffs' favor. While doing that, I cannot conclude that the plaintiffs fail to sufficiently plead a large and unjustified reverse payment.

Nor are the allegations of a large and unjustified reverse payment undermined by the permissibility of exclusive licensing under the Patent Act or in settlements generally. The defendants are surely correct that patent holders may legally grant exclusive licenses and that the particular restraint on competition such agreements represent is an exception to antitrust prohibition and expressly permissible **[**49]** by statute. That is not disputed. But such licenses can be worth money, and granting them can thus be the equivalent of transferring money. If some particular transfer of money would be unlawful—for whatever reason—its unlawfulness is not cured merely because the value is transferred in the form of exclusive licenses instead of cash, irrespective of whether the grant of an exclusive license would otherwise be valid. The statutory authority to grant exclusive licenses no more immunizes reverse-payment settlements that include them from antitrust scrutiny under *Actavis* than the statutory authority to use cash as legal tender immunizes reverse-payment settlements made in cash from such scrutiny. The issue is not whether the *form* of the payment was legal, but whether the *purpose* of the payment was legal. The plaintiffs do not appear to allege that "no—authorized generic" agreements are *per se* unlawful, nor that any individual feature of the settlement agreement would have necessarily constituted an antitrust violation as part of some other agreement. Rather, they allege that Boehringer gave much more than it got in the settlement agreement; and under *Actavis*, that can constitute an antitrust **[**50]** violation if it did so in order to avoid the risk of patent invalidation.

It may also be true that granting an exclusive licensing agreement is procompetitive relative to not granting it, but the anticompetitive harm described in *Actavis* is not measured by the exclusionary scope of the patent—that test was explicitly rejected. The question is whether a large and unjustifiable reverse payment was made in order to avoid the risk of patent invalidation. If a settlement that grants an exclusive license violates the rule of *Actavis*, it is not saved by comparison to the exclusionary scope of the unlicensed patent, or by the licensing arrangement being more competitive than a settlement agreement that lacked one.

HN9[] Rule-of-reason analysis proceeds in three steps:

> First, the plaintiff bears the initial burden of showing that the defendant's conduct had an actual adverse effect on competition as a whole in the relevant market. If plaintiff satisfies this burden, the burden then shifts to defendant to offer evidence that its conduct had procompetitive effects. If defendant is able to offer such proof, the burden shifts back to plaintiff, who must prove that any legitimate competitive effects could **[**51]** have been achieved through less restrictive alternatives.

Ark. Carpenters Health & Welfare Fund v. Bayer AG, 604 F.3d 98, 104 (2d Cir. 2010) (internal quotations and citations omitted). In the present context of a motion to dismiss, the plaintiffs need only allege plausible facts that, if true, raise a reasonable **[*246]** expectation that discovery will reveal sufficient evidence to prove their prima facie case. Under the treatment of reverse-payment settlements in *Actavis*, they have done so.

4. *Monopoly Power*

The defendants argue that the plaintiffs fail to state a claim because they do not sufficiently define a relevant product market, and the single-product market of Aggrenox alone (or of Aggrenox and potential generics) is overly narrow. Because Aggrenox is prescribed to reduce the risk of stroke, they suggest Plavix—an FDA-approved antiplatelet therapy—as an example of a pharmaceutical that shares the market with Aggrenox. The presence of that drug, they argue, means that the defendants could maintain a monopoly on Aggrenox alone without having monopoly power within a market sufficient to be governed by the Sherman Act. The plaintiffs contend that a market of Aggrenox and Aggrenox generics is sufficiently defined, and moreover that they need not define a market, because **[**52]** they plead actual detrimental effects, for which market power is merely a surrogate.

HN10[] Monopoly power is a necessary element of Sherman Act claims, *United States v. Grinnell Corp., 384 U.S. 563, 570, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*, and the Supreme court has defined that power as "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. The plaintiffs are correct, however, that when direct evidence is available that a party profitably charges supracompetitive prices, the existence of market power can be established from that fact alone. *Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 97-98 (2d Cir. 1998)* ("Monopoly power, also referred to as market power, is the power to control prices or exclude competition. It may be proven directly by evidence of the control of prices or the exclusion of competition or it may be inferred from one firm's large percentage share of the relevant market.").

The market for prescription pharmaceuticals is an unusual one, in part because consumers are typically insulated at least to some degree from both cost (which is often largely covered by an insurance plan) and choice (which is at least limited and more likely substantially directed by the prescribing physician), so market features such as cost-sensitivity and elasticity of demand might therefore defy reasonable expectations. It is nevertheless true ***HN11***[] in **[**53]** antitrust analysis that "as a general rule, the process of defining the relevant product market requires consideration of cross-elasticity of demand," *Hayden Pub. Co. v. Cox Broad. Corp., 730 F.2d 64, 71 (2d Cir. 1984)*, because the boundaries of a particular product market are determined by "the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Chapman v. New York State Div. for Youth, 546 F.3d 230, 237 (2d Cir. 2008)*. The plaintiffs allege that there is no such cross-elasticity of demand between Aggrenox and other drugs sufficient to define any broader antitrust market, and that because Boehringer is able to charge supracompetitive prices for Aggrenox without losing sales, it does not share a market defined by interchangeability. That is clearly a fact-intensive inquiry, and for that reason "courts hesitate to grant motions to dismiss for failure to plead a relevant product market." *Todd v. Exxon Corp., 275 F.3d 191, 199—200 (2d Cir. 2001)*; *see also* *Hayden Pub. Co. v. Cox Broad. Corp., 730 F.2d 64, 70 n.8 (2d Cir. 1984)* ("It frequently has been observed that a pronouncement as to market definition is not **[*247]** one of law, but of fact.") (quotation and citation omitted). The Supreme Court has been clear that market definitions can sometimes only be determined "after a factual inquiry into the commercial realities faced by consumers," *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 482, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* (quotation omitted), and that "in some instances **[**54]** one brand of a product can constitute a separate market." *Id*. Perhaps because of the peculiar features of pharmaceutical markets, the Second Circuit has even held that the relevant market can sometimes be limited *to the generic* of a particular drug, excluding the chemically-identical brand-name version. *Geneva Pharms. Tech. Corp. v. Barr Labs., Inc.., 386 F.3d 485, 496-500 (2d Cir. 2004)*.

The plaintiffs' allegations that Boehringer is able to charge supracompetitive prices for Aggrenox in a market with no cross-elasticity of demand with other drugs are highly plausible. If that were not the case, it is not clear why Boehringer would have sued to prevent entry of Barr's generic. The defendants are free to argue otherwise on an eventual summary judgment motion or at trial, but it is premature on a motion to dismiss for the court to make a more probing factual inquiry than that, and the defendants cannot persuasively argue that the complaints should be dismissed for failure to plead monopoly power within a sufficiently defined market.

5. *Attempt and Conspiracy*

Attempt and conspiracy to monopolize under the Sherman Act require specific intent to monopolize, and the defendants argue that the plaintiffs' pleading on intent amounts to mere recitation of the element. The facts **[**55]** as alleged, the defendants argue, merely reflect an effort to enforce a valid patent and later to settle the litigation, which judicial policy favors; and even if the settlement agreement is unlawful under *Actavis*, it was lawful under the Second Circuit "scope of the patent" test that was controlling at the time, so there can have been no unlawful intent. The alleged anticompetitive conduct is described at length above, and I do not recite it again here; but the plaintiffs do plead an anticompetitive scheme in significant detail, as already discussed, and they allege that the scheme was intentional. Moreover, ***HN12***[] it is clearly the law in the Second Circuit that anticompetitive intent can be inferred from anticompetitive conduct. *Volvo North America Corp. v. Men's Int'l. Prof'l Tennis Council, 857 F.2d 55, 74 (2d Cir. 1988)*. The defendants' argument that unlawful intent is precluded by the lawfulness of the agreement under the now-abrogated test used in the Second Circuit at the time the agreement was made is compelling as an argument from basic fairness; but the defendants offer no support for the suggestion that the necessary intent under federal law is intent to monopolize *unlawfully*, rather than merely intent to monopolize (perhaps with a good-faith belief that patent law or **[**56]** some other antitrust exception provided safety from liability). If the settlement included a large and unjustified reverse payment that was made *in order* to avoid the risk of patent invalidation, then antitrust liability may attach under *Actavis*; and that particular anticompetitive harm is necessarily intentional (even if intent is proved by inference). The defendants offer no authority to suggest that that analysis changes because they believed they were acting lawfully at the time under the Second Circuit's rule.

C. State-Law Claims

This case is rendered much more complicated by the rules of *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061,* ***[*248]*** *52 L. Ed. 2d 707 (1977)*, and *California v. ARC America Corp., 490 U.S. 93, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)*. In the former case, the Supreme Court held that only the overcharged direct purchaser, and no one else in the chain of distribution, can recover damages under federal ***antitrust law***; in the latter, the Supreme Court held that that "indirect-purchaser rule" does not prevent indirect purchasers from recovering damages under state antitrust laws where the state laws otherwise allow it (and many states have passed so-called "*Illinois Brick* repealers" in order to do so). Accordingly, the indirect purchaser complaint and the Humana complaint allege very many state-law claims; a few were withdrawn **[**57]** in the opposition memoranda to the defendants' motions to dismiss, but what remains includes claims under the law of nearly every state (and Washington, D.C. and Puerto Rico), including state antitrust claims, consumer-protection claims, and unjust-enrichment claims. The defendants move that all be dismissed, for a variety of reasons that respectively apply to individual claims or to particular subgroups of them.

1. *Statutes of Limitations*

The plaintiffs' theories of liability under the multiplicity of state claims do not significantly differ in substance from the theory underlying the federal claims; the allegedly unlawful conduct is the very same, and the multistate pleading headache appears to be a simple consequence of *Illinois Brick*'s bar on indirect purchaser recovery under the federal ***antitrust law***. The defendants argue that the claims are time-barred, but in most essentials they make common arguments that both state and federal claims are barred—the latter question has already been addressed above—and there is no argument that the analysis of the state statutes of limitations should differ materially from the federal one already discussed. The salient difference is just the number **[**58]** of years: the federal statute of limitations discussed above is four years, and the statutes of limitations under the state laws vary—mostly either three or four years, but some longer and some shorter. The defendants include several pages of tables that helpfully summarize that (and other) information as attachments to their memoranda in support of their motions to dismiss the indirect purchaser and Humana complaints (doc. # 152-1, pp. A-12 to A-16; doc. # 151-1, pp.A-15 to A-18). In the absence of any argument that the legislatures or courts of any particular states reject the reasoning in the *Berkey Photo* analysis above as it would apply to their particular statutes, I conclude that the same reasoning should apply, and that a new claim accrues with each alleged overcharge. Claims are therefore not time-barred that stem from alleged overcharges incurred within the relevant statutory period, whatever that period may be for a particular statute, measured backward from the filing of the claims.

a. Fraudulent Concealment

The indirect purchasers and Humana both initially alleged fraudulent concealment, presumably to reach overcharges otherwise outside the applicable statute of limitations. **[**59]** Partly in light of my ruling in *In re Publication Paper Antitrust Litigation, No. 3:04-md-1631 (SRU), 2005 U.S. Dist. LEXIS 19896, 2005 WL 2175139 (D. Conn. Sept. 6, 2005)*, the indirect purchasers dropped those allegations in their opposition brief (doc. # 182, p. 20 n.29), but Humana did not. Essentially for the reasons discussed in *Publication Paper*, I reject the argument that the statutes of limitations should be tolled because the defendants fraudulently concealed their allegedly unlawful conduct.

[*249] ***HN13***[] "[A]n antitrust plaintiff may prove fraudulent concealment sufficient to toll the running of the statute of limitations if he establishes (1) that the defendant concealed from him the existence of his cause of action, (2) that he remained in ignorance of that cause of action until some point within four years of the commencement of his action, and (3) that his continuing ignorance was not attributable to lack of diligence on his part." *State of New York v. Hendrickson Bros. Inc., 840 F.2d 1065, 1083 (2d Cir. 1988)*. Concealment can be shown in one of two ways: either by demonstrating that the defendant took affirmative steps to prevent discovery of the claim or injury, or by demonstrating that the violation itself was "self-concealing"—that is, by showing that it is the type of violation that by its very nature is designed to appear innocent, **[**60]** essentially establishing fraud-by-omission. *Id. at 1083—84*. As a claim of fraud, the allegations that provide the factual basis for fraudulent concealment must meet *Rule 9(b)*'s heightened pleading standard.

Humana plausibly alleges that the defendants did not publicly disclose the precise terms of the challenged settlement or their associated dollar values—despite overtly publicizing the settlement in more general terms, and despite an FTC investigation and other litigation challenging the agreement—and that Humana did not know it contained a large and unexplained reverse payment. Those allegations do not rise to the level of deliberate concealment, and do not suggest a self-concealing violation; nor has Humana sufficiently pleaded its own diligence. In short, Humana has failed to meet its pleading burden for tolling the statute of limitations. For the reasons discussed above, tolling is unnecessary for claims of alleged overcharges incurred within the relevant statutory period measured backward from the filing date; but any claims for overcharges outside of that window are untimely, and they are dismissed.

2. *Article III Standing*

The defendants argue that all indirect-purchaser claims under the laws of states **[**61]** where the named indirect-purchaser plaintiffs do not allege they incurred overcharges must be dismissed for lack of standing. In making that argument, the defendants rely most heavily on *Mahon v. Ticor Title Ins. Co., 683 F.3d 59 (2d Cir. 2012)*. The indirect purchasers disagree, contending that the defendants confuse Article III standing with "class" standing. They rely most heavily on *Gratz v. Bollinger, 539 U.S. 244, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003)*, and *NECA-IBEW Health and Welfare Fund v. Goldman Sachs & Co., 693 F.3d 145 (2d Cir. 2012)*. Both sides are manifestly mistaken in their assertions that this is a straightforward question with an obvious answer. ***HN14***[] The Supreme Court acknowledged in *Gratz* that when there is "variation" between the claims of named plaintiffs and absent class members, "there is a question whether the relevance of this variation . . . is a matter of Article III standing at all or whether it goes to the propriety of class certification pursuant to *Federal Rule of Civil Procedure 23(a)*," *539 U.S. at 263*, and that "there is tension in our prior cases in this regard." *Id. at 263 n.15*; *see also* *Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp., 632 F.3d 762, 768 (1st Cir. 2011)* ("The issue looks straightforward and one would expect it to be well settled; neither assumption is entirely true.").

The central question on this issue is what sort of "variation" matters. Some kinds of variation are not fatal to Article III standing, and some kinds are. The **[*250]** defendants point out that in virtually all of the cases relied upon **[**62]** by the indirect purchasers, including *Gratz* and *NECA-IBEW*, the variation between the respective claims of named plaintiffs and absent class members is variation of damages or of other facts, but not of the law under which the claims are brought. On the other side, the indirect purchasers point out that the cases relied upon by the defendants examine different and arguably more significant variation in claims than present here, most notably a variation of defendants. The question before the Second Circuit in *Mahon* was whether a plaintiff who alleged she was injured by at least one defendant therefore had Article III standing to pursue claims in a putative class action against *other* defendants she did not allege injured her but who allegedly did injure absent class members (the Court held that she did not). *683 F.3d at 60*. Here, the variation is of quite a different sort. Some of the claims of absent class members are brought under entirely different laws, and the laws of entirely different states, from the claims of the named plaintiffs. Still, the allegedly unlawful conduct is the same, and the different states' laws are versions of the same laws, or are least analogous laws that share essential **[**63]** similarities.

I generally agree with the indirect-purchaser plaintiffs' interpretation of class standing. ***HN15***[] The Second Circuit in *NECA-IBEW* announced a broad standard for class standing, consonant with *Gratz*, that turns on whether the "same set of concerns" is implicated by the defendants' allegedly injurious conduct toward the named plaintiffs and toward the absent class members. The named indirect-purchaser plaintiffs in the present case satisfy that standard, because the "same set of concerns" is implicated by the conduct of the defendants with respect to alleged overcharges incurred by indirect purchasers irrespective of the state of their residence. Still, there is a fundamental analytical distinction between class standing and Article III standing. And Article III standing, as a fundamental constitutional requisite of federal judicial power, presents a "threshold question in every federal case." *Warth v. Seldin, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)*.

The indirect purchasers seem to analyze Article III standing on a case-wide basis. They argue that, once they have sufficiently pleaded that they have suffered harm as a result of unlawful conduct by the defendants, they have Article III standing to bring the case and are then over the threshold constitutional **[**64]** hurdle. Any subsequent claim-by-claim analysis, the argument goes, is properly the concern of class standing. The defendants offer forceful authority to the contrary. *E.g., Lewis v. Casey, 518 U.S. 343, 358 n.6, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996)* ("But standing is not dispensed in gross."); *Davis v. Fed. Election Comm'n, 554 U.S. 724, 734, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008)* ("[A] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." (quotations omitted)). The indirect purchasers do not effectively rebut that authority. The pleadings plausibly allege that the indirect purchasers were harmed by the defendants' unlawful conduct, so it would be difficult to doubt that they present a live case or controversy for which they have standing under Article III. But the applicability to that case or controversy of the laws of states where the named plaintiffs do not (and perhaps cannot) plead harm is dependent upon harms caused to absent (and at this stage only putative) class members.

The indirect purchasers point to numerous cases that have interpreted *Ortiz v.* ***[*251]*** *Fibreboard Corp., 527 U.S. 815, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)*, and *Amchem Products, Inc. v. Windsor, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*, to stand for the proposition that the question of Article III standing can be deferred until after class certification. In *Mahon*, however, the Second Circuit repudiated that interpretation of those cases, noting that the Article III **[**65]** issue was deferred in them not because it is always permissible to do so but because the class issue was dispositive. *683 F.3d at 63—66*. The Court reasoned that ***HN16***[] "[a] federal rule cannot alter a constitutional requirement," and therefore "*with respect to each asserted claim*, a plaintiff must always have suffered a distinct and palpable injury to herself." *Id. at 64* (emphasis in the original, quotation omitted).

I therefore grant without prejudice the defendants' motion to dismiss the indirect-purchaser complaints with respect to all claims under the laws of states (or territories) where the named indirect-purchasers do not allege to have suffered injury. The indirect purchasers have leave to replead claims for any state where the named plaintiffs specifically can allege to have incurred overcharges.

Humana makes (essentially) the same state-law claims as the indirect-purchaser plaintiffs, but standing is uncomplicated because Humana pleads that it has been an indirect purchaser of Aggrenox in all fifty states. Humana and the indirect-purchaser plaintiffs each incorporate by reference the relevant portions of the other's opposition memorandum, and I will thus discuss the remaining arguments on both motions to **[**66]** dismiss collectively.

3. *State Antitrust Claims*

a. Standing in *Illinois Brick* States

In the wake of *Illinois Brick*'s announcement of the indirect-purchaser rule, many states passed "*Illinois Brick* repealers" to allow indirect purchasers to recover under their respective state antitrust laws, and the Supreme Court endorsed the permissibility of that approach in *ARC America Corp. 490 U.S. at 105—06*. Of course, there are also states that continue to follow the rule of *Illinois Brick*, so indirect purchasers cannot recover for overcharges under those states' antitrust laws. The defendants argue that Florida, Massachusetts, and Puerto Rico are *Illinois Brick* jurisdictions, and that Rhode Island was, too, until it passed an *Illinois Brick* repealer in 2013, which should not be applied retroactively here. They initially included Utah in that list as well, before admitting that it did pass an *Illinois Brick* repealer, but one that permits indirect-purchaser claims only by citizens or residents of the state. In response, the indirect purchasers withdraw their claims under the antitrust laws of Florida and Massachusetts,[2] and dispute the plaintiffs' interpretation of the laws of the other jurisdictions.

i. Utah

HN17[] Utah has passed an *Illinois Brick* repealer, and its antitrust statute therefore does grant indirect purchasers the right to bring antitrust damages claims, but only if they are citizens or residents of Utah. *See Utah Code § 76-10-3109*. The indirect purchasers claim to be asserting claims under that law on behalf of residents of Utah, but they do not claim that any of the **[*252]** named plaintiffs are such residents. For the reasons discussed above, they lack Article III standing to assert such claims. Humana claims to be an indirect purchaser of Aggrenox in all fifty states, but does not claim to be a citizen or resident of Utah. All claims under the Utah antitrust statute are therefore dismissed without prejudice to repleading in the event that any named plaintiff is a citizen or resident of Utah.

ii. Puerto **[**68]** Rico

HN18[] Puerto Rico has not passed an *Illinois Brick* repealer, and its territorial courts have apparently not directly addressed the issue, but its ***antitrust law*** is generally construed "as essentially embodying the jurisprudence relevant to the parallel federal law." *Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft, 19 F.3d 745, 754 (1st Cir. 1994)*. The defendants therefore urge the interpretation that *Illinois Brick* applies and bars indirect-purchaser actions, citing the persuasive authority of other district courts that have come to that conclusion. *See, e.g., United Food & Commercial Workers Local 1776 & Participating Employers Health & Welfare Fund v. Teikoku Pharma USA, Inc., No. 14-MD-02521-WHO, 74 F. Supp. 3d 1052, 2014 U.S. Dist. LEXIS 1610692014 WL 6465235, at *25—26 (N.D. Cal. Nov. 17, 2014)*; *In re Nexium (Esomeprazole) Antitrust Litig., 968 F. Supp. 2d 367, 409—10 (D. Mass. 2013)*; *In re Static Random Access Memory (SRAM) Antitrust Litig., No. 07-md-01819 CW, 2010 U.S. Dist. LEXIS 131002, 2010 WL 5094289, at *4 (N.D. Cal. Dec. 8, 2010)*; *In re Digital Music Antitrust Litig., 812 F. Supp. 2d 390, 413 (S.D.N.Y. 2011)* (citing *In re TFT - LCD (Flat Panel) Antitrust Litig., 599 F. Supp. 2d 1179, 1185—87 (N.D. Cal. 2009))*. The indirect purchasers cite *Rivera-Muñiz v. Horizon Lines Inc., 737 F. Supp. 2d 57 (D.P.R. 2010)*, a federal district court case that came to the contrary conclusion on the basis that Puerto Rico liberally construes its antitrust laws, and citing for that proposition *Pressure Vessels of Puerto Rico, Inc. v. Empire Gas de Puerto Rico, 137 P.R. Dec. 497, 1994 P.R.-Eng. 909,547 (P.R. 1994)*. As the defendants point out, however, *Pressure Vessels* did not address indirect-purchaser standing or the rule of *Illinois Brick*. And though I agree with the indirect purchasers' contention that the courts of a particular jurisdiction can authoritatively **[**69]** interpret their laws as allowing antitrust recovery by indirect purchasers even in the absence of an express *Illinois Brick* repealer by the legislature, I cannot conclude that *Pressure Vessels* is such an authoritative statement. In the absence of a clear decision—by either the legislature or by the jurisdiction's own courts—to allow indirect-purchaser recovery, the antitrust laws of a state (or territory) are interpreted as presumptively consistent with federal law. I therefore conclude that Puerto Rico follows the rule of *Illinois Brick* and all indirect-purchaser claims under its ***antitrust law*** are dismissed.

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[2] In the opposition **[**67]** memoranda, the indirect-purchaser plaintiffs also withdraw unjust-enrichment claims under Pennsylvania law and claims under the antitrust laws of Kansas, New York, and Tennessee; and Humana withdraws its claims under the consumer-protection laws of Hawaii and Kansas, under the state antitrust laws of Florida, Ohio, and Texas, and under the Sherman Act (which includes all of its direct-purchaser claims).

iii. Rhode Island

HN19[] Rhode Island was an *Illinois Brick* state until its legislature enacted a repealer on July 15, 2013. *See* R.I. Gen. Laws § 6-36-7(d). The indirect purchasers urge (with little argument, and less authority) retroactive application, citing cases for the proposition that such application is *sometimes* permissible, but nothing to substantiate the claim that the Rhode Island statute is "entitled" (doc. # 182, p.19) to such application. On the contrary, in Rhode Island as elsewhere, "statutes and their amendments are presumed to apply prospectively." Hydro-Mfg., Inc. v. Kayser-Roth, 640 A.2d 950, 954 (R.I. 1994). Indeed, it is very widely recognized as an **[**70]** "almost universal rule that statutes are **[*253]** addressed to the future, not to the past." Winfree v. N. Pac. Ry., 227 U.S. 296, 301, 33 S. Ct. 273, 57 L. Ed. 518 (1913). In the absence of evidence of the Rhode Island legislature's intent to the contrary, I conclude that the law applies only prospectively. All indirect-purchaser claims under the Rhode Island antitrust statute alleging overcharges before July 15, 2013 are dismissed. The motions to dismiss claims involving Rhode Island indirect purchases are denied, however, with respect to alleged overcharges incurred after that date.

b. Intrastate Conduct or Effects Requirements

The defendants argue that the antitrust laws of Mississippi, New York, Tennessee, Wisconsin, and the District of Columbia "require that the challenged conduct take place, or that its effects occur, purely or primarily within the state" (doc. # 151-1, p.31).[3] None of the cited statutes contains so categorical a limitation by its plain text, however. It is true that all of the claims essentially allege national anticompetitive conduct, but it is not obvious why the *intrastate* effect of anticompetitive conduct would not be reached by the cited statutes merely because *interstate* conduct predominates. A few of the cases that the defendants cite include **[**71]** dicta about the possibility of state antitrust laws violating the dormant Commerce Clause or being preempted by federal ***antitrust law***, *e.g.*, H-Quotient, Inc. v. Knight Trading Grp., Inc., No. 03 CIV. 5889 (DAB), 2005 U.S. Dist. LEXIS 1924, 2005 WL 323750, at *4 (S.D.N.Y. Feb. 9, 2005); Sun Dun, Inc. of Washington v. Coca-Cola Co., 740 F. Supp. 381, 396—97 (D. Md. 1990), but the defendants do not make those arguments. I cannot conclude on the basis of the arguments that have been briefed that any claims should be dismissed for failure to allege "purely or primarily" intrastate conduct or effects.

c. Hawaii Antitrust Act

HN20[] Hawaii's antitrust statute has an "unfair or deceptive acts or practices" prong, and an "unfair methods of competition" prong. *See* Haw. Rev. Stat. § 480-2. Claims under the "unfair or deceptive acts or practices" prong can only be brought by "consumer[s], the attorney general or the director of the office of consumer protection," *id*. § 480-2(d), and the indirect purchasers do not allege that they are any of those things. Claims under the "unfair methods of competition" prong are not limited in that way, but class actions brought under that prong require pre-suit notice to the state attorney general, who has a right of first refusal **[**72]** to bring claims. *Id*. § 480-13.3. The indirect purchasers do not allege that they have satisfied that requirement, either, but they argue that they need not follow such pre-filing requirements because they are merely procedural and not necessary to maintain a class action in federal court.

The parties differ in their analysis of the applicability of *Shady Grove Orthopedic Associates v. Allstate Ins. Co., 559 U.S. 393, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010)*, in which the Supreme Court held that Rule 23 applied in federal court to claims brought under New York law despite New York's general class action bar. It is difficult to isolate a holding in *Shady Grove* that is much broader than that, because the holding was announced by Justice Scalia in an opinion that garnered a majority only in part and a plurality in part. The fifth vote for the judgment was **[*254]** provided by Justice Stevens, who wrote a separate concurrence. When no single rationale garners a majority, the holding of the Court is "that position taken by those Members who concurred in the judgments on the narrowest grounds." Marks v. United States, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977). The indirect

[3] The defendants also make this argument with respect to the ***antitrust law*** of Massachusetts, but as mentioned above, the indirect-purchaser plaintiffs withdraw their claims under that law. Humana did not plead claims under it.

purchasers argue for an expansive application of Justice Scalia's opinion, which would broadly eliminate state class-action restrictions in federal court. The defendants argue that the holding is narrowed by the scope **[**73]** of Justice Steven's concurrence, which would allow state procedural rules to control in federal court when they are "part of a State's framework of substantive rights or remedies." *Shady Grove, 559 U.S. at 419* (Stevens, J., concurring).

The defendants point out that many courts have adopted Justice Stevens's concurrence or found it to be controlling, and that they have held that state class-action bars apply in federal court if they are part of a state statute's substantive scope. The defendants have not, however, offered any authority for that conclusion as applied to Hawaii's law, or argued persuasively that the class-action prerequisites that it contains are part of Hawaii's "framework of substantive rights or remedies." ***HN21***[] From the language of the statute itself, it does not appear, for instance, to create a substantive right to recovery that only "vests" after some action or inaction of the state attorney general. Rather, it creates a right to "bring an action based on unfair methods of competition" in *section 480-2*, without any reference to notice, and delineates procedural prerequisites for class actions under the chapter in *section 480-13.3*. The defendants offer nothing from the legislative history or otherwise to complicate that plain **[**74]** reading. I need not wade any deeper into the difficult problem of what part of the reasoning in *Shady Grove* is or is not controlling, because I cannot conclude on the basis of the arguments before me that the *section 480-13.3* procedural prerequisites are sufficiently a "part of a State's framework of substantive rights or remedies" to be controlling in federal court even under the Stevens concurrence.

4. *State Consumer-Protection and Unjust-Enrichment Claims*

The defendants make many arguments that the unjust-enrichment claims and the claims brought under state consumer-protection or unfair-trade-practices laws should be dismissed. Some of those arguments apply to all such claims, others to particular subsets, and still others to the laws of individual states. They argue, for instance, that some state consumer-protection laws require pleading consumer deception or reliance; that some require pleading a specific consumer-oriented transaction or "nexus"; that some have been expressly held inapplicable to antitrust conduct; that some only allow suits in a consumer capacity; that some have unsatisfied pre-filing notice requirements; that some states require privity, a quasi-contractual or special relationship, **[**75]** or the absence of an adequate remedy at law in order to sustain the equitable remedy of an unjust-enrichment claim; and even that some states listed in the pleadings do not recognize an independent claim of unjust enrichment at all. The indirect payers and Humana respond with particular state-by-state arguments and caselaw, and the defendants reply with still more, disputing among themselves, for instance, whether particular states do or do not recognize independent unjust-enrichment claims, or whether there is a split of authority among California courts on whether a nonsemantic distinction exists between unjust enrichment, restitution, and quasi-contract (doc. # 182, p.66; doc. # 215, pp. 15—16).

[*255] Most of the defendants' arguments on this point can be reduced essentially to the assertion that the plaintiffs are not *really* pleading violations of all those state laws, which have various restrictions they ignore, because they are pleading a nation-wide antitrust case. The plaintiffs' argument in response is essentially that the state laws are exceedingly broad, the statutory ones generally written "in the disjunctive," and that they cover, very generally, all "*deceptive* acts, *unfair* practices **[**76]** or *unconscionable* acts" (doc. # 182, p.35). The defendants' arguments are persuasive on many particular points, but the more pressing issue is the broader one. The indirect purchasers and Humana have *listed* claims under very many state laws, but they have not truly *pleaded* claims under those laws sufficient to show their entitlement to recovery under them, as required by *Rule 8*. *See Iqbal, 556 U.S. at 678* (***HN22***[] "A pleading that offers labels and conclusions or formulaic recitation of the elements of a cause of action will not do."). Rather, they have pleaded federal antitrust claims and the factual foundation for them, viable under *Actavis*, and they merely allege that those claims are also actionable under general consumer-protection laws and as unjust enrichment.

The indirect-purchaser complaint, for instance, includes a paragraph alleging that the defendants "have violated the following state unfair trade practices and consumer fraud laws," followed by twenty-five subparagraphs, each of which begins "[d]efendants have engaged in unfair competition or unfair acts or practices in violation of" and ends with a citation to a different state's statute, with no elaboration (doc. # 120, ¶ 204). The same complaint includes a paragraph **[**77]** that begins "[i]t would be inequitable under unjust enrichment principles under the laws of" and then lists forty-eight states, the District of Columbia, and Puerto Rico before finishing the sentence, the end of which is similarly bare and conclusory (¶ 214). The Humana complaint fares no better. For instance, it begins each of paragraphs 142 through 178 with the words "[d]efendants have engaged in unfair competition or unfair, deceptive or fraudulent acts or practices in violation of" followed by a citation to a different state's statute, again with no elaboration (doc. # 93). Even the state antitrust claims partly take this copy-and-paste form that simply assumes that every one of the many cited statutes is the functional equivalent of the rest, but at least those claims benefit from the very extensive pleading of factual allegations to show entitlement to relief under federal ***antitrust law***. The pleadings fail not only to account for any consequential differences that may exist among the undifferentiated state-law claims, but they fail to show that any but the antitrust laws entitle the plaintiffs to relief from antitrust violations. The bald assertion that the alleged antitrust conduct violates **[**78]** dozens of non-antitrust laws, or the implication that there are no consequential differences between those laws, is not entitled to deference, because "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal, 556 U.S. at 678*.

The problem for the indirect purchasers is that the indirect-purchaser rule of *Illinois Brick* blocks them from recovery under federal ***antitrust law***. In an effort to get in on the *Actavis* game, they attempt to build a Frankensteinian equivalent of *Actavis* to reach the very same conduct but without that formidable obstacle, by stitching together a hodge-podge of state-law claims. But the plaintiffs cannot simply enumerate a long list of state-law claims for states where they might otherwise have no available antitrust recovery **[*256]** and rely on the defendants and the court to sort out whether or how those laws can act as surrogates for ***antitrust law***. I need not rule on the many particular arguments the defendants make for individual state claims or subsets of them, because the indirect-purchaser plaintiffs and Humana have not pleaded state-law consumer-protection or unjust-enrichment claims sufficient to satisfy **[**79]** *Rule 8* under *Twombly* and *Iqbal*. The defendants' motions to dismiss are granted with respect to all such claims, without prejudice to repleading in nonconclusory fashion.

D. Personal Jurisdiction Over Teva Israel

Teva Israel moves under *Rule 12(b)(2)* to dismiss all claims against it for lack of personal jurisdiction. It emphasizes that it is an Israeli company with no direct physical or corporate presence in the United States, and that it and its American subsidiaries vigorously maintain corporate formalities. The settlement agreement that is the subject of the plaintiffs' allegations was formed between Boehringer and Barr prior to Teva USA's acquisition of Barr, so no Teva entity was a party to it. And the presence of a subsidiary alone is not sufficient to establish personal jurisdiction over the parent company. *See Jazini v. Motor Co., 148 F. 3d 181 (2d Cir. 1998)*. Teva Israel therefore argues that, even if all the plaintiffs' allegations are true regarding the liability of the other defendants, and even if Teva USA is liable as a successor to Barr, the mere fact of Teva Israel's ownership of Teva USA is not sufficient to subject Teva Israel to personal jurisdiction in this case.

HN23[] The authority of a court to subject a particular defendant to personal **[**80]** jurisdiction has been analyzed as a constitutional question for well over a century. *See generally Pennoyer v. Neff, 95 U.S. 714, 24 L. Ed. 565 (1877)*. The *statutory* authority for jurisdiction, though a necessary condition of it, is not a sufficient one. The plaintiffs seem to conflate the statutory authority for jurisdiction under the Clayton Act with the constitutional propriety. They also blur the distinction between the two forms of personal jurisdiction in the constitutional analysis: general, or all-purpose, personal jurisdiction; and specific, or case-linked personal jurisdiction. In order to show that an exercise of personal jurisdiction comports with Due Process, the plaintiffs must plead facts sufficient to support either general or specific personal jurisdiction, in addition to showing statutory authority.

"A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851, 180 L. Ed. 2d 796 (2011)* (quotation omitted). Being "essentially at home" in a place is a very high bar, almost never found for corporations where they are neither incorporated **[**81]** nor headquartered. "[E]ven a company's engagement in a substantial, continuous, and systematic course of business is alone insufficient to render it at home in a forum." *Sonera Holding B.V. v. Cukurova Holding A.S., 750 F.3d 221, 226 (2d Cir. 2014)* (quotation omitted). None of the complaints plead facts even close to a plausible claim of general jurisdiction over Teva Israel.

HN24[] "Specific jurisdiction, on the other hand, depends on an affiliation between the forum and the underlying controversy." *Goodyear Dunlop, 131 S. Ct. at 2851* (quotation omitted). Importantly, "[i]n contrast to general, all-purpose jurisdiction, **[*257]** specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Id*. (quotation omitted). Pleading specific jurisdiction does not present nearly so high a bar as pleading general jurisdiction, but unlike general jurisdiction, it depends on *case-specific* contacts. Even frequent, substantial contacts cannot confer jurisdiction in this case unless the contacts were made in connection with the specific controversy being litigated.

The plaintiffs emphasize how thoroughly entrenched in the American generic pharmaceutical industry Teva Israel is, and they cite SEC filings and corporate web pages to argue that the Teva entities **[**82]** play fast and loose with the "Teva" name. The broad general contacts that the plaintiffs describe do not rise to the very high "essentially at home" standard for general jurisdiction, and such generalized contacts are not useful for establishing specific personal jurisdiction, because they have nothing to do with the particular conduct giving rise to the claims here. Teva Israel's contacts with the United States are sufficient for specific personal jurisdiction to comport with constitutional requirements in *some* case, but this is not such a case. Apart from the bare, conclusory assertion that Teva Israel joined the antitrust conspiracy, the complaints do not allege any action by the Israeli company that is specifically in connection with this case. It is customary to analyze the issue of statutory jurisdictional authority before analyzing comportment with Due Process, but the pleadings are so obviously insufficient with respect to the latter that it is not necessary to examine the question of jurisdiction under the Clayton Act.

In their opposition memoranda, the plaintiffs argue that the conduct of Teva USA and Barr should be attributed to Teva Israel either because the latter is successor **[**83]** to the antitrust conspiracy or because it controls its American subsidiaries. Those arguments do not appear to correspond to a plausible factual foundation in the pleadings, and without more facts, the prospects for repleading either a veil-piercing theory or a successor-in-interest theory do not seem bright. Limited jurisdictional discovery of Teva Israel is not appropriate because the plaintiffs failed to make a prima facie case for personal jurisdiction. *See* *Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 197 (2d Cir. 1990)*. If discovery taken from the other defendants should turn up evidence of Teva Israel's contacts *specifically* in connection with the controversy underlying this case, then the plaintiffs may seek leave of the court to replead their claims against it. Accordingly, Teva Israel's motion to dismiss under *Rule 12(b)(2)* is granted without prejudice.

III. Conclusion

In sum, for the reasons discussed above:

(1) Teva Israel's motion to dismiss all complaints against it under *Rule 12(b)(2)* (doc. # 150) is granted without prejudice; the plaintiffs may seek leave to replead claims against it in the event that evidence of its participation in the specific agreements underlying this case are revealed in discovery taken from the other defendants.

(2) The defendants' motion **[**84]** to dismiss the direct-purchaser complaint under *Rule 12(b)(6)* (doc. # 149; sealed mem., doc.168) is denied in substantial part. It is granted with respect only to any claims made in connection with overcharges allegedly incurred more than four years prior to the filing of the claims.

(3) The defendants' motion to dismiss the indirect-purchaser complaint under *Rule 12(b)(6)* (doc. # 151) is granted in **[*258]** part and denied in part. It is granted without prejudice with respect to all state-law consumer-protection and unjust-enrichment claims. It is granted with prejudice with respect to any claims made in connection with overcharges allegedly incurred before the filing of the claims by a longer period than the relevant statute of limitations. It is granted with prejudice with respect to claims under the antitrust statute of Puerto Rico, and with respect to claims under the antitrust statute of Rhode Island that are in connection with overcharges allegedly incurred before July 15, 2013. It is granted without prejudice with respect to claims under the antitrust statute of

Utah; the indirect purchasers have leave to replead those claims only if some named plaintiff is a citizen or resident of that state. It is granted without **[**85]** prejudice with respect to other claims under the laws of states where the named plaintiffs do not plead injury; the indirect purchasers have leave to replead those claims only to the extent they can plead sufficient facts to allege harm to named plaintiffs in particular states.

(4) The defendants' motion to dismiss the Humana complaint under *Rule 12(b)(6)* (doc. # 152) is granted in part and denied in part. It is granted without prejudice with respect to all state-law consumer-protection and unjust-enrichment claims. It is granted with prejudice with respect to any claims made in connection with overcharges allegedly incurred before the filing of the claims by a longer period than the relevant statute of limitations. It is granted with prejudice with respect to claims under the antitrust statute of Puerto Rico, and with respect to claims under the antitrust statute of Rhode Island that are in connection with overcharges allegedly incurred before July 15, 2013. It is granted without prejudice with respect to claims under the antitrust statute of Utah; Humana has leave to replead those claims only if it is a citizen or resident of that state.

So ordered.

Dated at Bridgeport, Connecticut, this 23rd day **[**86]** of March 2015.

/s/ STEFAN R. UNDERHILL

Stefan R. Underhill

United States District Judge

Yastrab v. Apple Inc.

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

March 23, 2015, Decided; March 23, 2015, Filed

Case No. 5:14-cv-01974-EJD

Reporter
2015 U.S. Dist. LEXIS 37119 *; 2015 WL 1307163

DAVID YASTRAB, individually and on behalf of all others similarly situated, Plaintiff, v. APPLE INC., Defendant.

Subsequent History: Motion granted by, Dismissed by, Judgment entered by *Yastrab v. Apple Inc., 2016 U.S. Dist. LEXIS 39707 (N.D. Cal., Mar. 25, 2016)*

Core Terms

iPhone, allegations, misrepresentation, advertising, software, update, download, unfair, users, motion to strike, capabilities, prong, motion to dismiss, misrepresentation claim, representations, consumers, argues, alleged misrepresentation, plaintiff's claim, express warranty, cause of action, leave to amend, functionality, particularity, fraudulent, pleadings, campaign, features, grayed, mobile

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Judges: EDWARD J. DAVILA, United States District Judge.

Opinion by: EDWARD J. DAVILA

Opinion

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS; DENYING DEFENDANT'S MOTION TO STRIKE

Re: Dkt. Nos. 14, 15

Plaintiff David Yastrab ("Plaintiff") brings the instant putative class action against Defendant Apple Inc. ("Apple") in which he alleges his iPhone 4's Wi-Fi and Bluetooth capabilities stopped working after he downloaded a software update. Presently before the Court are two motions filed by Apple: one to dismiss Plaintiff's Complaint pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, and one to strike the class allegations from the Complaint under *Rule 12(f)*. See Docket Item Nos. 14, 15. Plaintiff has filed written **[*2]** opposition to both motions. See Docket Item Nos. 18, 19.

Federal jurisdiction arises pursuant to *28 U.S.C. § 1332*. Having carefully reviewed the parties' briefing and for the reasons explained below, the Motion to Dismiss will be granted while the Motion to Strike will be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

At the center of this case is Apple's popular iPhone product, which first debuted in 2007. See Compl., Docket Item No. 1, at ¶ 2. iPhones come equipped with a mobile operating system called iOS, which consists of a collection of software applications, or "apps." Id. at ¶ 3. These apps allow users to utilize the features of Apple products. Id. Since its first version in 2007, the iOS operating system has been updated several times by Apple. Id. at ¶ 4. When a new version of iOS is released, Apple prompts users to download the update via a message on their iPhone. Id. at ¶ 5.

Three iPhone models are implicated in the Complaint: the iPhone 4 released in 2010, the iPhone 4s released in 2011, and the iPhone 5 released in 2012. Id. at ¶¶ 2, 3. Also implicated is an update to the iOS software known iOS 7, which was unveiled by Apple on June 10, 2013. Id. at ¶¶ 1, 2, 3, 16. According to the Complaint, **[*3]** Apple described iOS 7 as "a platform for over a million mobile apps, iCloud,[1] and includes security features that prevent unauthorized access to Apple devices." Id. at ¶ 8. Plaintiff, however, contends that users of the iPhone 4, 4s, and 5 experienced reduced functionality as a result of installing iOS7, "essentially forcing consumers to render their iPhones obsolete." Id. at ¶ 1.

Plaintiff is a New York resident who acquired an iPhone 4s on or around April 30, 2012. Id. at ¶ 53. In doing so, Plaintiff alleges that he viewed Apple's representations regarding "the iPhone 4s's ability to download future iOS updates, Bluetooth[2] and Wi-Fi connection capabilities, ability to backup data via iCloud and the ability to run apps via a Wi-Fi connection," and would not have acquired the iPhone 4s had he not **[*4]** seen these representations. Id. at ¶ 35. Plaintiff believes these representations, as well as Apple's advertising and marketing campaigns, were designed to induce consumers to purchase the iPhone over other smartphones "because of their Bluetooth and Wifi connection capabilities, large library of apps, iCloud and Siri[3] - all of which require a Network connection or Wi-Fi connection to operate." Id. at ¶ 19.

Plaintiff received an alert from Apple in or about October 2013 notifying him that iOS 7 was available **[*5]** and he promptly downloaded it. Id. at ¶ 54. However, after the download was complete and the updated software installed, the Wi-Fi and Bluetooth connection capabilities on his iPhone 4s were disabled, or "grayed out." Id. at 55. Plaintiff alleges that the "grayed out" problem was experienced by a large number of users of the iPhone 4, 4s and 5, and that Apple received "thousands of comments" concerning the problem. Id. at ¶ 56. An updated version of iOS 7 was thereafter released on March 10, 2014 - iOS 7.1 - but that update did not resolve the "grayed out" problem.[4] Id. at ¶ 63. Nor was Plaintiff able to resolve the issue with his iPhone 4s after following instructions on Apple's website and

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[1] iCloud is a free "cloud service" offered by Apple to a user of its products which allows the user "to automatically and wirelessly" store content and "automatically and wireless push" that content to all of the user's Apple devices. See Compl., at ¶ 12. In other words, iCloud allows users to backup data from their iPhone to the "cloud" and make it available to other Apple devices. Id. at ¶ 13.

[2] "Bluetooth allows users to '[e]xchange or synchronize data between Bluetooth enabled computers and devices', '[u]se a Bluetooth enabled wireless keyboard or mouse", '[c]onnect wirelessly to a Bluetooth compatible printer, headset, headphones, or speakers', and '[s]hare your internet connection with other Bluetooth enabled devices.'" Id. at ¶ 18.

[3] "Siri is speech-recognition software that comes standard on every iPhone 4 and iPhone 5 . . . . It allows users to verbally give their iPhones commands and takes to complete . . . . For example, if you ask Siri to add something to your personal calendar, if is programmed to make the addition to your calendar and verbally confirms that the task is completed." Id. at ¶ 9.

[4] According to Plaintiff, "grayed out" iPhone users would not have been able to download the updated version of iOS or any other resolution patches "because such downloads require a Wi-Fi connection and cannot be downloaded over a Network connection." Id. at ¶ 23.

visiting two Apple stores. Id. at ¶ 68. In addition, Apple would not allow iPhone users to downgrade their mobile software to a previous version of iOS. Id. at ¶¶ 69-71.

Plaintiff alleges that, because the Wi-Fi and Bluetooth connection capabilities **[*6]** were "grayed out" after installing iOS 7, users of the iPhone 4s were forced to use their cellular network connection for all features requiring an internet connection, such as iCloud and Siri. Id. at ¶¶ 19, 73. As a result, users incurred "unanticipated monthly data usage charges" with their cellular provider and were left with an iPhone "of significant reduced value and utility." Id. at 73.

Because the "grayed out" problem was wide-ranging, Plaintiff believes it is "reasonable and plausible" to infer that Apple had either actual or constructive knowledge of the shortcomings in the iPhone 4s and iOS 7 prior to their distribution, and that Apple withheld this material information from consumers. Id. at ¶¶ 75-76. He seeks to represent the following classes:

> GENERAL CLASS: All users who experienced loss or reduced functionality of their iPhone as a result of upgrading iOS.
>
> SUBCLASS: All users of Apple iPhone 4s in the United States who experienced a loss of Wi-Fi and/or Bluetooth functionality after downloading iOS 7.

Plaintiff filed the Complaint underlying this action on April 29, 2014. He asserts five claims under California law: (1) violation of the Consumer Legal Remedies Act ("CLRA"), *California Civil Code §§1750 et seq.*, (2) violation **[*7]** of the Unfair Competition Law ("UCL"), *California Business and Professions Code §§ 17200 et seq.*, (3) breach of express warranty, (4) intentional misrepresentation, and (5) negligent misrepresentation. These motions followed.

II. LEGAL STANDARD

A. Motion to Dismiss

On a *Rule 12(b)(6)* motion to dismiss for failure to state a claim, the complaint is construed in the light most favorable to the non-moving party, and all material allegations in the complaint are taken to be true. *Sanders v. Kennedy, 794 F.2d 478, 481 (9th Cir. 1986)*. This rule does not apply to legal conclusions, however - "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to state a claim. *Ashcroft v. Iqbal, 556 U.S. 662, 663, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. While a complaint does not need detailed factual allegations to survive a 12(b)(6) motion, plaintiffs must at least provide grounds demonstrating their entitlement to relief. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Thus, the plaintiff must allege sufficient factual allegations "to raise a right to relief above the speculative level." Id. This threshold is reached when the complaint contains sufficient facts to allow the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Iqbal, 556 U.S. at 678*.

Fraud-based claims are subject to heightened pleading requirements under *Federal Rule of Civil Procedure 9(b)*. In that regard, a plaintiff alleging fraud "must state **[*8]** with particularity the circumstances constituting fraud." *Fed. R. Civ. Proc. 9(b)*. The allegations must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985)*. To that end, the allegations must contain "an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." *Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007)*. Averments of fraud must be accompanied by the "who, what, when, where, and how" of the misconduct charged. *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)* (citation omitted). Additionally, "the plaintiff must plead facts explaining why the statement was false when it was made." *Smith v. Allstate Ins. Co., 160 F. Supp. 2d 1150, 1152 (S.D. Cal. 2001)* (citation omitted).

Mechanically speaking, the court "may not consider any material beyond the pleadings" when considering a motion to dismiss.[5] *Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990)*. However, the court may consider material submitted as part of the complaint or relied upon in the complaint, and may also consider material subject to judicial notice. See *Lee v. City of Los Angeles, 250 F.3d 668, 688-69 (9th Cir. 2001)*. Where a complaint or claim is dismissed, "[l]eave to amend should be granted unless the district court determines that the pleading could not possibly be cured **[*9]** by the allegation of other facts." *Knappenberger v. City of Phoenix, 566 F.3d 936, 942 (9th Cir. 2009)*.

B. Motion to Strike

Federal Rule of Civil Procedure 12(f) provides that a court "may order stricken from any pleading . . . any redundant, immaterial, impertinent or scandalous matter." *Fed. R. Civ. P. 12(f)*. "Immaterial matter is that which has no essential or important relationship to the claim for relief or the defenses being pleaded." *Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993)*. "Impertinent matter consists of statements that do not pertain, and are not necessary, to the issues in question." Id.

Rule 12(f) motions to strike are generally regarded with disfavor because of the limited importance of pleading in federal practice, and because they are often used as a delay tactic. See *Cal. Dept. of Toxic Substances Control v. Alco Pac., Inc., 217 F. Supp. 2d 1028, 1033 (C.D. Cal. 2002)*. They are "not granted unless it is clear that the matter sought to be stricken could have no possible bearing on the **[*10]** subject matter of the litigation." *Rosales v. Citibank, 133 F. Supp. 2d 1177, 1180 (N.D. Cal. 2001)*. Thus, any doubt concerning the import of the allegations weighs in favor of denying the motion to strike. See *In re 2TheMart.com, Inc. Sec. Litig., 114 F. Supp. 2d 955, 965 (C.D. Cal. 2000)*.

III. DISCUSSION

For the Motion to Dismiss, Apple argues that Plaintiff's Complaint is deficient because (1) the claims are not pled with particularity as required by *Rule 9(b)*, and *(2)* the causes of action do not contain sufficient factual matter to state a claim. For the Motion to Strike, Apple believes the class allegations should be stricken as overbroad and unascertainable. It also argues that individual questions will predominate under Plaintiff's class definition, and that Plaintiff's claims are atypical in any event. These motions are addressed in turn.

A. Motion to Dismiss

i. *Rule 9(b)*

Apple argues that Plaintiff's CLRA, UCL and misrepresentation claims must be plead with particularity under *Rule 9(b)*. For his part, Plaintiff does not necessarily dispute that *Rule 9(b)* applies to the UCL and misrepresentation claims, but argues that the CLRA falls outside of the particularity requirement. On this issue, the court agrees with Apple. The claims must meet the *Rule 9(b)* standard because they all stem from one basic claim grounded in fraud, specifically, that Apple **[*11]** misrepresented the iPhone's ability to download updates and retain functionality. See *Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009)* (holding that *Rule 9(b)*'s particularity requirement applies to causes of action under the UCL and CLRA); see also *Neilson v. Union Bank of Cal., N.A., 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003)* ("It is well-established in the Ninth Circuit that both claims for fraud and negligent

[5] Plaintiff filed two declarations with over 200 pages of attachments along with his opposition to Apple's motions. See Docket Item Nos. 20-23. Apple objects to this evidence because it is neither subject to judicial notice nor specifically relied upon in the Complaint. The court agrees with Apple that consideration of this new information is improper. Accordingly, Apple's objection is sustained, and this information is disregarded for the purposes of this analysis.

misrepresentation must meet *Rule 9(b)*'s particularity requirements."). The CLRA claim is no different than its companion claims in that respect, since it is based on the same alleged misrepresentations. See Compl., at ¶ 90 ("Defendant violated and continues to violate the [CLRA] by . . . (a) Representing that the iPhone 4, iPhone 4s and/or iPhone 5 have characteristics and benefits which they do not have; (b) Representing that the iPhone 4, iPhone 4s and/or iPhone 5 are of a particular standard, quality, or grade, which they are not; (c) Advertising the iPhone 4, iPhone 4s and/or iPhone 5 with intent not to sell them as advertised; and (d) Representing that the iPhone 4, iPhone 4s and/or iPhone 5 has been supplied in accordance with previous representations when they have not."); ¶ 75 ("[I]ts [sic] reasonable and plausible to infer that Defendant had either actual or constructive knowledge of the iPhone 4s and iOS 7's shortcomings **[*12]** prior to their distribution."). Under his theory of liability, Plaintiff simply cannot state a CLRA claim without allegations based in fraud. See *Vess, 317 F.3d at 1105* ("[I]f particular averments of fraud are insufficiently pled under *Rule 9(b)*, a district court should 'disregard' those averments, or 'strip' them from the claim. The court should then examine the allegations that remain to determine whether they state a claim."); see also *Kearns, 567 F.3d at 1125* (holding that when a plaintiff alleges "a unified course of fraudulent conduct" and relies entirely on that conduct as a basis for the claim, "the claim is said to be 'grounded in fraud' or to 'sound in fraud,'" and must satisfy the particularity requirement of *Rule 9(b)*). Accordingly, the court will analyze the CLRA, UCL and misrepresentation claims under *Rule 9(b)*.

ii. CLRA

The CLRA makes unlawful "unfair methods of competition and unfair or deceptive acts or practices." *Cal. Civ. Code § 1770(a)*; *In re Actimmune Marketing Litig., No. C 08-02376 MHP, 2009 U.S. Dist. LEXIS 103408, at *47, 2009 WL 3740648 (N.D. Cal. Nov. 6, 2009)*. As relevant here, the CLRA prohibits a person from "[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have," "[r]epresenting that goods or services are of a particular standard, quality, or grade . . . if they are of another," **[*13]** "[a]dvertising goods or services with intent not to sell them as advertised," and "[r]epresenting that the subject of a transaction has been supplied in accordance with a previous representation when it has not." *Cal. Civ. Code §§ 1770(a)(5)*, *(a)(7)*, *(a)(9)*, *(a)(16)*.

Three elements are necessary to state a claim under the CLRA: misrepresentation, reliance, and damages. *Marolda v. Symantec Corp., 672 F. Supp. 2d 992, 1003 (N.D. Cal. 2009)*. Apple argues the allegations are insufficient to plead misrepresentation and reliance for multiple reasons. Some of Apple's arguments have merit.

Examining the two elements in order, Plaintiff alleges that Apple misrepresented three characteristics of the iPhone in its marketing, advertising and promotional materials: (1) its ability to download and run iOS 7 effectively; (2) its Bluetooth and Wi-Fi connection capabilities; and (3) its ability to upgrade to new iOS software and run new applications and features. See Compl., at ¶¶ 19, 20, 27. None of these alleged misrepresentations are described with the particularity necessary to support a fraud-based CLRA claim under *Rule 9(b)*. Indeed, despite the Complaint's length, the misrepresentation allegations are made up of nothing more than unadorned references to Apple's advertising campaign and marketing materials, and do not describe even one specific **[*14]** item that Plaintiff allegedly viewed or where and when he viewed it. In other words, missing are allegations informing Apple of how its "extensive multi-million dollar advertising campaign showcasing the iPhone's ability to wirelessly download the latest features and apps from new versions of iOS" reached Plaintiff, and which part of it was seen by him before he decided to purchase the iPhone 4. See Compl., at ¶ 22. It cannot be, as Plaintiff argues, that it is enough under *Rule 9(b)* to nebulously reference a product's advertising package and just declare the campaign misleading for a claim under the CLRA. Although each alleged statement made by Apple need not be identified at this stage, Plaintiff must at the very least describe some specific statements, state where or on what medium those statements were made, and reveal how Plaintiff accessed them. See *Baltazar v. Apple, Inc., No. CV-10-3231-JF, 2011 U.S. Dist. LEXIS 13187, at *6, 2011 WL 588209 (N.D. Cal. Feb. 10, 2011)* ("At the least, Plaintiffs must identify the particular commercial or advertisement upon which they relied and must describe with the requisite specificity the content of that particular commercial or advertisement."); see also *In re iPhone 4s Consumer Litig., 2014 U.S. Dist. LEXIS 19363, at *17-18, 2014 WL 589388 (N.D. Cal. Feb. 14, 2014)* ("*Rule 9(b)* therefore requires Plaintiffs to aver specifically the **[*15]** statements they relied upon in making their purchases, what is false or misleading about the statements, and why those statements turned out to be false."). Only then can the court be satisfied that Plaintiff has met his burden "to conduct a precomplaint investigation in sufficient depth to assure that the charge of fraud is responsible and supported, rather than defamatory and extortionate." *Ackerman v. Nw. Mut. Life Ins. Co., 172 F.3d 467, 469 (7th Cir. 1969)*. Plaintiff's reliance on *Morgan v. AT&T Wireless Services, Inc., 177 Cal. App. 4th 1235, 99 Cal. Rptr. 3d 768 (2009)*, for the proposition that he has met his federal pleading obligations is unpersuasive, considering Morgan discusses only a California pleading standard and was addressing an amended complaint pled with much greater detail.

As to the second element, "consumers seeking to recover damages under the CLRA based on a fraud theory must prove 'actual reliance on the misrepresentation and harm.'" *Sateriale v. R.J. Reynolds Tobacco Co., 697 F.3d 777, 794 (9th Cir. 2012)* (quoting *Nelson v. Pearson Ford Co., 186 Cal. App. 4th 983, 1022, 112 Cal. Rptr. 3d 607 (2010))*. Although actual reliance can be presumed or inferred when an alleged misrepresentation is material, a plaintiff must still plausibly allege that the misrepresentation was material, such that a reasonable person "would attach importance to [the misrepresentation's] existence or nonexistence in determining his choice of action in the transaction in question." *In re Tobacco II Cases, 46 Cal. 4th 298, 327, 93 Cal. Rptr. 3d 559, 207 P.3d 20 (2009)*.

Actual reliance **[*16]** cannot be presumed or inferred from the Complaint's allegations because Plaintiff has not plausibly established materiality. Without more detail describing the marketing materials Plaintiff reviewed before purchase, left unanswered is whether it was reasonable for Plaintiff to believe based on what he saw or heard that his iPhone 4's Bluetooth and Wi-Fi capabilities would always work despite changes to the operating software, or that the phone would be able to download and run iOS 7 effectively when it was eventually released. See *In re iPhone 4s Consumer Litig., 2014 U.S. Dist. LEXIS 19363, at *20-21* (finding plaintiff's allegations insufficient when, in relation to a lawsuit claiming that the iPhone's Siri feature did not always function as advertised, Plaintiff's did not identify "any specific statement by Apple that expressly indicates that Siri would be able to answer every question, or do so consistently."). Notably, Plaintiff cannot plausibly assert that he relied on any promotional material related to iOS 7 for this purpose since that particular software upgrade is not alleged to have been unveiled until June 10, 2013. See Compl., at ¶ 16. Plaintiff purchased his phone more than one year earlier, on April 30, 2012. Id. at ¶ 35. **[*17]** Thus, any representations about the subsequently-released operating software, some of which are carefully and uncoincidentally mixed into the Complaint, do not aid Plaintiff in stating a CLRA claim concerning his previously-acquired mobile device. See, e.g., id. at ¶ 20 ("According to Apple, 'because iOS 7 is engineered to take full advantage of the advanced technologies built into Apple hardware, your devices are always years ahead - from day one to day whenever.'").

Apple's other arguments directed to the CLRA claim - that iOS 7 is not a "good" or "service" that was sold or leased under the statutory scheme, and that the Apple iOS 7 Software Licensing Agreement preclude reliance - are rejected. The court need to decide whether iOS 7 can support a CLRA cause of action because Plaintiff's claims are directed at the inoperability of his phone, not at problems with the iOS 7 software itself. The iPhone 4s is indisputably a "good" that was sold. See *In re iPhone 4s Consumer Litig., No. C 12-1127 CW, 2013 U.S. Dist. LEXIS 103058, at *45-46, 2013 WL 3829653 (N.D. Cal. July 23, 2013)* (explaining the distinction between cases alleging defects in software which do not support a CLRA claim, and those based on defects in the mobile **[*18]** device which do support a CLRA claim). Additionally, the Apple iOS 7 Software Licensing Agreement is of no moment to Plaintiff's decision to acquire the iPhone 4 since, again, the software was not released until well after Plaintiff's purchase. Presumably, the referenced licensing agreement came to Plaintiff at the time he updated the operating software, not before he bought the phone.

For these reasons, Plaintiff has not sufficiently alleged a violation of the CLRA. Accordingly, the claim will be dismissed with leave to amend.

iii. UCL

The UCL prohibits acts of unfair competition, including "any unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue, or misleading advertising." *Cal. Bus. & Prof. Code § 17200*. Plaintiff alleges that Apple's conduct violated all three "prongs" of the UCL.

A violation of the "unlawful" prong of the UCL may be established by a variety of unlawful acts, including those practices prohibited by law, whether "civil or criminal, federal, state, municipal, statutory, regulatory, or court-made." *Saunders v. Super. Ct., 27 Cal. App. 4th 832, 838-39, 33 Cal. Rptr. 2d 438 (1994)*. Plaintiff's claim under the "unlawful" prong is based on a violation of the CLRA. Since Plaintiff has not established a violation of the CLRA, he similarly has not established **[*19]** this prong of the UCL.

To state a claim under the "fraudulent" prong of the UCL, a plaintiff must allege that the challenged practice is likely to deceive members of the public. *Bardin v. Daimlerchrysler Corp., 136 Cal. App. 4th 1255, 1274, 39 Cal. Rptr. 3d 634 (2006)*. Reduced to elements, "plaintiffs must allege with specificity that defendant's alleged misrepresentations: (1) were relied upon by the named plaintiffs; (2) were material; (3) influenced the named plaintiffs' decision to purchase the product; and (4) were likely to deceive members of the public." *In re Apple In-App Purchase Litig., 855 F. Supp. 2d 1030, 1041 (N.D. Cal. 2012)*. The sufficiency of a UCL fraud claim is routinely analyzed with a corresponding CLRA claim. Id. (citing *Kowalsky v. Hewlett-Packard Co., 2011 U.S. Dist. LEXIS 89379, at *17-18, 2011 WL 3501715 (N.D. Cal. Aug. 10, 2011))*. Since Plaintiff has not adequately identified with sufficient particularity the misrepresentation or fraudulent statements made by Apple which he relied upon to purchase the iPhone 4s, he has failed state a claim under the "fraudulent" prong of the UCL.

The UCL also creates a cause of action for a business practice that is "unfair" even if not specifically proscribed by some other law. *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1143, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)*. "Unfair" practices constitute "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, **[*20]** or otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. To determine whether a practice is unfair in a consumer action, the court weighs the utility of defendant's conduct against the gravity of the harm to the alleged victim. *Bardin v. DaimlerChrysler Corp., 136 Cal. App. 4th 1255, 1268, 39 Cal. Rptr. 3d 634 (2006)*.

Here, Plaintiff's own description of his "unfair" claim establishes that it is based on the same conduct underlying the CLRA claim. See Opp'n, Docket Item No. 19, at p. 17 ("Plaintiff alleged, with specificity, that Defendant falsely and misleadingly represented to its customers that the iPhone's key capabilities of Wi-Fi and Bluetooth would be functional with routine software updates."). But as already explained, the allegations of misrepresentation are not sufficient to support this theory. Plaintiff has not pointed to anything specific within Apple's advertising or marketing of the iPhone which promises that the Wi-Fi and Bluetooth functions would operate without interruption through all software updates. He therefore has not stated a claim under this prong of the UCL.

Because the allegations are insufficient under all three prongs, the UCL claim will be dismissed with leave to amend.

iv. Breach of Express Warranty

To prevail on a breach of express warranty **[*21]** claim, "a plaintiff must prove (1) the seller's statements constitute an 'affirmation of fact or promise' [which relates to the goods] or a 'description of the goods'; (2) the statement was 'part of the basis of the bargain'; and (3) the warranty was breached." *Weinstat v. Dentsply Int'l, Inc., 180 Cal. App. 4th 1213, 1227, 103 Cal. Rptr. 3d 614 (2010)* (quoting *Keith v. Buchanan, 173 Cal. App. 3d 13, 20, 220 Cal. Rptr. 392 (1985))*.

Plaintiff alleges that a warranty was created between Apple and its customers who purchased an iPhone through "promises and affirmations of fact made by [Apple] on its website and through its marketing and advertising campaign." See Compl., at ¶ 107. This warranty apparently guaranteed that the iPhone's Wi-Fi and Bluetooth connection would perform as advertised, even after implementation of iOS 7. Id. Despite this description, Plaintiff's allegations do not establish the elements of an express warranty claim. To successfully do so, Plaintiff must "identify a 'specific and unequivocal written statement'" about the product that constitutes an 'explicit guarantee[].'" *In re iPhone 4S Consumer Litig., 2014 U.S. Dist. LEXIS 19363, at *29* (quoting *Maneely v. Gen. Motors Corp., 108 F.3d 1176, 1181 (9th Cir. 1997))*. The court has explained above why the allegations are not sufficiently detailed to provide Apple with meaningful notice of which particular advertisements and webpages are at issue. Without more information, the exact terms of **[*22]** the purported warranty are not established with the requisite level of clarity. The claim for breach of express warranty will be dismissed with leave to amend.

v. Misrepresentation Claims

The elements of intentional misrepresentation in California are: (1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud or to induce reliance; (4) justifiable reliance; and (5) resulting damage. *Engalla v. Permanente Med. Group, Inc., 15 Cal. 4th 951, 974, 64 Cal. Rptr. 2d 843, 938 P.2d 903 (1997)*. The elements of negligent misrepresentation are similar except that a plaintiff need not show that the defendant knew of the falsity of the statement, but rather that the defendant lacked reasonable ground for believing the statement to be true. *Charnay v. Cobert, 145 Cal. App. 4th 170, 184, 51 Cal. Rptr. 3d 471 (2006)*.

As noted, the elements of any species of misrepresentation claim require Plaintiff to show, unsurprisingly, that Apple made some type of a misrepresentation to him. Here, Plaintiff has not done so with the level of specificity required by *Rule 9(b)*. In particular, Plaintiff has not pled the actual content of the alleged misrepresentations made by Apple in their advertising and marketing, either with respect to Wi-Fi or Bluetooth connectivity, nor has he alleged facts sufficient to show that he relied justifiably relied on those misrepresentations. See *Glen Holly Entm't, Inc. v. Tektronix, Inc., 352 F.3d 367, 379 (9th Cir. 2003)* (holding **[*23]** that reliance on "generalized, vague and unspecific assertions, constituting mere 'puffery'" is not reasonable). For these reasons, the misrepresentation claims will be dismissed with leave to amend.

B. Motion to Strike

Apple has filed a separate motion to strike the class allegations asserted in the Complaint. Essentially, Apple seeks a pre-certification decision on the sufficiency of these allegations under *Federal Rule of Civil Procedure 23*. This motion has not been brought at the appropriate time.

Federal Rule of Civil Procedure 23(c) authorizes the court to issue a class certification decision "[a]t an early practicable time after a person sues or is sued as a class representative." But in general, class allegations are not tested at the pleading stage and are instead scrutinized after a party has filed a motion for class certification. *Brown v. Hain Celestial Group, Inc., 913 F. Supp. 2d 881, 888 (N.D. Cal. 2012)*; see also *Thorpe v. Abbott Labs., Inc., 534 F. Supp. 2d 1120, 1125 (N.D. Cal. 2008)*. That is because a class certification decision usually involves considerations enmeshed in the factual and legal issues presented by the representative's claims. *Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)*. Thus, a motion to strike class allegations should only be seriously considered when "the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim." **[*24]** *Id*.

Here, it is not "plain enough from the pleadings" whether or not the interests of the unnamed class member are encompassed in Plaintiff's claims, especially when it is anticipated that Plaintiff will file an amended complaint with additional allegations. Under these circumstances, the pleadings have not been settled to the point that it is appropriate or efficient to test the class allegations. Moreover, the court does not believe it necessary to engage in a lengthy Rule 23 analysis now because it is unclear whether and in what form this case will ultimately proceed. The analysis presented by Apple through this motion is better suited in response to a motion for class certification, should one be filed in the future.

Because it is premature, Apple's Motions to Strike the Class Allegations will be denied.

IV. ORDER

Based on the foregoing, Apple's Motion to Dismiss (Docket Item No. 14) is GRANTED. All claims in the Complaint are DISMISSED WITH LEAVE TO AMEND. Any amended complaint filed in response to this order must be filed on or before **April 8, 2015**.

Apple's Motion to Strike (Docket Item No. 15) is DENIED.

IT IS SO ORDERED.

Dated: March 23, 2015

/s/ Edward J. Davila

EDWARD J. DAVILA

United States **[*25]** District Judge

Deborah Heart & Lung Ctr. v. Virtua Health, Inc.

United States District Court for the District of New Jersey

March 24, 2015, Decided; March 24, 2015, Filed

Civil No. 11-1290 (RMB/KMW)

Reporter

2015 U.S. Dist. LEXIS 36588 *; 2015-1 Trade Cas. (CCH) P79,119; 2015 WL 1321674

DEBORAH HEART AND LUNG CENTER, Plaintiff, v. VIRTUA HEALTH, INC., et al., Defendants.

Notice: NOT FOR PUBLICATION

Subsequent History: Affirmed by *Deborah Heart & Lung Ctr. v. Virtua Health, Inc., 833 F.3d 399, 2016 U.S. App. LEXIS 15090 (3d Cir. N.J., Aug. 17, 2016)*

Prior History: *Deborah Heart & Lung Ctr. v. Penn Presbypyterian Med. Ctr., 2011 U.S. Dist. LEXIS 149664 (D.N.J., Dec. 30, 2011)*

Core Terms

patients, anticompetitive, effects, relevant market, Cardiology, demonstrating, cardiac, antitrust, Lease, alleged conspiracy, rule of reason, no evidence, markets, de minimis, Defendants', competitors, privileges, contends, costs, summary judgment, Sherman Act, anesthesiologists, cardiologists, transferred, suspension, parties, prices, cases, adverse effect, oral argument

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Judges: RENEE MARIE BUMB, United States District Judge.

Opinion by: RENEE MARIE BUMB

Opinion

[Docket Nos. 204 & 205]

BUMB, UNITED STATES DISTRICT JUDGE:

This matter comes before the Court upon a two motions for summary judgment filed by the Defendants in this matter, Virtua Health, Inc. and Virtua Memorial Hospital Burlington County ("Virtua") and The Cardiology Group, P.A. ("CGPA"), (collectively referred to as the "Defendants"). Plaintiff Deborah Heart and Lung Center ("Plaintiff" or "Deborah") has opposed both motions. This Court heard oral argument on September 22, 2014, and ordered the parties to submit supplemental briefing on the issue of anticompetitive effects. After reviewing the parties' submissions, this Court will grant the Defendants' respective motions for summary judgment for the **[*2]** reasons set forth below.

I. Background

A. Relevant Facts

The record in this matter is voluminous and complex, and the facts, both undisputed and disputed, are well known to the parties. Therefore, this Court will set forth only those facts necessary for resolution of the instant motions. As is required on a motion for summary judgment, this Court will draw all inferences in favor of Plaintiff as the non-moving party. *Kopec v. Tate, 361 F.3d 772, 775 (3d Cir. 2004)*(stating that where there are significant factual disputes between the parties, the facts should be construed in favor of the non-moving party).

For the reasons set forth below, resolution of the instant motions turns entirely on whether Plaintiff has presented sufficient evidence of anticompetitive effects. See discussion infra at 25-44. Therefore, the facts recited herein will focus on this issue, and the Court will provide a brief overview of other facts as they relate to the alleged conspiracy underlying this case.[1]

i. The Relevant Business Entities

Plaintiff Deborah is a specialty hospital located in Browns Mills, New Jersey. [Virtua's Statement of Facts ("VSOF") and Plaintiff's Response ("PR") at ¶ 1].[2] Deborah is one of only three hospitals in the United States that is exempt from having to collect co-pays, deductibles, or any other out-of-pocket expenses from patients because the federal government recognizes its special status as a charity hospital. [PSOF at ¶ 2]. CGPA was a cardiology practice that practiced in Burlington County at the time relevant to this law suit. [Plaintiff's Statement of Fact ("PSOF") and Virtua's Response ("VR") at ¶ 17]. In July 2012, Virtua purchased all of CGPA's assets but none of its liabilities. [Id.]. Virtua is a multi-hospital health system in southern New Jersey, which includes Virtua Memorial Hospital Burlington County. [VSOF & PR at ¶ 3]. At the relevant time period, under applicable regulations, Virtua was not authorized to provide cardiac surgery. [PSOF & VR at ¶ 27]. Penn Presbyterian Medical **[*4]** Center ("PPMC") is a hospital in West Philadelphia and is part of the University of Pennsylvania Health System. [PSOF & VR at ¶ 22]. PPMC is authorized to perform cardiac surgery.

ii. ACI & PCI Procedures & Affiliation Agreements

The term "ACI procedures," which are performed in hospitals, refers to advanced cardiac interventional procedures comprised of three types of services — angioplasties, electrophysiology, and cardiac surgery. [VSOF & PR at ¶ 6]. ACI procedures form two relevant product markets: emergency angioplasty and non-emergency ACI procedures. [VSOF and PR at ¶ 6]. A "PCI" refers to a "Percutaneous Coronary Intervention" and is a type of angioplasty.[3] See Expert Report of Evan Hoffman Schouten, Pl.'s Ex. 140 at 3. In Pennsylvania and New Jersey, hospitals may only provide facilities for procedures under a license from the state's Department of Health. [VSOF & PR at ¶ 8]. It is

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[1] Much of the Statement of Facts submitted by Plaintiff focuses on establishing a "conspiracy" between Virtua and CGPA, see e.g., PSOF at ¶¶ 39-83, and between CGPA, Virtua and Penn, see PSOF at ¶¶ 87-113, to remove Deborah from the relevant market. The necessary facts surrounding **[*3]** the agreements are set forth herein only to the extent that the knowledge is necessary to understand the issue of anticompetitive effects, which is dispositive here.

[2] CGPA incorporated Virtua's response to the Plaintiff's Statement of Material Facts where relevant and Virtua incorporated CGPA's statement of material facts where relevant.

[3] For ease of reference, this Court will refer simply to ACI procedures throughout this Opinion as the term encompasses angioplasties and a PCI is a type of angioplasty.

undisputed that during the relevant time period Deborah and PPMC were licensed to provide cardiac surgery services whereas Virtua **[*5]** was not. [PSOF & VR at ¶ 27].

When a patient requires an ACI procedure and the physician lacks the expertise to provide the ACI procedure or where the hospital where the patient is seen is not licensed to provide the service, a physician must refer the patient to a more specialized interventional cardiologist or to a hospital where the interventional cardiologist can perform the service. [VSOR & PR at ¶¶ 7-10]. Prior to the transfer, patients must consent and the requirements of the New Jersey Patient's *Bill of Rights* must be fulfilled. [VSOF & PR at ¶¶ 7-10].[4]

ii. Deborah & CGPA

Because none of the CGPA cardiologists performed diagnostic invasive or interventional procedures before July 2006, patients in need of those procedures were referred to non-CGPA cardiologists who performed those types of specialty procedures, typically either to a Deborah-employed physician, or to physicians at Cooper University Hospital. [VSOF & PR at ¶ 15].

In 1992, Deborah approached CGPA about sending more CGPA patients to Deborah, which led to a growing **[*6]** referral relationship between Deborah and CGPA. [Id. at ¶ 16]. At this time, where a referral to a Deborah-employed physician was necessary for invasive diagnostic catheterization or ACI services and the CGPA patient was an inpatient or emergency patient at Virtua, the referral required the CGPA patient to be transferred from Virtua to Deborah for treatment by the Deborah-employed physician. [Id. at ¶ 17].

By 1999, the referral relationship between CGPA and Deborah-employed physicians had grown, and CGPA entered into five identical individual contracts (the "Deborah Physician Leases") with certain interventional cardiologists employed by Deborah, including Charles A. Dennis, M.D. [Id. at ¶ 18]. At the time CGPA entered into the Deborah Physician Leases, CGPA physicians primarily treated their patients at CGPA's own offices and at Virtua. [Id. at ¶ 22]. Although treated by Deborah-employed physicians, those patients remained patients of CGPA, and CGPA billed insurers and the patient for the services provided by the Deborah-employed physicians. [Id. at ¶ 21].

At the time of the 2002 Deborah Physician Leases between CGPA and Dr. Dennis, Dr. Dennis was the Chair of Deborah's Department of **[*7]** Cardiovascular Diseases, and had been employed at Deborah as an interventional cardiologist since 1991. [Id. at ¶ 25]. While still a Deborah employee in 2003, Dr. Dennis applied for and was granted medical staff privileges to perform low-risk catheterizations at Virtua, and Dr. Dennis became Virtua's first Cardiac Catheterization Laboratory Director, with Deborah's knowledge and consent. [Id. at ¶ 28].

On January 1, 2005, while the 2002 Deborah Physician Leases were in effect, CGPA entered into a Cardiology Services Agreement with Virtua (the "CSA") under which CGPA agreed to "provide all cardiac services to all patients in the Cardiovascular Department of the Hospital [Virtua]" on an exclusive basis . . . ." [Id. at ¶ 31]. The purpose of the CSA was "to promote control, cost, quality and efficiency of service in the performance of cardiac services" at Virtua, and its terms addressed CGPA's administrative and coverage obligations as the exclusive provider for cardiology services at Virtua. [Id. at ¶ 32]. In each year that the CSA was in effect, patients were transferred from Virtua to Deborah for procedures to be performed at Deborah, as follows: 2005, 627 patients; 2006, 652 patients; **[*8]** 2007, 392 patients; 2008, 157 patients; 2009, 169 patients; and between January 1, 2010 and July 15, 2010, 60 patients. [Id. at ¶ 37]. In 2006, Virtua became licensed by the New Jersey Department of Health and Senior Services to operate as a full-service adult diagnostic cardiac catheterization facility; the facility became operational in 2007. [Id. at ¶ 38].

iv. Dr. Dennis and His Suspension

[4] *N.J.S.A. §26:2H-12.8*.

Dr. Dennis was employed by Deborah from 1991 to 2006; he announced his resignation on February 21, 2006, providing notice of his intention to resign from Deborah effective June 30, 2006, in order to join CGPA and become a CGPA employee. [Id. at ¶ 41]. With Dr. Dennis employed by CGPA, it became unnecessary for CGPA to continue to lease Deborah-employed physicians to treat their patients in need of interventional services, so the Deborah Physician Leases were terminated in July 2006. [Id. at ¶ 46]. From July 2006 through February 2007, Dr. Dennis continued to perform angioplasties at Deborah. [Id. at ¶ 47].

Deborah alleges that as early as February 2006, Virtua executives were in contact with Dr. Dennis in an attempt to recruit him to help build Virtua's Cardiac Institute so that Virtua could obtain **[*9]** a cardiac surgery license. Deborah further contends that Virtua was part of a conspiracy with CGPA to force Deborah into either a merger or complete shutdown. [PSOF at ¶¶ 78-82].[5]

While the reasons precipitating his suspension are hotly disputed by the parties, it is undisputed that on February 20, 2007, Deborah suspended Dr. Dennis' privileges to perform interventional procedures at Deborah. [PSOF at ¶ 62]. This suspension caused an immediate rift between Deborah and CGPA. On the very same day as the suspension, Diane Hinkel, CGPA's administrator, wrote to Deborah and explained that CGPA would not sign the terms of a new Deborah-CGPA arrangement (called the "Deborah-EP **[*10]** Physician Lease") due to Deborah's suspension of Dr. Dennis's privileges. [VSOF & PR at ¶ 53]. Deborah attempted to persuade CGPA to sign the Deborah-EP Physician Lease, but CGPA declined. [Id. at ¶ 54]. Dr. Fish, a CGPA physician at that time, expressed CGPA's view that Deborah's suspension of Dr. Dennis's privileges was a "totally unfair" and "unjustified" "black mark" on Dr. Dennis' record, and stating that CGPA's physicians were united that Dr. Dennis "must be immediately granted unconditional interventional privileges at Deborah" for the relationship to continue. [Id. at ¶ 55]. Dr. Dennis was understood by Deborah to be the "bridge between the CGPA and Deborah." [Id. at ¶ 63]. Contrary to CGPA's "demands," Deborah ultimately terminated Dr. Dennis' interventional privileges entirely. [Id. at ¶ 58].

v. CGPA & PPMC

Following the suspension of Dr. Dennis' privileges, CGPA physicians began to refer their patients who could not be treated by CGPA physicians to Penn Cardiology physicians. [VSOF & PR at ¶ 72]. Because Penn Cardiology physicians were employed by Penn, they routinely transferred patients to Penn hospitals, including, most frequently, PPMC. [Id.] In November 2007, CGPA and **[*11]** Penn Cardiology formalized their relationship via what is referred to as the "Penn Cardiology Physician Lease." [Id. at ¶ 75]. In January and February of 2008, CGPA also entered into an Occupancy Agreement, Affiliation Agreement and a Cardiology Working Group Participation Agreement with University of Pennsylvania Health System and/or its affiliates, (collectively referred to as the "Affiliation Agreement").[6] [Id. at ¶¶ 76-77].

The Penn Cardiology Physician Lease provided for CGPA to pay an annual leasing fee to Penn Cardiology, in return for which Penn Cardiology leased interventional cardiologists to CGPA on a part-time basis to treat CGPA patients in need of diagnostic cardiac catheterization and interventional cardiac procedures that CGPA physicians could not provide. [Id. at ¶ 78].

The Penn Cardiology Physician Lease also provided that "[a]ll Services shall be performed at a hospital designated by [CGPA]" and that the Penn Cardiology physicians would "take all **[*12]** reasonable steps to ensure that any Physician providing Services [under the agreement] shall obtain or maintain medical staff privileges at the Hospital

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[5] The factual record contains evidence in support of this point. See, e.g., Pl.'s Ex. 14 (October 2006 email from Dr. Dennis to Virtua Vice President, Matt Zuino, discussing a "white knight" strategy wherein Virtua could gain Deborah's cardiac surgery services); Pl.'s Ex. 31 (email from Dr. O'Neil to CGPA Executive Committee stating, "One of [Deborah's] accountants said he gives them 2 years before [its] doors close. We could speed that up when we no longer do [percutaneous transluminal coronary angioplasties] at [Deborah].").

[6] It is undisputed that Penn reached a settlement agreement with the United States to resolve alleged claims of violations of the Stark Act and Anti-Kickback Act as a result of its contractual relationships with CGPA. [Pl.'s Ex. 65].

at which the Services are to be performed." [Id. at ¶ 80]. When procedures could not be performed by Penn Cardiology physicians at Virtua, the Penn Cardiology physicians provided those services at PPMC. [Id. at ¶ 82].

Deborah contends that Penn wanted a commitment for a "100% referral" of patients from CGPA. [PSOF at ¶ 90]. Plaintiff further avers, as is critical to its antitrust claims here, that "although the Affiliation Agreement that was being negotiated was ostensibly a contract between CGPA and Penn, there is no doubt that Virtua was an unnamed party to the agreement and directly participated in its negotiation." [PSOF at ¶ 93].[7] Plaintiff alleges that Penn and Virtua officials met during this time period and exchanged promises about what procedures would be sent from Virtua to PPMC. [Id. at ¶ 96]. Relatedly, Section 1.1. of the Affiliation Agreement provides, in relevant part, that "the Clinical Practices of the University of Pennsylvania. . . will be the exclusive provider of cardiac catheterization services to [CGPA's] patients." [PSOF **[*13]** at ¶ 100]. Again, the crux of Plaintiff's allegations is that there was a conspiracy to cut Deborah out of the market that involved Virtua, CGPA and Penn.

vi. Geographic Markets & Alleged Anticompetitive Effects

It is undisputed that the relevant markets for ACI procedures in this case, as are as follows:

- Non-emergency ACI procedures: Burlington, Camden, Mercer, Monmouth, and Ocean Counties, and parts of Philadelphia;
- Emergency PCI services: Burlington, Monmouth, and Ocean Counties.

[VSOF & PR at ¶ 96].

Following the inception of the alleged conspiracy, there was a powerful shift in transfers away from Deborah — i.e., "prior to 2007 the ratio of transfers from Virtua to either Deborah or Penn Presbyterian was roughly 85% Deborah to 15% Penn. After the suspension of Dr. Dennis's privileges, the ratio flipped, such that by January 2008 when the Penn Affiliation Agreement was signed the ratio was roughly 30% Deborah to 70% Penn." [PSOF at ¶ 256].

As a result of the alleged conspiracy, Plaintiff avers that "patients who were pipelined to **[*14]** Penn suffered higher out-of-pocket costs, lower quality and diminished choice." See Doc. 265, Pl.'s Supp. Br. at 1. As part of its conspiracy allegations, Plaintiff further states that Virtua and CGPA "had a policy of not informing patients of their option of transferring to Deborah instead of [PPMC]," and such failure to inform patients that they could be transferred to Deborah violates the New Jersey Patient's *Bill of Rights*. [See PSOF ¶¶ 138-148].[8] Moreover, Plaintiff contends that this failure to inform negatively impacted patient choice. For example, Plaintiff states that:

> there is abundant evidence that even when patients stated a preference to go to Deborah, they were bullied and lied to in order to block the transfer. More than twenty patients and/or family members have given sworn testimony in this case telling horrifying stories of rank mistreatment and bullying at the hands of Virtua physicians, Virtua nurses, and CGPA physicians.

[PSOF at ¶ 149]. Plaintiff's Statement of Facts provides detail on the individual accounts of the twenty-plus patients cited and their experiences, which, Plaintiff contends, demonstrate that the doctrine of informed consent and the New Jersey Patients' *Bill of Rights* were violated. **[*15]** [PSOF at ¶¶ 151-225.][9]

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[7] Plaintiff has pointed to record evidence in support of its point. See, e.g., Pl.'s Ex. 57 (email discussing "leakage" of patients from Virtua to Deborah).

[8] There is no private cause of action for violations of the New Jersey Patient *Bill of Rights*. See *Castro v. NYT Television, 370 N.J. Super. 282, 291, 851 A.2d 88 (N.J. App. Div. 2004)*.

[9] Plaintiff adds that it was unable to come forward with evidence of additional patients as state court discovery is not yet compete. It further contends that "anticompetitive effects were felt by all 3,100 patients pipelined to Penn." Doc. No. 265, Pl.'s Supp. Br. at 1, n. 2. For purposes of this motion, this Court will draw the inference in favor of Plaintiff that many more patients were "pipelined" to Penn beyond the 20-plus cited in the Plaintiff's Statement of Fact.

With respect to quality, Deborah and PPMC produced "door-to-balloon times," referring to the time lapse between a heart attack and the insertion of a catheter to the artery (a.k.a. "the balloon") to clear blockage. [PSOF at ¶ 248]. Shorter door to balloon times are preferable as "minutes are crucial [and] time is muscle." [Id. at ¶ 250]. Plaintiff alleges that the data demonstrates that Deborah beat PPMC's door-to-balloon times by, on average, eight minutes. [Id.] Thus, Plaintiff contends that one of the anticompetitive effects of the alleged conspiracy is that the patients experience inferior quality because of PPMC's **[*16]** higher door-to-balloon times. Pl.'s Supp. Br. at 1.

Finally, Plaintiff sets forth that "pipelined" patients "suffered higher out-of-pocket costs." The only factual allegation in Plaintiff's Statement of Facts with respect to this point is "all patients treated at Deborah pay less out-of-pocket costs than patients treated at Penn—even when the patients have the same insurances and undergo the same medical procedures." [PSOF at ¶ 23].

It is undisputed that Deborah's market share in the relevant markets as identified by Plaintiff was largely unchanged from 2006 to 2007: for ACI services, Deborah's 2007 market share was approximately 10 percent, based on data reported by Deborah and other hospitals to the State, and Deborah's 2007 market share for emergency PCI services was less than 9 percent. [VSOF & PR at ¶ 106]. Plaintiff admitted that "[e]ven if Deborah were to be driven out of the market altogether, which did not occur, there would have been no significant reduction in competition in any relevant market." [Id. at ¶ 106].[10]

B. Procedural ***[*17]*** *History*

Plaintiff's Complaint originally contained two claims: 1) that the Defendants conspired with one another in violation of *Section 1* of the Sherman Act to exclude Plaintiff from the market for certain advanced cardiac interventional procedures, thereby restricting consumers' choice of providers for these procedures, and forcing consumers to pay higher prices; and 2) that these efforts were part of an overlapping conspiracy by the Defendants, in violation of *Section 2* of the Sherman Act. During the pendency of this litigation, Plaintiff also has been simultaneously prosecuting a state court case again against the Defendants asserting common law claims for tortious interference and unfair competition. See Deborah Heart and Lung Center v. Virtua Health, Inc. et al., No. BUR-L-1487-09. That litigation is ongoing.

In a prior Opinion [Docket No. 56], this Court dismissed Plaintiff's *Section 2* count for failure to state a claim, but permitted the *Section 1* claim to proceed. In permitting that claim to proceed, this Court found that Plaintiff had sufficiently alleged anticompetitive effects within the relevant product and geographic markets. This Court also found that, because Plaintiff was alleging that it could demonstrate **[*18]** anticompetitive effects, it did not need to demonstrate market foreclosure. Docket No. 56 at 18-19.

II. Standard of Review

Summary judgment shall be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. A fact is "material" if it will "affect the outcome of the suit under the governing law . . . ." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A dispute is "genuine" if it could lead a "reasonable jury [to] return a verdict for the nonmoving party." Id.

When deciding the existence of a genuine dispute of material fact, a court's role is not to weigh the evidence; all reasonable "inferences, doubts, and issues of credibility should be resolved against the moving party." *Meyer v. Riegel Prods. Corp., 720 F.2d 303, 307 n.2 (3d Cir. 1983)*. However, a mere "scintilla of evidence," without more, will not give rise to a genuine dispute for trial. *Anderson, 477 U.S. at 252*. Further, a court does not have to adopt the version of facts asserted by the nonmoving party if those facts are "utterly discredited by the record [so] that no reasonable jury" could believe them. *Scott v. Harris, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)*.

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[10] At oral argument, Plaintiff clarified that it believed this statement to be a reference to market foreclosure, which is not at issue here. Sept. 22, Tr. at 73-74.

In the face of such evidence, summary judgment is still appropriate "where the record . . . could not lead a rational trier of fact to find for the nonmoving party . . **[*19]** . ." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*.

The movant "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* (quoting *Fed. R. Civ. P. 56(c)*). Then, "when a properly supported motion for summary judgment [has been] made, the adverse party 'must set forth specific facts showing that there is a genuine issue for trial.'" *Anderson, 477 U.S. at 250* (quoting *Fed. R. Civ. P. 56(e)*). The non-movant's burden is rigorous: it "must point to concrete evidence in the record"; mere allegations, conclusions, conjecture, and speculation will not defeat summary judgment. *Orsatti v. N.J. State Police, 71 F.3d 480, 484 (3d Cir. 1995)*; *Jackson v. Danberg, 594 F.3d 210, 227 (3d Cir. 2010)* (citing *Acumed LLC v. Advanced Surgical Servs., Inc., 561 F.3d 199, 228 (3d Cir. 2009))* ("[S]peculation and conjecture may not defeat summary judgment.").

III. Analysis

As set forth above, the only remaining claim in this matter is Plaintiff's claim pursuant to *Section 1* of the Sherman Act, which provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations is hereby declared to be illegal.

15 U.S.C. § 1 (1994). To establish a violation of *Section 1*, a plaintiff must prove: **[*20]** "(1) concerted action by the defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted actions were illegal; and (4) that it was injured as a proximate result of the concerted action." *Gordon v. Lewistown Hosp., 423 F.3d 184, 207 (3d Cir. 2005)*; *Angelico v. Lehigh Valley Hosp., 184 F. 3d 268, 275 (3d Cir. 1999)*; *Black Box Corp. v. Avaya, Inc., No. 07-6161, 2008 U.S. Dist. LEXIS 72821, 2008 WL 4117844, at *7 (D.N.J. Aug. 29, 2008)*. For the reasons set forth below, resolution of the instant motions turns on the second prong of the test, and the Plaintiff's failure to present sufficient evidence of anticompetitive effect warrants summary judgment in favor of the Defendants.[11]

A. Quick Look v. Rule of Reason

As an initial matter, this Court must first resolve the appropriate analytical framework to apply to the purported evidence of anticompetitive effects — i.e., the "quick look" or traditional "rule of reason" analysis. Plaintiff contends that it has set forth sufficient evidence to prove anticompetitive effects under either standard, but argues that this Court should apply the quick look standard. Pl.'s **[*21]** Opp. Br. at 34.

The quick look analysis is an intermediate standard applied "where per se[12] condemnation is inappropriate, but where no elaborate industry analysis is required to demonstrate the anticompetitive character of an inherently suspect restraint." *United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993)* (internal quotations and citations omitted). As stated by the Third Circuit, "the quick look approach may be applied only when an observer with even a rudimentary understanding of economics could conclude that the arrangement in question would have an anticompetitive effect on customers and markets." *Gordon, 423 F. 3d at 210* (citing *California Dental Ass'n v. FTC,*

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[11] Because Plaintiff cannot demonstrate the requisite anticompetitive effects, it is not necessary for this Court to address the other prongs of the test. See *Tunis Bros. Co., v. Ford Motor Co., 952 F.2d 715, 722 (3d Cir. 1991)*(declining to address other prongs where plaintiff did not demonstrate adequate anticompetitive effects).

[12] The per se rule applies to "plainly anticompetitive agreements or practices." *United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993)*. The Plaintiff does not contend that the per se rule applies here.

526 U.S. 756, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)). In applying this standard, "competitive harm is presumed and the defendant must set forth some justification for the restraints." Id.

In support of its argument that the quick look standard should be applied, Plaintiff contends that "[d]iscovery has yielded myriad facts which show that the conspiracy in which Virtua, CGPA and Penn engaged in is inherently suspect and has no legitimate competitive justification." Pl.'s Opp. Br. at 36. In response, the Defendants argue that there is no horizontal **[*22]** restraint present as the agreements at issue exist between Virtua and CGPA and Penn and CGPA, who are not market competitors. In addition, Defendants point to their expert's report, which found that 98% of the relevant markets were not impacted by the alleged restraint and that "such a de minimis restraint could have no impact on the market, either anticompetitive or procompetitive." Defs.' Reply Br. at 17.

Courts have applied the "quick look" analysis "in cases involving agreements not to compete in terms of price or output among members of professional associations," *FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 459, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*, or cases "where the plaintiff has shown that the defendant has engaged in practices similar to those subject to per se treatment." *In re K-Dur Antitrust Litig., 686 F.3d 197, 209 (3d Cir. 2012)*. More recently, the Third Circuit has noted that in order to succeed under either a per se or quick look approach, a plaintiff must show "the existence of a horizontal agreement, that is, an agreement between 'competitors at the same market level.'" *In re Insurance Brokerage Antitrust Litigation, 618 F. 3d 300, 318 (3d Cir 2010)*(quoting *In re Pharmacy Benefit Managers Antitrust Litig., 582 F.3d 432, 436 n.5 (3d Cir. 2009))*. Overall, as stated by the Supreme Court, the "quick look analysis carries the day when the great likelihood of anticompetitive effects can easily be ascertained." *Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)*.

Even if this Court views the alleged restraint as viewed by Plaintiff— **[*23]** i.e., a horizontal agreement between Virtua, CGPA and Penn—for the reasons set forth in more detail below, this Court is unable to find that the anticompetitive effects can be so easily ascertained as to militate in favor of the quick look analysis. See *Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1367 (3d Cir. 1996)*(declining to apply quick look analysis where plaintiff stated that the "restraint's negative effect on competition is manifest given the abundance of record evidence showing . . . decreasing output and increasing process . . . [,] because plaintiff "failed. . . to substantiate its assertion with facts."). Therefore, this Court finds it appropriate to apply the rule of reason analysis, "[t]he usual standard applied to determine whether a challenged practice unreasonably restrains trade[.]" *In re Insurance Brokerage Antitrust Litigation, 618 F. 3d at 315*. In applying this standard, this Court is mindful that "[r]egardless of the standard used, the purpose of the inquiry is always to assess the effect of the conduct on competition[.]" *Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 831 (3d Cir. 2010)*.

Even if this Court were to begin with a quick look analysis as urged by the Plaintiff, a rule of reason analysis would, nevertheless, become applicable. Where the quick look analysis is applied, "condemnation is proper only after assessing and rejecting the logic of proffered procompetitive **[*24]** justifications." *Deutscher, 610 F. 3d at 832*. In applying the quick look standard, "[i]f, after examining the competing claims of anti-and procompetitive effects, it remains plausible that the net effect is procompetitive or that there is no effect on competition, then '[t]he obvious anticompetitive effect that triggers abbreviated analysis has not been shown.'" Id. (emphasis added).

After reviewing the evidence propounded by the Defendants in support of their contention that the alleged restraint is neutral, i.e., "[has] no impact on the market either anticompetitive or procompetitive," Defs.' Reply Br. at 17, this Court finds that it remains plausible that there is no effect on competition by the alleged restraint. See Declaration of Gregory Vistnes, Virtua App. at 285 ("Deborah's loss of CGPA's ACI services referrals did not reduce competition in any relevant market, but was instead a manifestation of ongoing competition."); Expert Report of Gregory Vistnes, Virtua App. at 440 ("there is no evidence of anticompetitive effects in any relevant antitrust market — either direct or indirect.").[13] In finding that it remains plausible that there is no impact on competition, this Court must continue its

[13] See Pl.'s Ex. 112, Vistnes Deposition: 82:13-24 (noting, in response to various hypotheticals posed by Plaintiff's counsel that "the economic analysis that I've conducted remains fundamentally the same in all of the situations that you are hypothesizing about. That economic analysis leads me to conclude that there was no harm to competition.").

analysis and apply the **[*25]** rule of reason, even if it were to begin with a quick look framework. *Id. at 833* (noting that rule of reason analysis applies once the quick look presumption disappears).

B. Rule of Reason Analysis

The rule of reason test "requires that a factfinder look at the totality of the circumstances in order to determine whether a business combination constitutes an unreasonable restraint of trade." *Gordon, 423 F.3d at 210*. Moreover, under this standard, the plaintiff "bears the burden of showing that the alleged contract produced an adverse, anticompetitive effect within the relevant geographic market." Id. As stated in this Court's prior Opinion, [Docket No. 56], a plaintiff may demonstrate that concerted action produced adverse, anticompetitive effects within the relevant product and geographic markets in two ways: (1) through direct evidence of actual anticompetitive effects; or **[*26]** (2) through proof of the defendant's market power, which acts as a proxy for anticompetitive effect. *Deutscher, 610 F.3d at 830*.

While, in both cases, a plaintiff must make some showing of a relevant market, where a plaintiff demonstrates direct evidence of actual anticompetitive effects, the plaintiff's burden is diminished and it must only demonstrate "the rough contours of a relevant market." *In re Compensation of Managerial, Professional and Technical Employees Antitrust Litig., No. 02-CV-2924, 2008 U.S. Dist. LEXIS 63633, 2008 WL 3887619, at *7 (D.N.J. Aug. 20, 2008)*(quotation omitted). In this matter, Plaintiff has made clear that it is seeking to demonstrate direct evidence of actual anticompetitive effects. As stated by several courts in this Circuit, however, "proof that the concerted action actually caused anticompetitive effects is often impossible to sustain. . . ." *Gordon, 423 F. 3d at 210* (citing *Brown Univ., 5 F. 3d at 668*). As set forth above, the Defendants do not contest the relevant markets as identified by Plaintiff's expert, Evan Hoffman Schouten. These markets include:

- Emergency Angioplasties: Burlington, Monmouth and Ocean Counties.
- Non-emergent/Elective ACI Procedures: Burlington, Camden, Mercer, Monmouth, and Ocean counties, as well as parts of Philadelphia.

[VSOR & PR at ¶ 96]. This Court will, therefore, utilize the markets as defined by the Plaintiff for purposes of the anticompetitive effects analysis, and **[*27]** refers to both sets of procedures generally as "ACI Procedures."

Actual anticompetitive effects can be shown through reduced output, increased prices, decreased quality, and loss of consumer choice. *Tunis Bros. Co., Inc. v. Ford Motor Co., 952 F.2d 715, 728 (3d Cir. 1991)*("An antitrust plaintiff must prove that challenged conduct affected the prices, quantity or quality of goods or services")(quotation and citation omitted). Both Defendants have moved for summary judgment arguing that Plaintiff has failed to present evidence sufficient to create a genuine dispute of material fact that the alleged concerted action produced such anticompetitive effects within the relevant product and/or geographic markets.[14]

The Defendants advance the following arguments in support of their conclusion that Plaintiff has failed to provide direct evidence of actual anticompetitive effects in the relevant markets as a whole:[15]

- Plaintiff's expert offered no testimony demonstrating that prices have **[*28]** increased or that output or quality has decreased in the relevant market. Doc. No. 204 at 3.
- There is no evidence that Deborah was prevented from competing in the relevant markets as evidenced by CGPA's small market share. Doc. 205 at 23.
- Deborah has only demonstrated harm to itself as an individual competitor, which is insufficient to satisfy the required anticompetitive effects element. Id. at 25.

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[14] Virtua also moves for summary judgment arguing that Plaintiff has failed to present sufficient direct or circumstantial evidence of concerted action. Because this Court finds that there is no genuine dispute of fact with respect to anticompetitive effects, it need not reach this argument. *Tunis Bros. Co., Inc., 952 F.2d at 722*.

[15] See discussion infra at 27-41 regarding applicability of the "market as a whole" language.

- Even if certain patients paid higher co-pays or deductibles or were deprived of their choice to be transferred to Deborah, those individuals' experience do not establish the harm to competition in the relevant markets. Id. at 29.

In its opposition papers, Plaintiff begins its argument by asserting what this Court determined at the motion to dismiss stage — i.e., that Plaintiff does not have to prove market power where it can present direct evidence of actual anticompetitive effects. Pl.'s Opp. Br. at 40-45. Again, this Court agrees that the demonstration of actual anticompetitive effects on the market as a whole obviates the need to demonstrate market power. [Docket No. 56 at 19, n.8]. After this Court's ruling on the Motion to **[*29]** Dismiss, the parties engaged in extensive discovery regarding Deborah's claim that it had evidence of actual anticompetitive effects on the market as a whole. Defendants contend that discovery failed to reveal any competent evidence of actual anticompetitive effects. See e.g., Virtua's Br. at 22 (stating that Plaintiff's expert offers no opinions on "whether or how CGPA's switch to Penn Cardiology injured competition in the relevant markets she has defined[.]").

In their joint reply brief, the Defendants further argue that Plaintiff's evidence is limited to only one hospital — Deborah - and its loss of a portion of the referrals from the twelve physicians practicing as CGPA, whose market share among cardiologists in the relevant markets is less than 8%. Defs.' Reply, Doc. 232 at 1-2. This evidence alone is insufficient as a matter of law. In addition, Defendants argue that "Deborah has presented absolutely no evidence about the pricing, output or quality of ACI procedures in the [m]arkets as a whole." Id. at 3. Finally, Defendants contend that Plaintiff had not even attempted to introduce evidence of market-wide harm and, instead seeks to rely on claims that CGPA patients, who fail to represent the **[*30]** remaining 92% of the relevant market, "did not experience 'Deborah's superior patient satisfaction scores and door-to-door balloon times,' and 'paid higher out-of-pocket costs.'" Defs.' Reply at 9 (quoting Pl's Opp. at 9). In sum, it is the Defendants' view that, in addition to failing to show market power and/or market foreclosure, Plaintiff has not presented any evidence demonstrating that there have been price increases, output reductions, or quality diminishment in the relevant markets as a whole. The Court agrees.

Initially, in reviewing the Plaintiff's opposition papers, this Court found that Plaintiff had failed to address the issue of actual anticompetitive effects, the very issue this Court found survived Defendants' motion to dismiss.[16] This Court held a hearing on this issue on September 22, 2014. At the hearing, it became apparent that the parties diverged on a central legal point that would need to be resolved by this Court: Plaintiff contends that it must only demonstrate "more than de minimis anti-competitive effects," Pl.'s Supp. Br., Doc. 25 at 1, whereas the Defendants assert that "any attempt by Deborah to demonstrate direct evidence of anticompetitive effects of a restraint must **[*31]** provide such evidence as to the market as a whole, not just an effect on Deborah or the patients of [CGPA]." Defs' Supp. Br., Doc. 264 at 1-2 (emphasis added). Because resolution of this issue would ultimately impact this Court's decision, the Court directed the parties to submit supplemental briefs addressing this issue.

At oral argument and in their supplemental submission, the Defendants argued that the case law supports their conclusion that Plaintiff must demonstrate that the alleged agreement at issue injured competition in the markets "as a whole." **[*32]** Defendants contend that the evidence introduced by Plaintiff fails to show that there was any anticompetitive effect on the market as a whole. For example, as stated in the declaration of Virtua's expert, Gregory Vistnes, harm to individual patient choice or having to incur a higher co-pay at another hospital "is not attributable to a reduction in competition in any relevant market." Vistnes Decl., Virtua App. at 284.

In response to the Defendants' position that failure to demonstrate harm on the market as a whole is fatal, Plaintiff contends that "[t]he canard is that the anticompetitive effects have to be market wide. That unto itself is erroneous.

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[16] It is not enough to survive summary judgment to simply state that this Court found, at the motion to dismiss stage, that Plaintiff had adequately pled direct evidence of anticompetitive effects. Pleading and proof are distinct and summary judgment is the time Plaintiff is called on to put forth their evidentiary proof. *In re IKON Office Solutions, Inc., 277 F.3d 658, 666 (3d Cir. 2002)*("a party will not be able to withstand a motion for summary judgment merely by making allegations; rather, the party opposing the motion must go beyond its pleading and designate specific facts by use of affidavits, depositions, admissions, or answers to interrogatories showing there is a genuine issue for trial.").

There is no support for that in the case law." Sept. 22, 2014, Oral Arg. Tr. 56:22-24. Plaintiff instead argues that its burden with respect to presenting evidence of anticompetitive effects is to simply demonstrate that the effects are "more than de minimis." Plaintiff argues that the support for this proposition appears in *Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715 (3d Cir. 1991)*, discussed further infra, wherein the plaintiffs failed to demonstrate sufficient anticompetitive effects, not because they failed to demonstrate an injury on a market-wide basis, but because plaintiff had failed to demonstrate **[*33]** more than a de minimis injury. Sept. 22, 2014 Tr. at 59: 10-12. Plaintiff avers that, unlike the plaintiff in Tunis, it can demonstrate more than a de miminis injury because its patients who were "pipelined to Penn suffered higher-out-of-pocket costs, lower quality and diminished choice." Pl.'s Supp. Br. at 1. Importantly, Plaintiff does not point to any evidence that it has presented to this Court demonstrating anticompetitive effects as to the market as a whole. Instead, as set forth in its Statement of Facts, Plaintiff only presents evidence that Deborah or some patients of the CGPA were impacted as the relevant anticompetitive effects of the alleged conspiracy. See Doc. 265, Pl.'s Supp. Br. at 1.

This Court has reviewed the case law of this Circuit, other Circuits, and the cases cited by the parties, and it finds that, contrary to the Plaintiff's assertions at oral argument and in its submissions, the Third Circuit expressly requires a plaintiff to demonstrate that alleged anticompetitive effects impact the market at issue as a whole, as clearly set forth in *Eichorn v. AT&T Corp., 248 F. 3d 131 (3d Cir. 2001)*. In Eichorn, the Circuit discusses this requirement in two sections of its opinion: 1) as discussed by Plaintiff at oral **[*34]** argument, during its discussion of antitrust standing, and, 2) most critically as it applies to the instant case, in its analysis of the alleged anticompetitive activity under the rule of reason standard. In its standing discussion, the Court states:

> It is well established that an antitrust injury reflects an anti-competitive effect on the competitive market. . . . We have consistently held that an individual plaintiff personally aggrieved by an alleged anti-competitive agreement has not suffered an antitrust injury unless the activity has a wider impact on the competitive market.

Eichorn, 248 F. 3d at 140. Then, when discussing purported anticompetitive effects under the rule of reason analysis, the Court, again, notes "[t]he antitrust laws were not designed to protect every uncompetitive activity, but rather only those activities that have anti-competitive effects on the market as a whole." *Id. at 148* (emphasis added)(citing *Broad Music, Inc., v. Columbia Broadcasting Sys., 441 U.S. 1, 23, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*("Not all arrangements among actual or potential competitors that have an impact on price are per se violations of the Sherman Act or even unreasonable restraints.")). Thus, it is clear that under Third Circuit jurisprudence, anticompetitive effects must be shown *to impact the market as a whole*.[17] This **[*35]** is not, as Plaintiff urges, merely a requirement that the Plaintiff demonstrates only more than a de minimis market impact; that impact must extend to the whole defined market.

The Supreme Court's decision in *Jefferson Parish v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)* is instructive. The Jefferson Parish case involved an arrangement wherein East Jefferson hospital was party to a contract providing that all anesthesiological services required by the hospital's patients would be performed by Roux & Associates, a single group of anesthesiologists. *Id. at 5*. After finding that the agreement did not create a per se violation of the Sherman Act, the Court engaged in "an inquiry into the actual effect of the exclusive contract on competition among anesthesiologists." *Id. at 29*. Ultimately, the Court found that there was no antitrust violation, stating "there has been no showing that the market as a whole has been affected at all by the contract." (*Id. at 31*)(emphasis added).

While Plaintiff attempts to distinguish Jefferson Parish because it is a case involving a "tying" arrangement, such efforts are unsuccessful; the relevant **[*36]** portions on the analysis in Jefferson Parish are not undermined by the fact that the instant case does not involve tying. Instead, the Court's analysis of whether the contract between Roux and East Jefferson hospital unreasonably restrained competition is directly relevant here — i.e., the Court found "there is no evidence that any patient who was sophisticated enough to know the difference between two anesthesiologists was not also able to go to a hospital that would provide him with the anesthesiologist of his choice." *Id. at 30*. In so finding, the Court noted that there was "no showing that the market as a whole has been

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[17] Notably, and tellingly, the Plaintiff fails entirely to address the language of Eichorn in its supplemental briefing to this Court on this very issue.

affected at all by the contract." *Id. at 31*. There is no indication that the Court's analysis on this point is relevant in tying cases only. Instead, the statement follows the Court's discussion of whether the arrangement at issue had an unreasonable impact on purchasers with respect to price, quality or supply and/or demand. The same line of reasoning applies in the instant case, and other courts engaging in a similar analysis have made the same determination with respect to the required scope of anticompetitive effects. See, e.g., *Capital Imaging Assocs., P.C., v. Mohawk Valley Medical Assocs., 996 F.2d 537, 543 (2d Cir. 1993)*("Under [the rule of reason] test plaintiff **[*37]** bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice. Insisting on proof of harm to the whole market fulfills the broad purpose of the ***antitrust law*** that was enacted to ensure competition in general, not narrowly focused to protect individual competitors.")(emphasis in original)[18]; *Med Alert Ambulance, Inc., v. Atlantic Health System, Inc., No. 04-1615, 2007 U.S. Dist. LEXIS 57083, at *29 (D.N.J. Aug. 6, 2007)*("Under the rule of reason theory, the plaintiff must establish that the challenged action had an actual adverse effect on competition as a whole in the relevant market.")(emphasis added)(internal quotations omitted).

Other sources previously quoted by this Court refer to the need to demonstrate injury to the market as a whole. For example, Jonathan Jacobson, former member of the Congressional Antitrust Modernization Commission, persuasively writes: "In all cases, the relevant question is . . . whether there has been an adverse effect on price, output, quality, choice, or innovation in the market as a whole." Jonathan M. Jacobson, Exclusive Dealing, "Foreclosure," And Consumer Harm, 70 ANTITRUST L.J. 311, 362 (2002)(emphasis added).

In addition to the persuasive authority discussed above, this Court's decision is bolstered by other reasoning. For example, the need for Plaintiff's expert to define the rough contours of the market begs a critical question: Why does a plaintiff need to define a market if, ultimately, that plaintiff need not be concerned with the impact on that market overall? It is unclear how the undisputed need for a plaintiff to define the rough contours of the market fits into Plaintiff's espoused theory that its burden with respect to anticompetitive effects only requires a demonstration of more than de minimis effects, even **[*39]** if those effects only impact one competitor and a portion of its customers.[19] Under Plaintiff's theory, it appears that no market definition is even necessary. The Court disagrees.

Moreover, language from cases cited to this Court by Plaintiff as authoritative further undermine the Plaintiff's position. For example, in *Angelico v. Lehigh Valley Hospital, Inc., 184 F. 3d 268, 276 (3d. Cir. 1999)*, the Court notes that a plaintiff can prove actual anticompetitive effects via an "increase in price or deterioration in quality and goods and services." Id. The Court goes on to note "[d]ue to the difficulty of isolating the market effects of the challenged conduct, however, such proof is often impossible to make." Id.; see also, *Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1367 (3d Cir. 1996)*(same). Again, if the burden were simply that a plaintiff must prove only a more than de minimis impact, a standard clearly more easily satisfied than the burden to show impact on the market as a whole, the case law would not refer to such proof as "often impossible **[*40]** to make." Plaintiff provides no explanation.

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[18] Notably, Plaintiff cites to this case in its supplemental brief but fails to discuss the "to the whole market" language. In addition, Plaintiff contends that the Second Circuit does not require proof of a market-wide impact, citing *Eiberger v. Sony Corp., 622 F.2d 1068 (2d Cir. 1980)*, a case that pre-dates not only Capital Imaging (by 13 years), but also the Supreme Court's decision in *Jefferson Parish, 466 U.S. at 31-32* (finding no *Section 1* violation where "there has been no showing that the market as a whole has been affected at all . . . .")(emphasis added). In addition, the Second Circuit in *K.M.B. Warehouse Distribs. v. Walker Mfg. Co., 61 F.3d 123, 127 (2d Cir. 1995)* quotes *Capital Imaging* and **[*38]** its language with respect to demonstrating an adverse impact on the market "as a whole."

[19] As aptly stated by counsel for Virtua at oral argument, "Deborah went to the trouble of getting an expert to posit the rough contours of the market but there is no mention whatsoever of that market in Deborah's brief in opposition to summary judgment." Sept. 22, 2014 Hearing Tr. at 32:7-10.

In its supplemental brief and/or during oral argument,[20] the Plaintiff relied heavily on three cases: *Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715 (3d Cir. 1991)*; *Oltz v. Saint Peter's Community Hosp., 861 F.2d 1440 (9th Cir. 1988)*; and, *Rome Ambulatory Surgical Ctr. v. Rome Mem. Hosp., 349 F. Supp. 2d 389 (N.D.N.Y. 2004)*.[21] Plaintiff's central argument is that the Court in Tunis did not require harm to the market as a whole. Instead, the plaintiff's burden was only "to show more than a de minimis restraint." Sept. 22, 2014 Tr. at 59:10-12. While the Court in Tunis did note that "plaintiffs have a burden to show more than a de minimis restraint," the Plaintiff here cannot divorce this language from the language that follows in that same opinion: "The Sherman Act was designed to prohibit significant restraints of trade rather than to proscribe all unseemly business practices; and the plaintiffs must have demonstrated some harm to the competitive landscape from [defendant's] termination of the [plaintiff's] franchise." *Tunis, 952 F.2d at 728* (internal quotations and citations omitted). In addition, the very definitions of the relevant markets were at issue in Tunis, and the Court overturned the jury's finding as to the relevant product and geographic markets based on the evidence presented. *Id. at 725-727*. In the instant case, there is no dispute as to the relevant markets. Finally, the **[*41]** ultimate outcome of Tunis supports this Court's finding - i.e., a plaintiff's Sherman Act claim must fail where that plaintiff does not present evidence demonstrating that prices, quantity or quality for goods or services has been affected by the defendant's conduct. *Id. at 728*.

Plaintiff's reliance **[*42]** on *Oltz v. Saint Peter's Community Hosp., 861 F.2d 1440 (9th Cir. 1988)*, is similarly misplaced. As Plaintiff's counsel candidly acknowledged during oral argument, the contours of the market at issue in Oltz differed dramatically as the defendant in Oltz enjoyed a 84% market share of general surgical services in Helena, Montana, one of the relevant markets for purposes of that court's analysis. *Id. at 1442*. Notably, the Court in Oltz distinguished Jefferson Parish, finding that, in that case, "[t]he defendant was only one hospital of several in a large metropolitan area[,]" *Id. at 1447*, while the hospital in Oltz undisputedly dominated the relevant market. Finally, the plaintiff in Oltz was able to demonstrate that "the price of anesthesia services and the incomes of the MD anesthesiologists rose dramatically because of the challenged restraint." Id. Again, Deborah has set forth no evidence here that the price of ACI services rose dramatically because of the alleged restraint in this case.

Finally, this Court finds *Rome Ambulatory Surgical Ctr. v. Rome Mem. Hosp., 349 F. Supp. 2d 389 (N.D.N.Y. 2004)*, distinguishable. In Rome, the plaintiff, a freestanding ambulatory surgical facility, was forced to leave the market entirely as a result of the defendants' alleged conduct. In addition, the plaintiff was able to demonstrate that commercial payers paid 35% lower **[*43]** rates during its tenure. *Id. at 409*. Again, in the instant case, Deborah continues to operate as a choice for patients in the relevant markets and it has demonstrated no increase in prices in the market as a whole in contrast to the facts in Rome.

With the need for demonstrating effects on the market as a whole in mind, this Court finds that summary judgment is appropriate. Plaintiff has not offered any fact or expert evidence of anticompetitive effects on the market as a whole as defined by its own expert. Instead, Plaintiff's evidence is limited to impacts it alone felt along with a subset of patients of CGPA who were sent to Virtua over Deborah.

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[20] See Sept. 22, 2014 Tr. 50:15-18.

[21] Plaintiff's counsel, in discussing the applicability of cases like Rome, Oltz, Tunis, and KMB Warehouse to its situation stated:

> If you are saying that the injury to competition was that consumers were harmed because they lost access to you, you know, because for one reason or another you, the plaintiff, [is] not an option for consumers anymore, then you have to show that you gave consumers something that everybody else in the market isn't giving them.

Sept. 22, 2014 Oral Arg. Tr. 50:10-15. This Court fails to understand Plaintiff's appeal to these cases to the extent Plaintiff admitted that there was nothing special or different that Deborah offered.

> THE COURT: Are you saying that there is something special or different about Deborah that takes it out of the normal antitrust cases?
>
> MR. KANE: No, that's not what I'm saying, your Honor.

Sept. 22, 2014 Oral Arg. Tr. 49:18-22.

Plaintiff offers no factual evidence regarding the specifics of the price increases other than to offer that patients who were treated at facilities other than Deborah would have higher out-of-pocket costs. [PSOF at ¶ 23 ("all patients treated at Deborah pay less out-of-pocket costs than patients treated at Penn—even when the patients have the same insurances and undergo the same medical procedures.")]. Even assuming that Plaintiff is correct, there is no evidence in front of this Court demonstrating that costs for ACI procedures in the relevant markets **[*44]** rose on the whole as a result of the alleged conspiracy and a reduction in competition. See e.g., Expert Report of Gregory Vistnes ("Vistnes Report"), Virtua App. at 480 ("I am aware of no such claims or evidence that prices are higher than what one would predict in an alternative scenario in which CGPA continued to refer most of its ACI patients to Deborah."). Again, Plaintiff is only able to point out that patients who were treated at facilities other than Deborah would have higher out of pocket costs than at other hospitals. Certainly, however, this was the case both before and after the institution of the alleged conspiracy due to Deborah's charity hospital status.

With respect to quality, Plaintiff's only factual support for its contention is that PPMC had higher door-to-balloon times than Deborah. Again, this evidence only deals with CGPA patients who wanted to be sent to Deborah; there is no evidence presented by Plaintiff demonstrating that the quality of ACI procedures in the relevant markets as a whole was impacted by the agreements — i.e., that as a result of the alleged conspiracy, patients at other hospitals or of other practices experienced higher door-to-balloon times. In short, Plaintiff **[*45]** has presented no evidence demonstrating that the quality of ACI procedures in the relevant markets as a whole was impacted by the alleged conspiracy.

Finally, with respect to patient choice, this Court will assume for purposes of this motion that many more patients than the 20-plus patients specifically cited in the Plaintiff's Statement of Facts were "pipelined" to PPMC from Virtua. That said, the fact remains that this alleged restriction on choice involved less than 2% of the market for ACI procedures and there is no evidence that patients who wanted to go to hospitals other than Deborah were impacted. Again, this evidence alone is insufficient. See *Jefferson Parish, 466 U.S. at 30* (finding, where there was an exclusive contract between a hospital and one firm of anesthesiologists, that "there is no evidence that any patient who was sophisticated enough to know the difference between two anesthesiologists was not also able to go to a hospital that would provide him with the anesthesiologist of his choice.").

In *K.M.B. Warehouse Distribs. v. Walker Mfg. Co., 61 F. 3d 123, 128 (2d Cir. 1995)*, K.M.B., an auto parts distributor, contended that Walker, an auto parts manufacturer, and its distributors, violated *Section 1* of the Sherman Act. Walker, facing pressure from other distributors who were competitors **[*46]** of K.M.B., refused to supply its products to K.M.B. The Court, in determining whether K.M.B. had demonstrated "an actual adverse effect on competition as a whole in the relevant market[,]" found that K.M.B. could not show that the impact on intrabrand competition was "anything but de minimis." *Id. at 128*. The Court went on to find that

> KMB's proof on this point consists almost entirely of affidavits from twelve of its current customers stating that they prefer both Walker products and KMB's superior service. Such isolated statements of preference are not a sufficient "empirical demonstration concerning the [adverse] effect of the [defendants'] arrangement on price or quality," *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 30 n.49, 104 S. Ct. 1551, 80 L. Ed. 2d 2 . . . (1984)*, to state a *§ 1* claim. See *id. at 30* (finding inadequate evidence of an actual adverse effect on competition even though "the evidence indicates that some surgeons and patients preferred respondent's [anesthesiology] services").

Id. The analysis employed in *K.M.B.* is instructive here with respect to whether Plaintiff has demonstrated anticompetitive effects. Again, this Court finds that reference to a subset of CGPA patients who preferred Deborah is insufficient.

III. Conclusion

"It is axiomatic that 'the antitrust laws . . . were **[*47]** enacted for the protection of competition, not competitors.'" *Tunis Bros. Co., 952 F.2d at 727* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*(emphasis in original)(internal quotations omitted). The Plaintiff has brought a claim for an antitrust violation and this Court must remain mindful of the underlying purposes of the antitrust laws, which "were not designed to protect every uncompetitive activity, but rather only those activities that have anti-competitive effects on the market as a whole." *Eichorn, 248 F.3d at 148*. Ultimately, Plaintiff has failed to demonstrate that the alleged agreements created an anticompetitive effect on the market as a whole. Instead, drawing all reasonable inferences in favor of the Plaintiff, its evidence demonstrates that, at most, there has been harm to Plaintiff and a portion of its customers. See *K.M.B. Warehouse, 61 F.3d at 128* (finding no evidence of adverse effects where plaintiff "failed to come forward with any evidence that defendants' actions adversely affected service, quality or price market-wide."). Indeed, Plaintiff has pursued a remedy for such harm in the pending parallel state court proceeding.

In sum, Plaintiff's detailed inventory of evidence related to an alleged conspiracy between Virtua, CGPA, and Penn does not create a genuine dispute of fact as to whether **[*48]** there has been a sufficient demonstration of anticompetitive effects. This failure to show an impact of the alleged conspiracy on the market as a whole is fatal to Plaintiff's *Section 1* claim under the Sherman Act. See *Eichorn, 248 F.3d at 148*. Thus, while Plaintiff may be able to pursue a remedy in state court, its remedy does not lie in federal court for an antitrust violation. For the reasons stated above, Defendants' respective motions for summary judgment are granted. An appropriate Order will issue this date.

/s/Renée Marie Bumb

RENEE MARIE BUMB

United States District Judge

Date: March 24, 2015

ORDER

THIS MATTER having come before the Court upon the Defendants' respective Motions for Summary Judgment [Docket Nos. 204 & 205]; and the Court having reviewed the parties' submissions and having heard oral argument; and for the reasons set forth in the Opinion issued this date;

IT IS HEREBY this **24th** day of **March 2015**,

ORDERED that the Defendants' Motions for Summary Judgment [Docket Nos. 204 & 205] are **GRANTED;** and it is further

ORDERED that the Clerk close the file.

/s/ Renée Marie Bumb

RENÉE MARIE BUMB

UNITED STATES DISTRICT JUDGE

Methodist Health Servs. Corp. v. OSF Healthcare Sys.

United States District Court for the Central District of Illinois, Peoria Division

March 25, 2015, Decided; March 25, 2015, Filed

Case No. 1:13-cv-01054-SLD-JEH

Reporter

2015 U.S. Dist. LEXIS 37887 *; 2015 Trade Cas. (CCH) P79,133; 2015 WL 1399229

METHODIST HEALTH SERVICES CORPORATION, Plaintiff, v. OSF HEALTHCARE SYSTEM, an Illinois not-for-profit corporation b/d/a SAINT FRANCIS MEDICAL CENTER, Defendant.

Prior History: *Methodist Health Servs. Corp. v. OSF Healthcare Sys., 2014 U.S. Dist. LEXIS 55425 (C.D. Ill., Apr. 22, 2014)*

Core Terms

providers, pleadings, monopolization, health insurer, outpatient, patients, markets, surgical services, inpatient, motion for judgment, relevant market, Sherman Act, interchangeable, prices, foreclosure, insured, antitrust claim, allegations, competitor, healthcare, Antitrust, network, foreclosed, argues, tortious interference, health insurance, hospital service, geographic area, customers, sales

Counsel: **[*1]** For Methodist Health Services Corporation, Plaintiff: Andrew R Woltman, Angelo M Russo, Benjamin James Christenson, Kathleen Cunniff Ori, Susan Groh, Richard T Greenberg, MCGUIRE WOODS LLP, Chicago, IL.

For OSF Healthcare System d/b/a Saint Francis Medical Center, Defendant: Alexander George Bomstein, Barak A Bassman, Barbara T Sicalides, Evan W. Davis, Frank Hastings Griffin, IV, PEPPER HAMILTON LLP, Philadelphia, PA; Anand C Mathew, Ian Howard Fisher, SCHOPF & WEISS, Chicago, IL; L Lee Smith, HINSHAW & CULBERTSON, Peoria, IL.

For UnityPoint Health, Interested Party: Andrew R Woltman, Angelo M Russo, Richard T Greenberg, MCGUIRE WOODS LLP, Chicago, IL.

For Keystone Steel & Wire Company, Movant: Andrew J Martone, LEAD ATTORNEY, Lori Ann Schmidt, HESSE MARTONE PC, St Louis, MO.

Judges: SARA DARROW, UNITED STATES DISTRICT JUDGE.

Opinion by: SARA DARROW

Opinion

ORDER

In this antitrust case, Plaintiff Methodist Health Services Corporation ("Methodist") complains that Defendant OSF Healthcare System d/b/a Saint Francis Medical Center ("Saint Francis") has reduced competition and raised prices at the expense of consumers for inpatient hospital services and outpatient surgical services in the relevant geographic market by forcing **[*2]** commercial health insurers to enter into provider agreements that effectively exclude Saint Francis' competitor providers from contracting with those insurers. Now before the Court is Saint Francis' Motion for Judgment on the Pleadings, ECF No. 82. For the reasons below, it is DENIED. Defendant's Motion for Leave to File a Reply, ECF No. 89, and Plaintiff's Motion for Leave to File a Surreply, ECF No. 92, are GRANTED.

BACKGROUND

Methodist's 188-paragraph complaint raises 11 claims against Saint Francis: exclusive dealing in violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1* (Count I); attempted monopolization in violation of *Section 2* of the Sherman Act, *15 U.S.C. § 2* (Count II); monopolization in violation of *Section 2* of the Sherman Act, *15 U.S.C. § 2* (Count III); exclusive dealing in violation of the Illinois Antitrust Act, *740 ILCS 10/3* (Count IV); attempted monopolization in violation of the Illinois Antitrust Act, *740 ILCS 10/3* (Count V); monopolization in violation of the Illinois Antitrust Act, *740 ILCS 10/3* (Count VI); tortious interference with prospective economic advantage with respect to BCBS (Count VII); tortious interference with prospective economic advantage with respect to Aetna (Count VIII); tortious interference with prospective economic advantage with respect **[*3]** to Health Alliance (Count IX); tortious interference with prospective economic advantage with respect to Humana (Count X); and unfair and deceptive acts and practices in violation of the Illinois Consumer Fraud Act, *815 ILCS 505/10a* (Count XI).

Methodist seeks damages, fees and costs, and for this Court to enjoin Saint Francis from conduct which prevents Methodist from participating in any commercial health insurance network. Compl. 38, ECF No. 1.

I. The Parties

The Court accepts as true, as it must when considering a motion for judgment on the pleadings, the following facts alleged in Methodist's complaint. *Forseth v. Village of Sussex, 199 F.3d 363, 368 (7th Cir. 2000)*.

Defendant Saint Francis is a not-for-profit hospital located in Peoria, Illinois. *Id*. at ¶ 9. It is the fourth largest medical center in Illinois, *id*. at ¶ 38, and the only provider of certain essential medical services in the relevant geographic area, defined by Methodist as Peoria, Tazewell, and Woodford Counties, Illinois, *id*. at ¶¶ 10, 39.[1] These essential services include solid organ transplants, tertiary pediatric services, Level 3 neonatal intensive care ("NICU"), and Level 1 Trauma care. *Id*. at ¶ 39. Saint Francis is part of the OSF Healthcare System. *Id*. at ¶ 37.

Plaintiff Methodist is an integrated health care delivery system consisting of various operating divisions, including an acute care hospital. *Id*. at ¶ 10. It does not offer several of the essential services Saint Francis provides, including organ transplant, tertiary pediatric services, NICU, and Level 1 Trauma care. *Id*. at ¶ 40. Methodist is located in Peoria, Illinois. *Id*. at ¶ 10. In addition to Methodist and Saint Francis, there are four other hospitals in the relevant geographic area: Proctor Hospital, Pekin Memorial Hospital, Hopedale Medical Complex, and Advocate Eureka Hospital. *Id*. at ¶¶ 36, 44—47. None of these hospitals provides either Level 1 or Level 2 Trauma care. *Id*. at ¶¶ 44—47. There also are several non-hospital-based providers in the relevant geographic area that provide outpatient surgical services. *Id*. at ¶ 48.

Because Saint Francis is the largest hospital in the region and the only local provider of certain essential medical services, most health insurance companies doing business in the relevant geographic market consider Saint Francis a "must-have" participating hospital in their health insurance networks. *Id*. at ¶¶ 2, 39.

II. The [*5] Relevant Product Markets and Saint Francis' Market Power

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[1] Saint Francis does not contest **[*4]** the relevant geographic market.

The Complaint defines two relevant product markets: (1) "the sale of inpatient hospital services to commercial health insurers," and (2) "the sale of outpatient surgical services to commercial health insurers." *Id*. at ¶¶ 14, 21.[2] Commercial health insurers include managed-care organizations, other HMOs or PPOs, and employer self-funded plans. *Id*. at ¶ 17. Government payers, such as Medicare, Medicaid, and TRICARE, are excluded from the relevant markets. *Id*. at ¶¶ 17—18.

Methodist has excluded government payers from its relevant product market because the price government payers pay for inpatient hospital services and outpatient surgical services does not significantly **[*6]** constrain the prices hospitals and other providers charge commercial health insurers for the same services. *Id*. at ¶ 19. This is because commercial health insurers negotiate their rates with providers individually, while the federal government and each state unilaterally sets the rates and schedules at which it will pay providers for services provided to individuals covered by Medicare and TRICARE and by Medicaid, respectively—rates that typically are lower than the rates negotiated by commercial health insurers. *Id*. Methodist also claims that, because government payers unilaterally set the prices they will pay for services, a hospital or other healthcare provider can impose a price increase for inpatient hospital and/or outpatient surgical services solely on commercial health insurers. *Id*. at ¶¶ 20, 24.

Methodist claims that Saint Francis has approximately 53 percent of the market share for inpatient hospital services sold to commercial health insurers, and more than a 50 percent share of the market for outpatient surgical services sold to commercial health insurers. *Id*. at ¶ 2. Methodist further claims that, on average, OSF's prices are significantly higher than those of the hospitals **[*7]** and other providers with which it competes. *Id*. at ¶¶ 8, 53—54, 57.

III. Saint Francis' Anticompetitive Conduct and the Resulting Harm

As alleged in the Complaint, Saint Francis has been able to maintain its degree of market power in the relevant markets, despite its significantly higher prices, by leveraging its size and status as a "must-have" hospital to prevent commercial health insurers with whom it has provider agreements from also entering into provider agreements with Methodist or other competitor providers. *Id*. at ¶¶ 3, 81. In particular, Methodist alleges that Saint Francis has threatened the insurers with whom it has provider agreements that, in the event one of those insurers includes a competing provider in its network, Saint Francis will withdraw from that insurer's provider network (taking along with it the essential services that only it can provide) and/or impose substantial pricing penalties on that insurer. *Id*. at ¶¶ 4, 60—61, 68—85.

According to Methodist, Saint Francis has entered into these exclusionary provider agreements with at least BCBS (the largest commercial health insurance company in the relevant geographic area), Humana, Aetna, and Health Alliance. *Id*. **[*8]** at ¶¶ 50, 64, 81, 86—88. Methodist complains that by doing so, Saint Francis has effectively foreclosed Methodist and other competitor providers from over 60 percent of the fully insured commercial health insurance market in the relevant geographic area. *Id*. at ¶ 99. According to Methodist, inclusion in health insurance networks is crucial to hospitals and other healthcare providers because patients nearly always choose in-network healthcare providers for non-emergency care. *Id*. at ¶ 90. Therefore, by foreclosing Methodist and other competitor providers the opportunity to become participating providers in commercial health insurance networks, Saint Francis has reduced the number of privately-insured patients who might otherwise seek inpatient and/or outpatient surgical services from them. *Id*. at ¶¶ 7, 92.

[2] According to the complaint, inpatient hospital services "are a broad group of medical and surgical diagnostic and treatment services that include an overnight stay in the hospital by the patient." *Id*. at ¶ 15. Outpatient hospital services "are a broad group of surgical and related services that generally do not require an overnight stay in a hospital." *Id*. at ¶ 22. Outpatient hospital services "are distinct from procedures routinely performed in a doctor's office." *Id*.

Methodist further complains, and Saint Francis judicially admits,[3] that this foreclosure of access to privately-insured patients threatens its long-term sustainability, as well as that of other provider hospitals in the relevant geographic area. *Id*. at ¶ 98; Def.'s Ans. ¶ 98, ECF No. 12. Patients covered by commercial health insurance plans pay significantly more than patients covered **[*9]** by Medicare, Medicaid, or TRICARE for inpatient hospital and outpatient surgical services, *id*. at ¶ 93; Def.'s Ans. ¶ 93, and hospitals depend on payments from commercial health insurers to compensate for the comparatively low payments they receive from government payers, *id*. at ¶ 94; Def.'s Ans. ¶ 94.

Methodist believes that Saint Francis has undertaken this conduct with the purpose and intent of monopolizing the markets for inpatient hospital and outpatient surgical services by driving Methodist from the market or at least reducing Methodist's competitive significance within the market. *Id*. at ¶¶ 7—8.

DISCUSSION

I. Motion for Judgment on the Pleadings Standard

Federal Rule of Civil Procedure 12(c) permits a party to move for judgment on the pleadings after the pleadings are closed, but early enough not to delay trial. A motion for judgment on the pleadings is reviewed under the same standard as a motion to dismiss under *Rule 12(b)(6)*. *Hayes v. City of Chicago, 670 F.3d 810, 813 (7th Cir. 2012)*. Thus, a court should grant a *Rule 12(c)* motion "only if it appears beyond doubt the plaintiff cannot prove **[*10]** any facts that would support his claim for relief." *Id*. (quoting *Thomas v. Guardsmark, Inc., 381 F.3d 701, 704 (7th Cir. 2004))*; *see also* *AMCO Ins. Co. v. Swagat Grp., LLC, No. 07-3330, 2009 U.S. Dist. LEXIS 9628, 2009 WL 331539, at *3 (C.D. Ill. Feb. 10, 2009)* ("Judgment on the pleadings is appropriate if undisputed facts appearing in a pleading clearly entitle the moving party to judgment as a matter of law.").

When considering a motion for judgment on the pleadings, a court must take all well-pled allegations as true and draw all reasonable inferences in favor of the non-moving party. *Forseth, 199 F.3d at 368 (7th Cir. 2000)*. A court, however, should not assign any weight to unsupported conclusions of law or ignore any facts set forth in the complaint that undermine the plaintiff's claims. *N. Ind. Gun & Outdoor Shows, Inc. v. City of S. Bend, 163 F.3d 449, 452 (7th Cir. 1998)* (quoting *R.J.R. Serv., Inc. v. Aetna Cas. & Sur. Co., 895 F.2d 279, 281 (7th Cir. 1989))*.

II. Federal Antitrust Claims (Counts I—III)

In its motion for judgment on the pleadings, Saint Francis argues that it is entitled to judgment on the pleadings because Methodist has failed to plead, and cannot adequately plead, plausible relevant product markets or substantial foreclosure in those markets. Def.'s Mot. J. Pleadings ¶¶ 1—3, ECF No. 82. The Court addresses Saint Francis' argument with respect to the relevant product markets first.

a. Whether Methodist Has Alleged Implausibly Narrow Relevant Product Markets

Methodist alleges that by entering into and enforcing anticompetitive exclusionary contracts **[*11]** with BCBS, Humana, Aetna, and Health Alliance, Saint Francis unreasonably restrained trade in violation *Section 1* of the Sherman Act, Compl. ¶¶ 63, 110—18, and committed the offenses of monopolization and attempt to monopolize in violation of *Section 2* of the Sherman Act, *id*. at ¶¶ 119—132. *Section 1* of the Sherman Act declares unlawful "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce

[3] Judicial admissions are binding upon the party making them, and have the effect of withdrawing a fact from contention. *Keller v. United States, 58 F.3d 1194, 1199 (7th Cir. 1995)* ("A judicial admission is conclusive, unless the court allows it to be withdrawn.").

among the several States, or with foreign nations." 15 U.S.C. § 1. Section 2 of the Sherman Act prohibits "monopoliz[ing], or attempt[ing] to monopolize, or combin[ing] or conspir[ing] with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 2.

Courts have made clear that not all exclusive dealing arrangements are unlawful under Section 1 of the Sherman Act, but only those that restrict competition unreasonably. *See* Dos Santos v. Columbus-Cueno-Cabrini Med. Ctr., 684 F.2d 1346, 1352 (7th Cir. 1982) (citing Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327—29, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)). Accordingly, whether an exclusive dealing arrangement imposes an unreasonable restraint on competition in violation of Section 1 is analyzed under a rule of reason approach. *Id.*; *see also* Collins v. Associated Pathologists, Ltd., 676 F. Supp. 1388, 1394 (C.D. Ill. 1987), *aff'd* 844 F.2d 473 (7th Cir. 1988). A plaintiff alleging an exclusive dealing claim can prevail under a rule of reason approach only by establishing that the agreement in question results in a substantial **[*12]** foreclosure of competition in the area of effective competition—that is, in the relevant market. Dos Santos, 684 F.2d at 1352 (citing Tampa Elec. Co., 365 U.S. at 327—29); *see also* Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield, 373 F.3d 57, 66 (1st Cir. 2004) (finding it is "critical to any attack on [an] exclusive dealing arrangement . . . that plaintiffs establish a relevant market and harm within it"). A relevant market includes both product and geographic dimensions. Brown Shoe Co v. United States, 370 U.S. 294, 324, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962); *see also* United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 404, 76 S. Ct. 994, 100 L. Ed. 1264 ("Th[e] market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered.").

Market definition also plays a critical role in Section 2 monopolization and attempted monopolization causes of action. In order to recover on a monopolization claim, a plaintiff must establish: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570—71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966); *see also* Endsley v. City of Chicago, 230 F.3d 276, 282 (7th Cir. 2000). Similarly, to establish the offense of attempt to monopolize under Section 2 of the Sherman Act, a plaintiff must prove: "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) **[*13]** a dangerous probability of achieving monopoly power." Spectrum Sports v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993); *see also* Ind. Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1413 (7th Cir. 1989). "In order to determine whether there is a dangerous probability of monopolization, courts have found it necessary to consider the relevant market and the defendant's ability to lessen or destroy competition in that market." Spectrum Sports, 506 U.S. at 456; *see also* Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 270 (7th Cir. 1981).

In the present case, Saint Francis argues that Methodist's federal antitrust claims cannot survive judgment on the pleadings because Methodist has pleaded impermissibly narrow relevant product markets. Def.'s Mem. 1—2, 6, ECF No. 82-1. Specifically, Saint Francis argues that Methodist's alleged product markets "improperly and arbitrarily" exclude government payers, which, like commercial health insurers, buy inpatient hospital services and outpatient surgical services from Saint Francis and its competitor providers. *Id*. at 6—7. Saint Francis cites Little Rock Cardiology Clinic PA v. Baptist Health, 591 F.3d 591 (8th Cir. 2009), and Marion Healthcare LLC v. Southern Illinois Healthcare, No. 12-CV-00871-DRH-PMF, 2013 U.S. Dist. LEXIS 120722, 2013 WL 4510168 (S.D. Ill. Aug. 26, 2013), in support of its position.

In Little Rock, the Eight Circuit Court of Appeals affirmed the lower court's dismissal of Little Rock Cardiology Clinic's ("LRCC") federal antitrust claims pursuant to Rule 12(b)(6) for failing to plausibly define the relevant product market. 591 F.3d at 596—98. After LRCC cardiologists, **[*14]** who had been on staff at Baptist Health hospital and in Blue Cross & Blue Shield of Arkansas' ("BCBSA") preferred provider network, split away from Baptist Health and developed the competing Arkansas Health Hospital, Blue Cross removed LRCC and its doctors from its network. Id. at 594. LRCC sued Baptist Health and BCBSA for conspiracy in restraint of trade in violation of Section 1 of the Sherman Act and for conspiracy to monopolize, attempted monopolization, and monopolization in violation of Section 2 of the Sherman Act. Id. at 595. Similar to the Complaint at issue in this case, LRCC's complaint limited the relevant product market to patients covered by private insurance and excluded patients covered by government insurance. Id. at 596. LRCC claimed that its alleged product market properly excluded patients covered by government insurance because patients using private insurance are not reasonably interchangeable with patients using government insurance. *Id. at 597*.

The Eighth Circuit, however, did not agree with LRCC, and rejected the argument that patients covered by private insurance and those covered by government insurance are not reasonably interchangeable in light of LRCC's allegations:

> The trouble with this theory is that it **[*15]** analyzes the issue from the wrong side of the transaction. It may be true that, from the patient's perspective, private insurance and Medicare/Medicaid are not reasonably interchangeable. . . . But this lawsuit is not about the options available to patients, it is about the options available to shut-out cardiologists. . . . The relevant question, then, is to whom might the cardiologists at LRCC potentially provide medical service?

Id. at 597. The Eighth Circuit concluded that LRCC "must look to alternative patients who are able to pay the required fees, not just those who pay using private insurance": "Patients able to pay their medical bill, regardless of the method of payment, are reasonably interchangeable from the cardiologist's perspective—the correct perspective from which to analyze the issue in this case." *Id*.

The Southern District of Illinois adopted and relied on *Little Rock*'s reasoning in *Marion*—a case presenting issues very similar to those in this case. In *Marion*, the plaintiff, a provider of outpatient surgical services, sued both Southern Illinois Healthcare ("SIH"), a nonprofit corporation that owned both hospitals which provided inpatient and outpatient medical services and **[*16]** several freestanding outpatient service providers, and BlueCross and BlueShield of Illinois ("BCBSI") for violation of federal and state ***antitrust law*** and for tortious interference with a business expectancy. *2013 U.S. Dist. LEXIS 120722, 2013 WL 4510168, at *1—2*. The plaintiff alleged that SIH and BCBSI substantially suppressed competition for outpatient surgical services in Southern Illinois through exclusionary agreements and other anticompetitive conduct, including exclusive dealing, price discrimination, and monopolization. *2013 U.S. Dist. LEXIS 120722, [WL] at *1*. The complaint defined two relevant product markets: "(1) the sale of general acute-care inpatient hospital services, including pediatric services and neonatal care services to commercial health insurers, and (2) the sale of outpatient surgical services to commercial health insurers." *2013 U.S. Dist. LEXIS 120722, [WL] at *2* (internal quotation marks omitted).

The *Marion* defendants moved to dismiss the complaint on a number of grounds, including that the plaintiff had failed to plead, and could not adequately plead, a plausible relevant product market. *2013 U.S. Dist. LEXIS 120722, [WL] at *4—5, 9*. BCBSI, like Defendants here, asserted that the alleged relevant product markets were deficient as a matter of law because they excluded government payers to whom the plaintiff could and did sell its **[*17]** services. *2013 U.S. Dist. LEXIS 120722, [WL] at *9*. The plaintiff opposed dismissal of its claims on such product market grounds, arguing that government payers are not interchangeable with commercial health insurers because government payers pay providers significantly lower prices than do commercial health insurers. *Id*.

But the Southern District of Illinois, like the Eighth Circuit in *Little Rock*, disagreed with the plaintiff's interchangeability argument, and found that the relevant product markets, as defined in the complaint, were not plausible because they failed to include all potential buyers of inpatient or outpatient services: "Although plaintiff has alleged that government payers pay less than commercial insurers, and that the government reimbursement amounts are not negotiable, plaintiff has not adequately alleged that Medicare or Medicaid patients are not significant sources of input to it as a supplier of outpatient services." *2013 U.S. Dist. LEXIS 120722, [WL] at *10—11*.

In opposing Saint Francis' motion for judgment on the pleadings, Methodist argues that *Little Rock* and *Marion* are at odds with the relevant market inquiry set out by the Supreme Court in *Brown Shoe*, or at least distinguishable on the pleadings from the instant case. Pl.'s Resp. 3—5, 11, **[*18]** ECF No. 84. In *Brown Shoe*, the Supreme Court established that "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *370 U.S. at 325*. The Supreme Court, citing its decision in *E.I. du Pont de Nemours & Co., 353 U.S. at 593—95*, also established that within a product market, "well-defined submarkets may exist, which, in themselves, constitute product markets for antitrust purposes." *Id*. A court may determine the boundaries of such a submarket by examining "such practical indicia" as (i) industry or public recognition of the submarket as a separate economic entity, (ii) the product's peculiar characteristics and uses, (iii) unique production facilities, (iv) distinct customers, (v) distinct prices, (vi) sensitivity to price changes, and (vii) specialized vendors. *Id*. The same principles that are used to define a relevant market for products also are used to define a relevant market for services. *See Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 712 n.11 (7th Cir. 1979)*.

Where a plaintiff seller complains that a competitor's exclusionary conduct foreclosed it selling opportunities, courts typically find, as *Little Rock* and *Marion* held and Saint Francis argues, that all buyers to whom the competitor's **[*19]** rivals might sell their services are reasonably interchangeable under the test set out in *Brown Shoe. See, e.g., Stop & Shop Supermarket Co., 373 F.3d at 67* (noting "the concern in an ordinary exclusive dealing claim by a shut-out supplier is with the available market *for the supplier*"—in that case, "presumptively *all* retail customers for prescription drugs—not just that smaller sub-group who are insured or reimbursed"); *Campfield v. State Farm Mut. Auto. Ins. Co., 532 F.3d 1111, 1119 (10th Cir. 2008)* ("When there are numerous sources of interchangeable demand, the plaintiff cannot circumscribe the market to a few buyers in an effort to manipulate those buyers' market share."); *see also* 2B Philip E. Areeda et al., ***Antitrust Law*** ¶ 570e, at 418 (3d ed. 2007) ("The relevant market for this purpose includes the full range of selling opportunities reasonably open to rivals, namely all of the product and geographic sales they may readily compete for . . . .").

But courts also recognize that "there might be some special circumstance that ma[kes] separate consideration of [a] sub-group [of buyers] appropriate." *Stop & Shop Supermarket Co., 373 F.3d at 67*. For example, where the loss of high-profit sales unusually impairs the foreclosed rivals' survivability, see Areeda, ***Antitrust Law*** ¶ 570e, at 424, or where there is an inelastic difference in price between sales **[*20]** of a single product to a particular group of customers and sales of that same product to other customers, *see United States v. Rockford Mem'l Corp., 898 F.2d 1278, 1284 (7th Cir. 1990)* (noting, in dicta, that "diet soft drinks sold to diabetics are not a relevant product market, but that is because the manufacturers cannot separate their diabetic customers from their other customers and charge the former a higher price"); *United States v. Archer-Daniels-Midland Co., 866 F.2d 242, 246 (8th Cir. 1988)* (finding that a large price differential as a result of a government price support raising the price of one product, but not a second product, to an artificially high level supported placing products in separate relevant product markets, despite that the products were otherwise similar in use and quality, "because of the inability of the price supported product to constrain the price of the other product").

Here, Methodist has alleged, and Saint Francis has admitted, that access to privately-insured patients is critical to a healthcare provider's long-term sustainability in light of the comparatively low prices providers are required to charge patients covered by government plans for the same services, Pl.'s Resp. 4 (citing Compl. ¶¶ 93—94, 98; Def.'s Ans. ¶¶ 93—94, 98)—prices that, in certain cases, may be below cost, Comment to Proposed Consent Judgment at 3, *United States v. United Reg'l Heathcare Sys*., No. 7:11-cv-00030-0 (N.D. Tex. June 6, 2011), **[*21]** ECF No. 8-1.[4] Methodist also has alleged that government reimbursement rates do not significantly constrain healthcare providers' pricing to commercial health insurers, *id*. at ¶ 19, and that providers can target a price increase for inpatient hospital and/or outpatient surgical services solely at commercial health insurers, *id*. at ¶¶ 20, 24.

In light of such allegations and admissions, the Court cannot find, as a matter of law, that the sales of inpatient hospital and outpatient surgical services to commercial health insurers are interchangeable with the sales of these same services to government payers. Dismissal of Methodist's federal antitrust claims for failing to plead plausible relevant product markets therefore is inconsistent with the standard of review the Court must apply when considering **[*22]** a motion for judgment on the pleadings under *Rule 12(c)*.

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[4] While the consent judgment in *United Regional Healthcare System* is neither authoritative nor controlling, *see Beatrice Foods Co. v. F.T.C., 540 F.2d 303, 312 (7th Cir. 1976)*, the Court takes notice of the public comment submitted by the American Medical Association in that case as an example of evidence Methodist expects to be able to prove through fact and expert discovery, *see Geinosky v. City of Chicago, 675 F.3d 743, 745 n.1 (7th Cir. 2012)*.

Having found that Methodist's defined product markets are plausible based on the pleadings, the Court turns to Saint Francis' foreclosure argument.

b. Whether Methodist Has Failed to Plead Foreclosure

Saint Francis argues that judgment on the pleadings with respect to Methodist's federal antitrust claims is warranted because Methodist has failed to plead that Saint Francis' exclusive dealing has resulted in substantial foreclosure of competition in the relevant market, namely that Methodist only alleges foreclosure of a subset of patients covered by commercial health insurance plans (those covered by fully insured commercial plans). Def.'s Mem. 10—12; Def.'s Reply 3—4, ECF No. 89-1.

Saint Francis is correct that Methodist has alleged that Saint Francis' exclusionary conduct has foreclosed Methodist and other competitor providers from 60 percent of the fully insured commercial health market. *See, e.g.*, Compl. ¶¶ 114—115, 137—138. But its argument goes too far at this stage of the litigation. In particular, the argument ignores that, elsewhere in the Complaint, Methodist has pleaded factual allegations from which this Court can reasonably infer **[*23]** that, with the benefit of discovery, Methodist will be able to establish the extent to which it is foreclosed from the self-funded portion of the commercial health insurance market. *See Nat'l Fidelity Life Ins. Co. v. Karaganis, 811 F.2d 357, 358 (7th Cir. 1987)* (cautioning that motion for judgment on the pleadings may be granted only if, *inter alia*, the moving party clearly establishes that no material issue of fact remains to be resolved).

Moreover, Saint Francis has pointed to no authority, binding or otherwise, to suggest that dismissal of a plaintiff's antitrust claims for failing to allege an exact percentage foreclosure in its pleadings is appropriate under either *Rule 12(b)(6)* or *Rule 12(c)*, nor has the Court's own research uncovered a Seventh Circuit case saying as much. *Cf. In re Ductile Iron Pipe Fitting Direct Purchaser Antitrust Litig., No. 12-711, 2013 U.S. Dist. LEXIS 29865, 2013 WL 812143, at *19 (D.N.J. Mar. 5, 2013)* ("The question of whether the alleged exclusive dealing arrangements foreclosed a substantial share of the line of commerce is a merits question not proper for the pleading stage.").

The Court therefore finds that Methodist's allegations of substantial foreclosure are sufficient to survive Saint Francis' motion for judgment on the pleadings. Saint Francis' motion is DENIED with respect to Counts I—III.

III. State Law Claims (Counts IV—XI)

In addition to its federal antitrust claims, Methodist asserts state **[*24]** law claims for exclusive dealing, attempted monopolization, and monopolization under the Illinois Antitrust Act, *740 ILCS 10/3* (Counts IV—VI); for tortious interference with prospective economic advantage (Counts VII—X); and for unfair and deceptive acts and practices under the Illinois Consumer Fraud Act, *815 ILCS 505/10a* (Count XI). Saint Francis argues that Methodist cannot sustain these state causes of action absent the continuation of its antitrust causes of action, without asserting any independent bases for their dismissal. Def.'s Mem. 12. Therefore, because this Court has denied Saint Francis' motion with respect to Methodist's federal antitrust claims, the Court must also DENY Saint Francis' motion for judgment on the pleadings with respect to Methodist's state law claims.

CONCLUSION

For the above reasons, Saint Francis' Motion for Judgment on the Pleadings, ECF No. 82, is DENIED. Saint Francis' Motion for Leave to File a Reply, ECF No. 89, and Methodist's Motion in the Alternative for Leave to File Surreply, ECF No. 92, are both GRANTED. The Clerk is directed to file Defendant's Reply, ECF No. 89-1, and Plaintiff's Surreply, ECF No. 92-1.

Entered this 25th day of March, 2015.

/s/ Sara Darrow

SARA DARROW

UNITED **[*25]** STATES DISTRICT JUDGE

Cardoni v. Wells Fargo Bank, N.A.

Court of Appeal of California, Fourth Appellate District, Division One

March 26, 2015, Opinion Filed

D066351

Reporter

2015 Cal. App. Unpub. LEXIS 2117 *

MICHAEL CARDONI, Plaintiff and Appellant, v. WELLS FARGO BANK, N.A. et al., Defendants and Respondents.

Notice: NOT TO BE PUBLISHED IN OFFICIAL REPORTS. *CALIFORNIA RULES OF COURT, RULE 8.1115(a)*, PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY *RULE 8.1115(b)*. THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF *RULE 8.1115*.

Prior History: **[*1]** APPEAL from judgment of the Superior Court of Riverside County, No. RIC1106554, Gloria Connor Trask, Judge.

Disposition: Affirmed.

Core Terms

modification, cause of action, borrower, judicial notice, foreclosure, lender, allegations, documents, trust deed, recorded, default, notice, permanent, parties, modification agreement, terms, trial court, mortgage, breach of contract, declaratory relief, sustain a demurrer, demurrer, promise, breached, capitalization, notice of default, leave to amend, accounting, foreclosure sale, trustee sale

Counsel: Andrews Law Group and Brian C. Andrews for Plaintiff and Appellant.

Palmer, Lombardi & Donohue and Roland P. Reynolds, Frederick A. Haist for Defendant and Respondent Wells Fargo Bank, N.A.

Hogan Lovells US and Neil R. O'Hanlon, David W. Skaar for Defendant and Respondent Provident Funding Associates, L.P.

Judges: O'ROURKE, J.; McCONNELL, P. J., IRION, J. concurred.

Opinion by: O'ROURKE, J.

Opinion

Michael Cardoni appeals from a judgment dismissing his action against Wells Fargo Bank, N.A. (Wells Fargo), Provident Funding Associates, L.P. (Provident), and NDEx West, LLC (collectively respondents), after the trial court sustained respondents' demurrer to his operative complaint on the ground it failed to state any cause of action.[1] Cardoni contends the court erred because he alleged sufficient facts to state causes of action for breach of contract, breach of implied covenant of good faith and fair dealing, slander of title, accounting, wrongful foreclosure, void or cancel assignment of deed of trust, declaratory relief, unjust enrichment/restitution, quiet title, promissory estoppel, civil conspiracy, violations **[*2]** of the unfair competition law (UCL; *Business & Professions Code sections 17200 et seq.*), and negligence.

We affirm the judgment as to all causes of action.

FACTUAL BACKGROUND

Most of the facts are taken from Cardoni's third amended complaint; others come from the first amended complaint. We accept as true the properly pleaded material allegations and facts that may properly be judicially noticed. (*Olszewski v. Scripps Health (2003) 30 Cal.4th 798, 806, 135 Cal. Rptr. 2d 1, 69 P.3d 927*; *Debrunner v. Deutsche Bank National Trust Co. (2012) 204 Cal.App.4th 433, 435, 138 Cal. Rptr. 3d 830*.)[2]

Cardoni financed his Sun City property with a promissory note for $304,000 from lender Provident, and the property was secured by a deed of trust that was recorded in November 2007.

In March 2009, a notice of default and election to sell was recorded under the deed of trust. That same month, MERS substituted for the original trustee.

In April 2009, the deed of trust was recorded in the Riverside County Recorder's office.

In August 2009, Cardoni began loan modification negotiations with Wells Fargo under the Home Affordable Mortgage Program (HAMP).[3] Cardoni completed the process to qualify for participation in the HAMP Trial Period Plan (TPP).

Under the TPP, from September to November 2009, Cardoni paid monthly installments of $1,926.03 to Wells Fargo. In December 2009, Cardoni spoke to Wells Fargo supervisor Suzi Peasley in the "loss mitigation" department, who confirmed Cardoni had met his obligations under the TPP, he would be receiving a HAMP loan modification for the duration of the loan and the paperwork would be forthcoming. Peasley told him to continue his monthly payments.

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[1] Mortgage Electronic Registration Systems, Inc. (MERS) was dismissed as a defendant. NDeX West LLC (NDeX) filed a declaration of nonmonetary status under *Civil Code section 2924l, subdivision (d)*; accordingly, it has not filed briefs in this appeal, but it is bound by this court's decision relating to the deed of trust. Provident filed a separate reply brief arguing that none of Cardoni's allegations in the operative complaint relate to it, and otherwise joining Wells Fargo's arguments.

[2] At Wells Fargo's request, the trial court judicially noticed various documents including Cardoni's deed of trust recorded in November 2007, an assignment of the deed of trust recorded in April 2009, a notice of default recorded in January 2011, a notice of trustee's sale recorded in March 2011, and the trustee's deed upon sale recorded in December 2011. Other documents the court judicially noticed **[*3]** included minute orders, the parties' pleadings and other records properly admissible as court records under *Evidence Code section 452*.

[3] HAMP has been described thusly: "As authorized by Congress, the United States Department of the Treasury implemented . . . HAMP to help homeowners avoid foreclosure during the housing market crisis of 2008. 'The goal of HAMP is to provide relief to borrowers who have defaulted on their mortgage payments or who are likely to default by reducing mortgage payments to sustainable levels, without discharging any of the underlying debt.'" (*West v. JPMorgan Chase Bank, N.A. (2013) 214 Cal.App.4th 780, 785, 154 Cal. Rptr. 3d 285* (*West* **[*4]**).) Treasury guidelines set forth threshold criteria to define the class of eligible borrowers, and those guidelines set forth accounting steps using a standardized net present value test to determine whether it is more profitable to modify the loan or to allow it to proceed to foreclosure. (*Nungaray v. Litton Loan Servicing, LP (2011) 200 Cal.App.4th 1499, 1502, 135 Cal. Rptr. 3d 442*.) "Calculations under HAMP involve assigning values to certain variables that are largely within the servicers' discretion, thus precluding any entitlement to loan modifications." (*Id. at p. 1502, fn. 1*.)

On or around December 23, 2009, Cardoni sent Wells Fargo a letter stating he had not received the loan modification agreement paperwork as Peasley had promised. Cardoni enclosed another payment for $1,926.03. Cardoni's letter stated his understanding that after the trial period, Wells Fargo would offer him a loan modification at 2.37 percent interest for the first five years, and then following certain incremental increases, the interest rate would be capped **[*5]** at 5.25 percent from the eighth year and for the duration of the loan.

In January 2010, Cardoni spoke to Wells Fargo loss mitigation processor Audrey Mason, who said Wells Fargo had approved Cardoni's HAMP trial period loan modification and it would send him a copy of the agreement in about one week. On January 28, 2010, Cardoni wrote Wells Fargo a letter again seeking the loan modification paperwork for a loan at an initial 2.37 percent interest rate, and enclosing another check for $1,926.03.

In February 2010, Wells Fargo representative Josh Faber informed Cardoni he did not qualify for a HAMP permanent loan modification. That month, Cardoni started a new loan modification application process with Wells Fargo. However, its representative, Nathan Ziegel, spoke with Cardoni and said the loan could not be modified because Wells Fargo did not own the loan. Despite Cardoni's requests for an accounting of the combined total of $9,630.15 he had paid during the TPP and the subsequent loan modification program, Wells Fargo did not provide one.

In April 2010, Wells Fargo sent Cardoni a second modification agreement, which stated less favorable terms than Wells Fargo's oral offer. Specifically, **[*6]** the second loan modification agreement he entered into required him to pay 4.25 percent interest for the first 5 years and 5.25 percent interest thereafter. Cardoni signed the modified agreement and paid Wells Fargo monthly payments of $2,063.51 for five months. During that time, Cardoni repeatedly asked Wells Fargo for the final executed second modification agreement, but Wells Fargo stated it would take approximately four to six weeks to provide it to Cardoni. Wells Fargo never sent Cardoni the paperwork.

The notice of default was rescinded in June 2010.

Sometime after July 2010, Cardoni stopped paying on his loan. He explained the reason for his actions in his complaint: "After this long pattern and series of fraudulent, false, lying, and breaching acts and omissions by Wells Fargo, and after reading and watching many news stories, and investigative journalist reports, and other writings on the foreclosure crisis, [I] justifiably believed Wells Fargo had no real or true intention of ever modifying [my] loan, and that Wells Fargo was behaving in this manner because—by its own words!—it did not even own [my] loan and/or did not have authority to modify the terms of the loan or the note, **[*7]** and that Wells Fargo was simply attempting to induce [me] further and further into default, so that Wells Fargo could sell away [my] family home at foreclosure auction. [¶] . . . While media reports do not affect or change the contract, they certainly support the allegations that Wells Fargo has an unfair business practice of luring borrowers into default with false promises of loan modification with the intent to deny the modification application and foreclose." (Some capitalization omitted.)

On January 3, 2011, a second notice of default was recorded indicating Cardoni owed $7,868.00 on his loan.

On January 21, 2011, NDEx substituted as trustee under the deed of trust.

In March 2011, a notice of trustee sale was sent to Cardoni.

In August 2011, Cardoni filed a lis pendens in superior court.

On December 22, 2011, a trustee's deed upon sale was recorded of the property's sale to TDR Servicing, LLC.

PROCEDURAL BACKGROUND

In April 2011, Cardoni sued Wells Fargo, NDEx, MERS, Provident, and Doe defendants in a verified complaint for declaratory relief, accounting, unfair business practices, fraud, breach of contract, unjust enrichment and quiet title. Respondents demurred and the court sustained **[*8]** the demurrer with leave to amend.

Cardoni filed a first amended complaint against the same defendants and LSI Title Company and First American Loanstar Trustee Services, alleging sixteen causes of action: declaratory relief, accounting, breach of contract, breach of implied covenant of good faith and fair dealings, cancellation of contract, civil conspiracy, "to void or cancel assignment of deed of trust," violation of *Civil Code sections 2923.5*, *2924*, *2934a*, wrongful foreclosure, slander of title, negligence, the UCL, restitution/unjust enrichment, and quiet title.

Respondents again demurred. As to Wells Fargo, the court sustained the demurrer without leave to amend as to all causes of action except three: declaratory relief, breach of contract, and the UCL. The court dismissed MERS as a defendant.

Cardoni filed a second amended complaint for declaratory relief, breach of contract, and violation of the UCL. Respondents demurred, and the court sustained the demurrer with leave to amend.

Cardoni filed his third amended complaint for declaratory relief, breach of contract, and violations of the UCL. In his prayer for relief, Cardoni sought a declaration that Wells Fargo and he had entered into the loan modification agreements **[*9]** that he substantially performed upon, but Wells Fargo breached the agreements and also violated the laws regarding foreclosures; that his foreclosure was wrongful; that title to the subject property remained in his name; all sums he had paid should be credited to the loan; Wells Fargo should provide an accounting, and be bound by the terms agreed to as part of the TPP. Cardoni also sought cancellation of the deed of trust, a preliminary injunction, and an unwinding of the foreclosure on the property.

The court sustained respondents' demurrer to the third amended complaint without leave to amend, ruling Cardoni could not make out a cause of action for declaratory relief on his contract claim or on claims the court had previously dismissed, including those alleging violation of *Civil Code sections 2923.5*, *2932.5*, *2934a*, and *2924*. It also ruled Cardoni had not made out a cause of action for breach of either the TPP or the permanent loan agreement; finally, it ruled the UCL cause of action failed because no unlawful actions occurred, Cardoni had alleged no fraudulent actions, and no remedy was available. As to Provident, the court dismissed the lawsuit with prejudice.

DISCUSSION

I. *Standard of Review*

When reviewing a judgment dismissing **[*10]** a complaint after the court sustains a demurrer, the reviewing court must assume the truth of the complaint's properly pleaded or implied factual allegations, and also consider judicially noticeable matters. (*Schifando v. City of Los Angeles (2003) 31 Cal.4th 1074, 1081, 6 Cal. Rptr. 3d 457, 79 P.3d 569*.) "'[W]hen the allegations of the complaint contradict or are inconsistent with such facts, we accept the latter and reject the former.'" (*Hill v. Roll Internat. Corp. (2011) 195 Cal.App.4th 1295, 1300, 128 Cal. Rptr. 3d 109*.)

"'Because a demurrer both tests the legal sufficiency of the complaint and involves the trial court's discretion, an appellate court employs two separate standards of review on appeal.'" (*Filet Menu, Inc. v. Cheng (1999) 71 Cal.App.4th 1276, 1279, 84 Cal. Rptr. 2d 384*.) First, we review the complaint de novo to determine whether it alleges sufficient facts to state a cause of action under any legal theory. (*Id. at p. 1280*.) We treat the demurrer as admitting all properly pleaded and judicially noticeable material facts, "'but not contentions, deductions or conclusions of fact or law.'" (*Blank v. Kirwan (1985) 39 Cal.3d 311, 318, 216 Cal. Rptr. 718, 703 P.2d 58*.) We deem the properly pleaded facts "to be true, however improbable they may be." (*Del E. Webb Corp. v. Structural Materials Co. (1981) 123 Cal.App.3d 593, 604, 176 Cal. Rptr. 824*.) "[W]e give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank, at p. 318*.) "[I]ts allegations must be liberally construed, with a view to substantial justice between the parties." (*Code Civ. Proc., § 452*.) The plaintiff "bears the burden of demonstrating **[*11]** that the trial court erroneously sustained the demurrer as a matter of law" and "must show the complaint alleges facts sufficient to establish every element of [the] cause of action." (*Rakestraw v. California Physicians' Service (2000) 81 Cal.App.4th 39, 43, 96 Cal. Rptr. 2d 354*.)

"'Second, if a trial court sustains a demurrer without leave to amend, appellate courts determine whether or not the plaintiff could amend the complaint to state a cause of action.'" (*Filet Menu, Inc., v. Cheng, supra, 71 Cal.App.4th at p. 1280*.) If there is a reasonable possibility the defect can be cured by amendment, the trial court abused its discretion by sustaining the demurrer. (*Blank v. Kirwan, supra, 39 Cal.3d at p. 318*.) "The burden of proving such reasonable possibility is squarely on the plaintiff." (*Ibid.*)

II. *Wells Fargo's Judicial Notice Request*

Cardoni contends the trial court abused its discretion by taking judicial notice of the documents Wells Fargo submitted in support of its demurrer. Without specifying which judicially noticed documents he opposes, Cardoni states the operative complaint "genuinely disputes the authenticity of the recorded documents and many of other [*sic*] controversial documents in the Superior Court file." In turn, he asserts in his complaint: "The original note is the only legally binding document that can evidence chain of title, otherwise the instrument is faulty. **[*12]** [¶] . . . The original note was destroyed upon securitization because the note as a standalone, two-party, negotiable instrument and a tradable security instrument cannot exist at the same time. [¶] . . . Defendant Wells Fargo, the purported transferee, cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course because the transferee engaged in fraud or illegality affecting the instrument . . . . [¶] . . . Therefore, all defendants lack standing to enforce the note." (Some capitalization omitted.)

In ruling on the request for judicial notice, the court stated: "I think the record should reflect that the court resolves any issue in the favor of the plaintiff in . . . resolving this demurrer. So every benefit of the doubt I give to [Cardoni]. However, I have granted the request for judicial notice. And there are documents in here that he cannot contradict. And that's I think wherein we have the problem, is that the—that the documents that the court has taken judicial notice of bind [Cardoni], and he can't contradict those documents."

We review the trial court's ruling on the request for judicial notice for abuse of discretion. """Judicial **[*13]** notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter.""" (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC (2007) 152 Cal.App.4th 1106, 1117, 62 Cal. Rptr. 3d 59* (*Poseidon*).) *Evidence Code section 452, subdivisions (c)* and *(h)*, respectively, permit a court, in its discretion, to take judicial notice of "[o]fficial acts . . . of any state of the United States" and "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."

Pursuant to these provisions, courts have taken judicial notice of the existence and recordation of real property records, including deeds of trust, when the authenticity of the documents is not challenged. The official act of recordation and the common use of a notary public in the execution of such documents assure their reliability, and the maintenance of the documents in the recorder's office makes their existence and text capable of ready confirmation, thereby placing such documents beyond reasonable dispute. In addition, courts have taken judicial notice not only of the existence and recordation of documents but also of a variety **[*14]** of matters that can be deduced from the documents. In *Poseidon, supra, 152 Cal.App.4th 1106*, for example, the court affirmed the trial court's taking judicial notice, in sustaining a demurrer, of the parties, dates, and legal consequences of a series of recorded documents relating to a real estate transaction. Although the court recognized it would have been improper to take judicial notice of the truth of statements of fact recited within the documents, the trial court was permitted to take judicial notice of the legal effect of the documents' language when that effect was clear. Similarly, in *McElroy v. Chase Manhattan Mortgage Corp. (2005) 134 Cal.App.4th 388, 36 Cal. Rptr. 3d 176*, the court took judicial notice of the recordation of a notice of default under a deed of trust, the date of the notice's recording, and the amount stated as owing in the notice for the purpose of demonstrating the plaintiffs had notice of the amount claimed to be owing and the opportunity to cure a defective tender. (*Id. at p. 394*.)

"Strictly speaking, a court takes judicial notice of facts, not documents. (*Evid. Code, § 452, subds. (g)*, *(h)*.) When a court is asked to take judicial notice of a document, the propriety of the court's action depends upon the nature of the facts of which the court takes notice from the document. As noted in *Poseidon*,[*supra*, *152 Cal.App.4th at pp. 1117-1118*], for example, **[*15]** it was proper for the trial court to take judicial notice of the dates, parties, and legally operative language of a series of recorded documents, but it would have been improper to take judicial notice of the truth of various factual representations made in the documents. [Citations.] Taken together, the decisions discussed above establish that a court may take judicial notice of the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in a recorded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity. From this, the court may deduce and rely upon the legal effect of the recorded document, when that effect is clear from its face." (*Fontenot v. Wells Fargo Bank, N.A. (2011) 198 Cal.App.4th 256, 264-265, 129 Cal. Rptr. 3d 467* (*Fontenot*); accord, Simons, California Evidence Manual (2014 ed.) Judicial Notice, § 7:11.) "Where, as here, judicial notice is requested of a *legally operative* document—like a contract [or documents recorded in connection with a real property transaction]—the court may take judicial notice not only of the fact of the document and its recording . . . but also facts that clearly derive from its *legal effect* . . **[*16]** . [if] the fact is not reasonably subject to dispute." (*Scott v. JP Morgan Chase Bank, N.A. (2013) 214 Cal.App.4th 743, 754, 154 Cal. Rptr. 3d 394*; see *Jenkins v. JP Morgan Chase Bank, N.A. (2013) 216 Cal.App.4th 497, 537, 156 Cal. Rptr. 3d 912* (*Jenkins*) [court "may take judicial notice of the parties, dates, and legal significance of recorded documents relating to a real estate transaction"].)

Cardoni's attempt to demonstrate that the trial court abused its discretion in taking judicial notice as requested by Wells Fargo is not persuasive. His arguments do not raise any "genuine dispute regarding the document[s'] authenticity." (*Fontenot, supra, 198 Cal.App.4th at p. 265*.) Despite Cardoni's general objection to the court's ruling, we conclude he has offered no basis for a conclusion the court's action failed to accord with the principles set forth above regarding judicial notice. We conclude the court did not abuse its discretion in granting Wells Fargo's request for judicial notice.

III. *Breach of Contract*

Cardoni contends that he successfully completed the TPP; therefore, he was entitled to receive a HAMP modification of his loan, and Wells Fargo breached its contract with him by refusing to grant him that modification. He contends the permanent modification he entered into with Wells Fargo was not what he had bargained for.

The elements of a cause of action for breach of contract are (1) the existence **[*17]** and terms of the contract, (2) the plaintiff's performance or excuse for failing to perform, (3) the defendant's breach, and (4) plaintiff's damages. (*Amelco Electric v. City of Thousand Oaks (2002) 27 Cal.4th 228, 243, 115 Cal. Rptr. 2d 900, 38 P.3d 1120*; *Spinks v. Equity Residential Briarwood Apartments (2009) 171 Cal.App.4th 1004, 1031, 90 Cal. Rptr. 3d 453*.)

"The rules governing the role of the court in interpreting a written instrument are well established. The interpretation of a contract is a judicial function. [Citation.] In engaging in the function, the trial court 'give[s] effect to the mutual intention of the parties as it existed' at the time the contract was executed. (*Civ. Code, § 1636*.) Ordinarily, the objective intent of the contracting parties is a legal question determined solely by reference to the contract's terms. (*Civ. Code, § 1639* ['[w]hen a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible. . . .']; *Civ. Code, § 1638* [the 'language of a contract is to govern its interpretation . . .'].) [¶] The court generally may not consider extrinsic evidence of any prior agreement or contemporaneous oral agreement to vary or contradict the clear and unambiguous terms of a written, integrated contract. (*Code Civ. Proc., § 1856, subd. (a)*; *Cerritos Valley Bank v. Stirling (2000) 81 Cal.App.4th 1108, 1115-1116, 97 Cal. Rptr. 2d 432* . . . ; *Principal Mutual Life Ins. Co. v. Vars, Pave, McCord & Freedman (1998) 65 Cal.App.4th 1469, 1478, 77 Cal. Rptr. 2d 479* . . . [parol evidence may not be used to create a contract the parties did not intend to make or to insert language one or both parties now wish had been included].) **[*18]** Extrinsic evidence is admissible, however, to interpret an agreement when a material term is ambiguous. (*Code Civ. Proc., § 1856, subd. (g)*; *Pacific Gas & Electric Co.*[*v. G.W. Thomas Drayage & Rigging Co. (1968) 69 Cal.2d 33, 37, 69 Cal. Rptr. 561, 442 P.2d 641]* [if extrinsic evidence reveals that apparently clear language in the contract is, in fact, 'susceptible to more than one reasonable interpretation,' then extrinsic evidence may be used to determine the contracting parties' objective intent]." (*Wolf v. Walt Disney Pictures & Television (2008) 162 Cal.App.4th 1107, 1125-1126, 76 Cal. Rptr. 3d 585*.)

"A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." (*Civ. Code, § 1643*.) "'The court must avoid an interpretation which will make a contract extraordinary, harsh, unjust, or inequitable.'" (*Powers v. Dickson, Carlson & Campillo (1997) 54 Cal.App.4th 1102, 1111-1112, 63 Cal. Rptr. 2d 261*.)

Because Cardoni's cause of action for breach of contract centers on the HAMP trial payments, we rely on *Wigod v. Wells Fargo Bank N.A. (7th Cir. 2012) 673 F.3d 547, 556* (*Wigod*) for a summary of the HAMP program: In response to the near collapse of the financial markets in 2008, Congress enacted the Troubled Asset Relief Program (TARP), which in part required the United States Department of the Treasury to implement a plan to minimize home foreclosures. (*Wigod, supra, 673 F.3d at p. 556*.) That plan, HAMP, enables certain homeowners who are in default or at risk of default **[*19]** to obtain permanent loan modifications, reducing their mortgage payments to no more than 31 percent of their gross monthly income for at least five years. Lenders receive a $1,000 incentive payment from the government for each HAMP modification, as well as other incentives. (*Bushell v. JPMorgan Chase Bank, N.A. (2013) 220 Cal.App.4th 915, 923, 163 Cal. Rptr. 3d 539* (*Bushell*).)

HAMP Supplemental Directive 09-01, issued April 6, 2009, by the United States Department of the Treasury (hereafter, Supplemental Directive 09-01), sets forth eligibility requirements and modification procedures under HAMP. Lenders must perform HAMP loan modifications in accordance with United States Department of the Treasury regulations. (*West, supra, 214 Cal.App.4th at p. 787*; *Wigod, supra, 673 F.3d at p. 556*.)

Under Supplemental Directive 09-01, before a lender offers a TPP to a distressed borrower, the lender (1) has already found that the borrower satisfies certain simple threshold requirements under HAMP regarding the basic nature of the loan obligation, (2) has already calculated a trial modification payment amount using a "waterfall" method of specified steps that drops the borrower's monthly mortgage payment to the HAMP figure of 31 percent of monthly gross income, and (3) has already determined that it is more profitable to modify the loan under HAMP than to **[*20]** foreclose upon it. (*West, supra, 214 Cal.App.4th at pp. 787-788*; *Wigod, supra, 673 F.3d at pp. 556-557, 565*; Supplemental Directive 09-01, *supra*, at pp. 2-5, 8-10, 14-18.)

After receiving the signed TPP from the borrower, with income verification documents, the lender must confirm that the borrower continues to meet the HAMP eligibility criteria, and if not, the lender should promptly notify the fact in writing to the borrower and consider the borrower for another foreclosure prevention alternative. (Supplemental Directive 09-01, *supra*, at pp. 15, 17-18.) In essence, when a lender offers a TPP to a distressed borrower, the lender effectively has already determined the borrower qualifies for HAMP, assuming the borrower's representations on which the modification is based remain true and correct. (*Bushell, supra, 220 Cal.App.4th at p. 924*; Supplemental Directive 09-01, *supra*, at pp. 15, 17-18.)

Once a lender determines the borrower qualifies for HAMP, the lender implements the HAMP modification process in two stages. In the first stage, the lender provides the borrower with a TPP setting forth the trial payment terms; instructs the borrower to sign and return the TPP, a financial hardship affidavit, and income verification documents; and requests the first trial payment. In the second stage, after the trial period, if the borrower has complied with all the terms of the TPP, including **[*21]** making all required trial payments and providing all required documentation, and if the borrower's representations on which the modification is based remain correct, the lender must offer the borrower a permanent loan modification. ""If the borrower complies with the terms and conditions of the [TPP], the loan modification will become effective on the first day of the month following the trial period."" (*Bushell, supra, 220 Cal.App.4th at p. 925*; *West, supra, 214 Cal.App.4th at pp. 796-797*; *Wigod, supra, 673 F.3d at p. 557*; Supplemental Directive 09-01, *supra*, at pp. 14-15, 18.)

Here, Cardoni sought and received from Wells Fargo a modification of his loan through the TPP. After he had successfully completed the TPP, he and Wells Fargo agreed to a permanent modification of his loan, requiring him to pay a lower interest rate—4.25 percent initially—than on his original loan. Although Cardoni claims in his lawsuit that the permanent loan's terms were less favorable than what Wells Fargo had orally promised, the only evidence he offers to support that claim are letters he wrote Wells Fargo stating his understanding the loan would be for an initial 2.37 percent interest rate. But, as noted, under established contract principles, we do not consider that extrinsic evidence because there is no ambiguity regarding the terms of **[*22]** the TPP or the permanent modification agreement, based on properly judicially noticed materials. The properly noticed TPP document states: "I understand that once [Wells Fargo] is able to determine the final amounts of unpaid interest and any other delinquent amounts (except late charges) to be added to my loan balance and after deducting from my loan balance any remaining money held at the end of the trial period . . . [Wells Fargo] will determine the new payment amount." Therefore, Wells Fargo complied with the TPP by offering Cardoni a permanent modification of the loan at the 4.25 percent initial interest rate.

Further, Cardoni continued repaying the loan for several months under the permanent modification agreement, thus accepting its terms. As this court has held, "[*Civil Code section] 1636* requires the court to interpret a contract to give effect to the parties' intentions at the time of contracting. 'The conduct of the parties after execution of the contract and before any controversy has arisen as to its effect affords the most reliable evidence of the parties' intentions. [Citations.]' [Citation.] Thus, courts will adopt and enforce the parties' practical construction when reasonable." (*Hernandez v. Badger Construction Equipment Co. (1994) 28 Cal.App.4th 1791, 1814, 34 Cal. Rptr. 2d 732*.)

Cardoni **[*23]** alleged in the complaint that he withheld loan payments to Wells Fargo based on news stories regarding the foreclosure crisis and his experience with Wells Fargo's loan modification department. Therefore, it was Cardoni who breached the permanent loan modification agreement, which had superseded any alleged oral agreement. Cardoni alleged in his complaint that Wells Fargo breached a contract by failing to provide him an executed copy of the second modification agreement. But Cardoni's complaint did not allege that any provision in the TPP states that requirement. Even assuming without deciding any such requirement exists, and liberally construing Cardoni's allegations as we must, we conclude Wells Fargo's failure to comply with it was a mere matter of failing to provide notice regarding the finalization of the modification, and not a material breach of the contract. Therefore, the court did not err in sustaining the demurrer as to this cause of action.

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

Cardoni contends "Wells Fargo frustrated [his] rights to benefit from the HAMP loan modification when the [*sic*] stonewalled and would not provide [him] the promised HAMP loan." **[*24]**

The covenant of good faith and fair dealing is imposed upon each party to a contract. (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc. (1992) 2 Cal.4th 342, 371, 6 Cal. Rptr. 2d 467, 826 P.2d 710* (*Carma Developers*).) This fundamental covenant prevents the contracting parties from taking actions that will deprive another party of the benefits of the agreement. (*Id. at p. 372*.) The covenant also requires each party to do everything the contract presupposes the party will do to accomplish the agreement's purposes. (*Harm v. Frasher (1960) 181 Cal.App.2d 405, 417, 5 Cal. Rptr. 367*.)

"It is universally recognized the scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract." (*Carma Developers, supra, 2 Cal.4th at p. 373*.) "Because contracts differ, the nature and extent of the duties owed under the implied covenant are also variable and 'will depend on the contractual purposes.'" (*Love v. Fire Ins. Exchange (1990) 221 Cal.App.3d 1136, 1147, 271 Cal. Rptr. 246*.) Thus, it is well settled the implied covenant does not extend so far as to impose enforceable duties that are beyond the scope of the contract, nor does the covenant prohibit actions that are expressly authorized by the contract's terms. (*Carma Developers, supra, at p. 374*.)

A party's breach of the implied covenant of good faith and fair dealing gives rise to a contract claim. (See *Storek & Storek, Inc. v. Citicorp Real Estate, Inc. (2002) 100 Cal.App.4th 44, 55-56, 122 Cal. Rptr. 2d 267*.) Importantly, it is also well settled "[t]he prerequisite for any action for breach of the implied **[*25]** covenant of good faith and fair dealing is the existence of a contractual relationship between the parties, since the covenant is an implied term in the contract." (*Smith v. City and County of San Francisco* (1990) 225Cal.App.3d 38, 49.) "Without a contractual underpinning, there is no independent claim for breach of the implied covenant." (*Fireman's Fund Ins. Co. v. Maryland Casualty Co. (1994) 21 Cal.App.4th 1586, 1599, 26 Cal. Rptr. 2d 762*.)

Here, having rejected Cardoni's claim of breach of contract, we also conclude he cannot make out a claim for breach of an implied covenant. Wells Fargo and he negotiated a modified permanent loan, which he breached by defaulting on his payments. These facts do not support a claim that respondents breached an implied covenant.

V. *Slander of Title*

Cardoni attempted to state a cause of action for damages for slander of title, arguing, "[T]he publication of the assignment, the deeds of trust, the notice of trustee's sale, and the trustee's deed upon sale are false because the original note was destroyed upon securitizations by Defendant Provident." (Capitalization omitted.) A basic requirement of this action is that the plaintiff's publication be "'*without privilege* or justification.'" (*Alpha & Omega Development, LP v. Whillock Contracting, Inc. (2011) 200 Cal.App.4th 656, 664, 132 Cal. Rptr. 3d 781*.) Cardoni's slander of title claim fails because the publication of **[*26]** the challenged documents was privileged under *Civil Code section 2924, subdivision (d)(1)* and the *Civil Code section 47* litigation privilege.

VI. *Accounting*

To state an accounting cause of action, a plaintiff must allege (1) a fiduciary relationship or other circumstances appropriate to the remedy, and (2) a "balance due from the defendant to the plaintiff that can only be ascertained by an accounting." (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 820, p. 236; see *Brea v. McGlashan (1934) 3 Cal.App.2d 454, 460, 39 P.2d 877* ["cause of action for accounting need only state facts showing the existence of the relationship which requires an accounting and the statement that some balance is due the plaintiff"].)

As to the first element, Cardoni did not allege sufficient facts to show Wells Fargo owed him a fiduciary duty. And he did not allege other circumstances appropriate to the remedy. No fiduciary duty exists between a borrower and lender in an arm's length transaction. (*Oaks Management Corporation v. Superior Court (2006) 145 Cal.App.4th 453, 466, 51 Cal. Rptr. 3d 561*; *Union Bank v. Superior Court (1995) 31 Cal.App.4th 573, 579, 37 Cal. Rptr. 2d 653*; *Price v. Wells Fargo Bank (1989) 213 Cal.App.3d 465, 476, 261 Cal. Rptr. 735*.) "[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." (*Nymark v. Heart Fed. Savings & Loan Assn. (1991) 231 Cal.App.3d 1089, 1096, 283 Cal. Rptr. 53* (*Nymark*).) Cardoni having failed to allege facts supporting one of the elements of the cause of action, we conclude **[*27]** the court did not err by sustaining the demurrer without leave to amend.

VII. *Wrongful Foreclosure And Cancellation of Deed of Trust*

Cardoni argues he is exempt from the tender rule providing that a plaintiff generally may not challenge the propriety of a foreclosure on his or her property without offering to repay what he or she borrowed against the property. (*Karlsen v. American Sav. & Loan Ass'n (1971) 15 Cal. App. 3d 112, 117, 92 Cal. Rptr. 851* [judgment on the pleadings properly granted where plaintiff attempted to set aside trustee's sale for lack of adequate notice, because "[a] valid and viable tender of payment of the indebtedness owing is essential to an action to cancel a voidable sale under a deed of trust"].) Instead, Cardoni claims he made out a cause of action for wrongful foreclosure because Wells Fargo and Provident caused an "illegal, fraudulent, and willfully oppressive sale of [his] home. [He] was severely damaged because he was duped by defendants into defaulting on his loan and as a result lost title to his home and real property." (Some capitalization omitted.)

In addressing this and other contentions, it is helpful to begin with a summary of the law governing nonjudicial foreclosure: The power of sale in a deed of trust allows a beneficiary recourse **[*28]** to the security without the necessity of a judicial action. (See *Melendrez v. D & I Investment, Inc. (2005) 127 Cal.App.4th 1238, 1249, 26 Cal. Rptr. 3d 413*.) Absent any evidence to the contrary, a nonjudicial foreclosure sale is presumed to have been conducted regularly and fairly. (*Civ. Code, § 2924*.) However, irregularities in a nonjudicial trustee's sale may be grounds for setting it aside if they are prejudicial to the party challenging the sale. (See *Lo v. Jensen (2001) 88 Cal.App.4th 1093, 1097-1098, 106 Cal. Rptr. 2d 443*; see also *Angell v. Superior Court (1999) 73 Cal.App.4th 691, 700, 86 Cal. Rptr. 2d 657* ["'In order to challenge the sale successfully there must be evidence of a failure to comply with the procedural requirements for the foreclosure sale that caused prejudice to the person attacking the sale.'"].) Setting aside a nonjudicial foreclosure sale is an equitable remedy. (*Lo v. Jensen, at p. 1098* ["A debtor may apply to a court of equity to set aside a trust deed foreclosure on allegations of unfairness or irregularity that, coupled with the inadequacy of price obtained at the sale, mean that it is appropriate to invalidate the sale."].) A court will not grant equitable relief to a plaintiff unless the plaintiff does equity. (See *Arnolds Management Corp. v. Eischen (1984) 158 Cal.App.3d 575, 578-579, 205 Cal. Rptr. 15*; see also 13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, § 6, pp. 286-287.)

"It is settled that an action to set aside a trustee's sale for irregularities in sale notice or procedure should be accompanied **[*29]** by an offer to pay the full amount of the debt for which the property was security. [Citations.] This rule is premised upon the equitable maxim that a court of equity will not order that a useless act be performed. 'Equity will not interpose its remedial power in the accomplishment of what seemingly would be nothing but an idly and expensively futile act, nor will it purposely speculate in a field where there has been no proof as to what beneficial purpose may be subserved through its intervention.'" (*Arnolds Management Corp. v. Eischen, supra, 158 Cal.App.3d at pp. 578-579*.) "To hold otherwise would permit plaintiffs to state a cause of action without the necessary element of damage to themselves." (*Id. at p. 580*.) Moreover, as the court in *Stebley v. Litton Loan Servicing, LLP (2011) 202 Cal.App.4th 522, 526, 134 Cal. Rptr. 3d 604*, explained, "Allowing plaintiffs to recoup the property without full tender would give them an inequitable windfall, allowing them to evade their lawful debt."

"Recognized exceptions to the tender rule include when: (1) the underlying debt is void, (2) the foreclosure sale or trustee's deed is void on its face, (3) a counterclaim offsets the amount due, (4) specific circumstances make it inequitable to enforce the debt against the party challenging the sale, or (5) the foreclosure sale has not yet occurred." (*Chavez v. Indymac Mortgage Services (2013) 219 Cal.App.4th 1052, 1062, 162 Cal. Rptr. 3d 382*.) "Because the **[*30]** action is in equity, a defaulted borrower who seeks to set aside a trustee's sale is required to do equity before the court will exercise its equitable powers. [Citation.] Consequently, as a condition precedent to an action by the borrower to set aside the trustee's sale on the ground that the sale is voidable because of irregularities in the sale notice or procedure, the borrower must offer to pay the full amount of the debt for which the property was security. [Citations.] 'The rationale behind the rule is that if [the borrower] could not have redeemed the property had the sale procedures been proper, any irregularities in the sale did not result in damages to the [borrower].'" (*Lona v. Citibank, N.A. (2011) 202 Cal.App.4th 89, 112, 134 Cal. Rptr. 3d 622*; see *Pfeifer v. Countrywide Home Loans, Inc. (2012) 211 Cal.App.4th 1250, 1280-1281, 150 Cal. Rptr. 3d 673* [tender requirement applies to any action seeking to set aside a foreclosure sale].)

Cardoni did not allege he tendered the amount owed when he filed the operative complaint. Moreover, as we have noted, in his complaint he stated he had difficulty making his loan payments because his household income had dropped significantly. Thus, not only did he fail to allege he tendered the amount of his indebtedness, the complaint indicates he was financially unable to do so. In light of this failing, the court **[*31]** properly sustained respondents' demurrer to this cause of action.

Because Cardoni's cause of action to void or cancel the deed of trust is grounded on the same allegation and seeks the same relief, his failure to allege tender likewise precludes him from stating this cause of action.

VII. *Declaratory Relief*

Cardoni sought a declaration that "Defendant Wells Fargo breached the [TPP] and the [permanent] modification agreement by unilaterally rescinding the TPP and by refusing to tender an executed copy of the [permanent] modification agreement." (Some capitalization omitted.) Further, he sought a declaration that Wells Fargo had "fraudulently induced [him] to execute a[n] inferior and less favorable Wells Fargo internal modification agreement, by fraudulently representing to [him] that he did not qualify for HAMP loan modification." (Some capitalization omitted.) Finally, he sought a declaration that "Wells Fargo was not entitled to cause the subject property to be foreclosed upon and sold at trustee's sale, as [Cardoni] is the sole and true owner[] of the property and the defendants['] non-judicial foreclosure proceedings are illegal and void, and without authority of law." (Some capitalization **[*32]** omitted.)

To the extent Cardoni's declaratory relief claim relates to the question of Wells Fargo's alleged breach of contract, we have disposed of this matter above, and the court did not err in denying declaratory relief. To the extent Cardoni sought declaratory relief relating to his claim the foreclosure sale was improper, there was no basis for the court to grant his request. Declaratory relief is an equitable remedy (*City of L.A. v. City of Glendale (1943) 23 Cal. 2d 68, 81, 142 P.2d 289*; *Hartley v. Superior Court (2011) 196 Cal.App.4th 1249, 1258, 127 Cal. Rptr. 3d 174)*, and it is therefore subject to the equitable principle behind the tender requirement. (*Lona v. Citibank, N.A., supra, 202 Cal.App.4th at p. 112*.) A number of reported decisions have linked the availability of declaratory relief in a foreclosure challenge to satisfying the tender requirement. (*Abdallah v. United Savings Bank (1996) 43 Cal.App.4th*

1101, 1109, 51 Cal. Rptr. 2d 286 [tender requirement applies to "any cause of action for irregularity in the sale procedure"]; *McElroy v. Chase Manhattan Mortgage Corp., supra, 134 Cal.App.4th at p. 394*.) In the absence of a sufficient tender by Cardoni, the court did not err by sustaining the demurrer on this cause of action.

IX. *Unjust Enrichment/Restitution*

"[T]here is no cause of action in California for unjust enrichment." (*Melchior v. New Line Productions, Inc. (2003) 106 Cal.App.4th 779, 793, 131 Cal. Rptr. 2d 347*; *McKell v. Washington Mutual, Inc. (2006) 142 Cal.App.4th 1457, 1490, 49 Cal. Rptr. 3d 227*.) Unjust enrichment is synonymous with restitution. (*Dinosaur Development, Inc. v. White (1989) 216 Cal.App.3d 1310, 1314, 265 Cal. Rptr. 525*.)

"As a matter of law, an unjust enrichment claim does not lie where the parties have an enforceable express contract." (*Durell v. Sharp Healthcare (2010) 183 Cal.App.4th 1350, 1370, 108 Cal. Rptr. 3d 682*.) "'If the money is paid in satisfaction **[*33]** of an obligation actually owed by the plaintiff, he or she is obviously not entitled to restitution even though the performance was induced by mistake or fraud.'" (*Id. at p. 1371*.)

X. *Quiet Title*

The two elements of an ordinary cause of action to quiet title are the plaintiff's ownership and possession of the land and the defendant's claim of an adverse interest. (See *South Shore Land Co. v. Petersen (1964) 226 Cal.App.2d 725, 740-741, 38 Cal. Rptr. 392*, citing *Lucas v. Sweet (1956) 47 Cal.2d 20, 22, 300 P.2d 828* and *Ephraim v. Metropolitan Trust Co. (1946) 28 Cal.2d 824, 833, 172 P.2d 501*.) "A borrower may not . . . quiet title against a secured lender without first paying the outstanding debt on which the . . . deed of trust is based." (*Lueras v. BAC Home Loans Servicing, LP (2013) 221 Cal. App. 4th 49, 86, 163 Cal. Rptr. 3d 804*; accord, *Shimpones v. Stickney (1934) 219 Cal. 637, 649, 28 P.2d 673*.)

Cardoni cannot state such a cause of action because following the trustee's sale, Cardoni cannot allege he is the owner or in possession of the property. There are no allegations that Cardoni paid off the loan, or made a sufficient tender of payment. Thus, the court did not err by sustaining the demurrer on this cause of action.

XI. *Promissory Estoppel*

Cardoni contends in his opening brief that he "relied to his detriment that he would receive a HAMP loan modification under certain terms, however, Wells Fargo refused to provide [him] with such despite [his] faithful completion of the [TPP]. [¶] If [he] had known that he would not be provided a permanent HAMP **[*34]** loan modification on these express terms, [he] would have pursued other options." He adds this incomplete sentence: "The money put towards TPP agreements could have been used to[.]" His request for leave to amend his complaint to state this cause of action states in its entirety: "If given the opportunity, [I] can plead allegations that are sufficient to maintain a promissory estoppels [*sic*] cause of action. Leave to amend is requested to assert this viable cause of action."

The elements of promissory estoppel are (1) a promise, (2) the promisor should reasonably expect the promise to induce action or forbearance on the part of the promisee or a third person, (3) the promise induces action or forbearance by the promisee or a third person (which we refer to as detrimental reliance), and (4) injustice can be avoided only by enforcement of the promise. (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority (2000) 23 Cal.4th 305, 310, 96 Cal. Rptr. 2d 747, 1 P.3d 63*; see *Rest.2d Contracts, § 90, subd. (1)*.)

"'[A] promise is an indispensable element of the doctrine of promissory estoppel. The cases are uniform in holding that this doctrine cannot be invoked and must be held inapplicable in the absence of a showing that a promise had been made upon which the complaining party relied to his prejudice.' [Citation.] The promise must, **[*35]** in addition, be 'clear and unambiguous in its terms.'" (*Garcia v. World Savings, FSB (2010) 183 Cal.App.4th 1031, 1044, 107 Cal. Rptr. 3d 683*.) For a promise to be enforceable, it need only be "'definite enough that a court can determine the scope of the duty[,] and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages."' (*Bustamante v. Intuit, Inc. (2006) 141 Cal.App.4th 199, 209, 45 Cal. Rptr. 3d 692*.)

We have already concluded Cardoni cannot allege that he and Wells Fargo entered into a valid contract for the lower interest rate. Rather, his allegations demonstrate he accepted Wells Fargo's permanent loan modification agreement and started performing on it. By so doing, he undermined any claim that he was prejudiced by Wells Fargo's failure to grant him the loan at the lower interest rate he claims he was orally promised. It follows that he also cannot show detrimental reliance to make out a claim for promissory estoppel.

The plaintiff has the burden to show in what manner the pleadings may be amended and how such amendments will change the pleadings' legal effect. (*Careau & Co. v. Security Pacific Business Credit, Inc. (1990) 222 Cal.App.3d 1371, 1388, 272 Cal. Rptr. 387*.) This showing may be made for the first time on appeal, even if plaintiff made no request for leave to amend in the trial court. (*Code Civ. Proc., § 472c, subd. (a)*;[4] *Aubry v. Tri-City Hospital Dist. (1992) 2 Cal.4th 962, 971, 9 Cal. Rptr. 2d 92, 831 P.2d 317*.) Cardoni has not described, either in opposition to the demurrer motion below or on appeal, **[*36]** new or more specific facts, nor how those factual allegations would state a cause of action. Cardoni had three opportunities to amend his complaint in the trial court, and he does not meet his appellate burden of showing he can amend. We deny his request for leave to amend.

XII. *Civil Conspiracy*

Cardoni alleges he stated a cause of action for civil conspiracy, and refers to this allegation stated in his third amended complaint: "[Cardoni] was sold an alleged loan by [] Provident, which was not contemplated, scrutinized, underwritten, or designed by defendants to actually benefit [Cardoni], or to maximize [his] chances of maintaining possession of his real property, or to take into consideration [his] personal circumstances, including [his] income, assets, ability to pay, etc.; [he] was instead sold a loan that was contemplated, scrutinized, underwritten, and designed by defendants simply to feed secured paper into a Ponzi scheme (now known **[*37]** in knowledgeable circles as mortgage "securitization"), which scheme Defendants (including Wells Fargo) had designed and executed knowingly, all the while knowing it would almost surely cause [Cardoni] to lose possession of the subject real property, default on the subject loan, and would then allow the very foreclosure—fraudulently pre-conceived, pre-planned, and invalid though it is—which now threatens [him], and which is the primary subject and genesis of this civil action." (Emphasis and some capitalization omitted.)

Civil conspiracy is not an independent tort. Instead, it is a theory of vicarious legal liability under which certain defendants may be held liable for torts committed by others. That is, all parties to a conspiracy are jointly liable for tortious acts committed by any of them pursuant to the conspiracy. (*Okun v. Superior Court (1981) 29 Cal.3d 442, 454, 175 Cal. Rptr. 157, 629 P.2d 1369*.) The complaint must allege acts that give rise to a tort cause of action without the conspiracy; absent such allegation, the conspiracy allegation is meaningless. (*Manor Investment Company v. F. W. Woolworth Co. (1984) 159 Cal.App.3d 586, 595, 206 Cal. Rptr. 37*.) Thus, respondents' demurrer was properly sustained because the allegations of Cardoni's complaint do not show an independent potential for tort liability upon which the conspiracy claim is based. (*Chavers v. Gatke Corp. (2003) 107 Cal.App.4th 606, 614, 132 Cal. Rptr. 2d 198* **[*38]** ; *Abdallah v. United Savings Bank, supra, 43 Cal.App.4th at p. 1110*.)

XIII. *Unfair Competition Law Cause of Action*

In Cardoni's third amended complaint, he alleged Wells Fargo violated the UCL, in part by breaching the HAMP loan agreement, engaging in a "sham modification program" in which it informed persons with loans that they needed to default before they could get any loan modification assistance, and failing "to comply with consumer statutory protections under [*Civil Code sections] 2924 et seq.*, *2923.5*, *2923.6*, *2932.5*, *2934a* and *2936*, as well as [*Commercial Code sections] 3301-3312*, among other laws." (Italics omitted.) Cardoni also alleged respondents engaged in various other unlawful or unfair activities. Specifically, "executing and recording false and misleading

[4] *Code of Civil Procedure section 472c, subdivision (a)* states: "When any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made."

documents"; "acting as beneficiaries without the legal authority to do so"; "acting as trustee without the legal authority to do so"; "engaging in fraud, malfeasance, and perjury by utilizing an assignment of deeds of trust and other documents with forged signatures"; "improperly characterizing customers' accounts as being in default or delinquent to generate excessive and unwarranted payments and fees"; "instituting improper or unauthorized or unlawful foreclosure proceedings to generate unwarranted excessive payments and fees"; "misapplying or failing to apply customer payments"; **[*39]** "seeking to collect, and collecting, various improper fees, costs, and charges that are either not legally due under the mortgage contract or California law, or that are in excess of amounts legally due"; "mishandling borrower's loan payments and failing to timely or properly credit payments received, resulting in late charges, delinquencies, or default;" "treating borrower as in default on their loans even though the borrower have [*sic*] tendered timely and sufficient payments or have otherwise complied with mortgage payment requirements or California law." (Some capitalization omitted.)

In order to state a claim for a violation of the UCL, Cardoni must allege that respondents committed a business act or practice that is fraudulent, unlawful, or unfair. (See *Buller v. Sutter Health (2008) 160 Cal.App.4th 981, 986, 74 Cal. Rptr. 3d 47*.) A claim made under *Business and Professions Code section 17200* "'is not confined to anticompetitive business practices, but is also directed toward the public's right to protection from fraud, deceit, and unlawful conduct. [Citation.] Thus, California courts have consistently interpreted the language of [*Business and Professions Code] section 17200* broadly.'" (*South Bay Chevrolet v. General Motors Acceptance Corp. (1999) 72 Cal.App.4th 861, 877, 85 Cal. Rptr. 2d 301*.)

When a plaintiff predicates a claim of an unfair act or practice on public policy, it is not sufficient to merely allege the act violates public policy **[*40]** or is immoral, unethical, oppressive or unscrupulous. (*Durell v. Sharp Healthcare (2010) 183 Cal.App.4th 1350, 1365, 108 Cal. Rptr. 3d 682*.) This court has held on numerous occasions that to establish a practice is "unfair," a plaintiff must prove the defendant's "conduct is tethered to an[] underlying constitutional, statutory or regulatory provision, or that it threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of an ***antitrust law***." (*Id., at p. 1366*; *Levine v. Blue Shield of California (2010) 189 Cal.App.4th 1117, 1137, 117 Cal. Rptr. 3d 262*; *Scripps Clinic v. Superior Court (2003) 108 Cal.App.4th 917, 940, 134 Cal. Rptr. 2d 101*; *Byars v. SCME Mortgage Bankers, Inc. (2003) 109 Cal.App.4th 1134, 1147, 135 Cal. Rptr. 2d 796*.)

A.

In the first amended complaint, Cardoni alleged respondents had failed to contact him before the foreclosure as required by *Civil Code section 2923.5*, which states that a mortgagee or beneficiary may not record a notice of default until it (1) has contacted the borrower in person or by telephone to assess the borrower's financial situation and to explore options for the borrower to avoid foreclosure, or (2) has diligently tried to make such contact. (*Civ. Code, § 2923.5, subds. (a)(1)(A)*, *(2)* & *(e)*.)

However, elsewhere in that pleading, Cardoni alleged that Wells Fargo contacted him on August 18, 2009, after Cardoni's income fell significantly in 2008 and during the time he was seeking a HAMP loan modification. The timeline shows that the first notice of default was rescinded in June 2010. The second notice of default was not recorded until January 2011. **[*41]** Therefore, by Cardoni's own allegations, Wells Fargo in 2008 explained loan modification to him and gave him an opportunity to avoid foreclosure. Cardoni has not set forth facts to support his claim Wells Fargo violated *Civil Code section 2923.5*.

We also note that *Civil Code section 2923.5* provides Cardoni no relief at this late juncture: "There is nothing in [*Civil Code] section 2923.5* that even hints that noncompliance with the statute would cause any cloud on title after an otherwise properly conducted foreclosure sale. We would merely note that under the plain language of [*Civil Code] section 2923.5*, read in conjunction with [*Civil Code] section 2924g*, the *only* remedy provided is a postponement of the sale before it happens." (*Mabry v. Superior Court (2010) 185 Cal.App.4th 208, 235, 110 Cal. Rptr. 3d 201*.) Based on these considerations, we conclude Cardoni did not allege facts to state a cause of action under *Civil Code section 2923.5*, and therefore the court did not err in dismissing this cause of action without leave to amend.

Cardoni alleged in the first amended complaint that "First American was the true and rightful beneficiary, not the imposter beneficiary NDEx." He alleged that First American failed to comply with certain notice requirements contained in *Civil Code section 2924* before foreclosing on his property. We note that by its terms, this allegation does not apply to Wells Fargo or Provident. In any event, there was **[*42]** no statutory violation.

Civil Code sections 2924 through 2924k set forth a comprehensive framework for the regulation of nonjudicial foreclosure sales pursuant to a power of sale contained in a deed of trust. (See *Jenkins, supra, 216 Cal.App.4th at p. 508*.) *Civil Code section 2924* requires, inter alia, that the power of sale in a deed of trust "shall not be exercised" until a notice of default is recorded including "[a] statement that a breach of the obligation for which the mortgage or transfer in trust is security has occurred." (*Civ. Code, § 2924, subd. (a)(1)(B)*.) Here, the judicially noticed documents indicate that a notice of default was recorded with the accompanying statement. (*Jenkins, at p. 536* [judicial notice of fact or proposition within a recorded document that cannot reasonably be controverted].)

We conclude the trial court properly sustained the demurrer to this cause of action without leave to amend. *Civil Code section 2924, subdivision (a)(1)*—stating that a trustee, mortgagee, or beneficiary, or an agent of any of them, may initiate foreclosure—does not include a requirement that an agent demonstrate authorization by its principal. (*Fontenot, supra, 198 Cal.App.4th at p. 268*.)

Under *Civil Code section 2932.5*, where a power of sale for real property is given to a mortgagee or other encumbrancer to secure an obligation, such power of sale may be exercised by the assignee who is entitled to receive payment of the obligation **[*43]** "if the assignment is duly acknowledged and recorded." If the assignment has not been recorded, then the power cannot be exercised.

Civil Code section 2932.5 applies to mortgages in which the mortgagor or borrower has granted a power of sale to the mortgagee or lender. (*Herrera v. Federal Nat. Mortg. Assn. (2012) 205 Cal.App.4th 1495, 1509, 141 Cal. Rptr. 3d 326*.) It is well established that *Civil Code section 2932.5* does not apply to trust deeds, in which the power of sale is granted to a third party, the trustee. (*Calvo v. HSBC Bank USA, N.A., (2011) 199 Cal.App.4th 118, 123, 130 Cal. Rptr. 3d 815*.) This case involves a deed of trust; therefore, *Civil Code section 2932.5* does not apply and the court did not err in sustaining respondents' demurrer on this cause of action.

Cardoni alleged in his first amended complaint that "the new trustee NDEx . . . was not granted and did not succeed to the powers of the original trustee First American Loanstar," and thus NDEx did not have the authority to sell the property and initiate foreclosure proceedings.

Civil Code section 2934a provides that a trustee named in a recorded substitution of trustee is "deemed to be authorized to act as the trustee under the mortgage or deed of trust for all purposes from the date the substitution is executed by the mortgagee, beneficiaries, or by their authorized agents. . . . Once recorded, the substitution shall constitute conclusive evidence of the authority of the substituted trustee **[*44]** or his or her agents to act pursuant to this section." (*Civ. Code, § 2934a, subd. (d)*.) "That statute also provides a substituted trustee may record a notice of default *before* the substitution empowering the trustee to act is recorded," as long as notice of substitution is mailed to the appropriate parties in the manner provided in *Civil Code section 2924b* and an affidavit of mailing is attached. (*Rossberg v. Bank of America, N.A. (2013) 219 Cal.App.4th 1481, 1495, 162 Cal. Rptr. 3d 525*; *Civ. Code, § 2934a, subd. (b)*.) The judicially noticed documents in the record make clear that the process by which NDEx was substituted as trustee and recorded the notice of default was lawful. Therefore, Cardoni cannot base a UCL claim on a supposed violation of *Civil Code section 2934a*.

Civil Code section 2936 states: "The assignment of a debt secured by mortgage carries with it the security." This statute merely enunciates a legal principle. Cardoni does not explain how this statute was violated, and we find no basis for concluding that it supports a UCL claim.

B.

Wells Fargo argued in the trial court, and again on appeal, that some of Cardoni's allegations were a sham and made to assert improper claims. We agree, concluding Cardoni is bound by the contentions in his first amended complaint.

"'Generally, after an amended pleading has been filed, courts will disregard the original pleading. [Citation.] [¶] However, **[*45]** an exception to this rule is found . . . where an amended complaint attempts to avoid defects set forth in a prior complaint by ignoring them. The court may examine the prior complaint to ascertain whether the amended complaint is merely a sham.' [Citation.] . . . Moreover, any inconsistencies with prior pleadings must be explained; if the pleader fails to do so, the court may disregard the inconsistent allegations. [Citation.] Accordingly, a court is 'not bound to accept as true allegations contrary to factual allegations in former pleading in the same case.'" (*Vallejo Development Co. v. Beck Development Co. (1994) 24 Cal.App.4th 929, 946, 29 Cal. Rptr. 2d 669* (*Vallejo Development*); *State of California ex rel. Metz v. CCC Information Services, Inc. (2007) 149 Cal.App.4th 402, 412, 57 Cal. Rptr. 3d 156* ["'[U]nder the sham pleading doctrine, plaintiffs are precluded from amending complaints to omit harmful allegations, without explanation, from previous complaints to avoid attacks raised in demurrers or motions for summary judgment.'"].)

""'The principle is that of *truthful pleading*.'" [Citation.] When the plaintiff pleads inconsistently *in separate actions*, the plaintiff's complaint is nothing more than a sham that seeks to avoid the effect of a demurrer. [Citations.] Under such circumstances, the court will disregard the falsely pleaded facts and affirm the demurrer." (*Cantu v. Resolution Trust Corp. (1992) 4 Cal.App.4th 857, 877-878, 6 Cal. Rptr. 2d 151*.)

"The sham pleading doctrine is not **[*46]** 'intended to prevent honest complainants from correcting erroneous allegations . . . or to prevent correction of ambiguous facts.' [Citation.] Instead, it is intended to enable courts 'to prevent an abuse of process.'" (*Deveny v. Entropin, Inc. (2006) 139 Cal.App.4th 408, 42 Cal. Rptr. 3d 807*.) Plaintiffs therefore may avoid the effect of the sham pleading doctrine by alleging an explanation for the conflicts between the pleadings. (*Vallejo Development, supra, 24 Cal.App.4th at p. 946*.)

Cardoni alleged in his first amended complaint: "On August 18, 2009, Wells [Fargo] informed [him] that he was eligible for the [HAMP] and offered [him] a HAMP loan modification agreement which [he] promptly notarized, executed, and completed the automatic qualifying terms. [He] proceeded to tender his monthly mortgage payments, in the correct amount, for the next five . . . months." Cardoni further alleged that after he had satisfied the TPP requirements, Wells Fargo breached the contract by rescinding the permanent loan modification agreement.

By contrast, in the third amended complaint, Cardoni alleged for the first time: "Wells Fargo informed [him] that he could only get help if he missed three payments and fell into default. [He] indicated that he did not want to miss three payments, or to fall into default. Nevertheless, **[*47]** Wells Fargo indicated, consistently, that [he] must be in default or Wells Fargo was unable to help [him]." Cardoni elaborates on this allegation, referring to it as "an unfair and predatory business practice" and explaining he "gave consideration to Wells Fargo, to wit, including (among others) the destruction of [his] credit, and the exposure of his family and the subject property to the woes of potential foreclosure, all in reliance upon, and in exchange for, Wells Fargo's assurances that [he] would and did qualify for loan modification, and (at bare minimum) Wells [Fargo's] assurances that it would act in good faith in processing [his] application(s) for loan modification assistance, through HAMP or otherwise." (Some italics and capitalization omitted.)

Cardoni contends in his reply brief that he did not engage in sham pleadings, but rather, he "continues to assert the same allegations against respondents. [His] complaints do not omit harmful allegations from previous complaints, quite the opposite, [his] amendments continue to add more and more-harmful allegations against respondents each time." (Some capitalization omitted.)

The difference between Cardoni's pleadings is that the **[*48]** third amended complaint alleges a material difference, namely that Wells Fargo purportedly required Cardoni to default on his loan for three months before he would be eligible for a loan modification. This allegation is inconsistent with Cardoni's earlier pleading in which Wells Fargo was alleged to have unconditionally informed him he was eligible. Therefore, we disregard this allegation in the third amended complaint as sham.

As to Cardoni's remaining allegations regarding UCL violations, we conclude they fail to support a UCL cause of action either because they are encompassed by our analysis of the breach of contract cause of action or another cause of action addressed herein, or we do not consider them because they are not properly pleaded, but instead they are "contentions, deductions or conclusions of fact or law." (*Adelman v. Associated Internat. Ins. Co. (2001) 90 Cal.App.4th 352, 359, 108 Cal. Rptr. 2d 788*.)

XIV. *Negligence/Negligent Misrepresentation*

Relying on *Jolley v. Chase Home Finance, LLC (2013) 213 Cal.App.4th 872, 153 Cal. Rptr. 3d 546* (*Jolley*), Cardoni urges us to hold he has stated a cause of action for negligence, and that Wells Fargo owed him a duty of care not to make misrepresentations to him regarding the status of his loan modification.[5]

"The elements of negligent misrepresentation are (1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage. [Citation.] In contrast to fraud, negligent misrepresentation does not require knowledge of falsity. A defendant who makes false statements '"honestly believing that they are true, but without reasonable ground for such belief, . . . may be liable for negligent misrepresentation . . . . " [Citations.]' [Citation.] However, a positive assertion is required; an omission or an implied assertion or representation is not sufficient." (*Apollo Capital Fund LLC v. Roth Capital Partners, LLC (2007) 158 Cal.App.4th 226, 243, 70 Cal. Rptr. 3d 199*.)

"The existence of a duty of care owed by a defendant to a plaintiff is a prerequisite **[*52]** to establishing a claim for negligence." (*Nymark, supra, 231 Cal.App.3d at p. 1095*.) Whether a duty to use due care exists in a particular case is a question of law to be resolved by the court. (*Quelimane Co. v. Stewart Title Guaranty Co. (1988) 19 Cal.4th 26, 57-58, 77 Cal. Rptr. 2d 709, 960 P.2d 513*.)

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[5] *Jolley* was decided in the context of a motion for summary judgment brought by JP Morgan Chase (Chase), **[*49]** which had assumed the assets of its predecessor, Washington Mutual Bank (WaMu). (*Jolley, supra, 213 Cal.App.4th at pp. 877-878*.) There, the plaintiff and WaMu had entered into a construction loan, which WaMu agreed to modify in 2006 to permit the plaintiff to complete construction. (*Id. at pp. 877-879*.) The plaintiff alleged that before the modification, WaMu made false representations about certain matters, and that there were irregularities in the loan disbursements, causing construction delays. (*Id. at p. 878*.) After Chase purchased WaMu's assets, the plaintiff continued to deal with the same people in the construction loan department and sought another loan modification. (*Id. at p. 880*.) He also dealt with a Chase employee who told him there was a '"high probability"' Chase would be able to modify the loan so as to avoid the foreclosure, the '"likelihood was good"', and that it was likely when construction was complete he could roll the construction loan into a fully amortized conventional loan. (*Id. at p. 881*.) According to plaintiff, he was induced by these representations to borrow heavily to finish the project, and he claimed construction delays during the loan modification negotiations prevented him from selling the property before the housing market collapsed. **[*50]** (*Ibid.*)

Rather than agree to a loan modification, Chase demanded payment in full and its trustee recorded a notice of default and then a notice of sale. (*Jolley, supra, 213 Cal.App.4th at p. 881*.) Plaintiff filed suit two days before the foreclosure sale, alleging causes of action for fraud, negligent misrepresentation, breach of contract/promissory estoppel, negligence, violation of the UCL, declaratory relief, accounting and reformation. (*Ibid.*) He also obtained a temporary restraining order prohibiting Chase from proceeding with the trustee's sale. (*Ibid.*)

The trial court granted Chase's ensuing motion for summary judgment on various grounds, including that Chase, a lender, did not owe the plaintiff a duty of care. (*Jolley, supra, 213 Cal.App.4th at pp. 884-885*.) The appellate court reversed, however, as to the causes of action for fraud, breach of contract/promissory estoppel, negligence, violation of the UCL, and reformation. (*Id. at pp. 893-908*.) In reversing summary judgment on the plaintiff's UCL cause of action, the Court of Appeal focused in part on allegations indicating Chase had subjected the plaintiff to dual tracking, the "common bank tactic" whereby the lender pursues foreclosure at the same time it engages in loan modification negotiations. (*Id. at pp. 901, 904*.) The court observed that **[*51]** the California Legislature made dual tracking illegal effective January 1, 2018. (*Id. at pp. 904-905*.) Though it acknowledged the law did not apply and dual tracking was not forbidden by statute at the time, the appellate court nevertheless held "the new legislation and its legislative history may still contribute to its being considered 'unfair' for purposes of the UCL." (*Id. at pp. 907-908*.)

We decline to impose a duty of due care on Wells Fargo in handling Cardoni's loan modification. (See *Wagner v. Benson (1980) 101 Cal.App.3d 27, 34-35, 161 Cal. Rptr. 516* [lender's liability to a borrower for negligence arises only when the lender "'actively participates' in the financed enterprise 'beyond the domain of the usual money lender'"]; *Ragland v. U.S. Bank Nat. Assn. (2012) 209 Cal.App.4th 182, 206, 147 Cal. Rptr. 3d 41* ["No fiduciary duty exists between a borrower and lender in an arm's length transaction"].) And we agree with federal district courts that have held that "offering loan modifications is sufficiently entwined with money lending so as to be considered within the scope of typical money lending activities. If money lending institutions were held to a higher standard of care by offering a service that could benefit borrowers whose circumstances have changed, the money lender would be discouraged from leniency and would assert their rights to reclaim the property upon the borrower's default. The conventional-moneylender test shall be sufficient to determine that there is no duty of care owed in servicing Plaintiff's mortgage loan and loan modification. As the **[*53]** Plaintiff is unable to establish a duty, it is unnecessary to discuss the elements of breach, causation, and damages." (*Alvarado v. Aurora Loan Services, LLC (C.D. Cal., Sept. 20, 2012, No. SACV 12-0524-DOC-(JPRx)) 2012 U.S. Dist. LEXIS 135637, 2012 WL 4475330 *6*; see also *Juarez v. Suntrust Mortgage, Inc. (E.D. Cal., May 13, 2013, No. CV F 13-0485 LJO SAB) 2013 U.S. Dist. LEXIS 67850, 2013 WL 1983111*.)

At oral argument, Cardoni also relied on *Alvarez v. BAC Home Loans Servicing, LP (2014) 228 Cal.App.4th 941, 176 Cal. Rptr. 3d 304* (*Alvarez*), which held that the defendant lenders "owed [plaintiffs] a duty to exercise reasonable care in the review of their loan modification applications once they had agreed to consider them." (*Id. at pp. 944-945*.) In *Alvarez*, the plaintiffs alleged that defendants breached this duty by (1) failing to consider their application in a timely manner, (2) foreclosing while plaintiffs were under consideration for a modification, and (3) mishandling their application by relying on incorrect salary information and apparently misplacing application documents. (*Ibid.*) The *Alvarez* court reaffirmed that "As a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." (*Id. at p. 945*.) Nonetheless, the court held that on the facts of that case, **[*54]** the lender owed the borrower a duty of care. (*Id. at p. 949*.)

The *Alvarez* court also noted that the plaintiff's allegation in the complaint that defendants engaged in "dual tracking," a practice now prohibited by *Civil Code sections 2923.6*, and *2924.18*, increased the defendants' blameworthiness. The court added: "Much of the conduct that plaintiffs allege breached a duty of care in this case—failing to process the applications in a timely manner, dual tracking and losing documents—is conduct now regulated by the [*Home Owner's Bill of Rights*]. While the explicit articulation of the lender's duties was not available when plaintiffs applied for loan modification, these obligations fall well within the duty to use reasonable care in the processing of a loan modification. Recognizing this general duty will not place an undue burden on mortgage banks and servicers, nor will it have a chilling effect on borrowers' ability to obtain loan modifications." (*Alvarez, supra, 228 Cal.App.4th at p. 951*.)

Here, Cardoni's negligence claim in his first amended complaint is focused on his claim that respondents "owed [him] a duty of care to reasonably investigate whether statutory notice requirements were met before proceeding to auction the property and to comply with [*Civil Code sections] 2923.5*, *2932.5*, *2934*, *2934a*, and *2924 et seq.* [¶] . . . [Respondents] **[*55]** owed [him] and the public at large a duty of care to reasonably investigate the existence of any agreements, transactions, or conveyances concerning the property and thereby to not expose [him] to an unreasonable risk of harm, including deprivation of property." Cardoni alleged respondents conduct caused him harm: "As a direct and proximate result of [respondents'] failure to exercise reasonable care, [he] was placed in imminent peril as a foreclosure without any authority of law and without proper notice, completely void foreclosure proceedings, were instituted against [him.] [He] has suffered damages in an amount to be proved at trial, including reasonable attorneys' fees and costs. [He] has further suffered equitable harm for which legal damages are insufficient."

Having disposed of Cardoni's claims regarding alleged violations of the Civil Code sections, we further conclude Cardoni did not allege facts sufficient to distinguish Wells Fargo's conduct from "traditional money-lending activity," such as to impose a duty of care on Wells Fargo. Unlike in *Alvarez, supra, 228 Cal.App.4th 941*, Cardoni did not allege Wells Fargo engaged in dual tracking. Rather, as noted, the complaint established that Wells Fargo agreed **[*56]** to a loan modification, which Cardoni accepted. It was Cardoni who subsequently elected to stop payments on his mortgage. Accordingly, the trial court did not err in dismissing Cardoni's negligence claim.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.

In re Aluminum Warehousing Antitrust Litig.

United States District Court for the Southern District of New York

March 26, 2015, Decided; March 26, 2015, Filed

13-md-2481 (KBF) and all related cases

Reporter

95 F. Supp. 3d 419 *; 2015 U.S. Dist. LEXIS 38743 **; 2015-1 Trade Cas. (CCH) P79,120

IN RE ALUMINUM WAREHOUSING ANTITRUST LITIGATION

Subsequent History: Affirmed by *In re Aluminum Warehousing Antitrust Litig., 833 F.3d 151, 2016 U.S. App. LEXIS 14579 (2d Cir. N.Y., Aug. 9, 2016)*

Prior History: *In re Aluminum Warehousing Antitrust Litig., 2014 U.S. Dist. LEXIS 119074, 2014 WL 4211353 (S.D.N.Y., Aug. 25, 2014)*

Core Terms

aluminum, warehouse, Premium, conspiracy, allegations, entities, trading, antitrust, plaintiffs', affiliated, prices, defendants', conspirators, anti trust law, monopolization, commodities, Sherman Act, load-out, competitors, pleadings, relevant market, warrants, market power, consumers, alleged conspiracy, purchases, storage, geographic, contracts, enforcer

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For GS Power Holdings LLC, Metro International Trade Services, L. L. C., Defendants: Benjamin M. McGovern, Holland & Knight, LLP, Boston, MA; Gregory Lee Curtner, Schiff Hardin LLP (MI), Ann Arbor, MI; JEROME WAYNE HOFFMAN, HOLLAND & KNIGHT LLP - TALLAHASSEE FL, TALLAHASSEE, FL; Jessica A. Sprovtsoff, Schiff Hardin LLP, Ann Arbor, MI; Mark Aaron Cunningham, Jones Walker (New Orleans), New Orleans, LA; Menachem David Possick, Sullivan & Cromwell, LLP(NYC), New York, NY; Richard C. Pepperman, II, Suhana S. Han, Yavar Bathaee, Sullivan and Cromwell, LLP(NYC), New York, NY; Wesley B. Gilchrist, Lightfoot, Franklin & White, Birmingham, AL.

For London Metal Exchange Limited, Defendant: Jessica A. Sprovtsoff Mark Aaron Cunningham, Jones Walker (New Orleans), New Orleans, LA; Menachem David Possick, Sullivan & Cromwell, LLP(NYC), New York, NY; Richard C. Pepperman, II, Suhana S. Han, Yavar Bathaee, Sullivan and **[**16]** Cromwell, LLP(NYC), New York, NY; Wesley B. Gilchrist, Lightfoot, Franklin & White, Birmingham, AL; Margaret M. Zwisler, PRO HAC VICE, William R. Sherman, Latham & Watkins LLP (DC), Washington, DC; William H. Horton, Giarmarco, Mullins & Horton, P.C., Troy, MI.

For JP Morgan Chase & Co, Defendant: Henry Liu, LEAD ATTORNEY, John S. Playforth, Mark David Herman, PRO HAC VICE, Covington & Burling LLP, Washington, DC; GEORGE N MEROS, JR, GRAYROBINSON PA - TALLAHASSEE FL, TALLAHASSEE, FL; Neil K. Roman, Robert D. Wick, PRO HAC VICE, Covington & Burling, L.L.P. (DC), Washington, DC.

For Henry Bath LLC, Defendant: Henry Liu, LEAD ATTORNEY, John S. Playforth, Mark David Herman, PRO HAC VICE, Covington & Burling LLP, Washington, DC; Neil K. Roman, Robert D. Wick, PRO HAC VICE, Covington & Burling, L.L.P. (DC), Washington, DC.

For Pacorini Metals USA, LLC, Defendant: John M. Nannes, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, Washington, DC; Jay B. Kasner, Skadden, Arps, Slate, Meagher & Flom LLP (NYC), New York, NY; Thomas Jerome Nolan, Skadden, Arps, Slate, Meagher & Flom, LLP (Los Angeles), Los Angeles, CA.

For LME Holdings Limited, Defendant: Margaret M. Zwisler, LEAD ATTORNEY, **[**17]** PRO HAC VICE, Latham & Watkins LLP (DC), Washington, DC; William H. Horton, Giarmarco, Mullins & Horton, P.C., Troy, MI.

For The Goldman Sachs Group Inc., Defendant: Menachem David Possick, Sullivan & Cromwell, LLP(NYC), New York, NY; Richard C. Pepperman, II, Sullivan and Cromwell, LLP(NYC), New York, NY.

For MCEPF Metro I, Inc., MITSI Holdings LLC, Defendant: Menachem David Possick, Sullivan & Cromwell, LLP(NYC), New York, NY; Richard C. Pepperman, II, Sullivan and Cromwell, LLP(NYC), New York, NY; Suhana S. Han, Yavar Bathaee, Sullivan and Cromwell, LLP(NYC), New York, NY.

For Pacorini Metals AG, Defendant: Jay B. Kasner, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP (NYC), New York, NY; John H. Lyons, PRO HAC VICE, Tiffany Rider Rohrbaugh, Skadden, Arps, Slate, Meagher &

Flom LLP (DC), Washington, DC; John M. Nannes, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom LLP, Washington, DC.

For Hong Kong Exchanges & Clearing, Ltd., Defendant: Margaret M. Zwisler, LEAD ATTORNEY, PRO HAC VICE, Latham & Watkins LLP (DC), Washington, DC.

For Glencore Ltd., Defendant: Chelsea Rebekah McLean, Jacques Semmelman, Curtis, Mallet-Prevost, Colt & Mosle LLP, New York, NY; Eliot Lauer, Curtis, **[**18]** Mallet-Prevost, Colt & Mosle, LLP(NYC), New York, NY.

Judges: KATHERINE B. FORREST, United States District Judge.

Opinion by: KATHERINE B. FORREST

Opinion

[*427] OPINION & ORDER

KATHERINE B. FORREST, District Judge:

In August 2013 plaintiffs filed the first of what would be a large number of lawsuits alleging anticompetitive conduct impacting aluminum pricing. (See, e.g., 14-cv-217 ECF No. 1.[1] Numerous actions were filed in various jurisdictions across the country and eventually brought together in this District pursuant to an order of the U.S. Judicial Panel on Multidistrict Litigation. (ECF No. 1.)

This Court dismissed an initial set of pleadings in August and September 2014. (ECF Nos. 571 ("1st MTD Op."), 583, 586.) Certain plaintiffs—indirect purchasers—were dismissed because it was impossible for them to establish antitrust standing. (See 1st MTD Op. at 33-50.) The remaining plaintiffs then filed amended and proposed amended pleadings. Four plaintiffs who are self-styled "Direct Purchaser Plaintiffs," to whom the Court has referred as the "First Level Purchasers" or "FLPs," **[**19]** filed the Third Amended Complaint (the "TAC"). (ECF No. 631 ex. A ("TAC").) The remaining plaintiffs, Agfa Corporation, Agfa Graphics, N.V. (collectively, "Agfa"), Mag Instrument, Inc. ("Mag"), and Eastman Kodak Company ("Kodak"), filed the Joint Amended Complaint (the "JAC").[2] (ECF No. 608 ("JAC").) All defendants moved to dismiss and opposed the amendments. (ECF Nos. 650, 652, 654, 657-59, 662.)

Two recent decisions of this Court granted the motions to dismiss of four foreign defendants[3] due to a lack of personal jurisdiction, and certain other defendants[4] whose only tie to the events at issue was alleged to be a corporate affiliation with another defendant. (ECF Nos. 728, 731.) Now pending before the Court are defendants' motions to dismiss the JAC (ECF No. 649, 654) and plaintiffs' motions for leave to amend their complaint (ECF Nos. 608, 631.) This Opinion & Order addresses claims against the following defendants: Goldman, Sachs & Co.; Goldman Sachs International; Metro International Trade Services LLC ("Metro"); J. Aron & Company ("J. Aron");

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[1] Unless otherwise specified by reference to a specific docket number, all citations in parentheses refer to the main docket in this case, 13-md-2481.

[2] Plaintiffs filed the JAC and the TAC in connection with two consolidated motions to amend in support thereof. (ECF Nos. 608, 631.)

[3] The four foreign defendants were: LME Holdings Limited; Hong Kong Exchanges and Clearing Limited; Henry Bath & Son Ltd.; and Glencore plc. (ECF No. 578 at 2.)

[4] These other defendants were: The Goldman Sachs Group, Inc.; JPMorgan Chase & Co.; and Pacorini Metals AG. (ECF No. 579 at 6-7.)

Mitsi Holdings **[**20]** LLC ("Mitsi"); Burgess-Allen Partnership Ltd. ("BAP"); Robert Burgess-Allen; JPMorgan Securities plc; Henry Bath LLC; Glencore AG; Glencore Ltd.; and Pacorini Metals USA LLC ("Pacorini USA").[5]

Each defendant seeks its own dismissal as well as the dismissal of each claim against it, essentially for the same reasons **[*428]** as during the initial round of motions to dismiss. However, with the benefit of the limited discovery permitted by the Court since its initial decisions, plaintiffs have now added sufficient factual detail to their complaints and have sharpened their story and substantive claims to overcome these arguments, such that they have now stated a plausible claim under *§ 1 of the Sherman Act* (and certain related state law claims) against defendants. The *§ 2* monopoly claim asserted in the TAC remains legally deficient, as are certain of the TAC's *§ 1* and other state law claims.

Accordingly, **[**21]** for the reasons set forth below, defendants' motions to dismiss the JAC are DENIED and plaintiffs' motion for leave to amend the JAC is GRANTED; plaintiffs' motion for leave to amend the TAC is GRANTED IN PART and DENIED IN PART. In sum, no defendant who is the subject of this Opinion & Order is dismissed entirely; the Court does, however, dismiss certain claims, specifically the FLPs' claim under *§ 2* of the Sherman Act as well as the FLPs' random state law claims that do not substantively mirror its remaining claim under *§ 1* of the Sherman Act.

I. THE HEART OF PLAINTIFFS' ALLEGATIONS

Plaintiffs have spent thousands of pages assembling (or, trying out) various versions of claims that defendants have engaged in anticompetitive conduct. To put it in colloquial terms, they alleged they "smelled a rat" but could neither identify its whereabouts nor its destination. The cats prowled, seeking the hole from which the alleged rat emanated and into which it may have crept. The metaphorical cats have now pointed to a point of origin and destination. Whether there is in fact a rat at all, or whether any rodent has, could or would take up the position indicated remains a question for another day.

Needless **[**22]** to say, it should never take thousands of pages to state a claim. Were it not for the legal standards governing when enough is deemed enough (which allow for more than what this Court might otherwise be inclined to tolerate), the trees felled in an effort to state a claim might be leafing even now.

Plaintiffs' initial pleadings alleged a conspiracy by operators of warehouses approved by the London Metal Exchange ("LME")[6] to delay the loading out of aluminum stored in those warehouses. (See ECF Nos. 226, 271-72; 14-cv-6849 ECF No. 1.) According to the initial pleadings, these delays restrained the supply of aluminum, thereby increasing its price. Plaintiffs generally cast these allegations as a conspiracy to fix the price of aluminum—notwithstanding that defendants do not sell aluminum and could not, strictly speaking, fix its price. (See, e.g., ECF No. 226 ¶¶ 47, 117, 124; ECF No. 271 ¶¶ 90, 94; ECF No. 272 ¶¶ 48, 127, 134.) The FLPs (but not Mag, Agfa and Kodak) also alleged that certain defendants had together monopolized various markets. (ECF No. 271 ¶¶ 91, 335-41, 407-413.) These initial pleadings focused on the creation and maintenance of warehouse queues as **[*429]** the core of the allegedly **[**23]** unlawful conduct, but failed to adequately explain how and why the defendant financial institutions participated in or benefitted from the conduct. Even as to Metro, the primary alleged wrongdoer, the creation and maintenance of queues was painted in terms that were economically profit-maximizing. What warehouse, paid for a term of storage, would not want the longest legally permissible terms possible? For similar reasons, the inclusion of defendant warehouse companies which were not alleged to themselves have had queues was inadequately explained. How, indeed, would such a warehouse have benefitted from queues it did not have,

[5] See notes 6 & 11-14, infra.

[6] The TAC names the LME as a defendant. (TAC ¶¶ 74-75.) However, the Court dismissed the LME from this action without leave to replead in an Opinion & Order dated August 25, 2014. (ECF No. 564.) The TAC also names as defendants LME Holdings Ltd. ("LME Holdings") (TAC ¶¶ 74, 77) and Hong Kong Exchanges & Clearing Ltd. ("HKEx") (TAC ¶¶ 74, 78). On March 3, 2015, the Court denied **[**24]** plaintiffs' motions for leave to amend their complaints to the extent that they seek to join LME Holdings and HKEx as defendants. (ECF No. 728.) Accordingly, the LME, LME Holdings, and HKEx have all been dismissed from this action.

but which its competitors did? And what were the financial institutions doing in the case? How were they a part of the alleged conspiracy? Plaintiffs' theories left much to the imagination.

For a variety of reasons—including incomplete and implausible theories and a lack of relevant factual allegations—this Court dismissed all of plaintiffs' claims, but granted the FLPs, Mag, and Agfa[7] leave to seek to amend. (1st MTD Op.) Plaintiffs then filed motions presenting more factually detailed and substantively focused proposed pleadings, and Kodak filed its amended complaint as of right.

The FLPs have been particularly unclear as to what they want to allege. They alleged a set of theories in a short-lived proposed Second Amended Complaint (ECF No. 618 ex. 1), another set in the TAC, and yet another in a proposed Fourth Amended Complaint (the "FAC") (ECF Nos. 688, 690-91). This Court has noted the additional materials that the FLPs propose to include in the FAC; defendants have not yet had an opportunity to respond to this additional **[**25]** material, and accordingly, the Court here focuses on the TAC when evaluating the FLPs' claims.[8]

As explained above, Mag, Agfa, and Kodak have filed the JAC. The JAC, and the briefing in support of the JAC, does a far better job of articulating and supporting clear theories of anticompetitive conduct than the TAC. For this reason, the Court has used the JAC as its primary reference point for claims which overlap with those of the FLPs, though ultimately each complaint and all claims raised therein must rise or fall on their own merits. In large part—with the notable exception of the FLPs' monopolization claim under *§ 2* of the Sherman Act (and a couple of alternative versions of a Section 1 claim)—the JAC and the TAC both allege a singular core claim directed at the same conduct. In sum, the primary theories alleged in both the JAC and the TAC are now as follows:

Defendants consist of two groups: financial institutions with commodities trading arms that trade financial instruments (such as warrants) tied to physical metals, and operators of warehouses **[**26]** that store metals. Working together, these entities allegedly engaged in a conspiracy to increase the financial institutions' commodities trading profits and warehouse companies' revenues. This was effected—at least in part—by using the financial firms' ability to obtain, retain, and strategically settle aluminum warrants along with their affiliated warehouses' ability to store or agreeing to accommodate storage requests for aluminum. According to plaintiffs, the effect of these concerted actions was to raise the Platts Midwest Premium, which **[*430]** is commonly used as a component of the stated price in contracts for the purchase of aluminum. (See JAC ¶ 2; TAC ¶¶ 468, 471.) These claims are premised on a description of price setting as follows:

The spot metal price for physically delivered aluminum has two standardized components: the LME cash price[9] and a regional premium (for example, the Platts Midwest Premium). (JAC ¶ 118; TAC ¶ 176.) Together, these components are referred to as the "all-in" price for physical delivery of primary aluminum. (JAC ¶ 118; TAC ¶ 176.) The LME cash price is determined by daily open outcry by the marginal buyer and seller at a specific moment in time using standardized **[**27]** LME contracts covering spot material located in LME warehouses. (JAC ¶ 119.)[10]

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[7] Kodak filed its complaint later than the other plaintiffs and was not included in this initial round of motion practice.

[8] The Court has considered whether these additional materials and allegations would alter its conclusions as to the claims it dismisses herein; they do not.

[9] The TAC at times refers to the LME cash price as the "LME Settlement Price." (See TAC ¶ 176.)

[10] Plaintiffs allege that the LME certifies a global network of more than 700 warehouses, with close to 200 located in the United States. (JAC ¶ 127; TAC ¶ 188.) Defendants Metro, Henry Bath LLC and Pacorini are alleged collectively to operate more than 75-80% of the LME certified warehouses in the United States and throughout the world. (JAC ¶ 127; TAC ¶ 188.) In the United States, LME warehouses are located in Detroit, Baltimore, Chicago, Los Angeles, Mobile, New Orleans, Owensboro, St. Louis, and Toledo. (JAC ¶ 130; TAC¶ 190.) Defendants Metro and Pacorini are alleged to have warehouses in Detroit; Henry Bath is not. (JAC ¶ 130; TAC ¶ 190(a).) LME warehouses are alleged to be a critical **[**29]** part of the supply chain for aluminum in the United States because, inter alia, it is only in such warehouses that LME warrants can be issued and cancelled. (JAC ¶ 131; TAC ¶ 194.) An LME warrant is a standardized document issued by a warehouse upon delivery of a lot of aluminum into that warehouse, and it indicates who has the right of possession of that particular lot of aluminum. (JAC ¶ 132; TAC ¶ 195.)

The LME thus provides for a price discovery mechanism for a standard aluminum contract throughout the world. (JAC ¶ 119; TAC ¶ 177.) The LME cash price is a global price, and does not include the costs of delivery from a seller to a purchaser. (JAC ¶ 119; TAC ¶ 177.) To cover the costs of delivery to a customer, contracts incorporate various regional premiums. (JAC ¶ 120; TAC ¶ 178.) The regional premiums are compiled based on reporting of the preponderance of physical transactions between buyers and sellers of spot aluminum on a given day for delivery to relevant geographic points. (JAC ¶ 120; TAC ¶ 178.) Thus the regional premiums reflect current offers for immediately available aluminum for delivery from producers, traders and holders of warehoused aluminum. (JAC ¶ 120.) These offers incorporate the fluctuating delivery, storage, finance and insurance costs incurred by these competing suppliers or aluminum. (JAC ¶ 120.) The regional premiums are published by private companies including Platts and Metal Bulletin. (JAC ¶ 120; TAC ¶ 178.) There are other premiums including the Rotterdam Premium and CIF Japan **[**28]** Premium. (JAC ¶ 122; TAC ¶ 185.) Because industrial contracts for physical delivery of aluminum express the price using the LME cash price, which is allegedly a global price, regional premiums tend to move up and down together. (JAC ¶ 123; TAC ¶ 186.) If they did not, multinational aluminum purchasers, traders, and arbitrageurs could exploit pricing differences among regional premiums. (JAC ¶ 123; TAC ¶ 186.)

The vast majority of primary aluminum is purchased by industrial users such as plaintiffs. (JAC ¶ 124; TAC ¶ 166.) Their purchases are made pursuant to long-term contracts which typically include annual supply arrangements. (JAC ¶ 124; TAC ¶ 166.) The JAC alleges that the aluminum purchased in this manner would not **[*431]** typically ever be stored in an LME warehouse, but its pricing would still incorporate the spot metal price, which is the LME cash price plus the regional premium. (JAC ¶ 125.) The JAC also alleges that the pricing of aluminum for long-term industrial contracts, such as those to which Mag, Agfa, and Kodak are parties, is dependent upon the supply and demand in the LME warehouse system and immediate availability of aluminum for delivery. (JAC ¶ 125.) Agfa and Kodak also allege **[**30]** that as a result of recent sharp increases in regional premiums, they have sought to procure aluminum from suppliers via contracts that do not incorporate regional premiums as a component of pricing, and these efforts have been unsuccessful. (JAC ¶ 126.)

Warrants for aluminum traded on the LME are standardized and freely tradable. (JAC ¶ 133; TAC ¶ 195.) When a warrant nears expiration, a forward contract or futures contract price is alleged to move into line with prices for the physical commodity—a phenomenon known as price convergence. (JAC ¶ 134; see TAC ¶ 195.)

Mag, Agfa, and Kodak allege that from 1989 to 2008-2009, the LME warehouses fulfilled their represented mission of serving as a price-neutral storage place of last resort. (JAC ¶ 135.) These warehouses held primary aluminum that was available on a commercial basis to industrial and other consumers as a source of supply and received primary aluminum from producers and others. (JAC ¶ 136.) Thereby, the LME forward contracts achieved price convergence. (JAC ¶ 137.) That is, the LME price was equal to, or as equal as practicable with, the price of physical aluminum. (JAC ¶ 137.) The ability of industrial and other consumers to **[**31]** take delivery of and acquire primary aluminum through the LME gave them a way to obtain the primary aluminum they needed without paying the Midwest Premium and tended to cause price convergence. (JAC ¶ 139.) An active market existed for the trading and swapping of warrants for LME aluminum—allowing for warrant holders to obtain warrants for physical aluminum at preferred warehouse locations. (JAC ¶ 139.) This further allowed customers to obtain aluminum without having to pay the Midwest Premium and without experiencing significant delays. (JAC ¶ 139.)

Plaintiffs allege that defendants' actions caused supplies of aluminum stored in U.S. LME warehouses to increase dramatically starting during the recession of 2008-2009. (JAC ¶¶ 146-47; TAC ¶ 232.) However, even though supplies were increasing, so too was the Midwest Premium. (JAC ¶ 148; see TAC ¶¶ 567.) This was, according to plaintiffs, due to artificiality created by defendants' delays in loading-out aluminum in the LME warehouses. (See JAC ¶ 154; TAC ¶ 467.)

Plaintiffs do not allege that defendants have fixed a particular spot price for aluminum—but rather that they have taken a variety of actions that have caused the Midwest Premium **[**32]** to increase. As cast, this conspiracy does not fit into a traditional horizontal or vertical schema. Rather, affiliated entities are alleged to have worked with each other and with other co-conspirators at multiple levels, resulting in overlapping and mutually reinforcing actions. The conspirators are not alleged all to have been equal participants, but all are alleged to have benefitted from participation. For instance, the Goldman Sachs entities[11] and Metro are alleged to have **[*432]** been at the true center of the conspiracy, but as currently cast, they either needed or accepted the participation of other, third parties.

The structure of the alleged conspiracy consists of matching corporate groupings. Each co-conspirator financial institution is alleged to have or have had its own affiliated warehouse company. For instance, the Goldman Sachs entities were affiliated with Metro, the JPMorgan entities[12] with Henry Bath LLC, and the Glencore entities[13] with Pacorini.[14] Thus, plaintiffs allege that the conspiracy was both horizontal **[*433]** and vertical: the financial institutions are alleged to have engaged in a horizontal conspiracy with each other, and the warehouses are similarly alleged to have engaged in a conspiracy with other warehouses. But the alleged conspiracy is not solely vertical or **[**34]** solely horizontal—each corporate group interacted at various levels with the other corporate groups. The financial institutions are also alleged to have engaged in a vertical conspiracy with unaffiliated warehouses (for example, Goldman Sachs is alleged to have been in a conspiracy with warehouse operators Henry Bath LLC and Pacorini, which are not its corporate affiliates). (See JAC ¶¶ 2-3; TAC ¶ 473.) JP Morgan is alleged to have conspired with Metro. And on.

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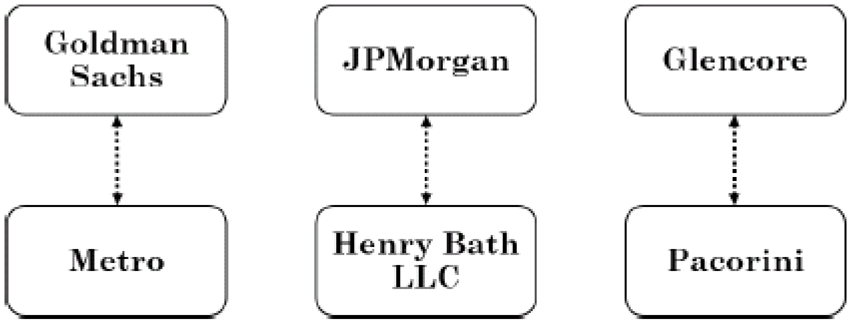
[11] The Goldman Sachs entities are the Goldman Sachs Group Inc. ("Goldman Sachs") and those entities affiliated with Goldman Sachs that are named as defendants in the JAC and/or TAC, which includes Goldman, Sachs & Co. (TAC ¶ 87), Goldman Sachs International (JAC ¶ 52; TAC ¶ 89), Metro (JAC ¶ 55; TAC ¶ 92), J. Aron (TAC ¶ 88), and Mitsi (TAC ¶ 93). The TAC also names as defendants alleged agents of Metro, BAP (TAC ¶ 88) and Robert Burgess-Allen (TAC ¶ 129). On August 29, 2014, the Court dismissed all claims against Goldman Sachs and all entities affiliated with Goldman Sachs that **[**33]** were named as defendants in plaintiffs' initial pleadings. (1st MTD Op.) On March 3, 2015, the Court granted Goldman Sachs' motion to dismiss and denied plaintiffs' motions for leave to amend their complaints to the extent that they seek to join Goldman Sachs as a defendant. (ECF Nos. 729, 731.) The following Goldman Sachs-related entities and agents have not to date been dismissed from this action (and remain in this action): Goldman, Sachs & Co.; Goldman Sachs International; Metro; J. Aron; Mitsi; BAP; and Burgess-Allen.

[12] The JPMorgan entities are JP Morgan Chase & Co. ("JPMorgan") and those entities affiliated with JPMorgan that are named as defendants in the JAC and/or TAC, which includes JPMorgan Securities plc (JAC ¶ 58; TAC ¶ 97), Henry Bath & Son Ltd. (JAC ¶ 61; TAC ¶ 100), and Henry Bath LLC (JAC ¶ 68; TAC ¶ 107). On August 29, 2014, the Court dismissed all claims against JPMorgan and all entities affiliated with JPMorgan that were named as defendants in plaintiffs' initial pleadings. (1st MTD Op.) On March 3, 2015, the Court granted Henry Bath & Son Ltd.'s motion to dismiss the JAC and denied plaintiffs' motions for leave to amend their complaints to the extent that they seek to add Henry Bath & Son Ltd. as a defendant. (ECF No. 728.) **[**35]** On March 4, 2015, the Court denied plaintiffs' motions for leave to amend their complaints to the extent that they seek to join JPMorgan as a defendant, and granted Henry Bath & Son Ltd.'s motion to dismiss the JAC. (ECF Nos. 729, 731.) The following JPMorgan entities have not to date been dismissed from this action (and remain in this action): JPMorgan Securities plc and Henry Bath LLC.

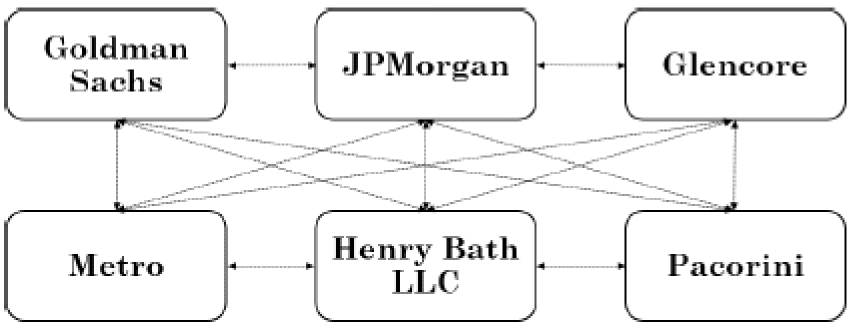
[13] The Glencore entities are Glencore plc ("Glencore") and those entities affiliated with Glencore that are named as defendants in the JAC and/or TAC, which includes Glencore International AG (TAC ¶¶ 110, 115), Glencore AG (TAC ¶¶ 110, 116), Glencore, UK Ltd. (TAC ¶¶ 110, 119), and Glencore Ltd. (JAC ¶ 77; TAC ¶¶ 110, 121). On August 29, 2014, the Court dismissed all claims against Glencore and all entities affiliated with Glencore that were named as defendants in plaintiffs' initial pleadings. (1st MTD Op.) On March 3, 2015, the Court granted denied plaintiffs' motions for leave to amend their complaints to the extent that they seek to join Glencore as a defendant. (ECF No. 728.) On March 4, 2015, the Court denied the FLPs' motion for leave to amend their complaints to the extent that they seek to join **[**36]** Glencore International AG and Glencore UK Ltd. as defendants. (ECF Nos. 729, 731.) The following Glencore entities have not to date been dismissed from this action (and remain in this action): Glencore AG and Glencore Ltd.

[14] Pacorini consists of the following two entities, which have been named as defendants in both the JAC and the TAC: Pacorini USA (JAC ¶ 78; TAC ¶¶ 110, 122) and its corporate parent Pacorini Metals AG (JAC ¶ 79; TAC ¶¶ 110, 123). Pacorini USA is alleged to own and operate LME-certified warehouses in the United States. (JAC ¶ 78; TAC ¶ 122.) In the TAC, plaintiffs group "Glencore," Pacorini Metals USA LLC, Pacorini Metals AG, and non-defendant Pacorini BV into the single collective term "Pacorini." (TAC ¶ 125.) On March 4, 2015, the Court denied plaintiffs' motions for leave to amend their complaints to the extent they seek to join Pacorini Metals AG as a defendant. (ECF No. 729.) Pacorini USA has not to date been dismissed from this action (and remains in this action).

Schematically, the players in the conspiracy are alleged to be:



The alleged conspiracy includes interconnections between these entities, resulting in a webbed structure:



Plaintiffs allege that the co-conspirators **[**37]** worked with each other to restrain a very specific piece of the aluminum supply comprising only a small portion of the total amount of available physical aluminum: aluminum traded by way of LME warrants. The trading of LME aluminum warrants is associated with establishing the Midwest Premium, which, as previously explained, plays a role in price-setting for physical aluminum contracts. This restraint is alleged to have led to increases in the spot price of physically delivered aluminum by way of increasing the Midwest Premium associated with an input into that price. (JAC ¶¶ 2-5; see TAC ¶¶ 461-627.) They **[*434]** allegedly did this by gaming the LME commodities trading system associated with the Midwest Premium. (JAC ¶ 3; TAC ¶¶ 532-49.) The key was that aluminum stored in LME-approved warehouses plays a unique role in setting the Midwest Premium. (JAC ¶ 2; TAC ¶ 5.) In a nutshell, the longer aluminum is stored in these LME warehouses, the higher the Midwest Premium. (See JAC ¶ 2; TAC ¶¶ 9(E), 10(e), 12.) As certain pricing of physical aluminum is contractually tied to the Midwest Premium. Plaintiffs allege that as a result, the higher the Midwest Premium, the higher the contract price.

As **[**38]** cast, (and despite loose language to the contrary,) this conspiracy was not a traditional "price fix"—no price was fixed. Instead, the conspiracy involved complicated interactions between participants who are alleged to have gained benefits primarily from trading activity. That defendants obtained increased warehouse rental revenues as a result of their conspiratorial acts was a necessary outcome, but not a key driver of defendants' behavior.

The conspiracy is alleged to have coalesced in 2010 and 2011. Plaintiffs allege that defendants used specific aspects of both their commodities trading and warehouse operations. First, each of the financial institutions acquired LME-approved warehouses in or around 2010. Then, the financial institutions worked with their affiliated warehouses to insure that stocks of aluminum were obtained and maintained at unusually high levels. This was done by (1) slowing the pace of load-outs of aluminum from warehouses, which was achieved by using the 1500-metric ton daily requirement for load-outs set by the LME as a de facto maximum for each warehouse owner (versus each warehouse), and not loading out more than that; (2) increasing the amount of aluminum **[**39]** stored in their warehouses by offering producers of aluminum (such as Alcoa) financial incentives to store with them; and (3) entering into agreements with each other and third parties to shuffle aluminum around so as to meet the 1500-

metric ton daily load-out requirement but without any other legitimate business purpose. (JAC ¶¶ 5, 10, 210-12, 246; TAC ¶¶ 467-68; 523-25, 559.)

The financial institutions' commodities trading arms allegedly assisted in the stockpiling by (1) obtaining large numbers of aluminum warrants on behalf of themselves or on behalf of clients; (2) strategically cancelling warrants and working with third parties to cancel warrants, for the purpose of putting the aluminum associated with cancelled warrants into the load-out queues, thereby delaying load-outs of aluminum legitimately seeking to exit the warehouses; and (3) lobbying and pressuring the LME not to alter its rules regarding required load-out amounts. (See JAC ¶¶ 11-15, 252-53; TAC ¶¶ 10, 360, 363, 468.)

As currently cast, the proposed complaints (particularly the JAC) now shed light on how and why the warehouse companies without queues in Detroit (specifically, Henry Bath LLC and Pacorini) can be part **[**40]** of a conspiracy that allegedly requires queues to succeed. Plaintiffs now allege, based on a number of emails and documents, that the conspiracy relied on give-and-take between the trading arms of several financial institutions and their affiliated warehouse companies in different parts of the country (and, as alleged in the TAC, around the world). Plaintiffs theorize that to drive trading profits, the various conspirators played different roles in different places to obtain what were perhaps different advantages. In short, they were not all doing the same thing but were united in obtaining benefits from their combined endeavors. Thus, while Pacorini and Henry Bath did not have warehouses **[*435]** with queues in the Detroit area, they (or their trading affiliates) are alleged to have assisted Metro in other ways; and the trading arms did likewise. (See, e.g., JAC ¶¶ 60, 160, 179, 197, 205-06; TAC ¶¶ 99, 473, 492, 510, 518-19.) For instance, Metro is alleged to have discussed an arrangement to "lock" Mobile and Long Beach with JPMorgan, with the anticipated result of higher premiums. (JAC ¶ 207; TAC ¶ 520.) JPMorgan is also alleged to have stored aluminum with Metro when to do so was contrary **[**41]** to its economic self-interest. (JAC ¶¶ 208, 221-22, 226; TAC ¶¶ 521, 534-35, 539.) In August 2011, Metro is alleged to have discussed a large warrant cancellation with JPMorgan and Henry Bath. (JAC ¶ 229; TAC ¶ 542; see also JAC ¶ 230; TAC ¶ 543.) In October 2011, Metro discussed with Goldman personnel giving all or substantially all of its aluminum stored in Mobile to JPMorgan. (JAC ¶ 231; TAC ¶ 544.)

With regard to Glencore and Pacorini, plaintiffs allege that Metro sent an email referring to Pacorini and Glencore not "nitpick[ing]" them in Detroit due to concerns regarding retaliation elsewhere. (JAC ¶ 197; TAC ¶ 510.) Plaintiffs also allege that Metro discussed re-warranting and refunding in connection with metal movement with Pacorini. (JAC ¶ 199; TAC ¶ 512.) In addition, plaintiffs allege that the defendant warehouse companies ignored information barriers imposed by LME rule, and shared information internally and across companies. (JAC ¶¶ 161-75, 202, 229; TAC ¶¶ 474-88, 515, 542.) Metro and Glencore are alleged to have engaged in swap discussions which ultimately benefitted the conspiracy. (JAC ¶¶ 233-36; TAC ¶¶ 546-49.) In addition, plaintiffs allege that all of the defendant warehouse **[**42]** companies, controlled by their trading affiliates, worked together to treat the minimum load out requirement as a maximum, thereby assisting in creating Metro's queues. (JAC ¶¶ 210-11; TAC ¶¶ 523-24; see JAC ¶ 218; TAC ¶ 531.)

Plaintiffs allege that this scheme benefited defendants in numerous ways. First, Mag, Agfa, and Kodak allege that the higher storage costs associated with unduly prolonged storage pushed up the Midwest Premium, enabling defendants to sell aluminum in the spot market at an inflated price. (JAC ¶ 17.) Second, plaintiffs allege that the trading arms of the financial institutions benefitted from the increased value of their holdings and increasing the profitability of certain futures and spot market transactions. (JAC ¶¶ 17, 289-96; TAC ¶¶ 602-09.) Third, defendants' warehousing operations were able to charge supra-competitive rents. (JAC ¶ 17; TAC ¶¶ 598-602.)

Reduced to its core, plaintiffs' theory posits that while defendants' actions impact the pricing industrial players may pay for aluminum, such is not at the heart of their intended financial play. Their goal, in other words, was not to fix the price of aluminum at a supra-competitive level or to fix the Midwest **[**43]** Premium at a particular level, but rather to be able to affect the price of (or inputs into the price) of aluminum in ways that made trades more profitable.[15]

[*436] But of course, commodities like aluminum are valuable primarily because they used by real world users to make real world products, and so the manipulation of a commodities market will necessarily result in real world effects. In this sense, plaintiffs' alleged payment of a higher Midwest Premium is theoretically necessary and central—but ultimately collateral damage. It is central and necessary **[**44]** because, as framed above, commodities can only be traded if they are used somewhere, by someone, to make real world goods or to provide real world services. It is collateral because impacting the price that real world users of aluminum may pay is not the focus of defendants' alleged financial play—it is merely the play's by-product. As alleged, the traders intend to impact other traders, but have to impact real world users in the process.

The law recognizes an important distinction between plausibility and probability at this stage of the case. In sum, and as discussed below, the allegations in the current proposed pleading are sufficient to support some—but not all—of plaintiffs' claims.[16]

II. MOTION TO DISMISS STANDARD

The Court undertakes its review of the proposed pleadings mindful of the standards governing a motion to dismiss under *Rule 12(b)(6)*.[17] The Court approaches all motions with the following two principles in mind: that the Court must accept as true—for purposes of this motion only—the facts as alleged in the pleadings, and the Court must draw all inferences in plaintiffs' favor. See *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citing *Bell Atl. Corp. v. Twombly, 550 U.S. at 555-57*). Thus, if a fact (such as an email) is susceptible to two or more competing inferences, in evaluating these motions, the Court must draw the inference that favors the plaintiff so long as it is reasonable. *N.J. Carpenters Health Fund v. Royal Bank of Scotland Grp., PLC, 709 F.3d 109, 121 (2d Cir. 2013)*. "[T]he existence of other, competing inferences does not prevent the plaintiff's desired inference from qualifying as reasonable unless at least one of those competing inferences rises to the level of an obvious alternative explanation." Id. **[*437]** (internal quotation marks omitted).[18]

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[15] Precisely how the trading operations obtained benefits is unclear—was it through, as plaintiffs allege, the exploitation of a contango? (See, e.g., JAC ¶¶ 295-96; TAC ¶¶ 608-09.) An ability to exploit differences between spreads or short and long positions? An ability to use warrants to advantage other trading opportunities such as equities or derivative positions? While the manifestation of the benefits is unclear, the economic plausibility of some advantage is sufficient at the pleading stage. The Court notes that in the absence of demonstrated tangible benefits by alleged conspirators following discovery, the case may well be narrowed.

[16] Defendants frequently and correctly quote this Court's prior decision dismissing prior pleadings. The Court believes its recitation of the law as set forth in that opinion was correct. The primary difference between the prior pleadings and the TAC and JAC is the refinement of the presentation of the alleged conspiracy (particularly in the JAC and its supporting papers). The addition of theoretical underpinnings to how and why the trading arms work with the warehouses, as well as the proffered factual **[**45]** support, alters the landscape.

[17] As the Court has previously noted, Kodak is in a different procedural posture from the other plaintiffs. That difference does not have substantive significance for purposes of the instant motions. The JAC is in fact an amended pleading for Kodak and motions to dismiss it are therefore **[**46]** evaluated under *Rule 12(b)(6)*. For the remaining plaintiffs, the pleadings are "proposed" and evaluated under the futility standard for amendments set forth in *Rule 15* and interpreting case law. See *Xiang Li. v. Morrisville State Coll., 434 Fed. App'x 34, 35 (2d Cir. 2011)* (summary order) (justice does not require a court to grant a plaintiff leave to amend a complaint under *Rule 15(a)(2)* "if amendment would be futile"). But at bottom, the *12(b)(6)* standard and the *Rule 15* futility standard are essentially the same. *Lucente v. Int'l Bus. Mach. Corp., 310 F.3d 243, 258 (2d Cir. 2002)* ("An amendment to a pleading is futile if the proposed claim could not withstand a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)*.") For convenience, and consistent with the manner of argument of the parties, the Court therefore refers to *Rule 12(b)(6)* and interpreting case law.

[18] Defendants assert that many of the quotes that plaintiffs set forth in the TAC and JAC are taken out of context, clearly misread the document, or support an opposite inference. The Court has reviewed the materials submitted. There is certainly support for

These standards do **[**47]** not require a court to accept conclusory assertions dressed up as facts. *Iqbal, 556 U.S. at 678*. Plaintiffs must allege sufficient factual content—which this Court must accept as true for purposes of this motion—to raise their asserted right to relief above the speculative level. *Twombly, 550 U.S. at 555*. A claim must have facial plausibility. *Iqbal, 556 U.S. at 678*.

A court must take care not to cloud its analysis of whether a claim is plausible with its views on whether ultimate success on that claim is probable. See *Twombly, 550 U.S. at 556*; *Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 184 (2d Cir. 2012)*. "Because plausibility is a standard lower than probability, a given set of actions may well be subject to diverging interpretations, each of which is plausible." *Anderson News, 680 F.3d at 184*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678*.[19]

Mag, Agfa, and Kodak are, therefore, entirely correct when they argue on these motions that when the Court evaluates the adequacy of the JAC, it must draw in plaintiffs' favor all competing inferences that can be drawn from the many emails and other **[**48]** materials cited therein. Put another way, while there may be a myriad of explanations for the conduct described in emails, if the inference plaintiffs ask the Court to draw is not unreasonable, then that is the inference the Court must draw at this stage. *N.J. Carpenters, 709 F.3d at 121*. Mag, Agfa and Kodak are also correct when they argue that this Court may not weigh the evidence in the guise of a plausibility analysis. See *Twombly, 550 U.S. at 556*; *Anderson News, 680 F.3d at 184-85*. Instead, it is the Court's task here to ask whether the assembled facts "nudge[] [plaintiffs'] claims . . . across the line from conceivable to plausible." *Iqbal, 556 U.S. at 679-80* (quoting *Twombly, 550 U.S. at 570*). Once over the line, the strength of the claims is a question for another day. See id.

With these basic pleading principles in mind, the Court turns to the many motions.[20]

III. PLAINTIFFS' SECTION 1 CONSPIRACY CLAIMS

Section 1 of the Sherman Act prohibits "[e]very contract, combination **[*438]** . . . or conspiracy, in restraint of trade . . . ." *15 U.S.C. § 1*. Since all contracts necessarily restrain trade to some extent, this provision cannot be read literally: only "unreasonable" restraints of trade are unlawful. *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*; see also *In re Publ'n Paper Antitrust Litig., 690 F.3d 51, 61 (2d Cir. 2012)*. To run afoul of *§ 1*, the unreasonable restraint must result from an agreement between two or more entities. See *Twombly, 550 U.S. at 553-54*; *Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540, 74 S. Ct. 257, 98 L. Ed. 273 (1954)*; *Anderson News, 680 F.3d at 182*. A unilateral or independent business decision that results in a restraint of trade is not a violation of *§ 1*. *Copperweld Corp. v. Ind. Tube Corp., 467 U.S. 752, 775, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*.

Mag, Agfa, and Kodak allege in the JAC that the Goldman Sachs, JPMorgan and Glencore entities and their respective warehouse operations conspired with each other to restrain trade in violation of *§ 1*. (JAC ¶¶ 330-336.) The FLPs allege three separate § 1 violations in the TAC (TAC ¶¶ 444-636), only one of which, the Third Claim, is coherent. That Third Claim also approximates the JAC's § 1 claim. Plaintiffs have also asserted claims based on the same allegations under New York's Donnelly Act, codified at *N.Y. Gen. Bus. Law §§ 340 et seq*., and

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defendants' positions in this regard, but the Court is mindful that at this stage plaintiffs are entitled to reasonable inferences being drawn in their favor. Discovery may make clear that there either is or is not a triable issue as to the proffered interpretations.

[19] If the Court can infer no more than "the mere possibility of misconduct" from the factual averments, dismissal is appropriate. *Iqbal, 556 U.S. at 679-80* (quoting *Twombly, 550 U.S. at 570*).

[20] The parties raise numerous arguments in their papers. This Court has reviewed all of them and addresses herein only those that are required for resolution of the instant motions. For instance, defendants argue that many alleged acts cannot themselves constitute violations of the antitrust laws. In this Opinion, the Court is not ruling otherwise (though it does not address each act seriatim). Instead, it bases its decision on the existence of a sufficient basis **[**49]** for plausibility for the pleadings to pass muster at this stage.

California's Cartwright Act, codified at *California Business and Professions Code §§ 16700 et seq*. (JAC ¶¶ 337-50, TAC ¶ 651(d).) In addition, the FLPs have **[**50]** asserted a claim under the Michigan Antitrust Reform Act (the "MARA"), codified at *M.C.L.A. §§ 445.771 et seq*. (TAC ¶¶ 637-42).

The FLPs' Second Claim is a porridge of conclusory statements sprinkled with various theories. A failure to achieve comprehensibility results in a failure to achieve plausibility. In this claim, plaintiffs allege that entities and people affiliated with Goldman Sachs conspired with the Glencore entities and entities affiliated with the LME (but not the JPMorgan entities). (TAC ¶¶ 444-60.) Plaintiffs allege that "Metro has made and performed a series of agreements in unreasonable restraint of trade for multiple anticompetitive purposes and with multiple anticompetitive effects." (TAC ¶ 445.) Included among these are agreements Metro made with the LME to reject a recommended change in the load-out rule, to reduce the amount of change in the rule, and to delay any implementation of such a change. (TAC ¶ 446.)

The FLPs allege that Metro conspired with its own agent, defendant Robert Burgess-Allen, to maintain and increase warehouse queues. (TAC ¶ 449.) Metro also agreed with the Glencore entities (as well as non-parties RK Capital Management LLP and Red Kite Group (collectively "Red **[**51]** Kite") and DB Energy Trading LLC ("DB Energy")) to cancel large numbers of warrants for the purpose of maintaining the load-out queue (demonstrated by the subsequent re-warranting of the same aluminum). (TAC ¶ 450.) Metro made and performed incentive payment agreements with its sister company, J. Aron. (TAC ¶ 451.) These agreements are alleged to have "foreclosed industrial and other users of aluminum, such as Plaintiffs, from sourcing aluminum on the LME," to have "ended LME forward contracts' role as a practicable source of aluminum for industrial and other consumers, including Plaintiffs," to have "caused the Midwest Premium in the primary aluminum market to reach supra-competitive levels," and to have destroyed pro-competitive price discipline as well as aluminum consumers' ability to hedge the price risks of physical aluminum. (TAC ¶ 459.)

[*439] In their Third Claim for relief, the FLPs allege that all defendants except for the LME-affiliated entities conspired to artificially raise prices "for purchases of aluminum for physical delivery by imposing a supra-competitive Midwest Premium." (TAC ¶ 463.) They also allege that the conspiracy allowed defendants' trading operations to engage **[**52]** in more profitable financial transactions. (TAC ¶¶ 603-09.) As part of this claim, plaintiffs assert that these defendants agreed that their warehouse operations would not compete against each other (TAC ¶ 510), agreed to use the minimum load out rules as a maximum (TAC ¶¶ 523-24), offered incentive payments to induce storage (TAC ¶¶ 550-56), shifted inventory between warehouses (TAC ¶¶ 559-66), and worked together strategically to cancel warrants (TAC ¶¶ 567-73).

In their Fourth Claim for relief, the FLPs allege a violation of *§ 1* by the "LME Combination," which consists of the LME, LME Holdings Limited, Hong Kong Exchanges and Clearing Limited ("HKEx"), Metro, Henry Bath LLC, and Pacorini. (TAC ¶¶ 20, 628-36.) According to the FLPs, the LME Combination systematically flouted the LME Charter, under which the LME has repeatedly assured that LME warehouses act as market participants of last resort and ensuring that the LME price stays in line with the physical/spot market price, and in doing so became "a combination in unreasonable restraint of trade." (TAC ¶¶ 6, 631-33.) The violations to which this claim refers include (1) the "failure to amend the unreasonable minimum load-out rule and **[**53]** the affirmative acts by which such rule was converted into a maximum output restriction that could be 'gamed' through anticompetitive contracts by Metro," (2) "the mix of consideration that Metro offered participants in the Primary Aluminum Market when it entered that market as a participant of first resort to divert aluminum into the LME, abused the LME Combination's power and to inflate prices," and (3) "all of the unlawful activity alleged in the Third Claim." (TAC ¶ 633.) The FLPs' state law claims rely upon the totality of the anticompetitive conduct alleged in their First through Fourth Claims. (See TAC ¶¶ 637, 643, 649, 653, 657.)

The FLPs' Third Claim for relief states an independent and cognizable claim, but the Second and Fourth claims do not. The FLPs' Second Claim is nearly incomprehensible and cannot withstand scrutiny as a standalone claim. There are no facts sufficient to support a restraint on the actual physical supply of aluminum sourced from the LME itself. (TAC ¶ 459.) The LME does not "source" physical supplies of aluminum to purchasers such as the FLPs; it is a commodities trading platform. The FLPs allege that they all purchased directly from producers and were **[**54]** not obtaining physical aluminum through the settlement of warrant positions.[21] The FLPs' short reference to hedging in the Fourth Claim (TAC ¶¶ 20(b), 630) is without factual support sufficient to render it a plausible basis for any element of a claim. The FLPs' Fourth Claim adds nothing substantive to the Third—the use or abuse of LME rules is inherent in the operations of the conspiracy alleged in the Third Claim; the Fourth Claim merely confuses the issues and is therefore dismissed as duplicative.

The Court now turns to those § 1 claims that remain. In sum, both Mag, Agfa, and Kodak and the FLPs have stated plausible **[*440]** and cognizable claims under *§ 1*, subject to the limitations set forth below.

A. Antitrust Standing[22]

Antitrust standing is "a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement [the court] must dismiss it as a matter of law." *Gatt Commc'ns Inc. v. PMC Assocs. L.L.C., 711 F.3d 68, 75 (2d Cir. 2013)* (quoting *NicSand, Inc. v. 3M Co., 507 F.3d 442, 450 (6th Cir. 2007)* (en banc)); see also *Paycom Billing Servs., Inc. v. MasterCard Int'l, Inc., 467 F.3d 283, 290-95 (2d Cir. 2006)* (dismissing a complaint under *Rule 12(b)(6)* for lack of antitrust standing).

Antitrust standing consists of three separate questions: have plaintiffs alleged injury in fact; have they alleged antitrust injury, and are they efficient enforcers of the antitrust laws? See *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 535 n.31, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*; *Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117, 121 (2d Cir. 2007)*.

Plaintiffs in both the JAC and the TAC allege that they have paid prices for aluminum that are higher than they would have paid in the absence of defendants' actions. (See, e.g., JAC ¶¶ 18, 19, 313, 316, 318, 320, 325, 328; TAC ¶¶ 9, 14-15, 18-21, 42-43, 80, 130, 201, 227, 239-40, 244, 297, 321, 359, 408, 414, 418, 422, 425, 439, 442, 445, 451-53, 455-56, 458, 633, 647, 650, 652, 660-61.) Whether this is true is not an issue currently before the Court. Because this injury is concrete, particularized, and actual, each of the plaintiffs has sufficiently alleged that it has suffered injury in fact. See *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*.

The Court next turns to whether the JAC and the TAC adequately allege antitrust injury in connection with **[**56]** their § 1 claims. Antitrust injury is not simply the fact that a plaintiff may be able to allege some harm; rather, the issue is whether that harm is an "injury of the type the antitrust laws were intended to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. Further, the harm must be causally related to that which makes defendants' acts unlawful. Id. Taking these two aspects of antitrust injury together, it is clear that although an injury may be causally related to an antitrust violation, it is not sufficient to support "antitrust injury" unless it is attributable to an anticompetitive aspect of the challenged conduct. *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*. This requirement is derived from the principle that the antitrust laws were enacted for "the protection of competition, not competitors." *Brown Shoe Co. v. United States, 370 U.S. 294, 319, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*; see also *Gatt, 711 F.3d at 75* ("Absent such boundaries, the potent private enforcement tool that is an action for treble damages could be invoked without service to—and potentially in disservice of—the purpose of the antitrust laws: to protect competition.").

The questions of antitrust injury and whether a plaintiff is an efficient enforcer of the antitrust laws are often analyzed together. The Court is guided by the Supreme Court's decision in **[**57]** *Associated **[*441]** General Contractors of California, Inc. v. California State Council of Carpenters ("AGC"), 459 U.S. 519, 103 S. Ct. 897, 74 L.*

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[21] One plaintiff, Ampal, states that it may have obtained aluminum directly from Glencore (TAC ¶ 49)—but it is not clear from the allegations in the TAC whether that was through a settled warrant, through owned physical stocks, or in some other manner.

[22] Plaintiffs must establish antitrust standing with respect to each antitrust claim pursued. See *Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 436-38 (2d Cir. 2005)* (antitrust standing inquiry is injury-specific). Accordingly, the Court reviews standing with regard to the FLPs' *§ 1* and *§ 2* claims separately. **[**55]**

Ed. 2d 723. In AGC, the Supreme Court identified several factors a court should consider in determining whether a plaintiff has antitrust standing: (1) the causal connection between the violation and the harm; (2) the presence of an improper motive; (3) the type of injury and whether it was one Congress sought to address; (4) the directness of the injury, (5) the speculative nature of the damages; and (6) the risk of duplicative recovery or complex damage apportionment. *Id. at 537-44*.

The Second Circuit has "distilled" the AGC factors "into two imperatives": first, that a plaintiff plausibly allege that he suffered antitrust injury, and, second, that he plausibly allege facts that support his suitability as a plaintiff to pursue the alleged antitrust violation—and that he would therefore be an "efficient enforcer" of the antitrust laws. *Gatt, 711 F.3d at 76*; see also *Port Dock, 507 F.3d at 121*; *Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 443 (2d Cir. 2005)*.

Whether a plaintiff is an efficient enforcer of the ***antitrust law*** depends on a balancing of the following factors:

> (1) the directness or indirectness of the asserted injury;
>
> (2) the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest **[**58]** in antitrust enforcement; (3) the speculativeness of the alleged injury; and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries.

Gatt, 711 F.3d at 76 (quoting *Paycom, 467 F.3d at 290-91*); see also *Port Dock, 507 F.3d at 121*; *Daniel, 428 F.3d at 443*.

To determine if a pleading adequately alleges antitrust injury as well as whether each plaintiff is an efficient enforcer of the antitrust laws, this Court analyzes whether a plaintiff's alleged injury constitutes injury to a competitive process, and not just injury to a competitor. Understanding where plaintiffs have positioned themselves in the competitive landscape is the most logical starting point for this question: are plaintiffs consumers of a product, and therefore injured when sellers engage in price fixing, allocating markets, or dividing customers, etc., because those actions have increased the prices the price paid? Or, do plaintiffs allege that they are competitors of a defendant, and injured when, for instance, they are deprived of customers as a result of an unlawful bargain struck between the defendants? Or, do plaintiffs allege that they are neither consumers nor competitors but nonetheless have suffered an injury of the type the antitrust **[**59]** laws are intended to address?

In *Blue Shield of Virginia v. McCready ("McCready"), 457 U.S. 465, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)*, the Supreme Court held that while plaintiff was not a competitor of the alleged conspirators, she had nevertheless suffered antitrust injury because "the injury she suffered was inextricably intertwined with the injury the conspirators sought to inflict," *id. at 484*;[23] see also *Crimpers Promotions Inc. v. Home Box Office, Inc., 724 F.2d 290, 294 (2d Cir. 1983)* (Friendly, J.) (plaintiff was trade show organizer, not direct participant in relevant **[*442]** market, but had antitrust standing); *Province v. Cleveland Press Publ'g Co., 787 F.2d 1047, 1052 (6th Cir. 1986)* (plaintiffs who are not "direct participants in the relevant market" can establish standing by showing that their injury is "inextricably intertwined" with the injury inflicted on the relevant market). "To be inextricably intertwined with the injury to competition, the plaintiffs must have been 'manipulated or utilized by [d]efendant as a fulcrum, conduit or market force to injure competitors or participants in the relevant product and geographical market.'" *Province, 787 F.2d at 1052* (quoting *Southaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079, 1086 (6th Cir. 1983))* (finding plaintiffs' injury was not inextricably intertwined because their injury was "a result of—rather than a means or the cause of—the harm"). The term "fulcrum" is defined as "the support about which a lever turns," or alternatively, "one that supplies **[**60]** capability for action." Fulcrum, Merriam-Webster, *http://www.merriam-webster.com/dictionary/fulcrum* (last visited Mar. 25, 2015).

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[23] A more complete description of McCready is set forth in the Court's Opinion & Order dated August 29, 2014. (1st MTD Op. at 35.)

Plaintiffs here are not competitors of any of these defendants: they do not operate warehouses, and they do not have commodities trading arms. Nor are they alleged to directly consume[24] any of defendants' trading products or aluminum warehouse-related products or services.[25] Rather, the core of plaintiffs' claims is that they have suffered necessary yet collateral damage from defendants' scheme. Plaintiffs are the real world users whose demand for aluminum creates the market for aluminum sales; thus, were it not for their need to use aluminum as an input in their production processes, it would not be possible for the financial trading defendants to trade aluminum as a commodity. Put another way, plaintiffs are central—they are the fulcrum—to the creation of the market opportunity underlying both metal storage and warrant trading for aluminum. As the real world buyers who—they allege—must pay prices for aluminum that incorporate Midwest Premium, they are necessarily directly impacted **[**61]** by the alleged conduct. That is, their purchases are inextricably intertwined with the competitive landscape in which defendants' alleged scheme ultimately played out. Plaintiffs argue that at the very least they therefore fall within the scope of antitrust injury contemplated by McCready. As now plead in the proposed pleadings, the Court agrees.

Here as in McCready, it is "not a question of the specific intent of the conspirators," but rather, "[w]here the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely the type of loss that the claimed violations . . . would be likely to cause." *457 U.S. at 479* **[*443]** (internal quotation marks omitted). Taken as a whole, plaintiffs' allegation is that defendants' actions altered the normal competitive price setting dynamic of aluminum, resulting in an abnormally high Midwest Premium; and they were forced to pay that premium as part of their purchases of physical aluminum. These allegations concern a dysfunction of the competitive process that—according to plaintiffs—would not have occurred but for defendants' actions. Defendants are the real world actors necessary for the effectuation of the conspiracy—the fulcrum, in the words of *McCready*. These allegations are, at this stage, sufficient to support "injury of the type **[**63]** the antitrust laws were intended to prevent." *Brunswick Corp., 429 U.S. at 489*.

Defendants contend (vigorously to be sure) that antitrust standing is lacking. The Court has examined these arguments with care. Defendants argue that plaintiffs are neither competitors nor consumers and that their arguments to the contrary are unsupportable. They are correct on both scores. However, McCready makes clear that the antitrust laws do not require a plaintiff fit neatly into a box of competitor or consumer, so long as "the injury [they] suffered was inextricably intertwined with the injury the conspirators sought to inflict." *457 U.S. at 484*. That is the case here. Ultimately, this case does not fit into any traditional box other antitrust cases involving commodities trading have not examined with precision market structure and anticompetitive acts analogous to those at issue here.[26] These are unusual facts for an antitrust case to be sure: where the commodity trading occurs at one level, warehousing is merely a means to an end, and the plaintiffs' injury is collateral damage. *McCready* also presented an unusual (and different) fact pattern and dictates that this Court examine whether plaintiffs have alleged facts that call for the application **[**64]** of analogous principles. They have.

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[24] One of the FLPs, Ampal, Inc. ("Ampal"), alleges that it purchased aluminum directly from Glencore. (TAC ¶ 49.)

[25] In the JAC, Mag, Agfa, and Kodak assert that but for the defendants' anticompetitive conduct, they might consider purchasing and storing aluminum in an LME warehouse—that is, "but for" the conduct, some plaintiffs would be consumers of warehouse services. (JAC ¶ 4.) However, plaintiffs do not allege any facts to support this claim. For instance, the JAC is devoid of factual allegations in which plaintiffs assert that on certain dates they considered purchasing and storing aluminum but load-out delays prevented them from doing so. In the TAC, plaintiffs allege that but for defendants' conduct they might have hedged certain transactions. (See TAC ¶¶ 317, 319, 412.) This assertion is similarly devoid of sufficient factual support. The **[**62]** Court assumes that these assertions were included in the JAC and the TAC to assist with standing arguments. As the Court finds that plaintiffs have adequately plead standing for other reasons, it need not address these assertions.

[26] The cases in which alleged purposeful commodity trading inefficiency has led to collateral damage in physical markets are *Loeb Industries, Inc. v. Sumitomo Corp., 306 F.3d 469 (7th Cir. 2002)*; *In re Crude Oil Commodity Litig., No. 06 Civ. 6677(NRB), 2007 U.S. Dist. LEXIS 47902, 2007 WL 1946553 (S.D.N.Y. June 28, 2007)*; and *Ice Cream Liquidation, Inc. v. Land O'Lakes, Inc., 253 F. Supp. 2d 262 (D. Conn. 2003)*. This Court does not necessarily agree with the manner in which the courts in those cases described the anticompetitive condition, conduct or markets. Nevertheless, they are instructive.

Here, the structure of the parties and the coordination necessary to make the alleged conspiracy succeed is complex. According to plaintiffs, this case arises because traders have the financial ability to purchase and control warehouses, and to devise trading strategies that exploit the interplay between their affiliated operations. According to plaintiffs' theory, the winners and losers of defendants' scheme are not only the counterparties to their trades, but also those who actually need the physical commodity underpinning the trades. As now cast in their most recent proposed pleadings, this scheme is alleged to have substituted supply and demand based-pricing with pricing driven by the webbed conspiracy described above. These allegations, taken in the light most favorable to plaintiff, **[**65]** are sufficient to support antitrust injury. In short, if defendants have engaged in a conspiracy that caused dysfunction in the price-setting process, driving prices higher, and defendants then paid those higher prices, then defendants have suffered an injury of the type the antitrust laws were designed to prevent. See *Atl. Richfield, 495 U.S. at 337* (higher prices that do **[*444]** not work to a plaintiff's advantage cause plaintiff to suffer antitrust injury).

Defendants also argue that even if they are able to allege injury to the competitive process, plaintiffs have not alleged sufficient facts to demonstrate that they are efficient enforcers of the antitrust laws. The complexity of the alleged scheme creates a fair amount of smoke around who plays what role and who is situated where. However, at base, the same facts that support antitrust injury support plaintiffs' roles as efficient enforcers. The following allegations support this determination.

First, each plaintiff is alleged to buy aluminum directly from a producer (and, in one instance, from one of the defendants[27]), and the contracts between the producer-seller and plaintiff-buyer allegedly contain provisions tying the contract prices to the Midwest Premium. (JAC **[**66]** ¶¶ 32; 39, 44; TAC ¶¶ 35, 48, 57, 64, 71.) Mag, Agfa, and Kodak allege that in the United States it is not possible to negotiate spot or long-term aluminum contracts with major producer Alcoa that do not incorporate the Midwest Premium. (JAC ¶ 32, 44.) Under these circumstances, conduct that causes the Midwest Premium to be higher than it would be otherwise harms these plaintiffs directly.

Second, according to plaintiffs, no buyer of aluminum other than defendants is higher up or more direct in their respective distribution chains. (JAC ¶¶ 35, 41, 47; TAC ¶¶ 39-40, 48-50, 57-58, 64, 71.) Plaintiffs' allegations support directness as well as that damages would not be duplicative. Indeed, plaintiffs are not affected through a chain of transactions, or through side-effects of others' economic activity; rather, they are the first parties in the distribution chain to be affected by fluctuations in the Midwest Premium, because they are both the first to buy aluminum and the first to do so at a price that incorporates the Midwest Premium.

Third and finally, plaintiffs' allegations support damages as non-speculative. Plaintiffs allege that their damages are defined by the **[**67]** amount by which the Midwest Premium was inflated. (See JAC ¶¶ 24, 322; TAC ¶ 17.) Again, whether damages will ultimately be found to have been incurred and, if so, whether any amount is determinable, are questions left for another day. See *Gatt, 711 F.3d at 76* (whether plaintiff is efficient enforcer is based in part on a prospective analysis of the difficulty of identifying and apportioning damages); *Paycom, 467 F.3d at 291* (same).

Defendants argue that plaintiffs are not efficient enforcers of the antitrust laws because another group of potential plaintiffs is better positioned to prosecute the alleged antitrust violations: users of defendants' warehouse services. But any injury to these potential plaintiffs would concern inflated rents, inflated warehousing fees, or delayed load-outs, and as such would be entirely different from the injury alleged by plaintiffs here, which concern an inflated Midwest Premium. Contrary to defendants' arguments, the *Gatt* inquiry is focused on who most directly suffered the alleged injuries caused by the allegedly anticompetitive conduct—it is not concerned with which market participants are most proximate to the allegedly unlawful conduct itself. Plaintiffs here are the most efficient enforcers **[**68]** of claims that defendants' anticompetitive conduct caused injuries to economic actors who paid prices in the primary aluminum market that incorporated the Midwest Premium.

[*445] B. Agreement Between Separate Entities

[27] See note 24, supra.

Section 1 claims require an agreement, contract, or understanding in restraint of trade by separate entities. See *15 U.S.C. § 1*. As cast, various conspirators acting to carry out the § 1 violation are affiliated with one another. As a matter of law, only separate entities can conspire in violation of the antitrust laws. *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*. Thus, a corporate parent and its wholly owned subsidiary are incapable of conspiring in violation of *§ 1* of the Sherman Act as a matter of law. *Id. at 767, 771*. "The coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of *§ 1* of the Sherman Act." *Id. at 771*. "[A]n agreement between a parent corporations and its . . . agents is not a concerted action for purposes of the [Sherman] Act." *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 542 (2d Cir. 1993)*.

"[W]hen lower courts are faced with the question of whether an affiliated, but not wholly owned, corporation can conspire with its parent in violation of *§ 1*, they must draw from the analysis in Copperweld without the benefit of a bright line rule." **[**69]** *In re Term Commodities Cotton Futures Litig., Master Docket No. 12 Civ. 5126(ALC)(KNF), 2014 U.S. Dist. LEXIS 145955, 2014 WL 5014235, at *4 (S.D.N.Y. Sept. 30, 2014)*; see also *Geneva Pharms. Tech. Corp. v. Barr Labs., Inc., 201 F. Supp. 2d 236, 275 (S.D.N.Y. 2002)* (noting that lower courts have held that affiliated corporations that are less than wholly owned have been found incapable of conspiring under Copperweld), rev'd on other grounds, *386 F.3d 485 (2d Cir. 2004)*; *Shaw v. Rolex Watch, U.S.A., Inc., 673 F. Supp. 674, 677 (S.D.N.Y. 1987)* (suggesting that Copperweld can apply to non-wholly-owned affiliates); VII Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶¶ 1466-67 (3d ed. 2010) (suggesting that "two corporations could constitute a single economic unit for Sherman Act *§ 1* purposes even though they are not wholly owned in common"). The Supreme Court's reasoning in Copperweld focused on whether a parent and its subsidiary had a "complete unity of interest," such that they shared common objectives and their actions were "guided or determined not by two separate corporate consciousnesses, but one." *Copperweld, 467 U.S. at 771*. In a more recent decision, the Supreme Court further articulated this principle by putting it another way: entities can conspire under *§ 1* of the Sherman Act only if their competitive actions are determined by "independent centers of decision-making." *Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 196, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)* (quoting *Copperweld, 467 U.S. at 769*). Taken together, *Copperweld* and *American Needle* establish that a non-wholly owned affiliate cannot conspire with its parent **[**70]** in violation of *§ 1* of the Sherman Act if they are jointly controlled. The same principles apply to agents. To the extent agents are merely carrying out the decisions of principals, they are not separate entities for purposes of *Section 1*.

Plaintiffs allege that each defendant is affiliated with at least one other entity: the Goldman Sachs entities are affiliated with J. Aron[28] and Metro; the JPMorgan **[*446]** entities are affiliated with Henry Bath & Son LLC; and the Glencore entities are affiliated with Pacorini. (See JAC ¶¶ 51, 62, 64-66, 79, 208; TAC ¶¶ 88, 102, 104-06, 125, 253, 521.) Plaintiffs also provide specific allegations that the financial-firm conspirators—Goldman Sachs, JPMorgan, and Glencore—each control the warehousing entities with which they are affiliated. For instance, both the JAC and the TAC allege that Goldman Sachs controlled Metro's entire board of directors (JAC ¶ 176; TAC ¶ 489), and both allege that Metro frequently had to seek authorization from Goldman to execute routine warehousing transactions, including authority to offer specified incentives for storage deals (JAC ¶¶ 177-94; TAC ¶¶ 490-507). The JAC and the TAC also both allege that by controlling all of Henry Bath & Son **[**71]** Ltd.'s directors and 100% of its stock, JPMorgan had complete control over Henry Bath & Son Ltd., and its wholly owned U.S.-based subsidiary, Henry Bath LLC, including all of its aluminum warehouses. (JAC ¶¶ 62, 65-66; TAC ¶¶ 102, 105-06.) And both complaints allege that Glencore controls the operations of all of the Pacorini entities, including Pacorini AG, which operates in the United States through its wholly owned subsidiary, Pacorini USA. (JAC ¶¶ 79-80; TAC ¶¶ 123, 125.)

The FLPs also allege that defendants BAP and its director, Robert Burgess-Allen, were the sales agents of defendant Metro. (See TAC ¶¶ 128-29, 254, 449.) BAP and Burgess-Allen are alleged to have not had any independent economic role in the conspiracy beyond that which it undertook while working on behalf of Metro—they

[28] In the JAC, J. Aron is alleged to be a trading division of Goldman Sachs (JAC ¶ 51), and it is not named individually as a defendant. The TAC alleges that J. Aron is a wholly owned subsidiary of Goldman Sachs and names it as an individual defendant. (TAC ¶ 88.)

are alleged only to have introduced customers to Metro and consulted on and negotiated transactions with or for Metro. (See TAC ¶¶ 254, 449, **[**72]** 605.)

Plaintiffs have sufficiently alleged that the financial-firm co-conspirators had control over the warehousing defendants and agents affiliated with them. Accordingly, as a matter of law, each financial-firm co-conspirator cannot conspire with its agents or with the warehousing entities with which they are affiliated in violation of *§ 1* of the Sherman Act. This conclusion is particularly relevant to the FLPs' Second Claim, which alleges that the Goldman Sachs entities conspired with each other, J. Aron, Burgess-Allen, HKex, Glencore, and the LME in violation of *§ 1*. (TAC ¶¶ 444-457.) The Goldman Sachs entities cannot conspire amongst themselves or with J. Aron as a matter of law. Thus, based on the allegations in these pleadings, no agreement solely between members of the same corporate group states a claim.[29]

Notwithstanding the affiliations discussed above, plaintiffs have alleged sufficient facts to support an agreement between separate entities. The illustrations of the alleged conspiracy set forth earlier **[**73]** in this Opinion portray a web of alleged agreements or understandings between a number of entities from different corporate families. For instance, Metro and the Goldman Sachs entities are alleged to have had agreements or understandings with the JPMorgan entities and Henry Bath LLC, as well as the Glencore entities and Pacorini; and they with each other. The "web" of agreements or understandings alleged is sufficient to satisfy the separate entity requirement.

C. Noerr-Pennington

Defendants separately assert that the FLPs' claims that Metro and the Goldman **[*447]** Sachs entities violated *§ 1* by lobbying the LME in an effort to change the minimum load-out rule are barred by the Noerr-Pennington doctrine, citing *United Mine Workers of Am. v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*. The Court construes this argument as addressing the FLPs' Fourth Claim, which alleges a conspiracy involving the LME Combination, as well as myriad allegations that defendants' actions with regard to the LME load-out rule plays a role in carrying out the overall conspiracy. Indeed, the load-out rule is cast as an enabling tool for the conspiracy.

The Court need not, at this stage, reach the legal question of whether Noerr-Pennington precludes a conspiracy claim based on certain lobbying **[**74]** efforts. As an initial matter, as set forth above, the Court has already determined that the FLPs' Fourth Claim has other fatal flaws (incomprehensibility among them). Defendants' actions vis-à-vis the load-out rule are therefore only relevant as one part of an alleged fabric of conspiratorial behavior. As there is sufficient alleged behavior which is independent of any lobbying efforts, whether or not Noerr-Pennington might apply is a question for another day.

D. Relevant Market

Agreements that fall within the scope of *§ 1* are characterized as either "horizontal" or "vertical." See *United States v. Topco Assocs., Inc., 405 U.S. 596, 608, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*; *Anderson News, 680 F.3d at 182*. A horizontal agreement is an "agreement between competitors at the same level of the market structure," while a vertical agreement is a "combination[] of persons at different levels of the market structure." *Topco, 405 U.S. at 608*. The parties dispute whether the agreement plaintiffs allege is vertical, horizontal, or both. They also dispute whether the agreement is a price-fixing agreement, or something else. Both of these issues impact whether plaintiffs must allege a plausible relevant market.

Horizontal agreements between competitors are considered the most potentially pernicious and are generally treated as "per se" unlawful. **[**75]** See, e.g., *Topco, 405 U.S. at 608, 611* (noting that horizontal agreements to engage in price fixing or market allocation are per se illegal under *§ 1* of the Sherman Act). The per se rule is a presumption of unreasonableness based on "'business certainty and litigation efficiency.'" *Atl. Richfield, 495 U.S. at 342* (quoting *Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 344, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982))*. "It represents a 'longstanding judgment that the prohibited practices by their nature have a substantial potential for

[29] This point may have more importance at a later stage of the case. If discovery reveals that only related and controlled entities were involved in certain conduct, a Section 1 claim would not lie.

impact on competition.'" Id. (quoting *FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 433, 110 S. Ct. 768, 107 L. Ed. 2d 851 (1990)* (internal quotation marks omitted). Horizontal price fixing—that is, price fixing by competitors in the same market—is per se illegal. *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223-24, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*; *Todd v. Exxon Corp., 275 F.3d 191, 198 (2d Cir. 2001)*.

To apply the per se rule, a court generally must have experience with the type of restraint at issue in order to predict with confidence that it would be condemned under the rule of reason; only when such predictability is present should the court apply the per se rule. *Maricopa County Med. Soc'y, 457 U.S. at 344*. A vertical restraint is not generally illegal per se unless it includes some agreement on price or price levels. *Bus. Elecs., 485 U.S. at 735-36*. "Vertical restraints that do not involve **[*448]** price-fixing are generally judged under the 'rule of reason, which requires a weighing of the relevant circumstances of a case to decide whether a restrictive practice constitutes an unreasonable restraint on competition.'" **[**76]** *Anderson News, 680 F.3d at 183* (quoting *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984))*. "Any combination which tampers with price structures is engaged in an unlawful activity." *Socony-Vacuum, 310 U.S. at 221*. Group efforts to raise, lower, or stabilize prices directly interfere with the free play of market forces and constitute unlawful price fixing. Id. "Where the means for price fixing are purchases or sales of the commodity in a market operation or, as here, purchases of a part of the supply of the commodity for the purpose of keeping it from having a depressive effect on the markets, such power may be found to exist though the combination does not control a substantial part of the commodity." *Id. at 224*.

Most antitrust claims are evaluated under the rule of reason. *Paycom, 467 F.3d at 289*. The "rule of reason" is the standard used to assess whether restraints not per se unlawful nonetheless violate *§ 1* of the Sherman Act. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885-86, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*. A rule of reason analysis requires a court to weigh all of the circumstances surrounding the challenged conduct to determine whether the alleged restraint is unreasonable, taking into account the nature of the specific business, the industry, the restraint's history, and whether the defendant has market power. Id.; see also *Gatt, 711 F.3d at 75 n.8*. Thus, to engage in a rule of reason analysis, the Court must determine **[**77]** what the relevant market is, and then examine that market.

The purpose of a rule of reason analysis is to enable a finder of fact to first determine whether a restraint imposes an unreasonable restraint on competition. *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*; *Paycom, 467 F.3d at 290*. As a threshold matter, a plaintiff must allege the plausible existence of a combination that causes an unreasonable restraint of trade. The burden shifts to defendant to present the procompetitive value of the practice; if defendant carries that burden, then the burden shifts back to plaintiff, who must show that the same procompetitive effect could have been achieved by less restrictive means. *Virgin Atl. Airways Ltd., v. British Airways PLC, 257 F.3d 256, 264 (2d Cir. 2001)*. Under a rule of reason analysis, plaintiff can only recover if the challenged conduct reduced competition, thereby harming consumers. Id. In a *§ 1* case, therefore, defining a relevant market is required in order for the finder of fact to be able to assess whether the nature of conduct is consistent with a functional or dysfunctional competitive process.

Plaintiffs here allege a complicated scheme involving both horizontal as well as vertical conduct—with trading entities alleged to be in a conspiracy with each other as well as with their warehouse affiliates and those of others. **[**78]** The market for LME-certified warehouse services for aluminum is one area in which conduct is alleged to have occurred, and the primary aluminum market is another area in which dysfunction in the competitive process is alleged to have played out (the primary aluminum market is the one in which plaintiffs are buyers; defendants are alleged to have created dysfunction in pricing through trading). As described above, the scheme is atypical for an antitrust case **[*449]** with plaintiffs as neither competitors nor consumers in any relevant market.[30] Moreover, despite the FLPs' allegations to the contrary, the conspiracy alleged is not a conspiracy to fix the price of physical aluminum—that is, "x" amount per metric ton. The scheme is primarily aimed at increasing trading profits, which requires a necessary price impact—not a price fix. Variations in price may have as much or more benefit to

[30] Nor is the scheme alleged a type of monopoly leveraging claim; such a claim would present additional issues.

participants in such a scheme as a price certain. A conspiracy to fix the price of aluminum would involve different players (for example, producers) in different markets.

Here, an impact on the price of aluminum **[**79]** is necessary to effectuate the conspiracy; such an impact can be achieved by increasing the Midwest Premium. That premium is a component of the stated price in aluminum contracts—but there are many other inputs as well. The complexity here has implications for causation and proof of damage—issues for another day. The relevant question now before the Court is whether this alleged conspiracy is of the type the antitrust laws deem per se illegal—a question to be asked for purposes solely of determining adequacy of pleadings, not on the merits.

The conspiracy here is certainly not of the type which the antitrust laws have routinely dealt with. It is not one in which a single market may be examined for competitive or anticompetitive conduct. The antitrust cases which have dealt with allegations of anticompetitive conduct by traders injuring users of commodities have struggled with fitting such claims into traditional rubrics. (See section III.A. above.) That alone is not, however, fatal at the pleading stage. Rather, the Court must attend to whether each element has been plausibly alleged. Here, a defined relevant market is one of those questions. In the absence of familiarity with a type **[**80]** of business conduct and competitive impact, courts apply the rule of reason analysis. That is highly likely to be necessary here and the pleadings should therefore provide proper notice of the markets alleged.[31]

The current pleadings allege two markets: a primary aluminum market (JAC ¶¶ 116; TAC ¶ 157), and a market for LME-certified warehouse services for aluminum (JAC ¶ 144; TAC ¶¶ 203-04, 207, 209, 422).[32] Neither pleading alleges a market for financial products. Both **[*450]** pleadings now contain a number of paragraphs alleging, for each market, its particular product and geographic characteristics (JAC ¶¶ 98-107, 127-144; TAC ¶¶ 155-58, 164-67, 172-75, 188-200, 202-04) and facts regarding elasticities **[**81]** and substitutability (JAC ¶¶ 108-16, 144; TAC ¶¶ 157, 159-62, 208), including, for the primary aluminum market, domestic and foreign sources of supply (JAC ¶¶ 104, 106-07; TAC ¶¶ 168-70), the feasibility of transport (JAC ¶ 117; TAC ¶ 168-70) and pricing dynamics (JAC ¶¶ 118-26; TAC ¶¶ 176-87) (though plaintiffs differ somewhat in their views on these topics).

The FLPs also assert a monopolization claim, and the allegations in their proposed complaint are tailored to a national market for primary aluminum **[**82]** (which includes both the United States and Canada) (TAC ¶ 169); Mag, Agfa, and Kodak have alleged worldwide markets (JAC ¶ 117). They allege that primary aluminum is manufactured worldwide, that the U.S. is a net importer, and that there has been a global oversupply since the mid-2000s. (JAC ¶¶ 104-06; TAC ¶¶ 174-75.) The U.S. imports over 3 million metric tons from more than two dozen countries annually in order to meet domestic consumption requirements. (JAC ¶ 106; TAC ¶ 166.) Most aluminum is sold directly from producers such as Alcoa to industrial users. (JAC ¶ 102; TAC ¶ 166.) Producers also sell a certain amount of aluminum to traders and financial buyers who typically store it in warehouses. (JAC ¶ 103; TAC ¶ 167.) Most often these sales involve the LME warehouse system, which operates worldwide. (JAC ¶¶ 91, 103; TAC ¶¶ 167, 188.)

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[31] If this Court were to agree with plaintiffs that the alleged restraints should be analyzed as per se violations of the antitrust laws, then plaintiffs' pleading burden as to market definition would be lower. See *State Oil, 522 U.S. at 10*; see also *Paycom, 467 F.3d at 289*.

The Court also notes that "[i]n this Circuit, a threshold showing of market share is not a prerequisite for bringing a § 1 claim." *Todd, 275 F.3d at 206*; *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co., 61 F.3d 123, 129 (2d Cir. 1995)* ("If a plaintiff can show an actual adverse effect on competition, such as reduced output . . . we do not require a further showing of market power.").

[32] The JAC describes this market as the "market for LME-certified warehouse services for aluminum." (JAC ¶ 144.) The TAC uses four distinct terms to refer to this market: the "market for warehouse services for LME aluminum" (TAC ¶ 203); the "market for aluminum warehouse services in LME-registered warehouses" (TAC ¶¶ 204, 209); the "market for warehouse services of aluminum in LME-registered warehouses" (TAC ¶ 207); and the "aluminum warehouse market for LME-registered warehouses" (TAC ¶ 422). The Court assumes for purposes of this motion that the JAC's term for this market, the "market for LME-certified warehouse services for aluminum," captures all of the TAC's conceptions of this market.

Plaintiffs allege that the demand for aluminum is generally inelastic. (JAC ¶ 108; TAC ¶ 161.) While there are some substitutes for certain applications, its price remains relatively inelastic. (JAC ¶¶ 108-15; see TAC ¶¶ 161-62.) There are lead times required to adjust production capacity, allowing prices to remain high if there is an unanticipated **[**83]** shortfall. (JAC ¶¶ 110; see also TAC ¶¶ 162.)

Defendants argue that these markets are inadequately defined and not cognizable markets for antitrust purposes. Defendants' arguments in this regard are better suited to a motion for summary judgment or class certification. In its prior decision on earlier pleadings, this Court laid out certain necessary prerequisites to pleading a relevant market. Plaintiffs have, in effect, checked the minimum boxes necessary to meet the required standard at the motion to dismiss stage.

Defendants' arguments reasonably follow traditional antitrust analysis: pleading relevant markets and measuring defendants' conduct and plaintiffs' harm in relation to those markets. In this regard, a market for LME-certified warehouse services for aluminum would appear to require conduct to drive up the price of renting warehouse storage space or constrain the availability of warehouse services. This is not, however, what plaintiffs are alleging. Instead, plaintiffs are alleging that—somewhat akin to McCready—actions in the market for LME-certified warehouse services for aluminum (including, inter alia, delays in load-out services) necessarily caused dysfunction in the **[**84]** price setting of aluminum. Thus, defendants' argument that allegations regarding the market for LME-certified warehouse services for aluminum are implausible because they do not provide sufficient detail on the substitutability of off-warrant storage at non-LME warehouses or on aluminum transportation costs is like a ship passing in the night with plaintiffs' theory of the market. The substitutability at issue would be load-out services for aluminum stored at LME warehouses that **[*451]** would and could, in turn, impact the Midwest Premium. Whether a particular load of aluminum can be stored in warehouse x or y is not, therefore, the issue. It all comes back to the factors that affect the Midwest Premium. Plaintiffs have not done the world's greatest job in explicating how all of the parts fit together, but they have done enough. They have alleged that only LME-certified warehouses store the aluminum corresponding with the warrants, the settling of which impacts the Midwest Premium. Thus, substitutability in the sense in which defendants argue does not meet this claim head on. This is not a case in which "warehouse services," strictly speaking, are at issue (though periodically plaintiffs' **[**85]** allegations are confused on this point). Rather, the issue as cast better by the JAC is the use of the particular market for LME-certified warehouse services for aluminum insofar as the services offered therein (such as load-outs) is a necessary and clear component of the Midwest Premium. Whether this market will survive the proverbial tire-kicking remains to be seen, but at this stage, the necessary allegations are present.

Defendants also argue that plaintiffs have failed to allege a plausible geographic market. In fact, both proposed pleadings now contain numerous allegations supporting their respective versions of the geographic market. (See JAC ¶ 117; TAC ¶ 208.) The Court views the JAC's allegations as more reasonable and more plausible—but it cannot now rule as a matter of law that what the TAC has asserted is either reasonable or plausible. Put differently, at this stage, plaintiffs need not show plausibility according to some sort of predominance (or probability) standard (that is, that their market is more likely than not correct). See *Twombly, 550 U.S. at 556*.

E. Concerted Action

In order for plaintiffs plausibly to allege coordinated conduct in violation of *§ 1*, they must allege plausible allegations **[**86]** of concerted action. Allegations merely consistent with unilateral action are insufficient. See *Twombly, 550 U.S. at 556-57*; *Copperweld, 467 U.S. at 768*; *Monsanto, 465 U.S. at 761*; *Anderson News, 680 F.3d at 183*. "[T]here is a basic distinction between concerted and independent action . . . ." *Monsanto, 465 U.S. at 761*. Allegations must support a unity of purpose, common design and understanding, or a meeting of the minds in an unlawful agreement. Cf. *Am. Tobacco Co. v. United States, 328 U.S. 781, 810, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)*.

Plaintiffs need not, however, plead direct evidence of conspiracy. See *Anderson News, 680 F.3d at 183*. Conspiracies are rarely evidenced by explicit agreements—they must nearly always be proven through "'inferences that may fairly be drawn from the behavior of the alleged conspirators.'" Id. (quoting *Michelman v. Clark-Schwebel Fiber Glass Corp., 534 F.2d 1036, 1043 (2d Cir. 1976)*; see also *Mayor & City Council of Balt. v. Citigroup, Inc., 709*

F.3d 129, 136-37 (2d Cir. 2013) (in many antitrust cases, "smoking gun" evidence can be hard to come by, and thus a complaint must set forth sufficient circumstantial facts supporting an inference of conspiracy).

At the pleading stage, plaintiffs here must allege sufficient facts to support (not "prove" or even "demonstrate") a plausible inference that defendants reached an agreement; a complaint merely alleging parallel conduct alone is not sustainable. Twombly, 550 U.S. at 556; see also Mayor & City Council of Balt., 709 F.3d at 135-36 ("[A]lleging parallel conduct alone is insufficient, even **[*452]** at the pleading stage."); Anderson News, 680 F.3d at 184. In cases in which there is obvious parallel conduct and the question is whether it is **[**87]** the product of coordinated or unilateral decision making, a plaintiff must allege additional facts that point toward a meeting of the minds. Twombly, 550 U.S. at 557.

Even conscious parallelism in pricing among competitors is not itself unlawful. Id. at 553-54; In re Publ'n Paper, 690 F.3d at 62. By engaging in conscious parallelism, firms in a concentrated market may lawfully recognize shared economic interests and, in effect, lawfully exercise market power by setting their prices at a profit maximizing, supra-competitive level. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227-28, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993). "Plus-factors" may provide the additional circumstances necessary to permit a fact-finder to infer a conspiracy. Examples of plus-factors are a common motive to conspire, actions taken against economic self-interest, and a high level of inter-firm communications. In re Publ'n Paper, 690 F.3d at 62; see also Apex Oil Co. v. DiMauro, 822 F.2d 246, 253-54 (2d Cir. 1987) (suggesting that allegations that are consistent only with market actors who are aware of and anticipate similar actions by competitors would be insufficient to support the existence of a tacit agreement).[33]

In both the JAC and the TAC plaintiffs cite a number of emails and documents from which they assert support an inference of an existing conspiracy. (E.g., JAC ¶¶ 2, 6, 7-8, 15; TAC ¶¶ 473, 476, 479-85, 488, 510, 512-22, 526-27, 529, 531, 533, 537-49, 565-66, 592-96, 605-07.) Plaintiffs cite documents which they assert show that Metro was at the heart of the alleged conspiracy and to have been more active than any other participant. The law does not require that all conspirators have the same level of involvement in a conspiracy, nor that they be involved at precisely the same time or for the same duration. See United States v. Nusraty, 867 F.2d 759, 763 (2d Cir. 1989).

Plaintiffs also cite documents they argue support an inference that Metro understood and intended that load-out delays would result in an increase in the Midwest **[*453]** Premium (e.g., JAC ¶¶ 187; TAC ¶¶ 291-94, 297,), and that JPMorgan's commodities unit understood that as well (JAC ¶ 152; TAC ¶ 465.)

[90]** Defendants argue that there are few allegations tying JPMorgan and its affiliated warehouse company Henry Bath LLC to the conspiracy. As to the number of allegations implicating JPMorgan, the Court agrees, but the

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[33] In Mayor & City Council of Baltimore, the Second Circuit reviewed whether allegations of certain parallel conduct in the auction rate securities market were sufficient to support a § 1 conspiracy. Plaintiffs alleged that defendant banks conspired with each **[**88]** other to simultaneously stop buying auction rate securities for their own proprietary accounts, causing auctions to fail and the market to collapse. 709 F.3d at 131-32. The Court found that the allegations supported only parallel conduct. Id. at 138.

The Court began by noting that the crucial question in a § 1 case is whether the challenged conduct stems from an agreement, and that the existence of such an agreement is a legal conclusion to be determined by the court—and not a factual allegation. Id. at 135-36 (citing Starr v. Sony BMG Music Entm't, 592 F.3d 314, 319 n.2 (2d Cir. 2010)). The Court further stated that plaintiffs must allege additional circumstances supporting an inference of conspiracy; merely alleging that parallel conduct occurred is insufficient to overcome a motion to dismiss because it would "risk propelling defendants into expensive antitrust discovery on the basis of acts that could just as easily turn out to have been rational business behavior as they could a proscribed antitrust conspiracy." Id. at 136-37. The Court found that defendants' alleged actions—an en masse flight from a collapsing market in which they had significant downside exposure—made perfect sense in light of their business interests. Id. at 138. This made the case different from Starr, in which specific allegations **[**89]** supporting an inference that defendants' parallel conduct was against their own economic selfinterest led the Second Circuit to conclude that plaintiffs had plausibly alleged an antitrust conspiracy. See id. at 138-39 (citing Starr, 592 F.3d at 327.) Accordingly, the Court affirmed defendants' motion to dismiss. Id. at 140.

documents to which plaintiffs cite in the current versions of their pleadings add to the allegations previously made. The documents cited now support some inference that both these entities were connected to the alleged conspiracy and benefitting from it. Whether these inferences will withstand the test of time, further context, and cross-examination remains to be seen. For now, at the motion to dismiss stage, they are sufficient to support a conspiracy claim against Henry Bath LLC (JPMorgan having already been dismissed from this action).

Defendants urge this Court to look more closely at the documents, read them in context, and determine that such inferences would be unreasonable. On a motion to dismiss, there is a limited extent to which a Court may evaluate the content of documents incorporated in the parties' pleadings. To the extent that plaintiffs refer to a document, it then becomes incorporated by reference; and to the extent that the inference they ask the Court to **[**91]** draw is patently unreasonable, the Court need not simply accept the inference as fair. However, when two competing inferences are offered—even if one is stronger than the other—on a motion to dismiss, a Court cannot choose between them. See *Iqbal, 556 U.S. at 678*; *N.J. Carpenters, 709 F.3d at 121*.

IV. THE FLPS' SECTION 2 MONOPOLIZATION CLAIMS

Only the FLPs allege claims pursuant to *§ 2* of the Sherman Act. *Section 2* provides, in pertinent part: "[e]very person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony." *15 U.S.C. § 2*. A violator of *§ 2* may be held civilly liable to any party suffering "injur[y] in his business or property" as a result of such a violation. *15 U.S.C. § 15*. Under *§ 2*, both the actions of a single firm to monopolize or to attempt to monopolize and conspiracies and combinations to monopolize or attempt to monopolize are unlawful. *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 454, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*. In addition to adequately pleading facts supportive of the elements of a *§ 2* claim, plaintiffs must also adequately allege antitrust standing. See *Port Dock, 507 F.3d at 121-22*.

The FLPs assert that the Goldman Sachs entities have conspired with entities affiliated with the LME to monopolize the market for LME-certified warehouse services for aluminum in violation of *§ 2*. (TAC ¶¶ 435-43.) The Court reads this **[**92]** claim as asserting both a *§ 2* conspiracy and a *§ 2* monopolization claim. Both claims fail.

To state any claim under *§ 2*, a plaintiff must allege plausible facts that a defendant possesses market power (sometimes referred to as "monopoly power") in a relevant market, and the willful acquisition or maintenance of such power as "distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*; see also *Heerwagen v. Clear Channel Commc'ns, 435 F.3d 219, 226 (2d Cir. 2006)*; *PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 105 (2d Cir. 2002)*. A firm possesses **[*454]** market power when it has the ability to raise price by restricting output. *PepsiCo., 315 F.3d at 107*. A plaintiff must also allege facts that the defendant has engaged in "'improper conduct that has or is likely to have the effect of controlling prices or excluding competition, thus creating or maintaining market power.'" *Heerwagen, 435 F.3d at 227* (quoting *PepsiCo, 315 F.3d at 108*).

Market power may be proven directly by evidence of the control of prices or the exclusion of competition. *PepsiCo, at 107*; *Todd, 275 F.3d at 206* ("If a plaintiff can show that a defendant's conduct exerted an actual adverse effect on competition, this is a strong indicator of market power."); *Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 98 (2d Cir. 1998)* (market power "may be proven directly by evidence of the control of prices"). However, in most cases this type of direct evidence is absent. "Indirect proof **[**93]** of market power, that is, proof that the defendant has a large share of the relevant market, is a surrogate for direct proof of market power." *Heerwagen, 435 F.3d at 227* (internal quotation marks omitted). "'In resolving market or 'monopoly' power issues, the courts have typically relied heavily on market definition and on the defendant firm's share of the market thus defined.'" *Id. at 227* (quoting 2A Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, ***Antitrust Law*** ¶ 515, at 114 (2d ed. 2002)). Market power may be shown by one firm's large percentage share of a defined relevant market. *PepsiCo, 315 F.3d at 107*; *Tops Mkts., 142 F.3d at 98*. For instance, "a market share of over 70 percent is usually strong evidence of monopoly power." *Tops Mkts., 142 F.3d at 99* (internal quotation marks omitted). A showing of market power is a substantive element of a monopolization claim, and "plaintiff cannot escape proving her claims with reference to a particular market even if she intends to proffer direct evidence of controlling prices or excluding competition." *Heerwagen, 435 F.3d at 229*.

The relevant market is the "area of effective competition," which is determined by defining relevant product and geographic markets. *PepsiCo, at 105, 108*; *AD/SAT v. Associated Press, 181 F.3d 216, 226 (2d Cir. 1999)*. A relevant product market consists of "products that have reasonable interchangeability for the purposes **[**94]** for which they are produced—price, use and qualities considered." *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 404, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*; *Todd, 275 F.3d at 200*. Products are considered reasonably interchangeable if consumers treat them as acceptable substitutes. *PepsiCo, 315 F.3d at 105*. Cases are subject to dismissal when plaintiff fails to allege a plausible explanation as to why a market should be limited in a particular way. See *Todd, 275 F.3d at 200 nn.3-4* (collecting cases).

The court must also determine the boundaries of a relevant geographic market. *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1967)*; *United States v. Eastman Kodak Co., 63 F.3d 95, 104 (2d Cir. 1995)*. The geographic market encompasses the geographic area in which purchasers of the product can practicably turn for alternative sources of the product. *Tampa Elec., 365 U.S. at 327*. A geographic market is determined by "how far consumers will go to obtain the product or its substitute in response to a given price increase and how likely it is that a price increase for the product in a particular location will induce outside suppliers to enter that market and increase supply-side competition in that location." *Heerwagen, 435 F.3d at 227*. Factors relevant to geographic scope of a market "may include **[*455]** barriers to transactions between buyers and sellers of different locations, such as transportation costs to a particular location, as well as the relative preferences of consumers with respect to travel and price." *Id. at 228*. The **[**95]** geographic market for "goods sold nationwide is often the entire United States, though it need not be if purchasers cannot practicably turn to areas outside their own area for supply of the relevant product." Id. (citing *Standard Oil Co. v. United States, 337 U.S. 293, 299 n.5, 69 S. Ct. 1051, 93 L. Ed. 1371 (1949))*.

Finally, to state an attempted monopolization claim, a plaintiff must allege plausible facts supporting that the defendant has engaged in predatory or anticompetitive conduct, with a specific intent to monopolize a particular and defined market, and a dangerous probability of success. See *Spectrum Sports, 506 U.S. at 456*; *PepsiCo., 315 F.3d at 105*; *Tops, 142 F.3d at 99-100*. A plaintiff must also allege that anticompetitive conduct occurring in connection with obtaining or retaining a monopoly position is proximately related to plaintiffs' injuries. See *Litton Sys., Inc. v. Am. Tel. & Tel. Co., 700 F.2d 785, 802-03 (2d Cir. 1983)* (proximate cause required to establish monopolization charge); see also *Lexmark Int'l Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1390, 188 L. Ed. 2d 392 (2014)* (a court should generally presume that a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of that statute).

There are a number of reasons the FLPs' First Claim cannot withstand scrutiny under *§ 2*.

First, the TAC alleges that Metro has a monopoly position. It is therefore Metro's position in a defined market that determines the viability of a *§ 2* claim.[34] Metro is alleged to have, **[**96]** or be about to achieve, a monopoly position in the market for LME-certified warehouse services for aluminum. (TAC ¶ 438.) The FLPs allege that "Metro intended to develop and did develop the market power to restrict output and set, control, and/or increase prices." (TAC ¶ 439.) Further, Metro is alleged to have "abused its monopoly power and discretion so as to impose the greatest restrictions on output that it could." (TAC ¶ 439.) Finally, Metro is alleged to have "knowingly and directly inflated the Midwest premium and other aluminum prices to increasingly higher levels." (TAC ¶ 439.) The LME, LME Holdings Limited, and HKEx along with other Goldman Sachs entities are alleged to have knowingly assisted Metro in its violations of the LME Charter so that it could monopolize the market. (TAC ¶ 441.)

[34] The Court notes that of the 146 LME-certified warehouses in the United States as of 2014, the warehouse defendants are alleged to own 123, or 84%. (See TAC ¶ 190.) The TAC is devoid of allegations regarding LME-certified warehouses not owned by defendants.

The FLPs' § 2 claim is incompatible with its § 1 claim. Moreover, in beefing up its § 1 claim between the prior pleadings and the instant ones, plaintiffs **[**97]** have cast conduct in warehouse services by many firms as an adjunct to trading activity by many firms—and it is both pieces together that allegedly caused competitive harm. The TAC does not support Metro and its Goldman financial affiliates alone being able to carry out the scheme (even assuming participation by the LME as alleged). Indeed, as discussed above, plaintiffs have alleged that Goldman and Metro needed and used conspirators in areas outside **[*456]** of Detroit to assist in the scheme. If, for instance, the JPMorgan entities and the Glencore entities and their affiliated companies were removed from this scheme, the FLPs would be proffering a different complaint that would require an altogether different analysis.

In addition, plaintiffs assert that Metro had or was on the cusp of achieving the ability to raise price or restrict output—that is, to exercise market power. The allegations as to Metro do not support this assertion. In this § 2 context in which the market alleged is the market for LME-certified warehouse services for aluminum, the "price" Metro can (even arguably) set concerns the cost of storage. That is the market in which Metro is alleged to have a monopoly position. Raising **[**98]** the price in this market would be raising the price for these services. But that is not plaintiffs' theory as laid out elsewhere in its complaint, and it is not the injury that plaintiffs claim to have suffered; the FLPs' injury is having paid more for aluminum due to an inflated Midwest Premium, in turn caused by an interaction between warehouse services and trading firm conduct.

Further, Metro is not alleged to have owned any aluminum as to which it could have increased price. Nor did it own aluminum warrants as to which it could control supply. At most, the allegations in the TAC support Metro's ability to slow-roll the supply of aluminum from its warehouses owned by others.

Even if the FLPs were able otherwise to allege plausible facts supportive of a § 2 claim, they do not have antitrust standing to pursue such a claim. Limited solely to actions taken in the market for LME-certified warehouse services for aluminum, the FLPs' antitrust standing is based solely on injuries they have sustained in connection with Metro's monopoly (or near-monopoly) position in that market. But the FLPs' allegations are not supportive. As cast, the FLPs' injury does not come from actions in that market **[**99]** alone. The FLPs themselves have not paid higher warehouse storage fees. Instead, the FLPs' injuries comes from a combination of actions relating to warehouse load-out delays and warrant trading—not solely the one and not solely the other. This interaction is not part of the § 2 claim.

The FLPs also fail the efficient enforcer test in connection with their § 2 claim.[35] It is only the combination of the coordinated actions of many different participants that spells out how plaintiffs' injury can be inextricably intertwined with the anticompetitive conduct. Analyzed on its own, as injury based solely on the monopolization of the market for LME-certified warehouse services for aluminum, the FLPs are not efficient enforcers. There are others more appropriately situated to pursue a monopoly claim in this market. The FLPs are simply too remote from the market for LME-certified warehouse services for aluminum to have antitrust standing to pursue a claim based on anticompetitive conduct in that market.

In sum, for the foregoing reasons, the FLPs' § 2 claim must be dismissed.

V. STATE LAW CLAIMS

Both the JAC and the TAC allege claims **[**100]** arising under the laws of various states. The JAC's Second Claim and the TAC's Sixth Claim seek relief under New York's Donnelly Act (JAC ¶¶ 337-43; TAC ¶¶ 643-48); the JAC's Third Claim seeks **[*457]** relief under California's Cartwright Act[36] (JAC ¶¶ 344-50); and the TAC's Fifth Claim seeks relief under Michigan's MARA (TAC ¶¶ 637-42). As explained in the Court's September 15, 2014 Memorandum Decision & Order (ECF No. 586 ("Prior State Law Op.")), the Donnelly Act and the Cartwright Act are modeled on § 1 of the Sherman Act, and the MARA is modeled on the Sherman Act generally (Prior State Law Op.

[35] The Court here incorporates the legal standard for standing set forth above.

[36] The TAC lists **[**101]** the Cartwright Act as a cause of action without breaking out its elements or explaining how they are met. (TAC ¶ 651(d).) Accordingly, the Court dismisses the FLPs' Cartwright Act claim under the Rule 8 analysis listed below.

at 4-6). The requirements for establishing claims under these statutes are essentially the same as those for doing so under the Sherman Act. (Prior State Law Op. at 4-7.) Accordingly, because plaintiffs have established plausible claims for relief under *§ 1* of the Sherman Act, their analogous claims for relief under the Donnelly Act, the Cartwright Act, and the MARA are also plausible, and may go forward. By the same token, because the FLPs have not alleged a plausible claim for relief under *§ 2* of the Sherman Act, to the extent that their claim under the MARA is predicated on unlawful monopolization, it must also be dismissed.

The FLPs, however, have not just asserted claims under state analogues for the Sherman Act; their Seventh and Eighth claims are a potpourri of antitrust, unfair competition, unfair trade practices, and unjust enrichment claims under the laws of 34 states and the District of Columbia. (TAC ¶¶ 651, 655, 658.) As explained in the Court's September 15, 2014 decision, a complaint that merely offers "a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Yet the FLPs simply provide lists of state causes of action, without even listing their elements or explaining how their factual allegations establish valid claims for relief under them. This is insufficient to meet even the basic requirements of *Rule 8*, and accordingly, these claims must be dismissed.[37] *Iqbal, 556 U.S. at 678* ("A pleading that offers labels and conclusions or formulaic recitation of the elements of a cause of action will not do.").

The FLPs' Ninth Claim for relief is an unjust enrichment claim. (TAC ¶¶ 657-63.) This claim is predicated on defendants' other federal and state law claims. To the extent that the FLPs' unjust enrichment claim relies upon other claims that are being dismissed by this Court, it too must be dismissed. (See Prior State Law Op. at 8 (collecting cases).) However, although plaintiffs cannot ultimately recover under both the antitrust laws and state unjust enrichment law, there is no bar to pleading both claims simultaneously at the pleading stage. *In re Credit Default Swaps Antitrust Litig., No. 13md2476 (DLC), 2014 U.S. Dist. LEXIS 123784, 2014 WL 4379112, at *18 (S.D.N.Y. Sept. 4, 2014)*. Accordingly, the Court will permit the FLPs' unjust enrichment claim to go forward.

In sum, all of plaintiffs' state law claims **[**103]** are dismissed, excepting plaintiffs' Donnelly Act claims, Mag, Agfa, and Kodak's **[*458]** Cartwright Act claim, the FLPs' MARA claim to the extent it does not concern monopolization, and the FLPs' unjust enrichment claim to the extent it is not predicated upon other claims that are being dismissed by this Court.

VI. CONCLUSION

For all of the reasons set forth above, defendants' motions to dismiss the JAC are DENIED and plaintiffs' motion for leave to amend the JAC is GRANTED; plaintiffs' motion for leave to amend the TAC is GRANTED IN PART and DENIED IN PART. The FLPs may assert the Third, Fifth, Sixth, and Ninth Claims for Relief stated in the TAC. Mag, Agfa, and Kodak may assert all claims in the JAC.

Discovery in this matter shall proceed immediately. The parties are directed to confer on a schedule for the remainder of this case including fact and expert discovery, briefing on class certification with regard to the TAC,[38] final motions for summary judgment (this Court takes motions for summary judgment, in whole or in part, at any time), and trial. The parties shall submit a joint proposed schedule within one week of the date of this Opinion.

The Clerk **[**104]** of Court is directed to close the motion at ECF No. 654.

SO ORDERED.

Dated: New York, New York

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[37] The TAC does list the elements of the causes of action under New York's and Rhode Island's **[**102]** consumer protection and unfair competition laws. (TAC ¶ 655(s),(u).) However, these lists are presented in precisely the formulaic, conclusory manner no longer permitted under Iqbal. See *556 U.S. at 678*. Further, the TAC is devoid of the state-specific allegations regarding defendants' engagement in commerce, public statements, and effects on plaintiffs within those states required to establish that these claims are plausible. These claims are therefore also properly dismissed.

[38] The JAC does not contain class allegations.

March 26, 2015

/s/ Katherine B. Forrest

KATHERINE B. FORREST

United States District Judge

Kleen Prods. LLC v. Int'l Paper

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

March 26, 2015, Decided; March 26, 2015, Filed

Case No. 10 C 5711 (UNDER SEAL)

Reporter
306 F.R.D. 585 *; 2015 U.S. Dist. LEXIS 100466 **

KLEEN PRODUCTS LLC, et al., individually and on behalf of all those similarly situated, Plaintiffs, v. INTERNATIONAL PAPER, et al., Defendants.

Subsequent History: Affirmed by *Kleen Prods. LLC v. Int'l Paper Co., 831 F.3d 919, 2016 U.S. App. LEXIS 14282 (7th Cir. Ill., Aug. 4, 2016)*

Prior History: *Kleen Prods., LLC v. Packaging Corp. of Am., 775 F. Supp. 2d 1071, 2011 U.S. Dist. LEXIS 38546 (N.D. Ill., Apr. 8, 2011)*

Core Terms

Defendants', conspiracy, damages, class certification, Containerboard, variables, Products, Plaintiffs', prices, class member, announcements, predominance, antitrust, reply, regression, class period, increased price, collusion, class-wide, alleged conspiracy, negotiated, parties, calculation, corrugated, quotation, marks, expert report, pre-discharge, common question, proposed class

LexisNexis® Headnotes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN1[] **Class Actions, Prerequisites for Class Action**

To be certified, a proposed class must satisfy the requirements of *Fed. R. Civ. P. 23(a)*, as well as one of the three alternatives in *Rule 23(b)*. *Rule 23(a)* requires plaintiffs to prove numerosity, typicality, commonality, and adequacy of representation. *Rule 23(b)(3)* also requires plaintiffs to prove that: (1) the questions of law or fact common to the members of the proposed class predominate over questions affecting only individual members; and (2) a class action is superior to other available methods of resolving the controversy.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Evidence > Burdens of Proof > Allocation

HN2[] Class Actions, Prerequisites for Class Action

Plaintiffs bear the burden of satisfying *Fed. R. Civ. P. 23*, which is not a mere pleading standard. To meet this burden, the plaintiffs must satisfy through evidentiary proof each of *Rule 23*'s elements. In deciding a class certification motion, a court must conduct a rigorous analysis before it can determine whether the plaintiffs have satisfied *Rule 23*'s requirements. This often means that a court must resolve issues that also bear on the merits of the claim, but only if those issues overlap with class certification issues.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Evidence > Burdens of Proof > Allocation

Evidence > Burdens of Proof > Preponderance of Evidence

HN3[] Class Actions, Prerequisites for Class Action

Despite the need for rigorous analysis, a court should not turn the class certification proceedings into a dress rehearsal for a trial on the merits. Instead, the court need only consider the evidence submitted by the parties and determine whether the plaintiffs have proven each of *Fed. R. Civ. P. 23*'s elements by a preponderance of the evidence.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN4[] Class Actions, Prerequisites for Class Action

When an expert's report or testimony is critical to class certification, a district court must make a conclusive Daubert ruling on any challenge to that expert's qualifications or submissions before it may rule on a motion for class certification.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN5[] Class Actions, Certification of Classes

Several courts have held evidentiary hearings prior to deciding a class certification motion, but such hearings are not required. Rather, the U.S. Supreme Court and the U.S. Court of Appeals for the Seventh Circuit have admonished district courts not to simply accept the plaintiffs' pleadings as true and to conduct a rigorous analysis of the plaintiffs' class certification claims.

Civil Procedure > Discovery & Disclosure > Disclosure > Mandatory Disclosures

HN6[] Disclosure, Mandatory Disclosures

Fed. R. Civ. P. 26(a)(2) governs expert discovery and requires a party to disclose to the other parties a written report of a retained expert that includes a complete statement of all opinions the witness will express and the basis and reasons for them. An expert rebuttal report is meant to contradict or rebut evidence disclosed in the initial report, *Fed. R. Civ. P. 26(a)(2)(D)(ii)*, and its proper function is to contradict, impeach or defuse the impact of the evidence offered by an adverse party. *Rule 26* does not address reply expert reports, but, much like reply briefs, parties may not advance new arguments for the first time in a reply expert report. If a reply expert report is truly rebuttal evidence, then it is admissible and the opposing party is not entitled to respond to it. If, however, the reply report contains new opinions that are not proper rebuttal testimony, the report must be stricken.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN7[] **Prerequisites for Class Action, Adequacy of Representation**

In order to warrant class certification, plaintiffs must prove numerosity, typicality, commonality, and adequacy of representation. *Fed. R. Civ. P. 23(b)*'s predominance standard often overlaps with typicality, commonality, and adequacy.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN8[] **Prerequisites for Class Action, Predominance**

Fed. R. Civ. P. 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN9[] **Regulated Practices, Private Actions**

The predominance inquiry under *Fed. R. Civ. P. 23(b)(3)* trains on the legal or factual questions that qualify each class member's case as a genuine controversy, with the purpose being to determine whether a proposed class is sufficiently cohesive to warrant adjudication by representation. Predominance is similar to *Rule 23(a)*'s typicality and commonality requirements, but the predominance criterion is far more demanding. And although the U.S. Supreme Court has said that predominance is a test readily met in antitrust cases, that simply means that in antitrust cases, *Rule 23*, when applied rigorously, will frequently lead to certification. This does not, however, make class certification automatic in antitrust cases.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN10[] **Prerequisites for Class Action, Predominance**

Generally, *Fed. R. Civ. P. 23(b)(3)* predominance is satisfied when common questions represent a significant aspect of a case and can be resolved for all members of a class in a single adjudication. In other words, common questions can predominate if a common nucleus of operative facts and issues underlies the claims brought by the proposed class. The presence of some individual questions is not fatal, but individual questions cannot predominate over the common ones. To determine if a question is common, a court must look to the evidence necessary to answer that question; if the members of a proposed class will need to present evidence that varies from member to member to answer the question, then the question is an individual one. Conversely, if the same evidence will suffice for each member to answer the question at issue, then the question is common.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN11[] **Regulated Practices, Private Actions**

Analysis of predominance under *Fed. R. Civ. P. 23(b)(3)* begins, of course, with the elements of the underlying cause of action. In the antitrust context, plaintiffs must prove: (1) that the defendants violated federal ***antitrust law***; and (2) that the antitrust violation caused them some injury. The plaintiffs must also show damages, but it is well established that the presence of individualized questions regarding damages does not prevent certification.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN12[] **Prerequisites for Class Action, Predominance**

Fed. R. Civ. P. 23(b)(3) does not require a plaintiff seeking class certification to prove that each individual element is susceptible to class wide proof. Rather, the inquiry is more holistic. And although predominance analysis is not simply bean counting, analyzing each element separately is useful in isolating what questions are common and determining whether those questions predominate.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN13[] **Prerequisites for Class Action, Predominance**

Whether a conspiracy exists is a common question that is thought to predominate over the other issues in the case and has the effect of satisfying the prerequisite in *Fed. R. Civ. P. 23(b)(3)*.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN14[] **Private Actions, Remedies**

"Impact" and "damages" are two separate elements in an antitrust claim. Impact is whether the plaintiffs were harmed, whereas damages quantify by how much. Oftentimes, demonstrating impact and damages involves comparing the but-for price — the price a customer would have paid in the absence of the conspiracy — and the actual price paid. When that happens, the single comparison establishes both impact and damages. Thus: One way of demonstrating predominance is to show that there is a common method for proving that the class plaintiffs paid higher actual prices than in the but-for world, such as using an econometric regression model incorporating a variety of factors to demonstrate that a conspiracy variable was at work during the class period, raising prices above the "but-for" level for all plaintiffs.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN15[] **Private Actions, Remedies**

Where other methods of common proof in an antitrust case exist to show class-wide impact such as lock-step increases of national price lists in an oligopolistic market, comparing but-for prices with actual transaction prices is not the only way for plaintiffs to succeed in an motion for class certification. For example, if it appears that plaintiffs may be able to prove at trial the price range was affected generally, then the plaintiffs can show impact without a but-for comparison, and this is so even if there are negotiated prices or a variety of prices.

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

HN16[] **Conspiracy to Monopolize, Sherman Act**

Courts have long held that a plaintiff can demonstrate antitrust impact by showing that the conspiracy caused an increase to the standard market price of the product at issue.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN17[] **Sherman Act, Claims**

Demonstrating antitrust impact for class-certification purposes does not require that the plaintiffs prove antitrust impact. Instead, the plaintiffs need only to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members. The focus, then, is on the evidence necessary to establish antitrust impact, not on whether the plaintiffs have adequately proven it. The court's overriding concern is whether the plaintiffs have established that the proposed class is sufficiently cohesive to warrant adjudication by representation.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN18[] **Sherman Act, Claims**

A court looks to all the evidence to determine whether the plaintiffs have established that evidence common to the class is capable of proving antitrust impact.

Antitrust & Trade Law > Sherman Act > Claims

HN19[] **Sherman Act, Claims**

It is a well-accepted practice to look to industry events as a whole to determine whether a defendant's conduct is consistent with collusion in an antitrust case.

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

HN20[] **Regulated Practices, Price Fixing & Restraints of Trade**

The prevailing view is that price-fixing affects all market participants, creating an inference of class-wide impact even when prices are individually negotiated.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN21[] **Prerequisites for Class Action, Predominance**

Damages are but one element that a court considers in determining predominance under *Fed. R. Civ. P. 23(b)(3)*. To establish predominance, a plaintiff must produce a reliable method of measuring class-wide damages based on common proof. But, it is well established that the presence of individualized questions regarding damages does not prevent certification.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN22[] **Prerequisites for Class Action, Predominance**

Comcast did not change the well-established rule that the existence of individual damage issues does not automatically defeat class certification.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN23[] **Expert Witnesses, Daubert Standard**

In some instances, inclusion or exclusion of a certain variable might be egregious enough to render an expert's report inadmissible altogether.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN24[] **Sherman Act, Claims**

To the extent that there are individualized damages issues, that alone will not defeat class certification, especially where common issues predominate the liability and impact elements of the plaintiffs' antitrust claim.

Civil Procedure > Settlements > General Overview

Civil Procedure > Settlements > Releases From Liability > General Releases

HN25[] **Civil Procedure, Settlements**

When parties settle a case, a court may release not only those claims alleged in the complaint and before the court, but also claims which could have been alleged in connection with any matter or fact set forth or referred to in the complaint. Such a general release is valid as to all claims of which a signing party has actual knowledge or that he could have discovered upon reasonable inquiry. In other words, a release applies only as long as the released conduct arises out of the identical factual predicate as the settled conduct.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN26[] **Class Actions, Certification of Classes**

A court has the authority under *Fed. R. Civ. P. 23(c)(1)(C)* to modify the class any time before final judgment.

Antitrust & Trade Law > Clayton Act > Scope

HN27[] **Antitrust & Trade Law, Clayton Act**

Generally speaking, a co-conspirator who joins a conspiracy with knowledge of what has gone on before and with an intent to pursue the same objectives may, in the antitrust context, be charged with the preceding acts of its co-conspirators.

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Judges: Harry D. Leinenweber, United States District Judge.

Opinion by: Harry D. Leinenweber

Opinion

[*588] **MEMORANDUM OPINION AND ORDER**

Before the Court are Defendants' Motion to Strike [ECF No. 845], and Plaintiffs' Motion for Class Certification [ECF No. 657.] These Motions have resulted in a deluge of briefing; the Class Certification Motion alone spawned seven separate briefs that total more than 3 00 pages (not including the attached exhibits) and that include two sur-replies and several notices of supplemental authority. **[**8]** The Court has rigorously analyzed all of the parties' submissions, and for the following reasons, Defendants' Motion to **[*589]** Strike [ECF No. 845] is granted in part and denied in part, and Plaintiffs' Class Certification Motion [ECF No. 657] is granted.

I. BACKGROUND

Plaintiffs are a proposed class of entities that directly purchased Containerboard Products from Defendants. Containerboard Products include containerboard itself and the various products made out of containerboard, such as containerboard sheets, which are used to make corrugated products like displays, boxes, and other containers. Plaintiffs allege that Defendants engaged in a conspiracy to artificially manipulate the market in order to increase the price of Containerboard Products in violation of antitrust laws. *See*, 15 U.S.C. § 1. The crux of Plaintiffs' Complaint is that Defendants agreed "to restrict the supply of containerboard by cutting capacity, slowing back production, taking downtime, idling plants, and tightly restricting inventory." [Pl.'s Mot. for Class Cert, at 1, ECF No. 660.] According to Plaintiffs, these actions illegally increased the price of containerboard, which caused them to pay more for Containerboard Products than **[**9]** they otherwise would have paid absent the conspiracy.

Plaintiffs seek to certify as a class:

> All persons that purchased Containerboard Products directly from any of the Defendants or their subsidiaries or affiliates for use or delivery in the United States from at least as early as February 15, 2004 through November 8, 2010.

The proposed class definition also excludes certain groups from being class members:

> Specifically excluded from this Class are the Defendants; officers, directors, or employees of any Defendant; any entity in which any Defendant has a controlling interest; and any affiliate, legal representative, heir or assign of any Defendants. Also excluded from this Class are any federal, state or local governmental entities, any judicial officer presiding over this action and the members of his or her immediate family and judicial staff, and any juror assigned to this action.

Defendants oppose certification, arguing that Plaintiffs have not satisfied *Rule 23*.

II. LEGAL STANDARD

HN1[] "To be certified, a proposed class must satisfy the requirements of *Federal Rule of Civil Procedure 23(a)*, as well as one of the three alternatives in *Rule 23(b)*." *Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 811 (7th Cir. 2012)*. *Rule 23(a)* requires Plaintiffs to prove "numerosity, typicality, commonality, and adequacy of representation." **[**10]** *Id.* Plaintiffs in this case seek certification under *Rule 23(b)(3)*, which also requires them to prove that: (1) the questions of law or fact common to the members of the proposed class predominate over questions affecting only individual members; and (2) a class action is superior to other available methods of resolving the controversy. *Id.*

HN2[] Plaintiffs bear the burden of satisfying *Rule 23*, which is not "'a mere pleading standard.'" *Comcast Corp. v. Behrend, 133 S.Ct. 1426, 1432, 185 L. Ed. 2d 515 (2013)* (quoting *Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2551-52, 180 L. Ed. 2d 374 (2011))*. To meet this burden, Plaintiffs must "satisfy through evidentiary proof" each of *Rule 23*'s elements. *Id.* In deciding a class certification motion, the Court must conduct a "rigorous analysis" before it can determine whether Plaintiffs have satisfied *Rule 23*'s requirements. *Id.* (internal quotation marks omitted). This often means that a Court must resolve issues that also bear on the merits of the claim, but only if those issues overlap with class certification issues. *Id.*

HN3[] Despite the need for rigorous analysis, "the court should not turn the class certification proceedings into a dress rehearsal for a trial on the merits." *Messner, 669 F.3d at 811*. Instead, the Court need only consider the evidence submitted by the parties and determine whether Plaintiffs have proven each of *Rule 23*'s elements by a preponderance **[**11]** of the evidence. *Id.*

III. ANALYSIS

There are two preliminary issues the Court must address. First, the Seventh **[*590]** Circuit has held that "***HN4***[] [w]hen an expert's report or testimony is 'critical to class certification,' . . . a district court must make a conclusive [*Daubert*] ruling on any challenge to that expert's qualifications or submissions before it may rule on a motion for class certification." *Id. at 812* (quoting *Am. Honda Motor Co. v. Allen, 600 F.3d 813, 815-16 (7th Cir. 2010))*. Expert reports in this case are indeed critical to class certification, but no Defendant has yet challenged Plaintiffs' experts on *Rule 702* or *Daubert* grounds. To the contrary, Defendants have "expressly reserve[d] their right to move to exclude [Plaintiffs' experts] under *Daubert* and *Rule 702*." [Def.'s Mem. in Opp. to Pl.'s Mot. for Class Cert. ("Def.'s Opp. Br.") at 40 n.35, ECF No. 763.] Although Defendants vigorously challenge Plaintiffs' experts' methodology and conclusions in the context of arguing that Plaintiffs' have not satisfied *Rule 23*, none of those arguments are based on *Rule 702* or *Daubert*. Defendants have not challenged, for example, Plaintiffs' experts' education or qualifications. The Court therefore reserves ruling on Plaintiffs' experts' admissibility until Defendants raise and brief that issue.

Second, Defendants **[**12]** seek a full evidentiary hearing prior to the Court deciding whether to certify the class. Plaintiffs oppose such a hearing, arguing that it is unnecessary and would waste time and money. ***HN5***[] Several courts have held evidentiary hearings prior to deciding a class certification motion, *see, e.g., In re Groupon, Inc. Sec. Litig., No. 12 C 2450, 2014 U.S. Dist. LEXIS 67437, 2014 WL 2035853, at *2 (N.D. Ill. May 16, 2014)*, but as far as the Court is aware, such hearings are not required. Rather, the Supreme Court and Seventh Circuit have admonished district courts not to simply accept Plaintiffs' pleadings as true and to conduct a "rigorous analysis" of the Plaintiffs' class certification claims. *See, Comcast Corp., 133 S.Ct. at 1432* ("Repeatedly, we have emphasized that it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question . . . .") (internal quotation marks omitted). As stated above, the parties have submitted an avalanche of briefing and opposing expert reports that set forth the parties' positions on the issues. Included in this briefing are thousands of pages of documents substantiating the parties arguments. Moreover, the parties' central dispute is legal, not factual. The dispute centers mainly on the proper legal standard under *Rule 23* and whether Plaintiffs' experts' reports are enough **[**13]** to satisfy that standard. For the most part, the parties agree on the basic facts, and both parties' experts rely upon the same data, so there are little if any factual disputes that the Court must resolve to decide class certification. Given the extensive paper record and the completeness of the parties' briefing, an evidentiary hearing would not add much to the Court's analysis. Thus, the Court is confident that it can determine class certification based on a careful examination of the evidentiary record the parties have submitted.

Having resolved those threshold issues, the Court must first decide Defendants' Motion to Strike some of the materials Plaintiffs submitted with their reply brief. Once that issue is decided, the Court can then determine whether Plaintiffs have satisfied *Rule 23*. All Defendants have joined in a single response to Plaintiffs' Class Certification Motion, to which Plaintiffs have replied. Defendant RockTenn joined in the combined response but also filed a separate response to the Class Certification Motion based on arguments that apply only to RockTenn. Plaintiff replied to RockTenn's response, to which RockTenn filed a Sur-reply, which prompted Plaintiffs to file **[**14]** a Sur-sur-reply. After deciding the Motion to Strike, the Court will first consider the joint opposition to class certification and then consider RockTenn's unique opposition.

A. Motion to Strike Plaintiffs' Reply Experts' Reports

Plaintiffs' initial Class Certification Motion contained expert reports from Drs. Mark Dwyer and Michael Harris. Defendants' combined response to the Motion included expert reports from Drs. Janusz Ordover and Dennis Carlton, who both criticized Plaintiffs' experts' reports in a number of ways, including a criticism of Plaintiffs' experts' choice of testing and methodology to prove class-wide injury. In response, Plaintiffs obtained reply **[*591]** expert reports from Drs. Dwyer and Harris, and also obtained a report from a new expert, Dr. Douglas Zona. Defendants have moved to strike certain portions of Dr. Dwyer's reply report and all of Dr. Zona's report.

HN6[] *Federal Rule of Civil Procedure 26(a)(2)* governs expert discovery and "requires a party to disclose to the other parties a written report of a retained expert that includes 'a complete statement of all opinions the witness will express and the basis and reasons for them.'" *Sloan Valve Co. v. Zurn Indus., Inc., No. 10 C 204, 2013 U.S. Dist. LEXIS 85897, 2013 WL 3147349, at *1 (N.D. Ill. June 19, 2013)* (quoting *Fed. R. Civ. P. 26 (a)(2)(B)(i)*). An expert rebuttal report is meant to "contradict or rebut **[**15]** evidence" disclosed in the initial report, *Fed. R. Civ. P. 26(a)(2)(D)(ii)*, and its "proper function . . . is to contradict, impeach or defuse the impact of the evidence offered by an adverse party." *Pearls v. Terre Haute Police Dep't, 535 F. 3d 621, 630 (7th Cir. 2008)*. *Rule 26* does not address reply expert reports, but, much like reply briefs, parties may not advance new arguments for the first time in a reply expert report. *Sloan Valve Co., 2013 U.S. Dist. LEXIS 85897, 2013 WL 3147349, at *1*. If a reply expert report is truly rebuttal evidence, then it is admissible and the opposing party is not entitled to respond to it. *2013 U.S. Dist. LEXIS 85897, [WL] at *4*. If, however, the reply report contains new opinions that are not proper rebuttal testimony, the report must be stricken. *2013 U.S. Dist. LEXIS 85897, [WL] at *2-3*.

1. Dr. Dwyer's Reply Report

Plaintiffs' disclosed Dr. Dwyer as an expert within the time frame outlined in the Court's scheduling order. The question is whether his reply report constitutes new and alternative opinion testimony or is instead proper rebuttal testimony in support of his original report.

Sloan Valve Co. is instructive. In that case, the plaintiff's initial expert report calculated damages based on "collateral unit sales ratios," and in that report the expert included data on both weighted and unweighted ratios. *2013 U.S. Dist. LEXIS 85897, [WL] at *2*. Despite including both sets of data, the expert's damages calculation relied **[**16]** solely on the weighted ratios. *Id.* In response, the defendant's expert attacked the plaintiff's expert for relying upon only the weighted ratios. *Id.* Consequently, the plaintiff's expert's reply report conducted a new calculation using the unweighted ratios in order to demonstrate that using the unweighted ratios would not change his initial conclusions. *Id.* The court found that this was proper reply expert testimony because, "rather than offering a new opinion and changing the basis for the calculation of the collateral unit sales, [the plaintiff's reply expert] included the [new] calculation . . . to refute [the defendant's expert's] criticisms." *Id.*

The plaintiff's reply expert report also included a "revised and increased estimate of incremental costs" based on data that the defendant first disclosed in its rebuttal expert's report. *2013 U.S. Dist. LEXIS 85897, [WL] at *3*. The court refused to strike that reply expert testimony because it was based on data that was previously unavailable to the plaintiff's expert due to the defendant's failure to disclose it. *Id.* Finally, the court struck a portion of the plaintiff's expert report that constituted "a new, alternative collateral sales calculation" based on data that was **[**17]** available to the plaintiff's expert when he filed his initial report. *Id.* The plaintiff argued that the new calculation was in response to the defendant's expert's criticism, but the court found that the opinion was new because it included a new opinion based on data that was not a part of the plaintiff's expert's initial report, though it was available to him. *Id.*

In this case, Dr. Dwyer's initial report concluded that "all or nearly all members of the proposed class were impacted by price increases implemented by the defendants," which is explored more thoroughly below in the Court's analysis regarding class certification. Dr. Dwyer's conclusion was based on "systematic, empirical comparisons of net prices paid by class members of Containerboard Products before and after price increase implementation dates previously announced by the defendants." Defendants' experts criticized Dr. Dwyer for conducting what Defendants call a "one penny more" analysis, where any increase in price is attributed to Defendants' alleged conduct. This, according to Defendants, means that **[*592]** Dr. Dwyer's methods did not account adequately for other factors that would have caused an increase in price even without **[**18]** a conspiracy. Defendants' experts argue that Dr. Dwyer should have done a "but-for" analysis to determine antitrust impact.

In his reply, Dr. Dwyer does the analyses that Defendants' experts argue he should have done initially. Importantly, Dr. Dwyer does not abandon his prior methods or conclusions. Rather, he conducted the additional analyses to refute Defendants' arguments and to show that his original conclusions and opinions are sound and a reliable method of assessing antitrust impact. This makes Dr. Dwyer's reply report remarkably similar to the reply report allowed in Sloan Valve Co. Much like the reply report in that case that included new calculations based on the same data included in the initial report, here Dr. Dwyer's reply report is based on the same data in his original report and does not seek to include new data. Instead of abandoning his prior methods in favor of the new ones, Dr. Dwyer's reply concludes that the new calculations support his initial methodology and opinions. Dr. Dwyer further concludes that Defendants' experts are wrong when they say that the additional testing and methods show that there is no antitrust impact. This is the very purpose of a reply **[**19]** report: to refute a defendant's expert's arguments and to provide further support, rather than abandoning, one's initial opinions. Dr. Dwyer will be held to the original methodology and opinions in his initial report, but that does not mean he cannot respond to Defendants' experts' criticisms in defending his initial conclusions. Thus, the Court denies Defendants' Motion to Strike to the extent that it seeks to strike portions of Dr. Dwyer's reply report.

2. Dr. Zona's Reply Report

Dr. Zona was not initially an expert disclosed before class certification briefing. Dr. Zona is an expert Plaintiffs hired to examine "the opening expert reports submitted by Drs. Harris and Dwyer, as well as the reports submitted by

Drs. Carlton and Ordover." He also conducted his own "but-for" analysis and concludes that Dr. Dwyer's "methodology and opinions on both impact and damages [is] reliable and valid."

Defendants are probably correct that Dr. Zona's report should be stricken. The Court need not engage in lengthy analysis, however, because Plaintiffs do not need Dr. Zona's report to satisfy *Rule 23*, a point Plaintiffs concede. Thus, the Court grants Defendants' Motion to Strike Dr. Zona's report.

B. Class [20] Certification — Combined Arguments**

Having narrowed the range of expert evidence to only the reports and deposition testimony of Drs. Dwyer, Harris, Ordover, and Carlton, the Court now considers whether to certify Plaintiffs' proposed class based on the parties' combined briefing.

1. Rule 23(a) Elements

HN7[] In order to warrant class certification, Plaintiffs must prove "numerosity, typicality, commonality, and adequacy of representation." *Messner, 669 F.3d at 811*. As Defendants correctly note, *Rule 23(b)*'s predominance standard often overlaps with typicality, commonality, and adequacy. Thus, Defendants have focused their arguments on predominance issues rather than individually attacking each of *Rule 23(a)*'s elements. Essentially, Defendants have conceded that typicality, commonality, and adequacy have been satisfied so long as Plaintiffs have adequately proven predominance.

As to numerosity, Defendants have not specifically challenged that element in their briefing, and the element is easily satisfied in this case. The sales data relied upon by both parties' experts establish that the proposed class numbers in the thousands. A potential class that large is sufficiently numerous for *Rule 23(a)* purposes. *See, Schmidt v. Smith & Wollensky LLC, 268 F.R.D. 323, 326 (N.D. Ill. 2010)*.

2. Rule 23 (b)(3) Elements

Plaintiffs seek certification under **[**21]** ***HN8***[] *Rule 23(b)(3)*, which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly **[*593]** and efficiently adjudicating the controversy." The Court will discuss predominance first and then, if necessary, superiority.

i. Predominance

The parties' statements of the proper legal standard for determining predominance differ greatly. To read Plaintiffs' version, one would think that predominance naturally flows from the fact that this is an antitrust case. [Pl.'s Mot. for Class Cert. at 49, ECF No. 660.] Defendants' version, on the other hand, would lead one to believe that the Supreme Court's opinion in *Comcast* makes satisfying predominance nearly insurmountable. [Def.'s Opp. Br. at 23-27, ECF No. 763.] The truth is somewhere in the middle.

HN9[] The predominance inquiry under *Rule 23(b)(3)* "'trains on the legal or factual questions that qualify each class member's case as a genuine controversy,' with the purpose being to determine whether a proposed class is 'sufficiently cohesive to warrant adjudication by representation.'" *Messner, 669 F.3d at 814* (quoting *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997))*. Predominance is similar to *Rule 23(a)*'s typicality and commonality **[**22]** requirements, but "the predominance criterion is far more demanding." *Id.* (internal quotation marks omitted). And although the Supreme Court has said that "predominance is a test readily met" in antitrust cases, that simply means that "in antitrust cases, *Rule 23*, when applied rigorously, will frequently lead to certification." *Id. at 815* (internal quotation marks and citation omitted). This does not, however, make class certification automatic in antitrust cases. *See, id.*

HN10[] Generally, predominance is satisfied when "'common questions represent a significant aspect of [a] case and can be resolved for all members of [a] class in a single adjudication.'" *Id.* (quoting 7AA Wright and Miller, Federal Practice & Procedure § 1778 (3d Ed. 2011)). In other words, "common questions can predominate if a common nucleus of operative facts and issues underlies the claims brought by the proposed class." *Id.* (internal quotation marks omitted). The presence of some individual questions is not fatal, but individual questions cannot predominate over the common ones. *Id.* To determine if a question is common, the Court must look to the evidence necessary to answer that question; if "the members of a proposed class will need **[**23]** to present evidence that varies from member to member" to answer the question, then the question is an individual one. *Id.* (internal quotation marks omitted). Conversely, "if the same evidence will suffice for each member" to answer the question at issue, then the question is common. *Id.*

HN11[] "Analysis of predominance under *Rule 23(b)(3)* 'begins, of course, with the elements of the underlying cause of action.'" *Id.* (quoting *Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 131 S.Ct. 2179, 2184, 180 L. Ed. 2d 24 (2011))*. In the antitrust context, plaintiffs must prove: "(1) that [Defendants] violated federal ***antitrust law***; and (2) that the antitrust violation caused them some injury." *Id.* Plaintiffs must also show damages, but "[i]t is well established that the presence of individualized questions regarding damages does not prevent certification." *Id.* (citing *Wal-Mart, 131 S.Ct. at 2558*).

To provide a clearer analysis, the Court will discuss each antitrust element separately, keeping in mind that ***HN12***[] "*Rule 23(b)(3)* . . . does not require a plaintiff seeking class certification to prove" that each individual element is "susceptible to classwide proof." *Amgen Inc. v. Conn. Ret. Plans and Trust Funds, 133 S.Ct. 1184, 1196, 185 L. Ed. 2d 308 (2013)*. "Rather, the inquiry is more holistic." *In re High-Tech Employee Antitrust Litig., 985 F.Supp.2d 1167, 1184 (N.D. Cal. 2013)*. And although predominance analysis is not simply "bean counting," *Butler v. Sears, Roebuck and Co., 727 F.3d 796, 801 (7th Cir. 2013)*, analyzing each element separately is useful in isolating what questions are common **[**24]** and determining whether those questions predominate.

a. Plaintiffs' Liability Proof

Plaintiffs have established that common questions regarding liability predominate over any individual issues. Plaintiffs' **[*594]** theory of liability is based on Defendants' alleged conspiracy to coordinate supply restrictions and price increase announcements in order to cause the price of Containerboard Products to increase. To prove each element of a conspiracy, virtually all class members would be relying on the same evidence that Plaintiffs have submitted in support of class certification — namely the documents, emails, phone records, and other indirect evidence necessary to prove that Defendants conspired in violation of antitrust laws. This type of alleged conspiracy is the prototypical example of an issue where common questions predominate, because it is much more efficient to have a single trial on the alleged conspiracy rather than thousands of identical trials all alleging identical conspiracies based on identical evidence. *See*, 7AA Wright & Miller, Federal Practice & Procedure § 1781 (3d Ed. 2014) (***HN13***[] "[W]hether a conspiracy exists is a common question that is thought to predominate over the other issues in the case **[**25]** and has the effect of satisfying the prerequisite in *Rule 23(b)(3)*.").

Defendants' arguments on this issue go entirely to the merits of Plaintiffs' conspiracy claims. Defendants argue that Plaintiffs have not established a conspiracy, offering up several innocent reasons for their conduct. Defendants also attach great significance to Plaintiffs' failure to produce any explicit, direct agreement among Defendants to fix prices. Because Plaintiffs have not proven an actual conspiracy, Defendants argue that the Court should deny class certification.

But whether Defendants actually conspired is not the issue before the Court. The issue is whether the conspiracy question will be decided by evidence common to the class, and both parties have demonstrated that the evidence either proving or disproving a conspiracy will be common to the entire class. Defendants' arguments on this point are identical to the defendants' liability arguments in *In re Polyurethane Foam Antitrust Litigation, No. 1:10 MD 2196, 2014 U.S. Dist. LEXIS 161020, 2014 WL 6461355 (N.D. Ohio Nov. 17, 2014)*. In that case, the defendants argued that "the price-fixing conspiracy alleged in the Complaint did not exist," based on "the failure of discovery to yield evidence of any agreement among foam manufactures to fix **[**26]** the timing or content of price increase letters." *2014 U.S. Dist. LEXIS 161020, [WL] at *16* (internal quotation marks and alterations omitted). The defendants also argued that their conduct was "consistent with legal and economic theory predictions of behavior" in the relevant markets. *Id.* The court rejected those arguments at the class certification stage, noting that those arguments "do not succeed in showing liability questions — however answered — cannot be answered through common proof." *Id.*

Like the defendants in *In re Polyurethane Foam,* Defendants' arguments here do not demonstrate the lack of common proof; rather, Defendants' own evidence tending to disprove a conspiracy is common to the entire class. Defendants' arguments, if correct, might entitle them to summary judgment or a verdict in their favor, but such merits arguments are inapplicable at this stage. *Id.* Thus, Plaintiffs have established that common questions predominate the liability issue.

b. Plaintiffs' Impact Proof

The heart of the battle in this case lies in the second element, *i.e.*, causation, which is often referred to as antitrust impact. According to Defendants, individual issues overwhelm the common questions regarding impact because Plaintiffs' experts **[**27]** have not provided a just and reliable method of proving that the alleged antitrust violations harmed all or nearly all class members. Thus, according to Defendants, Plaintiffs' only avenue of proving causation is through individual proof relating to each of the thousands of class members, which makes class certification inappropriate.

Given the parties' overlapping arguments relating to impact and damages, the Court must first outline an important distinction: ***HN14***[] "impact" and "damages" are two separate elements in an antitrust claim. *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litigation, 256 F.R.D. 82, 88 (D. Conn. 2009)*. Impact is "whether the plaintiffs were harmed," whereas "damages quantify *by how much*." *Id.* Parties and courts often conflate the two, leading to "confusion about what a plaintiff's burden precisely **[*595]** is at the motion for class certification stage." *Id.* Oftentimes, demonstrating impact and damages involves "comparing the 'but-for' price — the price a customer would have paid in the absence of the conspiracy — and the actual price paid." *Id.* When that happens, the single comparison establishes both impact and damages. *Id.* Thus:

> [O]ne way of demonstrating predominance is to show that there is a common method for proving that the class plaintiffs paid higher actual **[**28]** prices than in the but-for world, such as using an econometric regression model incorporating a variety of factors to demonstrate that a conspiracy variable was at work during the class period, raising prices above the "but-for" level for all plaintiffs.

Id. Defendants in this case base a large portion of their impact arguments on the perceived lack of a "but-for" analysis.

But, ***HN15***[] "where other methods of common proof exist to show class-wide impact such as lock-step increases of national price lists in an oligopolistic market, comparing 'but-for' prices with actual transaction prices is not the *only* way for plaintiffs to succeed in an motion for class certification." *Id.* For example, "'if it appears that plaintiffs may be able to prove at trial . . . the price range was affected generally,'" then the plaintiffs can show impact without a "but-for" comparison, and this is so even if there are negotiated prices or a variety of prices. *Id.* (quoting *In re NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493, 523 (S.D.N.Y. 1996))*; *see also, In re Urethane Antitrust Litig., 768 F.3d at 1254-55*. The court in Hedges summed up this point succinctly:

> The proof necessary to demonstrate that the defendants conspired to maintain an inflated "base" from which all pricing negotiations began and that this "base" price was higher than **[**29]** the "base" price which would have been established by competitive conditions would be common to all members of the class. Proof of a conspiracy to establish a "base" price would establish at least the fact of damage, even if the extent of the actual damages suffered by the plaintiffs would vary. . . . [T]he proof with respect to the "base" price from which these negotiations began, or the structure of the conspiracy to affect individual negotiations, would be common to the class. Accordingly . . . the fact of damage is predominantly, if not entirely, a common question.

Hedges Enters., Inc. v. Cont'l Grp., Inc., 81 F.R.D. 461, 475 (E.D. Penn. 1979). ***HN16***[] Courts have long held that a plaintiff can demonstrate antitrust impact by showing that the conspiracy caused an increase to the standard market price of the product at issue. *See, e.g., In re Urethane Antitrust Litig., 768 F.3d at 1254-55* (finding impact satisfied for class certification purposes based in part on evidence of "parallel issuance of similar product . . . price-increase announcements"); *In re Urethane Antitrust Litig. (Urethane II), 251 F.R.D. 629, 638 (D. Kan. 2008)* ("[E]vidence of a standardized pricing structure, which (in light of the alleged conspiracy) presumably establishes an artificially inflated baseline from which any individualized negotiations would proceed, provides generalized proof of class-wide impact."); *In re Indust. Diamonds Antitrust Litig., 167 F.R.D. 374, 383 (S.D.N.Y. 1996)* ("[I]f a plaintiff proves that **[**30]** the alleged conspiracy resulted in artificially inflated list prices, a jury could reasonably conclude that each purchaser who negotiated an individual price suffered some injury.").

This distinction between impact and damages is crucial in a case like this, where Plaintiffs have presented (1) record and expert evidence independently showing impact and (2) an econometric model that attempts to prove both damages and therefore impact. Because Plaintiffs do not rely solely on their econometric damages model for their impact proof, Defendants' impact arguments based on the lack of a "but-for" comparison are ineffective. *See, e.g., In re EPDM Antitrust Litigation, 256 F.R.D. at 88-89*. Those arguments go to damages, not impact. With this distinction in mind, the Court now addresses impact.

HN17[] Demonstrating antitrust impact for class-certification purposes does not require that Plaintiffs *prove* antitrust impact. Instead, Plaintiffs need "only to demonstrate that the element of antitrust impact *is capable* ***[*596]*** *of proof at trial* through evidence that is common to the class rather than individual to its members." *Messner, 669 F.3d at 818* (internal quotation marks omitted). The focus, then, is on the evidence necessary to establish antitrust impact, not on whether Plaintiffs **[**31]** have adequately proven it. Again, the Court's overriding concern is whether Plaintiffs have established that the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amgen Inc., 133 S.Ct. at 1196* (internal quotation marks omitted).

Although Defendants have concentrated their impact arguments on the expert evidence, ***HN18***[] the Court looks to all the evidence to determine whether Plaintiffs have established that evidence common to the class is capable of proving antitrust impact. *See, In re Urethane Antitrust Litig., 768 F.3d 1245, 1255-56 (10th Cir. 2014)*. The evidence in this case that goes to antitrust impact consists of (1) record evidence, which Plaintiffs allege shows illegal and anticompetitive conduct that increased the base price for Containerboard Products, (2) testimony from Dr. Harris regarding Defendants' industry and its susceptibility to collusive conduct, and (3) testimony from Drs. Dwyer and Harris that purport to establish that all or nearly all class members suffered harm as a result of the conspiracy.

First, Plaintiffs' have mustered a large amount of record evidence relevant to impact, which is mostly duplicative of their conspiracy evidence. Specifically, Plaintiffs produced evidence of what appears to be coordinated price increases, coordinated **[**32]** supply reductions, and other similar conduct that, according to Plaintiffs, Defendants would not have engaged in unless acting as part of a conspiracy. Plaintiffs also point to memoranda, phone calls, and trade association meetings that show the ability for Defendants to communicate with and monitor each other regarding their allegedly collusive activity.

Defendants respond by pointing to other evidence showing that they added capacity and supply during the class period, which would negate some of Plaintiffs' factual claims. Defendants also argue there are innocent reasons for their conduct. The Court need not decide at this stage which evidence to believe, however, because regardless of these factual disputes, the evidence on both sides is common to all class members. The question is whether Defendants' industry made it possible for them to collude in a way that would allow them to harm all or nearly all class members, and the evidence that both parties rely on to answer that question is common to the class.

Second, Plaintiffs rely on Dr. Harris to establish that the Containerboard Products market was ripe for collusion during the class period, and that Defendants' conduct is more likely **[**33]** the result of collusion than independent behavior. Dr. Harris conducted a "structure, conduct, performance" ("SCP") analysis to determine whether "the structure, conduct, and performance of [Defendants'] industry [was] consistent with, and likely to facilitate, collusive conduct, thereby providing a motive to collude and suggesting that any collusion would be broadly successful."

[Declaration of Dr. Harris at 5, ECF No. 658-2.] Dr. Harris also considered whether Defendants' conduct during the class period was more consistent with "concerted action or their unilateral self-interest." [*Id.*] Ultimately, Dr. Harris concludes that (1) "the economic evidence shows that Defendants had the motive, opportunity, and means to collude and were they to do so, . . . they would have succeeded," and (2) "the conduct of the Defendants was more consistent with collusion than with independent economic decision-making." [*Id.*]

In support of these opinions, Dr. Harris looked at a variety of industry-wide figures like capacity, operating rates, inventory, demand, and pricing in the containerboard market. Importantly, Dr. Harris found that the "vast majority of sales of . . . Containerboard Products are pegged **[**34]** to published price indices," the most common of which is the price for "42# Kraft liner [published] in Pulp and Paper Weekly ("PPW")." The PPW index in this case is critical because Drs. Harris and Dwyer rely in part on the movement of that index in demonstrating that all or nearly all class members suffered antitrust impact, as discussed more thoroughly below.

[*597] As to the "structure" portion of the SCP analysis, Dr. Harris analyzed the extent to which the Containerboard Products market is highly concentrated and the barriers to entry in that market. The evidence shows that, in 2003, only six North American firms controlled 72% of the Containerboard Products market, and by 2007, those six firms became five and accounted for 74% of the market. The evidence also shows, and Defendants do not challenge, that there are significant barriers to any new firms entering the market, such as the enormous amount of capital necessary to start a new firm. Dr. Harris also analyzed Containerboard Products to determine whether they are homogenous, which would mean that class members would see all Defendants as essentially offering the same product. If this is so, then the primary method of competition **[**35]** in the Containerboard Products market is price, rather than some other factor. Dr. Harris concludes that product homogeneity makes collusion easier, and finds that Containerboard Products are interchangeable commodities that are highly homogenous. This conclusion is based on Defendants' own statements, presentations, and tax filings, which tend to show that Defendants admit the commodity nature of Containerboard Products.

Finally, Dr. Harris analyzed the frequency of Defendants' interactions amongst each other and their participation and membership in trade associations. A conspiracy is much less likely to exist, Dr. Harris concludes, if firms communicate rarely. On the other hand, constant communication and participation in trade association events provide a fertile ground for collusion. Dr. Harris relies on academic economic literature for his conclusion "that trade associations tend to facilitate collusive conduct," and the evidence indeed shows that Defendants frequently interacted with each other as a part of their business operations and at various trade association meetings. Based on all this evidence and his own expert experience and opinion, Dr. Harris concludes that the "structural **[**36]** characteristics of the industry . . . are consistent with and would facilitate successful collusion among the Defendants."

As to the conduct portion of the SCP analysis, Dr. Harris looked at mill closures, operating rates/inventories/trades, downtime/slowback, coordinated pricing, monitoring, direct communication among Defendants, and Defendants' prior history of antitrust violations. In general, Dr. Harris concludes that, in the face of constant and increasing demand during the class period, Defendants reduced capacity — and therefore supply — by closing or slowing down the rate of production at mills. Specifically, Dr. Harris points to strategic mill closures or "downtime" that reduced capacity and supply in the face of "strong growth in box demand." Also important to Dr. Harris's analysis are the various price increase announcements that occurred during the class period. Defendants collectively announced fifteen price increases during the class period, nine of which were fully implemented. Defendants made these various announcements at near-identical times and for near-identical amounts. These announcements often occurred very shortly after various trade association meetings. Dr. **[**37]** Harris concludes that this conduct runs contrary to what independent firms would do when faced with similar market conditions and that Defendants' conduct is more consistent with collusive behavior than with normal, unilateral activity.

As to the "performance" portion of the SCP analysis, Dr. Harris relies on Dr. Dwyer's report, which Dr. Harris concludes is sound and founded in accepted economic theory. Based on Defendants' actual economic performance, Dr. Harris concludes that Defendants' performance is consistent with collusion.

Defendants hurl several attacks at Dr. Harris's opinions. First, Defendants argue that Dr. Harris failed to define the relevant market for purposes of his SCP analysis. According to Defendants, this failure is fatal and makes Dr. Harris's analysis useless. Defendants contend that Containerboard Products cannot possibly be a single market, because Containerboard Products include containerboard and corrugated products, which are not interchangeable and thus are **[*598]** not part of the same market. *See,* *Sargent-Welch Scientific Co. v. Ventron Corp., 567 F.2d 701, 710 (7th Cir. 1977)*.

Dr. Harris correctly responds, however, that the Containerboard Products market is the relevant market, and this is so despite the fact that the market includes both **[**38]** containerboard and corrugated products. Defendants draw an analogy between components of a personal computer and the personal computer itself, arguing that the components and the computer could not possibly be the same market, and therefore containerboard and corrugated products likewise cannot comprise a single market. The analogy fails because the analogs are not truly analogous; containerboard is not a component that goes into a corrugated product, it is the component. As Dr. Harris points out, containerboard is simply a corrugated product that hasn't been folded yet. Moreover, containerboard has no other use except for being folded into a corrugated product. And, there are no substitutes for containerboard — that is, corrugated products cannot come from some other source other than containerboard. Perhaps most importantly, Defendants' businesses are vertically integrated such that "the firms who manufacture the containerboard are the very same firms who convert that containerboard into corrugated products." [Reply Declaration of Dr. Harris at 24, ECF No. 826-2.] This means that there is no useful or principled way to separate the two into separate markets; they appear to be part **[**39]** in parcel of the same market. Thus, the Court finds that Plaintiffs have established and defined the relevant market for antitrust purposes.

Defendants next criticize Dr. Harris for failing to conduct a "but-for" analysis for each event that Dr. Harris analyzed, such as mill closures and downtime. In short, Defendants argue that Dr. Harris should have looked to each individual event during that class period, such as each mill closure, and then determined whether that specific event would have occurred even absent a conspiracy, and then further analyzed whether that specific event caused all or nearly all class members to pay higher prices than they otherwise would have paid.

Aside from "but-for" analysis not being required to show antitrust impact, this argument fails because it sets the hurdle too high. Defendants have not pointed to any case law or economic theory that says an expert conducting a SCP analysis must look at all events in isolation, and then view each individual event to see if that event specifically is the one that caused antitrust impact. To the contrary, ***HN19***[] it is a well-accepted practice to look to industry events as a whole to determine whether a defendant's conduct **[**40]** is consistent with collusion, as Dr. Harris does with his SCP analysis. *See,* *In re Processed Egg Prods. Antitrust Litig., F.Supp.3d , No. 08-md-2002, 81 F. Supp. 3d 412, 2015 U.S. Dist. LEXIS 8329, 2015 WL 337224, at *11 (E.D. Penn. Jan. 26, 2015)*. Dr. Harris correctly notes that "[n]othing in economic theory suggests that individuals or firms act on the basis of a single reason or animating event." [Reply Declaration of Dr. Harris at 24, ECF No. 826-2.] Dr. Harris's analysis simply looked at all of Defendants' capacity-reducing decisions in total to determine whether they were more likely the result of collusion or not. Plaintiffs' theory of harm is that Defendants' collusive actions caused an increase in the market price of Containerboard Products, which harmed all or nearly all class members, and Dr. Harris's SCP analysis is consistent with and supports that theory. Several courts have relied on an expert's analysis on the structures and features of a market in certifying a class. *See, e.g.,* *In re EPDM Antirust Litig., 256 F.R.D. at 90* ("The plaintiffs have not merely alleged that these prices lists existed and that they affected all EPDM purchasers — they have . . . provided expert opinion that the structural characteristics of the EPDM market would support collusive increases of prices to artificially high levels.").

Third, Plaintiffs rely on Dr. Dwyer's analysis of Defendants' **[**41]** conduct and the corresponding movement of the PPW index to demonstrate impact. Dr. Dwyer looked at "industry-wide reflections of price and actual prices paid by class members before and after" Defendants' price increase announcements. [Report of Mark Joseph Dwyer, Ph.D., **[*599]** at 7, ECF No. 658-4.] Dr. Dwyer's analysis started with looking at the nature of Defendants' price increase announcements. Of those fifteen announcements, fourteen included all Defendants. For eleven of those fifteen, the announcements were made during the same month. And, for all fifteen, the amount of the increased price was either identical or near-identical across all Defendants. Because of the "lock-step" nature of these price increase announcements, Dr. Dwyer found that "[t]he extent to which the [Defendants'] price increase announcements are reflected — both in timing and in magnitude — in a published price index for linerboard is indicative of impact on prevailing market prices and therefore of the class-wide price impact of such announcements." [*Id.* at 8.] Such a method is a common way that courts have allowed experts to demonstrate impact. *See, In re Urethane Antitrust Litig., 768 F.3d at 1254-55*.

As briefly mentioned above, the PPW index is the price index Dr. Dwyer relied on for his analysis. PPW and its price **[**42]** index are published by "RISI," which is a private publisher that has been publishing the PPW index consistently for thirty years, including throughout the class period. As Dr. Dwyer explains:

> Every third week of the month, PPW publishes price indexes for a variety of paper products, including linerboard and corrugated medium. These transaction price indexes are based on surveys of buyers and sellers of a particular containerboard grade. RISI included in the prices it published in its surveys only those related to transactions between non-affiliated parties. Internal transfers and trades between producers were excluded. PPW also excludes transactions that were contractually tied to a price index. These filters make the indexes more representative of the prices class members actually paid.

[Report of Mark Joseph Dwyer, Ph.D., at 9, ECF No. 658-4.] Of the various products that PPW provides an index for, Dr. Dwyer relied on the price for "42 lb. unbleached kraft linerboard." [*Id.*] This index price, according to Dr. Dwyer, "is used as the industry linerboard price in [Defendants'] own analysis of industry pricing." [*Id.*] This is supported by evidence indicating that Defendants do indeed rely upon the PPW index in setting their **[**43]** prices for Containerboard Products, negotiating prices in individual contracts, and analyzing the market. [Pl.'s Mot. for Class Cert. at 9, ECF No. 660 (citing evidence ranging from Defendants' own documents to deposition testimony demonstrating the pervasive use of the PPW index in determining Containerboard Product pricing).]

In comparing the PPW index and Defendants' price increase announcements, Dr. Dwyer found that nine of the fifteen announcements "are reflected by increases in the PPW Index after the effective dates of those announced increases." [Report of Mark Joseph Dwyer, Ph.D., at 11, ECF No. 658-4.] Most importantly, in all nine instances, the dollar amounts that the PPW index increased matched Defendants' announced increase. According to Dr. Dwyer, "[i]f a substantial portion of survey participants had reported that they did not experience a price increase, the PPW Index would not reflect an increase identical to what the defendants had announced." [*Id.*] In other words, Defendants collectively announced near-identical price increases, and shortly following those announcements, the PPW index showed that most customers experienced an increase in price exactly equal to the price increase Defendants announced. Thus, **[**44]** the lock-step increase in the PPW index that followed and tracked Defendants' collective price-increase announcements demonstrates that nearly all class members suffered antitrust impact.

Defendants first counter Dr. Dwyer's PPW index assessment by arguing that there is nothing surprising about the fact that a published index price would increase once manufacturers in a market announce that prices are increasing. In logical terms, Defendants characterize Dr. Dwyer's analysis as running afoul of the *post hoc ergo propter hoc* fallacy: that the PPW index increased *after* Defendants announcements does not necessarily mean it increased *because* of those announcements.

[*600] But, as Dr. Dwyer states, there is more than simple correlation here. First, there is more to the relationship between Defendants' price increase announcements and the PPW index than, say, the relationship between a Chicagoan jumping on one foot and not being eaten by a wild lion. It would be absurd to say that, because the Chicagoan was not eaten by a lion after jumping on one foot, jumping on one foot must keep lions away. That is because there are several reasonable, common-sense alternatives for why the Chicagoan was not eaten **[**45]** by a lion — for one, the lack of wild lions roaming Chicago. But here, as Dr. Dwyer demonstrates, there does not appear to be any other reasonable explanation for such a close relationship between the PPW index and Defendants' price increase announcements. Moreover, the source of the PPW index is known; the index represents actual prices purchasers paid following Defendants' price increase announcements. This constitutes strong evidence that Defendants' price increase announcements caused the PPW index to increase. And this, in turn, constitutes strong evidence that all or nearly all class members were impacted by the increased price, given Plaintiffs' evidence regarding the paramount importance of the PPW index in setting prices.

Defendants also argue that Plaintiffs' reliance on the PPW index in analyzing impact is misplaced. Defendants argue that the index does not reflect class member's actual transaction prices because it is "not a mathematical reflection of actual transaction prices; it is a level that virtually nobody actually pays for tonnage within assessed specifications." [Def.'s Opp. Br. at 14, ECF No. 763.] Additionally, Defendants argue that a large number of class members **[**46]** individually negotiated a price rather than simply paying the index price. These arguments miss the mark because Plaintiffs have produced evidence showing that (1) Defendants largely rely on the PPW index in setting prices, and (2) in most individually negotiated contracts, the PPW index factored into the negotiated price. At the least, Plaintiffs have presented sufficient evidence that would allow a fact-finder to infer that, even for negotiated prices, the starting point for those negotiations would be higher if the market price for the product was artificially inflated. This comports with ***HN20***[] the "prevailing view" that "price-fixing affects all market participants, creating an inference of class-wide impact even when prices are individually negotiated." *In re Urethane Antitrust Litig., 768 F.3d at 1254*. Thus, Defendants' attempt to minimize the importance of the PPW index fails to defeat class certification. And, to the extent that Defendants' arguments regarding the merits of relying on the PPW index are correct, those arguments are still based on class-wide evidence, which supports a finding of predominance.

Although Plaintiffs have provided additional testimony from Drs. Dwyer and Harris to prove the merits of antitrust impact - **[**47]** that all or nearly all class members *actually* suffered antitrust harm — at this point the Court is satisfied that Plaintiffs demonstrated that the impact element of their antitrust claim is capable of proof at trial through evidence common to the class. Each class member, if forced to proceed on an individual basis, would be relying on the same evidence of the structure, conduct, and performance of Defendants' industry and their uniform price-increase announcements in order to show an elevated baseline price for the Containerboard Products they purchased during the class period. Thus, the impact evidence in this case is common to the class, and because the evidence, if true, establishes that Defendants' conspiracy caused a market-wide increase to the price of Containerboard Products, Plaintiffs have established impact for class certification purposes. Numerous cases have found that when a plaintiff produces evidence that the alleged conspiracy increased the baseline price of a product, "there is an inference of class-wide impact." *In re Urethane Antitrust Litig., 768 F.3d at 1254* (collecting cases across several jurisdictions). Evidence that multiple defendants issued "parallel price-increase announcements" especially supports the **[**48]** inference of class-wide impact, and this is true "even when prices are individually negotiated." *Id. at 1254-55*. Defendants' arguments that, in fact, most class members were not impacted by the alleged conspiracy may ultimately prove successful at trial or summary judgment. **[*601]** But at the class certification stage, those issues are not before the Court. Therefore, Plaintiffs have established that common questions predominate over individual issues as to impact.

c. Plaintiffs' Damages Proof

HN21[] Damages are but one element that the Court considers in determining predominance under *Rule 23(b)(3)*. *Roach v. T.L. Cannon Corp., 778 F.3d 401, 2015 WL 528125, at *6-7 (2nd Cir. 2015)*. To establish predominance, a plaintiff must produce a reliable method of measuring class-wide damages based on common proof. *See, id.* But, "[i]t is well established that the presence of individualized questions regarding damages does not prevent certification." *Messner, 669 F.3d at 815* (citing *Wal-Mart, 131 S.Ct. at 2558*). Thus, if Defendants are correct that Plaintiffs' multiple-regression model is not capable of proving class-wide damages, that alone will not defeat certification. *See, id.* Instead, the Court would need to consider whether the individual issues in calculating damages would overwhelm the common issues relating to liability and impact.

Defendants **[**49]** resist these principles, arguing that the Supreme Court changed the law in this area with its decision in *Comcast*. Defendants argue that, "since *Comcast*, a class should not be certified if the plaintiffs fail to present a damages model applicable to individual class members on a class-wide basis or through a simple computation." [Def.'s Opp. Br. at 55, ECF No. 763.] As several courts since *Comcast* have noted, however, ***HN22***[] *Comcast* did not change the well-established rule that the existence of individual damage issues does not automatically defeat class certification. *See, e.g., In re Nexium Antitrust Litig., 777 F.3d 9, 2015 WL 265548, at *8 (1st Cir. 2015)* (stating, *post-Comcast*, that "the Supreme Court . . . and the circuits in other cases have made clear that the need for some individualized determinations at the . . . damages stage does not defeat class certification").

The Seventh Circuit has also stated *Comcast's* meaning in the class certification context, explaining that *Comcast* was concerned with a damages methodology that measured the harm resulting from four theories of liability, three of which the district court had rejected. *In re IKO Roofing Shingle Prods. Liability Litig., 757 F.3d 599, 602 (7th Cir. 2014)*. Because the damages model did "not even attempt" to "measure only those damages attributable to" the remaining **[**50]** liability theory, *Comcast Corp., 133 S.Ct. at 1433*, "the class could not get anywhere," *In re IKO Roofing Shingle Prods. Liability Litig., 757 F.3d at 602*. Also, the plaintiffs relied solely on their damages model to also prove impact, rather than presenting separate evidence of impact. Finally, as several courts have noted, *Comcast* was based entirely on one key concession: the plaintiffs in that case inexplicably did not challenge the district court's conclusion that it could not certify the class unless damages were measurable "on a class-wide basis through use of a common methodology." *Comcast Corp., 133 S.Ct. at 1430*; *see also, In re Urethane Antitrust Litig., 768 F.3d at 1258* ("First, unlike the claimants in *Comcast*, our plaintiffs did not concede that class certification required a method to prove class-wide damages through a common methodology."). Plaintiffs in this case have not made a similar concession, and they have presented additional class-wide evidence showing that impact is capable of proof at trial, as discussed above. Thus, the Court will consider whether Plaintiffs' damages model is capable of quantifying damages on a class-wide basis. If so, Plaintiffs have established predominance as to each element of their antitrust claim and the class will be certified. If not, the Court will determine whether individual damages issues will overwhelm **[**51]** the common issues.

In establishing damages, Plaintiffs rely on Dr. Dwyer, who conducted a "preliminary analysis that demonstrates the feasibility of reliably estimating damages on a class-wide basis through the use of . . . multiple regression analysis." Although no expert in this case explains in simple terms what a "multiple regression analysis" entails, the method is common enough to understand through case law and references like the *Reference Manual on Scientific Evidence* by Professor Daniel Rubinfeld, which the Seventh Circuit has deemed a reliable source for understanding this type of technical evidence. *See, ATA Airlines, Inc. v. Fed. Express Corp., 665 F.3d 882, 889-90* ***[*602]*** *(7th Cir. 2011)*. "Multiple regression analysis is a statistical tool for understanding the relationship between or among two or more variables." Daniel L. Rubinfeld, *Reference Guide on Multiple Regression*, in Reference Manual on Statistical Evidence 305 (3d Ed. 2011)). The tool looks at a dependent variable, which is the variable to be explained, and independent variables, which are the variables "thought to influence the dependent variable." *In re EPDM Antitrust Litig., 256 F.R.D. at 95*. Here, the price of Containerboard Products is the dependent variable, and the independent variables are the various factors that might have an **[**52]** effect on price, like the alleged conspiracy and the costs involved in producing the products. This type of statistical tool "allows economists to estimate whether a certain market factor has an effect on the dependent variable and to what degree. By determining whether a particular variable in the equation influences the dependent variable, the economist can accept or reject that variable as having an influence on the dependent variable." *Id.* Multiple regression analysis is common in antitrust cases, where the plaintiffs use it to show that an alleged "conspiracy" has a statistically significant impact on the dependent variable — usually price. Rubinfeld, *Reference Guide on Multiple Regression* 305-07.

Dr. Dwyer purports to do precisely this type of analysis in measuring damages. But, the Court cannot simply accept Dr. Dwyer's report simply because it appears to do a multiple regression analysis. Rather, "as painful as it may be," *ATA Airlines, Inc., 665 F.3d at 896*, the Court must rigorously screen expert evidence when certifying a class to ensure that the damages model only seeks to prove damages that flow from the harm alleged, *Comcast Corp., 133 S.Ct. at 1435*.

The reliability of an expert's multiple regression analysis depends on the choices the **[**53]** expert makes in choosing variables and setting up the model. *See*, Daniel L. Rubinfeld, *Reference Guide on Multiple Regression* 311-17. In determining whether a model is set up correctly, courts consider several questions: "has the expert correctly identified the dependent variable; has he or she chosen the correct explanatory variable that is relevant to the question at issue; are the additional variables chosen all correct or are some missing [or] irrelevant; is the form of the analysis correct?" *In re EPDM Antitrust Litig., 256 F.R.D. at 95*. (citing a prior edition of Professor Rubinfeld's *Reference Guide on Multiple Regression*).

Here, Dr. Dwyer estimates the economic damages attributable to the alleged conspiracy by looking at prices class members actually paid and what they would have paid "but for" the alleged conspiracy. To do this, Dr. Dwyer created two categories of products: Intermediate Containerboard Products ("ICP"), which consists of roll stock and corrugated sheets, and Final Containerboard Products ("FCP"), which consists of all other Containerboard Products. [Report of Mark Joseph Dwyer, Ph.D., at 19, ECF No. 658-4.] Dr. Dwyer then selected a benchmark period of months before and after the class period to compare the prices class members paid during the **[**54]** class period to those prices outside the period. Next, Dr. Dwyer conducted a multiple regression analysis whereby he analyzed the change in the price of Containerboard Products during the class period. He included several independent variables to control for non-conspiratorial economic factors that normally influence price, and he also included a "dummy variable," which is the independent variable that tests whether the alleged conspiracy influenced price. "A positive estimated effect for this dummy variable indicates that prices during the class period are higher than can be explained by the economic factors serving as controls and therefore supports the inference that the elevation is attributable to the collusion alleged by plaintiffs." [*Id.*]

As the Court understands it, under Dr. Dwyer's model, if the non-conspiratorial economic factors fully explain the increase in price during the class period, then the dummy variable indicator would be close to zero, which means that the conspiracy had virtually no effect on price. If this is the case, there are no damages because the conspiracy did not increase prices above what the prices would have been absent the conspiracy. **[*603]** Conversely, if **[**55]** the increase in price is attributable solely to the conspiracy and no other economic factor, then the dummy variable would be close to one. If this is the case, the damages would be astronomical because the full amount of the price increases during the class period would be attributed solely to the conspiracy.

Dr. Dwyer accounted for numerous variables in an attempt control for economic factors that might explain the change in price during the class period. The Court need not list them all, but Dr. Dwyer grouped them into four categories: downstream demand; production and delivery; inflation; and seasonal factors. Importantly, these categories include independent variables that account for various costs that affect price like the price of pulp that goes into making containerboard, labor costs, and fuel costs associated with production and delivery.

With the potential variables selected, Dr. Dwyer ran regressions for the ICP and FCP categories. Dr. Dwyer used two different procedures to determine which independent variables, in addition to the dummy variable, would be included in the regression. Under the first procedure, the Alkaike Information Criterion (the "AICC method"), the dummy **[**56]** variable reflected an overcharge of 4.05% for the ICP product category and 3.61% for the FCP product category. Under the second procedure, the Bayesian Information Criterion (the "BIC method"), the ICP overcharge was 4.04% and the FCP overcharge was 2.38%.

Dr. Dwyer also attempted to assess the robustness of his results by including only the 10 independent variables "with the most explanatory power." [Id.] This regression shows an overcharge attributable to the conspiracy of 3.33% for the FCP products and 2.78% for the ICP products. Dr. Dwyer then used the average overcharge amounts mentioned above to calculate damages. The average overcharge was 2.92% for the FCP products and 3.81% for the ICP products.

To arrive at a total damages figure, Dr. Dwyer multiplied the average ICP and FCP overcharges by the dollar amount of purchases class members made during the class period. Dr. Dwyer also attempted to subtract out of the total purchases those that were made during the class period, but whose prices were part of a contract entered into before the class period. This method is consistent with Plaintiffs theory of harm that Defendants' conspiracy raised the market price that all class members **[**57]** paid for Containerboard Products during the class period. During the class period, class members paid $21.06 billion for ICP products. Based on Dr. Dwyer's overcharge of 3.81%, class members paid $801.27 million dollars more than they would have absent the conspiracy. Class members also paid $102.25 billion for FCP products. Based on Dr. Dwyer's overcharge of 2.92%, class members paid $2.991 billion dollars more than they would have absent the conspiracy. Dr. Dwyer's report also breaks down the total amount of damages caused by each Defendant. In sum, Dr. Dwyer's preliminary estimate of damages is $3.792 billion.

Defendants first argue briefly that Dr. Dwyer's report cannot be trusted because it only shows damages based on the class period reflected in Plaintiffs Amended Complaint, rather than the period initially alleged. Defendants cite no authority for disregarding an expert's methodology because he relied upon the class period as alleged in an amended complaint. Dr. Dwyer did what was asked of him based on the class period supplied to him by Plaintiffs.

That Plaintiffs amended their Complaint does not change the Court's analysis on whether Dr. Dwyer's model is capable of demonstrating **[**58]** class-wide damages. To the extent Defendants' arguments are relevant, they go to the weight a jury might give Dr. Dwyer's testimony, not its reliability or admissibility. *See, In re Urethane Antitrust Litig., 768 F.3d at 1263* (refusing to reverse district court based on the defendants' argument that the plaintiffs' expert moved the class period start date to maximize damages).

As to the substance of Dr. Dwyer's damages model, Defendants' experts first attack Dr. Dwyer's use of a technique called "principal components" to address a collinearity problem. The parties' experts appear to agree that running regressions in this case **[*604]** presents a collinearity problem, which occurs when two independent variables are highly correlated or related. Including collinear variables in a regression often skews the results.

To correct for collinearity, Dr. Dwyer inserted 150 independent variables into a computer program that would then select "principal components," which are those components that, according to the program, best explain the covariance across the independent variables. The program produced 133 principal components, which Dr. Dwyer then inserted into two different "stepwise regression" programs — AICC and BIC. Both programs operate the **[**59]** same way by starting "with a core model in which the variables that are entering into the model selection are absent." [Dwyer Dep. 137:25-138, Aug. 12, 2014, Ex. 3, ECF No. 763-2.] The programs then "consider[] adding a variable one step at a time," creating a model "until none of the remaining factors meet a certain threshold of explanatory power." [Dwyer Dep. 138:2-6, Ex. 3, ECF No. 763-2.] The only difference between AICC and BIC is the relevant threshold at which the program stops selecting new variables from the 133 available.

Defendants broadly claim that, according to economists, "'stepwise regression is to be avoided.'" [Def.'s Opp. Br. at 51 (quoting Peter Kennedy, *A Guide to Econometrics* 49 (6th Ed. 2008), ECF No. 763.] But as Dr. Dwyer points out in his reply report, the "stepwise regression" that "is to be avoided" is not the same regression that Dr. Dwyer performed, though admittedly economists often use "stepwise regression" to describe Dr. Dwyer's approach, a point Dr. Dwyer alluded to in his deposition. [Dwyer Dep. 120:3-5 ("Stepwise can sometimes have a particular meaning that would be inappropriate here."), Ex. 3, ECF No. 763-2.] Dr. Dwyer provides academic support **[**60]** for the type of model selection procedures he used, and the Court has compared the description of the stepwise method that is disfavored and Dr. Dwyer's method, and the two are indeed different. Furthermore, Dr. Dwyer notes that the model selection methods he used are included in most or all statistical software packages. The Court finds it unlikely that a model selection method that supposedly is rejected by the academic community would be included in all the software that same community uses to run regressions. Finally, Defendants have not cited any case law that rejects an expert's model solely because of the expert's use of Dr. Dwyer's model selection method. The Court therefore refuses to ignore Dr. Dwyer's report solely because he employed a stepwise regression.

Defendants next take issue with the way Dr. Dwyer used the AICC and BIC model selection methods. Defendants assert that, despite Dr. Dwyer's claim that his model is neutral, he did not allow either selection model to select variables in a neutral fashion. This is so, Defendants argue, because Dr. Dwyer "limited the variables the stepwise software could exclude so that the conspiracy dummy variable *had to be included*." **[**61]** [Def.'s Opp. Br. at 51, ECF No. 763.] Defendants interpret this method as forcing the model to assign the conspiracy variable a value even if the model would have otherwise excluded it as having no explanatory value. Defendants argue that Dr. Dwyer should have simply let the software select from all the available variables, and Defendants contend that, by doing so, the conspiracy variable would not have been selected.

Dr. Dwyer, however, had good reason for including the conspiracy variable in each of his regressions. As he correctly states, allowing the conspiracy variable to be omitted would tell the experts nothing about the conspiracy's effect on price. Moreover, Defendants are incorrect that forcing the model to test for the alleged conspiracy's effect on price necessarily means the model will find such an effect. Presumably, if the conspiracy had no effect on price, the model would show that the conspiracy variable had a zero or statistically insignificant effect on price. Because the independent variable at issue is the existence of a conspiracy, Dr. Dwyer reasonably included that variable in his regressions. Otherwise, his regressions would tell us nothing about the conspiracy's **[**62]** effect on price.

Additionally, Defendants' arguments are inconsistent. On the one hand, Defendants **[*605]** criticize Dr. Dwyer for using a stepwise regression to select which independent variables to include in each model, rather than using his own independent judgment to select those variables. On the other hand, they criticize him for using his economic judgment to use the conspiracy and inflation variables in each model, rather than letting the program pick all of the variables. Both experts state that the stepwise method can exclude variables that the program finds less explanatory, even though economic principles compel inclusion of the variable. Dr. Dwyer used his economic expertise to select certain factors that test for conspiracy and control for inflation, along with other factors selected by the stepwise programs. To the extent that Defendants challenge the specific factors included and excluded from his model, those arguments go to the weight and probative value of his testimony, not to the underlying methodology. *See, In re Urethane Antitrust Litig., 768 F.3d at 1260-61*.

Of course,**HN23**[] in some instances, inclusion or exclusion of a certain variable might be egregious enough to render an expert's report inadmissible altogether. *See, In re Scrap Metal Antitrust Litig., 527 F.3d 517, 530 (6th Cir. 2008)*. **[**63]** But that is not the case here. Defendants have not pointed to some specific, major factor that Dr. Dwyer excluded that shows his model is wholly without merit. To the contrary, Dr. Dwyer went to great lengths to include in his independent variables all sorts of factors that might otherwise explain the price increases during the class period. His methodology therefore appears to be firmly rooted in sound economic and econometric principles, and the large majority of Defendants' experts' criticisms go to the merits of whether the price of Containerboard Products "increased disproportionately to the cost of inputs as the result of a conspiracy to raise/maintain prices, or instead resulted from a non-collusive cause." *In re EPDM Antitrust Litig., 256 F.R.D. at 98*. This is a merits question that the Court does not need to resolve in order to decide whether to certify the class.

Defendants finally argue that Dr. Dwyer's damages calculations do not support class certification because his model "cannot be applied to individual plaintiffs, and Dwyer admitted that comparing a customer's price to the price predicted by his regression model would not indicate whether or not the customer had been damaged." [Def.'s Opp. Br. at 56, ECF No. 763.] **[**64]** But in a complicated antitrust case such as this, where the theory of harm is that the entire market price of a product was inflated as a result of a conspiracy, "plaintiffs are permitted to use estimates and analysis to calculate a reasonable approximation of their damages." *Loeb Indus., Inc. v. Sumitomo Corp., 306 F.3d 469, 493 (7th Cir. 2002)*; *See also, In re Scrap Metal Antitrust Litig., 527 F.3d 517 at 529* (approving a method of comparing a defendant's profits before and after a violation in "proving antitrust damages").

Moreover, **HN24**[] to the extent that there are individualized damages issues, that alone will not defeat class certification, especially where, as here, common issues predominate the liability and impact elements of Plaintiffs' claim. *Butler, 727 F.3d at 801*. And, should discovery demonstrate that individual damages issues indeed threaten to overwhelm the common issues such that class certification becomes inappropriate, Defendants may seek to decertify the class or modify the class so that only liability and impact are decided on a class-wide basis. *Messner, 669 F.3d at 826*. In light of the key, overwhelming common questions of liability and impact in this case, Defendants have not demonstrated that individual damages issues threaten to overwhelm the litigation.

In sum, the Court has poured over the parties submissions and accompanying evidentiary **[**65]** record and finds that Plaintiffs have satisfied the predominance requirement of *Rule 23(b)(3)* based on competent evidence common to the class.

ii. Superiority

Lastly, Plaintiffs must demonstrate that proceeding on a class basis is superior to other forms of resolving the dispute. Plaintiffs have made a sufficient showing that class treatment in this case is superior to individual cases. The overarching liability and impact issues are common to the class and can "be resolved in one stroke." *Butler, 727 F.3d at 801* (internal quotation marks **[*606]** omitted). And given the breadth and importance of the common issues, "the superiority requirement . poses no serious obstacle to class certification here." *Messner, 669 F.3d at 814 n.5*.

In attempting to defeat superiority, Defendants argue first that releases they obtained as a result of settling a prior antitrust lawsuit bar many class members' claims in this suit. Second, Defendants argue that many class members purchased Containerboard Products pursuant to contracts that include various "disqualifying clauses," such as forum selection clauses, jury waivers, and clauses that set the available time to bring a claim and the available damages. Defendants conclude that these issues make a class action unmanageable **[**66]** and create a "quagmire" that causes individual issues to predominate the common questions.

As to the first argument, ***HN25***[] when parties settle a case, a "court may release not only those claims alleged in the complaint and before the court, but also claims which could have been alleged . . . in connection with any matter or fact set forth or referred to in the complaint." *Wal-Mart Stores, Inc. v. Visa, 396 F.3d 96, 107 n.13 (2d Cir. 2005)* (internal quotation marks omitted). Such a "general release is valid as to all claims of which a signing party has actual knowledge or that he could have discovered upon reasonable inquiry." *Oberweis Dairy, Inc. v. Associated Milk Producers, Inc., 568 F.Supp. 1096, 1101 (N.D. Ill. 1983)* (citing *Goodman v. Epstein, 582 F.2d 388, 402-04 (7th Cir. 1978))*. In other words, "a release applies only as long as the released conduct arises out of the identical factual predicate as the settled conduct." *In re Digital Music Antitrust Litig., 812 F.Supp.2d 390, 399 (S.D.N.Y. 2011)* (internal quotation marks omitted).

Defendants settled with various opt-in and opt-out plaintiffs the *In re Linerboard Antitrust Litigation* lawsuit in the Eastern District of Pennsylvania. The lawsuit involved an alleged conspiracy that occurred between 1993 and 1995, although some individual cases did not settle until as late as 2008. According to Defendants, a "typical" settlement agreement from the *Linerboard* litigation released Defendants from all claims "relating in any way to **[**67]** any conduct prior to the Effective Date" of the agreement "concerning the purchase, sale, distribution, or pricing of linerboard, medium, corrugated containers [or] corrugated sheets." [Def.'s Opp. Br. at 64 n.59, ECF No. 763.] Defendants argue that such a broad agreement bars the claims at issue here, and that determining whether those claims are barred makes class action impracticable.

The Court disagrees. Although the release language is very broad, Plaintiffs' claims in this case are not based on an "identical factual predicate as the settled conduct." *In re Digital Music Antitrust Litig., 812 F.Supp.2d at 399*. The conduct at issue in the prior litigation was Defendants' allegedly collusive behavior in the mid-nineties. The actions at issue here are coordinated market manipulation and price-increase announcements that occurred nearly a decade later. And even though the collusive behavior that was alleged in the prior litigation is similar to the behavior alleged here, the claims in this case are not based on Defendants' alleged price-fixing behavior of the nineties. Under Defendants' argument, they are free to keep colluding in violation of antitrust laws so long as they conspire in the same way as they were alleged to have behaved in **[**68]** a prior settled case. The Court is unaware of any case supporting this argument; indeed, several cases are to the contrary. *See, id.* Because none of the *Linerboard* releases apply to this new case that is based on different facts, the Court finds that those releases do not defeat class certification.

Defendants' second argument is that several contractual provisions apply to disqualify some class members from participating in the class. According to Defendants, "the multitude of individualized issues (under the laws of multiple states) presented by the disqualifying clauses . . . render the class action mechanism inefficient." [Def.'s Opp. Br. at 72.]

The Court rejects this argument for several reasons. First, Defendants' argument relies on *Lozano*, in which the Seventh Circuit approved of a district court relying on class-action waivers in arbitration agreements to **[*607]** find class certification inappropriate. *Lozano v. AT&T Wireless Servs., Inc., 504 F.3d 718, 728 (7th Cir. 2007)*. Unlike the arbitration agreements in *Lozano*, however, none of the clauses here preclude class actions. *Lozano* therefore provides no support for Defendants' position.

Second, Defendants rely heavily on *In re Titanium Dioxide Antitrust Litigation*, in which the court enforced clauses contained **[**69]** within individual class members' contracts. *In re Titanium Dioxide Antitrust Litigation, 962 F.Supp.2d 840, 851-52 (D. Md. 2013)*. That case also fails to support Defendants' argument because there, the court *did not* find the existence of contractual provisions to be an impediment to class certification. *Id. at 846* (stating that the defendants' motion to modify the class definition to exclude class members who were subject to various contractual provisions was premature until "after the expiration of the class opt-out period"). Plaintiffs are correct that the majority of cases hold that the existence of contractual provisions does not automatically defeat class certification. *See, e.g., id.; Herkert v. MRC Receivables Corp., 254 F.R.D. 344, 350 (N.D. Ill. 2008)* ("[A] possibility that some of the putative class members could have cardmember agreements with varying terms . . . does not necessarily preclude class certification.").

In the alternative, Defendants ask that the Court at least modify the class definition to exclude those class members that purchased pursuant to a disqualifying clause. This may indeed be necessary, but the Court agrees with the court in *Titanium Dioxide* that the more appropriate time to address this issue is after the class is certified and Defendants can determine which specific class members are subject to potentially **[**70]** disqualifying contractual provisions. ***HN26***[] The Court has the authority under *Rule 23(c)(1)(C)* to modify the class any time before final judgment. To the extent that class members are not eligible to participate due to their specific contracts, Defendants may file a motion to modify the class to exclude those specific members once that information is known.

Because Plaintiffs have proven beyond mere pleading each of *Rule 23*'s elements, the Court finds that class certification is appropriate. The only remaining issue is Defendant RockTenn's arguments as to why a class action cannot proceed against it.

C. Class Certification — Defendant RockTenn's Argument

RockTenn's position in this case is unique. (The Court uses "RockTenn" for ease of reference, although RockTenn was formally known as Smurfit-Stone Container Corporation during its bankruptcy proceedings). Unlike any other Defendant, RockTenn filed for bankruptcy prior to this lawsuit, which resulted in a bankruptcy discharge order dated June 30, 2010 that released RockTenn from any claims predating the discharge order. Thus, according to RockTenn, Plaintiffs' must independently establish a separate, RockTenn-specific class with a period starting no earlier than **[**71]** June 30, 2010.

In all the briefing on this issue, both parties rely on the exact same source material to support their argument: Judge Milton Shadur's statements during a hearing on November 24, 2010. According to RockTenn, Judge Shadur made it crystal clear that Plaintiffs would need to define and seek certification on a wholly separate class applicable just to RockTenn. Plaintiffs, on the other hand, argue that Judge Shadur could not have stated in any plainer terms that such a separation was unnecessary. The Court can resolve this issue easily by simply referring to what Judge Shadur said, in light of case law that supports those statements.

Neither party really explains the context for the hearing before Judge Shadur, but from reading the entire transcript of that hearing, it appears that RockTenn asked the bankruptcy court to enjoin this Court from hearing a claim against RockTenn. Judge Shadur set the hearing to inform RockTenn of his position on RockTenn's motion and to provide an avenue for communicating his opinion to the bankruptcy court without having to get into a "tug-of-war" with that court. Judge Shadur informed RockTenn that he had read the complaint and its allegations **[**72]** and found that Plaintiffs were only seeking to hold RockTenn liable for its post-discharge conduct. Understandably, Judge **[*608]** Shadur found it inappropriate for RockTenn to ask the bankruptcy court to enjoin this Court from entertaining a cause of action that is founded on post-discharge conduct over which the bankruptcy court has no jurisdiction. Judge Shadur stated that he found it "flat-out misleading [for RockTenn] to characterize the lawsuit before [the Court] as seeking relief from [RockTenn] that is at odds with its discharge in bankruptcy." [Brig Tr. 6, Nov. 24, 2010, ECF No. 108.]

Judge Shadur acknowledged that the complaint's allegations "speak . . . of [RockTenn's] pre[-]discharge conduct," but he noted the key difference between *basing liability* on pre-discharge conduct and *relying* in part on pre-discharge conduct as evidence supporting a post-discharge conspiracy. RockTenn's argument, in other words, "conflates evidence with claims." [*Id.* at 7.] RockTenn is correct that the Court promised to hold Plaintiffs to their word that their complaint is about imposing liability based on post-discharge conduct. But, contrary to both parties' assertions, Judge Shadur did not mention or address **[**73]** any issues related to the proper size or scope of the class to be certified. That is the issue currently before the Court.

The issue presented by Plaintiffs' complaint is novel. Plaintiffs have provided evidence that RockTenn participated in the alleged conspiracy post-bankruptcy. If a fact-finder found this to be true, RockTenn's bankruptcy discharge order would not protect it, since that order applies only to pre-discharge conduct. Plaintiffs have also sued RockTenn's alleged co-conspirators, and co-conspirators are joint and severally liable "*for all damages* caused by the [entire] conspiracy." *Paper Sys. Inc. v. Nippon Paper Indus. Co., 281 F.3d 629, 632 (7th Cir. 2002)* (emphasis added). No problem so far. But, the conspiracy for which Plaintiffs seek to hold RockTenn's co-conspirators liable predates RockTenn's discharge from bankruptcy, and that pre-discharge conspiracy included RockTenn. The question, then, is whether RockTenn, based on its post-discharge conduct, can be jointly and severally liable for its co-conspirators' damages when the basis for the co-conspirators' liability is pre-discharge conduct that includes RockTenn. RockTenn argues that to hold it jointly liable is to punish it for pre-discharge conduct. Plaintiffs argue that such a result **[**74]** is the consequence of the general joint and several liability principles in the antitrust context.

Neither party has cited a case directly on point, nor can the Court find one. RockTenn cites cases that preclude class certification against defendants that emerged from bankruptcy, but in those cases liability was premised on solely pre-discharge conduct. *See, In re Travel Agent Comm'n Antitrust Litig., 583 F.3d 896, 901 (6th Cir. 2009)*. Plaintiffs cite cases involving joint and several liability, but none of the defendants in those cases had filed for bankruptcy. *See, e.g., Paper Sys. Inc., 281 F.3d at 632*. Moreover, the Court notes that important principles weigh on both sides of the issue. On the one hand, bankruptcy is meant to absolve a debtor of liability for its pre-discharge conduct. *In re Ruben, 774 F.3d 1138, 1141 (7th Cir. 2014)* ("A principal goal of bankruptcy is to provide the debtor with . . . a fresh start.") (internal quotation marks omitted). On the other hand, joint and several liability is a "vital instrument for maximizing deterrence." *Paper Sys. Inc., 281 F.3d at 633*.

In the absence of controlling, binding authority, the Court finds that holding RockTenn jointly and severally liable does not violate the bankruptcy discharge order for several reasons. Plaintiffs alleged that RockTenn joined (or more correctly, re-joined) the conspiracy post-bankruptcy. **[**75]** ***HN27***[] Generally speaking, "a co-conspirator who joins a conspiracy with knowledge of what has gone on before and with an intent to pursue the same objectives may, in the antitrust context, be charged with the preceding acts of its co-conspirators." *Havoco of Am., Ltd. v. Shell Oil Co., 626 F.2d 549, 554 (7th Cir. 1980)*. Although a debtor discharged in bankruptcy is indeed provided a clean slate, what the debtor does with that slate matters. Assuming that RockTenn did, in fact, re-join the conspiracy as alleged, RockTenn certainly would have had knowledge of what has gone on before and presumably would have had the intent to pursue the same objectives. *See, id.*, Seen properly, RockTenn would not **[*609]** be "held liable" for its pre-discharge conduct. Liability would be premised solely on its post-discharge conduct. It only *appears* that it is being held liable for pre-discharge conduct because of the joint and several liability rule, which makes RockTenn on the hook for its co-conspirators' actions. But it is the *co-conspirators'* liability that is based on pre-discharge conduct, not RockTenn's.

The distinction may be a fine one, but it is important. If, for example, RockTenn is ultimately correct on the merits, *i.e.*, its post-discharge conduct does not give rise to an **[**76]** antitrust violation, RockTenn will be absolved of all liability, despite its participation in the pre-discharge conspiracy. The Court has made clear that it will hold Plaintiffs to their burden of proof that RockTenn's post-discharge conduct gives rise to liability. But, once liability is established, the general rule of joint and several liability applies. It would be a windfall to defendants to allow them to join a conspiracy post-bankruptcy, with the perfect knowledge and intent to continue causing damages to vast numbers of consumers, and then refuse to enforce joint and several liability while the remaining co-conspirators are all subject to such liability. If RockTenn did in fact choose to rejoin the alleged conspiracy, it cannot be heard to complain that it may be on the hook for all the damages the conspiracy caused.

Admittedly, this creates potential problems for trial. For example, what is a jury to do with evidence of both pre-and post-discharge conduct in determining RockTenn's liability? For one, the Court may give a limiting instruction that explains to the jury that, in order to determine whether RockTenn violated antitrust laws, it must only consider RockTenn's post-discharge **[**77]** conduct and determine whether that conduct violated the law. These problems, however, can be addressed later if the case goes to trial. For now, the Court agrees with Plaintiffs that this case can proceed as a single class action.

IV. CONCLUSION

For the reasons stated herein, Defendants' Motion to Strike [ECF No. 845] is granted in part and denied in part. Plaintiffs' Class Certification Motion [ECF No. 657] is granted. Named Plaintiffs are hereby designated as class representatives, and Michael J. Freed of Freed Kanner London & Millen LLC and Daniel J. Mogin of The Mogin Law Firm, P.C., are hereby designated as Co-Lead Counsel.

IT IS SO ORDERED.

/s/ Harry D. Leinenweber

Harry D. Leinenweber, Judge

United States District Court

Dated: 3/26/2015

Spinelli v. NFL

United States District Court for the Southern District of New York

March 27, 2015, Decided; March 27, 2015, Filed

13 Civ. 7398 (RWS)

Reporter

96 F. Supp. 3d 81 *; 2015 U.S. Dist. LEXIS 40716 **; Copy. L. Rep. (CCH) P30,747; 2015-1 Trade Cas. (CCH) P79,121

PAUL SPINELLI, SCOTT BOEHM, PAUL JASIENSKI, GEORGE NEWMAN LOWRANCE, DAVID STLUKA, DAVID DRAPKIN, and THOMAS E. WITTE, Plaintiffs, - against - NATIONAL FOOTBALL LEAGUE, NFL PROPERTIES, LLC, NFL VENTURES, L.P., NFL PRODUCTIONS, LLC, NFL ENTERPRISES, LLC, REPLAY PHOTOS, LLC, GETTY IMAGES (US), INC., ASSOCIATED PRESS, ARIZONA CARDINALS HOLDINGS, INC., ATLANTA FALCONS FOOTBALL CLUB LLC, BALTIMORE RAVENS LIMITED PARTNERSHIP, BUFFALO BILLS, INC., PANTHERS FOOTBALL LLC, CHICAGO BEARS FOOTBALL CLUB, INC., CINCINNATI BENGALS, INC., CLEVELAND BROWNS LLC, DALLAS COWBOYS FOOTBALL CLUB, DENVER BRONCOS FOOTBALL CLUB, DETROIT LIONS, INC., GREEN BAY PACKERS, INC., HOUSTON NFL HOLDINGS LP, INDIANAPOLIS COLTS, INC., JACKSONVILLE JAGUARS LTD., KANSAS CITY CHIEFS FOOTBALL CLUB, INC., MIAMI DOLPHINS, LTD., MINNESOTA VIKINGS FOOTBALL CLUB LLC, NEW ENGLAND PATRIOTS, LP, NEW ORLEANS LOUISIANA SAINTS, LLC, NEW YORK FOOTBALL GIANTS, INC., NEW YORK JETS FOOTBALL CLUB, INC., OAKLAND RAIDERS LP, PHILADELPHIA EAGLES FOOTBALL CLUB, INC., PITTBURGH STEELERS SPORTS, INC., SAN DIEGO CHARGERS FOOTBALL CO., SAN FRANCISCO FORTY NINERS LTD., FOOTBALL NORTHWEST LLC, THE RAMS FOOTBALL CO. LLC, BUCCANEERS LIMITED PARTNERSHIP, TENNESSEE FOOTBALL, INC., and WASHINGTON FOOTBALL INC., Defendants.

Subsequent History: Motion denied by *Spinelli v. NFL, 2015 U.S. Dist. LEXIS 107111 (S.D.N.Y., Aug. 11, 2015)*

Stay granted by *Spinelli v. NFL, 2015 U.S. Dist. LEXIS 155816 (S.D.N.Y., Nov. 17, 2015)*

Motion granted by, in part, Motion denied by, in part, Motion granted by, Dismissed by, in part *Spinelli v. NFL, 2016 U.S. Dist. LEXIS 92996 (S.D.N.Y., July 15, 2016)*

Stay granted by *Spinelli v. NFL, 2016 U.S. Dist. LEXIS 135275 (S.D.N.Y., Sept. 29, 2016)*

Core Terms

NFL, licensing, Plaintiffs', photographs, Contributor, arbitration, rights, sublicense, Images, copyright infringement, royalties, Entities, antitrust, unjust enrichment, allegations, license agreement, terms, motion to dismiss, antitrust claim, teams, intellectual property, exclusive license, Sherman Act, Football, licensee, infringement, contracts, relevant market, retroactive, arbitration clause

LexisNexis® Headnotes

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

HN1[] Motions to Dismiss, Failure to State Claim

Courts may consider documents on a motion to dismiss, even if not incorporated by reference in a complaint, where the complaint relies heavily upon its terms and effect, thereby rendering the document integral to the complaint.

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

HN2[] Motions to Dismiss, Failure to State Claim

On a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)*, all factual allegations in the complaint are accepted as true, and all inferences are drawn in favor of the pleader. However, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim is facially plausible when the plaintiff pleads factual content that allows a court to draw the reasonable inference that the defendant is liable for the misconduct alleged. In other words, the factual allegations must possess enough heft to show that the pleader is entitled to relief.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

HN3[] Arbitration, Arbitrability

When determining whether parties have agreed to arbitrate a dispute, courts consider two questions: (1) whether a valid agreement to arbitrate under the contract in question exists and (2) whether the particular dispute in question falls within the scope of that arbitration agreement.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Evidence > Burdens of Proof > Initial Burden of Persuasion

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Scope

HN4[] Federal Arbitration Act, Arbitration Agreements

Arbitration is strictly a matter of contract. The Federal Arbitration Act (FAA) provides that an agreement in writing to submit to arbitration an existing controversy shall be valid, irrevocable, and enforceable. *9 U.S.C.S. § 2*. The FAA requires the federal courts to enforce arbitration agreements, reflecting Congress' recognition that arbitration is to be encouraged as a means of reducing the costs and delays associated with litigation. The Second Circuit has often and emphatically applied the strong federal policy in favor of arbitration. Because of this policy favoring arbitration, the burden of persuasion falls on the party attempting to escape an arbitration agreement, not the one attempting to enforce it. When the existence of an arbitration agreement is undisputed, doubts as to whether a claim falls within the scope of that agreement should be resolved in favor of arbitrability. Courts in the Second Circuit have held that, where a valid arbitration clause has been found to exist, they must abstain from adjudicating plaintiffs' claims.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Scope

HN5[] Arbitration, Federal Arbitration Act

The Second Circuit has directed courts to classify arbitration clauses as either broad or narrow. Clauses requiring arbitration of disputes arising out of or in connection with underlying contracts are considered "broad" arbitration clauses. Indeed, an arbitration clause covering any claim or controversy arising out of or relating to an agreement is the paradigm of a broad clause -- broader than one covering all claims and disputes arising under the contract.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Evidence > Inferences & Presumptions > Presumptions > Creation

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Scope

HN6[] **Arbitration, Arbitrability**

A presumption of arbitrability arises from contracts containing broad arbitration clauses. In particular, a broad arbitration clause is presumptively applicable to disputes involving matters going beyond the interpretation or enforcement of particular provisions of the contract which contains the arbitration clause.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN7[] **Arbitration, Arbitrability**

A challenge to the validity of a contract as a whole, and not specifically to an arbitration clause, must go to the arbitrator.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Torts > Intentional Torts > Breach of Fiduciary Duty > Remedies

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Scope

HN8[] **Arbitration, Arbitrability**

Claimed breaches of fiduciary duty arising out of agreements with broad arbitration clauses are subject to arbitration.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Scope

HN9[] **Arbitration, Arbitrability**

Unjust enrichment claims fall within the scope of broad arbitration clauses.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Scope

Evidence > Burdens of Proof > Allocation

Evidence > Inferences & Presumptions > Presumptions > Creation

HN10[] **Arbitration, Federal Arbitration Act**

The Federal Arbitration Act (FAA) establishes a strong federal policy in favor of arbitration, and courts have long considered arbitration to be presumptively an appropriate and competent forum for federal statutory claims. Statutory claims may be arbitrated so long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum. The burden is on the party opposing arbitration to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Scope

HN11[] **Arbitration, Arbitrability**

The United States Supreme Court has set forth a two-step inquiry for determining whether statutory claims arising out of a contract are arbitrable. First, courts must determine whether the parties' agreement to arbitrate reached the statutory issues. Second, courts must consider whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims -- namely, if a party has made the bargain to arbitrate, it should be held to it unless Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue. Finally, where Congress has not clearly precluded arbitration, arbitration of a statutory claim will be compelled unless, as noted, the prospective litigant shows that it cannot effectively vindicate its statutory rights in the arbitral forum.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Copyright Law > ... > Assignments & Transfers > Licenses > Exclusive Licenses

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Scope

Copyright Law > ... > Assignments & Transfers > Licenses > Nonexclusive Licenses

HN12[] **Arbitration, Arbitrability**

Copyright claims asserted in connection with licensing disputes may be encompassed by broad arbitration clauses. In Kamazaki Music, the Second Circuit affirmed that an arbitration clause requiring the parties to arbitrate claims "arising out of, or relating to" their contract covered copyright claims.

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

Civil Procedure > Pleading & Practice > Motion Practice > Opposing Memoranda

HN13[] **Motions to Dismiss, Failure to State Claim**

Claims that are raised for the first time in an opposition brief to a motion to dismiss are not properly before the court.

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > Indispensable Parties

Copyright Law > ... > Civil Infringement Actions > Secondary Liability > Vicarious Liability Actions

HN14[] **Civil Infringement Actions, Indispensable Parties**

Secondary infringement claims are often litigated without joinder of any alleged direct infringer.

Antitrust & Trade Law > Sherman Act > Claims

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

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

HN15[] **Sherman Act, Claims**

The United States Supreme Court has made clear that Sherman Act antitrust conspiracy claims are arbitrable. Indeed, the Court in Mitsubishi found no explicit support in either the Sherman Act or in the Federal Arbitration Act (FAA) for holding Sherman Act claims to be nonarbitrable. The Second Circuit has held that if the allegations underlying claims touch matters covered by the parties' contracts, those claims must be arbitrated whatever the legal labels attached to them. Conspiracy allegations may touch matters covered by a contract even if the alleged conspiracy includes non-parties to the contract or involves alleged wrongdoing that occurred before or after the formation of the contract.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Scope

HN16[] **Arbitration, Federal Arbitration Act**

In dealing with broad arbitration clauses, the Second Circuit has not limited arbitration claims to those that constitute a breach of the terms of the contract at issue.

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

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

HN17[] **Conspiracy to Monopolize, Sherman Act**

Alleged anti-trust co-conspirators are not necessary parties; a plaintiff can prove the existence of a Sherman Act conspiracy in an action against just one of the members of the conspiracy.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

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

HN18[] Federal Arbitration Act, Arbitration Agreements

Individuals not party to an arbitration agreement cannot be "indispensable" for Fed. R. Civ. 19 purposes.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Scope

HN19[] Federal Arbitration Act, Arbitration Agreements

A broad arbitration clause is presumptively applicable to disputes involving matters going beyond the interpretation or enforcement of particular provisions of the contract which contains the arbitration clause.

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

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Evidence > Burdens of Proof > Allocation

HN20[] Private Actions, Sherman Act

The possibility that a party to an arbitration clause will be inconvenienced and will incur some extra expense does not necessarily mean that the party cannot effectively vindicate its statutory rights through arbitration. The antitrust laws do not guarantee an affordable procedural path to the vindication of every claim. It would be unwieldy to require courts to proceed case by case to tally costs and burdens to particular plaintiffs in light of their means. Additionally, uninformed speculation about cost is insufficient to carry the burden of proving that proceeding against antitrust defendants individually would prevent the plaintiffs from effectively vindicating their statutory rights.

Antitrust & Trade Law > Sherman Act > Claims

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

HN21[] Sherman Act, Claims

In order to state a claim against defendants under *§§ 1* and *3* of the Sherman Act, *15 U.S.C.S. §§ 1* and *3*, that will withstand a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, plaintiffs must allege sufficient facts to support a plausible inference that defendants took part in an agreement that unreasonably restrained trade.

Antitrust & Trade Law > Sherman Act > Claims

HN22[] Sherman Act, Claims

Section 3 of the Sherman Act, *15 U.S.C.S. § 3*, merely extends the reach of *15 U.S.C.S. § 1* to trade or commerce involving U.S. Territories and the District of Columbia. Substantively, however, *15 U.S.C.S. § 3* claims are analyzed in the same manner as *15 U.S.C.S. § 1* claims.

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

HN23[] **Private Actions, Remedies**

Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.

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

HN24[] **Standing, Requirements**

To have standing, a plaintiff must, among other things, be an "efficient enforcer" of the antitrust laws. The Second Circuit has identified four factors to determine whether a plaintiff is an efficient enforcer: (1) the directness or indirectness of the asserted injury; (2) the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; (3) the speculativeness of the alleged injury; and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries.

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

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

HN25[] **Standing, Requirements**

Antitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement, a court must dismiss as a matter of law.

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

HN26[] **Standing, Requirements**

In order to limit the class of plaintiffs with antitrust standing to the most efficient enforcers of the antitrust laws, courts have typically limited the types of individuals that may bring an antitrust action to direct competitors or consumers.

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

HN27[] **Standing, Requirements**

Suppliers to direct market participants typically cannot seek recovery under the antitrust laws because their injuries are too secondary and indirect.

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

HN28[] **Standing, Requirements**

With respect to the first "efficient enforcer" factor for standing, to satisfy the antitrust injury requirement, a plaintiff must plead facts showing that it has suffered injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The antitrust injury requirement obligates a plaintiff to demonstrate, as a threshold matter, that the challenged action has had an actual adverse effect on competition as a whole in the relevant market. In other words, a plaintiff must allege that its loss comes from acts that reduce output or raise prices to consumers.

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

HN29[] **Standing, Requirements**

Underpayment of royalties is not an antitrust injury for purposes of standing because it has no adverse effect on competition or consumers.

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

HN30[] **Standing, Requirements**

With respect to standing, antitrust injury is limited to injuries that are attributable to an anti-competitive aspect of the practice under scrutiny.

Antitrust & Trade Law > Sherman Act > Claims

HN31[] **Sherman Act, Claims**

An antitrust complaint under the Sherman Act must allege a relevant product market in which the anticompetitive effects of the challenged activity can be assessed.

Antitrust & Trade Law > Sherman Act > Claims

HN32[] **Sherman Act, Claims**

Generally, the distribution of a single brand, like the manufacture of a single brand, does not constitute a legally cognizable market because to define the market as that group of products over which a defendant exercises control would as an analytic matter read the market definition step out of the Sherman Act. Thus, the Second Circuit and courts in the Southern District of New York have often declined to recognize a relevant market defined by a single brand.

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

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

HN33[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

Because the benefits of exclusive licensing agreements are well-recognized, the Second Circuit has stated that these arrangements are presumptively legal. An exclusive licensing arrangement violates *Section 1* of the Sherman Act, *15 U.S.C.S. § 1*, only when it will foreclose competition in a substantial share of the line of commerce affected.

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

HN34[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

In order to adequately plead foreclosure in a relevant market, a plaintiff first must properly define the relevant market.

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

HN35[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

Exclusive agreements do not harm competition when there is competition to obtain the exclusive contract. The Second Circuit has recognized that such a situation may actually encourage, rather than discourage, competition, because the incumbent and other competitors have a strong incentive continually to improve the services and prices they offer in order to secure the exclusive positions.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Licenses

HN36[] **Ownership & Transfer of Rights, Licenses**

An exclusive license, which merely confers upon the licensee the ability to exploit the licensor's exclusive intellectual property rights, does not violate the antitrust laws.

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

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

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

HN37[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

Exclusive vertical arrangements are presumptively legal under the antitrust laws. To overcome that presumption at the pleading stage, a plaintiff must allege facts showing exceptional circumstances, such as evidence of predatory practices or a "unique" opportunity to leverage two distinct monopolies. A plaintiff that fails to allege such exceptional circumstances fails to state a claim under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, and its complaint must be dismissed under *Fed. R. Civ. P. 12(b)(6)*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

HN38[] **Vertical Restraints, Nonprice Restraints**

Exclusive vertical agreements of reasonable duration that are subject to a competitive award process do not violate the antitrust laws.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Stay Pending Arbitration

HN39[] **Federal Arbitration Act, Stay Pending Arbitration**

A stay as to claims against a nonarbitrating defendant is properly granted where the arbitration of the plaintiff's claims against a defendant party to the arbitration would at least partially determine the issues which form the basis of the claim against that non-arbitrating defendant.

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

Copyright Law > ... > Assignments & Transfers > Licenses > Exclusive Licenses

Copyright Law > ... > Assignments & Transfers > Licenses > Nonexclusive Licenses

HN40[] **Defenses, Demurrers & Objections, Motions to Dismiss**

A copyright owner who grants an exclusive or nonexclusive license to use a work waives any right to assert an infringement claim against the licensee, or anyone whom the licensee is entitled to sublicense, for acts within the scope of the license or sublicense. A defendant may raise a complete defense to a copyright infringement claim by presenting the court with the license or sublicense on a motion to dismiss, and dismissal of a claim for copyright infringement is proper where a contract underlying the suit clearly and unambiguously demonstrates the existence of the defendant's license to exploit the plaintiff's copyrights and where plaintiff has not shown any limitation on that license.

Copyright Law > ... > Licenses > Rule Application & Interpretation > Ambiguity Resolution

Evidence > Burdens of Proof > Allocation

Copyright Law > ... > Assignments & Transfers > Licenses > Nonexclusive Licenses

Copyright Law > ... > Assignments & Transfers > Licenses > Exclusive Licenses

HN41[] **Rule Application & Interpretation, Ambiguity Resolution**

Copyright licenses are construed according to neutral principles of contract interpretation. In cases where only the scope of the license is at issue, it is the copyright owner's burden to prove that defendant's usage was unauthorized. The licensor who argues that there should be an exception or deviation from the meaning reasonably conveyed by the language of a license loses, because he or she should bear the burden of negotiating for language that would express the limitation or deviation.

Contracts Law > ... > Ambiguities & Contra Proferentem > Contract Ambiguities > Latent Ambiguities

Contracts Law > ... > Ambiguities & Contra Proferentem > Contract Ambiguities > Patent Ambiguities

HN42[] **Contract Ambiguities, Latent Ambiguities**

The doctrine of contra proferentum only applies where a contract is ambiguous.

Copyright Law > ... > Assignments & Transfers > Licenses > Exclusive Licenses

HN43[] **Licenses, Exclusive Licenses**

As a matter of copyright law, copyright owners and exclusive licensees are free to grant such licenses after the fact as they see fit.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

Copyright Law > ... > Assignments & Transfers > Licenses > Exclusive Licenses

Copyright Law > ... > Civil Infringement Actions > Elements > Ownership

HN44[] **Breach of Contract Actions, Elements of Contract Claims**

Second Circuit law is clear that where a licensee's use of a copyrighted work is authorized by a license, any claim for unpaid royalties for that use cannot form the basis of an infringement claim. Rather, a failure to pay royalties under a valid license agreement could only give rise to a breach of contract claim against the party with which the copyright owner has contracted to receive royalties.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Conditions Precedent

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Conditions Subsequent

HN45[] **Contract Conditions & Provisions, Conditions Precedent**

Under New York law, conditions are not favored, and in the absence of unambiguous language, a condition will not be read into a contract.

Contracts Law > ... > Ambiguities & Contra Proferentem > Contract Ambiguities > Latent Ambiguities

Contracts Law > ... > Ambiguities & Contra Proferentem > Contract Ambiguities > Patent Ambiguities

HN46[] **Contract Ambiguities, Latent Ambiguities**

The determination of whether a contract term is ambiguous is a threshold question of law for the court. An agreement is ambiguous only if it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement. Silence, or omission of a term, however, does not generally create ambiguity.

Contracts Law > Contract Interpretation > Parol Evidence > Course of Dealing

Contracts Law > ... > Ambiguities & Contra Proferentem > Contract Ambiguities > Patent Ambiguities

Contracts Law > ... > Ambiguities & Contra Proferentem > Contract Ambiguities > Latent Ambiguities

Contracts Law > Contract Interpretation > Parol Evidence > Custom & Usage

HN47[] **Parol Evidence, Course of Dealing**

An omission or mistake in a contract does not constitute an ambiguity, and the question of whether an ambiguity exists must be ascertained from the face of an agreement without regard to extrinsic evidence.

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

Copyright Law > ... > Civil Infringement Actions > Elements > Ownership

HN48[] **Complaints, Requirements for Complaint**

A plaintiff must identify, with specificity, the original works that are the subject of her copyright claim and which acts committed by defendants constitute infringement of her rights. *Fed. R. Civ. P. 8(a)(2)* has been construed to require a plaintiff to plead with specificity the acts by which a defendant has committed copyright infringement.

Civil Procedure > Sanctions > Baseless Filings > Certification Requirements

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

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

HN49[] **Baseless Filings, Certification Requirements**

Fed. R. Civ. P. 11(b) does not relieve a party of the obligation to meet basic pleading standards established by *Fed. R. Civ. P. 8(a)(2)* and Second Circuit *Fed. R. Civ. P. 12(b)(6)* case law.

Copyright Law > ... > Assignments & Transfers > Licenses > Exclusive Licenses

Copyright Law > ... > Assignments & Transfers > Licenses > Nonexclusive Licenses

HN50[] **Licenses, Exclusive Licenses**

Use of a copyrighted work within the scope of a valid license is non-infringing as a matter of law, and a valid license, either exclusive or non-exclusive, immunizes the licensee from a charge of copyright infringement, provided that the licensee uses the copyright as agreed with the licensor. The same holds true for a sublicensee's use that has been authorized by a licensee.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > License

Copyright Law > ... > Assignments & Transfers > Licenses > Exclusive Licenses

Copyright Law > ... > Assignments & Transfers > Licenses > Nonexclusive Licenses

HN51[] **Affirmative Defenses, License**

Under copyright law, the existence of a license is viewed as an affirmative defense to infringement claims.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

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

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

HN52[] **Breach of Contract Actions, Elements of Contract Claims**

A breach of contract claim must be dismissed where the unambiguous terms of the contract do not support a plaintiff's claim. The provisions of the parties' agreements establish the rights of the parties and prevail over conclusory allegations in the complaint. A court cannot supply a specific obligation the parties themselves did not spell out. Moreover, New York law and the Twombly-Iqbal standards of federal pleading require a complaint to identify, in non-conclusory fashion, the specific terms of the contract that a defendant has breached. Otherwise, the complaint must be dismissed.

Copyright Law > ... > Civil Infringement Actions > Standing > Beneficial Owners

Copyright Law > ... > Assignments & Transfers > Licenses > Exclusive Licenses

HN53[] **Standing, Beneficial Owners**

A licensee has the right to sue for infringement of its exclusive license rights. *17 U.S.C.S. § 501(b)*.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Integration Clauses

HN54[] **Contract Conditions & Provisions, Integration Clauses**

A general merger clause precludes extrinsic proof to add or to or vary the terms of the agreement.

Business & Corporate Law > ... > Causes of Action & Remedies > Breach of Fiduciary Duty > Defenses

Torts > Intentional Torts > Breach of Fiduciary Duty > Defenses

Torts > Intentional Torts > Breach of Fiduciary Duty > Elements

HN55[] **Breach of Fiduciary Duty, Defenses**

In disputes between a purported principal and purported agent, where the interests of third parties or government agencies are not in issue, the parties are bound by a contractual agreement that their relationship is not one of agency. Such a disclaimer bars a claim for breach of fiduciary duty.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

Torts > Intentional Torts > Breach of Fiduciary Duty > Elements

HN56[] **Breach of Contract Actions, Elements of Contract Claims**

A cause of action for breach of fiduciary duty that is merely duplicative of a breach of contract claim cannot stand.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN57[] **Contract Interpretation, Good Faith & Fair Dealing**

While it is true that contracts include an implied covenant of good faith and fair dealing under New York law, a claim for breach of the implied covenant will be dismissed as redundant where the conduct allegedly violating the implied covenant is also the predicate for breach of covenant of an express provision of the underlying contract.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN58[] **Breach of Contract Actions, Elements of Contract Claims**

New York law does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim, based upon the same facts, is also pled.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN59[] **Types of Contracts, Quasi Contracts**

The existence of a valid and enforceable contract precludes an unjust enrichment claim relating to the subject matter of the contract.

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > Federal Preemption

HN60[] **Federal & State Law Interrelationships, Federal Preemption**

Under *17 U.S.C.S. § 301(a)*, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by *17 U.S.C.S. § 106* in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by *17 U.S.C.S. §§ 102* and *103*, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any state.

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > Federal Preemption

HN61[] **Federal & State Law Interrelationships, Federal Preemption**

A state-law claim is preempted by *17 U.S.C.S. § 301(a)* when: (1) the particular work to which the claim is being applied falls within the type of works protected by the Copyright Act under *17 U.S.C.S. §§ 102* and *103*, and *(2)* the claim seeks to vindicate legal or equitable rights that are equivalent to one of the bundles of exclusive rights already protected by copyright law under *17 U.S.C.S. § 106*. The first prong of this test is called the subject matter requirement, and the second prong is called the general scope requirement.

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

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > Federal Preemption

HN62[] **Motions to Dismiss, Failure to State Claim**

A preempted Copyright Act claim fails to state a cause of action and is subject to immediate dismissal under *Fed. R. Civ. P. 12(b)(6)*.

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > Federal Preemption

HN63[] **Federal & State Law Interrelationships, Federal Preemption**

For a claim arising under state law to be preempted under *17 U.S.C.S. § 301(a)*, two tests must be met. The first, called the subject matter requirement, requires that the work in which the right is asserted must be fixed in tangible form and come within the subject matter of copyright as specified in *17 U.S.C.S. §§ 102* or *103* of the Copyright Act. The second prong of the test for copyright preemption is that the right asserted by a plaintiff's state-law claim must be equivalent to rights specified and protected in *17 U.S.C.S. § 106* of the Act. This is often called the "general scope" requirement. The general scope requirement is satisfied when the state-created right may be abridged by an act that would, by itself, infringe one of the exclusive rights provided by federal copyright law.

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > Federal Preemption

HN64[] **Federal & State Law Interrelationships, Federal Preemption**

For a state-law claim not to be considered equivalent to a copyright claim, the state claim must require an additional element that is qualitatively different from the elements of copyright infringement. The courts take a restrictive view of what extra elements transform an otherwise equivalent claim into one that is qualitatively different from a copyright infringement claim. For example, an action will not be saved from preemption by elements such as awareness or intent, which alter the action's scope but not its nature.

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > Federal Preemption

HN65[] **Federal & State Law Interrelationships, Federal Preemption**

Although enrichment is not an element of a copyright infringement claim, it does not constitute an extra element for the purposes of preemption analysis.

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

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > Federal Preemption

HN66[] **Complaints, Requirements for Complaint**

Fed. R. Civ. P. 8(d)(2) does not purport to override *17 U.S.C.S. § 301* preemption. Pleading a claim in the alternative does not resuscitate an otherwise unviable claim.

Counsel: [1]** For the Plaintiffs: Danial A. Nelson, Esq., Kevin Patrick McCulloch, Esq., NELSON & MCCULLOCH LLP, New York, NY.

For the Defendants: Jeffrey A. Mishkin, Esq., Anthony Joseph Dreyer, Esq., Jordan Adam Feirman, Esq., Karen Hoffman Lent, Esq., SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, Four Times Square, New York, NY; Jura Christine Zibas, Esq., Jana A. Slavina, Esq., WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP, White Plains, NY; Bruce S. Meyer, Esq., WEIL, GOTSHAL & MANGES LLP, New York, NY; Andrew Lawrence Deutsch, Esq., Marc Evan Miller, Esq., Paolo Morante, Esq., Tamar Y. Duvdevani, Esq., DLA PIPER US LLP, New York, NY.

Judges: ROBERT W. SWEET, UNITED STATES DISTRICT JUDGE.

Opinion by: ROBERT W. SWEET

Opinion

[*90] [EDITOR'S NOTE: THIS DOCUMENT IS MISSING TEXT. THE LEXIS SERVICE WILL PLACE THE TEXT ON-LINE UPON RECEIPT.]

REDACTED OPINION*

Sweet, D.J.

There are several motions currently pending in this action between plaintiffs Paul Spinelli, Scott Boehm, Paul Jasienski, George Newman Lowrance, David Stluka, David Drapkin, and Thomas E. Witte **[*91]** ("Plaintiffs") and defendants National Football League ("NFL"), NFL Properties, **[**2]** LLC, ("NFLP"), NFL Ventures, L.P., NFL

* The initial Opinion was filed under seal to protect any confidential information asserted by the parties.

Productions, LLC, NFL Enterprises, LLC (together with NFL, NFLP, NFL Ventures, L.P, and NFL Productions, "NFL Entities"), Arizona Cardinals Holdings, Inc., Atlanta Falcons Football Club LLC, Baltimore Ravens Limited Partnership, Buffalo Bills, Inc., Panthers Football LLC, Chicago Bears Football Club, Inc., Cincinnati Bengals, Inc., Cleveland Browns LLC, Dallas Cowboys Football Club, Denver Broncos Football Club, Detroit Lions, Inc., Green Bay Packers, Inc., Houston NFL Holdings LP, Indianapolis Colts, Inc., Jacksonville Jaguars Ltd., Kansas City Chiefs Football Club, Inc., Miami Dolphins, Ltd., Minnesota Vikings Football Club LLC, New England Patriots, LP, New Orleans Louisiana Saints, LLC, New York Football Giants, Inc., New York Jets Football Club, Inc., Oakland Raiders LP, Philadelphia Eagles Football Club, Inc., Pittsburgh Steelers Sports, Inc., San Diego Chargers Football Co., San Francisco Forty Niners Ltd., Football Northwest LLC, The Rams Football Co. LLC, Buccaneers Limited Partnership, Tennessee Football, Inc., and Washington Football Inc. (Arizona Cardinal Holdings, Inc. through Washington Football Inc., "NFL Clubs," and together with **[**3]** NFL Entities, "NFL Defendants"), Replay Photos, LLC ("Replay"), Getty Images (US), Inc. ("Getty"), and Associated Press ("AP," together with NFL Defendants, Replay, and Getty, "Defendants").

NFL Defendants, Replay and AP have moved to dismiss the amended complaint (the "AC"). Getty has moved to dismiss the AC and compel arbitration, or stay the action as to Getty.

For the reasons set forth below, NFL Defendants', Replays', and AP's motions to dismiss, and Getty's motion to compel arbitration, are granted.

Prior Proceedings

Plaintiffs filed their initial complaint ("Complaint") against the NFL Entities, Replay, Getty, and AP on October 21, 2013. On December 16, 2013, Getty moved to dismiss or, in the alternative, to stay the action as against it based on arbitration clauses contained within contracts at issue in this dispute. (See Dkt. Nos. 21, 22, 24.) At the same time, Getty filed a demand for arbitration with the American Arbitration Association ("AAA"). (See Bloom Decl. Ex. A.) On December 18, 2013, AP and the NFL Entities, and on December 26, 2013, Replay filed motions to dismiss the complaint.

On February 12, 2014, in lieu of opposing Defendants' motions to dismiss, Plaintiffs filed **[**4]** the AC against all currently named Defendants. (See Dkt. No. 42.) On March 31, 2014, Defendants renewed their motions to dismiss. (Dkt. No. 51.) Getty and Plaintiffs have agreed to hold the arbitration proceeding in abeyance pending resolution of Getty's motion to compel arbitration. (See Bloom Decl. Ex. B.)

The instant motions were heard and marked fully submitted on October 1, 2014. Subsequently, and while the motions to dismiss have been pending, motions to stay discovery were filed by Defendants and granted by the Court. (See Dkt. Nos. 99, 100.)

Facts

The following facts are taken from the Plaintiffs AC, which are taken to be true for the purposes of disposing of the instant motions, and the terms of certain agreements either directly referenced by Plaintiffs or integral to the AC.[1]

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[1] Plaintiffs argue specifically that the Second AP Agreement and the Replay Agreement (defined below) should not be considered because Plaintiffs are not parties to the agreements, had no possession of the agreements, and had no "direct knowledge of the terms of these agreements." (Pls.' Opp'n to AP Mot. 15.) However, ***HN1***[] courts may consider documents on a motion to dismiss, even if not incorporated by reference **[**5]** in a complaint, "where the complaint 'relies heavily upon its terms and effect,' thereby rendering the document 'integral' to the complaint. *DiFolco v. MSNBC Cable LLC, 622 F.3d 104, 111 (2d Cir. 2010)* (citations omitted); see also *Chamberlain v. City of White Plains, 986 F. Supp. 2d 363 (S.D.N.Y. 2013)* (On a motion to dismiss, the Court may consider documents that are "integral" to Plaintiffs' AC, that is, documents "upon the terms and effect of which the complaint relies heavily . . . ."). The AC refers to and relies on these agreements (see AC ¶¶ 20, 25-26, 27, 28, 38, 54, 79, 92, 116, 136, 138, 139, 140, 141, 157, 166, 175, 181), the agreements were discussed and quoted in NFL's initial

[*92] Plaintiffs are seven "professional photographers who make their living taking and licensing sports-related photographs, including but not limited to content related to [NFL] practices, games, functions, and other events." (AC ¶ 1.)

Plaintiffs, collectively, have photographed "hundreds, if not thousands" of NFL and NFL Club games, practices and events, and have taken "literally hundreds of thousands of NFL-related photographs." (AC ¶ 31.) Among these photographs, Plaintiffs allege there are "tens of thousands of photos . . . that do[] not include any marks, logos, or other intellectual property owned by the NFL Entities."[2] (AC ¶¶ 34-35.)

The NFL has collectively licensed and protected NFL and NFL Club trademarks, including names, nicknames, logos, colors, designs, slogans, symbols, and other identifying indicia for decades. (See AC ¶¶ 44-45; NFL Def.'s Mot. 7) [TEXT REDACTED BY THE COURT] NFL and NFL Clubs, [TEXT REDACTED BY THE COURT] provided NFL with exclusive licensing rights for certain **[**7]** business operations [TEXT REDACTED BY THE COURT]

Prior to 2004, NFL maintained an in-house department that directly licensed the rights to NFL-related photographs. (AC ¶¶ 44-46.) For many years, Plaintiffs obtained media credentials - either through their agents, Getty and AP, or directly from the NFL Clubs via the NFL's in-house department, NFL Photos, to photograph events for the NFL and individual NFL Clubs. (AC ¶ 30.)[3]

In July 2004, NFL — through NFLP — entered into a five-year licensing agreement with Getty ("Getty Agreement"), whereby Getty acquired rights to license **[*93]** photographs of NFL content to: (i) NFL business partners (including sponsors and licensees of the NFL, and other NFL-approved companies) for commercial uses; and (ii) media organizations for editorial **[**8]** uses. (Getty Agreement [TEXT REDACTED BY THE COURT]; see also AC ¶ 46.) The rights granted under the Getty Agreement covered a "worldwide" territory (Getty Agreement [TEXT REDACTED BY THE COURT]), and became exclusive in 2007 when Getty acquired WireImage, another stock photography agency. (AC ¶ 46.)

Among the images covered by the Getty Agreement were photographs in which Getty owned the copyrights (Getty Agreement [TEXT REDACTED BY THE COURT]), and photographs from independent contributors such as Plaintiffs ("Contributor Photographs"), [TEXT REDACTED BY THE COURT] (Getty Agreement [TEXT REDACTED BY THE COURT]), [TEXT REDACTED BY THE COURT], Getty had entered into agreements with each of the Plaintiffs ("Getty Contributor Agreements"), pursuant to which Plaintiffs became contributing photographers for Getty, and Getty received the right to license Plaintiffs' works, including NFL photographs. (AC 1 47.)

The Getty Agreement authorized "NFL Entities" — defined to include the NFL (and its affiliates, subsidiaries, and successors in interest), and NFL Clubs (Getty Agreement [TEXT REDACTED BY THE COURT]) — to make royalty-free use of photographs owned by Getty for a wide variety of uses, **[**9]** including:

[TEXT REDACTED BY THE COURT]

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unredacted motion to dismiss (see Dkt. No. 30) and copies of these two agreements were attached as exhibits to the declaration of Andrew L. Deutsch (see Deutsch Decl. Exs. A-D) in support of AP's first motion to dismiss Plaintiffs' Complaint. See *Chambers v. Time Warner, Inc., 282 F.3d 147, 153-54 & n. 4 (2d Cir. 2002)* (contracts properly considered on *Rule 12(b)(6)* motion where "the Amended Complaint [was] replete with references to the contracts" and requested adjudication related to their terms); see also *Feinman v. Schulman Berlin & Davis, 677 F. Supp. 168, 170 n. 3 (S.D.N.Y. 1988)* (finding document referred to in complaint, but not identified by name, incorporated by reference). The Court "need not credit . . . characterizations presented as factual allegations," *In re Livent, Inc. Noteholders Securities Litig., 151 F. Supp. 2d 371, 404 (S.D.N.Y. 2001)*, or "accept as true **[**6]** an allegation that is contradicted by documents on which the complaint relies," *In re Elan Corp. Securities Litig., 543 F. Supp. 2d 187, 206 (S.D.N.Y. 2008)* (quoting *In re Bristol-Myers Squibb Sec. Litig., 312 F. Supp. 2d 549, 555 (S.D.N.Y. 2004))*.

[2] "NFL Entities," as defined in the AC, refers to the same entities defined herein by the same abbreviation.

[3] Plaintiffs allege that they primarily photographed NFL events and games under "speculation agreements," or "on spec," meaning that instead of being paid flat fees for their work they retained ownership of the copyrights in the photos that they took during an event and then earned income by licensing their photos. (AC ¶ 32.) Plaintiffs note that this action only involve those photos that Plaintiffs created on spec. (AC ¶ 33.)

(Id.) The right of NFL Entities to make such uses extended to Photographs, [TEXT REDACTED BY THE COURT] (Getty Agreement [TEXT REDACTED BY THE COURT]) Plaintiffs each submitted images to Getty of NFL games and other NFL-related matters pursuant to the Getty Contributor Agreements. (AC ¶ 47.)

Plaintiffs allege that "[d]espite the fundamental obligations to license Plaintiffs' works . . . Getty . . . granted the NFL nearly unfettered access to Plaintiffs' photo collections and, either expressly or by inaction, allowed the NFL to make free or 'complimentary' use of Plaintiffs' copyrights photos." (AC ¶ 72.) Plaintiffs further allege that Getty "lacked authority to grant such unfettered usage rights or complimentary and indefinite use licenses to the NFL without obtaining separate and express permission from Plaintiffs for each such 'complimentary' license or use," (AC ¶ 77) and that the Getty Contributor Agreements "precluded Getty . . . from granting usage rights at no cost and Getty['s] . . . own standard terms and conditions for usage licenses pertaining to its Rights Managed collections photos prohibited such use." (AC ¶ 78.)]

The Getty Agreement expired **[**10]** on March 31, 2009. (Getty Agreement [TEXT REDACTED BY THE COURT])

In 2009, "[NFLP] entertained bids for exclusive commercial licensing rights for NFL and NFL Club photos and eventually selected AP to be the sole commercial licensor [of] such photographs." (AC ¶¶ 26, 54.) Under the resulting agreement (the "First AP Agreement"), AP became the NFLP's exclusive agent and distributor for licensing commercial uses of images of NFL content to NFL business partners, and a non-exclusive agent for licensing editorial uses of those images. (First AP Agreement [TEXT REDACTED BY THE COURT].) As a direct consequence of the switch to AP, Plaintiffs allege they lost their ability to sell higher-value commercial licenses (as opposed to editorial licenses) through Getty and thus were forced to transition their entire NFL collections to AP if they wished to continue offering commercial licenses for their NFL content. (AC ¶ 55.)

Plaintiffs also allege that because they owned the copyrights and licenses for other non-NFL sports-related content, and Getty had exclusive licensing deals and/or significant licensing partnerships with other sports entities, such as Major League Baseball and National Collegiate **[**11]** Athletic Association, they were presented with an **[*94]** "impossible choice." (AC ¶¶ 56, 58.) Getty, Plaintiffs allege, threatened to remove Plaintiffs' other sports content from its distribution networks and/or terminate its relationship with Plaintiffs entirely if they did not agree to continue licensing their NFL content through Getty even after its commercial licensing deal with the NFL expired, and made it clear that it would not "welcome back" any contributors who moved their NFL content to AP should Getty ever regain the rights to license NFL content in the future. (AC ¶ 57.) Because certain Plaintiffs had significant non-NFL content at Getty, Getty's position forced Plaintiffs to choose between losing commercial licensing opportunities for their NFL content by not going to AP or giving up commercial licensing opportunities for their non-NFL content by leaving Getty. (AC ¶ 58.)

Five of the Plaintiffs, Jasienski, Stluka, Spinelli, Witte, and Drapkin, ended their relationships with Getty (AC ¶ 62), entered into license agreements with AP ("AP Contributor Agreements"), and transferred their existing images of NFL content from Getty to the AP photo library. (AC ¶ 59.) Subsequently, Plaintiffs **[**12]** Lowrance and Boehm entered into license agreements with AP and moved their NFL images from Getty to AP. (AC ¶ 62.) As a result of terminating their relationships with Getty, Plaintiffs allege that they have lost significant revenue due to the loss of licensing opportunities for their non-NFL content. (AC ¶ 63.)

The First AP Agreement encompassed the use and licensing of images in which AP owned copyrights (First AP Agreement [TEXT REDACTED BY THE COURT]), as well as Contributor Photographs [TEXT REDACTED BY THE COURT] (First AP Agreement [TEXT REDACTED BY THE COURT]). The First AP Agreement covered a "worldwide" territory (First AP Agreement [TEXT REDACTED BY THE COURT]), and authorized the NFL (and its affiliates, subsidiaries, and successors) and NFL Clubs to make a wide range of editorial, charitable, and marketing uses of photographs owned by AP on a royalty-free basis. (First AP Agreement [TEXT REDACTED BY THE COURT])

When the First AP Agreement expired, "[NFLP] again entertained bids for the exclusive commercial licensing rights for NFL and NFL Club photos and eventually renewed its agreement with AP." (AC ¶ 27.) AP and the NFL thus entered into a new license agreement, with a **[**13]** term from April 1, 2012 through March 31, 2015 (the "Second

AP Agreement"). (Second AP Agreement [TEXT REDACTED BY THE COURT]) The Second AP Agreement, while not identical to the First AP Agreement, states that AP is: (i) the "exclusive" and "worldwide agent and distributor" for licensing commercial uses of NFL photographs to NFL business partners (Second AP Agreement [TEXT REDACTED BY THE COURT]); and (ii) a non-exclusive worldwide agent and distributor for licensing editorial uses. (Second AP Agreement [TEXT REDACTED BY THE COURT].)

The Second AP Agreement permits "NFL Entities," i.e., NFL (and its affiliates, subsidiaries, and successors) and the NFL Clubs, to make royalty-free use of AP-owned and Contributor Photographs for a wide range of editorial, charitable, and marketing uses, including:

[TEXT REDACTED BY THE COURT]

(Second AP Agreement [TEXT REDACTED BY THE COURT].) The Second AP Agreement expressly authorizes the foregoing uses of photographs by the NFL and NFL Clubs from April 1, 2009 through the end of the agreement's term. (Id.)

Plaintiffs allege that at one time they contacted the NFL to "demand that it cease and desist using their copyrighted works without permission and **[**14]** without paying the requisite licensing fees." (AC ¶ 83.) The NFL responded that the First AP Agreement included an express license that allowed complimentary use of any NFL-related photos licensed by AP. (Id.) **[*95]** Plaintiffs then contacted AP regarding the NFL's response and contend that AP denied the NFL's claim and "assured Plaintiffs that not only did the [First AP Agreement] . . . not include such a license, but the AP was currently renegotiating its agreement with the NFL to address the widespread misuse of photos by the NFL." (AC ¶ 84.) Subsequently, AP granted NFL a license that was "Royalty Free" and "retroactive" to 2009, which Plaintiffs contend was granted due to "threats and coercive pressure by the NFL, including the threat of moving its exclusive license back to Getty . . ., which also had submitted a bid to reacquire the NFL's business." (AC ¶ 86.)

Plaintiffs allege that despite repeated cease and desist demands, the NFL Defendants continue to use thousands of Plaintiffs' photographic works to promote the NFL's brand, sell-NFL related products, and "enhance the NFL's image" in order to generate revenue both as an independent entity and on behalf of the NFL Clubs. (AC ¶ 98.) **[**15]** To that end, Plaintiffs allege that NFL permits visitors to NFL.com to access large resolution copies of Plaintiffs' photos "without appropriate copyright management information or protection against illegal copying," as well as "encourage[] visitor to 'tweet' on Twitter.com or 'share' on Facebook.com copies of Plaintiffs' works." (AC ¶ 111.)

Plaintiffs allege that if it were not for "the NFL's illegal efforts to control the commercial licensing market for NFL-related stock photos, Plaintiffs' licensing agents would not have been forced to purportedly grant the NFL 'complimentary' usage of Plaintiffs' photos . . . [and], [i]nstead . . ., Plaintiffs' agents could have negotiated licensing agreements with individual NFL [Clubs] on better terms and/or Plaintiffs could have negotiated agreements with other licensing agents that precluded such unfair and inequitable terms." (AC ¶ 148.)

Effective as of April 1, 2012, AP entered into an "NFL Photo Store Services and License Agreement" with Replay ("Replay Agreement"), under which Replay agreed to operate the "NFL Photo Store" for AP and fulfill customer orders. (Replay Agreement; AC ¶ 114 ("AP and Replay . . . also sell copies of photographs directly **[**16]** to consumers through the NFL Photo Store.").) Plaintiffs allege that Replay is an online retailer that specializes in selling sports-related photographs, and that owns and operates the website located at *www.replayphotos.com*. (AC ¶ 19.) Plaintiffs contend that Replay "infringed Plaintiffs' copyrights by copying, publishing, displaying, exporting, and otherwise using and exploiting photographic works to which Plaintiffs own all copyrights without a valid license." (AC ¶ 166.) Plaintiffs further allege that AP requested that Plaintiffs agree to amendments in their contributor agreements to allow such sales and Plaintiffs expressly rejected AP's request. (AC ¶ 116.)

The AC sets forth seven counts: Count I alleges violations of the Sherman Act against NFL Defendants, Getty, and AP for conspiring to "restrain trade" through exclusive licensing agreements (AC ¶¶ 122-59); Count II alleges copyright infringement against all Defendants (AC ¶¶ 160-200); Counts III through VI allege vicarious copyright infringement, contributory copyright infringement, breach of contract, and breach of fiduciary duties against Getty and AP (AC ¶¶ 201-46); and Count VII alleges unjust enrichment against all Defendants **[**17]** (AC ¶¶ 247-55).

The Contributor Agreements

Central to the success of Plaintiffs' claims are the Getty Contributor Agreements and the AP Contributor Agreements. **[*96]** As such, the relevant terms of each will be briefly outlined below.

1. The Getty Contributor Agreements[4]

Each of the Getty Contributor Agreements requires arbitration of any disputes arising in connection with the agreements. Specifically, Section 9.5 of the Lowrance Agreement provides that "[a]ny dispute arising out of or in connection with the Agreement shall be finally settled under the Commercial Rules of the [AAA] or International Chamber of Commerce ('ICC') . . . ." (Lowrance Getty Contributor Agreement § 9.5.) In virtually identical language, Section 11.8 of the Getty Images Standard Terms and Conditions, which is incorporated into the remaining six Getty Contributor Agreements, provides that "[a]ny dispute arising out of or in connection with the Brand Agreement shall be finally settled under the Commercial Rules of the [AAA] or [ICC] . . . ." (See Lindquist Decl. Exs. B-G.)

2. The AP Contributor Agreements

a. The Relationship Between the Parties **[**18]**

The AP Contributor Agreements are all governed by New York law.[5] (AP Contributor Agreements § 10.) Each of the Plaintiffs agrees to "provide contributing photography services to AP." (Id. § 1 or § 1.1.) AP agrees to use commercially reasonable efforts to assign each Plaintiff to cover NFL events and to obtain NFL credentials for that photographer to permit him to take photographs at the NFL events. (Id., §§ 2 or 2.2-2.3). Each Plaintiff agrees to make a selection of photos from the event available to AP, and AP agrees to review these photos and reasonably limit the rejection of tendered photos. (Id., §§ 3 or 3.1-3.4).

While each Plaintiff retains copyright in his photos, he provides a broad copyright license to AP in all of his photos **[**19]** that are not rejected by AP. (AP Contributor Agreements, § 4 or §4.2). In exchange for the license, AP agrees to pay royalties to each Plaintiff for certain sublicenses that AP grants to third parties. (Id., §§ 5.1-5.2). Either AP or the Plaintiff is entitled to terminate an AP Contributor Agreement, with or without cause, upon thirty days written notice. (Id., §§ 7 or 7.1). Obligations under the license section of the AP Contributor Agreements survive termination. (Id.)

In the AP Contributor Agreements, each Plaintiff agrees that he is an independent contractor to AP and that he has no agency relationship with AP:

> Photographer shall be acting as an independent contractor and shall not represent himself or herself as an employee of AP, but only as an independent contractor. . . . Neither the making of this Agreement nor the performance of its provisions shall be construed to constitute either Party an agent, partner, joint venture, employee or legal representative of the other Party.

(AP Contributor Agreements, §1 or §1.3.)

[*97] b. The License Provisions

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[4] Discussion of the Getty Contributor Agreements is limited to the terms relevant to Getty's motion to compel arbitration.

[5] "AP Contributor Agreements" as used herein collectively refers to all the AP Contributor Agreements between AP and Plaintiffs. Terms are substantially the same across AP Contributor Agreements, although in some AP Contributor Agreements, the terms are divided only by section numbers, while in others, section and subsection numbers are used. Citations reference both section and subsection numbers. References to a specific AP Contributor Agreement are prefaced by the particular Plaintiff's name.

Section 4 of each AP Contributor Agreement, with slight variation, contains a broad license to AP of the photographer's rights in his photos, which grants AP the right to copy, disseminate **[**20]** and otherwise use those photos, and permits AP to transfer and sublicense all these rights to "other entities":

> Photographer hereby provides to AP a perpetual, irrevocable, transferable, worldwide, right and license to reproduce, edit, translate the caption of, prepare derivative works of, publicly perform, publicly display, load into computer memory, cache, store and otherwise use the Event Photos and to transfer or sublicense these rights to other entities. With respect to NFL Event Photos taken at NFL Events for which AP directly or indirectly arranges for Photographer to obtain a credential, the foregoing rights shall be exclusive for so long as the NFL (or one of its affiliates) confers to AP (or one of its affiliates) the exclusive rights to operate as an NFL commercial use licensing agent, and non-exclusive thereafter. With respect to all other Event Photos, the foregoing rights shall be non-exclusive. AP shall present the Event Photos through AP's image database **[*98]** currently known as "AP Images" and other image databases at AP's discretion.[6]

(Boehm and Drapkin AP Contributor Agreements § 4.2.)

> Subject to Section 7.1, Photographer hereby provides to AP a perpetual, irrevocable, transferable, worldwide, **[**21]** right and license to reproduce, edit, translate the caption of, prepare derivative works of, publicly perform, publicly display, load into computer memory, cache, store and otherwise use the Final Photos and to transfer or sublicense these rights to other entities. With respect to NFL Event Photos taken at NFL Events for which AP directly or indirectly arranges for Photographer to obtain a credential, the foregoing rights shall be exclusive for so long as the NFL (or one of its affiliates) confers to AP (or one of its affiliates) the exclusive rights to operate as an NFL commercial use licensing agent, and non-exclusive thereafter. With respect to all other Event Photos and the Archival Event Photos, the foregoing rights shall be non-exclusive. AP shall present the Final Photos through AP's image database currently known as "AP Images" (the "AP Images Platform") and other image databases at AP's discretion.

(Spinelli, Stluka, Witte and Jasienski AP Contributor Agreements § 4.2.)

> Photographer hereby provides to AP a non-exclusive, transferable, perpetual, irrevocable, worldwide right and license to reproduce, edit, translate the caption of, prepare derivative works of, publicly perform, publicly **[**22]** display, load into computer memory, cache, store and otherwise use the Event Photos and to transfer or sublicense these rights to other entities. AP shall present the Final Photos through AP's image database currently known as "AP Images" and other image databases at AP's discretion.

(Lowrance AP Contributor Agreement § 4.2)

In all but Lowrance's AP Contributor Agreement, the photographer has granted AP an exclusive license for NFL Event Photos taken by him at an NFL event where AP directly or **[**23]** indirectly arranges for the photographer to be credentialed for the event. The license is to be exclusive for the period of time that AP remains the NFL's exclusive licensing agent, and is non-exclusive thereafter. The Lowrance AP Contributor Agreement grants AP the same broad rights as the other AP Contributor Agreements, but on a non-exclusive basis. As with the other AP Contributor Agreements, the Lowrance Contributor Agreement expressly authorizes AP to transfer and sublicense to other entities to the full extent of AP's own license rights.

c. The Royalty Provisions

Each of the AP Contributor Agreements sets forth AP's agreement to pay royalties to the contributor, "[i]n exchange for the license granted in Section 4." The Boehm, Drapkin, and Lowrance Agreements require AP to pay the photographer a royalty equal to a defined percentage of "Net Revenue" on "qualifying Event Photo Sales." "Event

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[6] "Event Photos" are defined as the photographs taken by the contributor at an "Event," which have been selected by the contributor as his best photographs taken at the Event ("Best Cut Photos") (AP Contributor Agreements § 3.1) and which AP has not rejected. (Id. §3.4). "NFL Event Photos" are Event Photos taken at "NFL Events," which are Events credentialed, promoted, sponsored or requested by the NFL, its affiliates, and its member clubs. (Id.) Some AP Contributor Agreements also use the term "Final Photos," which refer to the contributor's Event Photos together with his "Archival Event Photos" (photos taken by the contributor at NFL games prior to the effective date of the AP Contributor Agreement). (Id. § 3.2.1.)

Photo Sales" are defined as "mean[ing] only the a la carte sale of licenses for Event Photos through AP's online database service, currently known as 'AP Images.'" "A la carte sales" are further defined as "the sale of licenses for individual photos for which a per-image price is established." "Net Revenue" is defined **[**24]** as "all cash actually collected by AP from the sale of copies of a particular Event Photo, less sales commission." The AP Contributor Agreements also recognize that AP may offer the Event Photos for a la carte sale at a "bulk rate" which may include the photographs of photographers other than the contributor. In such a case, to determine royalties, AP is to apportion the cash received on an equal pro-rata basis across all photos included in the a la carte bulk rate. (AP Contributor Agreements § 5.1).

Section 5.1 of the Jasienski, Spinelli, Stluka and Witte AP Contributor Agreements provide that upon a "qualifying Event Photo Sale," AP will provide the contributor with the greater of royalties calculated on the revenue-share basis described in the above paragraph, and "a royalty equal [to] twenty-five dollars ($25.00) per Final Photo." However, these AP Contributor Agreements also provide that these minimum royalties are only due on "qualifying Event Photo Sales," which means "the a la carte sale of licenses for Event Photos." (Id.)

The AP Contributor Agreements do not require AP to license the contributors' photographs to third parties only through a "sale" that would generate revenue and therefore **[**25]** royalties.[7] Nothing in the AP Contributor Agreements requires AP to issue only royalty-bearing sublicenses. Additionally there is nothing in the AP Contributor Agreements that compels AP to limit the uses that NFL (or any other sublicensed third party) makes of a sublicensed photo, or to "track and manage" such sublicensee uses. (Cf. AC ¶¶ 69-72).

Applicable Standard

HN2[] On a motion to dismiss pursuant to *Rule 12(b)(6)*, all factual allegations in the complaint are accepted as true, and all inferences **[*99]** are drawn in favor of the pleader. *Mills v. Polar Molecular Corp., 12 F.3d 1170, 1174 (2d Cir. 1993)*. However, a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 663, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*.

A claim is facially plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 663* (quoting *Twombly, 550 U.S. at 556*). In other words, the factual allegations must "possess enough heft to show that the pleader is entitled to relief." **[**26]** *Twombly, 550 U.S. at 557* (internal quotation marks omitted).

HN3[] When determining whether parties have agreed to arbitrate a dispute, courts consider two questions: (1) whether a valid agreement to arbitrate under the contract in question exists and (2) whether the particular dispute in question falls within the scope of that arbitration agreement. See *Hartford Accident & Indem. Co. v. Swiss Reins. Am. Corp., 246 F.3d 219, 226 (2d Cir. 2001)* (quoting *Nat'l Union Fire Ins. Co. v. Belco Petrol. Corp., 88 F.3d 129, 135 (2d Cir. 1996))*.

I. The Motion To Compel Arbitration Of Plaintiffs' Claims Against Getty Is Granted

HN4[] Arbitration is "strictly a matter of contract." *Ross v. Am. Express Co., 478 F.3d 96, 99 (2d Cir. 2007)* (citing *Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 779 (2d Cir. 1995))*. The Federal Arbitration Act (FAA) provides that "an agreement in writing to submit to arbitration an existing controversy . . . shall be valid, irrevocable and enforceable . . . ." *9 U.S.C. § 2*. The FAA "requires the federal courts to enforce arbitration agreements, reflecting Congress' recognition that arbitration is to be encouraged as a means of reducing the costs and delays associated with litigation." *Vera v. Saks & Co., 335 F.3d 109, 116 (2d Cir. 2003)* (citation omitted); see also *Am.*

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[7] Some of the AC Contributor Agreements contain a "minimum royalty" provision. However, minimum royalties are due only where AP has made an "a la carte sale of licenses for Event Photos." (AP Contributor Agreements § 5.1.)

Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309, 186 L. Ed. 2d 417 (2013) (noting that courts "must 'rigorously enforce' arbitration agreements according to their terms") (citation omitted)). The Second Circuit has "often and emphatically applied" the strong federal policy in favor of arbitration. *Arciniaga v. Gen. Motors Corp., 460 F.3d 231, 234 (2d Cir. 2006)*.

Because of this policy favoring arbitration, "the burden of persuasion **[**27]** falls on the party attempting to escape an arbitration agreement, not the one attempting to enforce it." *Marubeni Am. Corp. v. M/V "OHFU" her Engines, No. 94 CIV. 6251 (SAS), 1996 U.S. Dist. LEXIS 2173, 1996 WL 84485, at *2 (S.D.N.Y. Feb. 27, 1996)*. When the existence of an arbitration agreement is undisputed, "doubts as to whether a claim falls within the scope of that agreement should be resolved in favor of arbitrability." *ACE Capital Re Overseas Ltd. v. Cent. United Life Ins. Co., 307 F.3d 24, 29 (2d Cir. 2002)* (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)*). Courts in this Circuit have held that, where a valid arbitration clause has been found to exist, they must abstain from adjudicating plaintiffs' claims. See, e.g., *Robinson Brog Leinwand Greene Genovese & Gluck P.C. v. Quinn & Assoc. LLP, 523 F. App'x 761, 764 (2d Cir. 2013)*.

HN5[] The Second Circuit has directed courts to classify arbitration clauses as either broad or narrow. *JLM Indus., Inc.* ***[*100]*** *v. Stolt-Nielsen SA, 387 F.3d 163, 172 (2d Cir. 2004)* (quoting *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc., 252 F.3d 218, 224 (2d Cir. 2001)*). Clauses requiring arbitration of disputes "arising out of or in connection with" underlying contracts are considered "broad" arbitration clauses. See, e.g., *Googla Home Decor LLC v. Uzkiy, No. 09-CV-1049 (CPS)(RML), 2009 U.S. Dist. LEXIS 81195, 2009 WL 2922845, at *5 (E.D.N.Y. Sept. 8, 2009)* (finding clause requiring arbitration of "[a]ny dispute, controversy, or claim arising out of or in connection with this Agreement" to be broad). Indeed, an arbitration clause covering "any claim or controversy arising out of or relating to" an agreement is "the paradigm of a broad clause," *Collins & Aikman Prods. Co. v. Bldg. Sys., Inc., 58 F.3d 16, 20 (2d Cir. 1995)* (citation omitted) - broader than one covering all claims and disputes "arising under th[e] contract." **[**28]** *Genesco, Inc. v. T. Kakiuchi & Co., Ltd., 815 F.2d 840, 845, 848 (2d Cir. 1987)*.

HN6[] A "presumption of arbitrability" arises from contracts containing broad arbitration clauses. *ACE Capital, 307 F.3d at 34*. In particular, a broad arbitration clause is "presumptively applicable to disputes involving matters going beyond the 'interpret[ation] or enforce[ment of] particular provisions' of the contract which contains the arbitration clause." *JLM, 387 F.3d at 172* (citation omitted).

a. The Arbitration Clauses Are Enforceable

Plaintiffs contend that they should not be subject to arbitration because the Getty Contributor Agreements as a whole were procedurally and substantively unconscionable. (See Pls.' Opp'n to Getty Mot. 11-18.) The United States Supreme Court has, however, held that ***HN7***[] "a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 448-49, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006)*; see also *Preston v. Ferrer, 552 U.S. 346, 128 S. Ct. 978, 169 L. Ed. 2d 917 (2008)* (holding that a dispute concerning the legality of a contract must be resolved by an arbitrator since respondent sought invalidation of the contract as a whole, and made no discrete challenge to the validity of the arbitration clause); *Cole v. Pearson Educ., Inc., No. 10 Civ. 7523(JFK)(RLE), 2011 U.S. Dist. LEXIS 110603, 2011 WL 4483760, at *5 (S.D.N.Y. Sept. 28, 2011)* ("[a]n arbitration clause is not rendered invalid by a challenge to the contract as a whole") (citing *Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 71, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010)* (holding that "basis of challenge [need] to be directed specifically to **[**29]** the agreement to arbitrate before the court will intervene")). Because Plaintiffs do not challenge the validity of the arbitration provision specifically, their arguments regarding the unenforceability of the arbitration provisions fail.

b. Breach Of Contract Claims Must Be Arbitrated

Plaintiffs' breach of contract claims are arbitrable. The allegation that Getty failed to honor its obligations under the Getty Contributor Agreements (see AC ¶¶ 219-20, 223-26) obviously "aris[es] out of or in connection with" the Getty Contributor Agreements. (See Lindquist Decl. Exs. A § 9.5, B-G § 11.8); *World GTL Inc. v. Petroleum Co. of Trinidad & Tobago Ltd., No. 10 Civ. 1542 (LMM), 2010 U.S. Dist. LEXIS 83244, 2010 WL 3291673, at *3-4*

(S.D.N.Y. Aug. 11, 2010) (holding that breach of contract claims were covered by broad arbitration clause). As stated above, Plaintiffs have not argued that the arbitration clauses themselves are unenforceable. Accordingly, the breach of contract claims must be arbitrated.

[*101] c. Breach Of Fiduciary Duties Claims Must Be Arbitrated

The breach of fiduciary duties claims also clearly arise out of and in connection with the Getty Contributor Agreements. ***HN8***[] Claimed breaches of fiduciary duty arising out of agreements with broad arbitration clauses are subject to arbitration. See, e.g., *Syncora Guar. Inc. v. HSBC Mexico, S.A., 861 F. Supp. 2d 252, 259 (S.D.N.Y. 2012)* ("This claim alleges that HSBC, as [t]rustee, owes Syncora a fiduciary duty under **[**30]** the Trust Agreement, and that HSBC breached its fiduciary duty owed to Syncora, and falls within the plain meaning of [a]ny controvers[y] arising pursuant to [the] Trust Agreement" (quotation marks and internal citations omitted) (alterations in original)). Plaintiffs base their allegation of fiduciary duties owed to them by Getty on the Getty Contributor Agreements. (See AC ¶¶ 229-30 ("Plaintiffs' contributor agreements with Getty Images expressly provided that Plaintiffs were permitted to select the licensing model of their photos at the time of submission . . . . Plaintiffs' contributor agreements with Getty Images expressly provided that Plaintiffs were permitted to specify any other restrictions on the licensing of any photos . . . and that Getty Images would honor such restrictions.").) Moreover, the allegation that Getty held itself out as Plaintiffs' agent (see AC ¶ 232) squarely implicates the provision in the Getty Contributor Agreements that the contributor "agrees that he/she is an independent contractor" and that the parties' relationship "is one of contract only and is not one of partnership, employment, joint venture, principal-agent or any other legal identity." (Getty Contributor Agreements **[**31]** §§ 9.3 (Lowrance), 11.7.)

In short, the breach of fiduciary duties claims are encompassed by the arbitration clauses and must be arbitrated.

d. Unjust Enrichment Claims Must Be Arbitrated

It is well established that ***HN9***[] unjust enrichment claims fall within the scope of broad arbitration clauses. See, e.g., *Grenawalt v. AT&T Mobility, LLC, 937 F. Supp. 2d 438, 459 (S.D.N.Y. 2013)* (compelling arbitration of unjust enrichment claim that cited agreement containing broad arbitration provision as "substantial support"). Plaintiffs' unjust enrichment claim is predicated on Getty allegedly having "used Plaintiffs' photos without paying any license fees, royalties, or other compensation to Plaintiffs" pursuant to the Getty Contributor Agreements. (AC ¶ 250.) This claim thus expressly "aris[es] out of or in connection with" the Getty Contributor Agreements and therefore, as in Grenawalt, must be arbitrated.

e. Federal Copyright Infringement Claims Must Be Arbitrated

As noted, ***HN10***[] the FAA establishes a strong federal policy in favor of arbitration, and courts have long considered arbitration to be "presumptively an appropriate and competent forum for federal statutory claims." *MBNA Am. Bank, N.A. v. Hill, 436 F.3d 104, 110 (2d Cir. 2006)*. Statutory claims may be arbitrated "so long as the prospective litigant effectively may vindicate his or her statutory **[**32]** cause of action in the arbitral forum." *Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000)* (citation omitted). "The burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 227, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987)*; see also *Green Tree, 531 U.S. at 91-92* ("We have held that the party seeking to avoid arbitration bears the burden of establishing that Congress intended to **[*102]** preclude arbitration of the statutory claims at issue.").

HN11[] The Supreme Court has set forth a two-step inquiry for determining whether statutory claims arising out of a contract are arbitrable. First, courts must determine "whether the parties' agreement to arbitrate reached the statutory issues." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)*. Second, courts must consider whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims - namely, if a party has "made the bargain to arbitrate," it "should be held to it unless Congress . . . has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." Id.; see also *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26, 111 S. Ct. 1647, 114 L. Ed. 2d 26*

(1991) (holding that claims under federal statutes generally are arbitrable so long as the arbitration agreement is broad enough to encompass the statutory claim and Congress has not indicated its intent **[**33]** to prohibit arbitration of the claim). Finally, where Congress has not clearly precluded arbitration, arbitration of a statutory claim will be compelled unless, as noted, the prospective litigant shows that it "cannot effectively vindicate [its] statutory rights in the arbitral forum." *In re Cotton Yarn Antitrust Litig., 505 F.3d 274, 282 (4th Cir. 2007)*; see also *Italian Colors, 133 S. Ct. at 2314*. Under this test, Plaintiffs cannot avoid arbitration of their copyright infringement or Sherman Act claims.

It is well settled that ***HN12***[] copyright claims asserted in connection with licensing disputes are encompassed by broad arbitration clauses like those contained in the Getty Contributor Agreements. In *Kamazaki Music Corp. v. Robbins Music Corp., 684 F.2d 228 (2d Cir. 1982)*, the Second Circuit affirmed that an arbitration clause requiring the parties to arbitrate claims "arising out of, or relating to" their contract covered copyright claims. See *id. at 229-31*. Similarly, in Cole the arbitration clause at issue required that "[a]ny dispute in connection with this stock picture invoice including its validity, interpretation, performance, or breach shall be arbitrated . . . ." *2011 U.S. Dist. LEXIS 110603, 2011 WL 4483760 at *4* (emphasis added). The court held that the arbitration clause "include[d] disputes arising under the copyright law. Defendant licensed all of the works claimed by the Plaintiff to have been infringed, and any dispute **[**34]** about the publication of the licensed photographs [wa]s a 'dispute in connection' with the license agreements . . ." and dismissal of the claims was warranted. *2011 U.S. Dist. LEXIS 110603, [WL] at *6*.

The arbitration provisions in the Getty Contributor Agreements are substantially similar to those held in *Kamakazi* and *Cole* to encompass both contract and related copyright claims. Moreover, Plaintiffs' copyright claims clearly arise "out of or in connection with" their agreements with Getty, as they are predicated on Getty's alleged authorization of or failure to prevent the NFL from engaging in uses of Plaintiffs' images that purportedly fell outside the scope of the Getty Contributor Agreements. (See AC ¶¶ 71-78, 167-71, 203-06, 212-15.) In other words, the claimed infringements are defined by the scope of the Getty Contributor Agreements. The copyright claims therefore must be arbitrated.[8]

[*103] f. Sherman Act Claims Must Be Arbitrated

HN15[] The Supreme Court has made clear that Sherman Act antitrust conspiracy claims are arbitrable. See *Mitsubishi, 473 U.S. at 633-34*; *Gilmer, 500 U.S. at 28* (claims under the Sherman Act "are appropriate for arbitration"); see also *In re Cotton Yarn, 505 F.3d at 282* ("We . . . have no difficulty concluding that domestic antitrust claims, as a class, are suitable for arbitration."). Indeed, the Court in Mitsubishi found no "explicit support" in either the Sherman Act or in the FAA for holding Sherman Act claims to be nonarbitrable. *473 U.S. at 628-29*.

The Second Circuit has held that if the allegations underlying claims "touch matters covered by the parties' contracts," those claims must be arbitrated "whatever the legal labels attached to them." JLM*, 387 F.3d at 172* (emphasis added). Conspiracy allegations may "touch matters" covered by a contract even if the alleged conspiracy

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[8] To the extent that Plaintiffs rely on agreements not pleaded in the AC (see Pls.' Opp'n to Getty Mot. 28 (arguing that Plaintiffs' claims arise under separate subsequent agreements with no arbitration clauses that are not mentioned in the AC)), their arguments are disregarded. See *Klauber Bros., Inc. v. Russell-Newman, Inc., 11 CIV. 4985 PGG, 2013 U.S. Dist. LEXIS 42758, 2013 WL 1245456, at *11 (S.D.N.Y. Mar. 26, 2013)* **[**35]** , aff'd sub nom *Klauber Bros., Inc. v. Bon-Ton Stores, Inc., 557 F. App'x 77 (2d Cir. 2014)* ("Allegations made outside of the complaint are not properly before the court on a motion to dismiss.") (citations omitted). ***HN13***[] Claims that are raised for the first time in an opposition brief are not properly before the court. *U.S. Bank Nat'l Ass'n v. PHL Variable Ins. Co., 12 CIV. 6811 CM JCF, 2013 U.S. Dist. LEXIS 38768, 2013 WL 791462, at *2 (S.D.N.Y. Mar. 5, 2013)*. Furthermore, Plaintiffs' assertions that the fact that NFL Defendants "are indispensable parties to Plaintiffs' claims against Getty involving secondary forms of liability" makes the secondary infringement claims against Getty are non-arbitrable must also fail. ***HN14***[] Secondary infringement claims are often litigated without joinder of any alleged direct infringer. See generally, *Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012)*; *Capitol Records, Inc. v. MP3tunes, LLC, 821 F. Supp. 2d 627 (S.D.N.Y. 2011)*; *Capitol Records, LLC v. Vimeo, LLC, 972 F. Supp. 2d 537 (S.D.N.Y. 2013)*; *Arista Records LLC v. Lime Grp. LLC, 784 F. Supp. 2d 398 (S.D.N.Y. 2010)*.

includes non-parties to the contract or involves alleged wrongdoing that occurred before or after the formation of the contract. *Alghanim v. Alghanim, 828 F. Supp. 2d 636, 655-56 (S.D.N.Y. 2011)* ("independent conspiracies may lie within the scope of arbitration clauses").

In JLM, the plaintiffs alleged an antitrust conspiracy among owners of tankers **[**36]** in the business of shipping liquid chemicals. The plaintiffs - corporations in the business of shipping, buying, selling, and trading chemicals in bulk - had entered into contracts with the defendants that directed "[a]ny and all differences and disputes of whatsoever nature arising out of this Charter . . . be put to arbitration." See *387 F.3d at 167*. The plaintiffs argued that because the alleged conspiracy was formed independently of the contractual relationship between the parties, the Sherman Act claims were not covered by the broad arbitration clause. See *id. at 175*.

The Second Circuit disagreed:

> [T]he damages which JLM asserts it suffered as a result of the conspiracy among the Owners result from the fact that it entered into the charters, each of which specifies price terms which are variously characterized in the amended complaint as "artificially high" and as "overpayments." We therefore conclude that this is a dispute "arising out of" the charters, and is therefore within the scope of the [] arbitration clause.

Id. The court added that ***HN16***[] in dealing with broad arbitration clauses, it "ha[s] not limited arbitration claims to those that constitute a breach of the terms of the contract at issue," *id. at 176* (quoting *Mehler v. Terminix Int'l Co., 205 F.3d 44, 50 (2d Cir. 2000))*, and it **[**37]** cited earlier cases in which it had held claims based on alleged conspiratorial conduct by a party with **[*104]** whom the plaintiffs were in privity to be arbitrable. See *JLM, 387 F.3d at 176*.

Plaintiffs' Sherman Act conspiracy allegations against Getty are analogous to those at issue in *JLM*. Plaintiffs allege, for example, that

> [t]he NFL's illegal monopoly and NFL Properties' agreement to grant an exclusive license to Getty Images and then AP also artificially undermined Plaintiffs' ability to bargain fairly with Getty Images and AP to obtain more favorable terms in their contributor contracts. . . . Because other licensors could not offer commercial licenses for NFL photos, Plaintiffs were forced into an impossible dilemma of either accepting the contract terms being offered by the NFL's licensing partner or losing the ability to earn revenue from the sale of more lucrative commercial licenses.

(AC ¶ 144.) As in JLM, Plaintiffs contend that the damages they purportedly suffered as a result of the alleged conspiracy among the NFL Defendants and Getty flowed from the Getty Contributor Agreements. See *JLM, 387 F.3d at 175*. Given these allegations, any assertion that the antitrust claims are not sufficiently connected to Getty Contributor **[**38]** Agreements to be arbitrable must fail.

Nor are there any "legal constraints external to the parties' agreement," *Mitsubishi, 473 U.S. at 628*, that should prevent arbitration of the antitrust claims despite the agreement to arbitrate. In their response and objection to Getty's arbitration demand, Plaintiffs argued that the Sherman Act claims should not be arbitrated because Getty is "a necessary and indispensable party to several of [Plaintiffs'] claims against the Getty Images co-defendants," which are not subject to arbitration. (See Bloom Decl. Ex. C at 2.) However, ***HN17***[] alleged co-conspirators "are not necessary parties; a plaintiff can prove the existence of a conspiracy in an action against just one of the members of the conspiracy." *In re Cotton Yarn, 505 F.3d at 284* (citing *Georgia v. Pa. R.R. Co., 324 U.S. 439, 463, 65 S. Ct. 716, 89 L. Ed. 1051 (1945)* ("In a suit to enjoin a[n anti-trust] conspiracy not all the conspirators are necessary parties defendant."); Cf. *Doctor's Assocs., Inc. v. Distajo, 66 F.3d 438, 445-46 (2d Cir. 1995)* (noting that ***HN18***[] individuals not party to an arbitration agreement cannot be "indispensable" for *Rule 19* purposes); see also *Wilson P. Abraham Constr. Corp. v. Tex. Indus., Inc., 604 F.2d 897, 904 n. 15 (5th Cir. 1979)* ("A private plaintiff need not sue all co-conspirators but may choose to proceed against any one or more of them.")).

In In re Cotton Yarn, the plaintiffs sought to evade a broad arbitration clause by arguing that "the inability to join all defendants **[**39]** in a single proceeding [by virtue of a no-joinder clause in the arbitration agreements] prevent[ed] them from vindicating their statutory rights." *505 F.3d at 283*. They argued that "severing the conspiracy into separate parts would deprive [them] of the full benefit of their proof, and make the proving of the conspiracy, if not impossible, extremely difficult." Id. In rejecting this argument, the Fourth Circuit found that potential inconvenience to the plaintiffs was trumped by congressional intent:

> [C]o-conspirators are not necessary parties in an action against a single conspirator. There is nothing in the arbitration agreements that would prevent the plaintiffs from presenting evidence about the actions of non-party defendants in order to establish the existence of the price-fixing conspiracy alleged by the plaintiffs. Accordingly, the mere fact that the plaintiffs may not join the defendants in a single arbitration proceeding does not prevent the plaintiffs from effectively vindicating their statutory rights. While individual proceedings **[*105]** may be less efficient than a single proceeding, that inefficiency is a function of Congress's preference for resolution of disputes by arbitration and cannot be a basis for **[**40]** defeating the arbitration that Congress was seeking to encourage.

Id. at 285.

The same reasoning applies here. Plaintiffs' assertion of nonarbitrable claims against alleged co-conspirators should not prevent arbitration of the claims against Getty. Indeed, the principle that co-conspirators are not necessary parties applies in this case because the alleged conspiracy is based on separate, successive exclusive licenses between the NFL and Getty and AP, respectively. (See AC ¶ 134 (alleging the NFL granted exclusive licenses to "Getty Images and then AP").) Plaintiffs allege that Getty held exclusive NFL licensing rights until 2009, (AC ¶ 46) after which AP entered into its own exclusive license agreement with the NFL (AC ¶ 46). The lack of any alleged temporal overlap between these licensing deals undermines Plaintiffs' assertion that Getty is a necessary party to this litigation.

Plaintiffs argue that their antitrust claims are collateral to any contracts between Plaintiffs and Getty and that the claims do not depend on the interpretation of the Getty Contributor Agreements. (Pls.' Opp'n to Getty Mot. 24-26.) However, the AC expressly links the claimed conspiracy to the Getty Contributor Agreements **[**41]** by alleging that the purported adverse impact of the alleged conspiracy between NFL and Getty is manifested in the Getty Contributor Agreements. (See AC ¶ 144.) As such, the Sherman Act claims appear to "touch matters covered by the parties' contracts[.]" See *JLM, 387 F.3d at 172* ("[T]he damages which JLM asserts it suffered as a result of the conspiracy among the Owners result from the fact that it entered into the charters, each of which specifies price terms which are variously characterized in the amended complaint as 'artificially high' and as 'overpayments.' We therefore conclude that this is a dispute 'arising out of' the charters, and is therefore within the scope of the [] arbitration clause.").

Plaintiffs also argue that the Court is "required to determine whether the claims would actually require construction of contract terms or determining rights under contract provisions." (Pls.' Opp'n to Getty Mot. 24.) However, ***HN19***[] a broad arbitration clause is "presumptively applicable to disputes involving matters going beyond the 'interpret[ation] or enforce[ment of] particular provisions' of the contract which contains the arbitration clause." *JLM, 387 F.3d at 172* (citation omitted). Plaintiffs' reliance on *Collins & Aikman Prods. Co. v. Bldg. Sys., Inc., 58 F.3d 16 (2d Cir. 1995)* to assert otherwise is misplaced.[9]

In sum, because Plaintiffs' antitrust claims touch and concern the Getty Contributor Agreements, the antitrust claims are properly referred to arbitration.

g. Objections Based On Cost Do Not Bar Arbitration

Finally, Plaintiffs' objection that they will incur additional expense or inconvenience from having to arbitrate their claims against Getty (see Bloom Decl. Ex. C at 2) cannot defeat the strong federal policy in favor of enforcing

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[9] Collins **[**42]** & Aikman did not involve an antitrust claim. At issue there was which of two contracts between the parties was implicated by the plaintiffs' state-law claims. See *58 F.3d at 23* ("the task of determining whether a clam or a set of claims 'arises out of or relates to' the particular contract in which the arbitration clause is found was properly determined by the district court") (emphasis added).

arbitration agreements. ***HN20***[] The "possibility that a party **[*106]** to an arbitration clause will be inconvenienced and will incur some extra expense . . . does not necessarily mean that the party cannot effectively vindicate its statutory rights through arbitration." *In re Cotton Yarn, 505 F.3d at 285*. As the Supreme Court stated in Italian Colors, the antitrust laws "do not guarantee an affordable procedural path to the vindication **[**43]** of every claim." *133 S. Ct. at 2309*. "It would be unwieldy . . . to require courts to proceed case by case to tally costs and burdens to particular plaintiffs in light of their means . . . ." *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 536, 115 S. Ct. 2322, 132 L. Ed. 2d 462 (1995)*.

Additionally, "uninformed speculation about cost" is insufficient to carry the burden of proving that proceeding against antitrust defendants individually would prevent the plaintiffs from effectively vindicating their statutory rights. *In re Cotton Yarn, 505 F.3d at 285*; see also *Green Tree, 531 U.S. at 90* (rejecting argument that statutory claims could not be arbitrated due to prohibitive costs as "too speculative to justify the invalidation of an arbitration agreement.") While Plaintiffs note the high costs of federal court litigation, they do not provide support for the proposition that arbitration would be more expensive (see Pls.' Opp'n to Getty Mot. 20), or that the expense would be so great as to impede prosecution of their claims. See *AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 131 S. Ct. 1740, 1749, 179 L. Ed. 2d 742 (2011)* ("the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution"); see also *Vera, 335 F.3d at 116* (noting Congress' determination that arbitration "is to be encouraged as a means of reducing the costs and delays associated with litigation" (citation omitted).

Finally, Plaintiffs note in **[**44]** passing that "there is a tremendous risk that Plaintiffs will not be able to effectively vindicate their claims against Getty Images because the NFL Defendants certainly will not agree to participate in arbitration and thus Plaintiffs cannot be assured of necessary discovery from those parties." (Pls.' Opp'n to Getty Mot. 30 n. 16.) However, any limitations on discovery in arbitration do not establish grounds to defeat the agreement to arbitrate.

Because Plaintiffs have failed to adequately plead or establish their objections based on cost, these objections are disregarded.

II. The Motion To Dismiss Plaintiffs' Sherman Act Antitrust Claims (Count I) Against NFL Defendants and AP Is Granted

a. Antitrust Claims Against NFL Defendants

HN21[] In order to state a claim against the NFL Defendants, Getty, and AP under Sections 1 and 3 of the Sherman Act, 15 U.S.C. §§ 1 and 3, that will withstand a motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)*, Plaintiffs must allege sufficient facts to support a plausible inference that NFL Defendants, Getty, and AP took part in an agreement that unreasonably restrained trade.[10] See *Twombly, 550 U.S. at 570*; *Port Dock & Stone Corp. v. Oldcastle **[*107]** Northeast, Inc., 507 F.3d 117, 121 (2d Cir. 2007)*; *In re Elevator Antitrust Litig., 502 F.3d 47, 50 (2d Cir. 2007)*.

The AC asserts that the NFL Defendants, in concert with Getty[11] and AP, "conspire[d] to create a monopoly in favor of NFL in order to illegally restrain trade and otherwise fix and control the market for commercial licensing of NFL-

[10] ***HN22***[] Section 3 of the Sherman Act merely extends the reach of Section 1 to trade or commerce involving U.S. Territories and the District of Columbia. Substantively, **[**45]** however, Section 3 claims are analyzed in the same manner as Section 1 claims. See *Dart Drug Corp. v. Parke, Davis & Co., 344 F.2d 173, 174 n. 1, 120 U.S. App. D.C. 79 (D.C. Cir. 1965)* ("Section 3 is, in terms of the substantive offense defined therein, an exact counterpart of Section 1, made expressly applicable to the Territories and the District of Columbia.").

[11] Consistent with the rest of this opinion, this section's mention of Getty does not serve as a determination with respect to Getty's antitrust liability but rather mentions Getty as an alleged participant in Plaintiffs' asserted antitrust conspiracy.

related 'stock' photos." (AC ¶¶ 28, 37.) According to Plaintiffs, the NFL Defendants conspired to restrain trade in two ways.

First, Plaintiffs allege that each NFL Club "authorized the NFL and/or [NFLP] to make decisions regarding [its] separately owned intellectual property [and] to grant an exclusive license to a single licensing company to market and sell commercial licenses for all stock photography of NFL-related photos." (Id. ¶ 24.) As such, according to Plaintiffs, in the absence of the alleged **[**46]** conspiracy, their "agents [i.e., Getty, AP or their competitors] could have negotiated licensing agreements with individual NFL Teams on better terms." (Id. ¶ 148.) Second, Plaintiffs allege that the NFLP and NFL granted "illegal" exclusive licenses to Getty in 2007 and then AP in 2009 and 2012 (id. ¶¶ 25-27, 136), which prevented Plaintiffs "from seeking or obtaining fair market value for commercial uses of their NFL photographs" and "undermined [their] ability to bargain fairly with Getty Images and AP to obtain more favorable terms in their contributor contracts." (Id. ¶¶ 143-44.) Plaintiffs also claim that they were harmed by the NFL's decision in 2009 to switch exclusive licensors from Getty to AP because Getty, with whom Plaintiffs had a continuing relationship, distributed their other photo collections (e.g., MLB and NCAA photos). (Id. ¶¶ 55-58, 147.)

As a threshold matter, ***HN23***[] "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 534, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* (quoting *Hawaii v. Standard Oil Co., 405 U.S. 251, 263, 92 S. Ct. 885, 31 L. Ed. 2d 184, n. l4 (1972)*). ***HN24***[] To have standing, a plaintiff must, among other things, be "an 'efficient enforcer' of the antitrust laws." *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C., 711 F.3d 68, 78 (2d Cir. 2013)*. The Second Circuit **[**47]** has identified four factors to determine whether a plaintiff is an "efficient enforcer:"

> (1) the directness or indirectness of the asserted injury; (2) the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; (3) the speculativeness of the alleged injury; and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries.

Id. (quoting *Paycom Billing Servs., Inc. v. MasterCard Int'l, Inc., 467 F.3d 283, 290-91 (2d Cir. 2006))*. Here, all four factors weigh against Plaintiffs' ability to establish antitrust standing, requiring dismissal of Plaintiffs' antitrust claims. *Gatt Commc'ns, Inc., 711 F.3d at 75* (***HN25***[] "[A]ntitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement we must dismiss as a matter of law." (citation omitted)).

Generally speaking, ***HN26***[] "[i]n order to limit the class of plaintiffs with antitrust standing to the most efficient enforcers of the **[*108]** antitrust laws, courts have typically limited the types of individuals that may bring an antitrust action to direct competitors or consumers." *Port Dock & Stone Corp. v. OldCastle Ne., Inc., No. 05 Civ. 4294, 2006 U.S. Dist. LEXIS 69076, 2006 WL 2786882, at *3 (E.D.N.Y. Sept. 26, 2006)*, aff'd, *507 F.3d 117 (2d Cir. 2007)*; see also *Solent Freight Servs., Ltd. v. Alberty, 914 F. Supp. 2d 312, 319 (E.D.N.Y. 2012)* ("Generally, a plaintiff that is 'neither a consumer nor a competitor in the market **[**48]** in which trade was restrained' does not have standing to allege an antitrust injury to that market." (citation omitted)).

Plaintiffs are neither consumers nor competitors in the alleged market for commercial licensing of NFL-related photographs. Plaintiffs do not purchase the rights to use NFL-related photographs for commercial purposes. Nor do they enter into license agreements with commercial enterprises that wish to use NFL photographs. Instead, they supply photographs to stock photography agencies, like Getty and AP, which compete in the alleged market. See *Reading Int'l, Inc. v. Oaktree Capital Mgmt. LLC, 317 F. Supp. 2d 301, 335 (S.D.N.Y. 2003)* ("Under Associated General Contractors, courts have held that ***HN27***[] suppliers to direct market participants 'typically cannot seek recovery under the antitrust laws because their injuries are too secondary and indirect.'" (citation omitted)).

Plaintiffs contend in their opposition that they "directly competed with agencies such as Getty Images and AP," (Pls.' Opp'n to NFL Def.'s Mot. 28) and that "prior to the NFL's decision to restrict licensing rights to a single agency, Plaintiffs were permitted to and did license their works directly to the NFL Teams and the NFL's fans, as well as other typical customers and end users" (id., at 27-28). However, **[**49]** no such allegation is contained within the AC. The AC states that Plaintiffs are professional photographers who initially submitted their photos to NFL Photos, which then licensed those photos "to media outlets and commercial entities," and after the NFL outsourced licensing to Getty and AP, Plaintiffs supplied their NFL-related photos to those agencies for licensing to commercial end-users. (AC ¶¶ 1, 17-18, 36, 44, 145.) Indeed, the AC clearly states that Plaintiffs have always "licensed the photos that they shot 'on spec' through third-party licensing agents (formerly NFL Photos and then Getty Images and currently AP)." (AC ¶ 36.) As such, Plaintiffs argument on this point must fail.

Specifically, ***HN28***[] with respect to the first "efficient enforcer" factor, to satisfy the antitrust injury requirement, see *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*, a plaintiff must plead facts showing that it has suffered "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. "The antitrust injury requirement obligates a plaintiff to demonstrate, as a threshold matter, 'that the challenged action has had an actual adverse effect on competition as a whole in the relevant **[**50]** market.'" *George Haug Co. v. Rolls Royce Motor Cars Inc., 148 F.3d 136, 139 (2d Cir. 1998)* (emphasis in original) (citation omitted). In other words, a plaintiff must allege "that its loss comes from acts that reduce output or raise prices to consumers." *Chi. Prof'l Sports Ltd. P'ship v. NBA, 961 F.2d 667, 670 (7th Cir. 1992)*. Here, Plaintiffs' purported injury is at most an indirect result of the challenged agreements.

The AC contains no facts to suggest that the challenged conduct reduced output of commercial licenses for NFL photographs **[*109]** or raised prices for consumers. Plaintiffs do not allege that fewer commercial entities are licensed to use NFL photographs, nor do they allege that the prices those entities or consumers pay are higher because of the NFL Clubs' collective licensing or the exclusive licenses with Getty and AP. The injury alleged by Plaintiffs is damage to their personal economic interests, namely that they received from Getty and AP insufficient royalties for the commercial use of their NFL-related photographs. (See, e.g., AC ¶¶ 146-49.)

But ***HN29***[] "underpayment of royalties . . . is not an antitrust injury because it has no adverse effect on competition or consumers." *Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co., 407 F.3d 1091, 1125 (10th Cir. 2005)* (affirming dismissal of complaint because it "makes no allegation of any harm other than the economic loss which [Appellant] itself allegedly **[**51]** suffered"). Because Plaintiffs' alleged injury amounts to personal economic loss, Plaintiffs have failed to allege antitrust injury. See *Carell v. Shubert Org., Inc., 104 F. Supp. 2d 236, 266-67 (S.D.N.Y. 2000)* (no antitrust injury because plaintiffs inability to license intellectual property "has had negligible effect on output and has chiefly prevented plaintiff from generating revenue"); *Nat'l Ass'n of Freelance Photographers v. Associated Press, No. 97 Civ. 2267, 1997 U.S. Dist. LEXIS 19568, 1997 WL 759456, at *10 (S.D.N.Y. Dec. 10, 1997)* (no antitrust injury when alleged "interfer[ence] with the ability of Freelance Photographers to compete in the commercial exploitation of their images" caused photographers "to lose substantial revenue" because the allegations "show at most that [photographers] personally were harmed by AP's actions toward them, and not that others in the market were thereby harmed" (citation omitted)).

Plaintiffs also have failed adequately to plead antitrust injury because their asserted injury was not the result of the challenged conduct. ***HN30***[] Antitrust injury is limited to injuries that are "attributable to an anti-competitive aspect of the practice under scrutiny." *Atl. Richfield Co., 495 U.S. at 334*. Plaintiffs challenge the NFL Clubs' collective licensing arrangement and the exclusive licensing agreements with Getty and AP, but acknowledge that any royalty payments for the commercial use of their NFL-related photographs stem from **[**52]** their contributor agreements with Getty and AP, and not any agreement to which the NFL or NFL Clubs are a party. (See, e.g., AC ¶¶ 51, 53, 68, 91, 144.) Put simply, Plaintiffs' claimed injury arises not from the allegedly anticompetitive agreements, but rather from the contributor agreements. See *Atl. Richfield Co., 495 U.S. at 344* (requiring injury to result from "competition-reducing aspect or effect of the defendant's behavior") (emphasis in original); *Granite Partners, L.P. v. Bear, Stearns & Co., 58 F. Supp. 2d 228, 245 (S.D.N.Y. 1999)* (holding plaintiff failed to allege antitrust injury when "there is a critical disjunction between the injuries suffered by the [plaintiffs] and the injuries to the relevant market").

Plaintiffs' claim that, absent the NFL Clubs' collective licensing arrangement, Getty and AP could have negotiated and secured better terms in agreements with individual NFL Clubs, and that, absent the exclusive licensing agreements, Plaintiffs could have negotiated and secured better terms with other stock photography agencies. (AC ¶ 148.) However, the AC alleges no facts to support these assertions, which themselves demonstrate and confirm the "critical disjunction" between Plaintiffs' asserted injuries and any alleged anticompetitive agreement. Indeed, the AC does not contain any facts **[**53]** to suggest that Getty or AP would have incorporated the benefit of any better terms they may have received from an individual NFL **[*110]** Club into Plaintiffs' contributor agreements, or that other stock photography agencies would have provided Plaintiffs with more advantageous terms in their contributor agreements.

Plaintiffs separately contend that they have adequately pled antitrust injury by alleging a per se "horizontal price fixing scheme." (Pls.' Opp'n to NFL Def.'s Mot. 25.) They also assert that "an adequate injury is alleged if the plaintiff is 'a participant in some capacity in the market in which the merger occurs,'" or "merely allege[s] an intent to enter the relevant market." (Pls.' Opp'n to NFL Def.'s Mot. 24.) However, antitrust injury is not as broadly defined as Plaintiffs contend, see *Brunswick, 429 U.S. at 489*, and, in any case, no merger is at issue here, and the AC does not allege that Plaintiffs ever intended to enter the market for commercial licensing of NFL photos.

In sum, because Plaintiffs fail to plead sufficient facts to demonstrate antitrust injury, they do not satisfy the first "efficient enforcer" factor and dismissal is warranted. See *Paycom, 467 F.3d at 293* (holding merchant lacked antitrust standing to challenge **[**54]** MasterCard's policy prohibiting banks from participating in competitor payment-card networks because it was those competitor networks, not the merchant, that were directly harmed); *Boyd v. A WB Ltd., 544 F. Supp. 2d 236, 250 (S.D.N.Y. 2008)* (holding wheat farmers did not have standing to challenge alleged conspiracy by certain wheat exporters because the farmers' injuries were derivative of the injury suffered by competitor wheat exporters).

With respect to the second factor, directly affected market participants could seek to enforce the antitrust laws on the basis of Plaintiffs' alleged violations. Specifically, Getty's and AP's competitors are potential plaintiffs with respect to the exclusive dealing claims, and Getty and AP themselves are potential plaintiffs with respect to the collective licensing claims. Because each constitutes "an identifiable class . . . whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement," Plaintiffs lack standing here. *Associated Gen. Contractors, 459 U.S. at 542*.[12]

With respect to the third factor, Plaintiffs' claimed injuries are too speculative to support antitrust standing. Plaintiffs have alleged that absent the NFL Clubs' agreement to collectively license their intellectual property, Getty and AP would have negotiated better terms in agreements with individual NFL Clubs, and that absent the exclusive licensing agreements with Getty and AP, Plaintiffs would have negotiated better terms in their contributor agreements. (AC ¶ 148.) Plaintiffs' theory is too speculative. See, e.g., *Paycom, 467 F.3d at 293* (affirming dismissal under *Rule 12(b)(6)* and rejecting as speculative claim that, absent MasterCard's policy prohibiting member banks from participating in competitor paymentcard networks, competition from Discover and American Express would have caused MasterCard to adopt policies more favorable to plaintiff).

Finally, Plaintiffs' claims raise complex and difficult issues of identifying and apportioning **[*111]** damages. "[Q]uantifying [plaintiffs'] damages wou1d require wholesale **[**56]** speculation," and "[i]t would be virtually impossible to apportion damages" between Getty, AP and their competitors, "which [allegedly] suffered direct injuries," and Plaintiffs, who "might have been indirectly harmed." *Paycom, 467 F.3d at 294*.

All four "efficient enforcer" factors weigh against a finding of antitrust standing. As such, Plaintiffs' antitrust claims are subject to dismissal.

However, even if Plaintiffs had adequately established standing, the AC would still fail to adequately set forth an antitrust claim. ***HN31***[] An antitrust complaint must allege a relevant product market in which the anticompetitive

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[12] That these more direct entities have not filed suit is telling. As the Supreme Court has observed, "if there is substance to [plaintiffs'] claim, it is difficult to understand why the[] direct victims of the conspiracy have not asserted any claim **[**55]** in their own right." *Associated Gen. Contractors, 459 U.S. at 542 n. 47*; see also Phillip Areeda & Herbert Hovenkamp, Fundamentals of ***Antitrust Law***, § 3.01c (4th ed. 2011) ("If the 'superior' plaintiff has not sued, one may doubt the existence of any antitrust violation at all.").

effects of the challenged activity can be assessed. *City of New York v. Grp. Health, 649 F.3d 151, 155 (2d Cir. 2011)*; see also *In re Aluminum Warehousing Antitrust Litig., No. 13-md-2481 (KBF), 2014 U.S. Dist. LEXIS 121435, 2014 WL 4277510, at *21 (S.D.N.Y. Aug. 29, 2014)*; *Global Disc. Travel Servs., LLC v. Trans World Airlines, Inc., 960 F. Supp. 701, 704 (S.D.N.Y. 1997)* ("In order to survive a motion to dismiss, a claim under . . . the Sherman Act must allege a relevant geographic and product market in which trade was unreasonably restrained or monopolized." (citation omitted)). When the proposed relevant market is defined without "reference to the rule of reasonable interchangeability and cross-elasticity of demand," or "clearly does not encompass all interchangeable substitute products . . . the relevant market is legally insufficient and a motion **[**57]** to dismiss may be granted." *Linzer Prods. Corp. v. Sekar, 499 F. Supp. 2d 540, 554 (S.D.N.Y. 2007)* (citation omitted); see also *Global Disc. Travel Servs., LLC, 960 F. Supp. at 705* ("Plaintiffs' failure to define its market by reference to the rule of reasonable interchangeability is, standing alone, valid grounds for dismissal." (citations omitted)).

Plaintiffs have defined the relevant market as the "market for commercial licensing of NFL-related stock photographs." (AC ¶¶ 23, 126.) ***HN32***[] Generally, however, "the distribution of a single brand, like the manufacture of a single brand, does not constitute a legally cognizable market," *Global Disc. Travel Servs., LLC, 960 F. Supp. at 705* (citation omitted), because to define the market as that group of products over which a defendant exercises control would "as an analytic matter read[] the market definition step out of the Sherman Act." *Carell, 104 F. Supp. 2d at 265* (citation omitted); cf. *Adidas Am., Inc. v. NCAA, 64 F. Supp. 2d 1097, 1102 (D. Kan. 1999)* ("[A]n antitrust plaintiff may not 'define a market so as to cover only the practice complained of, this would be circular or at least result-oriented reasoning.'" (citation omitted)). Thus, the Second Circuit and courts in the Southern District have often declined to recognize a relevant market defined by a single brand. See *Skyline Travel, Inc. (NJ) v. Emirates, 476 F. App'x 480, 481 (2d Cir. 2012)* ("Where, as here, the complaint 'limit[s] a product market to a single brand, franchise, institution, or comparable entity that competes with **[**58]** potential substitutes' or fails to provide a 'plausible explanation as to why a market should be limited in a particular way,' the complaint is properly dismissed." (citations omitted)); *Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 328-31 (2d Cir. 2008)* (rejecting a proposed relevant market limited to licenses for MLB intellectual property while excluding licenses such as those obtained by plaintiff for "football, boxing, basketball, ice skating, hockey, and NASCAR").[13]

[*112] In light of relevant Circuit case law, see, e.g., *Belfiore v. N.Y. Times Co., 826 F.2d 177, 180 (2d Cir. 1987)* (rejecting as "implausible" product market limited to the New York Times newspaper because substitutes reasonably included all "general circulation daily newspapers," at least some of which plaintiffs themselves distributed), the AC does not make sufficient factual allegations that would justify a product market limited to NFL-related photographs to the exclusion of, at a minimum, other sports-related photographs. Indeed, Plaintiffs contend that they "own the copyrights to and license other sports-related content, including photographs of Major League Baseball ('MLB') and National Collegiate Athletic Association ('NCAA') games and events, and Getty Images had exclusive licensing deals and/or significant licensing partnerships with these entities, including MLB." (AC ¶ 56.) However, Plaintiffs do not address why the commercial licensing of **[**60]** MLB- or NCAA-related photographs (or any other sports-related photographs) is not reasonably interchangeable with the commercial licensing of NFL-related photographs.

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[13] See also *Hack v. President & Fellows of Yale Coll., 237 F.3d 81, 86-87 (2d Cir. 2000)*, abrogated on other grounds (concluding that plaintiff had failed to allege a plausible relevant product market confined to Yale education because other colleges and universities provided interchangeable substitutes); *Carell, 104 F. Supp. 2d at 264-66* (rejecting alleged "market for licensing Makeup Designs [for the Broadway musical Cats] and other Cats-related intellectual property"); *Global Disc. Travel Servs., LLC, 960 F. Supp. at 705* ("The rule of reasonable interchangeability dictates that the relevant product market in this case be at least the market for ail airline tickets between the relevant city pairs, not just tickets on [Trans World Airlines]."); *Re-Alco Indus., Inc. v. Nat'l Ctr. for Health Educ., Inc., 812 F. Supp. 387, 391-92 (S.D.N.Y. 1993)* (holding that one particular brand of health education materials was not a plausible relevant product market); *Deep S. PepsiCola Bottling Co. v. Pepsico, Inc., No. 88 Civ. 6243, 1989 U.S. Dist. LEXIS 4639, 1989 WL 48400, at *7-8 (S.D.N.Y. May 2, 1989)* ("Plaintiffs' proposed market - Pepsi-Cola bottling franchises in the United States - does **[**59]** not comprise a viable antitrust market" and the "relevant product market might more reasonably be drawn as national brand soft drinks"); *Shaw v. Rolex Watch, U.S.A., Inc.., 673 F. Supp. 674, 679 (S .D.N.Y. 1987)* ("This Court does not need protracted discovery to state with confidence that Rolex watches are reasonably interchangeable with other high quality timepieces.").

The court in *Weber v. National Football League, 112 F. Supp. 2d 667 (N.D. Ohio 2000)*, dismissed a Sherman Act claim for failure to allege a relevant market under similar circumstances. There, the plaintiff, who bought and sold many different kinds of domain names, alleged that NFLP, the Miami Dolphins and New York Jets had monopolized the market for the domain names "dolphins.com" and "jets.com." The court held that the plaintiff had failed to demonstrate why the relevant market should not be more broadly defined as domain names in general. *Id. at 674*. Similarly here, in the face of Plaintiffs' allegations identifying a potential broader market for licensing of sports-related photographs, Plaintiffs have failed to allege a plausible product market limited to NFL-related photographs at this juncture. See *Adidas Am., Inc., 64 F. Supp. 2d at 1103* (rejecting "market for the sale of NCAA Promotional Rights" because "Adidas has failed to explain [why] ... sponsorship agreements with teams or individuals competing in the National Football League, the National Basketball Association, the Women's National Basketball Association, Major League Baseball, **[**61]** Major League Soccer, or the Olympics, are not reasonably interchangeable with NCAA promotion rights or sponsorship agreements"); *Theatre Party Assocs., Inc. v. Shubert Org., Inc., 695 F. Supp. 150, 154-55 (S.D.N.Y. 1988)* ("Plaintiff has failed to explain why other forms of entertainment, namely other Broadway shows, the opera, ballet or even sporting **[*113]** events are not adequate substitute products.").

Plaintiffs contend that *American Needle v. New Orleans Louisiana Saints, 385 F. Supp. 2d 687 (N.D. Ill. 2005)* and *Dang v. San Francisco Forty Niners, 964 F. Supp. 2d 1097 (N.D. Cal. 2013)* support the market limited to commercial licenses for NFL-related photos that they have defined. However, Second Circuit precedent instructs that there exist available substitutes for the intellectual property of a professional sports organization. See *Salvino, 542 F.3d at 330*. Moreover, the relevant markets alleged in *American Needle* and *Dang* are distinguishable from the market Plaintiffs assert here. The product markets in those cases were potentially limited to NFL-related headwear and apparel because there was evidence suggesting that "for many people purchasing headwear and apparel with an NFL team's logo, they are purchasing the ability to be identified with a particular team - the right to be recognized as a fan." *New Orleans Louisiana Saints, 385 F. Supp. 2d at 694*. As a result, the courts concluded that "[i]f a store sold out of hats carrying the Chicago Bears logo, these individuals would not necessarily find caps carrying **[**62]** logos for Spongebob, the University of Michigan, or even the Chicago Bulls to be reasonable substitutes." Id.; *Dang, 964 F. Supp. 2d at 1108*. In short, the courts relied on fan loyalty to find a genuine dispute about reasonably interchangeable products in those markets.

The same cannot be said of the "market for commercial licensing of NFL-related stock photographs." The "consumers" in the market alleged here are commercial enterprises licensing NFL-related photos to promote their products. (AC ¶¶ 150-52.) Plaintiffs have not plausibly alleged, and the AC is devoid of any facts to suggest, that if the price of NFL-related photos were to increase, "national photo licensors, media outlets, online vendors, clothing retailers, and any other companies that sell advertisements or products" (AC ¶ 151) would not simply substitute different, less costly sports photographs to promote their products.

Adidas America is analogous to the instant case. In Adidas America, the court rejected plaintiff's proposed "market for the sales of NCAA promotional rights" because plaintiff had "failed to explain . . . why . . . sponsorship agreements with teams or individuals competing in the National Football League, the National Basketball **[**63]** Association, the Women's National Basketball Association, Major League Baseball, Major League Soccer, or the Olympics, are not reasonably interchangeable with NCAA promotion rights or sponsorship agreements." *Adidas Am., 64 F. Supp. 2d at 1103*. The court dismissed plaintiff's antitrust claims on the pleadings because it had "not explained why sponsorship agreements with teams or individuals in any of the above organizations would fail to satisfy Adidas' goal of enhancing the 'visibility of adidas' trademarks on the playing field' and authenticating Adidas as a 'high quality athletic brand, with products that serve the high performance needs of athletes.'" Id.

Additionally, Plaintiffs allege that the NFL Clubs conspired to restrain trade in the market for commercial licensing of NFL-related photographs by allowing the NFL to "control and make decisions relating to each NFL Team's independently owned intellectual property." (AC ¶ 127.) However, the court in *Washington v. National Football League, 880 F. Supp. 2d 1004 (D. Minn. 2012)* dismissed nearly identical claims.

In Washington, a putative class of former professional football players alleged that the NFL and NFL Clubs had monopolized the market for former players' likenesses in violation of Section 1 by not **[*114]** giving the players rights to historical game **[**64]** films and images from the games in which they played. *Id.at 1005*. In dismissing Plaintiffs' claims, the court carefully analyzed the implications of the Supreme Court's decision in *American Needle, Inc. v. National Football League, 560 U.S. 183, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)*, noting a clear distinction between intellectual property that each NFL Club separately owns and property that is collectively owned:

> Here, unlike in American Needle, the intellectual property involved is historical football game footage, something that the individual teams do not separately own, and never have separately owned. Rather, the NFL owns the game footage, either alone or in conjunction with the teams involved in the game being filmed. These entities must cooperate to produce and sell these images; no one entity can do it alone . . . . The NFL and its teams can conspire to market each teams' individually owned property, but not property the teams and the NFL can only collectively own.

Washington, 880 F. Supp. 2d at 1006.

Similarly here, many if not most of the photographs at issue contain intellectual property owned by the NFL and at least one NFL Club - e.g., photographs displaying both the NFL shield and NFL Club marks on a player's jersey and/or helmet, typically in NFL game-action settings or at NFL events. Plaintiffs claim that their **[**65]** photo libraries include "tens of thousands of photos . . . that do[] not include any marks, logos, or other intellectual property owned by the NFL Entities." (AC ¶¶ 34-35.) Yet the majority of photographs Plaintiffs have attached to the AC are game-action photographs displaying the marks of the NFL and at least one NFL Club, and in many cases two NFL Clubs, and Plaintiffs have not pleaded sufficient facts to suggest that this case is principally about anything other than these types of NFL game and event photographs. Such photographs necessarily contain the intellectual property of more than one entity, and constitute "collectively owne[d]" property under Washington; the NFL and NFL Clubs "must cooperate to produce and sell these images; no one entity can do it alone." *Washington, 880 F. Supp. 2d at 1006*. As such, Plaintiffs have not plausibly alleged collective action by the NFL Defendants, and their Section 1 claim fails as a matter of law.[14]

[*115] Plaintiffs argue that the **[**67]** decision in Washington is inapposite and that "Plaintiffs' claims relate to still photography which neither the NFL nor the NFL Teams have ever owned any copyright." (Pls.' Opp'n to NFL Def.'s Mot. 37.) Nowhere in Washington, however, did the court limit "collectively own[ed]" property to copyright holders. Rather, the court deemed historical game footage "collectively own[ed]" because "the intellectual property involved is . . . something that the individual teams do not separately own, and never have separately owned." *Washington, 880 F. Supp. 2d at 1006*. NFL and the NFL Clubs "must cooperate to produce and sell these images; no one entity can do it alone." Id. Likewise, the majority of photos at issue here are "collectively owned" because they contain the trademarks of the NFL and at least one NFL Club, or the trademarks of more than one NFL Club, and thus neither the NFL nor any individual NFL Club alone could license these photos.

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[14] At a minimum, under American Needle the collective licensing of intellectual property for NFL-related photographs is reasonable as a matter of law because collective licensing is "essential if the product is to be available at all." *560 U.S. at 203*. In such cases, "the Rule of Reason may not require a detailed **[**66]** analysis; it 'can sometimes be applied in the twinkling of an eye.'" Id.; see also *Agnew v. NCAA, 683 F.3d 328, 341 (7th Cir. 2012)* (concluding that under American Needle, certain restraints, particularly necessary venture activities, may be held procompetitive, and thus lawful, in the "twinkling of an eye" - i.e., "at the motion-to-dismiss stage"). Here, without NFL and NFL Club cooperation, licensees would be unable to obtain from any one entity the rights to use photographs of NFL games and events, which exist only by virtue of that cooperation. See *American Needle, 560 U.S. at 202* ("The fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions."). Moreover, the pro-competitive benefits of collectively licensing intellectual property rights in NFL-related photographs are abundantly clear. See *Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 18-23, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*. If a collective license were not available, a photo-by-photo assessment would be required to determine who may hold intellectual property rights in any given photograph, and individual licensing negotiations would be required for every single photograph.

With respect to those photographs that reflect the intellectual property of only a single NFL Club, Plaintiffs also fail to allege a viable antitrust claim challenging the NFL Clubs' collective licensing arrangement. As the Second Circuit held in Buffalo Broadcasting Co. v. American Society of Composers, **[**68]** Authors & Publishers, a collective licensing agreement does not constitute a "restraint" within the meaning of Section 1 when "an alternative opportunity to acquire individual rights is realistically available." *744 F.2d 917, 925 (2d Cir. 1984)*.[15] Plaintiffs assert that the NFL maintains exclusive control over each NFL Club's independently owned intellectual property in the commercial market for photographs. (AC ¶¶ 127, 130.) However, [TEXT REDACTED BY THE COURT] the NFL Clubs have not granted the NFL exclusive control or licensing rights over all NFL-related photographs [TEXT REDACTED BY THE COURT] Plaintiffs argue that the Court should not consider the [TEXT REDACTED BY THE COURT] limiting the exclusivity of the collective license to "game action photographs" in ruling on the NFL Defendants' motion to dismiss. However, the collective licensing agreement memorialized in [TEXT REDACTED BY THE COURT] may be considered without converting the NFL Defendants' motion to one for summary judgment because Plaintiffs have made clear, definite, and substantial reference to the collective licensing agreement in the AC (see, e.g., AC ¶¶ 24, 38, 127, 130, 133, 137, 149), and thus have incorporated that agreement into their pleadings. The **[**69]** collective licensing agreement may be interpreted as a matter of law, *Log On Am., Inc. v. Promethean Asset Mgmt. L.L.C., 223 F. Supp. 2d 435, 444 (S.D.N.Y. 2001)*, and the agreement plainly grants NFL exclusive licensing rights only to "game action photographs" and not to "photos taken at NFL Team practices, functions, and events" (AC ¶ 35).

Additionally, Plaintiffs' assertion that this case involves "tens of thousands of photos [in their photo libraries] that do[] not include any marks, logos, or other intellectual property owned by the NFL Entities" (AC ¶¶ 34-35) is contradicted **[**70]** by the exhibits that Plaintiffs attached to the **[*116]** AC, which depict a multitude of images, many of which, if not most, display the intellectual property of the NFL, for example, the NFL shield on players' jerseys and/or helmets, as well as the intellectual property of at least one NFL Club.

Thus, Plaintiffs have not adequately alleged that the NFL Clubs' collective licensing is a "restraint" within the meaning of Section 1. As such, on this basis, their claims relating to such collective licensing must be dismissed.

Plaintiffs further allege that the NFL Defendants' granting of exclusive licenses to Getty and then AP violates Section 1 of the Sherman Act. (AC ¶ 135.) They claim that this anticompetitive activity began in 2003, when the NFL decided to use third parties to license the commercial rights to NFL photographs rather than continuing to conduct such licensing in-house through NFL Photos. (Id. ¶¶ 44-46.) However, these agreements cannot harm competition; an exclusive license is something that the NFL can legally achieve without the aid of a licensee. See *E & L Consulting, Ltd. v. Doman Indus.., 472 F.3d 23, 30 (2d Cir. 2006)* (finding no harm to competition as a result of exclusive distributorship "because the alleged single source and price increase, even if monopolistic, **[**71]** is something [defendant] can achieve without the aid of a distributor"); cf. *Washington, 880 F. Supp. 2d at 1007* ("Plaintiffs also contend that, because the game footage involved here is owned collectively, the antitrust laws somehow prescribe how the collective can market and sell the intellectual property it owns. But this is precisely what the antitrust laws do not prohibit.").[16]

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[15] The Second Circuit made clear that although it might be "difficult" to obtain licenses outside the joint venture, "realistic alternative[s]" to a collective license exist so long as individual licensing remains possible. *Buffalo Broad., 744 F.2d at 929*. The court reached this conclusion without any showing that alternatives to the blanket license were popular, or even that any such alternatives had ever been actively pursued. *Id. at 928* (finding no evidence that "any loca1 [television] station ever offered any composer a sum of money in exchange for the performing rights to his music"). Thus, so long as an individual venture member is not precluded from granting an individual license, a collective licensing agreement may not, as a matter of law, violate Section 1.

[16] Plaintiffs also take issue with NFLP's decision in 2009 to grant exclusive licensing rights to AP, rather than Getty. (AC ¶ 55.) But "freedom to switch suppliers lies close to the heart of the competitive process that the antitrust laws seek to encourage." *Nynex Corp. v. Discon, Inc., 525 U.S. 128, 137, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1997)*. Therefore, "[i]t is not 'a violation of the antitrust laws, without a showing of actual adverse effect on competition market-wide, for a manufacturer to terminate a distributor . . . and to appoint an exclusive distributor.'" *E & L Consulting, Ltd., 472 F.3d at 29* (alteration in original, citation omitted).

Moreover, ***HN33***[] because the benefits of exclusive licensing agreements are well-recognized, the Second Circuit has stated that these "arrangements are presumptively legal." *E & L Consulting, Ltd., 472 F.3d at 30*. An exclusive licensing arrangement violates Section 1 only when it "will foreclose competition in a substantial share of the line of commerce affected." *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*; see also U.S. **[**72]** Dep't of Justice and Federal Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property § 4.3 (1995) ("Absent extraordinary circumstances, the Agencies will not challenge a restraint in an intellectual property licensing arrangement if (1) the restraint is not facially anticompetitive and (2) the licensor and its licensees collectively account for not more than twenty percent of each relevant market significantly affected by the restraint.").

HN34[] In order to adequately plead foreclosure in a relevant market, a plaintiff first must properly define the relevant market. See, e.g., *Linzer Prods. Corp., 499 F. Supp. 2d at 554-55* (dismissing exclusive dealing claim because single patented product was not a relevant product market). As discussed above, Plaintiffs have failed to allege a properly defined product market. In fact, Plaintiffs allege that despite losing the NFL exclusive license to AP, Getty continued to hold commercial licensing rights to MLB- and NCAA-related **[*117]** photographs (AC ¶ 58), thus acknowledging that competition for commercial licensing of sports-related photographs is not foreclosed by the NFL's exclusive licensing agreements.

In addition, the challenged agreements are not "exclusive;" rather, as noted above, **[**73]** the agreements provide Getty and AP only with exclusive rights limited to licensing NFL photographs to [TEXT REDACTED BY THE COURT] not to individual NFL Club business partners. (Getty Agreement [TEXT REDACTED BY THE COURT], First AP Agreement [TEXT REDACTED BY THE COURT], Second AP Agreement [TEXT REDACTED BY THE COURT].) Once the relevant market is properly defined to include, at a minimum, the commercial licensing of all sports-related photographs (a market in which NFL-related photographs constitute only a small fraction) and takes into account the limited "exclusivity" granted to Getty and AP, Plaintiffs cannot allege foreclosure. See *Sterling Merch., Inc. v. Nestlé, S.A., 656 F.3d 112, 123-24 (1st Cir. 2011)* ("'[F]oreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent,' and while high numbers do not guarantee success for an antitrust claim, 'low numbers make dismissal easy.'" (citation omitted)); *CDC Techs., Inc. v. Idexx Labs., Inc., 186 F.3d 74, 77, n. l, 80 (2d Cir. 1999)* (noting that for exclusivity agreement limited to a single product line, "[i]f competitors can reach the ultimate consumers of the product by employing existing or potential alternative channels of distribution, it is unclear whether exclusive dealing arrangements with distributors foreclose from competition any part **[**74]** of the relevant market" (citations omitted) (emphasis in original)).

It also is well established that ***HN35***[] exclusive agreements do not harm competition when there is competition to obtain the exclusive contract. The Second Circuit has recognized that "[s]uch a situation may actually encourage, rather than discourage, competition, because the incumbent and other [competitors] . . . have a strong incentive continually to improve the [services] and prices they offer in order to secure the exclusive positions." *Balaklaw v. Lovell, 14 F.3d 793, 799 (2d Cir. 1994)*; see also *Indeck Energy Servs., Inc. v. Consumers Energy Co., 250 F.3d 972, 977-78 (6th Cir. 2000)* (affirming dismissal of antitrust claims "in light of the fact that the exclusive contracts were of limited duration, and in light of the fact that the customers were free to seek other [suppliers] at the conclusion of the contracts"); *Paddock Publ'ns, Inc. v. Chi. Tribune Co., 103 F.3d 42, 45 (7th Cir. 1996)* ("Competition-for-the-contract is a form of competition that antitrust laws protect rather than proscribe.").

Here, the NFL's licensing agreements with Getty and AP had exclusivity periods of no more than three years, and the NFL "entertained bids for the exclusive commercial licensing rights for NFL and NFL Team photos" at the conclusion of each agreement's term. (AC ¶¶ 25-27.) These types of contracts do not foreclose competition and are not anticompetitive **[**75]** as a matter of law. See *Indeck Energy Servs., Inc., 250 F.3d at 975, 977-78* (dismissing Section l complaint and describing as a "limited exclusivity deal" five to ten-year exclusives with nineteen facilities); *Balaklaw, 14 F.3d at 799* (noting that "opportunities for competition remain[ed]" for three-year exclusive dealing contract with early termination provision); *Ferguson v. Greater Pocatello Chamber of Commerce, Inc., 848 F.2d 976, 982 (9th Cir. 1988)* (upholding an exclusive six-year lease because all competitors had an equal opportunity to bid for the lease and "[s]uch an opportunity for free competition shall presumably arise again at the end of the six-year lease"). In their opposition, Plaintiffs contend that the NFL's arguments "conflict with Plaintiffs' well-pleaded allegations **[*118]** that the bidding process was not open and competitive and did not promote competition." (Pls.' Opp'n to NFL Def.'s Mot. 40.) However, the AC itself alleges that each time NFL entered into an exclusive licensing agreement, it "entertained bids for the exclusive commercial licensing rights for NFL and NFL Team photos." (AC ¶¶ 25-27.) Indeed, because the AC plainly alleges that there was competition to obtain the exclusive contract and that the exclusive licenses granted by NFL were of limited duration (AC ¶¶ 25-27), Plaintiffs cannot plausibly allege market foreclosure and harm **[**76]** to competition stemming from the challenged agreements.

b. Antitrust Claims Against AP

As discussed above with respect to the NFL Defendants, Plaintiffs lack standing to recover damages for the alleged antitrust violation because (1) Plaintiffs' asserted injury is indirect; (2) other, better-positioned potential plaintiffs exist; (3) Plaintiffs' claimed injuries are speculative; and (4) identifying damages and apportioning them among Plaintiffs would be speculative. See *Gatt Commc'ns, 711 F.3d at 78*.

Additionally, Plaintiffs' AC does not allege that AP had any involvement in an alleged agreement between the NFL and the NFL Clubs to create NFLP and to manage all commercial licensing of NFL-related stock photographs through NFLP. (AC ¶¶ 23-24; see also AC ¶¶ 37-39, 126-128, 130, 133). Plaintiffs allege only two agreements involving AP in their antitrust claim: the First and Second AP Agreements, effective respectively April 1, 2009 and April 1, 2012, each of which granted AP the exclusive right to commercially license NFL and NFL Club photographs for a term of three years. (AC ¶¶ 26-27, 54.)

Plaintiffs do not allege facts supporting a plausible inference that these exclusive license agreements are unlawful. ***HN36***[] An exclusive **[**77]** license, which merely confers upon the licensee the ability to exploit the licensor's exclusive intellectual property rights, does not violate the antitrust laws. *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 135-36, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*; *D.E. Virtue v. Creamery Package Mfg. Co., 227 U.S. 8, 36-37, 33 S. Ct. 202, 57 L. Ed. 393, 1913 Dec. Comm'r Pat. 519 (1913)*; *Genentech, Inc. v. Eli Lilly & Co., 998 F.2d 931, 949 (Fed. Cir. 1993)*, cert. denied, *510 U.S. 1140, 114 S. Ct. 1126, 127 L. Ed. 2d 434*, abrog. on other grounds, *515 U.S. 277, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (1994)*; *U.S. v. Studiengesellschaft Kohle, m.b.H., 670 F.2d 1122, 1127, 216 U.S. App. D.C. 303 (D.C. Cir. 1981)*; *U.S. v. Westinghouse Elec. Corp., 648 F.2d 642, 647 (9th Cir. 1981)*; *SCM Corp. v. Xerox Corp., 463 F. Supp. 983, 1005 (D. Conn. 1978)*, aff'd on other grounds, *645 F.2d 1195 (2d. Cir. 1981)*. Moreover, the license agreements in this case are "vertical" arrangements, meaning that they occur between companies at different levels of the distribution chain. See *Bus. Elecs. Corp. v. Sharp Elecs. Corp, 485 U.S. 717, 730, 108 S. Ct. 1515, 99 L. Ed. 2d 808 and n. 4 (1988)*. ***HN37***[] Exclusive vertical arrangements of this nature are presumptively legal under the antitrust laws. See *E & L Consulting, 472 F.3d at 30* (citing *Elec. Comm's Corp. v. Toshiba Am. Consumer Prods., 129 F.3d 240, 245 (2d Cir 1997))*. To overcome that presumption at the pleading stage, a plaintiff must allege facts showing exceptional circumstances, such as evidence of predatory practices or a "unique" opportunity to leverage two distinct monopolies. *E & L Consulting, 472 F.3d at 30*. A plaintiff that fails to allege such exceptional circumstances fails to state a Section 1 claim under the Sherman Act and its complaint must be dismissed under *Rule 12(b)(6)*. Id.; *Elec. Comm's Corp., 129 F.3d at 242*.

[*119] In this case, Plaintiffs' AC fails to allege exceptional circumstances, or anything else that suggests that the First and Second AP Agreements were something other than standard exclusive licensing arrangements. As noted above, Plaintiffs' own factual allegations **[**78]** regarding the competitive bidding process conducted by NFL undercut claims of illegality. (AC ¶¶ 26-27, 54, 88; Deutsch Decl. Ex. A at 1 and Ex. B at 1.) ***HN38***[] Exclusive vertical agreements of reasonable duration that are subject to a competitive award process do not violate the antitrust laws. See *Balaklaw, 14 F.3d at 799* ("Such a situation may actually encourage, rather than discourage, competition, because the incumbent and other, competing [suppliers] have a strong incentive continually to improve the care and prices they offer in order to secure exclusive positions."); see also *Ferguson, 848 F.2d at 982* (six-year lease that is subject to competitive award is not unlawful).

Accordingly, Plaintiffs have not alleged facts that would support a finding of exceptional circumstances, and have not overcome the presumption that the NFL and AP's exclusive license agreements are legal. Plaintiffs' antitrust claim against AP must, on this basis, therefore be dismissed.

Furthermore, as discussed above with respect to the NFL Defendants, Plaintiffs have not alleged facts plausibly suggesting that they suffered anticompetitive injury from the existence or performance of the exclusive license agreements, a substantive element of every private antitrust **[**79]** claim. See *Atl. Richfield, 495 U.S. at 334* (citing *Brunswick, 429 U.S. at 489*); *Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 441 (2d Cir. 2005)*; *USAirways Group, Inc. v. British Airways PLC, 989 F. Supp. 482, 488 (S.D.N.Y. 1997)*. The allegedly anticompetitive injury that Plaintiffs claim to have suffered is that Defendants "precluded Plaintiffs from seeking or obtaining fair market value for commercial uses of their NFL photographs." (AC ¶ 143.) However, the AC appears to allege that this injury does not arise from the fact that AP had an exclusive license with NFLP, but from the NFL Defendants' alleged exercise of market power conferred by an ostensible agreement between the NFL, the NFL Clubs, and NFLP to monopolize the market for commercial use of NFL-related photos.[17] (See AC ¶ 133.) However, the **[*120]** fact that NFLP gave an exclusive license to AP is irrelevant to Plaintiffs' alleged anticompetitive injury. Assuming, arguendo, that the NFL Defendants exercise monopoly power over the commercial use of NFL-related photographs, Plaintiffs would suffer the injury they allege regardless of whether the NFL Defendants (1) used an exclusive licensee such as AP or Getty Images, (2) used several non-exclusive licensees under terms similar to those of the AP agreements, or even (3) chose one NFL defendant to negotiate directly with the Plaintiffs and licensed their NFL-related photographs directly **[**80]** to commercial end-users. As such, there is a critical disjunction, as mentioned above, between the market injury asserted and the injury suffered. See *In re LIBOR-Based Fin. Instr. Antitrust Litig., 935 F. Supp. 2d 666, 690 (S.D.N.Y. 2013)*; *S.W.B. New England, Inc. v. R.A.B. Food Grp., LLC, 06 Civ. 15357, 2008 U.S. Dist. LEXIS 14892, 2008 WL 540091 (S.D.N.Y. Feb. 27, 2008)*; *Granite Partners, 58 F. Supp. 2d at 242*.

Because NFL's exclusive license to AP is not alleged to be the cause of Plaintiffs' alleged anticompetitive injury, the AC fails to allege an "antitrust injury" with respect to AP.

Neither is Plaintiffs' assertion that "[t]he NFL Teams and NFL Entities conspired to and did illegally restrain trade in concert with Getty Images and AP" (AC ¶ 129; see also AC ¶ 141) persuasive. There are no facts alleged to support this assertion of concerted action, and the conclusion itself does not state an antitrust claim against AP. *Twombly, 550 U.S. at 570*; *Iqbal, 556 U.S. at 678*; *Port Dock, 507 F.3d at 121*; *In re Elevator Antitrust Litig., 502 F.3d at 50*. In particular, Plaintiffs do not allege that AP was involved in the **[**82]** agreement between the NFL Defendants that is the alleged source of the anticompetitive harm.

Indeed, even if the NFL Defendants' alleged conduct violated the Sherman Act, the alleged violation would not allow Plaintiffs to sue in antitrust. As noted above, Plaintiffs are not participants in the relevant market and cannot recover for antitrust injury. See, e.g., *Reading Int'l, Inc. v. Oaktree Capital Mgmt., 317 F. Supp. 2d 301, 335*

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[17] Specifically, Plaintiffs allege:

- "[T]he NFL Defendants leveraged their illegal monopoly to obtained [sic] unfettered access to Plaintiffs' works and force Plaintiffs' agents to purportedly grant 'complimentary' or 'non-royalty bearing" licenses." (AC ¶ 75.)
- "AP granted this retroactive 'license' to the NFL under threats of coercive pressure by the NFL, including the threat of moving its exclusive license back to Getty Images, which had submitted a bid to reacquire the NFL's business." (AC ¶ 88.)
- "The NFL exploited its illegal control and monopoly of the commercial licensing rights to NFL content to force Getty Images and now AP to grant the NFL unfettered access to Plaintiffs' image libraries and to rob Plaintiffs of their rightful compensation for such uses." (AC ¶ 95).
- "The NFL has been able to convince Plaintiffs' licensing agents to purportedly allow this rampant and blatant exploitation of Plaintiffs' works only because of its illegal monopoly over the commercial **[**81]** licensing rights to NFL content." (AC ¶ 96.)
- "The NFL Defendants' illegal conduct directly and proximately created the circumstances that forced Plaintiffs into a 'take-it-or-leave-it' scenario when negotiating license terms with the NFL's chosen exclusive licensing partner (first Getty Images until 2009 and then AP thereafter)." (AC ¶ 144.)
- "If it were not for the NFL's illegal efforts to control the commercial licensing market for NFL-related stock photos, Plaintiff's licensing agents would not have been forced to purportedly grant the NFL 'complimentary' usage of Plaintiffs' photos." (AC ¶ 148.)

(S.D.N.Y. 2003) (noting "suppliers to direct participants in relevant market 'typically cannot seek recovery under the antitrust laws because their injuries are too secondary and indirect . . . .'") (citing Associated Gen. Contractors, 459 U.S. at 541). Likewise, the antitrust claim against AP is not saved because Plaintiffs now allege that the First and Second AP Agreements "purport to grant an exclusive license to all NFL-related photos . . . even if the photos feature only individual players, individual team colors, individual team logos, or other team specific intellectual property that is individually owned by the respective NFL Team." (AC ¶ 136.) The allegedly anticompetitive bundling of those licenses does not stem from the fact that AP's license is exclusive, but rather, again, from the alleged agreement among the NFL Defendants to manage all of those rights together through **[**83]** a single entity, NFLP. As already stated, the NFL Defendants could achieve the same alleged anticompetitive effect without using a licensing intermediary at all.

Because Plaintiffs' alleged anticompetitive injury does not derive from AP's exclusive license, and the AC does not allege that AP was involved in any other anticompetitive agreement, Plaintiffs have failed to allege an antitrust injury with respect to AP. Additionally, for the reasons stated above, Plaintiffs also fail to allege a plausible relevant product market.

The antitrust claim against AP must be dismissed for failure to state a claim.

[*121] III. The Motions To Dismiss Plaintiffs' Copyright Infringement Claims (Count II) Against AP And NFL Defendants Are Granted[18]

[84]** a. Copyright Infringement Claims Against AP

In general, Plaintiffs allege that AP "exceeded the scope" of the limited rights granted to it under the AP Contributor Agreements by granting NFL an invalid sublicense, thereby infringing on Plaintiffs' copyrights. (AC ¶ 192.) They further allege that AP also infringed Plaintiffs' copyrights by offering copies of Plaintiffs' photos for sale through its "NFL Photo Store" that it operates jointly with Replay. (AC ¶ 195.)

In general, ***HN40***[] a copyright owner who grants an exclusive or nonexclusive license to use a work waives any right to assert an infringement claim against the licensee, or anyone whom the licensee is entitled to sublicense, for acts within the scope of the license or sublicense. Graham v. James, 144 F.3d 229, 236 (2d Cir. 1998); U.S. Naval Inst. v. Charter Commc'ns, Inc., 936 F.2d 692, 695 (2d Cir. 1991); Harris v. Simon & Schuster, Inc., 646 F. Supp. 2d 622, 630 (S.D.N.Y. 2009) (a "valid license, either exclusive or non-exclusive, immunizes the licensee from a charge of copyright infringement, provided that the licensee uses the copyright as agreed with the licensor") (citation and internal quotation marks omitted). A defendant may raise a complete defense to a copyright infringement claim by presenting the court with the license or sublicense on a motion to dismiss, and "[d]ismissal of a claim for copyright infringement is proper where **[**85]** a contract underlying the suit clearly and unambiguously demonstrates the existence of the defendant's license to exploit the plaintiff's copyrights and where plaintiff has not shown any limitation on that license." Ariel (UK) Ltd. v. Reuters Grp. PLC, No. 05 Civ. 9646, 2006 U.S. Dist. LEXIS 79319, 2006 WL 3161467, at *5 (S.D.N.Y. Oct. 31, 2006); see also Jasper v. Sony Music Entm't, Inc., 378 F. Supp. 2d 334, 338 (S.D.N.Y. 2005) (noting that document essential to a complaint's allegations may be considered on a motion to dismiss).

The license that each Plaintiff granted to AP in his AP Contributor Agreement is as broad as the Plaintiff's own copyright in his photos. For each photo at issue in the lawsuit, AP is given a "perpetual, irrevocable transferable

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[18] Because Getty's motion to compel arbitration is granted, the claims regarding the NFL Defendants' uses of Plaintiffs' Getty photos will be stayed pending arbitration. See, e.g, Hikers Indus., Inc. v. William Stuart Indus. (Far East) Ltd., 640 F. Supp. 175, 178 (S.D.N.Y. 1986) (***HN39***[] "A stay as to claims against a nonarbitrating defendant is properly granted where the arbitration of the plaintiff's claims against a defendant party to the arbitration would at least partially determine the issues which form the basis of the claim against that non-arbitrating defendant.").

worldwide right and license to reproduce, edit, translate **the** caption of, prepare derivative works of, publicly perform, publicly display, load into computer memory, cache, store and otherwise use" the photos and the right to "transfer or sublicense these rights to other entities." (AP Contributor Agreements, § 4.2.) Thus, under the plain language of the AP Contributor Agreements, neither AP's license in the photos nor the sublicenses AP may grant appear to be limited as Plaintiffs allege.

Nothing in the license requires AP to issue only royalty-bearing sublicenses. AP acted within its licensed rights by granting the NFL Entities a sublicense **[**86]** giving them [TEXT REDACTED BY THE COURT] The NFL Entities' permissible uses include all those set forth in the Second AP Agreement's definition of "Scope of Use" (the "NFL Scope of Use").[19] (Second AP Agreement, § 4(a).)

[*122] The Second AP Agreement further states that [TEXT REDACTED BY THE COURT] Id. [TEXT REDACTED BY THE COURT]. Thelicense provisions of the AP Contributor Agreements show that when AP granted this sublicense, each Plaintiff had already given AP the rights to issue such a sublicense, as of the effective date of the Plaintiff's AP Contributor Agreement.

Plaintiffs contend that reading the AP Contributor Agreements to include a right to issue non-royalty-bearing sublicenses constitutes an "overly broad reading" and that there is no language that "expressly permit[s]" the issuance of retroactive or non-royalty-bearing sublicenses. (See Pis.' Opp'n to AP Mot. 26-27.) However, Plaintiffs fail to cite to authority holding that each right in a license must be specifically called out to exist.[20]

HN41[] Copyright **[**87]** licenses are construed according to neutral principles of contract interpretation. See *Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co., 145 F.3d 481, 487 (2d Cir. 1998)*; *Wu v. Pearson Educ. Inc., No. 10 Civ. 6537, 2013 U.S. Dist. LEXIS 5289, 2013 WL 145666 at *4 (S.D.N.Y. Jan. 11, 2013)*; *Leutwyler v. Royal Hashemite Court of Jordan, 184 F. Supp. 2d 303, 306 (S.D.N.Y. 2001)*. In cases where only the scope of the license is at issue, it is the copyright owner's burden to prove that defendant's usage was unauthorized. *MAI Photo News Agency, Inc. v. Am. Broad. Co., Inc., 97 Civ. 8908, 2001 U.S. Dist. LEXIS 1680, 2001 WL 180020, at *4 (S.D.N.Y. Feb. 22, 2001)*. The licensor who argues that there should be an exception or deviation from the meaning reasonably conveyed by the language of a license loses, because he or she "should bear the burden of negotiating for language that would express the limitation or deviation." *Boosey & Hawkes Music Publishers, 145 F.3d at 487*.

As made plain by the language of the AP Contributor Agreements, the grant of rights made by Plaintiffs to AP, and AP's right to sublicense these rights to others is broad and unlimited. Section 4.2 of the AP Contributor Agreements state that AP is granted a "perpetual, irrevocable, transferable, worldwide, right and license to reproduce, edit, translate the caption of, prepare derivative works of, publicly perform, publicly display, load into computer memory, cache, store and otherwise use the [NFL-related photos at issue] and to transfer and sublicense these rights to other entities." (Emphasis added.) Non-royalty-bearing licenses are **[**88]** not excluded from this grant. If Plaintiffs wanted to exclude non-royalty-bearing sublicenses, such a term should have been negotiated and included explicitly, *Boosey & Hawkes, 145 F.2d at 491*, and cannot be read in by the Court. See, e.g., *Gentieu v. Tony Stone Images/Chicago, Inc., 255 F. Supp. 2d 838 (N.D. Ill. 2003)* (finding giving price discounts for images did not exceed the scope of a broad license).

In their opposition, Plaintiffs assert, among other things,[21] that the language of **[*123]** the AP Contributor Agreements supports their argument that non-royalty-bearing sublicenses constitute a breach of contract.

[19] [TEXT REDACTED BY THE COURT]

[20] Plaintiffs cite to *S.O.S., Inc. v. Payday, Inc., 886 F.2d 1081, 1088 (9th Cir. 1989)* to support their argument. However, S.O.S. merely states the standard rule that copyright licenses are presumed to "prohibit any use not authorized." *Id. at 1087*.

[21] Plaintiffs make several assertions which will be briefly addressed. First, Plaintiffs contend that AP did not contest the plausibility of their copyright claims. This, however, is clearly contradicted by AP's moving memorandum. (See AP Mot. 13-19.) Second, Plaintiffs make a passing assertion that the AP Contributor Agreements may be invalid due to "fraud." (Pls.' Opp'n to AP

Specifically, Plaintiffs contend that apart from two instances in which AP is not required to remit royalties (downloading of browse-quality preview or thumbnail images and where AP uses event photos for its publicity or advertising materials), every other kind of sublicense that AP issues must be royalty-bearing. (Pls.' Opp'n to AP Mot. 22-23.) However, Section 5 of the AP Contributor Agreements expressly specifies AP's duty to pay royalties to "qualifying Event Photo Sales." This, in turn, is defined to mean "only the a la carte sales of licenses for Event Photos through AP's online database service, currently known as 'AP Images.' A la carte sales shall mean the sale of licenses for individual **[**89]** photos for which a per-image price is established." (AP Contributor Agreements § 5.1 (emphasis added).) The AP Contributor Agreements also recognize that AP may offer the Event Photos for a la carte sale at a "bulk rate" which may include the photographs of photographers other than the contributor. In such a case, to determine royalties, AP is to apportion the cash received on an equal pro-rata basis across all photos included in the a la carte bulk rate. (Id.) In other words, the AP Contributor Agreements enumerate only that Plaintiffs are entitled to receive royalties when AP receives revenue from Event Photo Sales, and their royalties represent a share of this revenue.

The two instances Plaintiffs raise - thumbnails and AP use of event photos - are contained within this Event Photo Sales royalty provision. Those instances appear to constitute exceptions to AP's obligation to share revenue that it earns from Event Photo Sales. Thus, AP does not have to share revenue it earns from selling access to thumbnails of Plaintiffs' Event Photos, or earned from AP's own use of the Event Photos in advertising or promotion. Section 5 states, in sum, that AP must share revenue it earns from sublicensing with Plaintiffs, except in certain situations. The broad rights granted in Section 4 of the AP Contributor Agreements do not limit AP's ability to issue non-royalty-bearing sublicenses, and such a restriction may not be read in from Section 5, which deals only with AP's obligation to share revenues that it actually earns from sublicenses.[22]

Plaintiffs separately contend that AP was not entitled to grant sublicenses that covered periods before the issue date. Under § 4(a) of the Second AP Agreement, [TEXT REDACTED BY THE COURT].[23] Because the sublicense covers uses by the NFL Entities prior to the effective date of the Second AP Agreement, Plaintiffs term it "retroactive," and claim that it is improper because they did not authorize retroactive sublicenses. (AC ¶¶182-83).

Contrary to Plaintiffs' assertions, however, such a license is permissible. ***HN43***[] As a matter of copyright law, copyright owners and exclusive licensees are free to grant **[*124]** such licenses **[**92]** "after the fact" as they see fit. See *Wu, 2013 U.S. Dist. LEXIS 5289, 2013 WL 145666, at *4* ("[T]here is no legal prohibition to obtaining a retroactive license if it is authorized by the rights holder."); *Silberstein v. Fox Entm't Grp., Inc., 424 F. Supp. 2d 616, 629 (S.D.N.Y. 2004)* ("The retroactivity of the licensing agreement between DAS and Fox has no necessary effect on its power to immunize Fox against claims of infringement of the [] copyright."), aff'd sub nom. *Silberstein v. John Does 1-10, 242 F. App'x 720 (2d Cir. 2007)*.

Plaintiffs contend that the Second Circuit has held that "retroactive" licenses are unenforceable where one co-owner of a copyright unilaterally grants a license after the filing of an infringement complaint to "extinguish[ ] the accrued infringement claims of a non-consenting co-owner," *Davis v. Blige, 505 F.3d 90, 103 (2d Cir. 2007)* and that that precedent applies and thus precludes retroactive licensing in the instant case. However, the holding in

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Mot. 18.) However, the AC does not allege fraud, so this contention will be disregarded. Last, Plaintiffs make mention of the doctrine of contra proferentum **[**90]** (Pls.' Opp'n to AP Mot. 22 n. 8), but ***HN42***[] that doctrine only applies where a contract is ambiguous which, as discussed below, the contracts do not appear to be, and only where there are no other interpretative tools to determine the parties' intent. See *Chesapeake Energy Corp. v. Bank Of New York Mellon Trust Co., N.A., 773 F.3d 110, 117 n. 3 (2d Cir. 2014)*; ***Int'l Multifoods Corp. v. Commercial Union Ins. Co., 309 F.3d 76, 88 n. 7 (2d Cir. 2002)***. Here, the AP Contributor Agreements' meaning may be clearly gleaned from their text.

[22] Plaintiffs further **[**91]** contend that if AP were correct that it was permitted to 'sublicense' its rights, "then it must follow that the NFL would be burdened with all of the responsibilities and limitations of the license grant." (Pls.' Opp'n to AP Mot. 24.) However, this assertion is without support.

[23] [TEXT REDACTED BY THE COURT] (§ the effective date of his AP Contributor Agreement, when AP acquired the right to license his photos. AP's sublicense to the NFL Entities thus covers their uses of each Plaintiff's photos for the period occurring on or after the effective date of that Plaintiff's AP Contributor Agreement.

Davis was a narrow one that does not apply to the facts here: "[a] 'retroactive' assignment or license that extinguishes the accrued infringement claims of a non-consenting co-owner by traveling back in time to 'undo' an unlawful infringement" may be held invalid. Davis, 505 F.3d at 103.

AP does not appear to have been a co-owner purporting to grant a license to which the other co-owner did not consent. Indeed, Plaintiffs make clear that AP is **[**93]** not a co-owner of Plaintiffs' copyrights. (AC ¶¶ 65, 131, 185.) Far from being a co-owner "extinguishing" Plaintiffs' rights behind their backs after Plaintiffs filed their infringement suit - which was the scenario in Davis - AP was expressly granted by Plaintiffs complete authority to sublicense their photographs as AP saw fit, and AP exercised those rights without "extinguishing" any legal action commenced by Plaintiffs.

Each AP Contributor Agreement licensed to AP all the rights comprised in copyright for each photo as of the effective date, and lasting "perpetual[ly]." AP had a co-extensive right to grant sublicenses. The AP Contributor Agreements do not limit AP's rights to issue a sublicense that covers any period while the AP Contributor Agreements are in effect. AP was therefore authorized and empowered to grant broad sublicenses for the use of Plaintiffs' copyrighted works and did so by issuing a sublicense to the NFL authorizing their uses of a Plaintiff's photos occurring after AP became a licensee of the Plaintiff, but before the issue date of the sublicense.[24]

Plaintiffs further contend that AP lacked **[**95]** authority to grant such a license with respect to "Archival Event Photos" because **[*125]** it purportedly holds only a non-exclusive license for those photographs, an allegation not found in the AC. However, even if the rights granted to AP were non-exclusive as Plaintiffs allege, Davis is still inapplicable. The court in Wu v. Pearson Education upheld as a matter of law the validity of a retroactive copyright license even though the licenses at issue apparently were non-exclusive and granted on a "rights managed" basis, just as Plaintiffs allege is the case with their AP Contributor Agreements. See Wu, No. 10 Civ. 6537, ECF No. 51 (Plaintiff's 56.1 Counter-Statement of Facts), at ¶¶ 7-8; ECF No. 54 (Summary Judgment Reply Br.), at 2.

In fact, the instant case bears a close resemblance to Wu. In Wu, the court distinguished and limited Davis to its specific facts by granting judgment as a matter of law to the defendant sublicensee based on a retroactive license granted by the plaintiff photographer's licensee. Id. At *4-5. As here, the plaintiff photographer in Wu had entered into licensing agreements with photography agencies that gave the agencies broad discretion to sublicense the photographs. **[**96]** The court determined that by granting the agencies discretion to confer upon the defendant "whatever licenses" were needed, the plaintiff "indisputably gave the Photo Agencies the discretion to enter into retroactive licenses." 2013 U.S. Dist. LEXIS 5289, [WL] at *5. As such, no copyright infringement claim could lie. Similarly here, each Plaintiff is an experienced sports photographer who individually negotiated his contract with AP and knowingly granted AP broad license and sublicense rights. Plaintiffs may not now attack AP for exercising those rights. See generally Wu, 2013 U.S. Dist. LEXIS 5289, 2013 WL 145666, at *4.

Plaintiffs' additional contention that the "retroactive" license (or the Second AP Agreement in general) was invalid because it was "illegal under the Sherman Act" is without basis. (AC ¶¶ 168, 181.) However, as discussed above, Plaintiffs' antitrust claims are insufficient. Because Plaintiffs do not adequately plead that the Second AP Agreement violates the Sherman Act, this contention must also fail.

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[24] Furthermore, there are basic differences between Davis and the facts of this case. In Davis, there was no written agreement between **[**94]** the copyright co-owners. One of the co-owners assigned his interest (including, purportedly, all causes of action for infringement of the copyright) to a person who had been sued for infringement by the other co-owner. The assignee then claimed that he was immune from the second co-owner's infringement suit. Davis held that the assignment cannot be given retroactive effect to defeat the suing co-owner's vested infringement claim, because one co-owner has no power to grant an exclusive license or release another co-owner's accrued claims. Id., 505 F.3d at 103-04. Here, however, each Plaintiff is the sole owner of the copyright in his photos and AP's sublicense does not affect the rights of any copyright co-owner. Each Plaintiff granted AP all rights comprised within copyright for the full term of his written AP Contributor Agreement, and gave AP the right to license others to make any use of the photos that AP could make. Although the license from Plaintiff Lowrance to AP is technically non-exclusive (see Lowrance AP Contributor Agreement § 4.2), this fact does not limit AP's right to issue retroactive licenses in Lowrance's photos to the full extent of AP's licensed rights.

Plaintiffs also allege that AP was required to "track or monitor" the NFL's uses of photos, to limit the uses that the NFL could make of photos, and to pay Plaintiffs royalties for uses of their photos by the NFL or by Replay. They further contend that AP **[**97]** breached the AP Contributor Agreements by failing to perform these obligations. (AC ¶¶ 168-174, 220-26.) As shown above, the language of the AP Contributor Agreements imposes no such obligations on AP. However, even if the AP Contributor Agreements had contained such terms, and AP had breached those terms, AP would not be liable for copyright infringement, but only for breach of contract. See *Graham, 144 F.3d at 236-37*.

HN44[] Second Circuit law is clear that where a licensee's use of a copyrighted work is authorized by a license, any claim for unpaid royalties for that use cannot form the basis of an infringement claim. Rather, a failure to pay royalties under a valid license agreement could only give rise to a breach of contract claim against the party with which the copyright owner has contracted to receive royalties. See, e.g., *Graham, 144 F.3d at 236-37* (finding that "the payment of royalties" is a "covenant" giving rise to a breach of contract claim but not a claim of copyright infringement); 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright § 10.15(A)(5)* (2013) ("Failure to pay royalties does not render past conduct an infringement of the copyright."); cf. *U.S. Naval Inst., 936 F.2d at 695* ("[A]n exclusive licensee of any of the rights comprised in the copyright, though it is **[**98]** capable of **[*126]** breaching the contractual obligations imposed on it by the license, cannot be liable for infringing the copyright rights conveyed to it."); *Russian Entm't Wholesale Inc. v. Close-Up Int'l, Inc., 767 F. Supp. 2d 392, 408 (E.D.N.Y. 2011)* ("A licensee's breach of a covenant in a copyright license does not rescind the authorization to use the copyright work, but rather provides the licensor with a cause of action for a breach of contract."), aff'd, *482 F. App'x 602 (2d Cir. 2012)*.

Plaintiffs contend that their AP Contributor Agreements differ from those in Graham because AP's obligations to pay royalties was a "condition" made "[i]n exchange for the license," and therefore breach of that condition could give rise to an infringement claim. (See Pls.' Opp'n to NFL Def.'s Mot. 32-33.) However, at least one court in this Circuit has held that language virtually identical to "in exchange for" is a covenant, not a condition. *Powlus v. Chelsey Direct, LLC, No. 09 Civ. 10461, 2011 U.S. Dist. LEXIS 3287, 2011 WL 135822, at *5 (S.D.N.Y. Jan. 10, 2011)* ("No court applying New York law has every construed the commonly used phrase '[i]n consideration for' as indicating a condition precedent."). Indeed, ***HN45***[] under New York law, "[c]onditions are not favored" and "in the absence of unambiguous language, a condition will not be read into [a contract]." *2011 U.S. Dist. LEXIS 3287, [WL] at *4*; see also *Graham, 144 F.3d at 237* ("New York respects a presumption that terms of **[**99]** a contract are covenants rather than conditions.") Plaintiffs offer no support for their assertion that the "in exchange for" language denotes a condition, rather than a covenant.

Plaintiffs finally argue that, "at worst," the AP Contributor Agreements are "ambiguous as to whether AP was permitted to grant 'non-royalty-bearing'" licenses to third parties, and that this creates a triable issue of fact that bars dismissal. (Pl. Opp'n to AP Mot. 31.) They assert generally that "a price term is an essential element of any binding agreement" and appear to argue that the absence of or silence regarding whether non-royalty-bearing licenses were permitted under the license constitutes an ambiguity in the contract necessitating the examination of extrinsic evidence. (Id.) This argument, however, is unavailing.

HN46[] "The determination of whether a contract term is ambiguous is a threshold question of law for the court." *Walk-In Med. Ctrs., Inc. Breuer Capital Corp., 818 F.2d 260, 263 (2d Cir. 1987)*. "An agreement is ambiguous only if it is 'capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement.'" *GSI Commerce Solutions, Inc. v. BabyCenter, L.L.C., 618 F.3d 204, 209 (2d Cir. 2010)* (citations omitted); see also *British Int'l Ins. Co. v. Seguros La Republica, S.A., 342 F.3d 78, 82 (2d Cir. 2003)*. Silence, or omission of a term, however, **[**100]** does not generally create ambiguity. See *Millgard Corp. v. E.E.Cruz/Nab/Fronier-Kemper, No. 99 CIV. 2952 (LBS), 2003 U.S. Dist. LEXIS 20928, 2003 WL 22741664, at *3 (S.D.N.Y. Nov. 18, 2003)* ("[U]nder New York law, the omission of terms in a contract does not create ambiguity."); *Kirschten v. Research Institutes of Am., Inc., No. 94 CIV. 7947 (DC), 1997 U.S. Dist. LEXIS 24037, 1997 WL 739587, at *9 (S.D.N.Y. Sept. 24, 1997)* (citing *Metropolitan Life Ins. Co. v. RJR Nabisco, Inc., 716 F. Supp. 1504, 1515 (S.D.N.Y. 1989)* ("While it may be true that no explicit provision either permits or prohibits an LBO, such contractual silence itself cannot create ambiguity to avoid the dictates of the parol evidence rule . . . ."); *Kaplan v. Cott Beverage Corp., 27 Misc.2d 655, 656-57, 212 N.Y.S.2d 103, 105 (Sup. Ct. 1961)* ("The written contract makes no mention of any adjustment in purchase price because of any variation in inventory **[*127]** and it is silent on the subject of any adjustments as to rent, taxes, etc. on closing of title. The plaintiff sought to overcome this apparent difficulty by asserting that the written contract is ambiguous and that the real intent of the parties may be shown by their conduct . . . . The written agreement is clear in its terms and purports to express the entire arrangement of the parties . . . . Therefore it may not be varied nor [sic] explained. All that can be said is that the plaintiff is the victim of his own circumstances.")

As noted above, on the face of the AP Contributor Agreements, the grant of rights made by Plaintiffs to AP is extremely broad, and nothing in the AP Contributor Agreements restricts AP from granting non-royalty-bearing **[**101]** sublicenses or retroactive sublicenses. See *Reiss v. Fin. Performance Corp., 97 N.Y.2d 195, 199, 764 N.E.2d 958, 961, 738 N.Y.S.2d 658 (2001)* (***HN47***[] "An omission or mistake in a contract does not constitute an ambiguity [and] * * * the question of whether an ambiguity exists must be ascertained from the face of an agreement without regard to extrinsic evidence") (citations omitted). The instant case does not qualify as an exception to the general rule that omission does not create ambiguity. See, e.g., *Chen-Oster v. Goldman, Sachs & Co., No. 10 CIV. 6950 LBSJCF, 2010 U.S. Dist. LEXIS 141813, 2011 WL 803101, at *3 (S.D.N.Y. Mar. 1, 2011)* (citing authority for the proposition that the missing term "must be one without which the contract is inherently ambiguous as to some issue material to defining the relationship between the parties" and "without which a contract could not be found.") (citations omitted).

Because the facts of the AC do not sufficiently allege direct copyright infringement by AP, Count II of the AC against AP is dismissed.

b. Claims Against NFL Defendants

Plaintiffs' copyright infringement claims are premised on a general allegation that the NFL has engaged in "unauthorized uses of Plaintiffs' copyrighted photographs." (AC ¶ 29.) Plaintiffs identify the following categories of alleged infringing uses of their images by the NFL:

1. Placement on NFL.com, including **[**102]** in "articles, as part of photo 'essays,' and also to create stand-alone photo 'galleries'" (id. ¶¶ 75, 99, 104, 107, 109, 111);

2. Publication on international websites such as nfljapan.com, nflmexico.com, and nfl.com/international (id. ¶¶ 75, 100, 107, 194);

3. Incorporation in printed publications such as NFL Magazine, Super Bowl programs, reports, newsletters, and game programs (id. ¶¶ 75, 101, 118);

4. Use in television programming on the NFL Network (id. ¶¶ 75, 102, 117);

5. Display of a "multi-story" image "draped" over facades of the Dallas Omni Hotel in Dallas and Cowboys Stadium to promote Super Bowl XLV (id. ¶ 103); and

6. Use of unspecified internet "links that allow and encourage visitors to buy copies of the photos through *www.nflshop.com*" (id. ¶ 113).

In addition to these alleged infringements, Plaintiffs also make reference to alleged "remov[al]" of "copyright management information" from photographs. (Id. ¶ 112.)

The purported basis of Plaintiffs' copyright claims, however, is not that the NFL lacked authority from Getty or AP to make the foregoing uses of Plaintiffs' photographs. (See id. ¶ 72.) Nor do Plaintiffs allege that Getty or AP lacked the authority and ability to grant a **[**103]** license to the NFL that would encompass all of the allegedly **[*128]** infringing uses identified in the AC. Rather, as set forth in detail below, Plaintiffs take issue only with the fact that they did not receive monetary compensation in the form of royalties for the NFL's uses - i.e., "the appropriate commercial licensing rates required for such uses" (AC ¶ 110) - to which Plaintiffs believe they are entitled pursuant to their licensing agreements with Getty and AP.

Although Plaintiffs bring copyright infringement claims against "all defendants," Plaintiffs fail to make allegations of specific instances of copyright infringement by any of the 32 NFL Clubs.[25] (See, e.g., id. ¶¶ 75, 94, 98-100, 164, 166, 176, 194.) None of the exhibits to the AC include any alleged uses of Plaintiffs' photographs by an individual NFL Club. (Id. Exs. 8-14.) Rather, substantive allegations in (and exhibits to) the AC relating to the infringement claims are made against the "NFL" or "NFL Defendants," which, in the AC, are defined to exclude the 32 individual NFL Clubs. (AC ¶ 16.) To the extent that the NFL Clubs are nominally included in the "catch all" infringement claim against "all defendants," this lack of specificity **[**104]** in the allegations fails to satisfy basic pleading standards, and therefore the infringement claim must be dismissed as to the NFL Clubs. See, e.g., *Broughel, 2009 U.S. Dist. LEXIS 35048, 2009 WL 928280, at *4* (***HN48***[] "[P]laintiff must identify, with specificity, the original works that are the subject of her copyright claim and which acts committed by defendants constitute infringement of her rights."); *Marvullo v. Gruner & Jahr, 105 F. Supp. 2d 225, 230 (S.D.N.Y. 2000)* ("*Rule 8(a)(2)* has been construed to require a plaintiff to plead with specificity the acts by which a defendant has committed copyright infringement.").[26]

As noted above, it is well established that ***HN50***[] use of a copyrighted work within the scope of a valid license is non-infringing **[**106]** as a matter of law, *Graham, 144 F.3d at 236*, and a "valid license, either exclusive or non-exclusive, immunizes the licensee from a charge of copyright infringement, provided that the licensee uses the copyright as agreed with the licensor." *Harris, 646 F. Supp. 2d at 630* (citation and **[*129]** internal quotation marks omitted). The same holds true for a sublicensee's use that has been authorized by a licensee. See *Ariel, 2006 U.S. Dist. LEXIS 79319, 2006 WL 3161467, at *9-10* (finding that "defendants' status as licensees or sub-licensees" precluded plaintiff from bringing copyright infringement claims as a matter of law), aff'd, *277 F. App'x 43 (2d Cir. 2008)*; *Major League Baseball Promotion Corp. v. Colour-Tex, Inc., 729 F. Supp. 1035, 1041 (D.N.J. 1990)* ("Under copyright law, a person is innocent of infringement if he possesses a sublicense issued by a licensee upon the due authority of the copyright owner." (citing *Pathe Exch. v. Int'l Alliance, 3 F. Supp. 63, 65 (S.D.N.Y. 1932)))*.

The various NFL uses challenged by Plaintiffs fall within three categories: the first category consists of the NFL's publication and display of the photographs for marketing purposes-specifically on (i) NFL.com, (ii) international websites, (iii) NFL-controlled print publications, (iv) the NFL Network, and (v) a "multi-story" image on buildings (AC ¶¶ 75, 99-104, 107, 109, 111); the second category is the NFL website "includ[ing] links that allow and encourage visitors to buy copies" of the Plaintiffs' photographs "through **[**107]** *www.nflshop.com*" (id. ¶ 113); the third

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[25] The sole exception is a stray reference to "individual NFL Teams" distributing unspecified "game programs" that included Plaintiffs' works. (AC ¶ 101.) Even as to this purported use, however, it is "the NFL" that is alleged to have "copied and published" Plaintiffs' works. In their opposition, Plaintiffs, without disputing that the AC lacks specific allegations of infringement by any of the 32 NFL clubs, assert that they are permitted to plead infringement "upon information and belief." (Pls.' Opp'n to NFL Def.'s Mot. 22.) This, type of pleading, however, is precisely the sort that cannot survive a motion to dismiss. See *Palmer Kane LLC v. Scholastic Corp., No. 12 Civ. 3890, 2013 U.S. Dist. LEXIS 27196, 2013 WL 709276, at *3 (S.D.N.Y. Feb. 27, 2013)* (holding that a complaint must "contain some factual allegations to narrow the infringing acts beyond **[**105]** broad conclusory statements of infringement"); *Broughel v. Battery Conservancy, No. 07-cv-7755, 2009 U.S. Dist. LEXIS 35048, 2009 WL 928280, at *4 (S.D.N.Y. Mar. 30, 2009)* (noting that "it is axiomatic that plaintiff's claims cannot rest on inchoate and conclusory accusations of unauthorized copying"). Additionally, Plaintiffs' reliance on *Federal Rule of Civil Procedure 11(b)* is misplaced - ***HN49***[] the rule does not relieve a party of the obligation to meet basic pleading standards established by *Rule 8(a)(2)* and current Circuit 12(b)(6) case law.

[26] Even assuming arguendo that Plaintiffs had sufficiently alleged infringing acts by any of the NFL Clubs, any copyright claim would nevertheless fail for the same reasons that the copyright claim against the NFL fails (as discussed below), including that the alleged uses of Plaintiffs' photographs are fully authorized and that allegations that Plaintiffs have been deprived of royalties can only give rise to breach of contract claims against Getty and AP. In this regard, the Getty and AP Agreements expressly permit the NFL Clubs to make the me marketing uses of intiffs' photographs a NFL. (Getty Agreement ; First AP Agreement, Second AP Agreement .)

category is removal of "copyright management information" from photographs in purported violation of the Digital Millennium Copyright Act. (Id. ¶ 112.) Plaintiffs do not allege that the NFL itself is selling Plaintiffs' photographs.

With respect to the first category, all of the alleged uses from April 1, 2009 forward are included within the rights AP granted to the NFL and NFL Clubs. The Second AP Agreement authorizes the NFL and NFL Clubs to make royalty-free use of contributor photographs for a variety of editorial, charitable, and marketing purposes. (Second AP Agreement [TEXT REDACTED BY THE COURT].) That broad grant of rights, in and of itself, is sufficient to cover the challenged uses on the NFL's websites, publications, programming, and other marketing efforts. Furthermore: the Second AP Agreement permits use for [TEXT REDACTED BY THE COURT] and identifies specific permissible uses of Plaintiffs' photographs that encompass the uses now being challenged. For example, the NFL and NFL Clubs are expressly permitted to make royalty-free use of Plaintiffs' NFL images in [TEXT REDACTED BY THE COURT] Moreover, the Second AP Agreement (like the **[**108]** First AP Agreement) imposes no territorial limitations that render use of the images on foreign NFL websites outside the scope of the license. (Id. [TEXT REDACTED BY THE COURT].)

With respect to the second category - the NFL's alleged "allowing" and "encouraging" of visitors to the NFL website to buy copies of photos on *www.nflshop.com* - the copyright infringement claim must also fail. First, Plaintiffs' allegation is a fleeting reference to *www.nflshop.com*, and Plaintiffs do not provide any examples (in the AC or in any of the exhibits attached thereto) of a photograph that has been sold or offered for sale on that website. This sole conclusory allegation is neither sufficient to make out a plausible infringement claim based on alleged "encouragement" or "allowing" sales on that website, nor does it provide sufficient specificity of the alleged infringing use to survive a motion to dismiss. See, e.g., *Broughel, 2009 U.S. Dist. LEXIS 35048, 2009 WL 928280, at *4*; *Marvullo, 105 F. Supp. 2d at 230*. Second, the mere allegation that the NFL "include[d] links" to another website and "encouraged" purchase of Plaintiffs' photographs cannot give rise to a claim of copyright infringement. See, e.g., *Pearson Educ., Inc. v. Ishayev, 963 F. Supp. 2d 239, 2013 WL 3948505, at *8-10 (S.D.N.Y. 2013)* (holding that merely providing links to websites where copyrighted works are sold does not, **[**109]** as a matter of law, constitute copyright infringement).

[*130] With respect to the third category, the solitary reference to removal of "copyright management information" (AC ¶ 112) is vague and conclusory. To the extent the alleged removal of information is part of Plaintiffs' cause of action for copyright infringement, Plaintiffs do not allege when, where, or how such removal of information occurred. (See generally id. ¶¶ 160-200.) Accordingly, any claim based on such activity is dismissed.

Plaintiffs' contention that the Second AP Agreement constitutes a "retroactive" license (AC ¶ 87) with respect to alleged royalty-free uses of contributor photographs prior to the effective date of that agreement (April 1, 2012) does not alter the conclusion that the NFL's alleged uses were authorized and the infringement claims against the NFL and NFL Clubs should be dismissed. As discussed further above with respect to AP, the grant of a retroactive license can be permissible, and in fact is permissible when there is a broad grant of rights, as here.

Additionally, Plaintiffs do not allege that their contributor agreements foreclosed Getty and AP from licensing the use of their photographs to the NFL for **[**110]** editorial, charitable, or marketing purposes across a wide variety of media. Rather, Plaintiffs' complaint is that that they were not paid by Getty and AP - and that Getty and AP did not seek to collect from the NFL (or NFL Clubs) - "the appropriate commercial licensing rates required for such uses." (Id. ¶ 110.) For example, Plaintiffs claim that:

• Getty and AP "allowed the NFL to make free or 'complimentary' use," "failed to charge the NFL appropriate market value" (id. ¶ 72), and permitted the NFL to use Plaintiffs' photos "without paying for any usage rights and without reporting usages to Plaintiffs on their royalty statements" (id. ¶ 82);

• "[T]he NFL has never paid any fees or compensation to Plaintiffs . . . and none of [the challenged] uses has ever been reported by Getty Images or AP to Plaintiffs on any royalty report or otherwise" (id. ¶ 106);

• Plaintiffs' photographs were not included in Getty's or AP's existing "royalty-free collections or offerings" (id. ¶ 173) and should have been part of "Rights-Managed licensing" that "would require a higher license fee than a license granting more narrow usage rights" (id. ¶ 70);

• "The notion that AP was authorized to grant its customers **[**111]** complimentary or 'non-royalty bearing' licenses" without any "compensation to Plaintiffs is anathema to the fundamental purpose and objective" of the Plaintiffs' agreements (id. ¶ 80); and

• "Plaintiffs have never received any compensation in exchange for the NFL Defendants' prolific and ongoing use of thousands of Plaintiffs' photos." (Id. ¶ 76.)

However, even assuming arguendo that Plaintiffs are entitled to such royalties under their agreements with AP, such an allegation cannot form the basis for a copyright infringement claim. As discussed above, a failure to pay royalties under a valid license agreement can only give rise to a breach of contract claim, not a claim of copyright infringement and Plaintiffs have failed to adequately establish that the failure of royalties constituted a violation of a "condition." See, e.g., *Graham, 144 F.3d at 236-37*.

c. Copyright Infringement Claims Against Replay

As with NFL, AP had a right to grant broad sublicense to Replay to use Plaintiffs' photographs, and did, in fact, grant such a sublicense as part of the **[*131]** Replay Agreement. (See Zibas Decl. Ex. A; AC ¶ 114.); see also *Bourne v. Walt Disney Co., 68 F.3d 621, 631 (2d Cir. 1995)* (***HN51***[ ] under copyright law, "the existence of a license is viewed as an affirmative defense" to infringement **[**112]** claims); *Pathe Exch., 3 F. Supp. at 63* ("It may well be that an exhibitor would be innocent if he held a sublicense issued by a license upon due authority from the copyright owner"). Replay may not be held liable for direct copyright infringement when it possesses a sublicense issued by a license upon the due authority of the copyright owner. See *Colour-Tex, 729 F. Supp. at 1041*. As such, there has been no primary infringement by Replay.[27]

III. The Motion To Dismiss Plaintiffs' Vicarious Copyright(Count III) and Contributory Infringement Claims (Count IV) Against AP Is Granted

Counts III and IV of the AC do not state plausible claims for vicarious and contributory copyright infringement against AP, based on the NFL and Replay's asserted **[**113]** use of photos. AP's license from Plaintiffs permitted the uses of the photos by NFL and Replay alleged in the AC, and AP was entitled to sublicense those rights to the NFL and Replay. The alleged uses are not copyright infringement. See *Colour-Tex, 729 F. Supp. at 1041*. As discussed above, because Plaintiffs have not adequately alleged primary infringement by either the NFL or Replay, AP cannot be liable for either vicarious or contributory copyright infringement. See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 930, 125 S. Ct. 2764, 162 L. Ed. 2d 781 (2005)*; *Faulkner v. Nat'l Geographic Enters. Inc., 409 F.3d 26, 40 (2d Cir. 2005)*; see also *Russian Entm't Wholesale, 482 F. App'x. at 606*.

As such, Counts II through IV of the AC for direct or secondary copyright infringement against AP are dismissed.

IV. The Motion To Dismiss Plaintiffs' Breach Of Contract (Count V) Against AP Is Granted

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[27] As with the Getty Agreement and First and Second AP Agreements, Plaintiffs' argument that the Court should not consider the Replay Agreement is unavailing. The Replay Agreement was attached as an exhibit to AP's original motion to dismiss the Complaint, which was incorporated by reference by Replay. (See Dkt. Nos. 26-28, 36-38.) Additionally, Plaintiffs' reliance on extraneous material to support contentions not found in the AC will be disregarded. See, e.g., *Adams v. Crystal City Mariott Hotel, 02 Civ. 10258 (PKL), 2004 U.S. Dist. LEXIS 5819 (S.D.N.Y. Apr. 5, 2004)*.

HN52[] A breach of contract claim must be dismissed where the unambiguous terms of the contract do not support a plaintiff's claim. *Soroof Trading Dev. Co. Ltd. v. GE Fuel Cell Sys. LLC, 842 F. Supp. 2d 502, 509-10 (S.D.N.Y. 2012)*. The provisions of the parties' agreements establish the rights of the parties and prevail over conclusory allegations in the complaint. *805 Third Ave. Co. v. M.W. Realty Assoc., 58 N.Y.2d 447, 451, 448 N.E.2d 445, 461 N.Y.S.2d 778, 780 (1983)*. The Court cannot "supply a specific obligation the parties themselves did not spell out." *Tonking v. Port Auth. Of New York and New Jersey, 3 N.Y.3d 486, 490, 821 N.E.2d 133, 787 N.Y.S.2d 708, 710 (2004)*. Moreover, New York law and the Twombly-Iqbal standards of federal pleading require a complaint to identify, in non-conclusory fashion, the specific terms of the contract that a defendant has **[**114]** breached. Otherwise, the complaint must be dismissed. *Swan Media Grp., Inc. v. Staub, 841 F. Supp. 2d 804, 807-08 (S.D.N.Y. 2012)*; *Orange Cnty. Choppers, Inc. v. Olaes Enter., Inc., 497 F. Supp. 2d 541, 554 (S.D.N.Y. 2007)*; *Highlands Ins. Co. v. PRG Brokerage, **[*132]** Inc., No. 01 Civ. 2272, 2004 U.S. Dist. LEXIS 83, 2004 WL 35439, at *8 (S.D.N.Y. Jan. 6, 2004)*.

These principles require dismissal of Plaintiffs' breach of contract claim against AP. Plaintiffs' nowhere allege specific contractual provisions that were allegedly breached by AP. Plaintiffs allege the following obligations on AP's part: (1) Plaintiffs' photos are subject to "rights managed" licensing (AC ¶ 69); (2) the agreements restricted AP's ability to retroactively or otherwise sublicense the photos to the NFL on a royalty-free basis (AC ¶ 223); (3) AP was required to notify Plaintiffs that it was granting the NFL Entities a royalty-free license to use the photos (AC ¶ 67); and (4) AP was required to report non-royalty bearing licenses of their photos (AC ¶¶ 68, 225). Plaintiffs have not shown any contractual language supporting these assertions.

In fact, Plaintiffs' conclusions are contradicted by the actual terms of the AP Contributor Agreements. While Plaintiffs retained all copyrights in their photos (AP Contribution Agreements § 4.1), this fact did not limit Plaintiffs' broad license to AP, which permitted AP to grant a sublicense to the NFL.[28] While Plaintiffs may have a right to sue for infringement for unauthorized **[**115]** uses of their photos, each Plaintiff authorized AP to issue sublicenses for uses of the Plaintiff's photos occurring after the effective date of the Plaintiff's AP Contributor Agreement. See id. AP did not breach the AP Contributor Agreements by exercising its right to grant those sublicenses. The AP Contributor Agreements contain no language requiring AP to "charge license fees" to the NFL and remit a percentage to the Plaintiffs, or requiring AP to "track or monitor" the activities of the NFL under their non-royalty-bearing sublicense. Plaintiffs' contrary conclusory statements are therefore disregarded. (Cf. AC ¶¶ 223-24).[29]

Finally, in their opposition to AP's motion to dismiss, Plaintiffs contend that the AP Contributor Agreements were obtained through "duress" or are "unconscionable." (**[**117]** See Pls.' Opp'n to AP Mot. 16-19.) However, while Plaintiffs cite to two paragraphs of the AC which would seem to support such claims (see AC ¶¶ 144-45), these contentions are not explicitly present or set forth as claims in the AC and at best **[*133]** more directly relate to

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[28] Ownership of copyright in the photos does not give Plaintiffs the exclusive right to pursue claims for infringement. For all Plaintiffs except Lowrance, AP is an exclusive licensee, and **HN53**[] AP has the right to sue for infringement of its exclusive license rights. *17 U.S.C. §501(b)*; *Eden Toys, Inc. v. Florelee Undergarment Co.., 697 F.2d 27, 32 (2d Cir. 1982)*, superseded on other grounds by *Fed. R. Civ. P. 52(a)*.

[29] Plaintiffs' allegations regarding the content of the First and Second AP Agreements (AC ¶¶ 175-76) or a request by AP to amend the AP Contributor Agreements (AC ¶¶ 116, 196-97) are similarly unavailing. It is the AP Contributor Agreements, not alleged unconsummated amendments **[**116]** to those contracts, that govern AP's right to license and sublicense Plaintiffs' photos. As detailed above, the broad license granted in the AP Contributor Agreements is the operative provision with respect to Plaintiffs' copyright infringement and breach of contract claims. Plaintiffs' inclusion of allegations regarding "rights managed licensing" which constitute extrinsic evidence is not considered in light of the unambiguous terms of the AP Contributor Agreements and the agreements' merger clause, which states that each AP Contributor Agreement "incorporates the entire understanding of the Parties and supersedes any and all prior agreements, oral or written, relating to Photographer's relationship with AP and is intended as a complete and exclusive statement of the terms of the arrangement between the parties." (AP Contributor Agreements § 10); see also *Abha Int'l, LLC v. Clover Int'l Corp., 11 Civ. 6841, 2012 U.S. Dist. LEXIS 23089, 2012 WL 569187, at *3 (S.D.N.Y. Feb. 16, 2012)* (**HN54**[] "A 'general merger clause' . . . 'precludes extrinsic proof to add or to or vary' the terms of the agreement.").

Plaintiffs' first count for violations of the Sherman Act. To be sure, the facts as alleged by Plaintiffs tend to show that the precedents relating to broad licensing, combined with the power and capacity of the Defendants, and, by contrast, apparent relative lack of market power of Plaintiffs, lead to a difficult result, approaching unfairness, in this case. This reality alone, however, does not transform Plaintiffs' duress and unconscionability arguments into viable claims at this juncture. See *Fox v. Idea Sphere, Inc., 12 Civ. 1342, 2013 U.S. Dist. LEXIS 42674, 2013 WL 1191743, at *28 (Mar. 21, 2014)* (dismissing claims of unconscionability raised "for the first time" in plaintiff's opposition to defendant's motion to dismiss and where "the [complaint] contains no allegations of unconscionability.")

In sum, Plaintiffs have failed to plausibly plead a claim for breach of contract against AP. Their conclusory allegations as to the terms of the contracts allegedly breached by AP are contradicted by the plain language of their own **[**118]** AP Contributor Agreements. As such, Count V is dismissed.

V. The Motion To Dismiss Plaintiffs' Breach of Fiduciary Duties (Count VI) Against AP Is Granted

Count VII of the AC, which alleges that AP breached a fiduciary duty to Plaintiffs, is premised on the legal conclusion that AP "held itself out" as Plaintiffs' "agent" and therefore owes them a special fiduciary duty. (AC ¶¶ 235-45.) However, the assertion of agency is conclusively contradicted by the Plaintiffs' own agreements. Each Plaintiff's AP Contributor Agreement expressly states that:

> Photographer shall be acting as an independent contractor and shall not represent himself or herself as an employee of AP, but only as an independent contractor. . . . Neither the making of this Agreement nor the performance of its provisions shall be construed to constitute either Party an agent, partner, joint venture, employee or legal representative of the other Party.

(AP Contributor Agreements § 1 or § 1.3.) ***HN55***[] In disputes between a purported principal and purported agent, where the interests of third parties or government agencies are not in issue, the parties are bound by a contractual agreement that their relationship is not one of agency. Such a **[**119]** disclaimer bars a claim for breach of fiduciary duty. See, e.g., *In re Rezulin Prods. Liab. Litig., 392 F. Supp. 2d 597, 607 n. 67 (S.D.N.Y. 2005)* (parties' own characterization of their relationship as not an agency may be disregarded only where it is attacked by a "stranger to the relationship."); *New Millennium Consulting, Inc. v. United Healthcare Servs., Inc., 695 F.3d 854, 858 (8th Cir. 2012)* ("this Court affirmed the district court's determination that ABC Radio was not an agent . . . as a matter of law because the parties expressly disclaimed a principal-agent relationship in their contract"); *Children's Broad. Corp. v. Walt Disney Co., 245 F.3d 1008, 1021-22 (8th Cir. 2001)*; *Norsul Oil & Mining Co. v. Texaco, Inc., 703 F. Supp. 1520, 1545-46 (S.D. Fla. 1988)*. Where a contract contains a disclaimer that the defendants are not acting as a fiduciary or financial investment advisor for two financial institutions, such a disclaimer "preclude[s] a finding of a fiduciary or other special relationship, absent special circumstances." *BNP Paribas Mortg. Corp. v. Bank of America, N.A., 866 F. Supp. 2d 257, 269-70 (S.D.N.Y. 2012)*; see also *Cooper v. Parsky, 140 F.3d 433, 439, 442 (2d Cir. 1998)*; *Seippel v. Jenkens & Gilchrist, P.C., 341 F. Supp. 2d 363, 381-82 (S.D.N.Y. 2004)*; *Calvin Klein Trademark Trust v. Wachner, 129 F. Supp. 2d 248, 250 (S.D.N.Y. 2001)*.

[*134] There are no "special circumstances" here, and Plaintiffs' conclusory assertions that AP "held itself out as Plaintiffs' agent" and "artfully craft[ed] the language of their contributor agreements" does not change that fact. (AC ¶¶ 235, 238.) The AP Contributor Agreements appear to embody ordinary commercial transactions. See, e.g., *Rodgers v. Roulette Records, Inc., 677 F. Supp. 731, 738-39 (S.D.N.Y. 1988)* (record company did not owe fiduciary duty to recording artist although it collected royalties for him); *Van Valkenburgh, Nooger & Neville v. Hayden Publ'g Co., 33 A.D.2d 766, 766, 306 N.Y.S.2d 599, 600 (1st Dep't 1969)*, aff'd, *30 N.Y.2d 34, 281 N.E.2d 142, 330 N.Y.S.2d 329 (1972)* (book publisher did not have a fiduciary relationship **[**120]** to author).

Finally, the breach of fiduciary duty claim must be dismissed because it is duplicative of Plaintiffs' claim for breach of contract. Both claims are based on the same allegations and alleged duties owed to Plaintiffs: that AP, under its contracts with Plaintiffs, was required to track and monitor the NFL uses of Plaintiffs' photos and to charge the NFL licensing fees (compare AC ¶¶ 223 and 241) was not permitted to grant retroactive licenses (compare AC ¶¶ 222 and 242), and failed to provide allegedly required information to Plaintiffs (compare AC ¶¶ 225 and 244-45).[30] ***HN56***[] A cause of action for breach of fiduciary duty that is merely duplicative of a breach of contract claim cannot stand. *Granirer v. The Bakery, Inc., 54 A.D.3d 269, 863 N.Y.S.2d 396, 399 (1st Dep't 2008)*; *William Kaufman Org. v. Graham & James, 269 A.D.2d 171, 703 N.Y.S.2d 439, 442 (1st Dep't 2000)*. Accordingly, Count VI is dismissed.

Plaintiffs have also contended that the "terms" of the AP Contributor Agreements "demonstrate that the entire purpose for Plaintiffs to enter these agreements was to earn royalties from AP licensing their photos" and the "covenant of good faith and fair dealing thus precludes AP's self-serving reading of the contracts." (Pls.' Opp'n to AP Mot. 26.) However, the AC does not plead a breach of an implied covenant of good faith and fair dealing. At any rate, ***HN57***[] while it is true **[**122]** that contracts include an implied covenant of good faith and fair dealing under New York law, a claim for breach of the implied covenant will be dismissed as redundant "where the conduct allegedly violating the implied covenant is also the predicate for breach of covenant of an express provision of the underlying contract." *Usov v. Lazar, 13 Civ. 818, 2013 U.S. Dist. LEXIS 89257, 2013 WL 3199652, at *6 (S.D.N.Y. June 25, 2013)*(quotation marks and citation omitted); see also *Matsumura v. Benihana Nat'l Corp., 465 F. App'x 23, 29 (2d Cir. 2012)*; *Harris v. Provident Life & Accident Ins. Co., 310 F.3d 73, 81 (2d Cir. 2002)* (***HN58***[] "New York law . . . does not **[*135]** recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim, based upon the same facts, is also pled."). Because Plaintiffs have already sued for breach of contract, a breach of implied duty of fair dealing and good faith claim based on the same contract has not been adequately pled.

VI. The Motions To Dismiss Plaintiffs' Unjust Enrichment Claim(Count VII) Against NFL Defendants, AP, And Replay Are Granted

"In the alternative to their copyright claims" (AC ¶ 248), Plaintiffs have asserted a claim for unjust enrichment based on NLF Defendants, AP, and Replay's alleged uses of their photographs. This claim, too, must fail because enforceable contracts govern the use of Plaintiffs' photographs **[**123]** and because the claim is preempted by the Copyright Act.

a. Enforceable Contracts Govern The Use Of Plaintiffs' Photographs

It is well-settled that ***HN59***[] "the existence of a valid and enforceable contract precludes an unjust enrichment claim relating to the subject matter of the contract." *Morgan Stanley & Co. v. Peak Ridge Master SPC Ltd., 930 F. Supp. 2d 532, 545 (S.D.N.Y. 2013)*; see also *Keiler v. Harlequin Enters. Ltd., No. 12-CV-5558, 2013 U.S. Dist. LEXIS 47690, 2013 WL 1324093, at *3 (S.D.N.Y. Apr. 2, 2013)*, rev'd in part on other grounds, ("Plaintiffs can recover on an unjust enrichment theory only in the absence of an enforceable agreement."); *IDT Corp. v. Morgan Stanley Dean Witter & Co., 12 N.Y.3d 132, 142, 907 N.E.2d 268, 879 N.Y.S.2d 355 (2009)* ("Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded."). Here, the use of Plaintiffs' photographs - which forms the basis for Plaintiffs' theory that NFL Defendants were unjustly enriched - is subject matter clearly governed by the AP Contributor Agreements and by the license agreements between AP and NFLP

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[30] Plaintiffs allege in their breach of contract count that the AP Contributor Agreements specifically provided that Plaintiffs retained the "exclusive right to pursue claims for infringements." (AC ¶ 221.) Plaintiffs then allege in their breach of fiduciary duty count that in AP's prior motion to dismiss, AP claimed that "it is entitled to pursue and settle infringement claims on plaintiffs' behalf" and that, as such, AP "must either claim such authority as **[**121]** co-owners of the underlying copyrights or as agents for the copyright owners." (AC ¶¶ 234, 236.) All Plaintiffs but Lowrance have issued exclusive licenses to AP encompassing all of their rights in copyright. This exclusive license gives AP the right to sue infringers as a matter of law - not for infringement of Plaintiffs' rights, but for infringement of AP's own rights. Were AP to sue for infringement, it would neither be acting as a co-owner of copyright nor as an agent of Plaintiffs. Thus, AP's right to sue for infringement does not bear on whether AP is an agent of Plaintiffs. Plaintiffs are bound by their own contractual agreements that unambiguously state that AP does not act as their agent, i.e., fiduciary.

(or, in the case of the Second AP Agreement, NFL Enterprises). Accordingly, any claim for unjust enrichment is precluded as a matter of law with respect to NFL Defendants.

They are similarly precluded as against AP. There is no dispute that every Plaintiff has entered into an AP Contributor **[**124]** Agreement, and that each AP Contributor Agreement deals with the subject matter which is the basis for the unjust enrichment claim, namely the extent to which Plaintiffs will be compensated for use of their photographs. As shown above, the AP Contributor Agreements do not prohibit AP from sublicensing Plaintiffs' photographs to NFLP for certain uses that will not result in the payment of royalties to the Plaintiffs. As such, Plaintiffs may not circumvent their contracts through the expedient of an unjust enrichment claim.

b. Copyright Act Preempts Unjust Enrichment Claims

Even if Plaintiffs' state-law claim for "unjust enrichment" were not precluded by the existence of written agreements, it still could not be maintained because it is preempted by *Section 301(a)* of the Copyright Act.

HN60[] Under *§ 301(a)*:

> all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by *section 106* in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by *sections 102* and *103*, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. **[*136]** Thereafter, no **[**125]** person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

HN61[] A state-law claim is preempted by *§ 301(a)* when:

> (1) the particular work to which the claim is being applied falls within the type of works protected by the Copyright Act under *17 U.S.C. §§ 102* and *103*, and (2) the claim seeks to vindicate legal or equitable rights that are equivalent to one of the bundle[s] of exclusive rights already protected by copyright law under *17 U.S.C. § 106*. The first prong of this test is called the "subject matter requirement," and the second prong is called the "general scope requirement."

Briarpatch Ltd. v. Phoenix Pictures, Inc., 373 F.3d 296, 305 (2d Cir. 2004) (internal citations omitted). ***HN62***[] A preempted claim fails to state a cause of action and is subject to immediate dismissal under *Rule 12(b)(6)*. *Briarpatch Ltd., 373 F.3d at 308-09*.

HN63[] For a claim arising under state law to be preempted, two tests must be met. The first, called the "subject matter requirement," *Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 848 (2d Cir. 1997)*, requires that the work in which the right is asserted must be fixed in tangible form and come within the subject matter of copyright as specified in *§§ 102* or *103* of the Copyright Act. Id. The second prong of the test for copyright preemption is that the right asserted by a plaintiff's state-law claim must be equivalent to rights specified and protected in *§ 106* of **[**126]** the Act. This is often called the "general scope" requirement. Id. The general scope requirement is satisfied when "the state-created right may be abridged by an act that would, by itself, infringe one of the exclusive rights provided by federal copyright law." *Briarpatch, 373 F.3d at 305*.

HN64[] For a state-law claim not to be considered 'equivalent' to a copyright claim, the state claim must require an additional element that is qualitatively different from the elements of copyright infringement. The courts "take a restrictive view of what extra elements transform an otherwise equivalent claim into one that is qualitatively different from a copyright infringement claim." *Briarpatch, 373 F.3d at 305*; *NBA, 105 F.3d at 851* ("[T]he 'extra element' test should not be applied so as to allow state claims to survive preemption easily."). For example, an "action will not be saved from preemption by elements such as awareness or intent, which alter 'the action's scope but not its nature.'" *Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 717 (2d Cir. 1992)* (citation omitted).

Plaintiffs' Count VII alleges that Defendants were "unjustly enriched by the uncompensated use of Plaintiffs' photos." (AC ¶ 249.) However, both preemption elements are satisfied in this case regarding NFL Defendants. As to the first element, Plaintiffs allege, and it is **[**127]** therefore presumed for purposes of this motion, that their photographs are protected by the Copyright Act. As to the second element, the substantive allegations underlying Plaintiffs' unjust enrichment claim are identical to those underlying their infringement claims: that the NFL improperly copied, displayed, and distributed Plaintiffs' photographs without paying royalties. (See, e.g., AC ¶¶ 176, 250-251.) While "enrichment" is an element of unjust enrichment but not copyright infringement, the allegation that the NFL has been "unjustly enriched . . . at the expense of Plaintiffs" (AC ¶ 254) as a result of the alleged infringements is insufficient to avoid preemption. *Briarpatch Ltd., 373 F.3d at 306* ("While enrichment is not required for copyright infringement, we do not believe that it goes far enough to make the unjust enrichment claim qualitatively different **[*137]** from a copyright infringement claim."); *Gusler v. Fischer, 580 F. Supp. 2d 309, 316-17 (S.D.N.Y. 2008)* (***HN65***[] "[A]lthough enrichment is not an element of a copyright infringement claim, it does not constitute an 'extra element' for the purposes of preemption analysis" (citation omitted)); see also *Atrium Grp. De Ediciones Y Publicaciones, S.L. v. Harry N. Abrams, Inc., 565 F. Supp. 2d 505, 509 (S.D.N.Y. 2008)* (noting that plaintiffs' allegation that they failed to receive royalties "does not transform their copyright infringement claim into **[**128]** an unjust enrichment claim," and "[i]f the law were otherwise," it would "undermine *§ 301* preemption"); accord *Thompson v. V.E.W. Ltd, Coty, Inc., No. 06 Civ. 15336, 2007 U.S. Dist. LEXIS 43820, 2007 WL 1746739, at *3-4 (S.D.N.Y. June 15, 2007)* (holding that a claim for unjust enrichment based upon the unauthorized use of images was preempted). A claim for unjust enrichment arising from unauthorized use (i.e., reproduction, display, and distribution) of such works is within the general scope of copyright, because it seeks to vindicate legal and equitable rights that do not qualitatively differ from the rights protected under copyright law. *Briarpatch Ltd., 373 F.3d at 306-307*.

Moreover, no allegation is made suggesting that AP was unjustly enriched: Plaintiffs' claim only addresses the "NFL Defendants' uses of their photos" without paying royalties. (Id. ¶¶ 250, 252.) But even if this claim were read to assert that AP was somehow unjustly enriched, it would also fail on preemption grounds.[31]

[31] The fact that Plaintiffs allege unjust enrichment "in the alternative" to their copyright infringement claims does not save Count VII from dismissal. "The relevant question is whether Plaintiffs could bring their claims under the copyright law at all, not whether they will, nor even whether they will ultimately prevail **[**129]** on their copyright claim." *Moser Pilon Nelson Architects, LLC v. HNTB Corp., 05 Civ. 422, 2006 U.S. Dist. LEXIS 58334, 2006 WL 2331013, at *11 (D. Conn. Aug. 8, 2006)* (emphasis in original) (granting summary judgment on unjust enrichment claim "plead in the alternative" to claim of copyright infringement on preemption grounds); see also *Atrium Grp., 565 F. Supp. 2d at 510* (alternatively plead unjust enrichment claim based on same theory as copyright claim preempted and dismissed, as ***HN66***[] "*Rule 8(d)(2) of the Federal Rules of Civil Procedure* does not purport to override *§ 301* preemption."); *Eliya, Inc. v. Kohls Dep't Stores, 06 Civ. 195, 2006 U.S. Dist. LEXIS 66637, 2006 WL 2645196, at *13 (S.D.N.Y. Sept. 13, 2006)* ("[P]leading a claim in the alternative does not resuscitate an otherwise unviable claim. Regardless of whether Eliya's statutory copyright claim has merit, its common law copyright claim asserts rights in 'the general scope of copyright' and therefore, win or lose, those rights are 'governed exclusively by' the Copyright Act. *17 U.S.C. § 301(a)*. Accordingly, Eliya's common law copyright claim will be dismissed."); *Katz Dochrermann & Epstein, Inc. v. Home Box Office, 97 Civ. 7763, 1999 U.S. Dist. LEXIS 3971, 1999 WL 179603, at *5 (S.D.N.Y. Mar. 31, 1999)* ("The [unjust enrichment] claim is dismissed . . . as an alternative ground for recovery on KDE's copyright infringement and unfair competition claims."). In any event, none of the case law cited by Plaintiffs discusses "alternative" pleading or supports their contentions. **[**130]** *Levine v. Landy, 832 F. Supp. 2d 176 (N.D.N.Y. 2011)*, presented a situation not at issue here, where the plaintiff alleged infringement with respect to some works and unjust enrichment with respect to others (for which the uses were conceded by plaintiff to have been authorized), and the court addressed only the issue of Copyright Act preemption, not alternative pleading. *Levine, 832 F. Supp. 2d at 187-88*. The court was never presented with the issue of whether an unjust enrichment claim is precluded by the existence of valid and enforceable contracts. In *Astroworks, Inc. v. Astroexhibit, Inc., 257 F. Supp. 2d 609 (S.D.N.Y. 2003)*, Copyright Act preemption was not implicated; the court simply determined that because the existence of a contract could not be determined absent discovery, an unjust enrichment claim could survive the motion to dismiss stage. *Astroworks, 257 F. Supp. 2d at 620-21*.

Additionally, Plaintiffs assertion that "even if AP is correct that it was technically authorized to grant a complimentary, royalty-free, and retroactive license to the NFL, it was still unjustly enriched because it had an obligation in equity to obtain compensation for Plaintiffs or share with them the benefits of its bargain with the NFL" is unsupported by case law - Plaintiffs cite

Lastly, the Plaintiffs' unjust enrichment claim against Replay is similarly preempted. **[*138]** Plaintiffs seek to protect their alleged interests in their photos under the theory that Replay was unjustly enriched by offering Plaintiffs' photos for sale without compensating plaintiffs, and without appropriate attribution. (AC ¶¶ 250-54.) As with the other defendants, these rights are those which are protected by the Copyright Act and are therefore preempted.

Conclusion

For the reasons set forth above, Getty's motion to compel arbitration is granted and Defendants' motions to dismiss are granted. The AC is dismissed without prejudice with leave to replead within 20 days of this opinion.

It is so ordered.

New York, NY

March 27, 2015

/s/ Robert W. Sweet

ROBERT W. SWEET

U.S.D.J.

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no authority that establishes that they can maintain a separate unjust enrichment claim even if all of the **[**131]** uses of their photos were authorized. (See Pls.' Opp'n to AP Mot. 41.)

Fjord v. AMR Corp.(In re AMR Corp.)

United States Bankruptcy Court for the Southern District of New York

March 31, 2015, Decided

Chapter 11, Case No. 11-15463 (SHL), (Jointly Administered), Adv. Pro. No. 13-01392 (SHL)

Reporter
527 B.R. 874 *; 2015 Bankr. LEXIS 1005 **; 2015-1 Trade Cas. (CCH) P79,130

In re: AMR CORPORATION, et al., Reorganized Debtors.CAROLYN FJORD, et al., Plaintiffs, v. AMR CORPORATION, AMERICAN AIRLINES, AMERICAN GROUP, INC. and AMERICAN, INC., Defendants, OFFICIAL COMMITTEE OF UNSECURED CREDITORS, As Intervenor.

Subsequent History: Motion denied by *Fjord v. AMR Corp. (In re AMR Corp.), 2019 Bankr. LEXIS 622 (Bankr. S.D.N.Y., Feb. 26, 2019)*

Prior History: *Fjord v. AMR Corp. (In re AMR Corp.), 502 B.R. 23, 2013 Bankr. LEXIS 5028 (Bankr. S.D.N.Y., Nov. 27, 2013)*

Core Terms

allegations, city-pairs, antitrust, tickets, Plaintiffs', merger, airline, relevant market, travel, travel agent, interchangeability, amend, flight, damages, consumers, cross-elasticity, anti trust law, injuries, anticompetitive, enforcer, Clayton Act, pleadings, harms, antitrust violation, amended complaint, treble damages, customers, products, pairs, individual plaintiff

LexisNexis® Headnotes

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

HN1[] **Amendment of Pleadings, Leave of Court**

A party may amend its pleading as a matter of course within the time limits imposed by *Fed. R. Civ. P. 15(a)(1)*. When a party seeks to amend its pleadings outside of the prescribed time frames, the opposing party must consent or the moving party must obtain leave of the court. *Fed. R. Civ. P. 15(a)(2)*. *Rule 15(a)(2)* provides that the court should freely give leave to amend the complaint when justice so requires. Summary disposition of all litigation, especially antitrust cases, is not favored and amendments should be freely and liberally granted to the end that all cases are decided on their merits. The decision to grant or deny a motion to amend rests within the sound judicial discretion of the trial court. A court may exercise its discretion to deny leave to amend a pleading where: (i) the movant has acted with undue delay, bad faith, or a dilatory motive; (ii) the movant has repeatedly failed to cure a deficient pleading; (iii) the amendment would unduly prejudice the opposing party; or (iv) the amendment would be futile. The same standard applies to motions to supplement the complaint pursuant to *Rule 15(d)*.

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

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

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

An amendment is futile when the proposed changes would be subject to immediate dismissal for failure to state a claim or on some other ground. The party opposing an amendment has the burden to establish that a proposed amendment would be futile. When a defendant objects to a proposed amended complaint, therefore, the court may scrutinize that complaint as if it were subject to a motion to dismiss for failure to state a claim under Fed. R> Civ. P. 12(b)(6). In such a circumstance, the court must assume the truth of the well-pled factual allegations in the complaint and must draw all reasonable interests against the defendant. Under Rule 12(b)(6), a court must determine whether the well-pleaded factual allegations, assumed to be true, state a claim to relief that is plausible on its face.

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

HN3[] **Motions to Dismiss, Failure to State Claim**

Plausibility of a claim is not akin to a probability requirement, but rather requires more than a sheer possibility that a defendant has acted unlawfully. Courts do not make plausibility determinations in a vacuum; it is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. A claim is plausible when the factual allegations permit the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. A claim that pleads only facts that are merely consistent with a defendant's liability does not meet the plausibility requirement. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. The pleadings must create the possibility of a right to relief that is more than speculative. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

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

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

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

HN4[] **Standing, Clayton Act**

When considering whether amendment of an antitrust claim is appropriate, the court must determine if the proposed new allegations allege a plausible claim for damages under ***antitrust law***. Congress does not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation. The right to pursue private actions for treble damages under *15 U.S.C.S. § 15(a)* has developed limiting contours. These contours are embodied in the concept of antitrust standing. Antitrust standing is a threshold, pleading-stage inquiry. When a complaint fails to establish this requirement, a court must dismiss it as a matter of law.

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

HN5[] **Standing, Requirements**

To plead antitrust standing, a plaintiff must allege that it suffered an antitrust injury and that it is an efficient enforcer of the antitrust laws. For the first requirement of antitrust injury, a plaintiff must identify the anticompetitive practice complained of and the reasons why such a practice is or might be anticompetitive, and link the anticompetitive practice to the actual injury suffered. The injury must be of the type of harm that antitrust laws were intended to prevent. The plaintiff must allege a direct antitrust injury, something more than just an injury causally linked to an antitrust violation. It is not sufficient to allege an injury that is indirect or derived from injury sustained by another entity with which the plaintiff has a business relationship.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

HN6[] **Regulated Practices, Private Actions**

While only a short plain statement of an antitrust claim is required to give notice to the opposing party, it is improper to assume that defendants have violated the antitrust laws in ways that have not been alleged.

Antitrust & Trade Law > Clayton Act > Scope

HN7[] **Antitrust & Trade Law, Clayton Act**

See *15 U.S.C.S. § 18*.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

HN8[] **Remedies, Damages**

See *15 U.S.C.S. § 15*.

Antitrust & Trade Law > Clayton Act > Claims

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

HN9[] **Clayton Act, Claims**

The relevant market definition shapes where a court must look to determine any actual anticompetitive effects. Without one, it is impossible to make that determination and identify any damages flowing from an antitrust violation. To state a claim under Section 7 of the Clayton Act, *15 U.S.C.S. § 18*, a plaintiff must allege a plausible relevant market in which competition will be impaired. The relevant market must be defined as all products reasonably interchangeable by consumers for the same purposes. The test for a relevant market considers what is reasonably interchangeable for consumers, not what a particular plaintiff considers to be interchangeable. In that way, alleging the product market is distinct from alleging antitrust injury, which requires allegations that are specific to the plaintiff. A plaintiff must provide at least a theoretically rational explanation for the boundaries it chooses for the relevant market.

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

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

For purposes of the relevant market definition in an antitrust claim, interchangeability looks to the use or function of the given product as compared to other products. Every product that can be substituted for the same use or purpose should be included within a single product market. Related to that, cross-elasticity looks at the extent to which a change in price of one product might alter demand for another product. If a change in the price of one product affects demand for the second product, they should be included in the same product market.

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

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

Where a plaintiff in an antitrust action fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient. Failure to define the market by reference to the rule of interchangeability is, standing alone, valid grounds for dismissal.

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

HN12[] **Motions to Dismiss, Failure to State Claim**

A plaintiff must plead enough facts to state a claim to relief that is plausible on its face. Factual allegations must be enough to raise a right to relief above the speculative level.

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

HN13[] **Standing, Requirements**

In addition to alleging a plausible antitrust claim and related injury, a plaintiff must establish that it is an efficient enforcer of the antitrust laws. As to this second requirement of an efficient enforcer, courts typically examine the following factors: (1) the directness or indirectness of the asserted injury; (2) the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; (3) the speculativeness of the alleged injury; and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries.

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Judges: Sean H. Lane, UNITED STATES BANKRUPTCY JUDGE.

Opinion by: Sean H. Lane

Opinion

[*878] **MEMORANDUM OF DECISION**

SEAN H. LANE

UNITED STATES BANKRUPTCY JUDGE

Before the Court is the Plaintiffs' motion to amend and supplement the complaint (the "Motion") (ECF No. 106) in this civil antitrust action challenging the merger between American Airlines and US Airways that took place in December 2013. The Motion seeks to add a claim for treble damages under Section 4 of the Clayton Antitrust Act (*15 U.S.C. § 15(a)*) (the "Clayton Act") and a demand for a jury trial. This is the Plaintiffs' second attempt to add a damages claim and related jury demand. The Court denied the Plaintiffs' first motion to amend because the proposed amendments failed to assert a sufficient basis for the damages suffered by the individual Plaintiffs. *See Fjord v. AMR Corp. (In re AMR Corp.), 506 B.R. 368, 386 (Bankr. S.D.N.Y. 2014)*. The Defendants oppose this new Motion, contending that the proposed amendments still fail to state a damages claim for a variety of reasons. **[**2]** For the reasons explained below, the Court agrees and denies the Motion.

BACKGROUND

A detailed account of the Debtors' bankruptcy case and the early stages of this adversary proceeding can be found in the Court's decision on the Plaintiffs' first motion to amend, familiarity with which is assumed. *See generally Fjord, 506 B.R. at 373—76*. But some brief history is necessary to understand the issues raised by the Motion.

In November 2013, the Plaintiffs sought a temporary restraining order to block the proposed merger between American and US Airways, a merger that formed the basis of the Debtors' reorganization. At the hearing on the TRO motion, the Court asked Plaintiffs' counsel to provide information about the individual Plaintiffs and how they would be harmed by the merger. Nov. 25 Hr'g Tr. 35:21—22, 36:16—17 (ECF No. 79). Plaintiffs' counsel could not identify allegations in the complaint that addressed the harm to the named Plaintiffs. *Id.* at 36:18—22. After the hearing, the Court denied the request for a TRO and permitted consummation of the merger because Plaintiffs failed to demonstrate irreparable harm or a likelihood of success on the merits of their antitrust claims. *See Fjord v. AMR Corp. (In re AMR Corp.), 502 B.R. 23 (Bankr. S.D.N.Y. 2013)*. That decision highlighted **[**3]** examples of the deficiencies in the Plaintiffs' pleadings, including the lack of information regarding the individual Plaintiffs and the failure to articulate how they would be harmed by the merger. *Id. at 33—35*.

In January 2014, the Plaintiffs filed their first motion to amend the complaint. In that motion, the Plaintiffs sought to add new factual allegations, a claim for treble damages under *Section 4*, and a demand for a jury trial. They also sought to modify language regarding the divestiture and declaratory relief sought under *Section 16* of the Clayton Act, *15 U.S.C. § 26*. *See* Proposed First Amended Complaint at 1, 38-39, Prayer for Relief A—D (ECF No. 91—2).[1] The Court granted in part and **[*879]** denied in part the first motion to amend. *See Fjord, 506 B.R. 368*. On the one hand, the Court permitted amendment to include new factual allegations that arose after the merger and revisions of the proposed divestiture relief.[2] On the other hand, the Court denied the remainder of the requested relief, finding that the proposed amended complaint failed to assert a sufficient basis for treble damages allegedly suffered by the individual Plaintiffs. *Id. at 385—86*. Consistent with the Court's ruling, the Plaintiffs filed an amended complaint in April 2014 (the "Amended Complaint") **[**4]** (ECF No. 103).

The Plaintiffs filed a second motion to amend and supplement the complaint (ECF No. 105), again seeking to add a damages claim and a jury trial demand. In this motion, the Plaintiffs sought to add over 160 new paragraphs to the Amended Complaint, but their abbreviated papers contained only a cursory explanation about why the Plaintiffs

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[1] The first motion to amend also included a request for a preliminary injunction requiring the Defendants to hold their assets separate during the pendency of the case. At the hearing on the first motion, the Plaintiffs clarified that they were not seeking such preliminary injunctive relief, notwithstanding the language of the proposed amended complaint. Feb. 13 Hr'g Tr. 35:11—38:11, 45:7—13 (ECF No. 100).

[2] The modifications regarding divestiture addressed the settlement between the Department of Justice (the "DOJ") and the airlines in the DOJ's antitrust action, which occurred after the filing of the Plaintiffs' original complaint. *See Fjord, 502 B.R. at 30*.

would be entitled to the relief sought.[3] The Court subsequently expressed concern about the boilerplate content of the motion, noting that it would be inappropriate for the Plaintiffs to raise new arguments **[**5]** for the first time in the reply brief. May 16 Hr'g Tr. 14:7—16:21 (ECF No. 107). To address these concerns, the Plaintiffs filed a revised motion to file a second amended complaint (ECF No. 106), which is the matter now before the Court.

The proposed second amended and supplemental complaint (the "PSASC") (ECF No. 106—1, Ex. A) identifies forty named Plaintiffs. In ruling on the Plaintiffs' first motion to amend the complaint, the Court observed that the complaint provided little, if any, information about the actual Plaintiffs. *See* *Fjord, 506 B.R. at 385-86*. In this second attempt to amend the complaint, the Plaintiffs propose extensive new allegations about individual Plaintiffs. But notwithstanding the additional text, the Plaintiffs still have failed to allege any information regarding twenty-seven of the Plaintiffs.[4] As to the remaining thirteen **[*880]** Plaintiffs, the alleged injuries can be generally grouped into three categories: personal injuries to the Plaintiffs regarding their own travel plans, *see, e.g.*, PSASC ¶ 248 (Ms. Fjord purchased tickets for her family departing **[**6]** from San Francisco rather than Sacramento); injuries to Plaintiffs' travel agencies or travel-related businesses, *see, e.g.*, PSASC ¶¶ 195, 198—200 (Ms. Jolly lost customers for her annual Paris group trips); and injuries suffered by the Plaintiffs' clients, *see, e.g.*, PSASC ¶¶ 257—62 (Mr. Fry's client has paid increased airfare on routes out of Philadelphia).[5]

DISCUSSION

I. Applicable Legal Standards

HN1[] A party may amend its pleading as a matter of course within the time limits imposed **[**8]** by *Rule 15(a)(1) of the Federal Rules of Civil Procedure*. When a party seeks to amend its pleadings outside of the prescribed time frames, the opposing party must consent or the moving party must obtain leave of the court. *Fed. R. Civ. P. 15(a)(2)*, incorporated in these proceedings by *Fed. R. Bankr. P. 7015*. *Rule 15(a)(2)* provides that "[t]he court should freely give leave [to amend the complaint] when justice so requires." *Id.* "[S]ummary disposition of all litigation, especially antitrust cases, is not favored and . . . amendments should be freely and liberally granted to the end that all cases are decided on their merits." *Food Basket, Inc. v. Albertson's, Inc., 383 F.2d 785, 788 (10th Cir. 1967)*. The decision to grant or deny a motion to amend rests within the "sound judicial discretion of the trial court." *Adelphia Recovery Trust v. FPL Grp., Inc. (In re Adelphia Commc'ns Corp.), 452 B.R. 484, 489 (Bankr. S.D.N.Y. 2011)*. A court may exercise its discretion to deny leave to amend a pleading where: (i) the movant has acted with undue delay, bad faith, or a dilatory motive; (ii) the movant has repeatedly failed to cure a deficient pleading; (iii) the

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[3] The memorandum of law in support of the second motion to amend was only eight pages, consisting largely of boilerplate language (ECF No. 105—1).

[4] The PSASC provides no new allegations regarding the following Plaintiffs other than their respective addresses: Katherine R. Arcell, Keith Dean Bradt, Jose M. Brito, Robert D. Conway, Judy Crandall, Pamela Faust, Gabriel Garavanian, Harry Garavanian, Lee M. Gentry, Gail S. Kosach, Michael C. Malaney, Len Marazzo, Lisa McCarthy, Patricia Ann Meeuwsen, L. West Oehmig, Jr., Cynthia Prosterman, Dana L. Robinson, Bill Rubinsohn, Sylvia N. Sparks, June Stansbury, Clyde D. Stensrud, Wayne Taleff, Gary Talewsky, Annette M. Tippetts, Diana Lynn Ultican, J. Michael Walker, and Christine O. Whalen.

At the hearing on the Motion, the Court asked Plaintiffs' counsel whether there were additional allegations regarding personal injuries. July 17 Hr'g Tr. 76:2—20 (ECF No. 113). Plaintiffs' counsel explained that all forty individuals have likely **[**7]** suffered personal injuries. *See id.* at 76:19—20 ("I believe, Your Honor, that all, most, if not all, would be [alleging] both."). But when Plaintiffs' counsel could not point to specific paragraphs at the hearing, the Court suggested filing a letter after the hearing to highlight the personal injuries alleged by the Plaintiffs. The Plaintiffs submitted a letter to chambers, but many of the injuries described in the letter pertain to the Plaintiffs who were "undescribed" in the proposed supplemental complaint. (ECF No. 114). In any event, the allegations of the PSASC are the relevant touchstone for this Motion.

[5] There is one other Plaintiff who alleges a harm that is less clearly a personal injury: Ms. Pulfer bought her children tickets for their honeymoon to St. Lucia. PSASC ¶¶ 205—12. Additionally, several Plaintiffs allege prospective injuries that may or may not occur. *See, e.g.*, PSASC ¶¶ 289—90 (discussing expectation of Plaintiffs that the USAir Vacation practice of paying travel agent commissions will be terminated and the impact this would have on Ms. Davis).

amendment would unduly prejudice the opposing party; or (iv) the amendment would be futile. *See, e.g., Tronox Inc. v. Kerr McGee Corp. (In re Tronox Inc.), 503 B.R. 239, 340 (Bankr. S.D.N.Y. 2013)* (citing *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962))*.

The same standard applies to motions to supplement the complaint pursuant to *Rule 15(d)*. *See Music Deli & Groceries, Inc. v. I.R.S., Dist. of Manhattan, 781 F. Supp. 992, 997 (S.D.N.Y. 1991)* ("Although *Rule 15(d)* does not include *Rule 15(a)*'s mandate that leave to amend be freely given when justice so requires, the same standards apply to motions under both **[**9]** of these subdivisions . . . . Thus leave to supplement should be freely granted '[i]n the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive . . . .'") (quoting *Foman, 371 U.S. at 182*) . It is well established that leave to amend or supplement should be denied if the amendment or supplement would be futile. *Houston Pipeline Co. LP v. Enron Corp. (In re Enron Corp.), 367 B.R. 373, 382 (Bankr. S.D.N.Y. 2007)*; *see also Kalimantano GmbH v. Motion in Time, Inc., 939 F. Supp. 2d 392, 403 (S.D.N.Y. 2013)*. ***HN2***[] An amendment is futile when the proposed **[*881]** changes would be subject to 'immediate dismissal' for failure to state a claim or on some other ground. *See Enron, 367 B.R. at 382*; *see also Health-Chem Corp. v. Baker, 915 F.2d 805, 810 (2d Cir. 1990)*. The party opposing an amendment has the burden to establish that a proposed amendment would be futile. *Velez v. Fogarty, 2008 U.S. Dist. LEXIS 96999, at *9 (S.D.N.Y. Nov. 20, 2008)* (citations omitted). When a defendant objects to a proposed amended complaint, therefore, the court may scrutinize that complaint as if it were subject to a motion to dismiss under *Rule 12(b)(6)*. *2008 U.S. Dist. LEXIS 96999 at *10*. In such a circumstance, the court must "assume the truth of the well-pled factual allegations in the complaint and must draw all reasonable interests against the defendant." *Penn Grp., LLC v. Slater, 2007 U.S. Dist. LEXIS 50651, at *11 (S.D.N.Y. 2007)*. Under *Rule 12(b)(6)*, a court must determine whether the well-pleaded factual allegations, assumed to be true, "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*; *see also Hayden v. Paterson, 594 F.3d 150, 160 (2d Cir. 2010)* (citing *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009))*.

HN3[] Plausibility "is not akin to a probability requirement," but **[**10]** rather requires "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal, 556 U.S. at 678* (citation and internal quotation marks omitted). Courts do not make plausibility determinations in a vacuum; it is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id. at 679* (citation omitted). A claim is plausible when the factual allegations permit "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id. at 678* (citation omitted). A claim that pleads only facts that are "merely consistent with a defendant's liability" does not meet the plausibility requirement. *Id.* (quoting *Twombly, 550 U.S. at 557*). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly, 550 U.S. at 555*). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citation omitted). "The pleadings must create the possibility of a right to relief that is more than speculative." *Spool v. World Child Int'l Adoption Agency, 520 F.3d 178, 183 (2d Cir. 2008)* (citation omitted). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility **[**11]** and plausibility of entitlement to relief." *Iqbal, 556 U.S. at 678* (citation and internal quotation marks omitted).

II. The Motion to Amend Is Futile

HN4[] When considering whether amendment is appropriate, the Court must determine if the proposed new allegations allege a plausible claim for damages under ***antitrust law***. As explained by the Supreme Court in *Associated General Contractors*, Congress "did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters, 459 U.S. 519, 534, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* (citation omitted). "The right to pursue private actions for treble damages under *Section 4* has [] developed limiting contours in the thirty years since *Associated General Contractors* was handed down. These contours are embodied in the concept of **[*882]** 'antitrust standing.'" *Gatt Commc'n, Inc., v. PMC Assocs., L.L.C., 711 F.3d 68, 75 (2d Cir. 2013)*. "'Antitrust standing is a threshold, pleading-stage inquiry. . . .'" *Id.* (quoting *NicSand, Inc. v. 3M Co., 507 F.3d 442, 450 (6th Cir. 2007)*). When a complaint fails to establish this requirement, a court must dismiss it as a matter of law. *Gatt, 711 F.3d at 75*.

HN5[] To plead antitrust standing, a plaintiff must allege that it suffered an antitrust injury and that it is an efficient enforcer of the antitrust laws. *Id. at 76*; *see also* *DNAML Pty, Ltd. v. Apple Inc., 25 F. Supp. 3d 422, 2014 U.S. Dist. LEXIS 77422, at *9 (S.D.N.Y. June 5, 2014)*. For the first requirement of antitrust injury, a plaintiff **[**12]** must identify the anticompetitive practice complained of and the reasons why such a practice is or might be anticompetitive, and link the anticompetitive practice to the actual injury suffered. *See* *Gatt, 711 F.3d at 76*. The injury must be of the type of harm that antitrust laws were intended to prevent. *Id.* The plaintiff must allege a direct antitrust injury, something more than just an injury causally linked to an antitrust violation. *IBM v. Platform Solutions, Inc., 658 F. Supp. 2d 603, 610—11 (S.D.N.Y. 2009)* (citing *G.K.A. Beverage Corp. v. Honickman, 55 F.3d 762, 767 (2d Cir. 1995))*. In the Second Circuit, it is not sufficient to allege an injury that is indirect or derived from injury sustained by another entity with which the plaintiff has a business relationship. *IBM, 658 F. Supp. at 609*.

HN6[] While only a short plain statement of an antitrust claim is required to give notice to the opposing party, it is improper to assume that defendants "have violated the antitrust laws in ways that have not been alleged." *Intellective, Inc. v. Massachusetts Mut. Life Ins. Co., 190 F. Supp. 2d 600, 607 (S.D.N.Y. 2002)*.

The Plaintiffs' original complaint alleged that the proposed merger between American and US Airways violated *Section 7* of the Clayton Act. *Section 7* of the Clayton Act provides:

> ***HN7***[] No person engaged in commerce or in any activity affecting commerce shall acquire the whole or any part of any of the stock . . . where the effect of such acquisition may be to substantially lessen competition **[**13]** or tend to create a monopoly.

15 U.S.C. § 18. For this alleged *Section 7* violation, the Plaintiffs sought to block the merger under *Section 16* of the Clayton Act. As the merger has now been consummated, the Plaintiffs' Motion seeks to add a claim for treble damages pursuant to *Section 4* of the Clayton Act, which provides:

> ***HN8***[] [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15. The Court must determine whether the proposed supplemental pleadings—the claim for treble damages—state a claim under *Section 4* of the Clayton Act. If the Plaintiffs fail to state a claim for treble damages, then the Court should deny leave to supplement the complaint. Analysis of the *Section 4* claim for treble damages, however, requires evaluation of the related underlying alleged substantive antitrust violation originally plead by the Plaintiffs under *Section 7*. So while the Court must analyze the proposed supplemental allegations, that analysis requires a review of the sufficiency of the original allegations as well.[6]

[*883] Applying the applicable legal standards here, the Court concludes that the PSASC suffers from two defects. First, the PSASC does not plausibly define a relevant market for the alleged antitrust violation and personal harm to the majority of the Plaintiffs. Most notably, it fails to allege cross-elasticity and interchangeability as required by applicable law and its allegations of a national market are flawed. Second, the Plaintiffs lack antitrust standing to the extent they seek damages as travel agents—rather than consumers—because they are not efficient enforcers for the alleged antitrust violations.

A. Plaintiffs Fail to Allege a Relevant Market and Harm to that Market from the Merger

[6] As previously noted by **[**14]** the Court, "the Plaintiffs' jury demand rests upon their proposed new treble damages claim" and therefore is contingent on whether the PSASC asserts a sufficient basis for the treble damages allegedly suffered by the individual Plaintiffs. *Fjord, 506 B.R. at 373*.

1. Failure to Define the Relevant Market is Fatal

HN9[] The relevant market definition shapes where the Court must look to determine any actual anticompetitive effects. Without one, it is impossible to make that determination and identify any damages flowing from an antitrust **[**15]** violation. *See Re-Alco Indus., Inc. v. Nat'l Ctr. For Health Educ., Inc., 812 F. Supp. 387, 392 (S.D.N.Y. 1993)* ("Absent an adequate market definition, it is impossible for a court to assess the anticompetitive effect of challenged practices."). To state a claim under *Section 7* of the Clayton Act, a plaintiff must allege a plausible relevant market in which competition will be impaired.[7] *City of New York v. Group Health Inc., 649 F.3d 151, 155 (2d Cir. 2011)*. "The relevant market must be defined as all products reasonably interchangeable by consumers for the same purposes . . . ." *Id.* (citations omitted). The test for a relevant market considers what is reasonably interchangeable for consumers, not what a particular plaintiff considers to be interchangeable. *See Grp. Health Inc., 2010 U.S. Dist. LEXIS 60196, 2010 WL 2132246, at *3*; *see also Queen City Pizza v. Domino's Pizza, Inc., 124 F.3d 430, 438 (3d Cir. 1997)*. In that way, alleging the product market is distinct from alleging antitrust injury, which requires allegations that are specific to the plaintiff. A plaintiff must provide "at least a theoretically rational explanation" for the boundaries it chooses for the relevant market. *Gianna Enterprises v. Miss World (Jersey) Ltd., 551 F. Supp. 1348, 1354 (S.D.N.Y. 1982)*.

Although the PSASC contains over 350 paragraphs, it devotes little time to the relevant market definition.[8] The definition of the market is contained in two short **[*884]** paragraphs: "The relevant product and geographic markets for purposes of this action are the transportation of airline passengers in the United States. Within the relevant market, well-defined submarkets exist which, in themselves, constitute geographic and/or product markets for antitrust purposes and include what are known as 'city pairs.'" PSASC ¶¶ 32—33.[9]

As a threshold matter, the PSASC does not contain any allegations about interchangeability and cross-elasticity, which is fatal to any claim of any market definition. Indeed, the words "interchangeability" and "cross-elasticity" do not appear anywhere in the PSASC. **HN10**[] "'Interchangeability' looks to the use or function of the given product as compared to other products. Every product that can be substituted for the same use or purpose should be included within a single product market." *Intellective, 190 F. Supp. 2d at 610*. Related to that, "cross-elasticity" looks at the extent to which a change in price of one product might alter demand for another product. *Id.* If a change in the price of one product affects demand for the second product, they should be included in the same product market. *Id.*

HN11[] "Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, **[**18]** or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient." *Grp. Health Inc., 649 F.3d at 155*;[10] *Intellective, 190 F. Supp. 2d at*

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[7] The requirement to identify a relevant product market is the same across many antitrust statutes. *See City of New York v. Grp. Health Inc., 2010 U.S. Dist. LEXIS 60196, 2010 WL 2132246, at *2 (S.D.N.Y. May 11, 2010)*, *aff'd*, *649 F.3d 151 (2d Cir. 2011)* ("To state claims under any of the statutes identified above [the Clayton Act, the Sherman Act or the Donnelly Act], Plaintiffs must identify the product market in which competition will be impaired.") **[**16]** (collecting cases); *see also Kaplan v. Burroughs Corp., 611 F.2d 286, 292 n.2 (9th Cir. 1979)* (citing *15 U.S.C. § 18*) ("Generally, principles of market definition applicable to cases arising under Sherman Two are also applicable to Sherman One actions, and to merger cases arising under *[Section] 7* of the Clayton Act."); *Lektro-Vend Corp. v. The Vendo Corp., 500 F. Supp. 332, 349 (N.D. Ill. 1980)*. For this reason, the Court cites to cases arising under these statutes in addition to those under *Section 7* of the Clayton Act.

[8] Similarly, the Motion states merely that "Plaintiffs allege that they bought airline tickets and ancillary services from the defendants after the merger at the higher prices which were predicted to result from the lessening of competition caused by the merger." Pls.' Mem. of Law at 12 (ECF No. 106—1).

[9] By contrast, the DOJ dedicated **[**17]** almost three pages of its significantly shorter complaint to define the relevant product and geographic markets. *See* DOJ Compl. ¶¶ 24—31. The DOJ alleged that scheduled air passenger service was the relevant product market and that city-pairs were the relevant geographic market. *Id.*

610 ("'Interchangeability' and 'cross-elasticity of demand' are the critical components of a relevant product market."). Failure to define the market by reference to the rule of interchangeability is, standing alone, valid grounds for dismissal. Global Discount Travel Servs., LLC v. Trans World Airlines, Inc., 960 F. Supp. 701, 705 (S.D.N.Y. 1997) (finding that plaintiff failed to define the relevant product market where they alleged only that the market was "tickets for travel on TWA between certain city pairs ... [and that] when a 'consumer needs to fly from a TWA original city to one of TWA's destination cities, and wants a certain package (flight time and date, mileage, first class confirmed seat at full faire price, etc.), only a TWA ticket will do.'") (citing Ford Piano Supply Co. v. Steinway & Sons, 1988 U.S. Dist. LEXIS 523, **[*885]** 1988 WL 3488, at *2 (S.D.N.Y. Jan. 13, 1988) (dismissing claims relating to monopoly and exclusive dealing due to failure to define market)); *see also* Queen City Pizza, 124 F.3d at 436 (motion to dismiss may be granted for failure to define relevant market).

In their briefs and at argument, the Plaintiffs have been steadfast in insisting upon a national market for airline travel. *See, e.g.*, July 17 **[**20]** Hr'g Tr. 42:17—23; Reply ¶¶ 16, 22—23 (ECF No. 112). But the definition of a national market is problematic for airfare. An airline passenger cannot buy a ticket that acts as a pass for travel anywhere within the country. They must buy a ticket with a specific origin and destination. As the Court noted in the TRO Opinion issued well before the instant Motion was filed, "Plaintiffs' theory of a national market would require a conclusion that all flights compete with each other. For example, a flight from Los Angeles to New York would compete with a flight from Detroit to Seattle. Plaintiffs have not explained why that would be true here . . . ." Fjord, 502 B.R. at 40. Over eight months later, on Plaintiffs' second attempt to amend the complaint, the PSASC still has not alleged why that might be true. *See* Bayer Schering Pharma AG v. Sandoz, Inc., 813 F. Supp. 2d 569, 575 (S.D.N.Y. 2011) ("'The relevant market is defined as all products reasonably interchangeable by consumers for the same purposes because the ability of consumers to switch to a substitute restrains a firm's ability to raise prices above the competitive level.'") (quoting Geneva Pharms. Tech. Corp. v. Barr Labs., Inc., 386 F.3d 485, 496 (2d Cir. 2004) (additional internal quotes omitted); Intellective, 190 F. Supp. 2d at 610 ("Every product that can be substituted for the same use or purpose should be included within a single product market."); **[**21]** Pepsico, Inc. v. The Coca-Cola Co., 315 F.3d 101, 105 (2d Cir. 2002) (per curiam) ("Products will be considered to be reasonably interchangeable if consumers treat them as 'acceptable substitutes.'") (internal citations and quotations omitted); Commer. Data Servers, Inc. v. IBM Corp., 166 F. Supp. 2d 891, 896 (S.D.N.Y. 2001) (plaintiff must offer "a theoretically rational explanation" for why the market boundaries are defined as they are) (quoting Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co., 893 F. Supp. 1207, 1213 (S.D.N.Y. 1994)).[11]

Indeed, the Plaintiffs' national market theory for the airline industry has been rejected by another court for a similar failure. In Malaney v. UAL Corp., 2011 U.S. Dist. LEXIS 150386, 2011 WL 6845773 (N.D. Cal. Dec. 29, 2011), the court dismissed the complaint, noting that:

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[10] In *Group Health Inc.*, the City of New York sued several insurance providers under the Clayton Act, the Sherman Act, and the **[**19]** Donnelly Act, seeking to prevent them from merging. *See* Grp. Health, 649 F.3d at 154. The City's complaint defined the relevant market as the "low-cost municipal health benefits market" which included "only those insurance plans that are inexpensive and that the City selects for inclusion in the Health Benefits Program." *Id.* The Court of Appeals for the Second Circuit found that that the market alleged in the City's complaint was "legally insufficient because it [was] defined by the City's preferences, not according to the rule of reasonable interchangeability and cross-elasticity of demand." Id. at 156. The Court of Appeals noted that "[t]he market alleged in the City's complaint ignores the competition existing among insurance providers for the City's business, as well as the health insurance market for other large employers in the region. The City does not allege an factor that would prevent insurance companies other than those it selects for the Health Benefits Program from proposing competitive products should the merged firm raise its premiums to supracompetitive prices." *Id.*

[11] The Plaintiffs allege that both USAir and American have stated that they compete only in a national market. *See* PSASC ¶¶ 43—45. But this does not change the fact that the Plaintiffs must make appropriate allegations of a market for purposes of stating an antitrust complaint and the statements they cite are not determinative of the relevant market. *See* United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1166 (N.D. Cal. 2004) (discounting statements in company's internal documents about competition where inconsistent with evidence in the marketplace); *c.f.* A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1402 (7th Cir. 1989) (downplaying utility of statements of senior executives regarding competitive intent).

> [P]laintiffs have already enjoyed ample opportunity to develop a substantial record on this question, yet both this Court and the Ninth Circuit have held **[**22]** that their pleadings, at least in their current form, fail to state a viable market. As both courts have explained, the national market for air transportation does [not] meet *Brown Shoe*'s standard because flights between distant cities are simply not reasonably interchangeable. . . . **[*886]** Plaintiffs have expressly refused to amend their pleadings to cure this defect since denial of the preliminary injunction.

2011 U.S. Dist. LEXIS 150386, [WL] at *4; *see* 2011 U.S. Dist. LEXIS 150386, [WL] at *1 (court referring to prior denial of preliminary injunction where it found, among other things, "no evidentiary support for plaintiffs' position that a New York—Los Angeles flight is a substitute for a Miami—Seattle flight."). Plaintiffs' counsel in this case also represented the Plaintiffs in *Malaney*. Thus, these same issues regarding a national market for airline travel should come as no surprise to Plaintiffs' counsel here, particularly as this Court has previously identified this as a problem. Fjord, 502 B.R. at 40.[12]

At oral argument, Plaintiffs' counsel suggested that a national market was evidenced from the "supply side." *See* July 17 Hr'g Tr. 39:13—40:12. He posited that most airports do not use slots, and therefore have low barriers to entry. If a company owns a plane, therefore, an airline simply needs to find a profitable route, "turn [its] airplane and go there." *Id.* But this argument goes against logic. If it is truly this easy to enter the market, the logical conclusion is that there will be low barriers to entry and therefore robust competition in the market. *See* July 17 Hr'g Tr. 90:22—90:24. If city-pairs have low barriers to entry and cannot sustain lasting market power, therefore, it is hard to follow Plaintiffs' logic that aggregating the city-pairs would amount to lasting market power nationally.[13]

While alleging a national market, the PSASC does make numerous references to city-pairs. Plaintiffs explain that "the relevant product and geographic markets alleged in the complaint are the transportation of airline passengers in the United States, within which well-defined city-pair submarkets also exist."[14] Reply ¶ 9. The Plaintiffs' allegations regarding price increases use city-pairs as a reference. *See, e.g.*, PSASC ¶ 248 (Ms. Fjord booked tickets from San Francisco to St. Louis, and compared them to Sacramento-St. Louis tickets). The Plaintiffs also rely heavily on the antitrust action filed—and eventually settled—by the DOJ, which defined the market by city-pairs. The Plaintiffs even attach the DOJ's chart of relevant city-pairs to the PSASC, although not all of the city-pairs discussed in the allegations correlate to city-pairs on the chart. *See* Opp'n at 21—22 (ECF No. 108).

Unlike a national market, the case law recognizes that city pairs are an appropriate way to define the market for antitrust purposes **[**25]** in the airline industry. The court in *Global Discount Travel Services*, recognized city-pairs for all airline tickets as the relevant product market. 960 F. Supp. at 705; *see also* In re Northwest Airlines Corp., 208 F.R.D. 174, 220 (E.D. Mich. 2002) (noting that "any broader **[*887]** attack on the use of city-pairs [as the relevant market] surely cannot succeed, where the airlines themselves, as well as numerous government and academic reports, have adopted this same general approach to analyzing the air travel industry."). With city-pairs as the relevant market, "[f]light times, dates, mileage, and other factors [can be understood as] features that enhance the enjoyment of the product." Global Discount, 960 F. Supp. at 705. While a consumer might prefer a certain airline based on flight times or frequent flyer programs, those factors were not a basis to restrict the product market in the *Global Discount* case. *Id.*

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[12] Plaintiffs cite to items such as baggage fees and frequent flyer awards. *See, e.g.*, PSASC ¶¶ 220. Policies for such items may be set at a national level, *see, e.g.*, July 17 Hr'g Tr. 93:18—20, but they are not stand-alone products that are purchased without having first purchased an **[**23]** airline ticket. In fact, the Plaintiffs characterize changes in these policies, such as increased baggage fees, as "tantamount to fare increases . . . ." PSASC ¶ 221.

[13] At the time, the Court also observed that the "Defendants have raised a legitimate question regarding why, even if a national market existed, such a market would not be deemed 'highly concentrated' using the prevailing industry **[**24]** standards." Fjord, 502 B.R. at 40.

[14] As courts have noted, submarkets are essentially their own product market for antitrust purposes. *See* Oracle, 331 F. Supp. 2d at 1118-19 (discussing "the rise (and fall) of the 'submarkets' doctrine.")

Despite the recognized use of city pairs as a relevant market in the case law, the Plaintiffs do not explain how the city-pair "submarkets" are relevant to their proposed national market. Indeed, the Plaintiffs make a point of rejecting a market based on city-pairs by stating that "the effects of the merger have been direct and immediate across the entire country and have not been limited to the 'city pair' submarkets **[**26]** in which the defendants seek to cabin their latest view of the relevant market." Reply ¶ 23. Perhaps not surprisingly then, the Plaintiffs never identify what city-pairs are at issue here. While the PSASC attaches a chart from the DOJ antitrust litigation, it does not explain if the city-pairs in the chart are where the alleged antitrust injuries to the named Plaintiffs took place. The Plaintiffs make some modest allegations that suggest that certain city-pairs are relevant, but they do not define which city-pairs are at issue here, much less analyze the impact on competition in those city-pairs. *See, e.g.*, PSASC ¶¶ 259—62 (describing fare increases paid by Mr. Fry's client for tickets in the city-pairs for Philadelphia-Portland, Philadelphia-San Francisco, Philadelphia-Minneapolis, and Philadelphia-Louisville). As Defendants' counsel has articulated, the complaint lacks "that middle content about what on a market level transpired in this particular [city-pair] market." July 17 Hr'g Tr. 63:8—13. Moreover, many of the allegations relate to city-pairs that are not identified on the DOJ chart, further confusing what city-pairs might be at issue in this litigation. *Compare* PSASC ¶¶ 206—08 **[**27]** (discussing city-pair of Columbus, Ohio to St. Lucia), PSASC ¶¶ 216—18 (discussing city-pair of Dallas—Ft. Worth to Ft. Lauderdale), PSASC ¶ 226 (discussing city-pair of Burbank, California to Ft. Lauderdale, Florida), PSASC ¶ 227 (discussing city-pair of Santa Barbara, California to Ft. Lauderdale), *with* DOJ chart attached as Appendix A to PSASC (ECF No. 106—1). Thus, their allegations regarding city-pair markets are insufficient.

Even assuming a city-pair market has been identified—which it has not—such a market in the PSASC would also suffer from the flaw of not alleging cross-elasticity and interchangeability. Some allegations in the PSASC hint at cross-elasticity for city-pairs but appear inconsistent with the Plaintiffs' claims for damages. For example, Ms. Fjord, based in Winters, California, bought her family tickets to St. Louis departing from San Francisco because the airfare from Sacramento was more expensive. *See* PSASC ¶¶ 243, 248. Although the complaint alleges that this was "a great inconvenience," PSASC ¶ 248, and is grounds for damages, it suggests that Sacramento-St. Louis and San Francisco-St. Louis might be included in the same market due to cross-elasticity. But **[**28]** if the product market includes the Sacramento-St. Louis and San Francisco-St. Louis flights, then it remains unclear how Ms. Fjord suffered any injury by choosing to fly from the less expensive airport within that market. *See Hack v. President & Fellows of Yale College, 237 F.3d 81, 86 (2d Cir. 2000)*, *abrogated on other grounds by* **[*888]** *Swierkiewicz v. Sorema N.A., 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)* (allegations of interchangeability and cross-elasticity must be plausible).

In fact, much of the Plaintiffs' supplemental allegations boil down to recitations of price fluctuations for tickets on American. For example, Ms. Russell complains of price increases for tickets from Dallas-Fort Worth to Fort Lauderdale. In October 2013, Ms. Russell purchased a round-trip ticket on American for travel in March that cost $425.80. PSASC ¶ 216. In March 2014, she purchased a ticket on American for travel in June that cost $626. PSASC ¶ 217. But the Plaintiffs do not offer any explanation regarding other flight options on the same route, such as comparable flights on another airline and their cost.[15] As other antitrust decisions involving airlines make clear, such allegations do not suffice to define a relevant market. *See Global Discount, 960 F. Supp. at 705-06* ("The rule of reasonable interchangeability dictates that the relevant product market in this case be at least the market **[**29]** for all airline tickets between the relevant city pairs, not just tickets on TWA. . . . Because [Plaintiff] cannot define a relevant product market in a single brand product, it is impossible to assess the anticompetitive effects of the challenged practices . . . . Plaintiff has made no reasonable showing why TWA airline tickets for travel between certain cities should be considered a market unto itself, as distinguished from the market consisting of all airline tickets for travel between the paired cities."); *Grp. Health Inc., 649 F.3d at 156* ("A single purchaser's preferences . . . cannot define a market.")[16]

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[15] Some discrepancies in price fluctuations are alleged in a way that makes comparison problematic. The price comparison for Ms. Russell, for example, compares one ticket purchased six months in advance against another ticket purchased only three months in advance, with one ticket for spring travel and the other for summer travel. PSASC ¶¶ 216—17.

[16] Some allegations focus on specific airports within a city. *See, e.g.*, PSASC ¶ 140 (discussing airport pair routes); ¶¶ 216—18 (Ms. Russell purchased tickets from Dallas-Fort Worth to Fort Lauderdale). The Defendants argue that this is an impermissible

Finally, the Plaintiffs have at times also seemed to suggest that there is also an international market. For example, Ms. Pulfer alleges price increases on flights from Columbus, Ohio to St. Lucia, PSASC ¶¶ 205—13, and Mr. Fry complains of increases on flights from Denver to Tel Aviv and Denver to Delhi. PSASC ¶¶ 267—71. In another part of the PSASC, however, the Plaintiffs define the relevant market as "the transportation of airline passengers *in the United States*." PSASC ¶ 32 (emphasis added). Thus, the PSASC does not allege the existence of an international market, nor does it provide any facts about that potential market. There are no allegations about how the merger adversely impacted this international market, other than a complaint of higher fares, and there are no allegations regarding interchangeability or cross-elasticity.

2. Failure [**31] to Allege Causal Connection Does Not Satisfy Twombly *Pleading Standard*

Even assuming that the Plaintiffs had properly defined any market, many of their complaints fail to allege a plausible chain of causation for many of the alleged **[*889]** harms arising out of the merger. Simply put, they fail to connect the dots.

As counsel for the airlines explained at the hearing, the PSASC contains allegations regarding the merger and hundreds of allegations of harm without "any explanation for why in *Twombly* terms it is plausible to believe that that is the anticompetitive effects of this merger, as opposed to the millions of other things it might be." July 17 Hr'g Tr. 63:24—64:5. Under *Twombly*, ***HN12***[] a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *550 U.S. at 570*. In *Twombly*, the Supreme Court considered an antitrust claim for violation of the Sherman Act, and concluded that the complaint's allegations of parallel conduct and a bare assertion of conspiracy were insufficient. *Id. at 556—57*. "Factual allegations must be enough to raise a right to relief above the speculative level." *Id. at 555*. The Court dismissed the complaint in *Twombly* because the plaintiffs did not "nudge[] their claims across **[**32]** the line from conceivable to plausible." *Id. at 570*.

The PSASC suffers from the same problem in many instances, often failing to move beyond the realm of possible claims. As one example, the Court turns to the allegations regarding Mr. Fry. The PSASC details how Mr. Fry and his wife have been inconvenienced since the US Air merger with America West, which has forced them to fly out of Denver rather than Colorado Springs. *See* PSASC ¶¶ 265—70. Most of these allegations concern a flight from Denver to Tel Aviv in October 2013. *Id.* But all of these alleged harms occurred before the American merger. Despite the lengthy description of pre-merger inconveniences, Plaintiffs have failed to allege any plausible explanation as to how the American merger relates to this harm.

Additionally, there are many instances where the PSASC complains of fare increases where no one is alleged to have even purchased a ticket. *See, e.g.*, PSASC ¶¶ 246—47 (discussing increased airfare between Sacramento and Toledo, as well as Sacramento to Caracao [sic], without mention of tickets purchased). The PSASC also fails to allege higher prices for the same product. For instance, the complaint alleges that Ms. Russell "plans **[**33]** to fly on American Airlines again in the foreseeable future . . . . As of April 29, 2014, a ticket which is the same as the one she purchased in March 2014 [for travel in June] on American Airlines, sells for $951.01, and the same ticket if priced using the USAir-American Airlines code share costs $1517.00." PSASC ¶ 218. But as the two tickets were not the same number of days from the proposed travel—the more expensive ticket was closer—the two tickets are not necessarily comparable. Without a comparison of like products, an antitrust injury is not plausibly pled. *See Gatt, 711 F.3d at 77* (no *Section 4* standing where plaintiff did not allege that it paid higher, anticompetitive prices for a product).

Moreover, the Plaintiffs often allege injury to the public at large, rather than harm to any named plaintiff. For example, in the supplemental allegations, the Plaintiffs include a discussion of how flight delays and cancellations have increased as a result of decrease in competition between carriers. PSASC ¶¶ 342—46.[17] "Damages claimed

market as well, because **[**30]** it ignores alternate airports that might be interchangeable. *See* Opp'n at 20. An airport-pair market may be very difficult to define because of interchangeability, although airline tickets are booked this way as a practical matter. But the Plaintiffs do not allege an airport market, or interchangeability and cross-elasticity for such a market.

in a private antitrust **[*890]** suit must be different from those suffered by the general public—i.e. they must be special to the claimant." *Highland Supply Corp. v. Reynolds Metals Co., 327 F.2d 725, 732 (8th Cir. 1964)*; *see also* *United States v. Borden Co., 347 U.S. 514, 518, 74 S. Ct. 703, 98 L. Ed. 903 (1954)* ("The Government seeks its injunctive remedies **[**34]** on behalf of the general public; the private plaintiff . . . may be expected to exercise it only when his personal interest will be served."); *Burkhead v. Phillips Petroleum Co., 308 F. Supp. 120, 123 (N.D. Cal. 1970)* (Whether private litigant seeks relief in form of injunction or damages, "suit may not be maintained by the private litigation merely because of violations of the antitrust laws which have resulted in injury to the public.").

The Court previously highlighted this problem in ruling on Plaintiffs' first motion to amend, noting that the alleged *Section 4* injuries must be personal to the Plaintiffs and cannot simply be harm suffered by the general public. *See* *Fjord, 506 B.R. at 386* ("Plaintiffs' counsel agreed that a pleading for injury requires allegations that something happened . . . Yet the PAC is devoid of any such allegations . . . In fact, many allegations in the PAC refer to harm to the general public or to 'millions of customers,' rather than any specific harm **[**35]** to these individual plaintiffs.") (internal citations omitted); *Fjord, 502 B.R. at 33-34* ("The Court has no evidence whatsoever regarding who the Plaintiffs are, what the nature of their interest in the airline industry is, or how they will be individually harmed by the proposed merger. . . . [T]he Court need only consider those injuries plaintiffs advance that are personal to them . . . and cannot consider any injuries that plaintiffs allege would be suffered by the general air carrier flying public as a whole. . . .") (internal citations and quotations omitted). Counsel for the Plaintiffs has received the same guidance in at least one other antitrust case. *See* *Malaney v. UAL Corp., 2010 U.S. Dist. LEXIS 106049, 2010 WL 3790296, at *13 (N.D. Cal. Sept. 27, 2010)* ("In evaluating plaintiffs' purported irreparable harm as well as the balance of equities, the Court must only consider those injuries plaintiffs advance that are personal to them were defendants to merge, and cannot consider any injuries that plaintiffs allege would be suffered by the general air carrier flying public as a whole."). Despite these repeated admonitions, the Plaintiffs here again level allegations of general harm without connecting such harms to any named plaintiff.

There are numerous other allegations that similarly do not state a personal **[**36]** harm to Plaintiffs, including harm from prior mergers, *see e.g.*, PSASC ¶¶ 274, 281, 291 (discussing results of previous airline mergers); and injuries yet to occur, *see, e.g.*, PSASC ¶¶ 289—90 (discussing expectation of Plaintiffs that the USAir Vacation practice of paying travel agent commissions will be terminated and the impact this would have on Ms. Davis). It would be improper to permit amendment of the complaint to add such deficient allegations. *See* *Reading Int'l, Inc. v. Oaktree Capital Mgmt. LLC, 317 F. Supp. 2d 301, 313 (S.D.N.Y. 2003)* ("[I]t is hardly 'absurd' to require that someone in the class of persons that would have standing if injured actually *be* injured in order for a suit to proceed.").

B. Plaintiffs Are Not an Efficient Enforcer of Antitrust Laws for the Majority of Their Claims

HN13[] In addition to alleging a plausible antitrust claim and related injury, *see supra* Section A, a plaintiff must establish that it is an efficient enforcer of the antitrust **[*891]** laws. As to this second requirement of an efficient enforcer, courts typically examine the following factors:

> (1) the directness or indirectness of the asserted injury;
>
> (2) the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust **[**37]** enforcement;
>
> (3) the speculativeness of the alleged injury; and
>
> (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries.

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[17] *See also* PSASC ¶¶ 347—51 (alleging that since the merger, American and USAir have begun to sell tickets to customers on the same planes, routes and departure times at substantially different fares, depending on which carrier the flight was booked through); PSASC ¶¶ 220—21 (discussing changes to baggage programs).

Gatt, 711 F.3d at 78 (citations omitted).

The Plaintiffs here have not shown that they are efficient enforcers of the antitrust laws for many of their alleged harms. Of the forty named Plaintiffs, the PSASC only contains specific allegations as to thirteen. For these thirteen Plaintiffs, the PSASC includes three classes of allegedly injured parties who could serve as antitrust plaintiffs: travel agents, *see, e.g.*, PSASC ¶¶ 195, 198—200 (Ms. Jolly lost customers for her annual Paris group trips); clients of the travel agents, *see, e.g.*, PSASC ¶¶ 257—62 (Mr. Fry's client has paid increased airfare on routes out of Philadelphia); and personal injuries to the Plaintiffs, *see, e.g.*, PSASC ¶ 248 (Ms. Fjord purchased tickets for her family departing from San Francisco rather than Sacramento). Thus, the individuals who could serve as plaintiffs for such harms are airline passengers or the travel agents who act on their behalf. Of these, airline passengers are the more efficient enforcer of the alleged antitrust violation **[**38]** here. Examination of the four relevant factors leads the Court to this conclusion: directness of the injury; existence of an identifiable class motivated to vindicate the public interest; speculativeness of the injury; and difficulty apportioning damages to avoid duplicative recoveries.

With respect to the first factor, "[d]irectness in the antitrust context means close in the chain of causation." *Gatt, 711 F.3d at 78* (citation omitted). Here, the Plaintiffs' complaint alleges that due to higher travel costs, consumers are choosing to book directly through airlines to avoid paying a travel agent's fee. PSASC ¶¶ 237, 291. If a consumer books a ticket and absorbs the higher cost, therefore, it does not appear that the travel agent would suffer any harm. The travel agents' loss of commissions or fees paid by consumers is further down the chain than any harm suffered directly by the consumers. Thus, it is clear that the injury alleged by the passengers is more direct.

As to the second factor, Plaintiffs' counsel argued that no other party was suing, and that, therefore, these parties were the proper plaintiffs. July 17 Hr'g Tr. 14:5—8 ("[W]e are the only ones challenging this merger for damages. So there is no one else . . **[**39]** . ."). But the fact that no other party is presently bringing suit "does not support recognizing [the travel agents'] standing." *Gatt, 711 F.3d at 79* (citing *Daniel v. Am. Bd. Of Emergency Med., 428 F.3d 408, 444 (2d Cir. 2005)*); *see also* *Associated General Contractors, 459 U.S. at 542 n.47* ("[I]f there is substance to [the plaintiff's] claim, it is difficult to understand why the[] direct victims of the conspiracy have not asserted any claim in their own right."). Given that customers exist to challenge any anti-competitive conduct, this second factor weighs against the standing of Plaintiffs to sue as travel agents.

The third factor also weighs against the travel agents. Their alleged damages are highly speculative when compared to customers. *See* *Gatt, 711 F.3d at 79* (concluding **[*892]** that damages were highly speculative where the plaintiff did not plausibly allege that "in the absence of the alleged scheme, its bids—rather than some other party—would have prevailed."). Where a travel agent has lost business, it is much more difficult to trace that loss of business to the challenged merger, as compared to a more direct and definable loss suffered by a customer paying a higher fare. *See, e.g.*, PSASC ¶¶ 224—37 (alleging loss of income and business to Ms. Brown—who works as a travel agent and travel consultant—due to increased fares and fees and decreased **[**40]** service resulting from lessening competition in airline industry due to Defendants' merger). Other economic factors could greatly affect any losses suffered by travel agents, a concern reflected by allegations in the complaint itself. *Cf.* *Gatt, 711 F.3d at 79* ("[T]he profits Gatt earned under a bid-rigging scheme shed little light on how much Gatt would earn in a competitive bidding environment. Moreover, Vertex had no obligation to authorize Gatt to sell Vertex products in the first place. It is thus entirely uncertain whether, absent the scheme, Vertex would have entered into the Dealer Agreement with Gatt at all.").

Fourth and finally, the issue of apportioning damages and the risk of duplicative recoveries are problematic for any travel agent claim. It is unclear from the PSASC how payments to travel agents are apportioned. But it seems clear that if the travel agent booked and paid for a ticket, the passenger reimbursed the travel agent for the cost of the ticket and paid the agent's fee on top of that. As such, it is unclear how to determine what damages are suffered by a travel agent as distinct from the harm suffered by the passenger. Allowing travel agents to pursue claims based on customers also risks **[**41]** duplicative recovers as passengers have four years to bring such an action on their own behalf. *See* July 17 Hr'g Tr. 35:21—23 (noting that statute of limitations for passenger claims would be four years); *see also* *Gatt, 711 F.3d at 79-80* ("[T]he risk of multiple and duplicative recoveries, while perhaps not of primary concern here, provides additional support for rejecting Gatt as an efficient enforcer. As we have observed, other Vertex dealers could assert—just as plausibly as Gatt has asserted in this case—that, had the bidding been independent, they would have bid on and won the . . . contracts. We recognize that other Vertex dealers may not file suit, and that future actions may well be time barred. *See* *15 U.S.C. § 15(b)* (establishing four-year statute of limitations for private antitrust suits under *15 U.S.C. § 15*). Regardless, this factor too works against Gatt.").

None of these factors weighs in favor of the travel agent Plaintiffs. The Court finds that the travel agent Plaintiffs would not be efficient enforcers and could not sustain a private action for lack of antitrust standing. Accordingly, the request to supplement the pleadings with respect to any allegations regarding the travel agent Plaintiffs would be futile.

CONCLUSION

For the **[**42]** reasons set forth above, the Motion is denied. The Defendants are directed to settle an order on three days' notice.

Dated: New York, New York

March 31, 2015

/s/ Sean H. Lane

UNITED STATES BANKRUPTCY JUDGE

End of Document

In re Animation Workers Antitrust Litig.

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

April 3, 2015, Decided; April 3, 2015, Filed

Master Docket No.: 14-CV-04062-LHK

Reporter

87 F. Supp. 3d 1195 *; 2015 U.S. Dist. LEXIS 44922 **; 2015-1 Trade Cas. (CCH) P79,204

IN RE ANIMATION WORKERS ANTITRUST LITIGATION. THIS DOCUMENT RELATES TO: ALL ACTIONS

Subsequent History: Motion granted by *In re Animation Workers Antitrust Litig., 2015 U.S. Dist. LEXIS 44929 (N.D. Cal., Apr. 3, 2015)*

Motion granted by, in part, Motion denied by, in part, Sub nomine at *Nitsch v. DreamWorks Animation SKG, Inc., 100 F. Supp. 3d 851, 2015 U.S. Dist. LEXIS 54986 (N.D. Cal., Apr. 24, 2015)*

Motion denied by *In re Animation Workers Antitrust Litig., 123 F. Supp. 3d 1175, 2015 U.S. Dist. LEXIS 111262 (N.D. Cal., Aug. 20, 2015)*

Motion granted by *Nitsch v. Dreamworks Animation SKG Inc., 2016 U.S. Dist. LEXIS 28115 (N.D. Cal., Mar. 3, 2016)*

Motion granted by, in part *In re Animation Workers Antitrust Litig., 2016 U.S. Dist. LEXIS 38973 (N.D. Cal., Mar. 23, 2016)*

Motion granted by, in part *In re Animation Workers Antitrust Litig., 2016 U.S. Dist. LEXIS 40642 (N.D. Cal., Mar. 28, 2016)*

Motion denied by *In re Animation Workers Antitrust Litig., 2016 U.S. Dist. LEXIS 44154 (N.D. Cal., Mar. 30, 2016)*

Class certification granted by, in part, Class certification denied by, in part, Without prejudice *Nitsch v. Dreamworks Animation SKG Inc., 315 F.R.D. 270, 2016 U.S. Dist. LEXIS 69397 (N.D. Cal., May 25, 2016)*

Motion denied by *Nitsch v. Dreamworks Animation SKG Inc., 2016 U.S. Dist. LEXIS 70028 (N.D. Cal., May 27, 2016)*

Request denied by *Nitsch v. Dreamworks Animation SKG, Inc., 2016 U.S. Dist. LEXIS 142790 (N.D. Cal., Oct. 14, 2016)*

Costs and fees proceeding at *In re Animation Workers Antitrust Litig., 2016 U.S. Dist. LEXIS 156720 (N.D. Cal., Nov. 11, 2016)*

Later proceeding at *Nitsch v. DreamWorks Animation SKG Inc., 2017 U.S. Dist. LEXIS 7789 (N.D. Cal., Jan. 19, 2017)*

Motion granted by *Nitsch v. Dreamworks Animation Skg Inc., 2017 U.S. Dist. LEXIS 29920 (N.D. Cal., Mar. 2, 2017)*

Costs and fees proceeding at, Motion granted by *Nitsch v. Dreamworks Animation SKG Inc., 2017 U.S. Dist. LEXIS 34106 (N.D. Cal., Mar. 9, 2017)*

Settled by, Judgment entered by, Dismissed by *Nitsch v. DreamWorks Animation SKG Inc., 2017 U.S. Dist. LEXIS 86113 (N.D. Cal., June 5, 2017)*

Costs and fees proceeding at, Motion granted by, in part, Motion denied by, in part *Nitsch v. DreamWorks Animation SKG Inc., 2017 U.S. Dist. LEXIS 86124 (N.D. Cal., June 5, 2017)*

Prior History: *In re High-Tech Emple. Antitrust Litig., 2015 U.S. Dist. LEXIS 26635 (N.D. Cal., Mar. 3, 2015)*

Core Terms

Plaintiffs', Defendants', High-Tech, conspiracy, allegations, studios, employees, Animation, statute of limitations, email, discovery rule, antitrust, motion to dismiss, human resources, Digital, mislead, fraudulent concealment, court concludes, anti-solicitation, continuing violation, antitrust claim, overt act, settlement, accrual, secret, cause of action, meetings, parties, senior, factual allegations

LexisNexis® Headnotes

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

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

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

Under *Fed. R. Civ. P. 12(b)(6)*, a party may move to dismiss a complaint for failure to state a claim upon which relief can be granted. Such a motion tests the legal sufficiency of a complaint. In considering whether the complaint is sufficient, the court must accept as true all of the factual allegations contained in the complaint. However, the court need not accept as true allegations that contradict matters properly subject to judicial notice or by exhibit or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. While a complaint need not allege detailed factual allegations, it must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.

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

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Mistake

HN2[] **Heightened Pleading Requirements, Fraud Claims**

Claims sounding in fraud or mistake are subject to the heightened pleading requirements of *Fed. R. Civ. P. 9(b)*, which require that a plaintiff alleging fraud must state with particularity the circumstances constituting fraud. *Fed. R. Civ. P. 9(b)*. To satisfy the heightened standard under *Rule 9(b)*, the allegations must be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong. Thus, claims sounding in fraud must allege an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations. A plaintiff must set forth what is false or misleading about a statement, and why it is false. However, intent, knowledge, and other conditions of a person's mind need not be stated with particularity, and may be alleged generally. *Fed. R. Civ. P. 9(b)*.

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

HN3[] **Amendment of Pleadings, Leave of Court**

If a court concludes that a complaint should be dismissed, it must then decide whether to grant leave to amend. Under *Fed. R. Civ. P. 15(a)*, leave to amend shall be freely given when justice so requires, bearing in mind the underlying purpose of *Rule 15* is to facilitate decision on the merits, rather than on the pleadings or technicalities. Nonetheless, a district court may deny leave to amend a complaint due to undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of amendment.

Antitrust & Trade Law > Sherman Act > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

HN4[] **Sherman Act, Defenses**

See *15 U.S.C.S. § 15b*.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Legislation > Statute of Limitations > Time Limitations

HN5[] **Private Actions, State Regulation**

See *Cal. Bus. & Prof. Code § 16750.1*.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > State Regulation

Governments > Legislation > Statute of Limitations > Time Limitations

HN6[] **Trade Practices & Unfair Competition, State Regulation**

See *Cal. Bus. & Prof. Code § 17208*.

Governments > Legislation > Statute of Limitations > Time Limitations

HN7[] **Statute of Limitations, Time Limitations**

Under California law the general accrual rule is the last element rule, where a claim accrues when it is complete with all of its elements—those elements being wrongdoing, harm, and causation. The discovery rule is an exception to the common law accrual rule.

Antitrust & Trade Law > Sherman Act > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

HN8[] **Sherman Act, Defenses**

Generally, an antitrust cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. This much is plain from the treble-damage statute itself. Each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act. In antitrust actions governed by *15 U.S.C.S. § 15b*, the plaintiff's knowledge is generally irrelevant to accrual, which is determined according to the date on which injury occurs.

Antitrust & Trade Law > Sherman Act > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

HN9[] **Sherman Act, Defenses**

The U.S. Supreme Court and the U.S. Court of Appeals for the Ninth Circuit have clearly held that claims under the Sherman Act are subject to an injury rule, rather than a discovery rule.

Antitrust & Trade Law > Clayton Act > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

HN10[] **Clayton Act, Defenses**

The ordinary Clayton Act rule, applicable in private antitrust treble damages actions, is where a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business.

Antitrust & Trade Law > Procedural Matters

Governments > Legislation > Statute of Limitations > Time Limitations

HN11[] **Antitrust & Trade Law, Procedural Matters**

The U.S. Court of Appeals for the Ninth Circuit does not require a plaintiff to actually discover its antitrust claims before the statute of limitations begins to run.

Antitrust & Trade Law > Procedural Matters

Governments > Legislation > Statute of Limitations > Time Limitations

HN12[] Antitrust & Trade Law, Procedural Matters

Both the U.S. Court of Appeals for the Ninth Circuit and the U.S. Supreme Court have long assumed as a basic principle of ***antitrust law*** that antitrust claims accrue at the time of injury.

Antitrust & Trade Law > Procedural Matters

Governments > Legislation > Statute of Limitations > Time Limitations

HN13[] Antitrust & Trade Law, Procedural Matters

Clear U.S. Supreme Court authority and the overwhelming majority of circuits have explicitly held that antitrust claims are subject to a pure injury rule, not a discovery rule.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > State Regulation

Governments > Legislation > Statute of Limitations > Time Limitations

HN14[] Trade Practices & Unfair Competition, State Regulation

California's Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200 et seq.*, does not categorically forbid the application of the discovery rule under appropriate circumstances. The UCL is a chameleon. The discovery rule might be appropriate for misrepresentation or fraud claims, but not in unfair competition claims.

Antitrust & Trade Law > Procedural Matters

Governments > Legislation > Statute of Limitations > Extensions & Revivals

HN15[] Antitrust & Trade Law, Procedural Matters

Under the continuing violation doctrine, each overt act that is part of the antitrust violation and that injures the plaintiff starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times. A continuing violation is one in which the plaintiff's interests are repeatedly invaded and a cause of action arises each time the plaintiff is injured. In the Ninth Circuit, an overt act restarts the statute of limitations if it: (1) is a new and independent act that is not merely a reaffirmation of a previous act; and (2) inflicts new and accumulating injury on the plaintiff.

Governments > Legislation > Statute of Limitations > Extensions & Revivals

HN16[] Statute of Limitations, Extensions & Revivals

A continuing violation is one in which the plaintiff's interests are repeatedly invaded and a cause of action arises each time the plaintiff is injured. However, even when a plaintiff alleges a continuing violation, an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act. Plaintiffs' bare allegation that their interests were repeatedly invaded is therefore insufficient as a matter of law. Rather, plaintiffs must plead that defendants engaged in an overt act, e.g., that defendants engaged in a new and independent act that is not merely a reaffirmation of a previous act, which inflicted new and accumulating injury on plaintiffs.

Governments > Legislation > Statute of Limitations > Extensions & Revivals

HN17[] **Statute of Limitations, Extensions & Revivals**

The continuing violations doctrine requires both continuing invasions of a plaintiff's interests and an overt act by the defendant.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > Equitable Estoppel

Evidence > Burdens of Proof > Allocation

Governments > Legislation > Statute of Limitations > Tolling

HN18[] **Tolling of Statute of Limitations, Fraudulent Concealment**

A statute of limitations may be tolled if the defendant fraudulently concealed the existence of a cause of action in such a way that the plaintiff, acting as a reasonable person, did not know of its existence. The plaintiff bears the burden of pleading and proving fraudulent concealment. To plead fraudulent concealment, the plaintiff must allege that: (1) the defendant took affirmative acts to mislead the plaintiff; (2) the plaintiff did not have actual or constructive knowledge of the facts giving rise to its claim as a result of the defendant's affirmative acts; and (3) the plaintiff acted diligently in trying to uncover the facts giving rise to its claim. Moreover, allegations of fraudulent concealment must be pled with particularity.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > Equitable Estoppel

Governments > Legislation > Statute of Limitations > Tolling

HN19[] **Tolling of Statute of Limitations, Fraudulent Concealment**

In the context of fraudulent concealment, the fact that a defendant's acts are by nature self-concealing is insufficient to show that the defendant has affirmatively misled the plaintiff as to the existence of the plaintiff's claim. Passive concealment of information is not enough to toll the statute of limitations, unless the defendant had a fiduciary duty to disclose information.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > Equitable Estoppel

Governments > Legislation > Statute of Limitations > Tolling

HN20[] **Tolling of Statute of Limitations, Fraudulent Concealment**

Fraudulent concealment requires some affirmative acts of misconduct above and beyond the conduct inherent to the underlying claims themselves. The "above and beyond" language has been cited by the U.S. Court of Appeals for the Ninth Circuit approvingly in cases as an element of fraudulent concealment claims.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > Equitable Estoppel

Governments > Legislation > Statute of Limitations > Tolling

HN21[] **Tolling of Statute of Limitations, Fraudulent Concealment**

In the context of fraudulent concealment, merely passively concealing material information is insufficient to toll the statute of limitations.

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For Blue Sky Studios, Inc., **[**3]** Defendant: Jonathan Bradley Pitt, Williams and Connolly LLP, Washington, DC; William Faulkner, McManis Faulkner, San Jose, CA.

Judges: LUCY H. KOH, United States District Judge.

Opinion by: LUCY H. KOH

Opinion

[*1198] ORDER GRANTING DEFENDANTS' JOINT MOTION TO DISMISS

Re: Dkt. No. 75

Defendants DreamWorks Animation SKG, Inc.; The Walt Disney Company; Lucasfilm Ltd., LLC; Pixar; ImageMovers, LLC.; Two Pic MC LLC (f/k/a ImageMovers Digital); Sony Pictures Animation Inc.; Sony Pictures Imageworks Inc.; and Blue Sky Studios have filed a joint motion to dismiss the consolidated amended complaint. ("MTD"), ECF No. 75. Having considered the parties' submissions, the relevant law, and the record in this case, the Court GRANTS Defendants' motion.

I. BACKGROUND

This is a consolidated class action brought by former employees alleging antitrust claims against their former employers, various animation studios with principal places of business in California.[1] Plaintiffs contend that Defendants engaged in a conspiracy to fix and suppress employee compensation and to restrict employee mobility.

A. Factual Background

The Court draws the following factual background from the uncontroverted allegations in the Consolidated Amended Complaint ("CAC"), and from judicially noticed documents.[2] Unless otherwise **[*1199]** noted, Plaintiffs' allegations are presumed to be true for purposes of ruling on Defendants' motion to dismiss. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

1. The Parties

Defendants include the following animation and visual effects studios: Blue Sky Studios, Inc. ("Blue Sky"), a Delaware corporation with its principal place of business in Greenwich, CT; DreamWorks Animation SKG, Inc. ("DreamWorks"), a Delaware corporation with its principal place of business in Glendale, CA; ImageMovers LLC, a

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[1] Defendant Blue Sky Studios, Inc. has its principal place of business in Greenwich, CT, but Plaintiffs allege that it is owned by Twentieth Century Fox **[**4]** Film Corporation, which has its principal place of business in Los Angeles, California. Consol. Am. Compl. ("CAC"), ¶ 21.

[2] The Court grants Defendants' unopposed request for judicial notice, ECF No. 76, and has taken notice of the adjudicative facts contained therein. Defendants request that the Court take judicial notice of the Civil Investigative Demands issued by the Department of Justice; public records from the State of Delaware; the expert report of Edward E. Leamer, as filed in *In re High-Tech Antitrust Litig.*, Case No. 11-CV-2509-LHK, ECF No. 856-8; media articles regarding the DOJ investigation; and an advertisement published by Plaintiffs' counsel. *See United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992)* (holding a court may take notice of proceedings in other courts); *Lee v. City of Los Angeles, 250 F.3d 668, 689—90 (9th Cir. 2001)* (matters of public record); *MGIC Indem. Co. v. Weisman, 803 F.2d 500, 505 (9th Cir. 1986)* (court records); ***Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 960 (9th Cir. 2010)***, *overruled on other grounds by Galbraith v. Cnty. of Santa Clara, 307 F.3d 1119, 1125—26 (9th Cir. 2002)* (media publications); *see also Fed. R. Evid. 201(d)*.

The Court grants Plaintiffs' unopposed **[**5]** request for judicial notice, ECF No. 97 at 37, and has taken notice of the adjudicative facts contained therein. Plaintiffs request that the Court take judicial notice of two sealing orders from the *High-Tech* litigation and a media report. *See Lee, 250 F.3d at 689—90*; ***Von Saher, 592 F.3d at 960***.

California corporation with its principal place of business in Los Angeles, CA; ImageMovers Digital LLC, a Delaware corporation with its principal place of business in Burbank, CA; Lucasfilm Ltd., LLC ("Lucasfilm"), a California corporation with its principal place of business in San Francisco, CA;[3] Pixar, a California corporation with its principal place of business in Emeryville, CA;[4] Sony Pictures Animation, Inc. and Sony Pictures Imageworks, Inc. (collectively, "the Sony Defendants"), California corporations with their principal places of business in Culver City, CA; and The Walt Disney Company ("Disney") **[**6]** is a Delaware corporation with its principal place of business in Burbank, CA.[5] CAC ¶¶ 21—29.

Plaintiffs Robert A. Nitsch, Jr., Georgia Cano, and David Wentworth (collectively, "Plaintiffs"), are artists and engineers that were previously employed by four of the named Defendants. *Id.* ¶¶ 18—20. Nitsch worked for Sony Picture Imageworks in 2004 and DreamWorks from 2007 to 2011. *Id.* ¶ 18. Cano worked for Walt Disney Feature Animation from 2004 to 2005, ImageMovers Digital in 2010, and at various other visual effects and animation studios. *Id.* ¶ 19. Wentworth worked at ImageMovers Digital from 2007 to 2010. *Id.* ¶ 20. Nitsch is a resident of Massachusetts, and Cano and Wentworth are residents of California. *Id.* ¶¶ 18—20.

Plaintiffs seek to represent the following class:

> All persons who worked at any time from 2004 to the present for Pixar, Lucasfilm, DreamWorks **[**7]** Animation, Walt Disney Animation Studios, Walt Disney Feature Animation, Blue Sky Studios, Digital Domain, ImageMovers Digital, Sony Pictures Animation or Sony Pictures Imageworks in the United States. Excluded from the Class are officers, directors, senior executives and personnel in the human resources and recruiting departments of the Defendants.

Id. ¶ 113.[6]

2. *In re High-Tech Employees Litigation* and the Department of Justice Investigation

There is significant factual overlap between Plaintiffs' allegations and the related action *In re High-Tech Employees Litigation*, No. 11-CV-02509-LHK, as well as the civil complaints filed by the Department of Justice ("DOJ") against several **[*1200]** Silicon Valley technology companies, Pixar, and Lucasfilm. As both the factual and procedural history of the related action, *In re High-Tech*, and the DOJ investigations and complaints are relevant to the substance **[**8]** of Defendants' motion to dismiss, the Court briefly summarizes the background of that litigation below.

From 2009 to 2010, the Antitrust Division of the DOJ investigated the employment and recruitment practices of various Silicon Valley technology companies, including Adobe Systems, Inc., Apple, Inc., Google, Inc., Intel Corp., and Intuit, Inc. *See* *In re High-Tech Employee Antitrust Litig., 856 F. Supp. 2d 1103, 1109 (N.D. Cal. 2012)*. In September of 2010, the DOJ then filed civil complaints against the above-mentioned technology companies, in addition to Pixar and Lucasfilm. *Id.* The DOJ filed its complaint against Adobe, Apple, Google, Intel, Intuit, and Pixar on September 24, 2010. *Id.* On December 21, 2010, the DOJ filed another complaint against Lucasfilm and Pixar. CAC ¶ 94. The defendants, including Pixar and Lucasfilm, stipulated to proposed final judgments in which they agreed that the DOJ's complaints had stated claims under federal ***antitrust law*** and agreed to be "enjoined from

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[3] Plaintiffs aver that Industrial Light & Magic ("ILM") is a division of Lucasfilm.

[4] According to Plaintiffs, ILM, Lucasfilm, and Pixar have been owned by Defendant The Walt Disney Company since 2012. CAC ¶¶ 25—26.

[5] Disney also "oversees the operations of" Walt Disney Animation Studios, formerly known as Walt Disney Feature Animation. CAC ¶ 29.

[6] Plaintiffs also allege that "[t]he members of the Settlement Class under the September 20, 2013 Settlement Agreement with Pixar and Lucasfilm [in *High-Tech]* . . . do not bring in this complaint any claims against Pixar, Lucasfilm, and Disney that were released pursuant to the Settlement Agreement." *Id.* ¶ 114.

attempting to enter into, maintaining or enforcing any agreement with any other person or in any way refrain from . . . soliciting, cold calling, recruiting, or otherwise competing for employees of the other person. 856 F. Supp. 2d at 1109—10. (quoting Adobe Proposed Final Judgment at 5). The D.C. District Court entered the stipulated proposed **[**9]** final judgments in March and June of 2011. *Id.*

The *High-Tech* plaintiffs filed five separate state court actions between May and July of 2011. Following removal, transfer to San Jose to the undersigned judge, and consolidation, the *High-Tech* plaintiffs filed a consolidated amended complaint on September 13, 2011. *Id. at 1113*. In their complaint, the *High-Tech* plaintiffs alleged antitrust claims against their employers, claiming that the defendants had conspired "to fix and suppress employee compensation and to restrict employee mobility." *Id. at 1108*. More specifically, the *High-Tech* plaintiffs alleged a conspiracy comprised of "an interconnected web of express bilateral agreements." *Id. at 1110*. One agreement, the "Do Not Cold Call" agreement involved one company placing the names of the other company's employees on a "Do Not Cold Call" list and instructing its recruiters not to cold call the employees of the other company. *Id.* In addition to the "Do Not Cold Call" agreements, the *High-Tech* plaintiffs also alleged that Pixar and Lucasfilm, defendants in both *High-Tech* and the instant action, entered into express, written agreements to (1) not cold call each other's employees, (2) to notify the other company **[**10]** whenever making an offer to an employee of the other company, and (3) not to engage in "bidding wars." *Id. at 1111*.

3. Alleged Conspiracy in the Instant Action

Here, Plaintiffs allege that Defendants conspired to suppress compensation in two ways. First, Defendants allegedly entered into a scheme not to actively solicit each other's employees. CAC ¶ 41. Second, Defendants allegedly engaged in "collusive discussions concerning competitively sensitive compensation information and agreed upon compensation ranges," which would artificially limit compensation offered to Defendants' current and prospective employees. *Id.*

a. Anti-Solicitation Scheme

According to Plaintiffs, "Defendants agreed not to contact their coconspirators' employees to inform them of available positions unless that individual employee had applied for a job opening on his or her own **[*1201]** initiative." *Id.* ¶ 42. This solicitation, also known as "cold calling," is "a key competitive tool in a properly functioning labor market, especially for skilled labor." *Id.* ¶ 42. Plaintiffs aver that employees of competitor studios represent "one of the main pools of potential hires," and that employees of competitor studios that are not actively searching **[**11]** for new employment are "more likely to be among the most sought after employees." *Id.* ¶ 43. Hiring an employee from a competitor studio "can save costs and avoid risks." *Id.* Absent active solicitation, these employees are also difficult to reach. *Id.* Defendants' anti-solicitation scheme also allegedly included "notifying each other when an employee of one Defendant applied for a position with another Defendant, and agreeing to limit counteroffers in such situations." *Id.* ¶ 44. Moreover, Defendants allegedly "often refrained from hiring other Defendants' employees at all without the permission of the current employer," and would sometimes decline to make offers of employment to an unemployed prospective hire if that individual had an outstanding offer from another Defendant. *Id.* ¶ 45.

Pixar and Lucasfilm: According to Plaintiffs, "the roots of the conspiracy reach back to the mid-1980s," when George Lucas, the former Lucasfilm Chairman of the Board and CEO, sold Lucasfilm's "computer division" to Steve Jobs, who had recently left Apple. *Id.* ¶ 46. Jobs named his new company Pixar. *Id.* Pixar's President, Ed Catmull, Lucas, and "other senior executives, subsequently reached an agreement **[**12]** to restrain their competition for the skilled labor that worked for the two companies." *Id.* Pixar drafted the terms of the agreement, which both Defendants communicated to their senior executives and "select human resources and recruiting employees." *Id.* Lucas stated in an email that Pixar and Lucasfilm "have agreed that we want to avoid bidding wars," and that the agreement prevented the two companies from "raid[ing] each other's companies." *Id.* Pixar and Lucasfilm allegedly agreed to the following terms: (1) not to cold call each other's employees; (2) to notify each other when making an offer to the other company's employee; and (3) that any offer by the other company would be "final," i.e., neither Pixar nor Lucasfilm would engage in counteroffers. *Id.* ¶¶ 46—48 (citing internal Pixar email sent on January 16, 2006).

Plaintiffs further allege that while the conspiracy originated with Pixar and Lucasfilm, Catmull brought additional studios into the fold. *Id.* ¶ 49. In a 2005 email, then Vice President of Human Resources at Pixar, Lori McAdams, wrote "With regard to ILM, Sony, Blue Sky, etc., we have no contractual obligations, but we have a gentleman's agreement not to directly solicit/poach **[**13]** from their employee pool." *Id.* ¶ 50. Pixar also drafted an internal "competitors list" that "listed anti-solicitation rules for each of the Defendants . . . ." *Id.* According to Plaintiffs, Blue Sky, DreamWorks, ImageMovers Digital, Sony Pictures Imageworks, and Walt Disney Animation Studios were "all listed with directions not to 'recruit directly' or 'solicit or poach employees.'" *Id.* Plaintiffs' allegations as to each Defendants' alleged role and participation in the anti-solicitation scheme is detailed below.

DreamWorks: Jobs and DreamWorks CEO, Jeffrey Katzenberg, "personally discussed DreamWorks joining into the conspiracy." *Id.* ¶ 52. In a February 18, 2004 email from Catmull to Jobs, Catmull stated that the mutual agreement "worked quite well." *Id.* A January 14, 2007 email from Catmull to Disney's Chairman Dick Cook, also provided that "we have an agreement with Dreamworks not to actively pursue each other's employees." *Id.* In **[*1202]** further emails between Catmull, McAdams, and DreamWorks' head of human resources, Kathy Mandato, Pixar and DreamWorks reiterated their "non-poaching practices." *Id.* ¶ 53. When a Pixar recruiting email was sent to a DreamWorks employee, Mandato reached out **[**14]** to McAdams, and McAdams responded that she'd "put a stop to it!" *Id.* ¶ 54.

Disney: A 2005 Pixar email "confirmed that Pixar would not recruit workers out of Disney or other studios." *Id.* ¶ 56. In 2006, Disney purchased Pixar, and Catmull assumed responsibility for Walt Disney Animation Studios. *Id.* In communications between Disney Chairman Cook and Catmull, Cook agreed that "avoid[ing] raiding each other" was necessary to avoid "seriously mess[ing] up the pay structure." *Id.* Cook allegedly promised to "reaffirm our position again" with ImageMovers Digital, which Plaintiffs contend is a joint venture Disney launched with ImageMovers.[7] *Id.* In 2006, Disney's Director of Animation Resources apparently asked ILM, a division of Lucasfilm, to "observe 'the Gentlewomen's agreement'" that ILM not recruit Disney digital artists. *Id.* ¶ 57.

Sony Defendants: Beginning in 2002, Sony Pictures Imageworks expanded significantly by offering higher salaries to lure workers away from other studios. *Id.* ¶ 58. In response, Catmull allegedly met with Sony executives in person in 2004 or 2005 to "ask[] them to quit calling our employees." *Id.* ¶ 59. Plaintiffs allege that Catmull reached an agreement with Sony at that time that the companies would not directly solicit or poach from each other. *Id.* Moreover, Sony allegedly then began to "restrain its relatively higher-wage practices to levels below what would otherwise have existed in a competitive market." *Id.* ¶ 62.

Blue Sky Studios: Plaintiffs aver that Blue Sky "similarly entered the conspiracy," did not recruit from other studios, and requested that other studios not recruit from Blue Sky. *Id.* ¶ 63. In 2005, Blue Sky allegedly declined to pursue a DreamWorks employee that would have been "an amazing addition," because Blue Sky did not "want to be starting anything with [Katzenberg, the DreamWorks **[**16]** CEO] over one story guy." *Id.* Blue Sky's Director of Human Resources, Linda Zazza, also allegedly spoke with Pixar's McAdams to discuss "our sensitive issue of employee retention," and McAdams assured Blue Sky that Pixar was not attempting to poach Blue Sky employees. *Id.* ¶ 64.

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[7] Defendants submit that Exhibit F in their request for judicial notice, consisting of Certificates of Corporate Formation and Amendment filed with the Secretary of State of the State of Delaware, Division of Corporations, disproves Plaintiffs' allegation that ImageMovers LLC was a party to the joint venture that created ImageMovers Digital. *See* ECF No. 76. Plaintiffs voluntarily dismissed ImageMovers LLC from this action after **[**15]** Defendants filed their motion to dismiss and request for judicial notice. Consequently, the Court concludes that ImageMovers' involvement in the purported joint venture is not relevant.

ImageMovers Defendants:[8] The ImageMovers Defendants allegedly also joined the conspiracy. Catmull wrote in a January 2007 email to Disney Chairman Cook that Catmull knew ImageMovers would "not target Pixar." *Id.* ¶ 65. Plaintiffs allege, however, that ImageMovers continued to recruit from other conspiring studios, including DreamWorks, by "offering higher salaries." *Id.* ¶ 66. Catmull then met with one of the founders of ImageMovers, Steve Starkey. Starkey allegedly told Catmull that ImageMovers had informed **[*1203]** Lucas that ImageMovers would "not raid ILM." *Id.* ¶ 67. Catmull then contacted Disney Studio's President, Alan Bergman, and Senior Vice President of Human Resources, Marjorie Randolph, requesting that they require the ImageMovers Defendants to comply with the anti-solicitation scheme. *Id.* ¶ 68. According to Plaintiffs, Randolph "responded that Disney had in fact gotten the ImageMovers Defendants to agree to the **[**17]** 'rules' of the anti-solicitation scheme." *Id.*

Digital Domain[9]: Digital Doman allegedly joined the conspiracy and had anti-solicitation agreements with "at least" DreamWorks, Lucasfilm/ILM and the Sony Defendants. *Id.* ¶ 69. According to Plaintiffs, starting in 2007, Digital Domain's Head of Human Resources was Lala Gavgavian, who had previously worked at Lucasfilm's ILM division "in senior roles in talent acquisition . . . during which time Pixar President Jim Morris explicitly informed her that Pixar and Lucasfilm" had an anti-solicitation/no-poaching agreement. *Id.* ¶ 70. Gavgavian and other senior personnel at Digital Domain allegedly "specifically instructed employees not to cold call or otherwise solicit other Defendants' employees." *Id.* ¶ 71.

As to all Defendants, Plaintiffs contend that Defendants "repeatedly sought to recruit" new studios into the scheme, including a small studio in 2008. *Id.* ¶ 72.

b. Compensation Ranges

In addition to the anti-solicitation scheme, **[**18]** Plaintiffs further allege that Defendants "directly communicated and met regularly to discuss and agree upon compensation ranges." *Id.* ¶ 74. According to Plaintiffs, Defendants met at least once a year in California at meetings organized by the Croner Company, a third-party that apparently collects industry-specific salary information. At the official meetings, the Defendants "set the parameters of a compensation survey" that "provides wage and salary ranges for the studios' technical or artistic positions, broken down by position and experience level." *Id.* ¶ 75. Senior human resources and recruiting personnel from DreamWorks, Pixar, Lucasfilm/ILM, Disney, ImageMovers Digital, the Sony Defendants, Blue Sky, and Digital Domain attended these survey meetings, in addition to other studios. *Id.* ¶ 76. Plaintiffs aver that Defendants used the Croner meetings to "go further than their matching of job positions across companies; they discussed, agreed upon and set wage and salary ranges during meals, drinks and other social gatherings that they held outside of the official Croner meetings." *Id.* ¶ 77. Defendants' human resources and recruiting personnel also allegedly held "side" meetings at **[**19]** the Siggraph conference, a major visual effects industry conference, which senior personnel from Blue Sky, Pixar, DreamWorks, Lucasfilm, and Sony Picture ImageWorks attended. *Id.* ¶ 79.

Defendants' Directors of Human Resources also allegedly "frequently sought to create new relationships when one of their counterparts was replaced at a co-conspirator to ensure the efficacy of communications about the conspiracy," and met with each other one-on-one "on many occasions." *Id.* ¶¶ 79—80. Plaintiffs further allege that Defendants regularly emailed each other with specific salary ranges. On May 13, 2005, DreamWorks requested that Disney provide salary information on three positions, and Disney promptly responded. *Id.* ¶ 81. The following **[*1204]** spring, DreamWorks also requested similar information from Pixar and Disney, and "made clear it was surveying multiple studios." *Id.* ¶ 82. On September 2, 2009, Blue Sky's Director of Human Resources requested salary range information from Pixar. *Id.* ¶ 83. In a 2007 email, DreamWorks' Head of Compensation explained that "we do sometimes share general comp information (ranges, practices) in order to maintain the relationships with other studios and to be able **[**20]** to ask for that kind of information ourselves when we need it." *Id.* ¶ 84.

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[8] Plaintiffs dismissed ImageMovers LLC without prejudice pursuant to a tolling agreement on January 14, 2015. ECF No. 83.

[9] Plaintiffs also dismissed Digital Domain 3.0 without prejudice pursuant to a tolling agreement. *See* CAC at 16 n.3.

According to Plaintiffs, Defendants' communications regarding salary ranges were not limited to bilateral "one off" exchanges, but rather Defendants would "openly email[] each other in large groups with competitively sensitive confidential current and future compensation information." *Id.* ¶ 85. On November 17, 2006, Pixar's McAdams emailed senior human resources personnel at DreamWorks, Sony Pictures Imageworks, Lucas Film, Walt Disney Animation Studios, and others:

> Quick question from me, for those of you who can share the info.
> What is your salary increase budget for FY '07? Ours is [REDACTED] but we may manage it to closer to [REDACTED] on average. Are you doing anything close, more, or less?

Id. ¶ 86. In January 2009, DreamWorks' Head of Production Technology emailed the heads of human resources at Pixar, ILM, Sony Pictures Animation, and Disney to "learn how they handled overtime." More specifically, DreamWorks wanted to "see if the other companies were 'as generous.'" *Id.* ¶ 88.

Defendants' human resources and recruiting personnel also allegedly regularly communicated via telephone. *Id.* ¶ 89. Plaintiffs quote **[**21]** emails from Pixar's McAdams to Sony Pictures Imageworks, ILM, DreamWorks, Disney, and Blue Sky "in early 2007" stating "[c]hatting with all of you each day is really becoming a fun habit," and an email response from Walt Disney Animation Studios Vice President of Human Resources also commenting that "[i]t is fun to hear from you all on a daily basis." *Id.* ¶ 90.

As Plaintiffs describe it, the Croner survey meetings, side meetings, emails, and telephone calls "provided the means and opportunities for Defendants to collude and to implement and enforce the conspiracy to suppress workers' compensation." *Id.* ¶ 91. Plaintiffs further allege that while press reports in 2009 noted that the DOJ was investigating anti-solicitation agreements among high-tech companies, including Google and Apple, there was no indication that the DOJ was also investigating Pixar, Lucasfilm, or any other animation company. *Id.* ¶ 95. Plaintiffs aver that September 17, 2010 marked the first news story naming Pixar as a company under investigation, but that there was no public disclosure that any other Defendant in the instant action was part of the conspiracy. *Id.* According to Plaintiffs, Lucasfilm was implicated in the Pixar investigation **[**22]** in December 2010, but until the Court unsealed certain filings in the *High-Tech* case, there was no public information that the other Defendants in this action had engaged in similar conduct. *Id.*

4. Claims

Plaintiffs' CAC contains three claims for relief under the following statutes: (1) *Section 1* of the Sherman Act, *15 U.S.C. § 1*; (2) California's Cartwright Act, *Cal. Bus. & Prof. Code § 16720*; and (3) California's Unfair Competition Law ("UCL"), *Cal. Bus. & Prof. Code §§ 17200 et seq.* Plaintiffs seek damages, pre- and post-judgment interest, attorney's fees and expenses, and a permanent injunction. *Id.* ¶ 147.

[*1205] B. Procedural Background

In light of the relationship between the instant case and the *High-Tech* case, the Court briefly summarizes the relevant procedural history in *High-Tech* in addition to the instant case.

1. *High-Tech* Procedural Background

The *High-Tech* defendants removed the first state-court action on May 23, 2011. No. 11-2509, ECF No. 1. On April 18, 2012, the Court granted in part and denied in part the *High-Tech* defendants' joint motion to dismiss and denied Lucasfilm's motion to dismiss. No. 11-2509, ECF No. 119. On April 5, 2013, the Court granted in part and denied in part the *High-Tech* plaintiffs' motion for class certification with leave to amend. No. **[**23]** 11-2509, ECF No. 382. The Court granted the *High-Tech* plaintiffs' supplemental motion for class certification on October 24, 2013. No. 11-2509, ECF No. 531. On November 13, 2013, the *High-Tech* defendants filed a Rule 23(f) petition before the Ninth

Circuit, requesting permission to appeal this Court's October 24, 2013 class certification order. No. 13-80223, ECF No. 1. The Ninth Circuit denied the defendants' petition on January 14, 2014. No. 13-80223, ECF No. 18.

In the interim, three of the *High-Tech* defendants, Intuit, Lucasfilm, and Pixar, reached an early settlement with the plaintiffs. On September 21, 2013, the *High-Tech* plaintiffs filed a motion for preliminary approval of a proposed class action settlement as to defendants Intuit, Lucasfilm, and Pixar. No. 11-2509, ECF No. 501. On October 30, 2013, the Court preliminarily approved the proposed settlement with Intuit, Lucasfilm, and Pixar. No. 11-2509, ECF No. 540. The Court granted final approval as to that settlement on May 16, 2014. No. 11-2509, ECF No. 915. The Court entered a final judgment with regards to Lucasfilm, Pixar, and Intuit on June 9, 2014. No. 11-2509, ECF No. 936. At the request of Intuit, the Court entered an amended **[**24]** final judgment on June 20, 2014. No. 11-2509, ECF No. 947.

The remaining *High-Tech* defendants, Adobe, Apple, Google, and Intel, filed individual motions for summary judgment, and joint motions for summary judgment and to strike certain expert testimony on January 9, 2014. No. 11-2509, ECF Nos. 554 (Intel), 556—57 (joint motions), 560 (Adobe), 561 (Apple), 564 (Google). The Court denied the *High-Tech* defendants' individual motions for summary judgment on March 28, 2014. No. 11-2509, ECF No. 771. On April 4, 2014, the Court granted in part and denied in part the *High-Tech* defendants' motion to strike, and denied the defendants' joint motion for summary judgment. No. 11-2509, ECF No. 778.

On May 22, 2014, the *High-Tech* plaintiffs filed a motion for preliminary approval of class action settlement as to the remaining defendants. No. 11-2509, ECF No. 920. On August 8, 2014, the Court denied the *High-Tech* plaintiffs' motion for preliminary approval, concluding that the proposed settlement did not fall "within the range of reasonableness." No. 11-2509, ECF No. 974, at 30. On September 4, 2014, the *High-Tech* defendants filed a petition for a writ of mandamus with the Ninth Circuit. No. 14-72745, **[**25]** ECF No. 1. On January 13, 2015, the *High-Tech* defendants filed correspondence with the Ninth Circuit referring to a new proposed settlement agreement. No. 14-72745, ECF No. 21. On January 30, 2015, the defendants filed an unopposed motion to dismiss the petition, which the Ninth Circuit granted on February 2, 2015. No. 14-72745, ECF Nos. 23, 24.

On January 15, 2015, the *High-Tech* plaintiffs filed a motion for preliminary **[*1206]** approval of class action settlement as to the remaining defendants. No. 11-2509, ECF No. 1032. In this second proposed class action settlement, the parties had reached a settlement amount exceeding the previously rejected settlement by approximately $90.5 million dollars. *Id.* at 1. Following a fairness hearing on March 2, 2015, the Court granted preliminary approval to the January 2015 settlement agreement on March 3, 2015. No. 11-1509, ECF Nos. 1051, 1054. A final approval hearing is scheduled for July 9, 2015.

2. Procedural Background in the Instant Action

Plaintiff Nitsch filed the first complaint against all Defendants but Blue Sky on September 8, 2014. ECF No. 1. The Court related Nitsch's action to *In re High-Tech Employee Antitrust Litigation*, No. 11-2509, on September **[**26]** 23, 2014. Plaintiff Cano filed the second complaint against all Defendants on September 17, 2014, which the Court related to *High-Tech* on October 7, 2014. *See* Case No. 14- 4203, ECF Nos. 1, 9. Plaintiff Wentworth filed the third complaint against all Defendants but Blue Sky on October 2, 2014, which the Court related to *High-Tech* on October 28, 2014. *See* Case No. 14-4422, ECF Nos. 1, 26. On November 5, 2014, the Court granted Plaintiffs' motion to consolidate the above-mentioned three cases into a single action, *In re Animation Workers Antitrust Litigation. See* Case No. 14-4062, ECF No. 38.

Pursuant to the Court's case management order, Plaintiffs filed their CAC on December 2, 2014. ECF No. 63. On January 9, 2015, Defendants filed the instant joint motion to dismiss, and a request for judicial notice. ECF Nos. 75, 76. Defendants also filed an administrative motion to seal exhibits in support of their motion to dismiss. ECF No. 79. Plaintiffs filed a timely opposition, ECF No. 97, and Defendants replied, ECF No. 100.

Also pending before the Court is Defendants' January 9, 2015, motion to compel arbitration. ECF No. 71. As that motion is set for hearing on April 23, 2015, the Court does **[**27]** not address that motion in the instant order.

II. LEGAL STANDARD

A. *Rule 12(b)(6)*

HN1[] Under *Federal Rule of Civil Procedure 12(b)(6)*, a party may move to dismiss a complaint for failure to state a claim upon which relief can be granted. Such a motion tests the legal sufficiency of a complaint. *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)*. In considering whether the complaint is sufficient, the Court must accept as true all of the factual allegations contained in the complaint. *Iqbal, 556 U.S. at 678*. However, the Court need not accept as true "allegations that contradict matters properly subject to judicial notice or by exhibit" or "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)* (citation omitted). While a complaint need not allege detailed factual allegations, it "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal, 556 U.S. at 678* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted **[*1207]** unlawfully." *Iqbal, 556 U.S. at 678* (internal citation omitted). **[**28]**

B. *Rule 9(b)*

HN2[] Claims sounding in fraud or mistake are subject to the heightened pleading requirements of *Federal Rule of Civil Procedure 9(b)*, which require that a plaintiff alleging fraud "must state with particularity the circumstances constituting fraud." *Fed. R. Civ. P. 9(b)*; *see* *Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009)*. To satisfy the heightened standard under *Rule 9(b)*, the allegations must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985)*. Thus, claims sounding in fraud must allege "an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." *Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007)* (per curiam) (internal quotation marks and citation omitted). A plaintiff must set forth what is false or misleading about a statement, and why it is false." *In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994)* (en banc), *superseded by statute on other grounds as stated in* *Marksman Partners, L.P. v. Chantal Pharm. Corp., 927 F. Supp. 1297, 1309 (C.D. Cal. 1996)*. However, "intent, knowledge, and other conditions of a person's mind" need not be stated with particularity, and "may be alleged generally." *Fed. R. Civ. P. 9(b)*.

C. Leave to Amend

HN3[] If the court concludes that the complaint should be dismissed, it must then decide whether to grant leave to amend. **[**29]** Under *Rule 15(a) of the Federal Rules of Civil Procedure*, leave to amend "shall be freely given when justice so requires," bearing in mind "the underlying purpose of *Rule 15* . . . [is] to facilitate decision on the merits, rather than on the pleadings or technicalities." *Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000)* (en banc) (internal quotation marks and citation omitted). Nonetheless, a district court may deny leave to amend a complaint due to "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *See* *Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 532 (9th Cir. 2008)*.

III. DISCUSSION

Defendants move to dismiss on the following grounds: that (1) Plaintiffs' claims are barred under the relevant statutes of limitations; (2) Plaintiffs fail to sufficiently allege a *per se* antitrust claim based on wage-fixing agreements; (3) Plaintiffs fail to state plausible claims against Blue Sky, the Sony Defendants, and the ImageMovers Defendants; (4) Plaintiffs' requested remedies are not unavailable under the UCL; and (5) Plaintiffs lack standing to seek injunctive relief. The Court begins by addressing whether Plaintiffs' claims are time barred.

A. Statute of Limitations [30]**

In the instant case, Defendants contend that Plaintiffs' claims are time barred. The parties agree that Plaintiffs' claims are subject to a four year statute of limitations. The parties dispute when Plaintiffs' claims accrued, whether Plaintiffs have adequately alleged a continuing violation, and whether Plaintiffs have sufficiently alleged fraudulent concealment so as to toll the statute of limitations.

[*1208] As a threshold matter, the Court agrees that Plaintiffs' claims under the Sherman Act, Cartwright Act, and UCL are all subject to a four year statute of limitations. *See* *15 U.S.C. § 15b* (Sherman Act); *Cal. Bus. & Prof. Code § 16750.1* (Cartwright Act); *Cal. Bus. & Prof. Code § 17208* (UCL). The statute of limitations provision in the Sherman Act provides:

> ***HN4***[] Any action to enforce any cause of action under section 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

15 U.S.C. § 15b. The statute of limitations provision under California's Cartwright Act is functionally identical:

> ***HN5***[] Any civil action to enforce any cause of action for a violation of this chapter shall be commenced within four years after the cause of action accrued. **[**31]** No cause of action barred under existing law on the effective date of the amendment of this section at the 1977-78 Regular Session of the Legislature shall be revived by such amendment.

Cal. Bus. & Prof. Code § 16750.1. California's UCL similarly provides for a four-year statute of limitations:

> ***HN6***[] Any action to enforce any cause of action pursuant to this chapter shall be commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section shall be revived by its enactment.

Cal. Bus. & Prof. Code § 17208 (UCL). The Court begins by addressing the accrual rule applicable to Plaintiffs' Sherman Act claim, which the parties do not dispute would also apply to Plaintiffs' Cartwright Act claim.[10] *See* MTD at 4; Opp. at 10 n.36. The Court then addresses Plaintiffs' UCL claim.

1. Accrual Rule

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[10] As Defendants note, ***HN7***[] under California law the general accrual rule is the "last element rule," where a claim accrues "'when [it] is complete with all of its elements'—those elements being wrongdoing, harm, and causation." *Pooshs v. Philip Morris USA, Inc., 51 Cal. 4th 788, 797, 123 Cal. Rptr. 3d 578, 250 P.3d 181 (2011)* (quoting *Norgart v. Upjohn Co., 21 Cal. 4th 383, 397, 87 Cal. Rptr. 2d 453, 981 P.2d 79 (1999))*. The "discovery rule" is an exception to the common law accrual rule. *Id.* In light of the fact that the discovery rule is an exception and not the default rule, the *Aryeh* court's holding that federal interpretation **[**32]** of the Sherman Act is instructive in interpreting the Cartwright Act, and the absence of any contrary argument from Plaintiffs, the Court focuses on the Sherman Act to resolve whether both Plaintiffs' Sherman and Cartwright Act claims are time barred. *See* *Aryeh v. Canon Bus. Solutions, Inc., 55 Cal. 4th 1185, 1196, 151 Cal. Rptr. 3d 827, 292 P.3d 871 (2013)*. Moreover, as stated above, the parties do not dispute that resolution of Plaintiffs' Sherman Act claim would also resolve Plaintiffs' Cartwright Act claim.

As an initial matter, the parties dispute whether Plaintiffs' claims accrued at the time of Plaintiffs' injuries (the "injury rule") or at the time that Plaintiffs discovered, or reasonably should have discovered their injuries (the "discovery rule"). Under controlling Supreme Court and Ninth Circuit authority, Plaintiffs' antitrust claims began to accrue at the time of injury.

> ***HN8***[] Generally, [an antitrust cause] of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. . . . This much is plain from the treble-damage statute itself. . . . [E]ach time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute **[**33]** of **[*1209]** limitations runs from the commission of the act.

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971); *see also* P. Areeda and H. Hovencamp, ***Antitrust Law*** ¶ 320a—b. As the Ninth Circuit explained in *Beneficial Standard Life Insurance Co. v. Madariaga, 851 F.2d 271, 274—75 (9th Cir. 1988)*, "In [antitrust] actions governed by *15 U.S.C. § 15b*, the plaintiff's knowledge is generally irrelevant to accrual, which is determined according to the date on which injury occurs."

While Plaintiffs are correct that some of the authorities Defendants cite are discussing accrual rules in the civil RICO context, the Court concludes that ***HN9***[] the U.S. Supreme Court and Ninth Circuit have clearly held that claims under the Sherman Act are subject to an injury rule, rather than a discovery rule. For example, although *Klehr v. A.O Smith Corp., 521 U.S. 179, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)*, addressed accrual rules in the civil RICO context, the *Klehr* Court explicitly noted that ***HN10***[] "the ordinary Clayton Act rule, applicable in private antitrust treble damages actions, [is where] a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Id. at 188*. The *Klehr* Court explicitly distinguished the "pure injury accrual rule . . . [as] it applies in traditional antitrust cases," from the possible discovery accrual rules in the civil RICO context. *See id.; see also id. at 191* ("The use of a **[**34]** discovery rule may reflect the fact that a high percentage of civil RICO cases, unlike typical antitrust cases, involve fraud claims."). If there were any remaining doubts, Justice Scalia's concurrence in *Klehr* explicitly listed the potential accrual rules to be applied in RICO cases: "last predicate act, injury discovery, and injury and pattern discovery . . . [and] the fourth accrual rule—the Clayton Act 'injury' rule." *Id. at 197 n.1* (Scalia, J., concurring in part and concurring in the judgment).

Plaintiffs also take issue with Defendants' reliance on *Hexcel Corp. v. Ineos Polymers, Inc., 681 F.3d 1055 (9th Cir. 2012)*. Plaintiffs contend that the Ninth Circuit did not apply an injury rule, but rather addressed whether the plaintiff had sufficient actual or constructive knowledge of its injuries so as to defeat its fraudulent concealment claim. *Id. at 1060—61*. What Plaintiffs fail to recognize, however, is that the Ninth Circuit began with the basic statement of law: ***HN11***[] "We do not require a plaintiff to actually discover its antitrust claims before the statute of limitations begins to run." *Id. at 1060* (citing *Beneficial Life Ins., 851 F.2d at 274—75*). Plaintiffs may be correct in a hypertechnical sense that Defendants cite no Ninth Circuit authority explicitly "rejecting" the discovery rule for antitrust **[**35]** claims, but that appears to be a function of the fact that the Ninth Circuit has consistently interpreted *15 U.S.C. § 15b* as requiring an injury rule since 1950. *See* *Suckow Borax Mines Consol. v. Borax Consol., 185 F.2d 196, 208 (9th Cir. 1950)* (cited approvingly in *Zenith, 401 U.S. at 338*). Simply put, ***HN12***[] both the Ninth Circuit and the U.S. Supreme Court have long assumed as a basic principle of ***antitrust law*** that antitrust claims accrue at the time of injury. In light of that established assumption, there has been no need for the Ninth Circuit to explain why a different accrual rule does not apply.

Plaintiffs' reliance on the general proposition that "in general, the discovery rule applies to statutes of limitations in federal litigation," is unavailing. *See* Opp. at 6 (quoting *Mangum v. Action Collection Serv., Inc., 575 F.3d 935, 940 (9th Cir.* ***[*1210]*** *2009))*. In light of explicit, longstanding U.S. Supreme Court and Ninth Circuit authority specifically holding that antitrust claims accrue at the time of injury, the Court declines to rely on general policy justifications for the discovery rule. Moreover, while the Seventh Circuit may have applied the discovery rule to antitrust claims in *In re Copper Antitrust Litigation, 436 F.3d 782 (7th Cir. 2006)*, this Court is bound by contrary Ninth Circuit authority. Insofar as Plaintiffs contend that the Ninth Circuit has not directly rejected the discovery rule, the Court further concludes that ***HN13***[] clear U.S. Supreme **[**36]** Court authority and the overwhelming majority of Circuits have explicitly held that antitrust claims are subject to a pure injury rule, not a discovery rule. *See* [Johnson v. Nyack Hosp., 86 F.3d 8, 11 (2d Cir. 1996)](#) ("An antitrust cause of action accrues as soon as there is injury to competition."); [Mathews v. Kidder, Peabody & Co., Inc., 260 F.3d 239, 246 n.8 (3d Cir. 2001)](#) ("[A]ntitrust claims are subject to the less plaintiff-friendly 'injury occurrence' accrual rule" as opposed to "a more lenient 'injury discovery' rule"); [Detrick v. Panalpina, Inc., 108 F.3d 529, 538 (4th Cir. 1997)](#) (agreeing that "under the antitrust accrual rule, the statute of limitations is triggered by the date of the injury alone"); [Bell v. Dow Chem. Co., 847 F.2d 1179, 1186 (5th Cir. 1988)](#) ("The general rule in our Circuit is that an antitrust cause of action accrues each time a defendant commits an act that injures plaintiff."); [DXS, Inc. v. Siemens Med. Sys., Inc., 100 F.3d 462, 467 (6th Cir. 1996)](#) (holding that "[f]or statute of limitations purposes . . . the focus is on the timing of the causes of injury . . .") (internal quotation marks omitted); [Granite Falls Bank v. Henrikson, 924 F.2d 150, 153 (8th Cir. 1991)](#) ("[A]ccrual in antitrust actions depends on the commission of the defendant's injurious act rather than on the plaintiff's knowledge of that act or the resulting injury . . . ."), *disapproved on other grounds by* [Rotella v. Wood, 528 U.S. 549, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000)](#); [Robert L. Kroenlein Trust ex rel. Alden v. Kirchhefer, 764 F.3d 1268, 1276 (10th Cir. 2014)](#) (noting that "the Clayton Act . . . employs the injury-occurrence rule" as opposed to the "the injury-discovery rule"); [Connors v. Hallmark & Son Coal Co., 935 F.2d 336, 342 n.10, 290 U.S. App. D.C. 170 (D.C. Cir. 1991)](#) ("[I]n the area of antitrust, . . . the Supreme Court has **[**37]** held, as a matter of statutory interpretation, that a cause of action accrues at the time of injury.").

Plaintiffs also rely on a recent decision from this District, [Fenerjian v. Nongshim Co., Ltd., No. 13-CV-04115-WHO, 72 F. Supp. 3d 1058, 2014 U.S. Dist. LEXIS 156229, 2014 WL 5685562 (N.D. Cal. Nov. 4, 2014)](#). While the *Fenerjian* court applied the discovery rule to Sherman Act claims, for the reasons stated above, this Court respectfully disagrees. In *Fenerjian*, the parties *did not dispute* that the discovery rule applied to Sherman Act claims, and the *Fenerjian* court therefore did not have the benefit of briefing on the question. *See* [2014 U.S. Dist. LEXIS 156229, 2015 WL 585562, at *12 n.27](#) ("Defendants do not dispute that the 'discovery rule' or fraudulent concealment are available to toll [the antitrust] statutes of limitation."). In the instant case, the Court agrees with Defendants that Plaintiffs' antitrust claims began to accrue at the time Plaintiffs suffered their injury, regardless of whether or not Plaintiffs knew of their injury at the time it occurred.

Moreover, the Court also concludes that Plaintiffs' UCL claim based on Defendants' alleged anticompetitive conduct also began to accrue at the time Plaintiffs suffered their injury. Plaintiffs assert that the discovery rule applies as a matter of law to their UCL claim under **[**38]** **[*1211]** [Aryeh v. Canon Bus. Solutions, Inc., 55 Cal. 4th 1185, 1196, 151 Cal. Rptr. 3d 827, 292 P.3d 871 (2013)](#). However, the Court agrees with Defendants that Plaintiffs mischaracterize the breadth of *Aryeh*. The *Aryeh* court held only that **HN14**[] the UCL does not categorically *forbid* the application of the discovery rule under appropriate circumstances, not that the UCL requires application of the discovery rule to every cause of action.[11] *See* [id. at 1196—97](#). More specifically, the *Aryeh* court explained that the "UCL is a chameleon," and that the discovery rule might be appropriate for misrepresentation or fraud claims, but not in unfair competition claims. *See id.* (citing approvingly [M&F Fishing, Inc. v. Sea-Pac Ins. Managers, Inc. 202 Cal. App. 4th 1509, 1531—32, 136 Cal. Rptr. 3d 788 (Ct. App. 2012)](#) (nature of UCL unfair competition claim rendered discovery rule inappropriate)). As Plaintiffs' UCL claim here is based purely on Defendants' alleged anticompetitive conduct, the Court concludes that Plaintiffs' UCL claim is also subject to the injury rule.

Here, Plaintiffs' claims began to accrue as early as 2004—05, when Plaintiff Cano worked for Defendant Disney and Plaintiff Nitsch worked for Sony. *See* CAC ¶¶ 19, 49—50, 56—57. At the latest, Plaintiffs' claims began to accrue in 2007 when Plaintiff Nitsch worked for DreamWorks and Plaintiff Wentworth worked at ImageMovers

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[11] Plaintiffs cite this Court's order in [Plumlee v. Pfizer, No. 13-CV-414-LHK, 2014 U.S. Dist. LEXIS 23172, 2014 WL 695024, at *8 (N.D. Cal. Feb. 21, 2014)](#), for the proposition that the delayed discovery rule applies to UCL claims as a matter of law. However, the UCL claims at issue in *Plumlee* were based on alleged fraudulent misrepresentations to consumers, precisely the type of UCL claim the *Aryeh* court recognized might be subject to the delayed discovery rule. **[**39]** *See* [Aryeh, 55 Cal. 4th at 1195—96](#). Thus in the fraud context, the Court observed that under *Aryeh*, the delayed discovery rule was "*available* to toll the statute of limitations" for a UCL claim. The Court did not hold that the discovery rule applied to all UCL claims. *See* [2014 U.S. Dist. LEXIS 23172, [WL] at *8 n.6](#) (emphasis added).

Digital. *Id.* ¶¶ 18, 20. As a result, the four-year statute of limitations ran on Plaintiffs' claims as early as 2008, and at best in 2011. The Court therefore concludes that Plaintiffs' claims are time barred absent sufficient allegations that Defendants engaged in "continuing violations" after September 8, 2010, i.e., four years prior to the first-filed complaint in this consolidated action, or that Defendants' fraudulent concealment should toll the statute of limitations.[12]

2. Continuing Violations

Plaintiffs contend that even if the injury rule applies to antitrust claims, Plaintiffs have alleged that Defendants engaged in "continuing violations," that would render Plaintiffs' claims timely. Defendants argue that Plaintiffs have failed to allege that Defendants took any "overt acts" that would restart the statute of limitations. According to Defendants, Plaintiffs' allegations are both insufficient under *Twombly* and also implausible in light of the 2009 DOJ investigation and 2011 stipulated final judgments.

HN15[] Under the "continuing violation" doctrine, "each overt act that is part of the [antitrust] violation and that injures the plaintiff . . . starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times." *Klehr, 521 U.S. at 189* (internal citations and quotations omitted); *Pace Indus. v. Three Phoenix **[*1212]** Co., 813 F.2d 234, 237 (9th Cir. 1987)* ("A continuing violation is one in which the plaintiff's interests are repeatedly invaded and a cause of action arises each time the plaintiff is injured."). In the Ninth Circuit, an overt act restarts the statute of limitations if it: (1) is "a new and independent act **[**41]** that is not merely a reaffirmation of a previous act"; and (2) "inflict[s] new and accumulating injury on the plaintiff." *Pace, 813 F.2d at 237*; *see also* *Samsung Elecs. Co., Ltd. v. Panasonic Corp., 747 F.3d 1199, 1202—03 (9th Cir. 2014)*.

Here, the Court concludes that the bald assertion that "Defendants repeatedly invaded Plaintiffs' . . . interests," is insufficient to show a continuing violation. *See* CAC ¶ 123. Plaintiffs allege that "Defendants' conspiracy was a continuing violation in which Defendants repeatedly invaded Plaintiffs' and class members' interest by adhering to, enforcing and reaffirming the anticompetitive agreements described herein." CAC ¶ 123. A review of the specific factual allegations in Plaintiffs' CAC, however, reveals no alleged wrongful communications or specific conduct during the limitations period. The Court observes the rather conspicuous absence of specific dates for many of Plaintiffs' factual allegations, but those allegations that do contain specific dates all pre-date 2009, with the vast majority occurring between 2004 and 2007. *See* CAC ¶¶ 4—7, 12—14, 48, 50, 52—73, 78, 82, 84—86, 90 (2004—2007 communications and conduct); *id.* ¶ 83 (September 2, 2009 email); *id.* ¶ 88 (January 2009 email). Plaintiffs do not allege that any Defendant abided by, attempted to enforce, **[**42]** or otherwise "reaffirmed" the anti-solicitation scheme or salary range setting on or after September 8, 2010, i.e., four years prior to the first-filed complaint in this consolidated action. There are no allegations of any new or independent actions taken by the Defendants after September 8, 2010 that caused Plaintiffs any new or accumulating injury. *See* *Pace, 813 F.2d at 237*. Plaintiffs fail to allege any new or accumulating injuries within the limitation period. The remainder of Plaintiffs' allegations in the "Statute of Limitations" portion of the CAC focus on Plaintiffs' fraudulent concealment claim. *See* CAC ¶¶ 124—32.

In opposition, Plaintiffs appear to concede that the CAC lacks factual allegations that Defendants engaged in any new and independent wrongful conduct after September 8, 2010, but instead rely on a price-fixing analogy. *See* Opp. at 20—21. Plaintiffs put forward the novel theory that because they entered into employment agreements with Defendants during the alleged conspiracy, and because Plaintiffs received artificially depressed compensation as a result, Plaintiffs suffered antitrust injury each time they received "price-fixed" compensation. As Plaintiff Nitsch worked for DreamWorks through 2011, **[**43]** Plaintiffs' theory is that Nitsch continued to be injured through 2011. According to Plaintiffs, their injuries are no different than consumers who suffer antitrust injury when purchasing artificially higher priced goods as a result of a price-fixing conspiracy. *Id.*

[12] The Court notes that Defendants contend that Blue Sky was not named in the first-filed complaint, the *Nitsch* complaint, but rather **[**40]** was only named on September 17, 2014 in the *Wentworth* complaint. *See* MTD at 4 n.3.

However, the Court is not persuaded that Plaintiffs' "price-fixed compensation" theory, as put forth in Plaintiffs' opposition, satisfies the "overt act" requirement. As a threshold matter, Plaintiffs need to do more than merely allege a continuing violation—they must also allege an overt act:

> ***HN16***[] A continuing violation is one in which the plaintiff's interests are repeatedly invaded and a cause of action arises each time the plaintiff is injured. *However, even when a plaintiff alleges a continuing violation, an overt act by the defendant is required* to restart the statute of **[*1213]** limitations and the statute runs from the last overt act.

Pace, 813 F.2d at 237 (emphasis added). Plaintiffs' bare allegation that their interests were "repeatedly invaded" is therefore insufficient as a matter of law. Rather, Plaintiffs must plead that Defendants engaged in an overt act, e.g., that Defendants engaged in a "new and independent act that is not merely a reaffirmation **[**44]** of a previous act," which "inflict[ed] new and accumulating injury" on Plaintiffs. *Id. at 238*.

Here, even assuming that Plaintiff's "price-fixed" compensation theory is viable, the Court concludes that Plaintiffs have failed to sufficiently allege that Defendants took any overt act that would restart the statute of limitations. Plaintiffs do not allege that their compensation was permanently depressed or otherwise continued to be affected by Defendants' wrongful conduct, which allegedly took place from 2004 to, at best, 2009. In other words, while Plaintiffs may have sufficiently pled facts showing Defendants' wrongful conduct from 2004 to 2009 prevented employees from receiving higher pay during that period of time, Plaintiffs have not pled any facts showing that Defendants continued to engage in the wrongful conduct which would have resulted in "artificially depressed compensation" on or after September 8, 2010. While Plaintiffs are correct that the Court generally takes as true factual allegations made in the complaint, *see* *Iqbal, 556 U.S. 678*, Plaintiffs have failed to allege any facts showing that their compensation was at all impacted at any point after September 8, 2010. This is unsurprising in light of Plaintiffs' **[**45]** failure to allege any wrongful conduct post-2009.

To be clear, the Court does not rely on Defendants' arguments regarding the plausibility of Plaintiffs' factual allegations. For instance, Defendants' reliance on the fact that the DOJ chose not to bring complaints against certain Defendants is irrelevant on a motion to dismiss, as that goes to the weight and veracity of Plaintiffs' factual allegations. *See* *Iqbal, 556 U.S. at 678*. Nor does the fact that an expert in *High-Tech* assumed that the anti-solicitation agreements at issue in that litigation stopped affecting wages in 2010 affect the adequacy of Plaintiffs' allegations in the instant case. *See* MTD at 8 n.6. Whether or not Defendants continued to engage in anticompetitive behavior in the four year period preceding the filing of the first complaint in this action is a factual question that the Court does not resolve on a motion to dismiss. Rather, the Court concludes that Plaintiffs have failed to state any such allegations in the first instance. In opposition, Plaintiffs rely on a single paragraph in the CAC, where Plaintiffs allege: "Nor did DreamWorks make any changes to its practices in the wake of the entrance of the Lucasfilm consent decree in 2011 that might **[**46]** have alerted its workers to the company's prior misconduct." CAC ¶ 129. Even construing this allegation broadly, the Court concludes this allegation has nothing to do with whether DreamWorks, or any other Defendant, continued to engage in anticompetitive behavior within the limitations period.

Furthermore, Plaintiffs cite *Oliver v. SD-3C LLC, 751 F.3d 1081, 1086—87 (9th Cir. 2014)*, in support of their price-fixing analogy, but that case is distinguishable. As *Oliver* relied on the factual background of the related case *Samsung Electronics Co., Ltd. v. Panasonic Corp., 747 F.3d at 1201—02*, the Court also relies on *Samsung*. In both *Oliver* and *Samsung*, the price-fixing conspiracy involved a group of defendants that had adopted two license agreements, in 2003 and 2006, which imposed **[*1214]** royalties on non-group member manufacturers of flash memory storage cards ("SD cards"). *Id.* Subsequently, in late 2006, the defendants attempted to enforce the royalty term on the plaintiff, a non-group member. *Id.* In *Samsung*, the Ninth Circuit held that the defendants' 2006 amended license agreement and the defendants' subsequent efforts to enforce the royalty agreement against the plaintiff constituted overt acts that restarted the statute of limitations, notwithstanding **[**47]** the fact that the alleged conspiracy began in 2003. *Id.* In *Oliver*, consumers of the SD cards sued the *Samsung* defendants, alleging, among other theories, a price-fixing conspiracy. *751 F.3d at 1086*. The *Oliver* plaintiffs alleged that they purchased SD cards within four years of filing their complaint and that they had been injured by the unlawfully high priced sales at the time of purchase.[13] *Id. at 1086—87*. Applying *Klehr*, the Ninth Circuit concluded that the *Oliver* plaintiffs had alleged both a continuing violation and an overt act within the limitations period. *Id. at 1086—87*.

Here, in contrast, there is no allegation that Defendants continued to compensate Plaintiffs at an artificially depressed rate. Unlike in *Samsung* and *Oliver*, where the defendants had continued to enforce the allegedly anticompetitive agreement such that prices continued to be artificially high, the CAC is bereft of any allegations that Defendants continued to abide by or enforce the anti-solicitation scheme or salary ranges such that compensation **[**48]** continued to be artificially low. ***HN17***[] The continuing violations doctrine requires *both* continuing invasions of a plaintiff's interests *and* an overt act by the defendant. "Any other holding would destroy the function of the statute, since parties may continue indefinitely to receive some benefit as a result of an illegal act performed in the distant past." *Aurora Enterprises v. National Broadcasting Co., 688 F.2d 689, 694 (9th Cir. 1982)*. Absent a showing that Defendants took some "new and independent act" that "inflict[ed] new and accumulating injury," the Court concludes that Plaintiffs have failed to adequately allege a continuing violations theory.

As a result, the Court concludes that Plaintiffs' claims, as currently alleged, are time barred.

3. Fraudulent Concealment

Plaintiffs' final argument is that the statute of limitations should be tolled under the fraudulent concealment doctrine.

HN18[] "A statute of limitations may be tolled if the defendant fraudulently concealed the existence of a cause of action in such a way that the plaintiff, acting as a reasonable person, did not know of its existence." *Hexcel, 681 F.3d at 1060*. The plaintiff bears the burden of pleading and proving fraudulent concealment. *Id.; see also Conmar, 858 F.2d at 502*. To plead fraudulent concealment, the plaintiff must allege that: (1) the defendant took **[**49]** affirmative acts to mislead the plaintiff; (2) the plaintiff did not have "actual or constructive knowledge of the facts giving rise to its claim" as a result of defendant's affirmative acts; and (3) the plaintiff acted diligently in trying to uncover the facts giving rise to its claim. *Hexcel, 681 F.3d at 1060*; *see also Conmar, 858 F.2d at 502*; *Beneficial Life Ins., 851 F.2d at 276*. Moreover, allegations of fraudulent concealment must be pled with particularity. *Conmar, 858 F.2d at 502*.

[*1215] Here, Defendants contend that Plaintiffs have failed to adequately allege any of the three elements of a fraudulent concealment claim. As the Court concludes that Plaintiffs have failed to adequately allege affirmative acts, the Court does not reach Defendants' arguments as to knowledge and diligence.

In the instant case, Plaintiffs contend that they have alleged three categories of conduct that satisfy the element of "affirmative acts": (1) Defendants' secret meetings; (2) Defendants' efforts to "minimize any written record of the conspiracy"; and (3) Defendants' efforts to mislead the public through use of the Croner survey. As to Plaintiffs' three categories of conduct, the Court concludes that these allegations fail to show affirmatively misleading conduct "above and beyond" the alleged conspiracy itself. **[**50]** *See Guerrero v. Gates, 442 F.3d 697, 706—07 (9th Cir. 2003)* (quoting *Santa Maria v. Pac. Bell, 202 F.3d 1170, 1176 (9th Cir. 2000)*).[14] As the Ninth Circuit explained in

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[13] Plaintiffs also neglect to mention that the Ninth Circuit in *Oliver* explicitly held that the four year statute of limitation in *15 U.S.C. § 15b* did not apply to the plaintiffs' claims, as they sought only injunctive relief. *751 F.3d at 1084*.

[14] While Plaintiffs are correct that the Ninth Circuit overruled *Santa Maria* in *Socop-Gonzalez v. INS, 272 F.3d 1176,1194—95 (9th Cir. 2001)*, the Ninth Circuit did so on other grounds. In *Socop-Gonzales*, the Ninth Circuit held that *Santa Maria*'s suggestion that "courts should not apply equitable tolling in situations where a plaintiff discovers the existence of a claim before the end of a limitations period and the court believes that the plaintiff reasonably could have been expected to bring a claim within the remainder of the limitations period," was contrary to Supreme Court precedent. *Id.*

The *Socop-Gonzales* court did not, however, overrule the general proposition that ***HN20***[] fraudulent concealment requires some affirmative acts of misconduct "above and beyond" the conduct inherent to the underlying **[**51]** claims themselves. The "above and beyond" language has been cited by the Ninth Circuit approvingly in subsequent cases as an element of fraudulent

Conmar, **HN19**[] the fact that a defendant's acts are "by nature self-concealing" is insufficient to show that the defendant has affirmatively misled the plaintiff as to the existence of the plaintiff's claim. *See* 858 F.2d at 505. In doing so, the *Conmar* court concluded that "[p]assive concealment of information is not enough to toll the statute of limitations, unless the defendant had a fiduciary duty to disclose information." *Id.* (internal citation omitted).

Here, the Court finds that the allegation that "Defendants engaged in a secret conspiracy" does not show that Defendants took "affirmative steps to mislead." *See* *Volk v. D.A. Davidson & Co., 816 F.2d 1406, 1415—16 (9th Cir. 1987)*. Plaintiffs allege that Defendants' senior human resources directors and senior management discussed the conspiracy in small in-person group meetings, avoided memorializing the scheme in writing, and attempted to keep the conspiracy secret from Plaintiffs. In *Volk*, however, the Ninth Circuit held that **HN21**[] merely "passively conceal[ing]" material information is insufficient to toll the statute of limitations. In the instant action, it may be the case that Defendants engaged in a secret conspiracy, but that allegation alone does not show that Defendants affirmatively and fraudulently concealed the existence of Plaintiffs' claims. As in *Volk*, Plaintiffs have failed to "represent any facts indicating an affirmative effort on the part of any [defendant] to mislead them or to conceal the fraud." *Id.*

Moreover, Plaintiffs' failure to aver any affirmative attempts **[**52]** to mislead "above and beyond" the existence of the conspiracy itself is illustrated by *Conmar*. In *Conmar*, the Ninth Circuit found that the defendant's creation and dissemination of false customs forms to mislead the plaintiff, **[*1216]** and the "direct public denial of any wrongdoing" could constitute affirmative actions to conceal anticompetitive behavior. *858 F.2d at 505*. Here, while Plaintiffs do provide detailed allegations of when and where certain Defendants met and conspired, these allegations do not support the conclusion that Defendants took active, affirmative steps to mislead Plaintiffs about the existence of Plaintiffs' claims. Instead, Plaintiffs' allegations show only that Defendants engaged in a conspiracy, that "by nature [is] self-concealing." *Conmar, 858 F.2d at 505*. That Defendants did not affirmatively disclose the details of their allegedly unlawful conspiracy to Plaintiffs is neither surprising nor sufficient to constitute "affirmative steps to mislead." *See id.* If the mere fact of a secret conspiracy were sufficient to toll the statute of limitations under the fraudulent concealment doctrine, there would be little point in imposing a period of limitation in the first instance. *See, e.g.*, Areeda and Hovencamp, **[**53]** ***Antitrust Law*** § 320e ("Of course, regarding every secret conspiracy as sufficiently self-concealing to toll the statute would often force the courts to deal with stale, if not ancient, evidence.").

Moreover, Plaintiffs cite *In re Lithium Ion Batteries Antitrust Litigation, No. 13-MD-2420, 2014 U.S. Dist. LEXIS 7516, 2014 WL 309192, at *16 (N.D. Cal. Jan. 21, 2014)*, but that case only highlights the insufficiency of Plaintiffs' factual allegations. In *Lithium Ion*, the plaintiffs alleged both that the defendants had made "public, putatively false statements . . . affirming their compliance with applicable antitrust laws, as well as the existence of vigorous price competition in the . . . market," on which plaintiffs could have reasonably relied, and that the defendants had taken affirmative steps to destroy evidence of the conspirators' secret meetings, avoided memorializing conversations, and used secret codes to refer to coconspirators and topics. *Id.; see also* *In re TFT-LCD (Flat Panel) Antitrust Litig., 586 F. Supp. 2d 1109, 1119 (N.D. Cal. 2008)* (defendants provided "numerous specific pretextual reasons for inflated prices" and also kept conspiracy secret); *In re Cathode Ray Tube (CRT) Antitrust Litig., 738 F. Supp. 2d 1011, 1024-25 (N.D. Cal. 2010)* (defendants gave "pretextual reasons for price increases, and coordinated their misleading announcements" and also kept conspiracy secret). These cases, *Lithium Ion, TFT-LCD*, and *Cathode Ray*, entailed **[**54]** affirmative, public misrepresentations by the defendants that they were not engaging in anticompetitive conduct, which allegedly misled the plaintiffs as to the existence of the plaintiffs' claims. It was the combination of those misleading, pretextual statements *and* the affirmative efforts taken to destroy evidence of the conspiracy or otherwise keep the conspiracies secret that supported the respective plaintiffs' fraudulent concealment allegations.

The above-mentioned cases also illustrate why Plaintiffs' allegations with regards to the Croner survey are lacking. In their opposition, Plaintiffs argue for the first time that because the Croner survey describes itself as providing

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concealment claims. *See, e.g., Guerrero, 442 F.3d at 706—07*; *Lukovsky v. City and Cnty. of San Francisco, 535 F.3d 1044, 1052 (9th Cir. 2008)*; *Coppinger-Martin v. Solis, 627 F.3d 745, 751 (9th Cir. 2010)*.

"competitive compensation information," when the survey actually reported "anticompetitive compensation," Defendants "deliberately misrepresent[ed] their suppressed compensation data as 'competitive.'" Opp. at 17. However, the Court concludes that this allegation is qualitatively different from the public misrepresentations that the defendants made in *Lithium Ion, TFT-LCD*, and *Cathode Ray. See Lithium Ion, 2014 U.S. Dist. LEXIS 7516, 2014 WL 309192, at *16* (noting "public, putatively false statements by various defendants affirming their compliance with applicable antitrust laws"); *TFT-LCD, 586 F. Supp. 2d at 1119* (allegations **[**55]** that defendants provided "numerous specific pretextual reasons for the inflated **[*1217]** prices"); *Cathode Ray, 738 F. Supp. 2d at 1024—25* (allegations that defendants used "misleading announcements" and "gave pretextual reasons for price increases"). As a threshold matter, there are no allegations in the CAC that the compensation information in the Croner survey was publicly accessible, that Defendants were responsible for publishing the Croner survey, or that Defendants publicized the Croner survey as "affirming their compliance with applicable antitrust laws . . . ." *See Lithium Ion, 2014 U.S. Dist. LEXIS 7516, 2014 WL 309192, at *16*. Nor do Plaintiffs allege that Defendants' participation in the Croner survey involved the type of "public statements" at issue in *Cathode Ray*, where the defendants allegedly agreed "on what to tell customers about price changes," and published misleading or pretextual statements on "capacity and supply." *738 F. Supp. 2d at 1025*. At bottom, Plaintiffs simply offer no factual allegations with regards to the information in the Croner survey itself, or Plaintiffs' reliance on such information.

Moreover, to the extent Plaintiffs rely on the bare allegation that "Defendants provided pretextual, incomplete or materially false and misleading explanations for hiring, recruiting and compensation **[**56]** decisions made pursuant to the conspiracy," CAC ¶ 130, the Court finds this conclusory allegation insufficient under *Rule 9(b)*. Plaintiffs offer no specific facts showing the "who, what, where, when" of these alleged incomplete or materially false statements. *See Swartz, 476 F.3d at 764*. This allegation would not satisfy *Twombly*, much less the heightened pleading standard in *Rule 9(b)*.

In sum, the Court concludes that Plaintiffs have failed to allege that Defendants took affirmative steps to mislead Plaintiffs as to the factual basis for Plaintiffs' claims. While Plaintiffs are correct as a general matter that Plaintiffs' allegations that Defendants attempted to avoid memorializing the anti-solicitation scheme in order to keep the conspiracy secret may be relevant to Plaintiffs' fraudulent concealment claim, those allegations alone as currently pled are insufficient.[15] Here, the Court finds that Plaintiffs fail to allege facts showing that Defendants did more than passively conceal information. *See Volk, 816 F.2d at 1416*.

As Plaintiffs have failed to allege an essential element of fraudulent concealment, and the Court has also concluded that Plaintiffs' claims, as currently alleged, are time barred, the Court grants Defendants' motion to dismiss Plaintiffs' CAC. This dismissal is without prejudice, as the Court concludes that amendment would not necessarily be futile, as Plaintiffs may be able to allege sufficient facts to support their continuing violations claim and their equitable tolling claim. *See Leadsinger, 512 F.3d at 532*.

In light of this conclusion, the Court does not reach the remainder of Defendants' arguments in support of their motion to dismiss Plaintiffs' CAC.[16]

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[15] Plaintiffs, in their opposition, raise for the first time the claim that some of the Defendants' requests to seal certain information in the *High-Tech* litigation constituted affirmative efforts to conceal information. As this theory **[**57]** is not pled anywhere in the CAC, the Court declines to entertain this new argument. *See Barnes v. Campbell Soup Co., No. 12-05185, 2013 U.S. Dist. LEXIS 118225, 2013 WL 5530017, at *2 (N.D. Cal. July 25, 2013)*.

[16] The Court notes that Defendants request that the Court dismiss or strike Plaintiffs' claim for wage-fixing in the event that the Court does not grant their motion to dismiss. MTD at 18 n.21. That request is denied. Moreover, the Court is concerned by Defendants' contention that "the claim regarding wage-fixing . . . . should not proceed into the discovery phase." *Id.* The Court has not stayed discovery in this action, and at the initial case management conference on November 5, 2014, **[**58]** the Court explicitly denied both Plaintiffs' request to expedite discovery and Defendants' request to stay discovery. ECF No. 39. To the extent Plaintiffs have properly served discovery requests to Defendants regarding Plaintiffs' wage-fixing claims, Defendants must promptly respond.

[*1218] IV. CONCLUSION

For the reasons stated above, the Court GRANTS Defendants' motion to dismiss Plaintiffs' CAC. Should Plaintiffs elect to file a Second Amended Complaint curing the deficiencies identified herein, Plaintiffs shall do so within 30 days of the date of this Order. Failure to meet the 30-day deadline to file a Second Amended Complaint or failure to cure the deficiencies identified in this Order will result in a dismissal with prejudice. Plaintiffs may not add new causes of action or parties without leave of the Court or stipulation of the parties pursuant to *Federal Rule of Civil Procedure 15*.

IT IS SO ORDERED.

Dated: April 3, 2015

/s/ Lucy H. Koh

LUCY H. KOH

United States District Judge

In re Blood Reagents Antitrust Litig.

United States Court of Appeals for the Third Circuit

February 12, 2014, Argued; April 8, 2015, Filed

No. 12-4067

Reporter

783 F.3d 183 *; 2015 U.S. App. LEXIS 5630 **; 2015-1 Trade Cas. (CCH) P79,122; 91 Fed. R. Serv. 3d (Callaghan) 693

IN RE: BLOOD REAGENTS ANTITRUST LITIGATION Ortho Clinical Diagnostics, Inc., Appellant

Subsequent History: On remand at, Class certification granted by *In re Blood Reagents Antitrust Litig., 2015 U.S. Dist. LEXIS 141909 (E.D. Pa., Oct. 19, 2015)*

Motion denied by *In re Blood Reagents Antitrust Litig., 2017 U.S. Dist. LEXIS 112090 (E.D. Pa., July 19, 2017)*

Summary judgment granted, in part, summary judgment denied, in part by *In re Blood Reagents Antitrust Litig., 2017 U.S. Dist. LEXIS 112091 (E.D. Pa., July 19, 2017)*

Prior History: [1]** On Appeal from the District Court for the Eastern District of Pennsylvania. (D.C. No. 2-09-md-02081). (Honorable Jan E. DuBois).

In re Blood Reagents Antitrust Litig., 283 F.R.D. 222, 2012 U.S. Dist. LEXIS 118727 (E.D. Pa., Aug. 22, 2012)

Core Terms

class certification, expert testimony, district court, plaintiffs', models, antitrust, damages, reliability, blood, trial court, reagents

LexisNexis® Headnotes

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Appellate Review

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

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

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

A court of appeals reviews a grant of class certification for an abuse of discretion, which occurs if the certification rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact. Whether an incorrect legal standard has been used is an issue of law to be reviewed de novo.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Preponderance of Evidence

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN2[] **Class Actions, Certification of Classes**

The proper task of the trial court is to consider carefully all relevant evidence and make a definitive determination that the requirements of *Fed. R. Civ. P. 23* have been met before certifying a class. Class certification requires a finding that each of the requirements of *Rule 23* has been met; factual determinations must be made by a preponderance of the evidence. Actual, not presumed, conformance with the *Rule 23* requirements remains necessary, and a party's assurance to the court that it intends or plans to meet the requirements is insufficient.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN3[] **Class Actions, Certification of Classes**

Under the present structure of *Fed. R. Civ. P. 23(c)*, a district court is no longer permitted to issue a "conditional certification" because a trial court must make a definitive determination that the requirements of *Rule 23* have been met before certifying a class.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN4[] **Class Actions, Certification of Classes**

A plaintiff cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with *Fed. R. Civ. P. 23* unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in Daubert.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN5[] **Class Actions, Certification of Classes**

The class certification analysis must be "rigorous." This "rigorous analysis" applies to expert testimony critical to proving class certification requirements. As part of the "rigorous analysis," a party seeking class certification must affirmatively demonstrate his compliance with *Fed. R. Civ. P. 23*. This means that the party seeking certification must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses, and adequacy of representation, as required by *Rule 23(a)*. The party must also satisfy through evidentiary proof at least one of the provisions of *Rule 23(b)*. Expert testimony that is insufficiently reliable to satisfy the Daubert standard cannot "prove" that the *Rule 23(a)* prerequisites have been met "in fact," nor can it establish "through evidentiary proof" that *Rule 23(b)* is satisfied. When an expert's report or testimony is critical to class certification, a district court must make a conclusive ruling on any challenge to that expert's qualifications or submissions before it may rule on a motion for class certification.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN6[] **Class Actions, Certification of Classes**

Both the U.S. Courts of Appeals for the Seventh and Eights Circuit limit the Daubert inquiry for class certification to expert testimony offered to prove satisfaction of *Fed. R. Civ. P. 23*'s requirements. A Daubert hearing is necessary only if the witness's opinion is "critical" to class certification. A trial court must resolve challenges to an expert's qualifications as well as any challenge to the reliability of information provided by an expert if that information is relevant to establishing any of the *Rule 23* requirements for class certification.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN7[] **Class Actions, Certification of Classes**

Opinion testimony should not be uncritically accepted as establishing a *Fed. R. Civ. P. 23* requirement merely because the court holds the testimony should not be excluded, under Daubert or for any other reason. Under *Rule 23* the district court must be "satisfied," or "persuaded," that each requirement is met before certifying a class. Like any evidence, admissible expert opinion may persuade its audience, or it may not. This point is especially important to bear in mind when a party opposing certification offers expert opinion. The district court may be persuaded by the testimony of either (or neither) party's expert with respect to whether a certification requirement is met. Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis *Rule 23* demands.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Admissibility > Expert Witnesses

HN8[] **Class Actions, Certification of Classes**

That weighing expert opinions is proper does not make it necessary in every case or unlimited in scope. In its sound discretion, a district court may find it unnecessary to consider certain expert opinion with respect to a certification requirement, but it may not decline to resolve a genuine legal or factual dispute because of concern for an overlap with the merits.

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Jay S. Cohen, Esq., Jeffrey J. Corrigan, Esq. [ARGUED], Rachel E. Kopp, Esq., Jeffrey L. Spector, Esq., Spector, Roseman, Kodroff & Willis, Philadelphia, PA, Counsel for Appellees.

Judges: Before: SMITH, CHAGARES, and SCIRICA, Circuit Judges.

Opinion by: SCIRICA

Opinion

[*184] OPINION OF THE COURT

SCIRICA, *Circuit Judge*.

The principal issues in this appeal under *Federal Rule of Civil Procedure 23(f)* in this antitrust action are (1) whether *Rule 23* requires scrutiny under *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*, of challenged expert testimony and (2) the propriety of class certification in light of the Supreme Court's decision in *Comcast Corp. v. Behrend, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)* (*Comcast*), which reversed **[*185]** *Behrend v. Comcast Corp., 655 F.3d 182 (3d Cir. 2011)* (*Behrend*), after the District Court relied on *Behrend* in granting class certification. Because we find that the District Court had no opportunity to consider the implications of *Comcast* and hold that, if applicable, a court must resolve any *Daubert* challenges to expert testimony offered to demonstrate conformity with *Rule 23*, we vacate and remand.[1]

I.[2]

Plaintiffs are direct purchasers of traditional blood reagents, products used to test blood compatibility between donors and recipients, from two companies, defendants Immucor, Inc., which has settled with plaintiffs, and Ortho-Clinical Diagnostics, Inc., the appellant here. Plaintiffs claim Ortho and Immucor violated federal ***antitrust law*** by conspiring to fix traditional blood reagent prices.

By 1999, the entire domestic supply of traditional blood reagents had come under the control of Ortho and Immucor in a duopoly in which both companies anticipated they could raise their prices and increase their profits.[3] In November 2000, **[**3]** Ortho and Immucor executives attended an annual trade meeting at which plaintiffs assert the conspiracy began. Soon thereafter, both Ortho and Immucor began increasing traditional blood reagents prices in rapid succession, and by 2009, many prices had risen more than 2000%. Following a Department of Justice

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[1] The District Court **[**2]** had jurisdiction under *15 U.S.C. § 15(a)* and *28 U.S.C. § 1331*. We have appellate jurisdiction under *28 U.S.C. § 1292(e)* and *Rule 23(f)*. ***HN1***[] We review the grant of class certification for an abuse of discretion, which occurs if the certification "rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 312 (3d Cir. 2008)* (citation omitted). "Whether an incorrect legal standard has been used is an issue of law to be reviewed *de novo*." *Id.* (alteration and citation omitted).

[2] The District Court's Memorandum provides a more detailed description of the alleged facts in this case. *See In re Blood Reagents Antitrust Litig., 283 F.R.D. 222 (E.D. Pa. 2012)*.

[3] During the 1980s and 1990s, the traditional blood reagent market was highly competitive. Faced with more than a dozen competing companies and low profit margins, Ortho considered abandoning the industry while Immucor approached bankruptcy. At some point in the 1990s, Immucor began to acquire competing producers and by 1999, Immucor and Ortho were the only remaining firms in the U.S. market.

probe, a number of private suits were filed and transferred by the Judicial Panel on Multidistrict Litigation to the District Court, which consolidated them in December 2009.

Plaintiffs seek damages under the Clayton Act, *see* *15 U.S.C. § 15*, for alleged horizontal price fixing in violation of the Sherman Act, *see* *15 U.S.C. § 1*. In July 2012, after preliminary approval of plaintiffs' settlement with Immucor, the court held a hearing to determine whether to certify plaintiffs' class of "[a]ll individuals and entities who purchased **[**4]** traditional blood reagents in the United States directly from Defendants Immucor, Inc., and Ortho-Clinical Diagnostics, Inc. at any time from January 1, 2000 through the present." *283 F.R.D. at 247*. The court then certified the class over Ortho's objection. We granted Ortho's petition to appeal under *Rule 23(f)*.

II.

Plaintiffs relied in part on expert testimony to produce their antitrust impact analyses and damages models. The District Court evaluated the testimony, the reliability of which Ortho consistently challenged, **[*186]** and, in part by holding that the testimony "could evolve to become admissible evidence" at trial, determined that plaintiffs had met *Rule 23(b)(3)*'s predominance requirement. *See* *283 F.R.D. at 243-45* (quoting *Behrend, 655 F.3d at 204 n.13*). Relying on our decision in *Behrend*, the court rejected Ortho's challenges to plaintiffs' damages models as irrelevant to class certification because, the court reasoned,

> [v]irtually all of Ortho's arguments go to the merits of the models [plaintiffs' expert] has constructed: the question whether the models give rise to "a just and reasonable inference or [are] speculative." *Behrend, 655 F.3d at 206*. These merits questions have some force, and they may prove persuasive at the summary judgment stage. However, they do not overlap with the *Rule 23* requirements, because **[**5]** they neither implicate a need for individual proof nor convince the Court that [the] models could not "evolve to become admissible evidence." *Id. at 204 n.13*.

Blood Reagents, 283 F.R.D. at 240-41 (third alteration in original).

On appeal, Ortho contends the trial court failed to rigorously scrutinize whether "questions of law or fact common to class members predominate over any questions affecting only individual members." *Fed. R. Civ. P. 23(b)(3)*. In particular, pointing to *Comcast*, Ortho asserts the trial court erred by declining to address at class certification whether plaintiffs' damages models were capable of producing just and reasonable damage estimates at trial and by accepting plaintiffs' theory as capable of proving classwide antitrust impact.[4] Ortho also argues that, under the class certification standard, the trial court should have scrutinized the plaintiffs' expert's testimony under *Daubert*.

III.

A.

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[4] More specifically, Ortho contends that plaintiffs' expert's methodologies cannot prove antitrust impact as a matter of law because they are incapable of distinguishing lawful price increases resulting from the creation of a duopoly from price increases resulting from the alleged price-fixing conspiracy. Ortho bases this argument in part on statements in **[**6]** *Comcast* such as, "Prices whose level above what an expert deems 'competitive' has been caused by factors unrelated to an accepted theory of antitrust harm are not 'anticompetitive' in any sense relevant here," *133 S. Ct. at 1435*, and the suggestion that a damages model must be able "to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to" the antitrust violation, *id. See also, e.g., id. at 1433* (stating that "a model purporting to serve as evidence of damages . . . must measure only those damages attributable to" the "theory of antitrust impact accepted for class-action treatment," and those damages must be "susceptible of measurement across the entire class"); *id. at 1435* ("The first step in a damages study is the translation of the *legal theory of the harmful event* into an analysis of the economic impact *of that event*.'" (quoting Federal Judicial Center, *Reference Manual on Scientific Evidence* 432 (3d ed. 2011))).

Because the District Court did not have the opportunity to consider *Comcast*'s later-issued guidance in the first instance, we will vacate the class certification order and remand for reconsideration. Without foreclosing what other conclusions **[**7]** the District Court might reach regarding *Comcast*'s ramifications for antitrust damages models[5] or proving antitrust impact,[6] we believe *Behrend*'s "could evolve" formulation of the Rule 23 standard did not survive *Comcast. See* *Comcast, 133 S. Ct. at 1433* (criticizing *Behrend* for "finding it **[*187]** unnecessary to decide 'whether the [expert's damages] methodology [was] a just and reasonable inference or speculative'" and indicating that such a methodology is not "acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be" (second alteration in original) (quoting *Behrend, 655 F.3d at 206*)). As we stated in *In re Hydrogen Peroxide Antitrust Litigation*, ***HN2***[] the "proper task" of the trial court is "to consider carefully all relevant evidence and make a definitive determination that the requirements of *Rule 23* have been met before certifying a class." *552 F.3d 305, 320 (3d Cir. 2008)*. "Class certification requires a finding that each of the requirements of *Rule 23* has been met," *id.*; factual determinations "must be made by a preponderance of the evidence," *id. at 307*. "'[A]ctual, not presumed, conformance' with the *Rule 23* requirements remains necessary," *id. at 322* (quoting *Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982))*, and "[a] party's assurance to the court that it intends or plans to meet the requirements is insufficient," *id. at 318*.[7]

B.

We join certain of our sister courts to hold that ***HN4***[] a plaintiff cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with *Rule 23* unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in *Daubert*. The Supreme Court has emphasized that ***HN5***[] the class certification analysis must be "rigorous." *Comcast, 133 S. Ct. at 1432* (quoting *Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011))*. This "rigorous analysis" applies to expert testimony critical to proving class certification requirements. *See, e.g., Comcast, 133 S. Ct. at 1433* (citing *Dukes, 131 S. Ct. at 2551-52*); *Hydrogen Peroxide, 552 F.3d at 323*. As part of the "rigorous analysis," the Court has clarified, "[a] party seeking class certification must affirmatively demonstrate his compliance" with *Rule 23*. *Dukes, 131 S. Ct. at 2551*. This means that the party seeking certification must "be prepared to prove that there are *in fact* sufficiently **[**9]** numerous parties, common questions of law or fact, typicality of claims or defenses, and adequacy of representation, as required by *Rule 23(a)*. The party must also satisfy through evidentiary proof at least one of the provisions of *Rule 23(b)*." *Comcast, 133 S. Ct. at 1432* (emphasis in original) (quotation marks and citation omitted). Expert testimony that is insufficiently reliable to satisfy the *Daubert* standard cannot "prove" that the *Rule 23(a)* prerequisites have been met "in fact," nor can it establish "through evidentiary proof" that *Rule 23(b)* is satisfied. Other courts of appeals have reached this conclusion. *See* *Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 812 (7th Cir. 2012)* ("When an expert's report or testimony is 'critical to class certification,' we have held that a district court must make a conclusive ruling on any challenge to that expert's qualifications or submissions before it may rule on a motion for class certification." (quoting *Am. Honda Motor Co. v. Allen, 600 F.3d 813, 815 (7th Cir. 2010)* (per curiam))); *In re Zurn Pex **[*188]** Plumbing Prods. Liab. Litig., 644 F.3d 604, 614 (8th Cir. 2011)* (approving "a focused *Daubert* analysis which scrutinized the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence");[8] *see also* *Ellis v. Costco Wholesale Corp.,*

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[5] *See generally **[**8]*** *Comcast, 133 S. Ct. at 1433-35*.

[6] *See supra* note 4 and accompanying text.

[7] Similarly, ***HN3***[] "[u]nder the present structure of *Rule 23(c)*, . . . a district court [is] no longer permitted to issue a 'conditional certification' . . . because [a] trial court must 'make a definitive determination that the requirements of *Rule 23* have been met before certifying a class.'" *In re NFL Players Concussion Injury Litig., 775 F.3d 570, 580, 2014 WL 7331936, at *6 (3d Cir. 2014)* (third alteration in original) (citation and internal quotation marks omitted) (quoting *Hydrogen Peroxide, 552 F.3d at 320*).

[8] We have no occasion to examine whether there might be some variation between the Seventh and Eighth Circuit formulations. Consistent with our holding here, ***HN6***[] both courts limit the *Daubert* inquiry to expert testimony offered to prove satisfaction of Rule 23's requirements. *See* *Zurn Pex, 644 F.3d at 614* (approving the district court's "focused *Daubert* analysis which

657 F.3d 970, 982 (9th Cir. 2011) (citing the Supreme Court's dictum in *Dukes* and stating, "In its analysis of Costco's motions to strike [expert testimony at the class certification stage], **[**10]** the district court correctly applied the evidentiary standard set forth in *Daubert*"). Furthermore, we believe the Supreme Court's dictum in *Dukes* buttresses our decision. *See* Dukes, 131 S. Ct. at 2553-54 ("doubt[ing]" a district court's "conclu[sion] that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings").

In the District Court, plaintiffs **[**11]** relied on expert testimony to produce most of their antitrust impact analyses and damages models, which they offered to demonstrate that common questions predominated over individual questions as required by Rule 23(b)(3). The court evaluated the expert testimony and, in part because it held the testimony "could evolve to become admissible evidence" at trial, determined that it satisfied Rule 23. 283 F.R.D. at 243-45 (quoting Behrend, 655 F.3d at 204 n.13). The court also stated that "[a]t the present stage of the litigation, the Court also rejects Ortho's arguments regarding the reliability of plaintiffs' damages models." Id. at 243.[9]

Because Ortho consistently challenged the reliability of plaintiffs' expert's methodologies and the sufficiency of his testimony to satisfy Rule 23(b)(3), we leave it to the District Court on remand to decide in the first instance which of Ortho's reliability attacks, if any, challenge those aspects of plaintiffs' expert testimony offered to satisfy Rule 23 and then, if necessary, to conduct a *Daubert* inquiry before **[**12]** assessing whether the requirements of Rule 23 have been met.[10]

[*189] IV.

For the foregoing reasons, we will vacate the class certification order and remand for proceedings consistent with this opinion.

End of Document

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scrutinized the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence"); Messner, 669 F.3d at 814 ("[A] *Daubert* hearing is necessary under *American Honda* only if the witness's opinion is 'critical' to class certification."); Am. Honda, 600 F.3d at 816 (holding that a trial court must resolve challenges to an expert's qualifications as well as "any challenge to the reliability of information provided by an expert if that information is relevant to establishing any of the Rule 23 requirements for class certification").

[9] Plaintiffs contend Ortho waived the opportunity to bring a *Daubert* challenge. But in the trial court proceedings, Ortho consistently challenged the reliability of plaintiffs' expert's models and the sufficiency of his testimony to satisfy Rule 23(b)(3).

[10] As we explained in *Hydrogen Peroxide*,

> **HN7**[] [O]pinion testimony should not be uncritically accepted as establishing a Rule 23 requirement merely because the court holds the testimony should not be excluded, under *Daubert* or for any other reason. Under Rule 23 the district court must be "satisfied," Falcon, 457 U.S. [147,] 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 [(1982)], or "persuaded," [*In re Initial Pub. Offering Sec. Litig.*], 471 F.3d [24,] 41 [(2d Cir. 2006)], that each requirement is met before certifying a class. Like any evidence, admissible expert opinion may persuade its audience, or it may not. This point is especially important to bear in mind when a party opposing certification offers expert opinion. The district court may be persuaded by the testimony of either (or neither) party's expert with respect to whether a certification requirement is met. Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands.

Hydrogen Peroxide, 552 F.3d at 323 (citations and footnote omitted). *See also generally* id. at 324 (**HN8**[] "That weighing expert opinions is proper does not make it necessary in every case or unlimited in scope. . . . In its sound discretion, a district court may find it unnecessary to consider certain expert opinion with respect to a certification requirement, **[**13]** but it may not decline to resolve a genuine legal or factual dispute because of concern for an overlap with the merits.").

In re Text Messaging Antitrust Litig.

United States Court of Appeals for the Seventh Circuit

February 10, 2015, Argued; April 9, 2015, Decided

No. 14-2301

Reporter

782 F.3d 867 *; 2015 U.S. App. LEXIS 5734 **; 2015-1 Trade Cas. (CCH) P79,128

IN RE: TEXT MESSAGING ANTITRUST LITIGATION;AIRCRAFT CHECK SERVICES CO., et al., individually and on behalf of all others similarly situated, Plaintiffs-Appellants, v. VERIZON WIRELESS, et al., Defendants-Appellees.

Subsequent History: US Supreme Court certiorari denied by *Aircraft Check Servs. v. Wireless, 2015 U.S. LEXIS 7218 (U.S., Nov. 16, 2015)*

Prior History: [1]** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 08 C 7082—Matthew F. Kennelly, Judge.

In re Text Messaging Antitrust Litig., 630 F.3d 622, 2010 U.S. App. LEXIS 26299 (7th Cir. Ill., 2010)

Disposition: AFFIRMED.

Core Terms

messaging, prices, collusion, emails, firms, customers, tacit, increased price, competitors, bundles, seller, circumstantial evidence, consumers, carriers, raising, conspiracy, leader, discovery, costs, defendants', plaintiffs', antitrust, colluder, deletion, entrant, fixing, output, sales, text message, fix prices

LexisNexis® Headnotes

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

HN1[] **Cartels & Horizontal Restraints, Price Fixing**

Express collusion violates ***antitrust law***; tacit collusion does not. In a highly concentrated market, seizing an opportunity to gouge consumers need not imply express collusion.

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

HN2[] **Cartels & Horizontal Restraints, Sherman Act**

The Sherman Act, *15 U.S.C.S. § 1 et seq.*, imposes no duty on firms to compete vigorously, or for that matter at all, in price.

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

HN3[] **Cartels & Horizontal Restraints, Price Fixing**

It is not a violation of ***antitrust law*** for a firm to raise its price, counting on its competitors to do likewise (but without any communication with them on the subject) and fearing the consequences if they do not.

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

Evidence > Types of Evidence > Circumstantial Evidence

HN4[] **Cartels & Horizontal Restraints, Price Fixing**

The existence of express collusion can sometimes be inferred from circumstantial evidence. Circumstantial evidence of such collusion might be a decline in the market shares of the leading firms in a market, for their agreeing among themselves to charge a high fixed price might have caused fringe firms and new entrants to increase output and thus take sales from the leading firms. Circumstantial evidence might be inflexibility of the market leaders' market shares over time, suggesting a possible agreement among them not to alter prices, since such an alteration would tend to cause market shares to change. Or one might see a surge in nonprice competition, a form of competition outside the scope of the cartel agreement and therefore a possible substitute for price competition. Other evidence of express collusion might be a high elasticity of demand (meaning that a small change in price would cause a substantial change in quantity demanded), for this might indicate that the sellers had agreed not to cut prices even though it would be to the advantage of each individual seller to do so until the market price fell to a level at which the added quantity sold did not offset the price decrease. But these phenomena are consistent with tacit as well as express collusion; their absence tends to negate both, but their presence does not point unerringly to express collusion.

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

HN5[] **Cartels & Horizontal Restraints, Price Fixing**

It is difficult to prove illegal collusion without witnesses to an agreement. A court can, moreover, without suspecting illegal collusion, expect competing firms to keep close track of each other's pricing and other market behavior and often to find it in their self-interest to imitate that behavior rather than try to undermine it—the latter being a risky strategy, prone to invite retaliation.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Types of Evidence > Circumstantial Evidence

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

HN6[] **Sherman Act, Claims**

Tacit collusion, also known as conscious parallelism, does not violate Sherman Act *§ 1*, *15 U.S.C.S. § 1*. Collusion is illegal only when based on agreement. Agreement can be proved by circumstantial evidence.

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Judges: Before WOOD, Chief Judge, and POSNER and TINDER, Circuit Judges.

Opinion by: POSNER

Opinion

[*869] POSNER, *Circuit Judge*. This class action antitrust suit is before us for the second time. More than four years ago we granted the defendants' petition to take an interlocutory appeal (see *28 U.S.C. § 1292(b)*) from the district judge's refusal to dismiss the complaint for failure to state a claim. But we upheld the judge's ruling. *In re Text Messaging Antitrust Litigation, 630 F.3d 622 (7th Cir. 2010)*. Three years of discovery ensued, culminating in the district judge's grant of the defendants' motion for summary judgment, followed by entry of final judgment dismissing the suit, precipitating this appeal by the plaintiffs.

The suit is on behalf of customers of text messaging—the sending of brief electronic messages between two or more mobile phones or other devices, over telephone systems (usually wireless systems), mobile communications systems, or the Internet. (The most common method of text messaging today is to type the message into a cellphone, which transmits it instantaneously over a telephone or other **[**3]** communications network to a similar device.) Text messaging is thus an alternative both to email and to telephone calls. The principal **[*870]** defendants are four wireless network providers—AT&T, Verizon, Sprint, and T-Mobile—and a trade associa-tion, The Wireless Association, to which those companies belong. The suit claims that the defendants, in violation of section 1 of the Sherman Act, *15 U.S.C. §§ 1 et seq.*, conspired with each other to increase one kind of price for text messaging service—price per use (PPU), each "use" being a mes-sage, separately priced. This was the original method of pricing text messaging; we'll see that it has largely given way to other methods, but it still has some customers and they are the plaintiffs and the members of the plaintiff class.

The defendants' unsuccessful motion to dismiss the complaint—the motion the denial of which we reviewed and upheld in the first appeal—invoked *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, which requires a complaint to pass a test of "plausibility" in order to avoid dismissal. The reason for this requirement is to spare defendants the burden of a costly defense against charges likely to prove in the end to have no merit. We decided that the plaintiffs' second amended complaint passed the **[**4]** test; we noted that the complaint

> alleges a mixture of parallel behaviors, details of industry structure, and industry practices, that facilitate collusion. There is nothing incongruous about such a mixture. If parties agree to fix prices, one expects that as a result they will not compete in price—that's the purpose of price fixing. Parallel behavior of a sort anomalous in a competitive market is thus a symptom of price fixing, though standing alone it is not proof of it; and an industry structure that facilitates collusion constitutes supporting evidence of collusion. ... [T]he complaint in this case alleges that the four defendants sell 90 percent of U.S. text messaging services, and it would not be difficult for such a small group to agree on prices and to be able to detect "cheating" (underselling the agreed price by a member of the group) without having to create elaborate mechanisms, such as an exclusive sales agency, that could not escape discovery by the antitrust authorities.
>
> Of note is the allegation in the complaint that the defendants belonged to a trade association and exchanged price information directly at association meetings. This allegation identifies a practice, not illegal **[**5]** in itself, that facilitates price fixing that would be difficult for the authorities to detect. The complaint further alleges that the defendants, along with two other large sellers of text messaging services, constituted and met with each other in an elite "leadership council" within the association—and the leadership council's stated mission was to urge its members to substitute "co-opetition" for competition.
>
> The complaint also alleges that in the face of steeply falling costs, the defendants increased their prices. This is anomalous behavior because falling costs increase a seller's profit margin at the existing price, motivating him, in the absence of agreement, to reduce his price slightly in order to take business from his competitors, and certainly not to increase his price. And there is more: there is an allegation that all at once the defendants changed their pricing structures, which were heterogeneous and complex, to a uniform pricing structure, and then simultaneously jacked up their prices by a third. The change in the industry's pricing structure was so rapid, the complaint suggests, that it could not have been accomplished without agreement on the details of the new **[**6]** structure, the timing of its adoption, and the specific, uniform price **[*871]** increase that would ensue on its adoption. ...
>
> What is missing, as the defendants point out, is the smoking gun in a price-fixing case: direct evidence, which would usually take the form of an admission by an employee of one of the conspirators, that officials of the defendants had met and agreed explicitly on the terms of a conspiracy to raise price. The second amended complaint does allege that the defendants "agreed to uniformly charge an unprecedented common per-unit price of ten cents for text messaging services," but does not allege direct evidence of such an agreement; the allegation is an inference from circumstantial evidence. Direct evidence of conspiracy is not a sine qua non, however. Circumstantial evidence can establish an antitrust conspiracy. ... We need not decide whether the circumstantial evidence that we have summarized is sufficient to *compel* an inference of conspiracy; the case is just at the complaint stage and the test for whether to dismiss a case at that stage turns on the complaint's "plausibility." ...
>
> The plaintiffs have conducted no discovery. Discovery may reveal the smoking gun or bring **[**7]** to light additional circumstantial evidence that further tilts the balance in favor of liability.

In re Text Messaging Antitrust Litigation, supra, 630 F.3d at 627—29; see also, for example, *White v. R.M. Packer Co., 635 F.3d 571 (1st Cir. 2011)*.

In short, we pointed to the small number of leading firms in the text messaging market, which would facilitate concealment of an agreement to fix prices; to the alleged exchanges of price information, orchestrated by the firms' trade association; to the seeming anomaly of a price increase in the face of falling costs; and to the allegation of a sudden simplification of pricing structures followed very quickly by uniform price increases.

With dismissal of the complaint refused and the suit thus alive in the district court, the focus of the lawsuit changed to pretrial discovery by the plaintiffs, which in turn focused on the alleged price exchange through the trade association and the sudden change in pricing structure followed by uniform price increases. Other factors mentioned in our first opinion—the small number of firms, and price increases in the face of falling costs—were conceded to be present but could not be thought dispositive. It is true that if a small number of competitors dominates a market, they will **[**8]** find it safer and easier to fix prices than if there are many competitors of more or less equal size. For the fewer the conspirators, the lower the cost of negotiation and the likelihood of defection; and provided that the fringe of competitive firms is unable to expand output sufficiently to drive the price back down to the competitive level, the leading firms can fix prices without worrying about competition from the fringe. But the other side of this coin is that the fewer the firms, the easier it is for them to engage in "follow the leader" pricing ("conscious parallelism," as lawyers call it, "tacit collusion" as economists prefer to call it)—which means coordinating their pricing without an actual agreement to do so. As for the apparent anomaly of competitors' raising prices in the face of falling costs, that is indeed evidence that they are not competing in the sense of trying to take sales from each other. However, this may be not because they've agreed not to compete but because all of them have determined independently that they may be better off with a higher price. That higher price, moreover—the consequence of parallel but independent decisions to raise prices—may generate **[**9]** even greater profits (compared to competitive **[*872]** pricing) if costs are falling, provided that consumers do not have attractive alternatives.

Important too is the condition of entry. If few firms can or want to enter the relevant market, a higher price generating higher profits will not be undone by the output of new entrants. Indeed, prospective entrants may be deterred from entering by realization that their entry might lead simply to a drastic fall in prices that would deny them the profits from having entered. And that drastic fall could well be the result of parallel but independent pricing decisions by the incumbent firms, rather than of agreement.

The challenge to the plaintiffs in discovery was thus to find evidence that the defendants had colluded expressly—that is, had explicitly agreed to raise prices—rather than tacitly ("follow the leader" or "consciously parallel" pricing). The focus of the plaintiffs' discovery was on the information exchange orchestrated by the trade association, the change in the defendants' pricing structures and the defendants' ensuing price hikes, and the possible existence of the smoking gun—and let's begin there, for the plaintiffs think they have found **[**10]** it, and they have made it the centerpiece—indeed, virtually the entirety—of their argument.

Their supposed smoking gun is a pair of emails from an executive of T-Mobile named Adrian Hurditch to another executive of the firm, Lisa Roddy. Hurditch was not a senior executive but he was involved in the pricing of T-Mobile's products, including its text messaging service. The first of the two emails to Roddy, sent in May 2008, said "Gotta tell you but my gut says raising messaging pricing again is nothing more than a price gouge on consumers. I would guess that consumer advocates groups are going to come after us at some point. It's not like we've had an increase in the cost to carry message to justify this or a drop in our subscription SOC rates? I know the other guys are doing it but that doesn't mean we have to follow." ("SOC" is an acronym for "system on a chip," a common component of cellphones.) The second email, sent in September 2008 in the wake of a congressional investigation of alleged price gouging by the defendants, said that "at the end of the day we know there is no higher cost associated with messaging. The move [the latest price increase by T-Mobile] was colusive [*sic*] and **[**11]** opportunistic." The misspelled "collusive" is the heart of the plaintiffs' case.

It is apparent from the emails that Hurditch disagreed with his firm's policy of raising the price of its text messaging service. (The price increase, however, was limited to the PPU segment of the service; we'll see that this is an important qualification.) But that is all that is apparent. In emphasizing the word "col[l]usive"—and in arguing in their opening brief that "Hurditch's statement that the price increases were collusive is thus dispositive. Hurditch's statement is a party admission and a co-conspirator statement"—the plaintiffs' counsel demonstrate a failure to understand the fundamental distinction between express and tacit collusion. *HN1*[] Express collusion violates ***antitrust law***; tacit collusion does not. There is nothing to suggest that Hurditch was referring to (or accusing his company of) express collusion. In fact the first email rather clearly refers to tacit collusion; for if Hurditch had thought that his company had agreed with its competitors to raise prices he wouldn't have said "I know the other guys are doing it but *that doesn't mean we have to follow*" (emphasis added). They would have to follow, **[**12]** or at least they would be under great pressure to follow, if they had agreed to follow.

[*873] As for the word "opportunistic" in the second email, this is a reference to the remark in the first email that T-Mobile and its competitors were seizing an opportunity to gouge consumers—and in a highly concentrated market, seizing such an opportunity need not imply express collusion.

Consider the last sentence in the second, the "colusive," email: "Clearly get why but it doesn't surprise me why public entities and consumer advocacy groups are starting to groan." This accords with another of Hurditch's emails, in which he predicted that the price increase would cause "bad PR [public relations]." Those concerns would be present whether the collusion among the carriers was tacit or express.

Nothing in any of Hurditch's emails suggests that he believed there was a conspiracy among the carriers. There isn't even evidence that he had ever communicated on any subject with any employee of any of the other defendants. The reference to "the other guys" was not to employees of any of them but to the defendants themselves—the companies, whose PPU prices were public knowledge.

The plaintiffs make much of the fact **[**13]** that Hurditch asked Roddy to delete several emails in the chain that culminated in the "colusive" email. But that is consistent with his not wanting to be detected by his superiors criticizing their management of the company. The plaintiffs argue that, no, the reason for the deletion was to destroy emails that would have shown that T-Mobile was conspiring with the other carriers. If this were true, the plaintiffs would be entitled to have the jury instructed that it could consider the deletion of the emails to be evidence (not conclusive of course) of the defendants' (or at least of T-Mobile's) guilt. But remember that there is no evidence that Hurditch was involved in, or had heard about, any conspiracy, and there is as we've just seen an equally plausible reason for the deletion of the emails in question. There's nothing unusual about sending an intemperate email, regretting sending it, and asking the recipient to delete it. And abusing one's corporate superiors—readily discernible even in Hurditch's emails that were not deleted—is beyond intemperate; it is career-endangering, often career-ending. Hurditch and Roddy acknowledged in their depositions that at least one of the deleted **[**14]** emails had criticized T-Mobile's senior management in "emotional" terms. Furthermore, if T-Mobile destroyed emails that would have revealed a conspiracy with its competitors, why didn't it destroy the "smoking gun" email—the "colusive" email?

Even if the district judge should have allowed the jury to draw an adverse inference from the destruction of the emails, this could not have carried the day for the plaintiffs or even gotten them a trial. T-Mobile's Record Retention Guidelines indicate that Hurditch and Roddy had no obligation to retain their correspondence, because the guidelines state that employees need not retain "routine letters and notes that require no acknowledgment or follow-up" as distinct from "letters of general inquiry and replies that complete a cycle of correspondence." Hurditch's emails to Roddy were not inquiries; they were gripes and worries. Nor can a subordinate employee's destruction of a document, even if in violation of company policy, be automatically equated to a bad-faith act by the company.

The problems with the plaintiff's case go beyond the inconclusiveness of the "colusive" email on which their briefs dwell at such length. The point that they have particular **[**15]** difficulty accepting is that ***HN2***[] the Sherman Act imposes no duty on firms to compete vigorously, or for that matter at all, in price. This troubles some antitrust **[*874]** experts, such as Harvard Law School Professor Louis Kaplow, whose book *Competition Policy and Price Fixing* (2013) argues that tacit collusion should be deemed a violation of the Sherman Act. That of course is not the law, and probably shouldn't be. A seller must decide on a price; and if tacit collusion is forbidden, how does a seller in a market in which conditions (such as few sellers, many buyers, and a homogeneous product, which may preclude nonprice competition) favor convergence by the sellers on a joint profit-maximizing price without their actually agreeing to charge that price, decide what price to charge? If the seller charges the profit-maximizing price (and its "competitors" do so as well), and tacit collusion is illegal, it is in trouble. But how is it to avoid getting into trouble? Would it have to adopt cost-plus pricing and prove that its price just covered its costs (where cost includes a "reasonable return" to invested capital)? Such a requirement would convert ***antitrust law*** into a scheme resembling public utility **[**16]** price regulation, now largely abolished.

And might not entry into concentrated markets be deterred because an entrant who, having successfully entered such a market, charged the prevailing market price would be a tacit colluder and could be prosecuted as such, if tacit collusion were deemed to violate the Sherman Act? What could be more perverse than an antitrust doctrine that discouraged new entry into highly concentrated markets? Prices might fall if the new entrant's output increased the market's total output, but then again it might not fall; the existing firms in the market might reduce their output in order to prevent the output of the new entrant from depressing the market price. If as a result the new entrant found itself charging the same price as the incumbent firms, it would be tacitly colluding with them and likewise even if it set its price below that of those firms in order to maximize its profit from entry yet above the price that would prevail were there no tacit collusion.

Further illustrating the danger of the law's treating tacit collusion as if it were express collusion, suppose that the firms in an oligopolistic market don't try to sell to each other's sleepers, **[**17]** "sleepers" being a term for a seller's customers who out of indolence or ignorance don't shop but instead are loyal to whichever seller they've been accustomed to buy from. Each firm may be reluctant to "awaken" any of the other firms' sleepers by offering them discounts, fearing retaliation. To avoid punishment under ***antitrust law*** for such forbearance (which would be a form of tacit collusion, aimed at keeping prices high), would firms be *required* to raid each other's sleepers? It is one thing to prohibit competitors from agreeing not to compete; it is another to order them to compete. How is a court to decide how vigorously they must compete in order to avoid being found to have tacitly col-luded in violation of ***antitrust law***? Such liability would, to repeat, give antitrust agencies a public-utility style regulatory role.

Or consider the case, of which the present one may be an exemplar, in which there are four competitors and one raises its price and the others follow suit. Maybe they do that because they think the first firm—the price leader—has in-sights into market demand that they lack. Maybe they're afraid that though their sales will increase if they don't follow the leader **[**18]** up the price ladder, the increase in their sales will induce the leader to reduce his price, resulting in increased sales by him at the expense of any firm that had refused to increase its price. Or the firms might fear that the price leader had raised his price in order to finance product improvements that would enable him to hold **[*875]** on to his existing customers—and win over customers of the other firms. If any of these reflections persuaded the other firms—without any communication with the leader—to raise their prices, there would be no conspiracy, but merely tacit collusion, which to repeat is not illegal despite the urging of Professor Kaplow and others.

Competitors in concentrated markets watch each other like hawks. Think of what happens in the airline industry, where costs are to a significant degree a function of fuel prices, when those prices rise. Suppose one airline thinks of and implements a method for raising its profit margin that it expects will have a less negative impact on ticket sales than an increase in ticket prices—such as a checked-bag fee or a reservation-change fee or a reduction in meals or an increase in the number of miles one needs in order to earn a free **[**19]** ticket. The airline's competitors will monitor carefully the effects of the airline's response to the higher fuel prices afflicting the industry and may well decide to copy the response should the responder's response turn out to have increased its profits.

The collusion alleged by the plaintiffs spanned the period 2005 to 2008 (the year the suit was filed), and we must consider closely the evolution of the text messaging market in that period. Text messaging (a descendant of the old telex service) started in the 1990s and started slowly. In 2005, 81 billion text messages were sent in the United States, which sounds like a lot; in fact it was peanuts—for by 2008 the number had risen to a trillion and by 2011 to 2.3 trillion. One reason for the rapid increase was the advent and increasing popularity of volume-discounted text messaging plans. These plans entitled the buyer to send a large number of messages (often an unlimited number) at a fixed monthly price that made each message sent very cheap to the sender. We'll call these plans "bundles," and ignore the fact that often a text messaging bundle includes services in addition to text messaging, such as voice and video messaging. The **[**20]** pricing of text messaging bundles (for example charging a fixed monthly rate for unlimited messaging) largely replaced the original method of pricing text messages, which had been price per use (PPU), that is, price per individual message, not per month or per some fixed number of messages. Once text messaging bundles became popular, the PPU market shrunk to the relative handful of people who send text messages infrequently. The collusion alleged in this case is limited to that market.

In 2005 the price per use was very low—as low as 2 cents, though more commonly 5 cents. But between then and late 2008 all four defendant companies, in a series of steps (10 steps in all for the four companies), raised each of their PPUs to 20 cents. The increase attracted congressional concern and an investigation by the Justice

Department's antitrust division, but neither legislative nor prosecutorial action resulted—only the series of class actions suits consolidated in 2009 in the suit before us.

The popularity of text messaging bundles took a big bite out of the PPU market. The consumers left in that market were as we said those who sent very few messages. The total cost to such users was very low. **[**21]** Each defendant company made, so far as appears, an independent judgment that PPU usage per customer was on average so low that the customer would not balk at, if he would even notice, an occasional increase of a few cents per message. Suppose a grandparent living in Florida sends one text message a week to his grandchild in Illinois at a cost of 5 cents a message. That adds up to roughly **[*876]** 4 messages a month, for a total of 20 cents. The text messaging service now doubles the price, to 10 cents a message. The monthly charge is now 40 cents. Is the customer likely to balk? When in 2006 Sprint raised its PPU from 10 cents to 15 cents, it estimated that the average result would be an increase of 74 cents a month in the cost of the service for the vast majority of its PPU customers. Neither in our hypothetical example nor in Sprint's real-world analysis is a competing carrier likely to spend money advertising that its PPU price is 5 cents lower than what the competition is charging.

Our earlier discussion of "sleepers" is relevant here. As heavy users of text messaging switched from PPU to bundles, the PPU market was left with the dwindling band of consumers whose use of text messaging was **[**22]** too limited to motivate them to switch to bundles or to complain about small increases in price per message. And they certainly weren't going to undergo the hassle of switching companies just because they would be paying a few dollars a year more for text messaging. This is no more than a plausible interpretation of the motive for and character of the price increases of which the plaintiffs complain, but the burden of establishing a prima facie case of explicit collusion was on the plaintiffs, and as the district judge found in his excellent opinion they failed to carry the burden.

Granted, the defendants overstate their case in some respects. They point out that each company conducted independent evaluations of the profitability of raising their PPUs, but one would expect such "independent" evaluations even if the firms were expressly colluding, as the "independent" evaluations would disguise what they were doing. The firms contend unnecessarily that the evaluations showed that the contemplated price increases would be profitable even if none of the other three carriers raised its PPU. That is overkill because ***HN3***[] it is not a violation of ***antitrust law*** for a firm to raise its price, counting **[**23]** on its competitors to do likewise (but without any communication with them on the subject) and fearing the consequences if they do not. In fact AT&T held back on raising its PPU for several months, fearing that Sprint's increase would have a bad effect on public opinion, and raised its own price only when the bad effect did not materialize.

The plaintiffs point out that ***HN4***[] the existence of express collusion can sometimes be inferred from circumstantial evidence, and they claim that they produced such evidence, along with Hurditch's emails, which they term direct evi-dence of such collusion—which, as we know, they are not. Circumstantial evidence of such collusion might be a decline in the market shares of the leading firms in a market, for their agreeing among themselves to charge a high fixed price might have caused fringe firms and new entrants to increase output and thus take sales from the leading firms. Circumstantial evidence might be inflexibility of the market leaders' market shares over time, suggesting a possible agreement among them not to alter prices, since such an alteration would tend to cause market shares to change. Or one might see a surge in nonprice competition, a form **[**24]** of competition outside the scope of the cartel agreement and therefore a possible substitute for price competition. Other evidence of express collusion might be a high elasticity of demand (meaning that a small change in price would cause a substantial change in quantity demanded), for this might indicate that the sellers had agreed not to cut prices even though it would be to the advantage of each individual seller to do so until the market price fell to a level at which the added quantity sold did not offset the price decrease.

[*877] The problem is that these phenomena are consistent with tacit as well as express collusion; their absence would tend to negate both, but their presence would not point unerringly to express collusion. And anyway these aren't the types of circumstantial evidence on which the plaintiffs rely. Rather they argue that had any one of the four carriers not raised its price, the others would have experienced costly consumer "churn" (the trade's term for losing customers to a competitor), and therefore all four dared raise their prices only because they had agreed to act in concert. For that would minimize churn—PPU customers would have no place to turn for a lower **[**25]** price. There is, however, a six-fold weakness to this suggested evidence of express collusion:

First, a rational profit-maximizing seller does not care about the number of customers it has but about its total revenues relative to its total costs. If the seller loses a third of its customers because it has doubled its price, it's ahead of the game because twice two-thirds is greater than one (4/3 > 3/3).

Second, in any case of tacit collusion the colluders risk churn, because no one would have committed to adhere to the collusive price. And yet tacit collusion appears to be common, each tacit colluder reckoning that in all likelihood the others will see the advantages of hanging together rather than hanging separately.

Third, the four defendants in this case did not move in lockstep. For months on end there were price differences in their services. For example, during most of the entire period at issue (2005 to 2008) T-Mobile's PPU was 5 cents below Sprint's. To eliminate all risk of churn the defendants would have had to agree to raise their prices simultaneously, and they did not.

Fourth, while there was some churn, this does not imply that each defendant had decided to raise its price **[**26]** so high as to drive away droves of customers had the other defendants not followed suit. T-Mobile, for example, appears not to have gained a significant number of customers from charging less for PPU service than Sprint. (As one internal T-Mobile email puts it, "we should seriously consider raising our pay per message rate ... . [F]or having the lowest messaging rates on the planet, we are not necessarily receiving a more favorable share of the market. I'm thinking we can move to 10c[ents] with little erosive concerns.") One reason is that, as noted earlier, while 5 cents can make a large percentage difference in this market, it is such a small absolute amount of money that it may make no difference to most consumers, especially when a nickel or a dime or 20 cents is multiplied by a very small number of monthly messages. More important, as a customer's monthly messaging increases, and also the price per message (as was happening during this period), the alternative of a text messaging bundle plan becomes more attractive. A company that stands to lose some PPU customers because of a price increase may be confident that they will not abandon the company for another but instead sign on to the company's **[**27]** text messaging bundle plan. Put differently, there is no evidence that PPU pricing is a major determinant of consumers' choice of carrier.

Fifth, the period during which the carriers were raising their prices was also the period in which text messaging caught on with the consuming public and surged in volume. Many PPU customers would have found that they were text messaging more, and the more one text messages the more attractive the alternative of a bundle plan. The defendants *wanted* their PPU customers to switch to bundles; as an internal T-Mobile email in the plaintiffs' **[*878]** appendix explains, "the average cost to serve an 'Unlimited SMS' [i.e., a bundled short-message service at a fixed price regardless of the number of messages, "short message" referring to a simple text message, rather than a message having voice or video content] customer paying $9.99 [per month] is $1.90 per month and [we make] a profit of $8.09 per sub[scriber]."

And sixth, if the carriers were going to agree to fix prices, they wouldn't have fixed their PPU prices; why risk suit or prosecution for fixing such prices when the PPU market was generating such a slight—and shrinking—part of the carriers' overall revenues? The possible **[**28]** gains would be more than offset by the inevitable legal risks. Furthermore, since an agreement to fix prices in the PPU market would have left the carriers free to cut prices on the bulk of their business (for they are not accused of fixing bundle prices), the slight gains from fixing PPU prices would be negated by increased competition in the carriers' other markets.

The plaintiffs argue that many of the price increases were forced by senior management on the middle managers who would ordinarily be responsible for pricing decisions. The claim is that it would be the senior officials, few in number, at each company who would have negotiated the actual collusive agreement that the plaintiffs must prove. But what the record shows is merely (as in the Hurditch emails) that there was disagreement within each company about the optimal price to charge, obviously a speculative matter since no one could be certain how either competitors or consumers would react to any price change. There was plenty of evidence that proposals for price increases came from middle management. An economist would say (one of the defendants' economic experts did say) that as the price-sensitive users moved off PPU **[**29]** to bundles, leaving PPU to the sleepers, the overall demand for PPU became less elastic, meaning that a given percentage increase in the price of PPU service had a smaller negative effect on the demand for the service. That made raising the PPU a revenue winner.

It remains to consider the claim that the trade association of which the defendants were members, The Wireless Association (it has a confusing acronym—CTIA, reflecting the original name of the association, which was Cellular Telephone Industries Association), and a component of the association called the Wireless Internet Caucus of CTIA, were forums in which officers of the defendants met and conspired to raise PPU prices. Officers of some of the defendants attended meetings both of the association and of its caucus, but representatives of companies not alleged to be part of the conspiracy frequently were present at these meetings, and one of the plaintiffs' expert witnesses admitted that in the presence of non-conspirators "the probability of collusion would go away." Still, opportunities for senior leaders of the defendants to meet privately in these officers' retreats abounded. And an executive of one of the defendants (AT&T) **[**30]** told the president of the association that "we all try not to surprise each other" and "if any of us are about to do something major we all tend to give the group a heads up"—"plus we all learn valuable info from each other." This evidence would be more compelling if the immediate sequel to any of these meetings had been a simultaneous or near-simultaneous price increase by the defendants. Instead there were substantial lags. And as there is no evidence of what information was exchanged at these meetings, there is no basis for an inference that they were using the meetings to plot prices increases.

[*879] This and other circumstantial evidence that the plaintiffs cite are almost an afterthought. They have staked almost their all on Hurditch's emails—the name "Hurditch" recurs more than 160 times in the plaintiffs' opening and reply briefs. It's a mystery to us that the plaintiffs have placed such weight on those emails, thereby wasting space in their briefs that might have been better used. The plaintiffs greatly exaggerate the significance of the emails, but apart from the emails the circumstantial evidence that they cite provides insufficient support for the charge of express collusion.

[31]** ***HN5***[] It is of course difficult to prove illegal collusion without witnesses to an agreement. And there are no such witnesses in this case. We can, moreover, without suspecting illegal collusion, expect competing firms to keep close track of each other's pricing and other market behavior and often to find it in their self-interest to imitate that behavior rather than try to undermine it—the latter being a risky strategy, prone to invite retaliation. The plaintiffs have presented circumstantial evidence consistent with an inference of collusion, but that evidence is equally consistent with independent parallel behavior.

We hope this opinion will help lawyers understand the risks of invoking "collusion" without being precise about what they mean. ***HN6***[] Tacit collusion, also known as conscious parallelism, does not violate *section 1 of the Sherman Act*. Collusion is illegal only when based on agreement. Agreement can be proved by circumstantial evidence, and the plaintiffs were permitted to conduct and did conduct full pretrial discovery of such evidence. Yet their search failed to find sufficient evidence of express collusion to make a prima facie case. The district court had therefore no alternative to granting **[**32]** summary judgment in favor of the defendants.

AFFIRMED.

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Ryan v. Microsoft Corp.

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

April 10, 2015, Decided; April 10, 2015, Filed

Case No. 14-CV-04634-LHK

Reporter
2015 U.S. Dist. LEXIS 47753 *; 2015-2 Trade Cas. (CCH) P79,374; 2015 WL 1738352

DESERAE RYAN, et al., Plaintiffs, v. MICROSOFT CORPORATION, Defendant.

Subsequent History: Motion denied by *Ryan v. Microsoft Corp., 2015 U.S. Dist. LEXIS 73955 (N.D. Cal., June 8, 2015)*

Dismissed by, Request granted, Judgment entered by *Ryan v. Microsoft Corp., 147 F. Supp. 3d 868, 2015 U.S. Dist. LEXIS 158944 (N.D. Cal., Nov. 23, 2015)*

Prior History: *In re High-Tech Emple. Antitrust Litig., 856 F. Supp. 2d 1103, 2012 U.S. Dist. LEXIS 55302 (N.D. Cal., Apr. 18, 2012)*

Core Terms

Plaintiffs', statute of limitations, court concludes, employees, factors, parties, forum selection clause, hiring, anti-solicitation, damages, cause of action, Cartwright Act, employment agreement, venue, weigh, allegations, conspiracy, choice of forum, accrual, Sherman Act, anticompetitive, four year, settlement, witnesses, continuing violation, discovery rule, quotation, tolling, accrue, time barred

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Judges: LUCY H. KOH, United States District Judge.

Opinion by: LUCY H. KOH

Opinion

ORDER DENYING MOTION TO TRANSFER VENUE; GRANTING MOTION TO DISMISS

Re: Dkt. No. 26, 32

Before the Court are Defendant Microsoft Corporation's motions to transfer venue and to dismiss. ECF Nos. 26, 32. Having considered the submissions of the parties, the relevant law, and the record in this case, the Court hereby DENIES Defendant's **[*2]** motion to transfer venue and GRANTS Defendant's motion to dismiss.

I. BACKGROUND

A. Factual Background

1. The Parties

Plaintiff Deserae Ryan ("Ryan") and Plaintiff Trent Rau ("Rau"), (collectively, "Plaintiffs"), bring this putative class action against Defendant Microsoft Corporation ("Defendant" or "Microsoft") for alleged violations of state and federal antitrust laws. Plaintiff Ryan, an individual, is a resident of the State of California. Compl. ¶ 16. Plaintiff Ryan worked for Microsoft as a "Senior Product Manager" from April 2007 to September 2012 in Redmond, Washington. *Id.* ¶ 16. Plaintiff Rau, an individual, is a resident of the State of Washington. *Id.* ¶ 19. Plaintiff Rau worked for Microsoft as a "Lead Systems Engineer Senior" from June 2006 to June 2010.

Defendant Microsoft is a Washington corporation with its principal place of business in Redmond, Washington. *Id.* ¶ 20.

B. *In re High-Tech Employees Litigation*

Here, Plaintiffs allege that Defendant Microsoft conspired with "several other technology companies" in both a "Do Not Cold Call" agreement and a "Restricted Hiring" agreement. There appears to be significant factual overlap between Plaintiffs' allegations and the related **[*3]** action *In re High-Tech Employees Litigation*, No. 11-CV-02509-LHK. As both the factual and procedural history of the related action, *In re High-Tech*, and the DOJ investigations and complaints are relevant to this action; the Court briefly summarizes the background of that litigation below.

From 2009 to 2010, the Antitrust Division of the DOJ investigated the employment and recruitment practices of various Silicon Valley technology companies, including Adobe Systems, Inc., Apple, Inc., Google, Inc., Intel Corp., and Intuit, Inc. *See* *In re High-Tech Emple. Antitrust Litig., 856 F. Supp. 2d 1103, 1109 (N.D. Cal. 2012)*. In September of 2010, the DOJ then filed civil complaints against the above-mentioned technology companies, in addition to Pixar and Lucasfilm. *Id.* The DOJ filed its complaint against Adobe, Apple, Google, Intel, Intuit, and Pixar on September 24, 2010. *Id.* On December 21, 2010, the DOJ filed another complaint against Lucasfilm and Pixar. CAC ¶ 94. The defendants, including Pixar and Lucasfilm, stipulated to proposed final judgments in which they agreed that the DOJ's complaints had stated claims under federal ***antitrust law*** and agreed to be "enjoined from attempting to enter into, maintaining or enforcing any agreement with any other person or in any way **[*4]** refrain from . . . soliciting, cold calling, recruiting, or otherwise competing for employees of the other person. *856 F. Supp. 2d at 1109-10*. (quoting Adobe Proposed Final Judgment at 5). The D.C. District Court entered the stipulated proposed final judgments in March and June of 2011. *Id.*

The *High-Tech* plaintiffs filed five separate state court actions between May and July of 2011. Following removal, transfer to San Jose to the undersigned judge, and consolidation, the *High-Tech* plaintiffs filed a consolidated amended complaint on September 13, 2011. *Id. at 1113*. In their complaint, the *High-Tech* plaintiffs alleged antitrust claims against their employers, claiming that the defendants had conspired "to fix and suppress employee compensation and to restrict employee mobility." *Id. at 1108*. More specifically, the *High-Tech* plaintiffs alleged a conspiracy comprised of "an interconnected web of express bilateral agreements." *Id. at 1110*. One agreement, the "Do Not Cold Call" agreement involved one company placing the names of the other company's employees on a "Do Not Cold Call" list and instructing its recruiters not to cold call the employees of the other company. *Id.* In addition to the "Do Not Cold Call" agreements, the *High-Tech* plaintiffs also alleged that Pixar **[*5]** and Lucasfilm entered into express, written agreements to (1) not cold call each other's employees, (2) to notify the other company whenever making an offer to an employee of the other company, and (3) not to engage in "bidding wars." *Id. at 1111*.

2. Alleged Conspiracy in the Instant Action

Here, Plaintiffs allege that Microsoft conspired with unnamed "technology companies" to suppress compensation in two ways. First, Microsoft allegedly "was one of several parties to an Anti-Solicitation Agreement otherwise known as the 'Do Not Cold Call' list." Compl. ¶ 28. Second, Microsoft allegedly entered into a "Restrictive Hiring Agreement"[1] with "several other technology companies." *Id.* ¶ 36. According to Plaintiffs, the effect of both agreements was to restrict competition in the labor market and artificially depress compensation. *Id.* ¶¶ 33, 37, 40.

a. Anti-solicitation scheme

Plaintiffs allege that "[a]round May 2007, Microsoft agreed to be **[*6]** a party to the Anti-Solicitation Agreement," which provided that Microsoft "and each of the other parties" to the agreement, would "'[n]ot . . . directly cold call into those companies [or their respective subsidiaries.]'" *Id.* ¶ 28. According to Plaintiffs, "[c]old calling serves as an essential and effective recruiting method," because current employees of competitors are "often the most highly qualified," but also "often unresponsive to other recruiting strategies." *Id.* ¶ 30. Plaintiffs allege that restrictions on cold calling have the effect of "limit[ing] an employee's leverage when negotiating his or her salary with his or her current employer," and, consequently, negatively "impact[s] all salaried employees of participating companies." *Id.* ¶ 32. More specifically, Plaintiffs contend that anti-solicitation agreements "alleviate[] pressure to retain good employees by paying higher salaries," and "suppress[] wages because other rivals are not actively soliciting employees through promises of higher salaries and benefits." *Id.* ¶ 33.

b. Restricted Hiring Agreement

In addition to the alleged anti-solicitation agreement, Plaintiffs further allege that "around May 2007, Microsoft, along with several other technology **[*7]** companies, entered into a Restrictive Hiring Agreement." *Id.* ¶ 36. Under this alleged restricted hiring agreement, Microsoft and some number of unknown technology companies allegedly agreed "[n]ot to pursue manager level and above candidates for Product, Sales, or G&A roles - even if they have applied" to any of the other "parties to the Anti-Solicitation Agreement." *Id.* According to Plaintiffs, Microsoft entered into the restricted hiring agreement with "the intent and effect of suppressing the compensation and mobility of [its] employees." *Id.* ¶ 37. Other than "the most senior executives, managerial employees and above at these companies were not aware of, and did not agree to, these restrictions." *Id.*

3. Claims

Plaintiffs' complaint contains four claims for relief under the following statutes: (1) Section 1 of the Sherman Act, *15 U.S.C. § 1*; (2) California's Cartwright Act, *Cal. Bus. & Prof. Code § 16720*; (3) California's Unfair Competition Law ("UCL"), *Cal. Bus. & Prof. Code §§ 17200 et seq.*; and (4) *California Business & Professions Code § 16600 et seq.* Plaintiffs seek damages, pre- and post-judgment interest, attorney's fees and expenses, and injunctive relief. Compl. at 18.

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[1] Plaintiffs alternate between referring to this alleged agreement as the "Restrictive Hiring Agreement" and the "Restricted Hiring Agreement." The Court will refer to the agreement as the "restricted hiring agreement," other than when quoting Plaintiffs' inconsistent usage.

C. Procedural History

In light of the relationship between the instant case and the *High-Tech* case, the Court briefly summarizes the relevant **[*8]** procedural history in *High-Tech* in addition to the instant case.

1. *High-Tech* Procedural Background

The *High-Tech* defendants removed the first state-court action on May 23, 2011. No. 11-2509, ECF No. 1. On April 18, 2012, the Court granted in part and denied in part the *High-Tech* defendants' joint motion to dismiss and denied Lucasfilm's motion to dismiss. No. 11-2509, ECF No. 119. On April 5, 2013, the Court granted in part and denied in part the *High-Tech* plaintiffs' motion for class certification with leave to amend. No. 11-2509, ECF No. 382. The Court granted the *High-Tech* plaintiffs' supplemental motion for class certification on October 24, 2013. No. 11-2509, ECF No. 531. On November 13, 2013, the *High-Tech* defendants filed a Rule 23(f) petition before the Ninth Circuit, requesting permission to appeal this Court's October 24, 2013 class certification order. No. 13-80223, ECF No. 1. The Ninth Circuit denied the defendants' petition on January 14, 2014. No. 13-80223, ECF No. 18.

In the interim, three of the *High-Tech* defendants, Intuit, Lucasfilm, and Pixar, reached an early settlement with the plaintiffs. On September 21, 2013, the *High-Tech* plaintiffs filed a motion for preliminary approval **[*9]** of a proposed class action settlement as to defendants Intuit, Lucasfilm, and Pixar. No. 11-2509, ECF No. 501. On October 30, 2013, the Court preliminarily approved the proposed settlement with Intuit, Lucasfilm, and Pixar. No. 11-2509, ECF No. 540. The Court granted final approval as to that settlement on May 16, 2014. No. 11-2509, ECF No. 915. The Court entered a final judgment with regards to Lucasfilm, Pixar, and Intuit on June 9, 2014. No. 11-2509, ECF No. 936. At the request of Intuit, the Court entered an amended final judgment on June 20, 2014. No. 11-2509, ECF No. 947.

The remaining *High-Tech* defendants, Adobe, Apple, Google, and Intel, filed individual motions for summary judgment, and joint motions for summary judgment and to strike certain expert testimony on January 9, 2014. No. 11-2509, ECF Nos. 554 (Intel), 556-57 (joint motions), 560 (Adobe), 561 (Apple), 564 (Google). The Court denied the *High-Tech* defendants' individual motions for summary judgment on March 28, 2014. No. 11-2509, ECF No. 771. On April 4, 2014, the Court granted in part and denied in part the *High-Tech* defendants' motion to strike, and denied the defendants' joint motion for summary judgment. No. 11-2509, **[*10]** ECF No. 778.

On May 22, 2014, the *High-Tech* plaintiffs filed a motion for preliminary approval of class action settlement as to the remaining defendants. No. 11-2509, ECF No. 920. On August 8, 2014, the Court denied the *High-Tech* plaintiffs' motion for preliminary approval, concluding that the proposed settlement did not fall "within the range of reasonableness." No. 11-2509, ECF No. 974, at 30. On September 4, 2014, the *High-Tech* defendants filed a petition for a writ of mandamus with the Ninth Circuit. No. 14-72745, ECF No. 1. On January 13, 2015, the *High-Tech* defendants filed correspondence with the Ninth Circuit referring to a new proposed settlement agreement. No. 14-72745, ECF No. 21. On January 30, 2015, the defendants filed an unopposed motion to dismiss the petition, which the Ninth Circuit granted on February 2, 2015. No. 14-72745, ECF Nos. 23, 24.

On January 15, 2015, the *High-Tech* plaintiffs filed a motion for preliminary approval of class action settlement as to the remaining defendants. No. 11-2509, ECF No. 1032. In this second proposed class action settlement, the parties had reached a settlement amount exceeding the previously rejected settlement by approximately $90.5 **[*11]** million dollars. *Id.* at 1. Following a fairness hearing on March 2, 2015, the Court granted preliminary approval to the January 2015 settlement agreement on March 3, 2015. No. 11-1509, ECF Nos. 1051, 1054. A final approval hearing is scheduled for July 9, 2015.

2. Procedural Background in the Instant Action

Plaintiffs filed their complaint on October 16, 2014. ECF No. 1. The Court related this action to *In re High-Tech Employees Litigation*, No. 11-CV-2509-LHK, on November 19, 2014. ECF No. 24. Defendant Microsoft filed the instant motions to transfer venue and to dismiss on December 15, 2014. ECF Nos. 26, 31. Microsoft also filed a request for judicial notice in connection with its motion to dismiss.[2] ECF No. 33. Plaintiffs filed oppositions to Defendant's motions on January 15, 2015. ECF Nos. 37, 38. Defendant filed replies on January 28, 2015. ECF Nos. 40, 41.

II. MOTION TO TRANSFER VENUE

The Court begins by addressing Defendant's motion to transfer venue pursuant to *28 U.S.C. § 1404(a)*. The Court then turns to Defendant's motion to dismiss under *Rule 12(b)(6)*.

In its motion to transfer venue, Microsoft contends that the Court should transfer this action to the Western District of Washington because (1) Plaintiffs' employment agreements "select the Western District of Washington forum" and (2) the convenience of the parties and witnesses, and the interest of justice favor transfer.

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." *28 U.S.C. § 1404(a)*. In the Ninth Circuit, the district court has discretion to transfer under *§ 1404(a)*, depending on a "case-by-case consideration of convenience and fairness." *Jones v. GNC Franchising, Inc., 211 F.3d 495, 498 (9th Cir. 2000)* (internal citation and quotation marks omitted). The Court must consider public factors relating to "the interest of justice" and private factors relating to "the convenience of the parties and **[*13]** witnesses." *See Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 843 (9th Cir. 1986)*. Such factors may include: (1) the location where relevant agreements were negotiated and executed; (2) the state that is most familiar with the governing law; (3) the plaintiff's choice of forum; (4) the parties' contacts with the forum; (5) the contacts relating to the plaintiff's cause of action in the chosen forum; (6) the differences in the costs of litigation in the two forums; (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses; (8) the ease of access to sources of proof; (9) the presence of a forum selection clause; and (10) the relevant public policy of the forum state, if any. *Jones, 211 F.3d at 498-99*. The moving party bears the burden of showing that transfer is appropriate. *Jones, 211 F.3d at 499*.

Transfer under *§ 1404(a)* is only appropriate if the action could properly have been brought in the transferee venue. When deciding whether to transfer venue, the Court "must balance the preference accorded plaintiff's choice of forum with the burden of litigating in an inconvenient forum." *Id.* Plaintiffs do not contest that this action could have been brought in the Western District of Washington. However, Plaintiffs have chosen to bring this action in this District because **[*14]** the alleged anti-solicitation and restricted hiring agreements were made and performed "in Silicon Valley," and the related *High-Tech* action is currently being litigated in this District. Generally, the plaintiff's choice of forum is treated with great deference, and only significant inconvenience or unfairness will justify transfer. *See Shultz v. Hyatt Vacation Mktg. Corp., No. 10-4568, 2011 U.S. Dist. LEXIS 24692, 2011 WL 768735, at *3 (N.D. Cal. Feb. 28, 2011)*. As discussed below, however, Defendant contends that Plaintiffs' choice of forum warrants no deference.

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[2] The Court GRANTS Defendant's unopposed request for judicial notice and has taken judicial notice of the adjudicative facts contained therein. *See* ECF No. 33. Defendants request that the Court take judicial notice of documents issued by the Department of Justice; public records; and media articles regarding the DOJ investigation. *See United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992)* (holding **[*12]** a court may take notice of proceedings in other courts); *Lee v. City of Los Angeles, 250 F.3d 668, 689-90 (9th Cir. 2001)*, *overruled on other grounds by Galbraith v. Cnty. of Santa Clara, 307 F.3d 1119, 1125-26 (9th Cir. 2002)* (matters of public record); *MGIC Indem. Co. v. Weisman, 803 F.2d 500, 505 (9th Cir. 1986)* (court records); ***Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 960 (9th Cir. 2010)*** (media publications); *see also Fed. R. Evid. 201(d)*.

A. Forum Selection Clause

Here, Microsoft contends that Plaintiffs' employment agreements contain valid forum selection clauses that require Plaintiffs to litigate the instant action in the Western District of Washington. A forum selection clause "may be enforced through a motion to transfer under *§ 1404(a)*." *Atl. Marine Constr. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Tx., 134 S. Ct. 568, 579, 187 L. Ed. 2d 487 (2013)*. Where a valid forum selection clause applies, it must "be given controlling weight in all but the most exceptional cases." *Id.* (internal quotation marks omitted). More specifically, where a valid forum selection clause preselects a different forum than the one selected by the plaintiff, the *§ 1404(a)* analysis is altered in three ways: (1) the plaintiff's choice of forum "merits no weight," and the burden shifts to the plaintiff to show why the action should not be transferred to **[*15]** the preselected forum; (2) the court "must deem the private-interest factors to weigh entirely in favor of the preselected forum"; and (3) a *§ 1404(a)* transfer of venue "will not carry with it the original venue's choice-of-law rules." *Id. at 582*.

In support of its motion to transfer venue based on a forum selection clause, Microsoft relies on two provisions of Plaintiffs' employment agreements: the noncompetition clauses and the forum selection clauses. The identical noncompetition clauses in Plaintiff Ryan's and Plaintiff Rau's employment agreements provide:

> While employed at MICROSOFT and for a period of one year thereafter, I will not (a) engage in any competitive activities or accept employment by or agree to provide services to any person or entity that engages in competitive activities ("competitive activities" meaning the development, production or provision of any product, service, technology, product feature or project that is or is intended to be competitive with one or more products, services, technologies, product features or projects, including actual or demonstrably anticipated research or development, on which I worked or about which I learned confidential or proprietary information **[*16]** or trade secrets while employed at MICROSOFT or a MICROSOFT subsidiary) . . . .

Declaration of Rob Greenall in support of Microsoft's motion to transfer ("Greenall Decl."), Exh. A, ECF No. 28-1, at 7; Greenall Decl, Exh. B, ECF No. 28-2 at 4. The identical forum selection clauses provide:

> I agree that this Agreement shall be governed for all purposes by the laws of the State of Washington as such laws apply to contracts performed within Washington by its residents and that exclusive venue and exclusive personal jurisdiction **for any action arising out of this Agreement** shall lie in state or federal court located in King County, Washington.

Greenall Decl., Exh. A, ECF No. 28-1, at 8 (emphasis added); Greenall Decl, Exh. B, ECF No. 28-2 at 5 (emphasis added).

As a general matter, forum selection clauses covering disputes "arising out of" a contract are narrower than those covering disputes "arising out of or relating to" a contract. *Mediterranean Enters., Inc. v. Ssangyong Corp., 708 F.2d 1458, 1464 (9th Cir. 1983)*. Where a forum selection clause covers only disputes "arising out of" a contract, the Ninth Circuit has held that the forum selection clause should be "narrowly construed." *Cape Flattery Ltd. v. Titan Maritime, LLC, 647 F.3d 914, 922 (9th Cir. 2011)*. These "arising out of" and "arising under" forum selection clauses apply only to "disputes **[*17]** and controversies relating to the interpretation of the contract and matters of performance." *Mediterranean Enters., 708 F.2d at 1464*. In contrast, a forum selection clause which covers disputes "arising out of or relating to" a contract applies much more broadly, as "the inclusion of the phrase 'relating to' should lead to a 'broad[er]' interpretation." *Perry v. AT&T Mobility LLC, No. C 11-01488 SI, 2011 U.S. Dist. LEXIS 102334, 2011 WL 4080625, at *4 (N.D. Cal. Sept. 12, 2011)* (quoting *Cape Flattery, 647 F.3d at 922-23*).

Here, the relevant forum selection clauses cover "any action arising out of" Plaintiffs' employment agreements. As such, the scope of the forum selection clauses is limited to disputes which require "interpretation of the contract." *Mediterranean Enters., 708 F.2d at 1464*. Microsoft contends that because Plaintiff Ryan and Plaintiff Rau agreed to noncompetition clauses that prevented Plaintiffs from working for competitor companies for a period of one year following the termination of Plaintiffs' employment with Microsoft, those noncompetition clauses "create[d] a powerful disincentive for competing companies to 'poach' them." ECF No. 26 at 8. According to Microsoft, this "powerful disincentive" will be material to adjudicating Plaintiffs' claims against Microsoft. However, Microsoft does not explain why resolution of Plaintiffs' antitrust claims will require interpretation of **[*18]** the scope of Plaintiffs' noncompetition agreements. In the instant case, the Court concludes that Plaintiffs' claims do not "arise out of" Plaintiffs' employment contracts because whether Defendant violated federal and state antitrust laws does not require interpretation of Plaintiffs' employment agreements.

More specifically, Plaintiffs aver that Microsoft engaged in anticompetitive behavior by conspiring with other technology companies to suppress employee compensation and restrict mobility. *See* Compl. ¶¶ 28, 33, 36, 40-44. It may be the case that Plaintiffs were less likely to have been "poached" as a result of the noncompetition clauses, but that argument alone does not establish that adjudication of Plaintiffs' claims will require interpretation of their employment agreements. Microsoft assumes that resolving Plaintiffs' claims will require a finding that but-for Microsoft's alleged anticompetitive behavior, Plaintiffs would have taken positions at competing companies in breach of Plaintiffs' employment agreements. This straw-man argument is both incorrect and not determinative to the scope of the forum selection clause. *See Cape Flattery, 647 F.3d at 922* ("The fact that the tort claim would not have arisen **[*19]** 'but for' the parties' licensing agreement is not determinative [to the scope of the arbitration clause].") (internal quotation marks omitted).[3]

Here, Plaintiffs allege that Microsoft participated in a conspiracy which resulted in artificially depressed compensation for all employees at "high technology" companies, and restricted employee mobility because Microsoft and its co-conspirators agreed not to solicit each other's employees and restricted their hiring practices for certain types of employees. *See* Compl. ¶¶ 42-43. Whether Microsoft did in fact engage in a conspiracy that had the effect of depressing employee wages and restricting mobility does not require determining whether Plaintiffs' employment agreements were breached, or the scope of the rights and responsibilities of the parties under Plaintiffs' employment agreements. *See, e.g., Hopkins & Carley, ALC v. Thomson Elite, No. 10-CV-05806-LHK, 2011 U.S. Dist. LEXIS 38396 2011 WL 1327359, at *6 (N.D. Cal. Apr. 6, 2011)* (plaintiff's claims "arose under" contract where the claims required "interpretation of the obligations **[*20]** [defendant] owed [plaintiff] under the contract, the services [defendant] agreed to perform under the contract, and the product and services [plaintiff] contracted to receive"). Nor are Plaintiffs' claims related to the conditions under which Plaintiffs agreed to work for Microsoft. Rather, Plaintiffs' claims are based on Microsoft's alleged illegal conduct that is wholly independent of Plaintiffs' agreements not to seek employment with a competitor for a period of one year.

In sum, the Court concludes that the forum selection clauses in Plaintiffs' employment agreements do not apply to the instant litigation as Plaintiffs' claims do not "arise out of" the employment agreements. Microsoft has failed to show that Plaintiffs' claims "cannot be adjudicated without analyzing whether the parties were in compliance with the contract." *See* *Manetti-Farrow, 858 F.2d at 514*. As such, Plaintiffs' claims do not "arise out of" their employment agreements, and the forum selection clauses do not cover the instant dispute. As such, the burden of showing why transfer is warranted in this action remains with Defendant Microsoft, and the Court evaluates Microsoft's motion under the normal *§ 1404(a)* framework. *See* *Jones, 211 F.3d at 499*; *Atl. Marine, 134 S. Ct. at 582*.

1. Private Factors

Microsoft **[*21]** argues, in the alternative, that even if the forum selection clauses do not apply, the private factors under *§ 1404(a)* weigh in favor of transfer. Under *Jones*, the private factors to be considered in a *§ 1404(a)* analysis include, where relevant: (1) the location where relevant agreements were negotiated and executed; (2) the plaintiff's choice of forum; (3) the parties' contacts with the forum; (4) the contacts relating to the plaintiff's cause of action in the chosen forum; (5) the differences in the costs of litigation in the two forums; (6) the availability of compulsory process to compel attendance of unwilling non-party witnesses; and (7) the ease of access to sources of proof. *Jones, 211 F.3d at 498-99*.

[3] As the Ninth Circuit explained in *Manetti-Farrow, Inc. v. Gucci Am., Inc, 858 F.2d 509, 514 n.4 (9th Cir. 1988)*, "an agreement to arbitrate is actually a specialized forum selection clause," and the analysis of one is therefore applicable to the analysis of the other.

Relevant agreements: Here, Microsoft argues that the "relevant agreements" are Plaintiffs' employment agreements, which the parties entered into in the State of Washington. See ECF No. 26 at 10-11. However, as the Court concluded above, the "relevant agreements" at issue in this litigation are not Plaintiffs' employment agreements, but rather the alleged anti-solicitation and restricted hiring agreements. Plaintiffs argue in opposition to Defendant's motion that Defendant negotiated and entered into the anti-solicitation **[*22]** and restricted hiring agreements in Silicon Valley, i.e., within the geographic boundaries of this District. According to Plaintiffs, the anti-solicitation and restricted hiring agreements were "discussed, negotiated, agreed upon, performed, and enforced by Microsoft and others in California - particularly in Silicon Valley." Compl. ¶ 12. This factor therefore weighs against transfer.

Plaintiffs' Choice of Forum, the Parties' Contacts, and the Contacts Relating to Plaintiffs' Claims in the Chosen Forum: The Court concludes that these factors also weigh against transfer of venue. As to Plaintiffs' choice of forum in the Northern District of California, the Court agrees with Microsoft that Plaintiffs' choice is not entitled to the "substantial consideration generally given to a plaintiff's choice of forum." *Park v. Dole Fresh Vegetables, Inc., 964 F. Supp. 2d 1088, 1094 (N.D. Cal. 2013)*. As Microsoft notes, a plaintiff's choice of forum is afforded less deference where "(1) the plaintiff's venue choice is not its residence, (2) the conduct giving rise to the claims occurred in a different forum; (3) the plaintiff sues on behalf of a putative class; or (4) plaintiff's choice of forum was plaintiff's second choice." *Id.* (internal quotation marks and citations omitted); **[*23]** *see also Lou v. Belzberg, 834 F.2d 730, 739 (9th Cir. 1987)*. In the instant case, Plaintiffs bring suit on behalf of a putative class, a fact that detracts from the deference given to Plaintiffs' choice of venue. Neither Plaintiff is a resident of this District, though Plaintiff Ryan is a resident of California. These factors call for less deference. However, Plaintiffs allege that the anticompetitive conduct giving rise to their claims took place in the Northern District of California. Compl. ¶¶ 16, 12. Moreover, there is no indication that this District is Plaintiffs' second choice. *See, e.g., Glaxo Grp. Ltd. v. Genentech, Inc., No. 10-00675, 2010 U.S. Dist. LEXIS 46440, 2010 WL 1445666, at *4 (N.D. Cal. Apr. 12, 2010)* (plaintiffs first filed in Florida before filing in transferor district). These two factors would therefore weigh in favor of deferring to Plaintiffs' choice of forum. Balancing these factors, the Court finds that Plaintiffs' choice of forum is entitled to some deference, though not the "substantial deference" normally afforded to a plaintiff's choice of forum.

Moreover, in addition to Plaintiffs' decision to file the instant action in this District, the Court finds that the parties have substantial contacts with this District. Plaintiffs point to Microsoft's extensive contacts with this forum, including Microsoft's offices in Mountain View, **[*24]** CA and San Francisco, CA. ECF No. 37 at 3. While Microsoft argues that its corporate headquarters and the majority of its employees are located in Washington, Microsoft does not contest that it has extensive contacts with the Northern District of California, including the aforementioned corporate offices and several hundred California employees. ECF No. 37 at 7; ECF No. 40 at 7. Furthermore, Plaintiffs contend that the conspiracy at issue in the instant litigation is the "same anti-poaching agreement being litigated in the *In re High Tech* case," and involves the same conspirators. ECF No. 37 at 3. The Court therefore concludes that these factors weigh against transfer.

Differences in Costs, Compulsory Process, and Availability of Witnesses and Evidence: The Court finds that these factors weigh in favor of transfer. Here, Microsoft contends that its personnel management records are located in Washington. Greenall Dec. ¶ 3. These documents will be relevant evidence as to Microsoft's "recruiting, hiring, and compensation of the proposed class members." ECF No. 26 at 10. As Microsoft concedes, however, the availability of electronic records and methods of electronic conveyance have substantially **[*25]** reduced the costs of transferring documents from one locale to another. *See Park, 964 F. Supp. 2d at 1095*. This factor therefore only weighs slightly in favor of transfer.

Microsoft also argues that several potential witnesses, including Plaintiffs' former supervisors, and Microsoft's "Senior Personnel Management Manager," and "Staffing Director," live in Washington. ECF No. 26 at 9. According to Microsoft, two former employees that managed and supervised Plaintiffs' work at Microsoft would not be subject to compulsory process in this District. Plaintiffs dispute whether Plaintiffs' former supervisors' testimony will be relevant to whether Microsoft was part of a conspiracy to suppress employee compensation and restrict employee mobility. The Court agrees that this may be true. However, Plaintiffs' individual performances may be relevant to determining damages and Plaintiffs' ability to represent the class. Moreover, Plaintiffs concede that Microsoft and its witnesses would incur travel expenses and be inconvenienced by venue in the Northern District of California, and that certain nonparty witnesses may not be available for live testimony outside of Washington. Balancing the costs and inconvenience to potential **[*26]** witnesses and the possibility that some of Microsoft's purported witnesses are unlikely to offer relevant testimony, the Court concludes that these factors weigh somewhat in favor of transfer.

On balance, the Court finds that the private factors weigh slightly against transfer of this action to the Western District of Washington. Plaintiffs' choice of forum is entitled to some deference, and Plaintiffs have alleged that the relevant agreements implicated by Plaintiffs' state and federal antitrust claims were negotiated, entered into, and enforced within this District. Moreover, Microsoft has substantial contacts with this District, and Plaintiff Ryan is a resident of California. While the Court concludes that Microsoft has shown that certain witnesses would be inconvenienced by Plaintiffs' choice of venue and that the cost of litigation may be higher in this District, these factors alone are not determinative. In sum, the private factors weigh slightly against transfer.

2. Public Factors

In evaluating whether transfer would serve the interest of justice, a court may consider "public interest factors such as court congestion, local interest in deciding local controversies, conflicts of **[*27]** laws, and burdening citizens in an unrelated forum with jury duty." *Decker Coal, 805 F.2d at 843*.

Here, Plaintiffs contend that venue is appropriate in the instant District because of the related action *In re High-Tech*. As discussed above, there is substantial factual overlap between the instant case and the alleged conspiracies in *High-Tech*. Plaintiffs allege that Microsoft was a party to the same anti-solicitation agreements at issue in the *High-Tech* litigation. Based on this apparent factual overlap, the Court related the instant case to *High-Tech* on November 19, 2014. ECF No. 24. Microsoft disputes the veracity of Plaintiffs' allegations and contends that the record in *High-Tech* illustrates the implausibility of Plaintiffs' claims. *See* ECF No. 26 at 15. However, whether or not Plaintiffs will ultimately prevail on their claims does not impact whether it would best conserve judicial resources for this Court to retain jurisdiction over this action in light of its familiarity with the *High-Tech* litigation. The Court concludes that the significant overlap between Plaintiffs' claims in the instant action and the related action *High-Tech* weigh against transfer. *See, e.g., FTC v. Watson Pharms., Inc., 611 F. Supp. 2d 1081, 1089 (C.D. Cal. 2009)* (familiarity with underlying facts weighed **[*28]** against transfer). Additionally, court congestion weighs in favor of transfer, as Defendant argues that the Western District of Washington has "materially fewer pending cases" than the Northern District of California. However, in light of this District's familiarity with alleged underlying agreements, the Court concludes that court congestion is of less importance here.

Moreover, Microsoft argues that Washington has a significant interest in resolving controversies between its citizens, including Microsoft, putative class members, and Plaintiff Rau. ECF No. 26 at 14. However, as Plaintiffs note, Plaintiff Ryan is a citizen of California, and Plaintiffs have alleged that a number of potential class members reside in California. Furthermore, to the extent Plaintiffs contend that the relevant, alleged anticompetitive agreements were negotiated, entered into, and performed in this District, this would support California's interest in this action. On balance, the Court concludes that this factor is neutral.

Defendant also contends that Washington law governs Plaintiffs' employment agreements and will therefore be "central" to this dispute. As discussed above, the Court is not persuaded that **[*29]** the enforceability or terms of Plaintiffs' employment agreements are material to Plaintiffs' claims in the instant action. Moreover, Plaintiffs also assert claims under California law, and have alleged negative effects of Microsoft's alleged anticompetitive behavior within the State of California. Whether or not the Court has to apply California or Washington law, the Court notes that both the Western District of Washington and the Northern District of California are capable of applying both Washington and California law. *Cf. Foster v. Nationwide Mut. Ins. Co., No. 07-04928, 2007 U.S. Dist. LEXIS 95240, 2007 WL 4410408, at *6 (N.D. Cal. Dec. 14, 2007)* (noting that federal courts are "fully capable" of applying the laws of different states). While each District may be more familiar with the law of the state in which it sits, here the parties assert that both California and Washington state law may be implicated. As such, the Court finds that the "familiarity of each forum with the applicable law" factor neither weighs for nor against transfer.

In sum, the Court finds that the "interest of justice" would not be best served by transfer of the instant litigation to the Western District of Washington. While court congestion might weigh in favor of transfer, this District's familiarity with the related *High-Tech* **[*30]** litigation would also conserve judicial resources. The "applicable state law" and "local interest" factors are neutral, as both California and Washington have interests in this litigation, and both the Western District of Washington and Northern District of California are fully capable of applying either or both California and Washington law. Having evaluated these factors, the Court concludes that the public factors do not weigh in favor of transfer.

3. Conclusion

The Court therefore concludes that Defendant Microsoft has failed to carry its burden of showing that transfer of venue to the Western District of Washington is warranted in the instant action. Viewing the totality of the circumstances, the Court concludes that while this action could have been brought in the Western District of Washington, the interest of justice and the convenience of the parties do not call for transfer of the instant action to Washington. Accordingly, Microsoft's motion to transfer venue is denied.

III. MOTION TO DISMISS

In addition to its motion to transfer venue, Microsoft also moves to dismiss Plaintiffs' complaint. The Court turns to this motion below.

A. Legal Standard

1. *Rule 12(b)(6)*

Under *Federal Rule of Civil Procedure 12(b)(6)*, a party may move to dismiss **[*31]** a complaint for failure to state a claim upon which relief can be granted. Such a motion tests the legal sufficiency of a complaint. *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)*. In considering whether the complaint is sufficient, the Court must accept as true all of the factual allegations contained in the complaint. *Iqbal, 556 U.S. at 678*. However, the Court need not accept as true "allegations that contradict matters properly subject to judicial notice or by exhibit" or "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)* (citation omitted). While a complaint need not allege detailed factual allegations, it "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal, 556 U.S. at 678* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal, 556 U.S. at 678* (internal citation omitted).

2. *Rule 9(b)*

Claims sounding in fraud or mistake are subject to the heightened pleading requirements of **[*32]** *Federal Rule of Civil Procedure 9(b)*, which require that a plaintiff alleging fraud "must state with particularity the circumstances constituting fraud." *Fed. R. Civ. P. 9(b)*; *see Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009)*. To satisfy the heightened standard under *Rule 9(b)*, the allegations must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985)*. Thus, claims sounding in fraud must allege "an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007) (per curiam) (internal quotation marks and citation omitted). A plaintiff must set forth what is false or misleading about a statement, and why it is false." In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc), *superseded by statute on other grounds as stated in* Marksman Partners, L.P. v. Chantal Pharm. Corp., 927 F. Supp. 1297, 1309 (C.D. Cal. 1996). However, "intent, knowledge, and other conditions of a person's mind" need not be stated with particularity, and "may be alleged generally." Fed. R. Civ. P. 9(b).

3. Leave to Amend

If the court concludes that the complaint should be dismissed, it must then decide whether to grant leave to amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend "shall be freely given when justice so requires," bearing in mind "the **[*33]** underlying purpose of Rule 15 . . . [is] to facilitate decision on the merits, rather than on the pleadings or technicalities." Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (internal quotation marks and citation omitted). Nonetheless, a district court may deny leave to amend a complaint due to "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *See* Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 532 (9th Cir. 2008).

B. Discussion

Defendant moves to dismiss Plaintiffs' complaint on five grounds: (1) Plaintiffs' claims are time barred; (2) Plaintiffs fail to adequately allege facts supporting their antitrust claims; (3) Plaintiffs fail to plead facts to support the application of California law; (4) Plaintiffs have no right to restitution as a remedy under California's Unfair Competition Law ("UCL"); and (5) Plaintiffs lack standing to assert a claim under *California Business & Professions Code § 16600*. As the Court concludes that Plaintiffs' claims are time barred, the Court does not reach the remainder of Defendant's arguments.

Microsoft contends that Plaintiffs' claims are time barred. The parties agree that Plaintiffs' Sherman Act, Cartwright **[*34]** Act, and UCL claims are subject to a four year statute of limitations. The parties dispute: (1) whether Plaintiffs' *California Business & Professions Code § 16600* claim is subject to a four year statute of limitations; (2) when Plaintiffs' federal and state law claims accrued; and (3) whether Plaintiffs have sufficiently alleged fraudulent concealment so as to toll the statute of limitations.

1. Statutes of Limitations

As a threshold matter, the Court agrees that Plaintiffs' claims under the Sherman Act, Cartwright Act, and UCL are all subject to a four year statute of limitations. *See* 15 U.S.C. § 15b (Sherman Act); Cal. Bus. & Prof. Code § 16750.1 (Cartwright Act); Cal. Bus. & Prof. Code § 17208 (UCL). The statute of limitations provision in the Sherman Act provides:

> Any action to enforce any cause of action under section 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

15 U.S.C. § 15b. The statute of limitations provision under California's Cartwright Act is functionally identical:

> Any civil action to enforce any cause of action for a violation of this chapter shall be commenced within four years after the cause of action accrued. No cause of action barred under **[*35]** existing law on the effective date of the amendment of this section at the 1977-78 Regular Session of the Legislature shall be revived by such amendment.

Cal. Bus. & Prof. Code § 16750.1. California's UCL similarly provides for a four-year statute of limitations:

> Any action to enforce any cause of action pursuant to this chapter shall be commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section shall be revived by its enactment.

Cal. Bus. & Prof. Code § 17208 (UCL).

As to the *California Business & Professions Code § 16600* claim, Microsoft argues that *§ 16600* is part of the Cartwright Act and therefore subject to the Cartwright Act's four year statute of limitations. *See* *Cal. Bus. & Profs. Code §16750.1*. Microsoft relies on references to the Cartwright Act as "*California Business and Professions Code §§ 16600 et seq.*" *See* ECF No 41 at 2 (citing *ABC Int'l Traders v. Yamaha Corp. of Am., No. CV-86-7892, 1993 U.S. Dist. LEXIS 20947, at *20 (N.D. Cal. Jan. 27, 1993)*; *Cal. ex rel. Lockyer v. Mirant Corp., No. 2-1787, 2002 U.S. Dist. LEXIS 15733, at *17 (N.D. Cal. Aug. 6, 2002))*. However, that part of the California Business & Professions Code, part 2 of division 7 (titled "General Business Regulations"), includes the Cartwright Act, *§§ 16700-16770*, the Unfair Practices Act, *§§ 17000-17101*, and the Unfair Competition Act, *§§ 17200-17210*, in addition to other statutory restrictions on covenants not to compete.

Moreover, the language of *§ 16750.1*, the Cartwright **[*36]** Act's statute of limitations, expressly provides that "[a]ny civil action to enforce any cause of action for *a violation of this chapter* shall be commenced within four years after the cause of action accrued." The chapter to which *§ 16750.1* refers is "Chapter 2. Combinations in Restraint of Trade," which includes *§§ 16700-16770*, i.e., the Cartwright Act. *See* *Cal. Bus. & Profs. Code § 16750.1*. As Microsoft cites no authority actually concluding that the express language of *§ 16750.1* has been interpreted to apply to "Chapter 1. Contracts in Restraint of Trade," which includes *§§ 16600-16607*, the Court concludes that *§ 16600* is neither a part of the Cartwright Act nor governed by the Cartwright Act's four year statute of limitations.

However, Plaintiffs are incorrect in stating that there is no applicable statute of limitations for *§ 16600* whatsoever. *Section 343* of the California Code of Civil Procedure provides that "[a]n action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued." While *§ 16750.1* of the Cartwright Act may not apply to Plaintiffs' *§ 16600* claim, the Court finds no reason why California's catch-all statute of limitations provision in California Code of Civil Procedure *§ 343* would not apply to this action. *See, e.g.,* *Bd. of Trustees of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc., 583 F.3d 832, 846 (Fed. Cir. 2009)* (noting that **[*37]** *§ 343* is a "residuary four-year limitation period to all causes of action that do not fall under specific statutes of limitation").

In sum, the Court concludes that each of Plaintiffs' four claims is subject to a four year statute of limitations.

2. Accrual Rule

As the parties separately dispute when Plaintiffs' federal and state law claims accrued, the Court begins by addressing Plaintiffs' federal Sherman Act claim before turning to Plaintiffs' state law claims.

a. Sherman Act

Under the Sherman Act, Plaintiffs' claims began to accrue at the time Microsoft allegedly injured Plaintiffs. *See* *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)* ("Generally, [an antitrust cause] of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. . . ."). As the Ninth Circuit explained in *Beneficial Standard Life Insurance Co. v. Madariaga, 851 F.2d 271, 274-75 (9th Cir. 1988)*, "In [antitrust] actions governed by *15 U.S.C. § 15b*, the plaintiff's knowledge is generally irrelevant to accrual, which is determined according to the date on which injury occurs." Plaintiffs concede, as they must, that the "injury rule" of accrual applies to their Sherman Act claims. *See also* *In re Animation Workers Antitrust Litig., __ F. Supp. 2d. __, 2015 U.S. Dist. LEXIS 44922, 2014 WL 1522368, at *10-11 (N.D. Cal. April 3, 2015)*.

Here, Plaintiffs' claim began to accrue in 2007, when Plaintiff Ryan worked for Microsoft as a Senior Product Manager, and Plaintiff **[*38]** Rau worked for Microsoft as a Lead Systems Engineer Senior. Compl. ¶¶ 16, 18. Plaintiffs further allege that Microsoft entered into the anti-solicitation agreement and restricted hiring agreement "around May 2007." *Id.* ¶¶ 28, 36. Consequently, the four year statute of limitations ran on Plaintiffs' claim in 2011. As Plaintiffs filed their complaint on October 16, 2014, Plaintiffs' claim is time barred unless Plaintiffs have sufficiently alleged that their claim falls within two narrow statute of limitations exceptions or that a tolling doctrine applies. The Court first addresses the applicability of: (1) an exception for unascertainable damages; and (2) an exception for "continuing violations" by Defendant. The Court then addresses whether Defendant's alleged fraudulent concealment should toll the statute of limitations.

First, Plaintiffs contend that their Sherman Act claim is subject to the narrow exception for unascertainable damages. *See* *Zenith, 401 U.S. at 340*. As the Ninth Circuit has explained, if "harm is uncertain or speculative at the time of the antitrust violation, the statute of limitations period begins on the date that the plaintiff's damages first accrued and became ascertainable." *Samsung Elecs. Co., Ltd. v. Panasonic Corp., 747 F.3d 1199, 1204 (9th Cir. 2014)* (internal **[*39]** quotation marks omitted). Here, Plaintiffs argue that their damages were "unascertainable" until May 2013, when Plaintiffs first discovered Microsoft's alleged involvement in the anti-solicitation and restricted hiring agreements, because Plaintiffs "did not know" the terms, existence, parties, or scope of the agreements. ECF No. 38 at 6. This argument fails as a matter of law.

As an initial matter, Plaintiffs misunderstand the scope of the speculative damages exception. The unascertainable damages exception is not related to whether Plaintiffs were aware of the existence of their injuries. *See* P. Areeda and H. Hovencamp, ***Antitrust Law*** § 320d ("The question of whether there is a right to recovery is not to be confused with the difficulty in ascertaining the scope or extent of the injury."). Instead, the unascertainable damages exception addresses situations where it is not certain that a plaintiff has been injured at the time a defendant commits the relevant anticompetitive act. More specifically, "the key question in determining whether damages were overly speculative such that recovery would be unavailable at the time of the initial act is whether the existence of the harm is determinable, **[*40]** not the specific dollar value of that harm." *Samsung, 747 F.3d at 1204* (citing *Pace, 813 F.2d at 240*). That Plaintiffs "did not 'know for certain' whether or to what extent they had been damaged prior to May 2013," does not show Plaintiffs would not have been able to allege the fact of damages at the time Microsoft allegedly entered into the anticompetitive agreements.

Plaintiffs rely on *Samsung*, but that case is distinguishable. In *Samsung*, the Ninth Circuit concluded that the unascertainable damages exception applied to Samsung's claims because at the time the defendants entered into the illegal conspiracy, whether or not Samsung would actually suffer damages was too speculative to support a claim. *Samsung, 747 F.3d at 1205*. More specifically, the Ninth Circuit noted that at the time the defendants allegedly conspired and entered into their anticompetitive agreement in 2003, Samsung was not in the same market as the defendants, and no one could have predicted that Samsung would enter that market in late 2006. *Id. at 1202, 1204-05*. As such, Samsung's damages were unascertainable in 2003, that is, at the time defendants entered into the alleged anticompetitive conspiracy. Here, in contrast, at the time of the alleged "initial wrong," e.g., Microsoft becoming a party to the **[*41]** anti-solicitation and restricted hiring agreements in 2007, Plaintiffs allegedly suffered ascertainable damages as Microsoft employees who were injured by Microsoft's alleged illegal conduct. Unlike in *Samsung*, where Samsung could not have alleged an actual injury in 2003 when the defendants entered into their conspiracy, here Plaintiffs could have alleged actual damages and injury in 2007 when Microsoft allegedly entered into the anti-solicitation and restricted hiring agreements. *See id.* That Plaintiffs were unaware of the scope or precise amount of damages in 2007 is not relevant to whether Plaintiffs suffered an ascertainable injury in 2007. *See* *Samsung, 747 F.3d at 1204*; *Pace, 813 F.2d at 240*.

The Court therefore concludes that Plaintiffs' claims do not fall within the unascertainable damages exception.

Second, Plaintiffs further argue that even if their claim would otherwise be time barred, Microsoft engaged in "continuing violations" that would render Plaintiffs' claim timely. Defendant argues that Plaintiffs have failed to allege any facts showing that Defendant engaged in any "overt acts" that would restart the statute of limitations.

Under the "continuing violation" doctrine, "each overt act that is part of the [antitrust] **[*42]** violation and that injures the plaintiff . . . starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times." *Klehr v. A.O Smith Corp., 521 U.S. 179, 189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)* (internal citations and quotations omitted); *Pace Indus. v. Three Phoenix Co., 813 F.2d 234, 237 (9th Cir. 1987)* ("A continuing violation is one in which the plaintiff's interests are repeatedly invaded and a cause of action arises each time the plaintiff is injured."). In the Ninth Circuit, an overt act restarts the statute of limitations if it: (1) is "a new and independent act that is not merely a reaffirmation of a previous act"; and (2) "inflict[s] new and accumulating injury on the plaintiff." *Pace, 813 F.2d at 237*; *see also* *Samsung, 747 F.3d at 1202-03*.

Here, the Court concludes that the bald assertion that "Microsoft's conspiracy was a continuing violation through which Microsoft repeatedly invaded Plaintiffs' and Plaintiff Classes' interests by adhering to, enforcing, and reaffirming the anticompetitive agreements described herein" is insufficient to show a continuing violation. *See* Compl. ¶ 55. A review of the specific factual allegations in Plaintiffs' complaint reveals no alleged wrongful communications or specific conduct during the limitations period. Other than the two allegations that Microsoft entered into the anti-solicitation **[*43]** and restricted hiring agreements in or around May 2007, the complaint is bereft of *any* dates or details with regards to Microsoft's specific conduct. *See generally* Compl. There are no allegations of any new or independent actions taken by the Defendants after October 16, 2010, i.e., within four years of the filing date of this complaint, that caused Plaintiffs any new or accumulating injury. *See* *Pace, 813 F.2d at 237*. This is not entirely surprising given the complaint's conspicuous absence of specific factual allegations regarding Microsoft's alleged conduct before, during, or after the limitations period, with the exception of the two allegations that Microsoft entered into the anti-solicitation and restricted hiring agreements in May 2007.

In opposition, Plaintiffs rely on their allegations that Microsoft "communicated by phone and e-mail and through in-person meetings to further the conspiracy," and the use of the present tense in describing the effect of the alleged anti-solicitation and restricted hiring agreements. *See* ECF No. 38 at 15. The Court finds these allegations woefully lacking. Plaintiffs have pled no facts supporting their allegations. At a minimum, under *Twombly*, a complaint "must contain **[*44]** sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal, 556 U.S. at 678*. Plaintiffs offer no facts detailing who Microsoft's alleged co-conspirators were, much less any facts showing when, where, or with whom these alleged phone calls, emails, and in-person meetings took place. Similarly, allegations that the anti-solicitation agreement "suppresses wages," or that "[a]s additional companies joined the conspiracy . . . competition among participating companies for skilled labor continued to drop," do not show that Microsoft took any overt act within the limitations period. As a threshold matter, Plaintiffs need to do more than merely allege a continuing violation—they must also allege an overt act:

> A continuing violation is one in which the plaintiff's interests are repeatedly invaded and a cause of action arises each time the plaintiff is injured. *However, even when a plaintiff alleges a continuing violation, an overt act by the defendant is required* to restart the statute of limitations and the statute runs from the last overt act.

Pace, 813 F.2d at 237 (emphasis added). Plaintiffs' bare allegation that their interests were "repeatedly invaded" is therefore insufficient as **[*45]** a matter of law. Here, the Court finds that Plaintiffs have failed to plead that Microsoft engaged in an overt act, e.g., that Microsoft engaged in a "new and independent act that is not merely a reaffirmation of a previous act," which "inflict[ed] new and accumulating injury" on Plaintiffs. *Id. at 238*.

In sum, Plaintiffs have failed to allege a continuing violation.

Third, Plaintiffs also argue that the statute of limitations on their Sherman Act claim should be tolled under the fraudulent concealment doctrine. Defendant contends that Plaintiffs' allegations are insufficient under *Rule 9(b)*, Plaintiffs have failed to plead diligence, and Plaintiffs were on inquiry notice of their claims.

"A statute of limitations may be tolled if the defendant fraudulently concealed the existence of a cause of action in such a way that the plaintiff, acting as a reasonable person, did not know of its existence." *Hexcel Corp. v. Ineos Polymers, Inc., 681 F.3d 1055, 1060 (9th Cir. 2012)*. The plaintiff bears the burden of pleading and proving fraudulent concealment. *Id.*; *see also* *Conmar v. Mitsui & Co. (U.S.A.), Inc., 858 F.2d 499, 502 (9th Cir. 1988)*. To plead fraudulent concealment, the plaintiff must allege that: (1) the defendant took affirmative acts to mislead the plaintiff; (2) the plaintiff did not have "actual or constructive knowledge of the facts giving rise to its **[*46]** claim" as a result of defendant's affirmative acts; and (3) the plaintiff acted diligently in trying to uncover the facts giving rise to its claim. *Hexcel, 681 F.3d at 1060*; *see also* *Conmar, 858 F.2d at 502*; *Beneficial Life Ins., 851 F.2d at 276*. Moreover, allegations of fraudulent concealment must be pled with particularity. *Conmar, 858 F.2d at 502*.

As a threshold matter, Plaintiffs contend that they do not need to plead affirmative acts of concealment because Microsoft had a duty to disclose its participation in the alleged anticompetitive conspiracy to Plaintiffs. *See* ECF No. 38 at 7 ("Defendant absolutely had a duty to disclose to Plaintiffs its unlawful Agreement . . . ."). In the Ninth Circuit, "passive concealment of information is not enough to toll the statute of limitations, unless the defendant had a fiduciary duty to disclose information to the plaintiff." *Conmar, 858 F.2d at 505* (internal citation omitted). Plaintiffs rely on a single case, *Harris v. Duty Free Shoppers Ltd. Partnership, 940 F.2d 1272, 1276 (9th Cir. 1991)*, for the proposition that Microsoft owed Plaintiffs, and all of Microsoft's employees, a fiduciary duty. *Harris*, however, is inapposite. In *Harris*, the Ninth Circuit held that tour guides did not owe fiduciary duties to tourists under California law. *Id. at 1275*. Moreover, as a general matter, the fact of an employer-employee relationship alone is insufficient to create **[*47]** a fiduciary relationship. *See, e.g.,* *Salsgiver v. Am. Online, Inc., 32 F. App'x 894 (9th Cir. 2002)* (citing *O'Dell v. Freightliner Corp., 10 Cal. App. 4th 645, 659, 12 Cal. Rptr. 2d 774 (Ct. App. 1992))* ("[T]here is generally no fiduciary relationship between employee and employer."); *see also* *Amid v. Hawthorne Comm. Medical Grp., Inc., 212 Cal. App. 3d 1383, 1391, 261 Cal. Rptr. 240 (Ct. App. 1989)* ("A bare employee-employer relationship does not create a confidential relationship."). Plaintiffs offer no other argument or authority for the proposition that Microsoft owes fiduciary duties to Plaintiffs, much less to all of Microsoft's employees. As Plaintiffs have provided no basis for the Court to conclude that Defendant owed Plaintiffs fiduciary duties, the Court concludes that Microsoft had no obligation to affirmatively disclose its alleged illicit conduct.

Moreover, having reviewed Plaintiffs' complaint, the Court concludes that Plaintiffs' allegations with respect to Microsoft's alleged fraudulent concealment of Plaintiffs' claims fail to pass muster under *Rule 9(b)*. To satisfy the heightened standard under *Rule 9(b)*, Plaintiffs must allege "an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." *Swartz, 476 F.3d at 764 (9th Cir. 2007)*. Plaintiffs fail to allege any facts whatsoever showing the "who, what, where, when, and how" of Microsoft's alleged fraudulent concealment. For example, Plaintiffs allege **[*48]** that "Microsoft also provided pretextual, incomplete, or materially false and misleading explanations for hiring, recruiting, and compensation decisions made under the conspiracy." Compl. ¶ 59. Plaintiffs do not allege when, where, or to whom Microsoft allegedly provided these false and misleading explanations, or the content of these allegedly misleading explanations. This conclusory allegation devoid of factual content does not satisfy *Rule 12(b)(6)*'s pleading standard, much less *Rule 9(b)*'s heightened pleading standard. In the absence of any factual allegations regarding Microsoft's alleged wrongful conduct in fraudulently concealing the existence of Plaintiffs' claims, the Court concludes that Plaintiffs have failed to adequately allege an essential element of fraudulent concealment. *See* *Hexcel, 681 F.3d at 1060*.

In sum, the Court finds that Plaintiffs' Sherman Act claim is time barred, and that Plaintiffs have failed to adequately allege an applicable exception to the normal accrual rule or a plausible tolling theory. This dismissal is without prejudice, as the Court concludes that amendment would not necessarily be futile, as Plaintiffs may be able to allege sufficient facts to support their claims of continuing violations **[*49]** and equitable tolling. *See* *Leadsinger, 512 F.3d at 532*.

b. Cartwright Act, UCL, and *California Business & Professions Code § 16600*

While Plaintiffs concede that the injury rule applies to Sherman Act claims, Plaintiffs contend that the Ninth Circuit has applied the "discovery rule" to Cartwright Act and UCL claims. Plaintiffs rely on *Oliver v. SD-3C LLC, 751 F.3d 1081, 1086-87 (9th Cir. 2014)*, and *Samsung Electronics Co., Ltd. v. Panasonic Corp., 747 F.3d 1199, 1201-02 (9th Cir. 2014)*. According to Plaintiffs, their California state law claims did not begin to accrue until they "discovered" their claims on May 17, 2013, rather than in May 2007 when Microsoft allegedly entered into the anticompetitive agreements and injured the Plaintiffs. Compl. ¶ 57.

As a general rule, under California law the default accrual rule is the "last element rule," where a claim accrues "'when [it] is complete with all of its elements'—those elements being wrongdoing, harm, and causation." *Pooshs v. Philip Morris USA, Inc., 51 Cal. 4th 788, 797, 123 Cal. Rptr. 3d 578, 250 P.3d 181 (2011)* (quoting *Norgart v. Upjohn Co., 21 Cal. 4th 383, 397, 87 Cal. Rptr. 2d 453, 981 P.2d 79 (1999))*. The "discovery rule" is an exception to the common law accrual rule. *Id.* In California, the discovery rule postpones accrual of a claim until the plaintiff discovers, or has reason to discover, the cause of action." *Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1024 (9th Cir. 2008)* (internal quotation marks omitted). The discovery rule "may be expressed by the Legislature or implied by the courts." *Norgart, 21 Cal. 4th at 397*. By statute, the discovery rule applies to fraud actions. *See E-Fab, Inc. v. Accountants, Inc. Servs., 153 Cal. App. 4th 1308, 1318, 64 Cal. Rptr. 3d 9 (Ct. App. 2007)*.

As an initial **[*50]** matter, the Court concludes that neither *Oliver* nor *Samsung* applied the discovery rule to California antitrust and unfair competition claims, much less to *§ 16600* claims.[4] Plaintiffs overstate the breadth of the Ninth Circuit's decisions in *Oliver* and *Samsung*. In both Oliver and Samsung, the Ninth Circuit concluded that the district court had erred in finding that the plaintiffs' federal antitrust claims were time barred. *See Oliver, 751 F.3d at 1086-87*; *Samsung, 747 F.3d at 1204-05*. As the district court had assumed that resolution of the federal claims was dispositive as to the plaintiffs' California antitrust and unfair competition claims, the district court had not specifically addressed the timeliness of the state law claims. *See Oliver, 751 F.3d at 1087*. The Ninth Circuit vacated and remanded for the district court to "apply the California Supreme Court's [intervening] decision in *Aryeh v. Canon Business Solutions, Inc., 55 Cal. 4th 1185, 151 Cal. Rptr. 3d 827, 292 P.3d 871 (2013)*[,] in determining whether Plaintiffs' Cartwright Act claim was timely filed." *Id.* The Ninth Circuit did not hold that the discovery rule applied to the plaintiffs' state law claims. Instead, the Ninth Circuit noted that *Aryeh* had changed the law in California by holding that interpretations of federal ***antitrust law*** were only instructive and not conclusive with respect to state ***antitrust*** **[*51]** ***law***. *Samsung, 747 F.3d at 1205 n.4*.

Plaintiffs further assert that *Aryeh* held that the discovery rule applies to their Cartwright Act, UCL, and § 16600 claims. *See* ECF No. 38 at 5. However, the California Supreme Court did not hold so broadly in *Aryeh*. The *Aryeh* Court specifically addressed the issue of whether the "common law theory of continuous accrual" could "apply to actions under the [UCL]." *292 P.3d at 873*. The *Aryeh* Court began with the premise that the traditional common law accrual rule is the "last element" accrual rule, where "the statute of limitations runs from the occurrence of the last element essential to the cause of action." *Id. at 875* (internal quotation marks omitted). In deciding whether equitable exceptions to the "last element rule" apply to the UCL, the *Aryeh* Court held only that the UCL does not categorically *forbid* the application of equitable exceptions like the discovery rule under appropriate circumstances. *See id. at 878-79*. The *Aryeh* Court did not hold that the UCL *requires* application of particular equitable exceptions to every cause of action. *See id.* More specifically, the *Aryeh* court explained that the "UCL is a chameleon," and that "a UCL claim in some circumstances **[*52]** might support the application of one or another exception, and in others might not." *Id. at 878* (internal citations omitted). Accordingly, "the nature of the right sued upon and the circumstances attending its invocation control the point of accrual." *Id.* (internal quotation marks and citation omitted).

Here, the Court finds that Plaintiffs have failed to identify any circumstances warranting a deviation from the default common law last element accrual rule. *See id. at 878*. Unlike the exemplar UCL claims involving fraudulent misrepresentations and deceptive practices, which the Aryeh Court identified as instances where equitable exceptions might apply, Plaintiffs' UCL claim appears to rely solely on Microsoft's alleged anticompetitive conduct. *See id.*; Compl. ¶¶ 77-84. More specifically, Plaintiffs allege that Microsoft entered into an unlawful trust in restraint of trade and commerce as the basis of their UCL claim. *See* Compl. ¶¶ 69-72. Plaintiffs have presented no argument or authority as to why the circumstances of Plaintiffs' particular UCL claim support the application of any equitable exception, including the delayed discovery rule. As the "last element" accrual rule functions as the

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[4] Plaintiffs fail to mention that neither *Oliver* nor *Samsung* involved ***California Business & Professions Code § 16600*** claims.

default **[*53]** accrual rule under California law, and Plaintiffs have failed to make any showing as to why the Court should deviate from the default rule, the Court concludes that Plaintiffs' UCL claim began to accrue in 2007 and is now time barred.

Plaintiffs cite only to *Aryeh* in support of their assertion that the discovery rule also applies to their Cartwright Act and *§ 16600* claims. As discussed above, however, *Aryeh* addressed only whether certain equitable exceptions could apply to UCL claims such as UCL claims based on misrepresentation and fraud. Moreover, the *Aryeh* Court specifically rejected the notion that Cartwright Act claims are equivalent to unfair competition claims under the UCL, and the California Supreme Court limited its analysis to UCL claims. *See* *id. at 877-78*. Plaintiffs' reliance on *Aryeh* is therefore misplaced.

In California, the default accrual rule is the "last element rule." *Id. at 875*; *see also* *Consortium Info. Servs., Inc. v. Experian Info. Solutions, Inc., No. G043781, 2011 Cal. App. Unpub. LEXIS 3511 , 2011 WL 1782114, at 5 (Cal. Ct. App. May 10, 2011)* (applying last element rule to Cartwright Act claim). Under that rule, Plaintiffs' claims began to accrue in 2007, when Microsoft allegedly injured Plaintiffs by entering into anticompetitive conspiracies that had the effect **[*54]** of suppressing Plaintiffs' wages and restricting their mobility. Compl. ¶¶ 28, 36, 44. At that point, the elements of Plaintiffs' claims, "wrongdoing, harm, and causation," were complete. *See* *Pooshs, 51 Cal. 4th 788, 797, 123 Cal. Rptr. 3d 578, 250 P.3d 181*.

The Court therefore concludes that all of Plaintiffs' state law claims began to accrue in 2007 and are time barred. Moreover, Plaintiffs have failed to adequately allege an equitable exception or tolling doctrine that would render Plaintiffs' state law claims timely. As such, the Court grants Microsoft's motion to dismiss Plaintiffs' Cartwright Act, UCL, and § 16600 claims. This dismissal is without prejudice, as the Court concludes that amendment would not necessarily be futile, as Plaintiffs may be able to allege sufficient facts to support their claims of continuing violations and equitable tolling. *See* *Leadsinger, 512 F.3d at 532*.

3. Conclusion

In sum, the Court finds that Plaintiffs' Sherman Act, Cartwright Act, UCL, and *California Business & Professions Code § 16600* claims are time barred. As Plaintiffs have failed to adequately allege an applicable exception or tolling doctrine, the Court grants Defendant's motion to dismiss Plaintiff's complaint.

IV. CONCLUSION

For the foregoing reasons, the Court DENIES Defendant's motion to transfer venue and GRANTS Defendant's motion to dismiss. Should Plaintiffs elect **[*55]** to file an Amended Complaint curing the deficiencies identified herein, Plaintiffs shall do so within 30 days of the date of this Order. Failure to meet the 30-day deadline to file an Amended Complaint or failure to cure the deficiencies identified in this Order will result in a dismissal with prejudice. Plaintiffs may not add new causes of action or parties without leave of the Court or stipulation of the parties pursuant to *Federal Rule of Civil Procedure 15*.

IT IS SO ORDERED.

Dated: April 10, 2015

/s/ Lucy H. Koh

LUCY H. KOH

United States District Judge

[Aetna, Inc. v. Blue Cross Blue Shield of Mich.](#)

United States District Court for the Eastern District of Michigan, Southern Division

April 14, 2015, Decided; April 14, 2015, Filed

Case No. 11-15346

Reporter

2015 U.S. Dist. LEXIS 48534 *; 2015-1 Trade Cas. (CCH) P79,139; 2015 WL 1646464

AETNA, INC., Plaintiff, v. BLUE CROSS BLUE SHIELD OF MICHIGAN, Defendant.

Prior History: *Aetna Inc. v. Blue Cross Blue Shield of Mich., 2015 U.S. Dist. LEXIS 41972 (E.D. Mich., Mar. 31, 2015)*

Core Terms

contracts, motion in limine, nonprofit, lawsuits, argues, References, antitrust, asserts, rates, exclude evidence, mission, conspiracy, witnesses, damages, effects, harmed, cases, mutual, anticompetitive, monopoly, treble, changes, terms, personal knowledge, Sherman Act, calculations, depositions, premiums, hearsay, parties

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For Jeffrey Connolly, Interested Party: Daniel J. McGlynn, McGlynn Associates, PLC, Troy, MI USA.

Judges: Denise Page Hood, United States District Judge.

Opinion by: Denise Page Hood

Opinion

ORDER REGARDING VARIOUS MOTIONS IN LIMINE

I. BACKGROUND

This matter **[*2]** is before the Court on various Motions in Limine filed by the parties. Briefs have been filed and the Court now issues its order.

Aetna filed a two-count Complaint against Blue Cross alleging: Unlawful Agreement in Violation of *Sherman Act § 1* (Count One); and, Violation of *M.C.L. § 445.772*, Michigan Antitrust Reform Act (Count Two). Aetna alleges that Blue Cross, the dominant provider of health insurance and administrative services to managed care plans in Michigan, has implemented a scheme to use ever-increasing premiums from the patients and employers it serves in order to protect its dominant position and thwart competition from Aetna and other competitors. (Comp., P 1) Aetna claims that Blue Cross entered into exclusionary contracts with hospitals under which Blue Cross agreed to pay hospitals more money if the hospitals increased the rates they demanded to treat patients covered by its competitors' health plans. (*Id.*) Aetna claims that Blue Cross' use of most favored nations clauses ("MFNs") reduced competition.

II. ANALYSIS

A. Motion in Limine Standard of Review

The Federal Rules of Evidence does not explicitly authorize in limine rulings, but the practice was developed pursuant to a district court's **[*3]** inherent authority to manage the course of trials. *Luce v. United States, 469 U.S. 38, 41, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984)*. It is within the district court's discretion to make an in limine ruling on evidentiary matters, but there is no right to an in limine ruling. *Huddleston v. United States, 485 U.S. 681, 688-89, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988)*. A motion in limine ruling is nothing more than a preliminary opinion which allows the parties to formulate trial strategy. *United States v. Yannott, 42 F.3d 999, 1007 (6th Cir. 1994)*. The trial court is not bound by an in limine ruling and can change its determination during the trial where sufficient facts have developed to warrant the change or even if nothing unexpected happens at trial. *Id.*; *Luce, 469 U.S. at 41-42*). In analyzing a motion in limine, the trial court first considers issues of relevance, admissibility and prejudice.

Rule 401 of the Rules of Evidence defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." The standard set forth in *Rule 401* is a liberal one. *Churchwell v. Bluegrass Marine, Inc., 444 F.3d 898, 905 (6th Cir. 2006)*. *Rule 402* states that "all relevant evidence is admissible, except as otherwise provided ..." and that "evidence which is not relevant is not admissible." *Rule 403* states that "although relevant, evidence may be excluded if its probative value is substantially outweighed **[*4]** by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Trial courts have broad discretion in determining whether to admit evidence based on considerations of relevance, materiality and prejudice. *United States v. Jackson-Randolph, 282 F.3d 369, 376 (6th Cir. 2002)*.

B. Evidence Required in *Antitrust Law*

The Sherman Act, *15 U.S.C. § 1*, provides that a contract, combination in the form of trust, *or* conspiracy, in restraint of trade or commerce is illegal. *15 U.S.C. § 1*. *Section 1* has been interpreted to prohibit "unreasonable agreements in restraint of trade. *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. *Section 1* provides that a contract, combination in the form of trust, *or* conspiracy, in restraint of trade or commerce is illegal. *15 U.S.C. § 1*. A plaintiff must prove that defendant 1) contracted, combined or conspired among each other, that such 2) unreasonably restrained trade in the relevant market. *Nat'l Hockey League Players' Assoc. v. Plymouth Whalers Hockey Club, 325 F.3d 712, 718 (6th Cir. 2003)*; *Expert Masonry, Inc. v. Boone County, Ky, 440 F.3d 336, 342 (6th Cir. 2006)*. The antitrust plaintiff "must show (1) that the alleged violation tends to reduce competition in some market and (2) that the plaintiff's injury would result from a decrease in that competition rather than from some other consequence of the defendant's actions." *Tennessean Truckstop v. NTS, Inc., 875 F.2d 86,* 88 (6th Cir. 1989). A private antitrust plaintiff, in addition to having to **[*5]** show injury-in-fact and proximate cause, must eventually prove "antitrust injury." *In re Cardizem CD Antitrust Litigation, 332 F.3d 896, 909 (6th Cir. 2003)*. "Antitrust injury" is (1) "injury of the type the antitrust laws were intended to prevent" and (2) injury "that flows from that which makes defendants' acts unlawful." *Id.* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. The relevant antitrust laws "were enacted for the protection of *competition* not *competitors*." *Id. at 488 (1977)*; *Indeck Energy Servs., Inc. v. Consumers Energy Co., 250 F.3d 972, 977 (6th Cir. 2000)*. A plaintiff's showing of harm only as to its capacity as a competitor in the marketplace, not as a defender of marketplace competition, is insufficient to establish an antitrust claim. *Valley Products Co., Inc. v. Landmark, 128 F.3d 398, 403 (6th Cir. 1997)*.

C. Blue Cross' Motion in Limine to Exclude At Trial Aetna's Written Expert Reports (Doc. No. 317)

Blue Cross seeks to exclude two written expert reports submitted by Aetna authored by Dr. Christopher Vellturo and Dr. Gustavo Bamberger asserting these reports are hearsay. No written opposition was filed to this motion by Aetna.

Generally, the written report of expert witnesses prepared in anticipation of trial are inadmissible because they are considered hearsay. *Fed. R. Evid. 702*, *703*, *1006*; *Engebretsen v. Fairchild Aircraft Corp., 21 F.3d 721, 729 (6th Cir. 1994)*. The expert reports will be excluded at trial and Blue Cross' Motion in Limine to Exclude at Trial Aetna's Written Expert Reports is granted.

D. Blue Cross' Motion in Limine [*6] to Exclude Evidence of Supposed Antitrust or Other Legal Concerns (No. 318)

Blue Cross seeks to exclude evidence of and all references to any "antitrust concerns" or other legal concerns relating to the use of MFNs that Michigan hospital executives or Blue Cross witnesses expressed or considered, including but not limited to: 1) internal Blue Cross communications; 2) internal hospital communications; and 3) communications between Blue Cross witnesses and hospital executives. Blue Cross claims that such evidence lacks probative value since these opinions do not answer the question of whether the conduct was illegal. Even if these documents or witnesses' testimony had probative value, prejudice to Blue Cross far outweighs any probative value of this evidence. Blue Cross claims that the mere expression of "antitrust concerns" would confuse and mislead the jury that there would be a legal basis for that concern.

Aetna responds that the statements Blue Cross seeks to exclude are central to explain to the jury that even though numerous parties raised concerns that these contracts violated federal antitrust laws, that Blue Cross continued to pursue these contracts in the face of these concerns. **[*7]** Aetna claims these concerns speak volumes about Blue Cross' intentions and the importance of these contracts in Blue Cross' eyes. Aetna asserts that this evidence is relevant to show that Blue Cross had to pay millions of dollars to hospitals to accept the MFNs because these hospitals resisted the contracts based on antitrust concerns. The evidence is also relevant according to Aetna because it casts doubt on the credibility of testimony that Blue Cross will likely present at trial, that the MFNs were adopted with the support of hospitals or to further Blue Cross' "social mission." Aetna argues that this evidence shows that the witnesses were well aware of the risk. Aetna claims that this evidence also goes to the issue of Blue Cross' market power in that despite the risks, Blue Cross had the ability to control the behavior of the hospitals. Aetna asserts that the evidence also shows Blue Cross' coercive behavior which undermines Blue Cross' argument that the MFNs were procompetitive. Aetna claims that the jury is entitled to know the setting of the case and how the MFNs came into effect.

Blue Cross replies that Aetna wants the jury to conclude that because some hospitals and their **[*8]** lawyers questioned whether MFNs raised issues under the antitrust laws, the MFNs must have been illegal and had anticompetitive effects. Blue Cross claims this is improper and Aetna's various arguments as to why such evidence might be relevant should fail. Blue Cross argues that it is the Court's role to instruct the jury as to the law, and the jury's role to determine the relevant facts. Blue Cross argues that Aetna should not be allowed to obscure or usurp either or both of those functions through non-party lawyer and/or hospital remarks expressing "antitrust concerns" about MFNs before the MFNs went into effect. Blue Cross asserts that evidence of antitrust concerns does not demonstrate anticompetitive effect and whether the MFNs actually had such anticompetitive effect. Blue Cross claims that Aetna's conspiracy arguments and rule of reason arguments are not relevant in this case because there are no allegations of conspiracy and the rule of reason arguments apply to monopoly and RICO cases. Aetna's argument in seeking to allow the evidence is premised on the theory that hospital lawyers and executives knowingly entered into illegal contracts because they were coerced by Blue Cross. **[*9]** The hospital executives' concerns demonstrate that they were doing their jobs during the negotiations of the contracts.

The Court finds that the proposed evidence sought by Aetna to be admitted—documents as to a hospital's concern about antitrust violations—is not relevant to the issues to be tried by the jury. These concerns were raised during the various negotiations between Blue Cross and the hospitals. The issue is whether the contracts entered into by Blue Cross and the hospitals, with the MFN provisions, reduced the competition in some markets and whether Aetna's injury, if any, resulted from a decrease in that competition rather than from some other consequence of Blue Cross' actions, including any alleged coercive actions by Blue Cross to make the hospitals sign the contracts. *See, Tennessean Truckstop, 875 F.2d at 88*. The illegality at issue is not whether the contracts themselves were illegal, but whether the contracts, specifically the MFN provisions, illegally affected competition. This means that the relevant evidence to be focused on is what occurred after the MFNs went into effect, not whether there were concerns that the contracts were illegal before entering into the contracts. As noted by Blue Cross, **[*10]** there is no conspiracy claim before this Court, which means the hospitals' concerns before entering into the contracts with Blue Cross are not relevant. Even though Aetna claims that the hospitals were "coerced" into entering into the contracts, the fact is that they did so. The issue before the jury is not whether such contracts exist. Here, there is no dispute that the hospitals entered into the MFN contracts with Blue Cross, therefore any concerns raised either by the hospital or Blue Cross officials during the negotiations of the contracts are not relevant to how the MFN contracts affected competition after the contracts went into effect. Blue Cross' Motion In Limine to Exclude Evidence of Supposed Antitrust or Other Legal Concerns prior to the applicable parties entering into the MFN contracts is granted.

E. Blue Cross' Motion in Limine to Exclude Evidence of and all References to MFN Hearsay and Speculation (No. 319)

Blue Cross seeks to exclude evidence, mostly from Aetna employees, that Blue Cross' MFNs had effects on Aetna's business as hearsay and based on lack of personal knowledge. Blue Cross cited three examples of this type of testimony. The first was the testimony of Aetna **[*11]** employees, Ms. Lantzy-Talpos who testified that Blue Cross' MFN caused Aetna's rate at Beaumont to increase, but she also admitted that no one at Beaumont told her that and that her conclusion was based on newspaper accounts. Kelly Wright, a Cofinity employee, testified that the MFN contracts caused harm to Cofinity's business, but admitted that she did not know exactly how the MFN contracts affected the business. Mr. Winters, an Aetna employee, testified that he thought it was possible that a hospital with an MFN contract with Blue Cross could affect Aetna's rate at that hospital, but that he did not know how. Daniel Fishbein, an Aetna employee, testified that it was a reasonable theory that if Humana was seeing some decrease it was because of the Blue Cross MFNs. He claims that this affected all discounts including the Cofinity discounts. Mr. Fishbein conceded this information came from communications with Humana about discount degradation, but not specifically about MFN contracts.

Blue Cross argues that the only person who would have first-hand knowledge whether the MFNs affected the rate a hospital gave Aetna would be that hospital. This non-expert testimony as to why Aetna received **[*12]** a certain rate from a certain hospital is not based on personal knowledge and because these witnesses are not expert witnesses, Blue Cross argues they cannot speculate as to the reason why Aetna received such a rate.

Aetna responds that Blue Cross merely cited snippets of the witnesses' testimony. Aetna claims that these witnesses have the experience and personal knowledge of whether the MFNs affected Aetna. Some of these witnesses are contract negotiators who have ample foundation, experience and personal knowledge to testify about the impact of the MFNs on Aetna's business. Aetna claims that Blue Cross' request for a broad, categorical and blanket exclusion of its witnesses without any inquiry into the purpose for each testimony offered or whether the testimony is relevant hearsay should be denied at this time.

The Court at this time declines to exclude Aetna's non-expert witnesses from testifying at trial given that they may have the experience and personal knowledge of Aetna contracts with the hospitals and the impact of the MFNs. Although the testimonies cited by Blue Cross, without more, may indicate that the witnesses' testimonies are based on hearsay or lack of personal knowledge, **[*13]** the Court will not order a blanket exclusion of these witnesses' testimony at trial. However, if at trial a hearsay statement or testimony based on lack of personal knowledge will be offered, Blue Cross may certainly object to such at trial. The Court will then rule on the admissibility of such testimony to be offered at trial. Blue Cross' Motion in Limine to Exclude Evidence of and all References to Alleged Effects of MFNs by Aetna non-expert witnesses is denied without prejudice.

F. Blue Cross' Motion in Limine to Exclude Evidence of Changes to Michigan Law (No. 321)

Blue Cross moves to exclude any reference at trial regarding the enactment of *M.C.L. §§ 550.1400* and *500.3405a* and OFIR Order No. 12-035-M, all of which address the legality of MFNs, including any statement that MFNs are illegal or prohibited. Blue Cross claims the changes to the law are not relevant to the issues in this case and do not add to any fact Aetna is required to prove at trial. Blue Cross argues that the primary law at issue is *15 U.S.C. § 1*. The changes in Michigan law are irrelevant since they were enacted after Aetna filed its complaint and were not in effect during the relevant period. Blue Cross claims the changes in the law are irrelevant and **[*14]** inadmissible under *Rules 401* and *402* and unduly prejudicial to Blue Cross.

Aetna claims that Blue Cross' motion to exclude references to related litigation, investigations and legislation regarding MFNs is a key part of its effort to conceal critical facts from the jury and tilt the case in its favor. Aetna asserts that Blue Cross' defense is that the MFNs did not prevent Aetna from securing better rates from hospitals. Aetna claims that the evidence at issue will show that Blue Cross' MFN contracts accomplished their intended goal to keep competitors from eroding Blue Cross' hospital discount advantage. Aetna will show that before the MFNs took effect, Aetna had improved its hospital rates and when the MFNs took effect, Aetna was unable to make further progress. Aetna claims that Blue Cross' MFN grip loosened in October 2010 when the government and private plaintiffs filed lawsuits challenging the MFNs. Aetna states that Blue Cross' "chokehold" was finally broken when the MFNs were banned in Michigan in early 2013. Aetna asserts that Aetna began experiencing success in achieving hospital rate improvements as a direct result of this litigation and legislation. Aetna claims that the related lawsuits **[*15]** and legislative ban on MFNs are highly relevant to the antitrust impact and causation to show the "before-during-after" scenario.

Blue Cross replies that Aetna does not discuss the change in Michigan law in 2013 without "burying" that issue in a list of other evidence Blue Cross has moved to exclude in other motions. Blue Cross claims Aetna has not connected the post-Complaint changes in Michigan law and its asserted injury because of the MFNs. Blue Cross asserts that Aetna cannot really expect the Court to believe that changes in Michigan law in 2013 allowed Aetna to achieve contracting successes after October 2010. Blue Cross claims that Aetna in fact has told the Court that evidence of changes in Michigan law that allowed Blue Cross to reorganize as a non-profit mutual company should be excluded because they are irrelevant. (Doc. No. 324) Blue Cross asserts that Aetna wants to tell the jury that the law was changed in 2013 prohibiting MFNs so that the jury will assume that MFNs had illegal effects which Michigan needed to remedy. Blue Cross claims there is serious prejudice from that improper inference which substantially outweighs any probative value Aetna can attempt to raise.

[*16] The Nonprofit Health Care Corporation Reform Act, *M.C.L. § 550.1400 et seq.*, became effective on March 18, 2013. P.A. 2013, No. 4, Imd. Eff. March 18, 2013; *M.C.L. § 550.1400*. The statute applies "to the use of a most favored nation clause in a provider contract on and after February 1, 2013." *M.C.L. § 550.1400(1)*. However, contracts with MFNs beginning February 1, 2013, may still be used if approved by the commissioner. *M.C.L. § 550.1400(2)*. Beginning January 1, 2014, a health care corporation "shall not use a most favored nation clause in any provider contract, including a provider contract in effect on January 1, 2014." (*M.C.L. § 550.1400(3)*)

Based on the language of the statute, the Court finds that the change in the law in 2013 prohibiting MFNs is not relevant to whether the MFN contracts at issue caused injury to Aetna. The 2013 change in the law does not establish any material fact at issue. Most statutes are meant to regulate primary conduct, and will not be applied in trials involving conduct that occurred before their effective date. *See* *Landgraf v. USI Film Prods., 511 U.S. 244, 291, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994)*. The claim in this case involves violations of the Sherman Antitrust Act and Michigan statute effective in 2010, not a claim under the Michigan statute enacted in 2013. The Court finds any reference to the new law enacted in 2013 is not relevant. The Court grants Blue Cross' Motion in Limine to Exclude Evidence of Changes to Michigan Law.

G. Aetna's Motion in Limine to Preclude Evidence or Argument Regarding Blue Cross' Purported Social Mission and Nonprofit Status (No. 322)

Aetna seeks to exclude any reference at trial to Blue Cross' status as a nonprofit and any evidence or argument regarding Blue Cross' social mission as a justification for entering into MFNs. Aetna claims that this evidence is irrelevant because it would **[*17]** result in a trial within a trial regarding Blue Cross' social mission, the benefits it receives from the State for performing that mission and whether it is necessary for Blue Cross to harm competition to perform any such mission. Aetna claims that as an insurer of last resort, Blue Cross enjoys an exemption from state and local taxes, which Aetna claims outstripped the burdens of fulfilling its social mission. Aetna asserts that Blue Cross' own witnesses testified that the MFN contracts had nothing to do with Blue Cross' social mission. Aetna claims that any such evidence would unfairly prejudice Aetna. Aetna asserts that Blue Cross' status as a non-profit is irrelevant because non-profits may be held liable under antitrust laws. Aetna claims that any reference to Blue Cross' status would be prejudicial in that the jury might be influenced to decide the case based on improper grounds.

Blue Cross responds that Aetna's motion is based on the false premise that the only purpose for introducing evidence of Blue Cross' nonprofit status and social mission is to excuse allegedly anticompetitive conduct by Blue Cross. Blue Cross claims that its nonprofit status and social mission is material **[*18]** in at least three ways. First, Blue Cross argues that this evidence is directly relevant to refuting Aetna's key contention that the MFNs were the cause of Blue Cross' success and Aetna's struggles in obtaining contracts with both hospitals and downstream insurance customers. Blue Cross claims the evidence shows that the Michigan's nonprofit hospitals did not trust for-profit Aetna, but instead valued Blue Cross' social mission's contributions to Michigan's healthcare system. Blue Cross asserts that other customers, including union locals, businesses and others, also preferred Blue Cross to Aetna for this same reason. Blue Cross claims that if it cannot present this evidence to the jury, the jury will only have before it Aetna's reason for its failure to obtain contracts with the hospitals was because of the MFNs. Blue Cross asserts that the jury should be able to hear the evidence that there are other reasons why Aetna was unable to obtain contracts with hospitals besides the MFNs.

Blue Cross' second argument is that this evidence refutes a number of Aetna's claims that Blue Cross is inefficient, overpaid small rural hospitals to secure MFNs and has earned massive profits. As a nonprofit, **[*19]** Blue Cross argues it cannot earn profits, but is required under the statute to have reserves. Aetna as a for profit is able to raise capital by selling equity in order to pay claims when its premium levels are too low. Blue Cross claims that unlike a for-profit like Aetna, it is unable to raise capital. Blue Cross is required under the statute to maintain surplus to cushion against periods when claims exceed premiums. The surplus amount may seem large, but when compared to other Blue plans or when one considers the number of insureds whom Blue Cross must protect, the number is not so large. If Blue Cross' nonprofit status is not raised before the jury, it would not be able to assess Aetna's claim of "massive profits" without understanding nonprofits and Blue Cross' status as a nonprofit.

The third argument is that Blue Cross' unique structure established by the Michigan legislature, is a central fact in the framework and competitive landscape of Michigan health care and health insurance for the relevant time period. Blue Cross claims it would be impossible for the jury to understand Blue Cross' conduct, including the legitimate business justifications, without knowing the central fact **[*20]** of Blue Cross' existence. Blue Cross asserts that its status a nonprofit with a social mission is material evidence, although it may not be dispositive on whether the MFNs violated the antitrust statute. Blue Cross claims that Aetna's argument that a nonprofit is not allowed to violate the ***antitrust law*** *because* it is a nonprofit, is not the same as whether the nonprofit status is relevant to its actions and conduct as it pertains to any violation of the Sherman Act. The fact that Blue Cross is a nonprofit is central to its expert's economic analysis, Blue Cross claims this evidence is relevant. Blue Cross' expert shows that the nonprofits spend more of each premium dollar on medical care than for profits, including Aetna, and have higher customer satisfaction ratings. This evidence, Blue Cross argues, is relevant to how Blue Cross and Aetna act and the customers' reactions to those actions. Blue Cross asserts that its social mission is not a pretext for the MFN as argued by Aetna. Instead, Blue Cross claims that its witnesses recognize the link between hospital discount advantage and the social mission. Without the discount, Blue Cross claims it would be at a disadvantage because as **[*21]** recognized by the Michigan legislature, its population is unhealthier which exposes Blue Cross to a higher risk. As an insurer of last resort, Blue Cross claims it cannot cut unhealthy patients, whereas Aetna, as a for-profit, is able to do so.

Most claims under *Section 1 of the Sherman Act*, as in this case, are evaluated using a "rule of reason" approach where the "finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature and effect." *In re Cardizem, 332 F.3d at 906* (quoting *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997))*. The Court finds that Blue Cross' status as a nonprofit with a social mission is relevant to the issue of why Blue Cross sought MFNs from hospitals and as a defense to Aetna's claim that Blue Cross sought MFNs to crush the competition. Without evidence as to the statute-mandated Blue Cross nonprofit status and the requirements on Blue Cross set forth in the statute, including as an insurer of last resort, Blue Cross would be unable to present any evidence that it sought the MFNs because of its status. In order **[*22]** for the jury to have sufficient information to decide whether the MFNs are illegal, as opined by the Supreme Court and the Sixth Circuit, the jury must "take into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature and effect." *Id.* It is relevant for the jury to have facts before it as to Michigan's health insurance business, which includes statute-mandated non-profit insurer Blue Cross, and the nature of such business in Michigan.

The status of Blue Cross and how the hospitals perceive Blue Cross and Aetna is also relevant to Aetna's claim of antitrust injury since Aetna must establish that its injury "flowed" because of the anticompetitive effects of the MFNs and not from other reasons such as the hospitals' desire to contract with Blue Cross instead of Aetna. *Id. at 911* ("[n]o antitrust injury because the plaintiff's injury did not "flow" from the anticompetitive effects of the alleged antitrust violation.") Aetna's Motion in Limine to Preclude Evidence or Argument Regarding Blue Cross' Purported Social Mission and Nonprofit Status is denied.

H. Aetna's Motion in [*23] Limine to Preclude Blue Cross from Informing the Jury that Compensatory Damages will be Trebled (No. 323)

Aetna seeks to preclude Blue Cross from informing the jury that any damages found would be trebled under the Clayton Act, *15 U.S.C. § 15(a)*. Aetna claims that Blue Cross has indicated it intends to inform the jury of the mandatory trebling provision in the apparent hope that the jury will artificially reduce its damage calculation.

Blue Cross responds that it has no intention of arguing that the jury should reach a lower damages number because the Court will automatically treble any damage award, but opposes a blanket exclusion of the information. Blue Cross claims that a jury instruction would protect Aetna and Blue Cross from the potential prejudice both may encounter during the trial. Blue Cross claims the case has received some press attention and so potential jurors may be aware of the treble provision in the antitrust laws. Blue Cross also argues that such information may be necessary to counter Aetna's attempts to play on the jury's sympathy that damages would somehow enhance the public good by helping Aetna to compete.

The Court finds at this time that the issue of trebling the damages is **[*24]** not relevant to the issues to be tried by the jury. In light of Blue Cross' intention not to argue that the jury should reach a lower damages amount because of the treble damage provision, the Court will not allow any evidence or argument regarding the trebling the damages. If a party believes the treble damage provision becomes relevant at trial, the parties should then seek to confer with the Court at side bar prior to any mention of the treble damage provision. As to the jury instruction issue, the Court will consider such if it is required at trial. The Court grants Aetna's Motion in Limine to Preclude Blue Cross from Informing the Jury that Compensatory Damages will be Trebled.

I. Aetna's Motion in Limine to Preclude References to Blue Cross' Mutual Ownership Status (No. 324)

Aetna seeks to preclude at trial references of Blue Cross' mutual ownership status as of January 1, 2014. Aetna argues that Blue Cross' status as a mutual insurance company has no connection to any fact of consequence in this litigation. If introduced, Aetna claims that it would most likely be employed as an emotional appeal to shift the focus of the damages inquiry from the extent of Aetna's injuries to a **[*25]** purported effect of the verdict on Blue Cross and its policyholders. Aetna claims that this is irrelevant to the jury's function and should be precluded.

Aetna further argues that if Blue Cross were to introduce evidence or present argument about its mutual status, this would serve as an improper appeal to the jury's self-interests. Aetna claims Blue Cross controls approximately 60-70% of the commercial health insurance market in Michigan. Aetna asserts that it is almost certain that members of the jury pool, or at the very least some of their family members, friends, or co-workers, will be Blue Cross policyholders. Aetna claims that allowing Blue Cross to present evidence of its mutual structure would seriously prejudice the jury against awarding damages in this case.

Blue Cross responds that it will not argue to the jury that it should not award Aetna damages because the jurors, who may be current Blue Cross policy holders, will bear the financial brunt of the judgment. Blue Cross notes that Aetna in its brief admits the fact that Blue Cross and the State of Michigan agreed that Blue Cross' policyholders do not have any residual rights to surplus in the case of dissolution and that **[*26]** any potential concerns about harms unique to insurance policyholders are not present in this case. Blue Cross claims that the mere fact of its structure is nothing more than a true statement of its identity. Blue Cross asserts that Aetna's arguments in this motion is inconsistent with Aetna's position opposing Blue Cross' motion seeking to exclude statements of the post-Complaint changes in Michigan law prohibiting MFNs. Blue Cross claims Aetna cannot have it both ways—prohibiting mention of Blue Cross' current status as a mutual company and allowing statements that MFNs are now illegal.

The legislature provided for a merger of a healthcare corporation with a nonprofit mutual disability insurer; the surviving entity of a merger being the nonprofit mutual disability insurer. *M.C.L. § 550.1220(1)*. A healthcare corporation shall not be formed on or after January 1, 2014. *M.C.L. § 550.1201a*. As of January 1, 2014, Blue Cross became a nonprofit mutual company. P.A. 2013, No. 4, Imd. Eff. March 18, 2013. For the same reasons set forth in the Court's ruling prohibiting statements regarding the post-Complaint changes in the law as to MFNs, the Court will not allow mention of Blue Cross' post-Complaint change in status to a non-profit **[*27]** mutual company. The Court finds Blue Cross' change of status to a non-profit effective in 2014 is not relevant to the facts the jury has to decide. Blue Cross' status in 2014 has no bearing on how Blue Cross acted when the Complaint was filed. The Court grants Aetna's Motion to Preclude References to Blue Cross' Mutual Ownership Status. However, the issue Aetna raises regarding the jury pool may be an issue the parties need to address with the Court at the final pretrial conference.

J. Blue Cross' Motion in Limine to Exclude References to Other Lawsuits (No. 325) and Motion in Limine to Exclude Reference to Government Investigations and Lawsuits (Doc. No. 332)

Blue Cross seeks to exclude any reference to other lawsuits against Blue Cross including, but not limited to: *The Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, No. 2:10-cv-14360, 2011 U.S. Dist. LEXIS 114956 (E.D. Mich.), *Michigan Regional Council of Carpenters Employee Benefits Fund v. Blue Cross Blue Shield of Michigan*, No. 2:10-cv-14887, 2011 U.S. Dist. LEXIS 114956 (E.D. Mich.), *Scott Steele v. Blue Cross Blue Shield of Michigan*, No. 2:11-cv-10375, 2011 U.S. Dist. LEXIS 114956 (E.D. Mich.), *City of Pontiac v. Blue Cross Blue Shield of Michigan*, No. 2:11-cv-10276 (E.D. Mich.), *Frankenmuth Mutual Ins. Co.* ***[*28]*** *v. Blue Cross Blue Shield of*

Michigan, No. 1:10-cv-14633 (E.D. Mich.), and *In re: Blue Cross Blue Shield Antitrust Litigation* (MDL No. 2406), No. 2:13-cv-20000, and a series of cases about administrative services contracts referred to as the "Access Fee cases," including *Hi-Lex Corp. v. Blue Cross Blue Shield of Michigan*, Case No. 2:11-cv-12557 (E.D. Mich.). Blue Cross also seeks to exclude any reference to the United States and State of Michigan's investigations and lawsuits against Blue Cross in *United States, et al. v. Blue Cross Blue Shield of Michigan*, Case No. 2:10-cv-14155 (E.D. Mich).

Blue Cross argues that as to the class action cases, with the lead case being *The Shane Group* case, these cases are not relevant to the issues before the jury in Aetna. Blue Cross claims that in *The Shane Group* case, other than allegations, there have been no findings of liability against Blue Cross.

Blue Cross asserts that in *The Shane Group* case the putative class amended its proposed class definition to focus on discrete effects at particular hospitals with MFNs, which does not reconcile with Aetna's theory that Blue Cross' MFN program had a market-wide uniform effect. As to the Access Fee cases **[*29]** and the MDL antitrust case, Blue Cross argues that these cases do not involve the MFN provisions at issue and, are therefore, not relevant. Blue Cross also argues that reference to other lawsuits is hearsay and would prejudice Blue Cross because it would appear that Blue Cross had violated the law based on all these lawsuits against it.

Regarding the lawsuit brought by the Department of Justice of the United States and the Attorney General of the State of Michigan, which was later voluntarily dismissed, Blue Cross argues that the claims brought by the DOJ and the Michigan AG were not based on the same theory of causation as Aetna's lawsuit. Blue Cross claims that the DOJ and the Michigan AG's theory of liability was based on examination of rates at individual hospitals with Blue Cross MFNs, but they did not assert any liability for hospitals without MFNs. Blue Cross argues no facts were established in the suit brought by the DOJ/Michigan AG and in the MDL.

In its response, Aetna agreed it would not refer to the MDL case and the Access Fee cases, with the lead case being the *Hi-Lex* case. As to *The Shane Group* and the DOJ and Michigan AG cases, Aetna claims that these cases are highly **[*30]** relevant to the central issues of this case: whether Blue Cross' MFNs harmed Aetna and competition, and the extent to which Aetna's hospital rates and competitive positioning would have improved had Blue Cross not implemented its MFNs across the Michigan healthcare market. Aetna claims that evidence regarding these civil suits is relevant because it casts doubt on testimony by certain hospital executives that have adopted what Aetna claims is Blue Cross' "no harm, no foul" story. Aetna asserts that its fortunes changed significantly after the private plaintiffs filed their suit and even more following the ban on MFNs in provider contracts.

The Court finds that because the DOJ, the Michigan AG and *The Shane Group* class action cases have been resolved without any finding of liability against Blue Cross in those cases, any reference to those cases would be more prejudicial than probative to show that Blue Cross's MFNs harmed competition because cases involving MFNs were filed against Blue Cross. This would result in litigating the issues brought by the DOJ, the Michigan AG and the plaintiffs in *The Shane Group* class action case. There are sufficient issues raised in the instant case without **[*31]** litigating the issues brought in the other cases. The alleged anti-competitive acts at issue are the MFN provisions effective when Aetna brought the lawsuit and whether competition was harmed because of those provisions. If such MFN provisions were later taken out of the contracts for one reason or another and Aetna shows that since the filing of those suits it was able to secure contracts with better rates, then it matters not the reason why the MFNs were removed from the contracts. Aetna is still able to show that without the MFNs it was able to obtain better rates, which goes to prove Aetna's point that with the MFNs it was unable to obtain better rates. Since the facts after 2010, as argued by Aetna, show that the MFNs were no longer at issue in the contracts, Aetna is still able to argue that the MFNs in effect when it filed the lawsuit harmed competition. Aetna's burden is to show that the MFNs in effect when they filed the lawsuit harmed competition, and therefore, Aetna. It is the MFNs which Aetna alleges harmed competition. The lack of MFNs in contracts after the DOJ, the Michigan AG and the other plaintiffs filed their lawsuits against Blue Cross is not relevant to whether **[*32]** the MFNs in effect at the time Aetna filed the lawsuit harmed competition. The issue that Aetna received better rates after the other lawsuits were filed and after the MFNs were banned goes to how far out Aetna's damages flow from the time Aetna is found to be harmed. However, testimony about the other lawsuits is not relevant to show such, because the calculation of damages does not require evidence of the reason why the MFNs were no longer at issue; only that the MFNs were no longer part of the contracts. This testimony can be presented from those familiar with the contracts, not from the fact that lawsuits were filed.

As to Aetna's claim that the hospital executives' testimony were biased and not credible because of the lawsuits brought by the DOJ, the Michigan AG and *The Shane Group* plaintiffs, Blue Cross claims all the hospital executives were deposed and it was Aetna who failed to ask the executives any question about how these lawsuits impacted the executives' decisions. Blue Cross asserts Aetna had knowledge of these lawsuits at the time the depositions were taken. If at trial, Aetna can establish bias by hospital executives because of these lawsuits against Blue Cross, Aetna **[*33]** may raise the issue at that time. Without hearing the executives' testimony in context and without being able to judge their credibility at this time, the Court cannot make a determination whether the hospital executives were biased in their responses to their depositions. The Court grants Blue Cross' Motions in Limine to Exclude References to Other Private and Government Lawsuits against Blue Cross.

K. Blue Cross' Motion in Limine to Bar Use of Irrelevant and Prejudicial Terms Monopoly, Collusion, Conspiracy and their Derivatives (No. 326)

Blue Cross seeks to exclude any reference to the terms monopoly, collusion, conspiracy and their derivatives. Blue Cross asserts that these terms are not relevant in this lawsuit which only involves an anticompetitive contract MFN claims. Blue Cross argues, as Aetna affirmed to the Court, that this case involves 67 MFN contracts. (Doc. No. 314) Blue Cross argues Aetna did not plead a claim under the Sherman Act based on monopoly, collusion or conspiracy.

Aetna responds that it should be able to refer to Blue Cross as a "monopolist" and that it "colluded" and "conspired" with others as to the MFN contracts. Aetna claims the testimony by hospital executives **[*34]** and others, including Blue Cross personnel, show that Blue Cross is a monopolist and the reason for the MFNs was to keep its monopoly of the healthcare insurance industry. Aetna also claims that Blue Cross colluded and conspired with the hospitals to include the MFNs in the contracts to minimize competition.

As noted above, *Section 1 of the Sherman Act* provides that a contract, combination in the form of trust, *or* conspiracy, in restraint of trade or commerce is illegal. *15 U.S.C. § 1*. A plaintiff in a *Section 1* claim must prove that defendant 1) contracted, combined or conspired among each other, that such 2) unreasonably restrained trade in the relevant market. *Nat'l Hockey League, 325 F.3d at 718 (6th Cir. 2003)*. The Sherman Act, *15 U.S.C. § 2*, declares that a firm shall not "monopolize" or "attempt to monopolize" or "combine or conspire" with any other person to "monopolize" any part of the trade or commerce. *15 U.S.C. § 2*. A claim under *Section 2* requires proof of two elements: 1) the possession of monopoly power in a relevant market; and 2) the willful acquisition, maintenance or use of that power by anti-competitive or exclusionary means as opposed to growth or development resulting from a superior product, business acumen, or historic accident. *Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768, 782 (2002)*. A plaintiff must demonstrate that a defendant **[*35]** either unfairly attained or maintained monopoly power. *Id.*

In the Sherman Act, the terms monopolization and conspiracy are terms of art and are expressly noted in the Act. As alleged by Aetna in the Complaint, it alleges violations by Blue Cross of *Section 1of the Sherman Act* , *15 U.S.C. § 1* based on exclusionary contracts with hospitals. (Comp., Doc. 1) As stated by Aetna on the record, the case involves 67 MFN contracts. *Section 1* sets forth three ways a violation could occur—by contract, or combination, or conspiracy. Here, Aetna has alleged a violation by way of contracts with MFN provisions. *Section 2* of the Sherman Act involves monopolies. Aetna's Complaint includes no such claim. Because the terms "monopoly" and "conspiracy" are specific terms in the Sherman Act, which Aetna does not assert any claims under *Section 2*, those terms should not be used by Aetna to argue that Blue Cross violated the Act because of a "conspiracy" or because of a "monopoly." Although "collusion" is not an express term under the Sherman Act, it infers a strong conspiracy. Aetna cannot argue that Blue Cross "colluded" with others to violate the Sherman Act.

However, inasmuch as those terms were used by witnesses during depositions, without prompting **[*36]** by the plaintiffs' counsel and without objections by the defense during the deposition, those terms can remain in any deposition testimony presented to the jury . Aetna cannot argue during opening or closing statements, or by way of questions, that Blue Cross violated the Sherman Act because of a "conspiracy," a "monopoly" or a "collusion." Aetna can argue the facts, such as whether Blue Cross was a "dominant" figure in the market or that Blue Cross and the hospitals "agreed" to the terms of the contracts. Blue Cross' Motion in Limine to Bar Use of the Terms Monopoly, Collusion, Conspiracy and their derivatives is granted as set forth above.

L. Blue Cross' Motion in Limine to Exclude at Trial Evidence of All References to MFN Programs (No. 328)

Blue Cross seeks to exclude evidence from the jury of any form of labeling (mostly by the experts) the contracts at issue or Blue Cross' conduct as "MFN program," "scheme," "contracting scheme," "contracting program," and "contracting strategy." Blue Cross claims that Aetna's case is based solely on the harm from 67 MFN contracts and Blue Cross' efforts to enforce those contracts. Blue Cross argues that it cannot be held liable for rate decisions **[*37]** made by hospitals without MFNs because those are unilateral decisions by those hospitals. Blue Cross argues that evidence of other hospitals' decision-making does not prove anything about Blue Cross' actions. Blue Cross claims that Aetna made the same arguments in another antitrust case which was accepted by the district judge, citing, *Rheumatology Diagnostics Lab., Inc. v. Aetna, Inc., No. 12-cv-05847-JST, 2013 U.S. Dist. LEXIS 89208, 2013 WL 3242245 (N.D. Cal. June 25, 2013)*. Blue Cross also argues that reference to other hospitals' decision-making outside the 67 MFN contracts at issue would confuse the jury because it would be difficult for the jury to keep track of which hospitals had MFNs and which did not. Blue Cross claims that the decision-making of other hospitals as to rates outside the 67 MFN contracts is not relevant as to the effects of the 67 MFN contracts on competition.

Aetna responds that Blue Cross is in reality seeking to exclude broad categories of critical evidence and the motion is a thinly veiled argument for summary judgment. Aetna claims that Blue Cross' motion is premised on a gross distortion of Aetna's claims and legal theory. Aetna asserts that there is a disconnect in that Blue Cross refuses to acknowledge that its MFN contracts **[*38]** caused an array of anticompetitive harms, including harming Aetna's business and altering the incentives of Michigan hospitals, which adversely affected Aetna's ability to secure the improved rates it would have experienced at hospitals throughout Michigan, had Blue Cross not implemented its anticompetitive contracts. Aetna is not seeking to recover for "unilateral conduct" as argued by Blue Cross. Aetna argues that one of the effects of Blue Cross' contracts is that they harmed competition, and that Aetna's business was harmed. Aetna asserts that because of the MFN contracts, Aetna became less attractive for others to deal with, including both customers and hospitals. Aetna argues that the impact on competition from Blue Cross' 67 MFN contracts included adverse effects on Aetna's (and other insurers') ability to secure improved rates from both MFN and non-MFN hospitals.

The Court finds that Blue Cross is seeking more than exclusion of labels and words to be used before the jury. Blue Cross is instead seeking to exclude evidence from hospital executives or the experts as to the reasons why the hospitals would not or could not give Aetna better rates. The Court agrees that the issue **[*39]** in a Sherman Act, *section 1* anti-trust action is to show how the contracts at issue harmed competition. Aetna is attempting to show this harm by showing that even though hospitals were not parties to the MFN agreement and made "unilateral" decisions, those hospitals' decisions were materially impacted by the MFN agreements. As an example, Aetna proffered a statement from a non-MFN hospital witness that the hospital was hesitant to agree to provide Aetna with a discount improvement until Aetna could attest to commitments from other facilities or other key providers to provide a "Blues-competitive rate" to Aetna. (Doc. 349, Pg ID 22798-99) The Court finds statements like these relevant to the issue of whether the MFN agreements impacted competition. As to confusion, the Court finds that counsel will be able to provide the jury the information as to whether the hospital witness is a hospital that has an MFN contract with Blue Cross. The *Rheumatology* case cited by Blue Cross involving Aetna is not applicable to this motion in limine since that case involved the issue of whether the plaintiff stated a claim under *Rule 12(b)(6)*, and did not involve the types of evidence a party may present at trial to show whether **[*40]** a certain contract harmed competition. Blue Cross' Motion in Limine to Exclude at Trial Evidence of and All References to Blue Cross' alleged "MFN Program" is denied.

M. Blue Cross' Motion in Limine to Exclude Evidence Quantifying the Alleged Effect of MFNs on Rates at Peer Group 1-4 Hospitals, Peer Group 5 Hospitals Not Listed on Vellturo Exhibit 17A, or Premiums (No. 329)

Blue Cross seeks to exclude evidence from the jury which was never produced to Blue Cross quantifying the impact of MFNs on Aetna's or other competitors' hospital rates and premiums. The only such evidence Blue Cross claims Aetna provided during discovery was figures for Peer Group 5 hospitals on the expert, Vellturo's Exhibit 17A. Blue Cross claims Aetna never provided such evidence as to hospital rates and premiums on Peer Group 1-4 Hospitals. Blue Cross further claims that the *Rule 30(b)(6)* deposition of Dr. Vellturo (not in his capacity as an expert) taken after the close of discovery where he testified that Aetna's rates were $80-$100 million lower as a result of the MFNs should also be excluded. Blue Cross asserts that Dr. Vellturo was not testifying as an expert, but as a representative of Aetna. Blue Cross claims that **[*41]** the $80-$100 million figure is not based on facts known to Aetna, and that Dr. Vellturo, as a fact witness, did not have personal knowledge of the amount. Blue Cross asserts that the underlying document Dr. Vellturo relied on to reach this amount is an internal Blue Cross one page undated document based on rates in other states to quantify the effects of alleged anticompetitive conduct. Blue Cross claims this document was from a third-party vendor about hospital discounts in various areas in the country. Blue Cross claims that this document was never seen or used by Aetna personnel in the course of conducting Aetna's business. Dr. Vellturo also cannot testify to this amount as an expert since he has no data or written calculations to support the figure. Blue Cross notes that Aetna's damages expert, Dr. Bamberger, did not rely on this document.

Aetna responds that Dr. Vellturo was not Aetna's Rule 30(b)(6) designee regarding premium-setting. Aetna's designee, Michael Sipos, a senior actuary at Aetna, answered all the questions posed by Blue Cross. Aetna claims that Dr. Vellturo, in his expert report, described his extensive empirical analysis of the impact of Blue Cross' anticompetitive contracts **[*42]** at hospitals throughout Michigan, not merely those listed in Exhibit 17A. Aetna claims Dr. Vellturo also quantified the impact on reimbursement rates at Peer Group 1-4 hospitals with and without MFN provisions in his report at Figure 4.

Blue Cross is seeking to exclude evidence at trial that was not provided during discovery. As a Rule 30(b)(6) designee fact witness, the Court finds that Dr. Vellturo cannot offer any opinion as to calculations of the MFNs' impact on Aetna which are not based on his personal knowledge of Aetna's business and which were not produced to Blue Cross during discovery. Specifically, Dr. Vellturo's calculations as a Rule 30(b)(6) witness of the $80-$100 million impact are not based on any documents Aetna obtained during its course of business. Aetna's fact witnesses may testify as to documents and calculations the witnesses may have performed during Aetna's conduct of its business if such calculations and underlying documents were produced to Blue Cross during discovery, including the discovery conducted by the parties ordered by this Court in 2014. Any calculations by Aetna's witnesses must either be based on personal knowledge as representatives of Aetna or as an expert with proper **[*43]** notice in the experts' reports. Also, Dr. Vellturo, as an expert, cannot testify to the $80-$100 million impact because this calculation and the underlying document were not identified in his expert report. Blue Cross' Motion in Limine to Exclude Evidence Quantifying Alleged Impact of MFNs on Rates at Peer Group 1-4 Hospitals, Peer Group 5 Hospitals Not Listed on Vellturo Exhibit 17A, or Premiums is granted as set forth above, unless Aetna can show at trial that this information was produced during the 2014 Court-ordered discovery.

N. Blue Cross' Motion in Limine Regarding References to Government or Non-Aetna Plaintiff's Lawyers (No. 330)

Blue Cross seeks to exclude at trial all references to non-Aetna plaintiffs' attorneys, most notably government lawyers, conducting depositions and other references (such as exhibit stickers). Blue Cross claims that such notifications would prejudice Blue Cross in that Aetna can argue that it was on the "same team" as the United States and the State of Michigan.

Aetna's response focuses on its previous arguments relating to Blue Cross' motion in limine regarding exclusion of other lawsuits. As to this specific request by Blue Cross, Aetna only argues **[*44]** that it is burdensome, without specifics.

Because the Court has ruled above that no reference should be made to other lawsuits, the Court finds that documents, including deposition transcripts referring to any government counsel would confuse the jury and would be prejudicial to Blue Cross. The parties must meet and confer to redact any reference to any government lawyers in any documents or depositions to be used at trial. If a government or non-Aetna counsel's name appears, those names need not be redacted. Only any reference that the government or non-Aetna counsel's name works for or represents the government or another plaintiff party other than Aetna should be redacted. Blue Cross' Motion In Limine Regarding References to Government or Non-Aetna Plaintiffs' Lawyers is granted.

O. Blue Cross' Motion in Limine to Exclude Evidence Of or References to the Factors Used to Determine Employee Compensation (No. 331)

Blue Cross seeks to exclude from trial all evidence of and references to the factors used by Blue Cross to determine employee compensation as irrelevant and prejudicial. Blue Cross argues that the compensation and benefit information of its executives is not relevant to whether **[*45]** Blue Cross operated as a nonprofit and charitable institution as required by the statutes. Blue Cross claims that non-profits and for-profits entities have compensation packages which include incentives.

Aetna claims that the Magistrate Judge has ruled the evidence is relevant. Aetna argues that the issue of compensation is relevant since Blue Cross claims that it has a social mission and the evidence would show that Blue Cross' executives were "incentivized" to protect Blue Cross' market share and operating profits. Aetna claims that this information is relevant to rebut Blue Cross' motive for seeking MFNs; that it was not because of Blue Cross' status as a nonprofit but because of Blue Cross' executives' incentives.

As noted by the Magistrate Judge in the order regarding discovery issues, the compensation information was relevant. The Magistrate Judge specifically noted that the detailed compensation and benefit information sought in Request No. 18 was *not* relevant to whether Defendant operated as a nonprofit, charitable and benevolent institution. (Doc. No. 92, Pg ID 1535) (italics added). However, the Magistrate Judge found *relevant* the information sought in Request No. 19 for documents **[*46]** which show *all targets, goals or formulas* concerning any form of compensation for certain Blue Cross employees. *Id.* It is noted that the *amount* of such compensation was not ordered to be produced by the Magistrate Judge. The Court finds that the "targets, goals or formulas" concerning the executives' compensation may be relevant to rebut Blue Cross' claim that it sought MFNs because of its statutory mission. However, before presenting this information at trial, Aetna must show that the executives about whom it seeks to present such information had input into the MFN contracting process and that the executives in fact had a compensation package which was tied to these "targets, goals or formulas." Aetna must not seek information regarding the amount of the executives' compensation. Blue Cross' Motion in Limine to exclude Evidence of or References to the Factors Used to Determine Employee Compensation is denied as more specifically noted above.

III. CONCLUSION

For the reasons set forth above,

IT IS ORDERED that Blue Cross' Motion in Limine to Exclude At Trial Aetna's Written Expert Reports **(Doc. No. 317)** is GRANTED.

IT IS FURTHER ORDERED that Blue Cross' Motion in Limine to Exclude Evidence **[*47]** of Supposed Antitrust or Other Legal Concerns **(Doc. No. 318)** is GRANTED.

IT IS FURTHER ORDERED that Blue Cross' Motion in Limine to Exclude at Trial Evidence of and all References to MFN Hearsay and Speculation **(Doc. No. 319)** is DENIED without prejudice.

IT IS FURTHER ORDERED that Blue Cross' Motion in Limine to Exclude Evidence of Changes to Michigan Law **(Doc. No. 321)** is GRANTED.

IT IS FURTHER ORDERED that Aetna's Motion in Limine to Preclude Evidence or Argument Regarding Blue Cross' Purported Social Mission and Nonprofit Status **(Doc. No. 322)** is DENIED.

IT IS FURTHER ORDERED that Aetna's Motion in Limine to Preclude Blue Cross from Informing the Jury that Compensatory Damages will be Trebled **(Doc. No. 323)** is GRANTED.

IT IS FURTHER ORDERED that Aetna's Motion in Limine to Preclude References to Blue Cross' Mutual Ownership Status **(Doc. No. 324)** is GRANTED.

IT IS FURTHER ORDERED that Blue Cross' Motion in Limine to Exclude References to Other Lawsuits **(Doc. No. 325)** is GRANTED.

IT IS FURTHER ORDERED that Blue Cross' Motion in Limine to Bar Use of Irrelevant and Prejudicial Terms Monopoly, Collusion, Conspiracy and their Derivatives **(Doc. No. 326)** is GRANTED.

IT IS FURTHER ORDERED that Blue **[*48]** Cross' Motion in Limine to Exclude At Trial Evidence of and All References to Blue Cross' Alleged "MFN Program" **(Doc. No. 328)** is DENIED.

IT IS FURTHER ORDERED that Blue Cross' Motion in Limine to Exclude Evidence Quantifying the Alleged Effect of MFNs on Rates at Peer Group 1-4 Hospitals, Peer Group 5 Hospitals Not Listed on Vellturo Exhibit 17A, or Premiums **(Doc. No. 329)** is GRANTED.

IT IS FURTHER ORDERED that Blue Cross' Motion in Limine Regarding References to Government or Non-Aetna Plaintiffs' Lawyers **(Doc. No. 330)** is GRANTED.

IT IS FURTHER ORDERED that Blue Cross' Motion in Limine to Exclude Evidence of or References to the Factors Used to Determine Employee Compensation **(Doc. No. 331)** is DENIED.

IT IS FURTHER ORDERED that Blue Cross' Motion in Limine to Exclude Reference to Government Investigations and Lawsuits **(Doc. No. 332)** is GRANTED.

/s/ Denise Page Hood

Denise Page Hood

United States District Judge

Dated: April 14, 2015

End of Document

[McWane, Inc. v. FTC](#)

United States Court of Appeals for the Eleventh Circuit

April 15, 2015, Decided

No. 14-11363

Reporter

783 F.3d 814 *; 2015 U.S. App. LEXIS 6111 **; 2015 Trade Cas. (CCH) P79,134; 25 Fla. L. Weekly Fed. C 1115

MCWANE, INC., Petitioner, versus FEDERAL TRADE COMMISSION, Respondent.

Subsequent History: Motion granted by *McWane, Inc. v. FTC, 136 S. Ct. 565, 193 L. Ed. 2d 422, 2015 U.S. LEXIS 7475 (U.S., 2015)*

US Supreme Court certiorari denied by *McWane, Inc. v. FTC, 2016 U.S. LEXIS 2010 (U.S., Mar. 21, 2016)*

Prior History: **[**1]** Petition for Review of a Decision of the Federal Trade Commission. Agency No. 9351.

In re McWane, Inc., 2014 FTC LEXIS 28 (F.T.C., Jan. 30, 2014)

Core Terms

domestic, monopoly power, distributors, prices, anticompetitive, foundry, foreclosure, rival, competitor, projects, market share, imported, domestic-only, monopolist, courts, sales, products, costs, harmed, substantial evidence, procompetitive, manufacturers, consumers, specifications, substantial evidence standard, relevant market, effective, supplier, cases, pipe

LexisNexis® Headnotes

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

HN1[] **Standards of Review, Substantial Evidence**

The United States Court of Appeals for the Eleventh Circuit reviews the Federal Trade Commission's findings of fact and economic conclusions under the substantial evidence standard. Substantial evidence is more than a mere scintilla, and the Eleventh Circuit requires such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. This standard forbids a court to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences. Indeed, the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

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

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

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

The United States Court of Appeals for the Eleventh Circuit reviews de novo the Federal Trade Commission's (FTC's) legal conclusions and the application of the facts to the law. However, the Eleventh Circuit affords the FTC some deference as to its informed judgment that a particular commercial practice violates the Federal Trade Commission Act.

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

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

Antitrust & Trade Law > Federal Trade Commission Act > Scope

HN3[] Standards of Review, Substantial Evidence

The United States Court of Appeals for the Eleventh Circuit's case law makes clear that the definition of the relevant market is essentially a factual question. Thus, the Eleventh Circuit reviews the Federal Trade Commission's determination of market definition, like all its factual findings, for substantial evidence.

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

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > Scope

HN4[] Standards of Review, Substantial Evidence

The Federal Trade Commission's determination that a defendant possesses monopoly power is a factual or economic conclusion that the United States Court of Appeals for the Eleventh Circuit reviews for substantial evidence. No prior case of the Eleventh Circuit appears to hold this specifically, but this conclusion follows from previous cases that have treated a determination that a defendant possesses market power, a lesser-included element of monopoly power, as a factual finding.

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

Antitrust & Trade Law > Federal Trade Commission Act > Scope

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

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

HN5[] Standards of Review, De Novo Standard of Review

The ultimate legal conclusion that a defendant's conduct violates the Federal Trade Commission Act is an application of the facts to the law, which the United States Court of Appeals for the Eleventh Circuit reviews de novo, except for the limited deference prescribed by judicial precedent. But the Federal Trade Commission's factual building blocks and economic conclusions, findings of market definition, monopoly power, and harm to competition, are reviewed for substantial evidence.

Antitrust & Trade Law > Federal Trade Commission Act > Scope

HN6[] **Antitrust & Trade Law, Federal Trade Commission Act**

Section 5, 45 U.S.C.S. § 45, of the Federal Trade Commission Act prohibits unfair methods of competition in or affecting commerce. Although exclusive dealing arrangements are common and can be pro-competitive, particularly in competitive markets, these arrangements can harm competition in certain circumstances. When a market is competitive, the competition for the exclusive contract is a vital form of rivalry that can induce the offering firm to provide price reductions or improved services to buyers, to the ultimate benefit of consumers. But, notably, in the absence of such competition, a dominant firm can impose exclusive deals on downstream dealers to strengthen or prolong its market position. Thus, while such arrangements are not illegal in themselves, they can run afoul of antitrust laws as an improper means of maintaining a monopoly.

Antitrust & Trade Law > Federal Trade Commission Act > Scope

HN7[] **Antitrust & Trade Law, Federal Trade Commission Act**

A violation of § 5, *15 U.S.C.S. § 45*, of the Federal Trade Commission Act premised on monopolization requires proof of (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

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

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

Defining the market is a necessary step in any analysis of market power and thus an indispensable element in the consideration of any monopolization case arising under *15 U.S.C.S. § 2*. A product market consists of products that have reasonable interchangeability for the purposes for which they are produced. The reasonable interchangeability of use or the cross-elasticity of demand between a product and its substitutes constitutes the outer boundaries of a product market for antitrust purposes. Cross-elasticity of demand measures the extent to which modest variations in the price of one good affect customer demand for another good. A high cross-elasticity of demand indicates that the two products in question are reasonably interchangeable substitutes for each other and hence are part of the same market.

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

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

In defining product markets, the United States Court of Appeals for the Eleventh Circuit has long looked to the factors set forth in judicial precedent, including industry or public recognition of the sub-market as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

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

HN10[] Relevant Market, Geographic Market Definition

To consider monopolization, a relevant geographic market must be defined.

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

HN11[] Relevant Market, Product Market Definition

Judicial precedent specifically identifies distinct prices as a factor indicating a separate product market.

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

HN12[] Relevant Market, Product Market Definition

It is true that in some circumstances the United States Court of Appeals for the Eleventh Circuit has said that a market definition must be based on expert testimony. Such testimony can be insufficient when conclusory or based upon insufficient economic analysis.

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

HN13[] Actual Monopolization, Monopoly Power

As a legal matter, *15 U.S.C.S. § 2* requires that the defendant either have monopoly power or a dangerous probability of achieving it. Monopoly power is the ability to control prices or exclude competition. However, because direct proof of the ability to profitably raise prices substantially above the competitive level is only rarely available, courts more typically examine market structure in search of circumstantial evidence of monopoly power. Courts regularly ask whether the firm has a predominant market share and look to other circumstantial factors such as the size and strength of competing firms, freedom of entry, pricing trends and practices in the industry, ability of consumers to substitute comparable goods, and consumer demand.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN14[] Monopolies & Monopolization, Actual Monopolization

Exclusive dealing arrangements are not per se unlawful, but they can run afoul of the antitrust laws when used by a dominant firm to maintain its monopoly. An exclusive dealing arrangement can be harmful when it allows a monopolist to maintain its monopoly power by raising its rivals' costs sufficiently to prevent them from growing into effective competitors.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN15[] Actual Monopolization, Anticompetitive & Predatory Practices

Neither the United States Supreme Court nor the United States Court of Appeals for the Eleventh Circuit has provided a clear formula with which to evaluate an exclusive dealing monopoly maintenance claim, but the United States Court of Appeals for the District of Columbia Circuit has synthesized a structured, rule of reason-style approach to monopolization cases that has been cited with approval. First, the government must show that the monopolist's conduct had the anticompetitive effect of harming competition, not just a competitor. If the government succeeds in demonstrating this anticompetitive harm, the burden then shifts to the defendant to present pro-competitive justifications for the exclusive conduct, which the government can refute. If the court accepts the defendant's proffered justifications, it must then decide whether the conduct's pro-competitive effects outweigh its anticompetitive effects. This approach mirrors rule of reason analysis.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN16[] Actual Monopolization, Anticompetitive & Predatory Practices

The Federal Trade Commission adopts a case-by-case approach in evaluating exclusive dealing arrangements, looking to the reality of the marketplace and the practical effect of the arrangement. The United States Court of Appeals for the Eleventh Circuit agrees with this approach.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN17[] Actual Monopolization, Anticompetitive & Predatory Practices

The United States Court of Appeals for the Eleventh Circuit, without specifically citing judicial precedent, has joined the consensus that exclusive dealing arrangements are reviewed under the rule of reason.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN18[] Actual Monopolization, Anticompetitive & Predatory Practices

The difference between the traditional rule of reason and the rule of reason for exclusive dealing is that in the exclusive dealing context, courts are bound by the Tampa Electric requirement to consider substantial foreclosure. But foreclosure is usually no longer sufficient by itself; rather, it serves a useful screening function as a proxy for anticompetitive harm. Thus, foreclosure is one of several factors we now examine in determining whether the conduct harmed competition. The United States Court of Appeals for the Eleventh Circuit will also look for direct evidence that the challenged conduct has affected price or output, along with other indirect evidence, such as the degree of rivals' exclusion, the duration of the exclusive deals, and the existence of alternative channels of distribution. The ultimate question remains whether the defendant's conduct harmed competition.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN19[] Actual Monopolization, Anticompetitive & Predatory Practices

To effect anticompetitive harm, a defendant must harm the competitive process, and thereby harm consumers. In contrast, harm to one or more competitors will not suffice. This distinction makes good sense, particularly in a competitive market where injury to a single competitor may not have a significant effect on overall competition due to the persistence of other rivals. However, competitors and competition are linked, particularly in the right market settings: in a concentrated market with very high barriers to entry, competition will not exist without competitors. Indeed, this is one reason that the behavior of monopolists faces more exacting scrutiny under the antitrust statutes.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN20[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The governing judicial precedent in exclusive dealing cases speaks not of clear evidence or definitive proof of anticompetitive harm, but of probable effect. Indeed, the United States Court of Appeals for the Eleventh Circuit has often articulated the rule of reason, the governing standard for evaluating exclusive dealing claims, by quoting judicial precedent's instruction to analyze the effects of the challenged conduct, actual or probable.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN21[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The United States Court of Appeals for the District of Columbia Circuit found no case supporting the proposition that *15 U.S.C.S. § 2* liability requires plaintiffs to present direct proof that a defendant's continued monopoly power is precisely attributable to its anticompetitive conduct. It noted that to require that *§ 2* liability turn on a plaintiff's ability or inability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct would only encourage monopolists to take more and earlier anticompetitive action.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN22[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Substantial foreclosure continues to be a requirement for exclusive dealing to run afoul of the antitrust statutes. Foreclosure occurs when the opportunities for other traders to enter into or remain in the market are significantly limited by the exclusive dealing arrangements. Traditionally a foreclosure percentage of at least 40 percent has been a threshold for liability in exclusive dealing cases. However, some courts find that a lesser degree of foreclosure is required when the defendant is a monopolist.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN23[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The test for substantial foreclosure is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit. Some circuits find monopolists liable for anticompetitive conduct where the targeted rival gained market share, but less than it likely would have absent the conduct. Exclusive dealing measures that slow a rival's expansion can still produce consumer injury.

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

HN24[] **Standards of Review, Substantial Evidence**

Under the United States Court of Appeals for the Eleventh Circuit's deferential standard of review, the mere fact that two inconsistent conclusions could be drawn from the record does not prevent the Federal Trade Commission's finding from being supported by substantial evidence.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN25[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Anti-competitive intent alone, no matter how virulent, is insufficient to give rise to an antitrust violation. But, as the United States Court of Appeals for the Eleventh Circuit has said, evidence of intent is highly probative not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. For a monopolization charge, intent is relevant to the question whether the challenged conduct is fairly characterized as exclusionary or anticompetitive. There is agreement on the proposition that no monopolist monopolizes unconscious of what he is doing.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Evidence > Burdens of Proof > Burden Shifting

HN26[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Once the Federal Trade Commission establishes that a defendant's conduct harmed competition, the burden shifts to the defendant to offer pro-competitive justifications for its conduct. As the Commission explains, cognizable justifications are typically those that reduce cost, increase output or improve product quality, service, or innovation. Such justifications, however, cannot be merely pretextual.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN27[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Judicial precedent looks to evidence that proffered justifications for conduct are merely an excuse to cover up different and anticompetitive reasons.

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Judges: Before MARCUS, and JILL PRYOR, Circuit Judges, and HINKLE,* District Judge.

Opinion by: MARCUS

Opinion

[*819] MARCUS, Circuit Judge:

This antitrust case involves allegedly anticompetitive conduct in the ductile iron pipe fittings ("DIPF") market by McWane, Inc., a family-run company headquartered in Birmingham, Alabama. In 2009, following the passage of federal legislation that provided a large infusion of money for waterworks projects that required domestic pipe fittings, Star Pipe Products entered the domestic fittings market. In response, McWane, the dominant producer of domestic pipe fittings, announced to its distributors that (with limited exceptions) unless they bought all of their domestic fittings from McWane, they would lose their rebates and be cut off from purchases for 12 weeks. The Federal Trade Commission ("FTC") investigated and brought an enforcement action under *Section 5 of the Federal Trade Commission Act*, *15 U.S.C. § 45*. The Administrative Law Judge ("ALJ"), after a two-month trial, and then a divided Commission, found that McWane's actions constituted an illegal exclusive dealing policy used to maintain McWane's monopoly power in the domestic fittings market. The Commission issued an order directing McWane to stop requiring exclusivity from distributors. McWane appealed, challenging nearly **[**3]** every aspect of the Commission's ruling.

After thorough review, we affirm the Commission's order. The Commission's factual and economic conclusions -- identifying the relevant product market for domestic fittings produced for domestic-only projects, finding that McWane had monopoly power in that market, and determining that McWane's exclusivity program harmed competition -- are supported by substantial evidence in the record, as required by our deferential standard of review, and their legal conclusions are supported by the governing law.

I.

A.

The essential facts developed in this extensive record are these. Pipe fittings join together pipes and help direct the flow of pressurized water in pipeline systems. They are sold primarily to municipal water authorities and their contractors. Although there are several thousand unique configurations of fittings (different shapes, sizes, coatings, etc.), approximately 80% of the demand is for about 100 commonly used fittings.

Fittings are commodity products produced to American Water Works Association ("AWWA") standards, and any fitting that meets AWWA specifications is interchangeable, regardless of the country of origin. Ductile iron pipe fittings **[**4]** manufacturers rarely sell fittings directly to end users; instead, they sell them to middleman distributors, who in turn sell them to end users. An end user (e.g., a municipal water authority) will issue a

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* Honorable Robert L. Hinkle, United States District Judge for the Northern District of Florida, sitting by designation. **[**2]**

"specification" for its project, detailing the pipes, fittings, and other products required. Competing contractors solicit bids for the specified products from distributors, who in turn seek quotes from various manufacturers like McWane.

[*820] End users issue either "open specifications," permitting the use of fittings manufactured anywhere in the world, or "domestic specifications," requiring the use of fittings made in the United States. An end user might issue a domestic specification either because of its preference or due to legal procurement requirements: certain municipal, state, and federal laws require waterworks projects to use domestic-only fittings.[1] Domestic fittings sold for use in projects with domestic-only specifications command higher prices than imported fittings or domestic fittings sold for use in projects with open specifications. The majority of specifications are open, and the majority of fittings sold (approximately 80-85%) are imported.

Historically, fittings were made by a number of American companies, most of which offered a full line of domestic fittings. However, beginning in the 1980s, importing fitting suppliers -- including Star Pipe Products and Sigma Corporation -- began to make significant inroads into the market. By 2005, imported fittings made up the vast majority of ductile iron pipe fittings sales, and the competition from lower-priced and lower-cost imports drove most domestic manufacturers out of the market.

Today, the overall market for fittings sold in the United States -- whether manufactured domestically or abroad, sold into both open-specification and domestic-only projects -- is an oligopoly with three major suppliers: McWane, Star, and Sigma. Together they account for approximately 90% of the fittings sold in the United States. There are two national distributors, **[**6]** HD Supply and Ferguson, which together account for approximately 60% of the overall waterworks distribution market.

From April 2006 until Star entered the domestic fittings market in late 2009, McWane was the only supplier of domestic fittings. Until 2008, McWane produced fittings at two domestic foundries, one in Anniston, Alabama, ("Union Foundry") and the other in Tyler, Texas. In 2005, McWane opened a foundry to produce fittings in China, and in 2008 it closed its Texas foundry.

In 2009, looking to take advantage of the increased demand for domestic fittings prompted by ARRA, Star decided to enter the market for domestic DIPFs. In June 2009, Star publicly announced at an industry conference and in a letter to customers that it would offer domestic fittings starting in September 2009. Star became a "virtual manufacturer" of domestic fittings, contracting with six third-party foundries in the U.S. to produce fittings to Star's specifications. Star also investigated acquiring its own U.S. foundry, which the Commission found would have been a decidedly less costly and more efficient way to produce domestic fittings.

In response to Star's forthcoming entry into the domestic DIPF market, **[**7]** McWane implemented its "Full Support Program" in order "[t]o protect [its] domestic brands and market position." This program was announced in a September 22, 2009 letter to distributors. McWane informed customers that if they did not "fully support McWane branded products for their domestic fitting and accessory requirements," they "may forgo participation in **[*821]** any unpaid rebates [they had accrued] for domestic fittings and accessories or shipment of their domestic fitting and accessory orders of [McWane] products for up to 12 weeks." In other words, distributors who bought domestic fittings from other companies (such as Star) might lose their rebates or be cut off from purchasing McWane's domestic fittings for up to three months.[2] The Full Support Program did contain two exceptions permitting the

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[1] In particular, the American **[**5]** Recovery and Reinvestment Act of 2009 ("ARRA"), ***Pub. L. No. 111-5, 123 Stat. 115***, provided more than $6 billion to fund water infrastructure projects, all with domestic-only specifications. Pennsylvania and New Jersey state laws also require domestic materials in public projects, as do Air Force bases, certain federal programs, and various municipalities. See, e.g., *73 P.S. § 1884*, *1886*; *N.J. Stat. Ann. § 52:33-3*; *McWane, Inc. (McWane I), 155 F.T.C. 903, 994-95, 2013 FTC LEXIS 76 (2013)*.

[2] McWane emphasizes that the policy deliberately used the words "may" and "or" to convey "a weak stance." However, McWane's Vice President and General Manager Richard Tatman recognized **[**8]** that "[a]lthough the words 'may' and 'or' were specifically used, the market has interpreted the communication in the more hard line 'will' sense."

purchase of another company's domestic fittings: where McWane products were not readily available, and where the customer bought domestic fittings and accessories along with another manufacturer's ductile iron pipe.

Internal documents reveal that McWane's express purpose was to raise Star's costs and impede it from becoming a viable competitor. McWane executive Richard Tatman wrote, "We need to make sure that they [Star] don't reach any critical market mass that will allow them to continue to invest and receive a profitable return." In another document, he "observed that 'any competitor' seeking to enter the domestic fittings market could face 'significant blocking issues' if they are not a 'full line' domestic supplier." McWane I, 155 F.T.C. at 1134. In yet another, McWane employees described the nascent Full Support Program as a strategy to "[f]orce [d]istribution to [p]ick their [h]orse," which would "[f]orce[] Star[] to absorb the costs associated with having a more full line before they can secure major distribution." Mr. Tatman was concerned about the "[e]rosion of domestic pricing if Star emerges as a legitimate competitor," and another McWane executive wrote that his "chief concern is that the domestic market [might] get[] creamed from a pricing standpoint" should Star become a "domestic supplier."

Initially, the Full Support Program **[**9]** was enforced as threatened. Thus, for example, when the Tulsa, Oklahoma branch of distributor Hajoca Corporation purchased Star domestic fittings, McWane cut off sales of its domestic fittings to all Hajoca branches and withheld its rebates.[3] Other distributors testified to abiding by the Full Support Program in order to avoid the devastating result of being cut off from all McWane domestic fittings. For example, following the announcement of the Full Support Program, the country's two largest waterworks distributors, HD Supply (with approximately a 28-35% share of the distribution market) and Ferguson (with approximately 25%), prohibited their branches from purchasing domestic fittings from Star unless the purchases fell into one of the Full Support Program exceptions, and even canceled pending orders for domestic fittings that they had placed with Star. Indeed, the Commission found that "Star was rebuffed by some distributors even after offering a more generous rebate than McWane." However, some distributors also identified other factors that contributed to their decision not to purchase from Star, including "concerns about Star's inventory, the quality of fittings produced at several **[**10]** different foundries, . . . the timeliness of delivery," **[*822]** and negative past business dealings with Star.

Despite McWane's Full Support Program, Star entered the domestic fittings market and made sales to various distributors. From 2006 until Star's entry in 2009, McWane was the only manufacturer of domestic fittings, with 100% of the market for domestic-only projects. By 2010, Star had gained approximately 5% of the domestic fittings market, while McWane captured the remaining 95%. Star grew to just under 10% market share in 2011, leaving the remaining 90% for McWane, and Star was "on pace, at the time of trial, to have its best year ever for [d]omestic [f]ittings sales in 2012." The Commission noted that "many distributors made purchases under the exceptions allowed by the Full Support Program," but that Star's sales in total "were small compared to the overall size of the market." Star estimated **[**11]** that if the Full Support Program had not been in place, its sales would have been greater by a multiple of 2.5 in 2010 and by a multiple of three in 2011.

Star never ended up building or buying a domestic foundry of its own. The Commission found that this was because Star "believed its sales level was insufficient to justify running its own foundry." Star estimated that the cost of producing fittings at its own domestic foundry would have been significantly lower than the cost of contracting with independent foundries, and that operating its own foundry would have allowed it to appreciably reduce its domestic fittings prices. (This is because the third-party foundries used less specialized and less efficient equipment, had increased logistical costs and higher labor costs, and charged a markup plus a fee for shipping.) The Commission and the ALJ also found that the Full Support Program was a "significant reason" that another distributor, Serampore Industries Private, decided not to enter the domestic fittings market.

During 2009-2010, following Star's entry into the market and the Full Support Program's implementation, McWane's production costs for domestic fittings remained flat, but **[**12]** it raised its prices for domestic fittings and increased its gross profits. These prices were relatively consistent across all states, regardless of whether Star had entered

[3] McWane maintains that this was the only example of the Full Support Program's enforcement: "McWane never enforced the rebate program against any other distributor." Of course, the goal of the program was not necessarily to enforce the punishments but to dissuade customers from leaving McWane in the first place.

the domestic fittings market as a rival; Star's presence in various states did not result in lower prices. McWane "continued to sell its domestic fittings into domestic-only specifications at prices that earned significantly higher gross profits than for non-domestic fittings, which faced greater competition." *McWane, Inc. (McWane II), 2014-1 Trade Cas. (CCH) ¶ 78670, 2014 FTC LEXIS 28, 2014 WL 556261, at *17 (F.T.C. Jan. 30, 2014)*. Star's average prices, however, were higher than McWane's in several states.

The duration of the Full Support Program is a matter of some dispute. McWane contends that it ended the Full Support Program in early 2010, eliminating the provision that customers might forego shipments for up to 12 weeks. But the Commission found that McWane had never "publicly withdrawn the policy or notified distributors of any changes," and that some distributors believed that the policy was "still in effect." There is also evidence that some distributors started to ignore the Full Support Program in 2010 after they learned of the FTC's investigation into McWane's practices.

B.

On January 4, 2012, the FTC issued a seven-count **[**13]** administrative complaint **[*823]** charging McWane, Star, and Sigma[4] with violating *Section 5 of the Federal Trade Commission Act*. (In February and May of 2012, Star and Sigma entered consent decrees with the FTC without any admission of wrongdoing, leaving McWane as the sole defendant.) The only charge at issue on appeal is found in count six,[5] which alleged that McWane's exclusivity mandate (the Full Support Program) constituted unlawful maintenance of a monopoly over the domestic fittings market.

The ALJ conducted a two-month trial. On May 8, 2013, he issued a 464-page decision ruling in favor of the complaint counsel on count 6.[6] He specifically found that the sales for projects requiring domestic **[**14]** fittings constituted a separate product market in which McWane had monopoly power. McWane I, 155 F.T.C. at 1239-40, 1375-88. He ruled that McWane's Full Support Program was an exclusive dealing arrangement that foreclosed Star from a substantial share of the domestic fittings market and, thereby, unlawfully maintained McWane's monopoly. Both McWane and the complaint counsel appealed the ALJ's decision to the Commission.

A divided Commission affirmed as to count 6.[7] Like the ALJ, the Commission found that the relevant market was the supply of domestically manufactured fittings for use in domestic-only waterworks projects, because imported fittings are not a substitute for domestic fittings for such projects. *McWane II, 2014 FTC LEXIS 28, 2014 WL 556261, at *13*. The Commission noted that this conclusion was bolstered by the higher prices charged for domestic fittings used in domestic-only projects. *2014 FTC LEXIS 28, [WL] at *14*. The Commission also found that McWane had monopoly power in that market, with 90-95% market share from 2010-11 (a much higher share than courts usually require for a prima facie showing of monopoly power) and substantial barriers to entry in the form of major capital outlays required to produce **[**15]** domestic fittings. *2014 FTC LEXIS 28, [WL] at *15-18*.

The Commission agreed that McWane's Full Support Program was an unlawful exclusive dealing arrangement that foreclosed Star's access to distributors for domestic fittings and harmed competition, thereby contributing significantly to the maintenance of McWane's monopoly power in the market. *2014 FTC LEXIS 28, [WL] at *18-28*.

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[4] In a series of events irrelevant to the resolution of this appeal, Sigma entered the domestic fittings market as an authorized distributor of McWane's domestic fittings. See *McWane II, 2014 FTC LEXIS 28, 2014 WL 556261, at *10-11*.

[5] Counts 1, 2, and 3 alleged an earlier conspiracy among McWane, Sigma, and Star to stabilize prices in the non-domestic fittings market. Counts 4 and 5 alleged that McWane's distribution agreement with Sigma violated the Federal Trade Commission Act. Count 7 alleged that the same conduct targeted in Count 6 amounted to attempted monopolization.

[6] The ALJ dismissed counts 1-3 but ruled in favor of the complaint counsel on counts 4-7.

[7] The Commission dismissed the other six counts. As to Count 7, attempted monopolization, the Commission deemed it "unnecessary to ask whether McWane attempted to monopolize the market" since it had found that McWane had actually done so. *McWane II, 2014 FTC LEXIS 28, 2014 WL 556261, at *31 n.16*.

It noted that HD Supply and Ferguson, the country's two largest waterworks distributors (with a combined 60% market share), prohibited their branches from purchasing domestic fittings from Star after the Full Support Program was announced, except through the program's limited exceptions. *2014 FTC LEXIS 28, [WL] at *23*. The practical effect of the program, the Commission found, "was to make it economically infeasible for distributors to drop McWane[] . . . and switch to Star." *2014 FTC LEXIS 28, [WL] at *24*. Unable to attract distributors, **[*824]** Star was prevented from generating the revenue needed to acquire its own foundry, a more efficient means of producing domestic fittings; thus, its growth into a rival **[**16]** that could challenge McWane's monopoly power was artificially stunted. *2014 FTC LEXIS 28, [WL] at *25*.

Moreover, the Commission found that there was evidence that McWane's exclusionary conduct had an impact on price: after the Full Support Program was implemented, McWane raised domestic fittings prices and increased its gross profits despite flat production costs, and it did so across states, regardless of whether Star had entered the market as a competitor. *2014 FTC LEXIS 28, [WL] at *27*.

Commissioner Wright filed a lengthy dissent. He assumed that McWane was a monopolist in the domestic-only fittings market, agreed that the Full Support Program was an exclusive dealing arrangement, and concluded that there was "ample record evidence" that the program harmed Star. *2014 FTC LEXIS 28, [WL] at *46* (Wright, dissenting). However, he contended that the government "failed to carry its burden to demonstrate that the Full Support Program resulted in cognizable harm to competition." *2014 FTC LEXIS 28, [WL] at *62*. He argued that according to modern economic theory, exclusive dealing is harmful to competition (as opposed to merely harmful to a competitor) only if it prevents rivals from attaining a minimum efficient scale needed to constrain a monopolist's exercise of monopoly power. *2014 FTC LEXIS 28, [WL] at *48*. Commissioner Wright contended **[**17]** that the government had failed to demonstrate such harm to competition, either through direct or indirect evidence. Specifically, he suggested that the government had failed to show that Star's inability to afford its own foundry was the equivalent of its being unable to achieve minimum efficient scale, failed to link the market foreclosure to McWane's alleged maintenance of monopoly power, and miscalculated the relevant foreclosure share. *2014 FTC LEXIS 28, [WL] at *58-60*. Moreover, he noted that other forms of indirect evidence -- including Star's ability to enter the domestic fittings market and expand despite the existence of the Full Support Program, as well as the short duration and terminability of the exclusive dealing arrangement -- cut against a finding that McWane's conduct was exclusionary.[8]@@*2014 FTC LEXIS 28, [WL] at *61-62*.

McWane filed a timely petition in this Court seeking review of the Commissioner's order on the lone remaining count.

II.

HN1[] This Court "review[s] the FTC's findings of fact and economic conclusions under the substantial **[**18]** evidence standard." *Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1062 (11th Cir. 2005)*; see *15 U.S.C. § 45(c)* ("The findings of the Commission as to the facts, if supported by evidence, shall be conclusive."). "Substantial evidence is more than a mere scintilla, and [this Court] require[s] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Schering-Plough, 402 F.3d at 1062* (quotation omitted). This standard "forbids a court to 'make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences.'" *Polypore Int'l, Inc. v. FTC, 686 F.3d 1208, 1213 (11th Cir. 2012)* (quoting *FTC v. Algoma Lumber Co., 291 U.S. 67, 73, 54 S. Ct. 315, 78 L. Ed. 655, 18 F.T.C. 669 (1934)*). Indeed, "the possibility of drawing two **[*825]** inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n, 383 U.S. 607, 620, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966)*.

HN2[] We review de novo the Commission's legal conclusions and the application of the facts to the law. *Polypore Int'l, 686 F.3d at 1213*. However, "we afford the FTC some deference as to its informed judgment that a particular commercial practice violates the Federal Trade Commission Act." *Schering-Plough, 402 F.3d at 1063*;

[8] Former FTC Commissioner Rosch -- whom Commissioner Wright replaced on the Commission in January 2013 -- had issued similar criticisms in his dissents at both the pleading and summary judgment stages of the case.

see FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 454, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986) ("[T]he identification of governing legal standards and their application to the facts found . . . are . . . for the courts to resolve, although even in considering such issues the courts are to give some deference to the Commission's informed judgment that a particular commercial **[**19]** practice is to be condemned as 'unfair' [under the Federal Trade Commission Act].").

McWane challenges three particular determinations by the Commission: its market definition; its finding that McWane monopolized the domestic fittings market; and its finding that the Full Support Program harmed competition. Because the standard of review is essential to our analysis, we explain the applicable standard for each of the Commission's conclusions. All three determinations are factual or economic conclusions reviewed only for substantial evidence.

First, ***HN3***[] our caselaw makes clear that "[t]he definition of the relevant market is essentially a factual question." U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 994 (11th Cir. 1993). Thus, we review the FTC's determination of market definition -- like all its factual findings -- for substantial evidence. See Jim Walter Corp. v. FTC, 625 F.2d 676, 682 (5th Cir. 1980) (applying the substantial evidence standard in reviewing the FTC's finding of market definition).[9]

[*826] Second, ***HN4***[] the FTC's determination that a defendant possesses monopoly power is a factual or economic conclusion that we also review for substantial evidence. No prior case of ours appears to hold this specifically, but this conclusion follows from previous cases that have treated a determination that a defendant possesses market power -- a lesser-included element of monopoly power -- as a factual finding. See NaBanco, 779 F.2d at 605. Again, other circuits agree. E.g., Realcomp II, Ltd. v. FTC, 635 F.3d 815, 829 (6th Cir. 2011) (applying substantial evidence standard to FTC's finding that defendant possessed substantial market power); L.G. Balfour Co. v. FTC, 442 F.2d 1, 13 (7th Cir. 1971) (applying substantial evidence standard to FTC's finding that defendant possessed monopoly power).

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[9] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this Court adopted as binding precedent all decisions of the old Fifth Circuit handed down prior to October 1, 1981.

A recent opinion of this Court stated that we review the FTC's finding of market definition for "clear error." Polypore Int'l, 686 F.3d at 1217. Clear error is the traditional standard used to review a district court's factual **[**20]** findings, and we employ it in reviewing a finding of market definition by a district court judge. See, e.g., United States v. Engelhard Corp., 126 F.3d 1302, 1305 (11th Cir. 1997); Cable Holdings of Ga., Inc. v. Home Video, Inc., 825 F.2d 1559, 1563 (11th Cir. 1987); Nat'l Bancard Corp. (NaBanco) v. VISA U.S.A., Inc., 779 F.2d 592, 604 (11th Cir. 1986). Polypore drew its "clear error" language from just such a case. 686 F.3d at 1217 (citing Engelhard, 126 F.3d at 1305). But substantial evidence, not clear error, is the "traditional . . . standard used by courts to review agency decisions." Am. Tower LP v. City of Huntsville, 295 F.3d 1203, 1207 (11th Cir. 2002). Indeed, Polypore itself noted the correct standard of review for the FTC's factual findings earlier in the opinion. See 686 F.3d at 1213.

Other circuits follow this distinction, reviewing the FTC's market definition finding for substantial evidence while reviewing a district court's market definition finding for clear error. Compare, e.g., Olin Corp. v. FTC, 986 F.2d 1295, 1297-98 (9th Cir. 1993) (reviewing FTC's market definition for substantial evidence), and ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559, 566 (6th Cir. 2014) (same), petition for cert. filed, No. 14-762 (Dec. 30, 2014), with, e.g., JBL Enters., Inc. v. Jhirmack Enters., Inc., 698 F.2d 1011, 1016 (9th Cir. 1983) (reviewing district court's market definition for clear error), and United States v. Cent. State Bank, 817 F.2d 22, 24 (6th Cir. 1987) (per curiam) (same).

Moreover, Polypore's language cannot be squared with the old Fifth Circuit's approach in Jim Walter. In that case, the Court asked "whether there is substantial evidence to support the FTC's finding of a national market for tar and asphalt roofing products." 625 F.2d at 683. After determining that the FTC's market definition was founded "primarily **[**21]** on the casual observations of industry representatives and an economist," the Court held that the FTC's proposed market was "not supported by substantial evidence" and remanded "for reconsideration of the appropriate . . . market." Id. Jim Walter plainly held that the FTC's market definition is reviewed for substantial evidence. Although Polypore may be read to say otherwise, in the case of an intra-circuit conflict, the earlier case is binding. See Morrison v. Amway Corp., 323 F.3d 920, 929 (11th Cir. 2003).

Finally, so too with the Commission's determination that McWane's conduct harmed competition **[**22]** and lacked offsetting procompetitive benefits. Again, no binding case of ours appears to deal with the particular type of Federal Trade Commission Act violations at issue here, but we have applied the substantial evidence standard to analogous findings under that same act and other antitrust statutes. See *Schering-Plough, 402 F.3d at 1068* (examining "whether there is substantial evidence to support the Commission's conclusion that [defendant's conduct] restrict[ed] competition" in violation of *Section 1 of the Sherman Act* and *Section 5 of the Federal Trade Commission Act*); *Foremost Dairies, Inc. v. FTC, 348 F.2d 674, 678-79 (5th Cir. 1965)* (applying substantial evidence standard to FTC's finding of injury to competition under the Robinson-Patman Act).

This approach comports with the law in other circuits in a variety of antitrust contexts. The Seventh Circuit put the point most clearly in a Clayton Act case: "[T]he substantial evidence rule (like the clearly erroneous rule) applies to ultimate as well as underlying facts, including economic judgments. . . . [T]he ultimate question under the Clayton Act -- whether the challenged transaction may substantially lessen competition -- is governed by the substantial evidence rule." *Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1385 (7th Cir. 1986)* (internal citation omitted). Our sister circuits have applied the substantial evidence standard **[**23]** to analogous economic conclusions in cases brought under the Federal Trade Commission Act, e.g., *N.C. State Bd. of Dental Exam'rs v. FTC, 717 F.3d 359, 374 (4th Cir. 2013)* (applying substantial evidence standard to FTC's determination that defendant's behavior "was likely to cause significant anticompetitive harms" in violation of the Federal Trade Commission Act), aff'd, *135 S. Ct. 1101, 191 L. Ed. 2d 35 (2015)*; *Realcomp II, 635 F.3d at 831-34* (applying substantial evidence standard to FTC's finding that defendant's policies harmed competition in violation of the Federal Trade Commission Act), and under other antitrust statutes, see, e.g., *N. Tex. Specialty Physicians v. FTC, 528 F.3d 346, 370 (5th Cir. 2008)* (applying substantial evidence standard to FTC's determination that defendant's conduct "amounted to horizontal price-fixing that is unrelated to competitive efficiencies" under *Section 1 of the Sherman Act)*; **[*827]** *Gibson v. FTC, 682 F.2d 554, 571 (5th Cir. 1982)* (applying substantial evidence standard to FTC's finding of illegal brokerage in violation of *Clayton Act § 2(c)*); RSR Corp. v. FTC*, 602 F.2d 1317, 1320, 1324-25 (9th Cir. 1979)* (applying substantial evidence standard to FTC's finding under *Section 7 of the Clayton Act* that merger was anticompetitive); *Fruehauf Corp. v. FTC, 603 F.2d 345, 355 (2d Cir. 1979)* (same); *Yamaha Motor Co. v. FTC, 657 F.2d 971, 977 n.7 (8th Cir. 1981)* (same, as to a joint venture).

HN5[] The ultimate legal conclusion that a defendant's conduct violates the Federal Trade Commission Act is an "application of the facts to the law," which we review de novo, *Polypore Int'l, 686 F.3d at 1213*, except for the limited deference prescribed by *Indiana Federation of Dentists, 476 U.S. at 454*. But the **[**24]** Commission's factual building blocks and economic conclusions -- findings of market definition, monopoly power, and harm to competition -- are reviewed for substantial evidence.

III.

The Commission found that McWane adopted an exclusionary distribution policy that maintained its monopoly power in the domestic fittings market in violation of ***HN6***[] *Section 5* of the Federal Trade Commission Act, which prohibits "[u]nfair methods of competition in or affecting commerce." *15 U.S.C. § 45*.[10] Although exclusive dealing arrangements are common and can be procompetitive, particularly in competitive markets, see *Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57, 76 (3d Cir. 2010)*, these arrangements can harm competition in certain circumstances, see *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 45, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)* (O'Connor, J., concurring) ("Exclusive dealing can have adverse economic consequences by allowing one supplier of goods or services unreasonably to deprive other suppliers of a market for their goods . . ."), abrogated

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[10] The Commission acknowledged that violations of *Section 2 of the Sherman Act* (monopolization) also constitute "unfair methods of competition" under *Section 5 of the Federal Trade Commission Act*, and therefore relied on Section 2 caselaw in its analysis. See *McWane II, 2014 FTC LEXIS 28, 2014 WL 556261, at *11 n.7* (citing *Cal. Dental Ass'n v. FTC, 526 U.S. 756, 762, 119 S. Ct. 1604, 143 L. Ed. 2d 935 & n.3 (1999)*; *FTC v. Motion Picture Adver. Serv. Co., 344 U.S. 392, 394-95, 73 S. Ct. 361, 97 L. Ed. 426, 49 F.T.C. 1730 (1953))*; see also William Holmes & Melissa Mangiaracina, ***Antitrust Law*** Handbook § 7:2 (2014) ("For the most part . . . the [Federal Trade Commission Act] has been held coterminous with the Sherman and Clayton Acts."). Both parties (and the dissenting Commissioner) agree that this is the correct **[**26]** analytical approach.

on other grounds by *Ill. Tool Works Inc. v. Ind. Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)*; Jonathan M. Jacobson, Exclusive Dealing, "Foreclosure," and Consumer Harm, 70 Antitrust L.J. 311, 328 (2002) ("The concern [with exclusive dealing arrangements] is . . . that creating or increasing market power through exclusive dealing is the means by which the defendant is likely to increase prices, restrict output, reduce quality, slow innovation, **[**25]** or otherwise harm consumers."). When a market is competitive, the "competition for the [exclusive] contract is a vital form of rivalry" that can induce the offering firm to provide price reductions or improved services to buyers, to the ultimate benefit of consumers. See *Menasha Corp. v. News Am. Mktg. In-Store, Inc., 354 F.3d 661, 663 (7th Cir. 2004)*. But, notably, in the absence of such competition, a dominant firm can impose exclusive deals on downstream dealers to "strengthen[] or prolong[] [its] market position." **[*828]** IIIB Philip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 760b7, at 54 (3d ed. 2008). Thus, while such arrangements are "not illegal in themselves," they can run afoul of antitrust laws as "an improper means of maintaining a monopoly." *United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187 (3d Cir. 2005)*.

HN7[] A violation of *Section 5 of the Federal Trade Commission Act* premised on monopolization requires proof of "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Morris Commc'ns Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1293-94 (11th Cir. 2004)* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))* (internal quotation mark omitted). Thus, for the Commission's conclusion that McWane violated the Federal Trade Commission Act to stand, it must have successfully defined the relevant market, demonstrated that McWane had monopoly power in that market, and showed that McWane's Full Support Program constituted the illegal maintenance of that monopoly power. McWane challenges all three of the Commission's determinations, and we address each of them in turn.

A. Monopoly Power in the Relevant Market

1. Market Definition

HN8[] "Defining the market is a necessary step in any analysis of market power and thus an indispensable element in the consideration of any monopolization . . . case arising under *section 2*." *U.S. Anchor, 7 F.3d at 994*. A product market consists of "products that have reasonable interchangeability for the purposes for which they are produced." *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 404, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. **[**27]** "The reasonable interchangeability of use or the cross-elasticity of demand between a product and its substitutes constitutes the outer boundaries of a product market for antitrust purposes." *U.S. Anchor, 7 F.3d at 995* (footnote omitted). "Cross-elasticity of demand" measures the extent to which modest variations in the price of one good affect customer demand for another good. "[A] high cross-elasticity of demand indicates that the two products in question are reasonably interchangeable substitutes for each other and hence are part of the same market." *Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1337 n.13 (11th Cir. 2010)*.

HN9[] In defining product markets, this Court has long looked to the factors set forth by the Supreme Court in *Brown Shoe Co. v. United States, 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*, including "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Polypore Int'l, 686 F.3d at 1217* (quoting *U.S. Anchor, 7 F.3d at 995*). Again, we are obliged to review the Commission's market definition for substantial evidence.

HN10[] A relevant geographic market also must be defined. See, e.g., *Am. Key Corp. v. Cole Nat'l Corp., 762 F.2d 1569, 1579 (11th Cir. 1985)*. The Commission (and the ALJ) defined the relevant geographic market as the United States. Neither party contests this determination. **[**28]**

As for the product market, the Commission, agreeing with the ALJ, found that the relevant market was one "for the supply of domestically-manufactured fittings **[*829]** for use in . . . projects with domestic-only specifications." *McWane II, 2014 FTC LEXIS 28, 2014 WL 556261, at *13*. It noted that various laws and end-user preferences requiring projects to use domestic fittings precluded imported fittings from being "reasonable substitutes" for those projects, even though the fittings themselves are functionally identical. Id.; see IIB Phillip E. Areeda, Herbert Hovenkamp & John Solow, ***Antitrust Law*** ¶ 572b, at 430 (3d ed. 2007) ("To the extent that regulation limits substitution, it may define the extent of the market."). The Commission also noted that McWane charged higher prices for (and reaped greater profits from) domestic fittings in domestic-only projects: the ALJ found that McWane charged approximately 20%-95% more for its domestic fittings for domestic-only projects than for open-specification projects. This price differentiation reflected McWane's ability to target customers with domestic-only project specifications who could not avoid the higher prices by substituting imported fittings. Indeed, ***HN11***[] Brown Shoe specifically identified "distinct **[**29]** prices" as a factor indicating a separate product market. *370 U.S. at 325*.

McWane contends, however, that domestic and imported fittings are, in fact, interchangeable, because some customers (those whose projects' specifications are not dictated by law) can "flip" their projects from domestic-only to open, thereby turning imported fittings into a reasonable substitute. However, the Commission found, based on testimony in the record, that "flipping typically only occurs when domestic fittings are unavailable, rather than as a result of competition between domestic and imported fittings." *McWane II, 2014 FTC LEXIS 28, 2014 WL 556261, at *15*. This is consonant with the ALJ's finding that end users with domestic-only preferences "are aware of, but not sensitive to, the price differential between domestic fittings and import fittings." McWane I, 155 F.T.C. at 999.

McWane also alleges that the Commission's definition was insufficient as a matter of law because it "was unsupported by an expert economic test," which McWane claims is a requirement under Eleventh Circuit caselaw. ***HN12***[] It is true that in some circumstances we have said that a market definition "must be based on expert testimony." *Bailey v. Allgas, Inc., 284 F.3d 1237, 1246 (11th Cir. 2002)*; see *Am. Key Corp., 762 F.2d at 1579* ("Construction of a relevant economic market . . . cannot . . . be based upon lay **[**30]** opinion testimony."). Such testimony can be insufficient when "conclusory" or "based upon insufficient economic analysis." *Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs, Inc., 479 F.3d 1310, 1313 (11th Cir. 2007)* (per curiam); see *Bailey, 284 F.3d at 1246-47* (finding that plaintiff's expert testimony, which failed to consider alternative products in defining relevant market, was insufficient as a matter of law).

But in this case, the Commission did rely in part on the complaint counsel's expert witness, Dr. Laurence Schumann, who considered a hypothetical monopolist test and the lack of interchangeability between domestic and imported fittings in domestic-only projects. Nevertheless, McWane claims that the expert's analysis was insufficient because it did not involve an econometric analysis, such as a cross-elasticity of demand study. However, there appears to be no support in the caselaw for McWane's claim that such a technical analysis is always required. Indeed, as the Commission correctly noted, "[c]ourts routinely rely on qualitative economic evidence to define relevant markets." *McWane II, 2014 FTC LEXIS 28, 2014 WL 556261, at *14*. Thus, for example, in Polypore, the Commission's market definition was affirmed by this Court on the basis of the **[*830]** Brown Shoe factors, apparently without an econometric study. *686 F.3d at 1217-18*. Given the identification of persistent price **[**31]** differences between domestic fittings and imported fittings, the distinct customers, and the lack of reasonable substitutes in this case, there was sufficient evidence to support the Commission's market definition.

2. Monopoly Power

HN13[] "As a legal matter, *Sherman Act § 2* requires that the defendant either have monopoly power or a dangerous probability of achieving it . . ." XI Philip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 1800c5, at 22 (3d ed. 2011); accord *Dentsply, 399 F.3d at 187* ("A prerequisite for [a *§ 2* violation] is a finding that monopoly power exists."). Monopoly power is the ability "to control prices or exclude competition." *Grinnell, 384 U.S. at 571* (quotation omitted). However, "[b]ecause . . . direct proof [of the ability to profitably raise prices substantially above the competitive level] is only rarely available, courts more typically examine market structure in search of circumstantial evidence of monopoly power." *United States v. Microsoft Corp., 253 F.3d 34, 51, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (en banc) (per curiam). Courts regularly ask whether the firm has a predominant market share, see *Bailey, 284 F.3d at 1246* ("Because demand is difficult to establish with accuracy, evidence of a seller's market share may provide the most convenient circumstantial measure of monopoly power."), and look to other circumstantial factors such **[**32]** as "the size and strength of competing firms, freedom of entry, pricing trends and practices in the industry, ability of consumers to substitute comparable goods, and consumer demand," *Dentsply, 399 F.3d at 187*.

In determining that McWane had monopoly power, the Commission found that McWane's market share of the domestic fittings market had been 100% from 2006 until Star's entry into the market in 2009. McWane's market share was then approximately 95% in 2010 and approximately 90% in 2011, "far exceed[ing] the levels that courts typically require to support a prima facie showing of monopoly power." *McWane II, 2014 FTC LEXIS 28, 2014 WL 556261, at *16*. It also observed that there were "substantial barriers to entry in the domestic fittings market" both for brand new entrants and for those who already supply imported fittings. Id. Although Star was able to enter the market, the Commission noted that its share remained below 10% in 2010 and 2011, and, notably, its entry had no effect on McWane's prices. The Commission reasoned that McWane's "ability to control prices" in the market "provide[d] direct evidence of [its] monopoly power." *Id. at *18*.

The difficulty in this case is that the circumstantial evidence does not all point in the same direction. McWane's market share during the relevant **[**33]** time period is plainly high enough to be considered predominant. See *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* (80-95% market share sufficient to establish monopoly power); *Grinnell, 384 U.S. at 571* (87% sufficient); *Dentsply, 399 F.3d at 188* (market share between 75-80% is "more than adequate to establish a prima facie case of [monopoly] power"); *Colo. Interstate Gas Co. v. Natural Gas Pipeline Co. of Am., 885 F.2d 683, 694 n.18 (10th Cir. 1989)* ("[To establish monopoly power,] lower courts generally require a minimum market share of between 70% and 80%."); *Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203, 207 n.2 (5th Cir. 1969)* ("[S]omething more than 50% of the market is a prerequisite to a finding of monopoly"). Standing alone, **[*831]** this would seem to be sufficient evidence to support the Commission's conclusion that McWane had monopoly power in the domestic fittings market.

However, there is also evidence that, despite the presence of the Full Support Program, Star was still able to enter the domestic fittings market and expand its market share from 0% in 2009 to approximately 5% in 2010 to approximately 10% in 2011, while McWane's market share correspondingly declined. McWane contends that this "clear and successful entry" and growth by a competitor precludes a finding of monopoly power by demonstrating a lack of barriers to entry in the market. The Commission disagreed, finding that, despite Star's entry and growth, substantial barriers to entry existed **[**34]** in both the overall fittings market and the domestic fittings market. The ALJ found (and the Commission agreed) that "a significant capital investment" is required to enter the overall fittings market, McWane I, 155 F.T.C. at 1113, as "new entrant[s] must overcome existing relationships between existing manufacturers[,] and the [d]istributors[,] and [e]nd [u]sers," in addition to "develop[ing] hundreds of patterns and moldings," id. at 1114. All told, the Commission agreed with the ALJ that a de novo entrant would need approximately three to five years to enter the fittings market. *McWane II, 2014 FTC LEXIS 28, 2014 WL 556261, at *16*. Star, as an established player in the overall fittings market, did not face all of these obstacles in entering the domestic fittings market. (For example, it had pre-existing relationships with some distributors and did not need to alter its sales team.) Nevertheless, the Commission found that significant barriers to entry existed in the domestic market, as Star still needed to purchase its own foundry or contract with third-party domestic foundries. Id.; see *Bailey, 284 F.3d at 1256* ("Entry barriers include . . . capital outlays required to start a new business . . . ."). Moreover, the Commission found that the Full Support Program itself posed a barrier to entry by shrinking the number of available distributors. **[**35]** In support of this argument, the Commission observed that two other suppliers of imported fittings, Sigma Corporation and Serampore Industries Private, considered entering the domestic fittings market but ultimately concluded that the costs and challenges were too high. *McWane II, 2014 FTC LEXIS 28, 2014 WL 556261, at *17*.

Some caselaw from other circuits appears to support McWane. See *Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 99 (2d Cir. 1998)* ("We cannot be blinded by market share figures and ignore marketplace realities, such as the relative ease of competitive entry. . . . [A competitor's] successful entry . . . refutes any inference of the existence of monopoly power that might be drawn from [the defendant's] market share.").[11] But not all courts agree. See *Rebel*

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[11] It is worth noting, however, that the defendant in Tops Markets had a lower market share than McWane -- 74% as opposed to over 90% -- and the plaintiffs "failed to produce any . . . evidence to rebut [the defendant's] assertion" that the market contained

Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1440 (9th Cir. 1995) ("The fact that entry has occurred does not necessarily preclude the existence of 'significant' entry barriers. If the output or capacity of the new entrant is insufficient to take significant business away from the predator, they are unlikely to represent a challenge to the predator's market power."); Reazin v. Blue Cross & Blue Shield of Kan., Inc., 899 F.2d 951, 971 (10th Cir. 1990) (rejecting defendant's **[*832]** argument that presence of multiple competitors demonstrated that entry barriers were insubstantial where "no other entrant remotely approached [defendant's] domination of the market"); Oahu Gas Serv., Inc. v. Pac. Res. Inc., 838 F.2d 360, 366-67 (9th Cir. 1988) ("A declining market **[**36]** share may reflect an absence of market power, but it does not foreclose a finding of such power." (quotation omitted)). No decision of this Court appears to be directly on point.

In addition to McWane's overwhelming (albeit declining) market share, the Commission cited the particular importance of Star's inability to constrain McWane's pricing for domestic fittings. After Star's entry, McWane continued to sell domestic fittings for domestic-only products at prices that "earned significantly higher gross profits than for non-domestic fittings, which faced greater competition." McWane II, 2014 FTC LEXIS 28, 2014 WL 556261, at *17. Indeed, McWane's prices and profits for domestic fittings rose in 2010, the year after Star's entry.

On this record, we are unprepared to say that Star's entry and growth foreclose a finding that McWane possessed monopoly power in the relevant **[**37]** market. Although the limited entry and expansion of a competitor sometimes may cut against such a finding, the evidence of McWane's overwhelming market share (90%), the large capital outlays required to enter the domestic fittings market, and McWane's undeniable continued power over domestic fittings prices amount to sufficient evidence that "a reasonable mind might accept as adequate to support" the Commission's conclusion. Schering-Plough, 402 F.3d at 1062 (quotation omitted).

B. Monopoly Maintenance

Having established that McWane "possess[es] . . . monopoly power in the relevant market," we turn to the question of whether the government proved that McWane engaged in "the willful . . . maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." Morris Commc'ns, 364 F.3d at 1293-94 (quoting Grinnell, 384 U.S. at 570-71).

As we've observed, ***HN14***[] exclusive dealing arrangements are not per se unlawful, but they can run afoul of the antitrust laws when used by a dominant firm to maintain its monopoly. Of particular relevance to this case, an exclusive dealing arrangement can be harmful when it allows a monopolist to maintain its monopoly power by raising its rivals' costs sufficiently to prevent them from growing **[**38]** into effective competitors. See XI Areeda & Hovenkamp, supra, ¶ 1804a, at 116-17 (describing how exclusive contracts can raise rivals' costs and harm competition); see generally Thomas G. Krattenmaker & Steven C. Salop, Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price, 96 Yale L.J. 209 (1986). The following description seems particularly appropriate here:

> [S]uppose an established manufacturer has long held a dominant position but is starting to lose market share to an aggressive young rival. A set of strategically planned exclusive-dealing contracts may slow the rival's expansion by requiring it to develop alternative outlets for its product, or rely at least temporarily on inferior or more expensive outlets. Consumer injury results from the delay that the dominant firm imposes on the smaller rival's growth.

XI Areeda & Hovenkamp, supra, ¶ 1802c, at 76; see ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 271 (3d Cir. 2012); Dentsply, 399 F.3d at 191.

[*833] Tracking this economic argument, the Commission's theory is that McWane's Full Support Program was an exclusive dealing policy designed specifically to maintain its monopoly power "by impairing the ability of rivals to grow into effective competitors that might erode the firm's dominant position." McWane II, 2014 FTC LEXIS 28, 2014 WL 556261, at *19. To prevail, the FTC must establish that McWane "has engaged in anti-competitive

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no barriers to entry. 142 F.3d at 99. In this case, as we noted, the complaint alleged and the Commission found significant entry barriers.

conduct **[**39]** that reasonably appears to be a significant contribution to maintaining monopoly power." *Dentsply, 399 F.3d at 187*; accord *Microsoft, 253 F.3d at 79* (quoting III Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 650c, at 69 (1996)).

HN15[] Neither the Supreme Court nor this Circuit has provided a clear formula with which to evaluate an exclusive dealing monopoly maintenance claim, but the D.C. Circuit has synthesized a structured, "rule of reason"-style approach to monopolization cases that has been cited with approval. See Jacobson, supra, at 364-69; III Areeda & Hovenkamp, supra, P 651, at 97 n.1. First, the government must show that the monopolist's conduct had the "anticompetitive effect" of "harm[ing] competition, not just a competitor." *Microsoft, 253 F.3d at 58-59*. If the government succeeds in demonstrating this anticompetitive harm, the burden then shifts to the defendant to present procompetitive justifications for the exclusive conduct, which the government can refute. *Microsoft, 253 F.3d at 59*; *Dentsply 399 F.3d at 196*; see *Eastman Kodak, 504 U.S. at 482-84* (describing defendant's proffered "valid business reasons" for its actions and plaintiff's rebuttal). If the court accepts the defendant's proffered justifications, it must then decide whether the conduct's procompetitive effects outweigh its anticompetitive effects. *Microsoft, 253 F.3d at 59*. This approach mirrors rule of reason analysis. See *Schering-Plough, 402 F.3d at 1064-65* (outlining a substantially similar burden-shifting **[**40]** approach in "traditional rule of reason analysis").

The Commission followed this approach. It found that McWane's Full Support Program was an exclusive dealing policy that harmed competition by foreclosing Star's access to necessary distributors and contributed significantly to Star's lost sales and subsequent inability to purchase its own foundry and expand output. It considered McWane's procompetitive justifications but ultimately found them unpersuasive.

McWane challenges each aspect of the Commission's ruling: first, it says that its Full Support Program was "presumptively legal" because it was non-binding and short-term; second, it contends that the government failed to carry its burden of establishing harm to competition; third, it argues that the Commission wrongly rejected its proffered procompetitive justifications. We address each claim in turn.

1. Presumptive Legality

McWane suggests that the Full Support Program lacked the characteristics of anticompetitive exclusive dealing arrangements. Specifically, it urges that the Full Support Program was "presumptively legal" and "[could not] harm competition" because it was short-term and voluntary (rather than a binding contract of **[**41]** a longer term). No binding precedent from the Supreme Court or this Court speaks specifically to this issue, but McWane hangs its hat on caselaw from other circuits. See, e.g., *Omega Envtl. v. Gilbarco, Inc., 127 F.3d 1157, 1163 (9th Cir. 1997)* ("[T]he short duration and easy terminability of these [one-year] agreements negate substantially their potential to foreclose competition." (footnote omitted)); *Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 395* ***[*834]*** *(7th Cir. 1984)* ("Exclusive-dealing contracts terminable in less than a year are presumptively lawful under *section 3 [of the Clayton Act]*."); Jacobson, supra, at 351-52 & n.195.

But not all courts agree. The Third Circuit in Dentsply held that where exclusive deals were "technically only a series of independent sales," they nevertheless constituted antitrust violations because "the economic elements involved -- the large share of the market held by [the defendant] and its conduct excluding competing manufacturers -- realistically ma[d]e the arrangements . . . as effective as those in written contracts." *399 F.3d at 193*. The Dentsply court noted that "in spite of the legal ease with which the relationship can be terminated, the [distributors] have a strong economic incentive to continue [buying defendant's product]." *Id. at 194*; see also *ZF Meritor, 696 F.3d at 270* ("[D]e facto exclusive dealing claims are cognizable under the antitrust laws."); *Minn. Mining & Mfg. Co. v. Appleton Papers, Inc., 35 F. Supp. 2d 1138, 1144 (D. Minn. 1999)* (evaluating an **[**42]** exclusive dealing arrangement's "practical effect" rather than "merely . . . its form" in determining whether it was terminable at will (internal quotation marks omitted)). The Third Circuit distinguished opposing cases by noting that those situations primarily involved markets in which firms could viably sell directly to consumers even when foreclosed from distributors, *Dentsply, 399 F.3d at 194 n.2*, whereas in Dentsply direct sales were not "a practical alternative for most [competing] manufacturers," *id. at 189*. Likewise, in the case at hand, both the Commission and the ALJ found that distributors were essential to the domestic fittings market: "No evidence supports the existence of viable alternate distribution channels, including direct sales to end users." McWane II, 2014 FTC LEXIS 28, 2014 WL 556261, at *23.

This approach is consistent with the Supreme Court's instruction to look at the "practical effect" of exclusive dealing arrangements. Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 326-28, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961); see also Eastman Kodak, 504 U.S. at 466-67 ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in ***antitrust law***. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record.'" (quoting Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 579, 45 S. Ct. 578, 69 L. Ed. 1093 (1925))). ***HN16***[] The Commission adopted this **[**43]** approach, looking to "the reality of [the] marketplace" and finding that "the practical effect of McWane's program was to make it economically infeasible for distributors to . . . switch to Star." McWane II, 2014 FTC LEXIS 28, 2014 WL 556261, at *24. Even the dissenting commissioner agreed with this approach. Id. at *55 n.38 (Wright, dissenting). So do we.

Moreover, the nature of the Full Support Program arguably posed a greater threat to competition than a conventional exclusive dealing contract, as it lacked the traditional procompetitive benefits of such contracts. As we've noted, courts often take a permissive view of such contracts on the grounds that firms compete for exclusivity by offering procompetitive inducements (e.g., lower prices, better service). But not here. The Full Support Program was "unilaterally imposed" by fiat upon all distributors, and the ALJ found that it resulted in "no competition to become the exclusive supplier" and no "discount, rebate, or other consideration" offered in exchange for exclusivity. McWane I, 155 F.T.C. at 1414. This is consistent with evidence that McWane's prices rose, rather than fell, in the wake of the program.

[*835] We are disposed to follow the Supreme Court's instruction that we consider "market realities" rather than "formalistic **[**44]** distinctions" in rejecting McWane's argument that the specific form of its exclusivity mandate insulated it from antitrust scrutiny.

2. Harm to Competition

We turn then to the first step in the monopolization test: the government must demonstrate that the defendant's challenged conduct had anticompetitive effects, harming competition.

As with many areas of ***antitrust law***, the federal judiciary's approach to evaluating exclusive dealing has undergone significant evolution over the past century. Under the approach laid out by the Supreme Court in Standard Oil Co. of California and Standard Stations, Inc. v. United States (Standard Stations), 337 U.S. 293, 69 S. Ct. 1051, 93 L. Ed. 1371 (1949), all that was required for an exclusive deal to violate the Clayton Act was proof of substantial foreclosure -- "proof that competition ha[d] been foreclosed in a substantial share of the line of commerce affected." Id. at 314. The Supreme Court amended that approach in Tampa Electric, in which it continued to emphasize the importance of substantial foreclosure, but opened the door to a broader analysis. See 365 U.S. at 328-29.

Lower federal courts have burst through that door over the past 50 years, interpreting Tampa Electric as authorizing a rule of reason approach to exclusive dealing cases. See, e.g., ZF Meritor, 696 F.3d at 271 (characterizing Tampa Electric as standing for the proposition that **[**45]** "exclusive dealing agreements . . . [are] judged under the rule of reason"); Jacobson, supra, at 322 (noting that "later cases have suggested" that Tampa Electric "authorize[d] full-scale rule of reason analysis"); XI Areeda & Hovenkamp, supra, P 1820b, at 177 ("Most decisions follow the language in the Supreme Court's Tampa Electric decision indicating that a complete rule of reason analysis is essential, and foreclosure percentages represent only a first step in the inquiry."). ***HN17***[] This Court, without specifically citing Tampa Electric, has joined the consensus that exclusive dealing arrangements are "reviewed under the rule of reason." DeLong Equip. Co. v. Washington Mills Abrasive Co., 887 F.2d 1499, 1508 n.12 (11th Cir. 1989).

HN18[] The difference between the traditional rule of reason and the rule of reason for exclusive dealing is that in the exclusive dealing context, courts are bound by Tampa Electric's requirement to consider substantial foreclosure. See Microsoft, 253 F.3d at 69. But foreclosure is usually no longer sufficient by itself; rather, it "serves a useful screening function" as a proxy for anticompetitive harm. Id. Thus, foreclosure is one of several factors we now examine in determining whether the conduct harmed competition. See Jacobson, supra, at 361-64; XI Areeda & Hovenkamp, supra, P 1821d, at 197 ("[Foreclosure percentages] are seldom decisive in and of themselves. Rather, they provide the jumping-off **[**46]** point for further analysis."). We will also look for direct evidence that the challenged conduct has affected price or output, along with other indirect evidence, such as the degree of rivals' exclusion, the duration of the exclusive deals, and the existence of alternative channels of distribution. XI Areeda & Hovenkamp, supra, P 1821d, at 197-209. The ultimate question remains whether the defendant's conduct harmed competition.

HN19[] To effect anticompetitive harm, a defendant "must harm the competitive process, and thereby harm consumers. In contrast, harm to one or more competitors **[*836]** will not suffice." *Microsoft, 253 F.3d at 58*; see also *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Co., 509 U.S. 209, 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*. This distinction makes good sense, particularly in a competitive market where injury to a single competitor may not have a significant effect on overall competition due to the persistence of other rivals. However, competitors and competition are linked, particularly in the right market settings: "in a concentrated market with very high barriers to entry, competition will not exist without competitors." *Spirit Airlines, Inc. v. Nw. Airlines, Inc., 431 F.3d 917, 951 (6th Cir. 2005)*. Indeed, this is one reason that the behavior of monopolists faces more exacting scrutiny under the antitrust statutes. See *Eastman Kodak, 504 U.S. at 488* (Scalia, J., dissenting) ("Behavior that might otherwise not be of concern to the **[**47]** antitrust laws . . . can take on exclusionary connotations when practiced by a monopolist."); *Dentsply, 399 F.3d at 187* ("Behavior that otherwise might comply with ***antitrust law*** may be impermissibly exclusionary when practiced by a monopolist."); IIIB Areeda & Hovenkamp, supra, P 806e, at 423.

Before we proceed, we address a point of disagreement between the Commission, the dissenting commissioner, and the amici: the government's burden of proof in demonstrating harm to competition. The dissenting commissioner insisted that, given the high likelihood that an exclusive dealing arrangement is actually procompetitive, a plaintiff alleging illegal exclusive dealing must show "clear evidence of anticompetitive effect." *McWane II, 2014 FTC LEXIS 28, 2014 WL 556261, at *51* (Wright, dissenting). Applying that standard, Commissioner Wright concluded that the government had not met its burden for several reasons, including that it had not sufficiently established that the Full Support Program caused the observed price effects. The Commission countered that Commissioner Wright sought "a new, heightened standard of proof for exclusive dealing cases" that had "no legal support." *Id. at *26* & n.12 (majority). Although McWane does not articulate its proposed burden of proof using the dissenting commissioner's **[**48]** language, it agrees in substance that the Commission did not prove harm to competition with sufficient certainty.

We agree with the Commission. Putting aside the possible economic merits of raising the standard of proof for exclusive dealing cases, we can find no foundation for this conclusion in the caselaw. ***HN20***[] The governing Supreme Court precedent speaks not of "clear evidence" or definitive proof of anticompetitive harm, but of "probable effect." *Tampa Elec., 365 U.S. at 329* (instructing courts to weigh the "probable effect of the [exclusive dealing] contract on the relevant area of effective competition" (emphasis added)); accord *ZF Meritor, 696 F.3d at 268* ("Under the rule of reason, an exclusive dealing arrangement will be unlawful only if its 'probable effect' is to substantially lessen competition in the relevant market." (quoting *Tampa Elec., 365 U.S. at 327-29*)). Indeed, this Court has often articulated the rule of reason -- the governing standard for evaluating exclusive dealing claims, *DeLong Equip. Co., 887 F.2d at 1508 n.12* -- by quoting the Supreme Court's instruction in *Board of Trade of Chicago v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918)*, to analyze the effects of the challenged conduct, "actual or probable." E.g., *Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1334 n.8 (11th Cir. 2010)*; *Schering-Plough, 402 F.3d at 1064 n.12*.

Of course, the FTC's allegation is not merely that McWane engaged in exclusive dealing, but that it used exclusive dealing **[*837]** to maintain its monopoly **[**49]** power. In the monopolization context, courts have articulated the government's burden in terms of the causality that must be shown between the defendant's conduct and the anticompetitive harm. These formulations, too, are framed in terms of probability: "unlawful maintenance of a monopoly is demonstrated by proof that a defendant has engaged in anti-competitive conduct that reasonably appears to be a significant contribution to maintaining monopoly power." *Dentsply, 399 F.3d at 187* (emphasis added); accord Microsoft, 253 F.3d at 79. In Microsoft, HN21[] the D.C. Circuit found no case supporting the proposition that Sherman Act § 2 liability requires plaintiffs to "present direct proof that a defendant's continued monopoly power is precisely attributable to its anticompetitive conduct." Microsoft, 253 F.3d at 79. It noted that "[t]o require that § 2 liability turn on a plaintiff's ability or inability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct would only encourage monopolists to take more and earlier anticompetitive action." Id.; see also III Areeda & Hovenkamp, supra, P 657a2, at 162 ("[T]he government suitor need not show that competition is in fact less than it would be in some alternative universe in which the challenged conduct had not occurred. It is enough **[**50]** to show that anticompetitive consequences are a naturally-to-be-expected outcome of the challenged conduct.").

We agree with the Commission and our sister circuits that in these circumstances the government must show that the defendant engaged in anticompetitive conduct that reasonably appears to significantly contribute to maintaining monopoly power. As we've already discussed, because this determination is an economic conclusion, the Commission's finding on this count must be supported by substantial evidence.

a) Substantial Foreclosure

HN22[] "Substantial foreclosure" continues to be a requirement for exclusive dealing to run afoul of the antitrust statutes. Foreclosure occurs when "the opportunities for other traders to enter into or remain in [the] market [are] significantly limited" by the exclusive dealing arrangements." Microsoft, 253 F.3d at 69 (quoting Tampa Elec., 365 U.S. at 328) (internal quotation marks omitted). Traditionally a foreclosure percentage of at least 40% has been a threshold for liability in exclusive dealing cases. Jacobson, supra, at 362. However, some courts have found that a lesser degree of foreclosure is required when the defendant is a monopolist. See Microsoft, 253 F.3d at 70 ("[A] monopolist's use of exclusive contracts . . . may give rise to a § 2 violation **[**51]** even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation.").

In this case, both the Commission and the ALJ found that the Full Support Program foreclosed Star from a substantial share of the market. Although the Commission did not quantify a percentage, it did note that the two largest distributors, who together controlled approximately 50-60% of distribution, prohibited their branches from purchasing from Star (except through the Full Support Program exceptions) following the announcement of the Full Support Program. Indeed, HD Supply went so far as to cancel pending orders for domestic fittings that it had placed with Star. The Commission also observed that the third-largest distributor was initially interested in purchasing domestic fittings from Star, but followed suit soon after the Full Support Program was announced. Testimony in the record supports **[*838]** the Commission's conclusion that this pattern recurred with other dealers, even when Star promised lower prices than McWane. Thus, for example, U.S. Pipe refused to purchase domestic fittings from Star, despite a promise of lower prices, until September 2010. Likewise **[**52]** with TDG distributors. Executives at Groeniger and Illinois Meter also testified that the Full Support Program deterred them from dealing with Star. Although the Commission did not place an exact number on the percentage foreclosed, it found that the Full Support Program "tie[d] up the key dealers" and that the foreclosure was "substantial and problematic." McWane II, 2014 FTC LEXIS 28, 2014 WL 556261, at *24 n.10.

These factual findings are all consistent with the ALJ's determinations, and all pass our deferential review. Nevertheless, McWane challenges the Commission's conclusion by arguing that Star's entry and growth in the market demonstrate that, as a matter of law, the Full Support Program did not cause substantial foreclosure. As before, when McWane raised a substantially similar claim to rebut the Commission's finding of monopoly power, this argument is ultimately unpersuasive. Again, HN23[] "[t]he test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit." Dentsply, 399 F.3d at 191. Our sister circuits have found monopolists liable for anticompetitive conduct where, as here, the targeted rival gained market share -- but less than it likely would have absent the conduct. See Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768, 789-91 (6th Cir. 2002). As noted above, **[**53]** exclusive dealing measures that slow a rival's expansion can still produce consumer injury. See XI Areeda & Hovenkamp, supra, ¶ 1802c, at 76; accord Dentsply, 399 F.3d at 191; ZF Meritor, 696 F.3d at 271. Given the ample evidence in the record that the Full Support Program significantly contributed to key dealers freezing out Star, the Commission's foreclosure determination is supported by substantial evidence and sufficient as a matter of law.

b) Evidence of Harm to Competition

Having concluded that the Commission's finding of substantial foreclosure is supported by substantial evidence, we turn to the remainder of the Commission's evidence that McWane's Full Support Program injured competition. The record contains both direct and indirect evidence that the Full Support Program harmed competition. The Commission relied on both, and taken together they are more than sufficient to meet the government's burden. The Commission found that McWane's program "deprived its rivals . . . of distribution sufficient to achieve efficient scale, thereby raising costs and slowing or preventing effective entry." *McWane II, 2014 FTC LEXIS 28, 2014 WL 556261, at *22*. It found that the Full Support Program made it infeasible for distributors to drop the monopolist McWane and switch to Star. This, the Commission found, deprived Star **[**54]** of the revenue needed to purchase its own domestic foundry, forcing it to rely on inefficient outsourcing arrangements and preventing it from providing meaningful price competition with McWane. *2014 FTC LEXIS 28, [WL] at *25*.

Perhaps the Commission's most powerful evidence of anticompetitive harm was direct pricing evidence. It noted that McWane's prices and profit margins for domestic fittings were notably higher than prices for imported fittings, which faced greater competition. Thus, these prices appeared to be supracompetitive. Yet in states where Star entered as a competitor, notably there was no effect on McWane's prices. Indeed, soon after Star entered **[*839]** the market, McWane raised prices and increased its gross profits -- despite its flat production costs and its own internal projections that Star's unencumbered entry into the market would cause prices to fall. *Id. at *27*. Since McWane was an incumbent monopolist already charging supracompetitive prices (as demonstrated by the difference in price and profit margin between domestic and imported fittings), evidence that McWane's prices did not fall is consistent with a reasonable inference that the Full Support Program significantly contributed to maintaining McWane's **[**55]** monopoly power.

McWane claims, however, that the government did not adequately prove that the Full Support Program was responsible for this price behavior. But as we've noted, McWane demands too high a bar for causation. While it is true that there could have been other causes for the price behavior, the government need not demonstrate that the Full Support Program was the sole cause -- only that the program "reasonably appear[ed] to be a significant contribution to maintaining [McWane's] monopoly power." *Dentsply, 399 F.3d at 187*. Moreover, ***HN24***[] under our deferential standard of review, the mere fact that "two inconsistent conclusions" could be drawn from the record "does not prevent [the Commission's] finding from being supported by substantial evidence." Consolo*, 383 U.S. at 620*.

The Commission also drew on testimony from Star executives that the Full Support Program deprived Star of the sales and revenue needed to invest in a domestic foundry of its own. These estimates were based in part on distributors' withdrawn requests for quotes or orders in the wake of the Full Support Program. Indeed, Star had identified a specific foundry to acquire and had entered negotiations to purchase it, but after the announcement of the Full Support Program, decided **[**56]** not to move forward with the purchase. Without a foundry of its own with which to manufacture fittings, Star was forced to contract with six third-party domestic foundries to produce raw casings -- a "more costly and less efficient" arrangement on account of higher shipping, labor, and logistical costs; smaller batch sizes; less specialized equipment; and various other factors. *McWane II, 2014 FTC LEXIS 28, 2014 WL 556261, at *25*. Star estimated that with its own foundry, it could have reduced costs and substantially lowered its domestic fittings prices.

Moreover, as the ALJ found, some customers, including HD Supply and Ferguson, were reluctant to purchase from a supplier that lacked its own foundry, thereby further inhibiting any challenge to McWane's market dominance. McWane I, 155 F.T.C. at 1157, 1160. Thus, the record evidence suggests that the Full Support Program stunted the growth of Star -- McWane's only rival in the domestic fittings market -- and prevented it from emerging as an effective competitor who could challenge McWane's supracompetitive prices.

We also consider it significant that alternative channels of distribution were unavailable to Star. In cases where exclusive dealing arrangements tie up distributors in a market, courts will often consider whether **[**57]** alternative channels of distribution exist. See *Dentsply, 399 F.3d at 193*; *Omega Envtl., 127 F.3d at 1162-63*; XI Areeda &

Hovenkamp, supra, ¶ 1821d4, at 203-09. If firms can use other means of distribution, or sell directly to consumers, then it is less likely that their foreclosure from distributors will harm competition. In Denstply, the Third Circuit found exclusive deals with distributors to be anticompetitive where direct sales of the market's products (artificial teeth) to consumers was not "practical or feasible in the market **[*840]** as it exists and functions." *399 F.3d at 193*. The Commission found the same in the domestic fittings market, and the dissent agreed. Thus, Star's foreclosure from the major distributors was particularly likely to harm competition in this market.

Finally, the clear anticompetitive intent behind the Full Support Program also supports the inference that it harmed competition. ***HN25***[] Anticompetitive intent alone, no matter how virulent, is insufficient to give rise to an antitrust violation. See *Microsoft, 253 F.3d at 60*. But, as this Court has said, "[e]vidence of intent is highly probative 'not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.'" *Graphic Prods. Distribs., Inc. v. ITEK Corp., 717 F.2d 1560, 1573 (11th Cir. 1983)* (quoting *Bd. of Trade of Chi., 246 U.S. at 238*). For **[**58]** a monopolization charge, intent is "relevant to the question whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive' . . . . [T]here is agreement on the proposition that 'no monopolist monopolizes unconscious of what he is doing.'" *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)* (quoting *United States v. Aluminum Co. of Am., 148 F.2d 416, 432 (2d Cir. 1945))*; see also *Microsoft, 253 F.3d at 59* ("Evidence of the intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct.").

In this case, the evidence of anticompetitive intent is particularly powerful. Testimony from McWane executives leaves little doubt that the Full Support Program was a deliberate plan to prevent Star from "reach[ing] any critical market mass that will allow them to continue to invest and receive a profitable return" by "[f]orc[ing] Star[] to absorb the costs associated with having a more full line before they can secure major distribution." Indeed, the plan was implemented as a reaction to concerns about the "[e]rosion of domestic pricing if Star emerges as a legitimate competitor." Although such intent alone is not illegal, it could reasonably help the Commission draw the inference that the witnessed price behavior was the (intended) result of the Full Support Program. **[**59]**

Not all of the evidence adduced in this case uniformly points against McWane. For example, as we've previously noted, Star was not completely excluded from the domestic fittings market; it was able to enter and grow despite the presence of the Full Support Program. However, it is still perfectly plausible to conclude on this record that Star's growth was meaningfully (and deliberately) slowed and its development into a rival that could constrain McWane's monopoly power was stunted. Cf. *Microsoft, 253 F.3d at 71* (stating that defendant's exclusionary conduct kept the rival's product "below the critical level necessary for [the targeted rival] or any other rival to pose a real threat to [the defendant's] monopoly"). Also, the Full Support Program was not a binding contract of a lengthy duration. As noted above, these characteristics do not render the program presumptively lawful, but they also do not point in the FTC's favor as an indirect indicator of anticompetitive harm. Nevertheless, the direct and indirect evidence of anticompetitive harm is more than sufficient to pass our deferential review. Again, the Commission's conclusion that the Full Support Program harmed competition is supported by substantial **[**60]** evidence and sound as a matter of law.

3. Procompetitive Justifications

HN26[] Having established that the defendant's conduct harmed competition, the **[*841]** burden shifts to the defendant to offer procompetitive justifications for its conduct. As the Commission explained, "[c]ognizable justifications are typically those that reduce cost, increase output or improve product quality, service, or innovation." *McWane II, 2014 FTC LEXIS 28, 2014 WL 556261, at *30* (collecting cases); see also XI Areeda & Hovenkamp, supra, ¶ 1822a, at 213 ("A justification is reasonable if it reduces the defendant's costs, minimizes risk, or lessens the danger of free riding . . . ."). Such justifications, however, cannot be "merely pretextual." *Morris Commc'ns, 364 F.3d at 1296*; see *Eastman Kodak, 504 U.S. at 483-84*.

McWane offers two; neither is persuasive. First, McWane says that the Full Support Program was necessary to retain enough sales to keep its domestic foundry afloat. The Commission rightly rejected this argument; as other courts have recognized, such a goal is "not an unlawful end, but neither is it a procompetitive justification."

Microsoft, 253 F.3d at 71. And as the Commission noted, the steps McWane took to preserve its sales volume "were not the type of steps, such as a price reduction, that typically promote consumer welfare by increasing overall market output." McWane II, 2014 FTC LEXIS 28, 2014 WL 556261, at *30. McWane's sales "did **[**61]** not result from lower prices, improved service or quality, or other consumer benefits," but rather from reducing the output of its only rival. Id.

Second, McWane offers the more sophisticated argument that the Full Support Program was needed to keep Star from "'cherrypick[ing]' the core of [the] domestic fittings business by making only the top few dozen fittings that account for roughly 80% of all fittings sold," while leaving McWane alone to sell the remaining 20%. But even if McWane had good business reasons to adopt such a strategy, and such conduct could result in increased efficiency in the right market conditions, McWane offers no reasons to think that such conditions exist in this case. As the Commission noted, a full-line supplier like McWane could instead compete "by lowering its price for [the more common] products and increasing its price for the less common products." 2014 FTC LEXIS 28, [WL] at *31. Again, McWane has not explained why such a strategy would not work, how the collapse of the full line of products would harm consumers, or why full-line forcing was instead necessary. Thus, this argument is also unpersuasive.

Moreover, McWane's internal documents belie the notion that the Full Support Program was designed **[**62]** for any procompetitive benefit. As the Commission noted, McWane executives discussed the Full Support Program in terms of maintaining domestic prices and profitability by preventing Star from becoming an effective competitor. For example, McWane executive Richard Tatman said that his "chief concern" with Star becoming a domestic fittings supplier was that "the domestic market [might] get[] creamed from a pricing standpoint," and identified the biggest risk factor of Star's entry as the "[e]rosion of domestic pricing if Star emerged as a legitimate competitor." In a document encouraging the adoption of an exclusive dealing arrangement, Tatman opined that not doing so would allow Star to "drive profitability out of our business." And in an e-mail, he stated, with regard to Star, "we need to make sure that they don't reach any critical mass that will allow them to continue to invest and receive a profitable return." ***HN27***[] The Supreme Court has looked to evidence that proffered justifications for conduct "are merely . . . an excuse to cover up different and anticompetitive reasons." Jacobson, supra, at 367-68 (citing Eastman Kodak, 504 U.S. at 483). McWane's damning internal documents seem to be powerful **[*842]** evidence that its procompetitive justifications are **[**63]** "merely pretextual."

IV.

All told, the Commission's factual and economic conclusions are supported by substantial evidence and its legal conclusions comport with the governing law. The Commission's determination of the relevant market and its findings of monopoly power and anticompetitive harm pass our deferential review, and we agree that the conduct amounts to a violation of Section 5 of the Federal Trade Commission Act.

Accordingly, we AFFIRM.

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Mylan Pharms., Inc. v. Warner Chilcott Pub. Ltd. Co.

United States District Court for the Eastern District of Pennsylvania

April 16, 2015, Decided; April 16, 2015, Filed

Civ. No. 12-3824

Reporter

2015 U.S. Dist. LEXIS 50026 *; 2015-1 Trade Cas. (CCH) P79,137; 2015 WL 1736957

MYLAN PHARMACEUTICALS, INC., Plaintiff, v. WARNER CHILCOTT PUBLIC LIMITED COMPANY, et al., Defendants.

Subsequent History: Affirmed by *Mylan Pharms. Inc. v. Warner Chilcott Pub. Ltd. Co., 838 F.3d 421, 2016 U.S. App. LEXIS 17599 (3d Cir. Pa., Sept. 28, 2016)*

Prior History: *Mylan Pharms., Inc. v. Warner Chilcott Pub., 2013 U.S. Dist. LEXIS 152467 (E.D. Pa., June 11, 2013)*

Core Terms

generic, tablet, tetracyclines, branded, manufacturer, capsules, monopoly power, pharmaceutical, doxycycline, changes, anticompetitive, competitors, sales, summary judgment, antitrust, score, substitution, acne, monopolization, hopping, prices, prescriptions, products, interchangeable, single-scored, consumers, hyclate, anticompetitive conduct, innovation, courts

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Judges: Paul S. Diamond, J.

Opinion by: Paul S. Diamond **[*5]**

Opinion

MEMORANDUM

Diamond, J.

Generic drug manufacturers, drug wholesalers, and retail pharmacies allege that Defendants Warner Chilcott and Mayne Pharmaceuticals have illegally thwarted competition in the sale of generic drugs. Defendants produce and sell Doryx, the branded version of delayed-release doxycycline hyclate, a prescription antibiotic used primarily to treat severe acne. Plaintiffs allege that Defendants conspired to protect their monopoly by "product hopping": making changes to the drug that ostensibly provided no significant improvements, but prevented pharmacists from automatically filling Doryx prescriptions with generic equivalents. Direct purchaser Plaintiffs, indirect purchaser Plaintiffs, and retailer Plaintiffs have all concluded modest settlements with Defendants, leaving generic drug maker Mylan Pharmaceuticals as the sole remaining Plaintiff. The Parties have filed cross motions for summary judgment. I will grant Defendants' Motions for Summary Judgment, deny Plaintiff's Motion, and enter judgment in favor of Defendants on all counts.

THE PARTIES

Plaintiff Mylan Pharmaceuticals is the third-largest generic pharmaceutical company in the world. (Doc. No. 84 at 1.) Mylan **[*6]** has a "global portfolio of approximately 1,100 different products." (Id.) In 2011, Mylan reported $6.13 billion in revenue and estimated that one of every eleven prescriptions dispensed in the United States was for a Mylan product. (Id. at 3.) Defendant Mayne Pharmaceuticals is an Australian-based pharmaceutical company that has six products, including Doryx. Mayne reported $50.1 million in sales in 2011. (Id. at 4.) Defendant Warner Chilcott is a United States-based pharmaceutical company that distributes and promotes Doryx domestically pursuant to a License Agreement with Mayne. Warner Chilcott reported $2.7 billion in revenue in 2011, 93% of which came from eight products. (Id. at 4.)

BACKGROUND

Several oral tetracyclines are used to treat acne: doxycycline monohydrate, doxycycline hyclate, and minocycline. (W.C. Mot. S.J. at 22-23.) Doryx is the branded form of delayed-release doxycycline hyclate. (Id.) To decide the Motions before me, I must consider the product history of Doryx—branded and generic. In doing so, I have set out those record facts that are undisputed and construed them in the light most favorable to Mylan. I have disregarded Mylan's allegations that are without evidentiary support. See *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* **[*7]** ; *Jones v. UPS, 214 F.3d 402, 407 (3d Cir. 2000)* ("unsupported allegations" cannot defeat summary judgment). I have accepted as true Mylan's remaining factual allegations and have construed them in the light most favorable to Mylan.

I. Regulatory Procedures

The Food, Drug and Cosmetic Act requires Food and Drug Administration approval before any drug may be marketed. *21 U.S.C. § 301 et seq.* The manufacturer must submit to the FDA a "New Drug Application" and prove the drug's safety and efficacy through extensive clinical trials. The FDCA originally obligated an applicant seeking to market a new generic drug to meet the same requirements as one seeking FDA approval of a branded drug, including full clinical trials. With the 1984 adoption of the Hatch-Waxman Act, however, generic manufacturers could submit an "Abbreviated New Drug Application" to expedite the approval process and lower costs. See Drug Price Competition and Patent Term Restoration Act of 1984, *Pub. L. No. 98-417, 98 Stat. 1585*. An "ANDA" filer must show only that its drug is bioequivalent to an already approved "reference" drug. Jessie Chang, Note, An Antitrust Analysis of Product Hopping in the Pharmaceuticals Industry, *108 Colum. L. Rev. 1471, 1479 (2008)*.

If the generic drug is the branded drug's bioequivalent and the two are the same dosage, strength, **[*8]** and form, the FDA identifies the generic as the branded version's "AB-rated" equivalent. *21 U.S.C. § 355*. Most states have incorporated this AB-rating into their own statutes. Under these "Drug Product Selection" laws, a pharmacist who fills a prescription for a branded drug can—or, in some states, must—substitute an AB-rated generic version (which is usually less expensive than the branded version), unless the prescribing physician notes "dispense as written."

Chang, Product Hopping, at 1479. Twelve states require pharmacists to substitute generic drugs, unless the physician prescribes otherwise. Thirty-nine states permit substitution in such circumstances. (W.C. Resp. to Mylan S.J. at 30.)

II. Doryx Development

Immediate-release doxycycline hyclate has been available to treat acne since the 1960s, when Pfizer launched Vibramycin. (W.C. Resp. to Mylan S.J. at 5.) Doryx capsules—delayed-released doxycycline hyclate—were first approved by the FDA in 1985 and launched by Mayne that same year. The capsules were not patent-protected. (Id.) They included enteric-coated pellets which would allow delayed release, intended to reduce the nausea and stomach irritation caused by immediate-release doxycycline. (Mayne S.J. at 5.) Mayne also produced **[*9]** an authorized generic version of Doryx. (W.C. Resp. to Mylan S.J. at 6.) Warner Chilcott, then a subsidiary of Warner Lambert, distributed branded and generic Doryx for Mayne in the United States. (Id.)

Sales of branded and generic Doryx capsules were sluggish in the early 1990s. (Id.) In 1994, Mayne (then known as F.H. Faulding & Co.), and Warner Chilcott entered into an exclusive license agreement intended to increase Doryx sales: (1) Mayne agreed to take its generic Doryx off the market and act as the exclusive manufacturer and supplier to Warner Chilcott of branded Doryx; (2) Warner Chilcott agreed to distribute branded Doryx in the United States and to market Doryx through targeted promotions to dermatologists in exchange for the rights to all income from the domestic sales of the drug. (W.C. Ex. 121.) Mayne agreed not to sell Doryx domestically, provided Warner met minimum Doryx purchase and sales thresholds. (Mayne S.J. at 9.) Although the License Agreement originally ran from 1997 to 2004, Mayne and Warner Chilcott have renewed the Agreement several times and it remains in force today. (Id. at 10.) The Agreement increased Doryx sales more than twenty-fold by 2005. (W.C. Resp. to Mylan S.J. at 33-34 **[*10]** & Table 2.)

III. "Product Hopping"

The 1997 License Agreement obligated Defendants to enter into negotiations "with respect to a new agreement pursuant to which [Mayne] would develop a doxycycline hyclate delayed release tablet" for Warner Chilcott to distribute in the United States. (W.C. Ex. 121 at 6.) That tablet development took over six years, during which Mayne: (1) reformulated delayed-release doxycycline hyclate, and (2) added a stabilizing coat solution to improve the drug's shelf-life. (Mayne S.J. at 16; W.C. Exs. 226, 191.)

In May 2005, the FDA approved Defendants' NDA for Doryx 75 and 100 mg tablets. (W.C. Ex. 211.) The tablets were introduced in September 2005, and Defendants took steps to switch the market for Doryx capsules to Doryx tablets. (Mylan S.J. at 12.) They: (1) stopped selling the capsules to wholesalers (Mylan Ex. 59); (2) removed Doryx capsules from the Warner Chilcott website (Mylan Ex. 62); (3) worked with retailers to "auto-reference" the Doryx tablet whenever a doctor filed a Doryx prescription (Mylan Ex. 61); (4) informed wholesalers, retailers, and doctors that "Doryx Capsules have been replaced by Doryx Tablets" (Mylan Ex. 63); (5) destroyed some of their remaining capsule inventory **[*11]** (Mylan Ex. 73); and (6) bought back some portion of the remaining capsule inventory (Mylan Ex. 68, 69, 71).

Beginning in January 2007, Defendants worked to develop a 150 mg strength Doryx tablet with a single "score"—a groove running across the tablet's surface. The "score" allows the user to split a 150 mg Doryx tablet into two 75 mg doses. Defendants submitted a supplemental NDA for the 150 mg single-scored tablet in December 2007. (W.C. Ex. 358.) The FDA granted its approval in June 2008 and Defendants launched the 150 mg Doryx single-scored tablet a short time later. (W.C. Ex. 216.)

In January 2009, Defendants stopped promoting the 75 and 100 mg tablets, and began an "aggressive marketing program[]" for the 150 mg dose tablet. (Mylan Ex. 130.) By late March 2009, the 150 mg tablet represented 71% of all new Doryx prescriptions and 61% of total Doryx prescriptions. (Id.) In May 2010, Warner Chilcott reported to investors that the company was able to transfer about 90% of its Doryx franchise into the 150 mg tablet. (Mylan Ex. 132.)

While they developed the 150 mg tablet, Defendants also developed scored versions of their existing 75 and 100 mg Doryx tablets. Defendants submitted the **[*12]** supplemental NDAs for 75 and 100 mg single-scored Doryx tablets in June and August 2008, and received approval in February and March 2009. (W.C. Exs. 360, 361, 248, 123.) Warner Chilcott stopped distributing the 75 and 100 mg single-scored Doryx tablets in March and August 2011, when the great majority of Doryx prescriptions were for the 150 mg tablet. (W.C. Exs. 362, 363.)

In March 2010, Defendants began developing a dual-scored 150 mg Doryx tablet, which could be broken into two or three pieces, thus providing dosing options of 50, 100, and 150 mg. (W.C. Ex. 251.) The firms submitted the supplemental NDA for the dual-scored 150 mg tablet in February 2011. (W.C. Ex. 223.) After receiving approval in September 2011, Warner Chilcott stopped distributing single-scored 150 mg tablets. (Id.; Mylan S.J. at 28.)

Finally, Defendants introduced an unscored 200 mg Doryx tablet in April 2013 as a once-a-day dosing regimen for chlamydia. (W.C. Resp. to Mylan S.J. at 17-18.) Today, Defendants produce and sell the 200 mg and 150 mg dual-scored Doryx tablets in the United States. (Id. at 18.)

IV. Mylan's Development of Generic Doryx

Although Mylan first began developing a generic Doryx capsule in April 2003, by the time Doryx **[*13]** tablets launched in September 2005, Mylan still had no viable generic capsule. (W.C. Resp. to Mylan S.J. at 19-21.) Mylan did not abandon the capsule effort until January 2006, after the FDA had approved a generic Doryx capsule manufactured by Sandoz, which launched in July 2006. (Id.; W.C. Exs. 261, 382.)

By September 2006, Mylan had prepared the tablet formulation for a wholly-coated Doryx tablet to achieve delayed release. (Mylan S.J. at 27.) In March 2008, Mylan submitted an ANDA for its generic 75 and 100 mg Doryx tablets; the FDA granted its approval in December 2010. (Mylan Ex. 207.)

While Mylan's ANDA application was pending in March 2009, Mayne and Warner Chilcott added score lines to their 75 and 100 mg tablets. The Parties dispute whether this alone delayed the market entry of Mylan's generic. (Mylan S.J. at 27.) It appears that at least part of the delay resulted from the FDA's issuance to Mylan of several deficiency notices unrelated to the scoring issue. (W.C. Ex. 377 (timeline of Mylan tablet development); Mylan Ex. 209, 210, 110.) I will nonetheless resolve this dispute in Mylan's favor, and find that the decision to add score lines to branded 75 and 100 mg Doryx tablets delayed the entry of Mylan's **[*14]** generic until December 2010. (Mylan Ex. 213.)

At that time, while Mylan's were the only generic Doryx tablets on the market, the FDA—acting in accordance with federal law—granted Mylan 180 days exclusivity, preventing other generic drug manufacturers from introducing their own generic versions of Doryx. *21 U.S.C. § 355*; (Mylan Ex. 213 (FDA approval of 75 and 100 mg generics).) When Defendants stopped selling 75 and 100 mg Doryx tablets in 2011, Mylan was the exclusive seller of 75 and 100 mg tablets—branded or generic—for two and a half years. (W.C. Opp. at 23.) During that period, Mylan raised the tablet prices to levels that were higher than Defendants' last reported prices for Doryx. (W.C. Resp. to Mylan S.J. at 23; W.C. Ex. 267.)

After Defendants' June 2008 launch of a 150 mg single-scored tablet, Mylan immediately began working on a generic version, and submitted an ANDA in December 2008. The FDA tentatively granted approval in June 2011. (Mylan Exs. 217-219.)

Finally, Defendants launched the dual-scored 150 mg tablet in September 2011 and petitioned the FDA, asking—as they had with the single-scored 150 mg tablet—that ANDA generic applicants match the dual scoring. (Mylan Ex. 222.) An e-mail from Mayne's CFO **[*15]** predicted that it was "likely that the FDA will make Mylan alter their generic to be a dual scored product." (Mylan Ex. 146.) The FDA rejected the request, however, noting that it might approve an ANDA for a 150 mg generic Doryx with a single score. (Mylan Ex. 149.) The FDA determined in

February 2012 that Mylan's single-scored 150 mg tablet would be AB-rated—at least initially—to Defendants' dual-scored 150 mg tablet. (Mylan Ex. 221.) Mylan thus launched its first 150 mg generic Doryx in February 2012. (Id.)

V. The Challenged "Hops"

Mylan alleges that each of the following changes to Doryx was an anti-competitive product hop:

1. 2005 change from 75 and 100 mg capsules to 75 and 100 mg tablets;
2. 2008 introduction of a single-scored 150 mg tablet;
3. 2009 addition of a single score to 75 and 100 mg tablets; and,
4. 2011 change from single to dual score on the 150 mg tablet.

(Mylan S.J. at 11-21.)

Defendants insist that each of these product changes improved Doryx and benefited consumers. (W.C. Resp. to Mylan S.J. at 4.) Defendants offer evidence that they had legitimate business reasons for each product change, including: (1) shelf-life stability issues with Doryx capsules; (2) the increased risk of esophageal **[*16]** injuries with capsules; (3) concern from French and Swedish regulators over the risk of esophageal injury; (4) a putative class action in the United States alleging esophageal injury from capsules; and, (5) dosing flexibility. (Resp. to Mylan S.J. at 4-5, 7-13.)

Mylan counters that any purported "legitimate business justifications . . . collapse[] under close scrutiny." (Mylan S.J. at 2.) Mylan has presented evidence that the stability problems could have been solved without switching to tablets. (Id. at 24-25.) Moreover, despite pressure from foreign regulators over the risk of esophageal injury, Doryx tablets were introduced only in the United States. (Id. at 22.) Doryx capsules continue to be sold in other jurisdictions and, as recently as 2011, Defendants considered re-introducing capsules into the United States. (Mylan Ex. 160, 172.) The products liability litigation to which Defendants refer was a putative class action that never got past the certification stage. (Mylan Reply at 10.)

Mylan has also presented evidence that Defendants' product changes were intended to delay generic market entry. Internal Mayne and Warner Chilcott documents provide that Doryx product changes were a "defen[s]e strategy to generic competition." **[*17]** (Mylan Ex. 31; see also Mylan Ex. 49 (tablet development is "an anti-generic strategy for Doryx"); Mylan Ex. 53 ("Th[e] tablet is to be utili[z]ed as an anti-generic strategy should competition to the existing capsule eventuate."); Mylan Ex. 107 (tablet scoring is an "additional product protection strategy"); Mylan Ex. 130 ("This dominance of Doryx by the 150 mg dose strength . . . provides some time for WC and [Mayne] to complete developments for new dose forms further discouraging generic competition.").)

That Defendants' product "hops" provided some benefit to consumers seems undeniable. For instance, the scoring of Doryx tablets made it easier to reduce the medicine's dosage. Nonetheless, at summary judgment, I am compelled to find that Defendants made the Doryx "hops"—even the six-year developmental "hop" from capsules to tablets—primarily to defeat generic competition. See *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 316 n.12 (3d Cir. 2010)* (in an antitrust case, disputed factual questions about reasonableness may not be resolved at summary judgment but usually should be left to jury).

PROCEDURAL HISTORY

Plaintiffs—then generic drug manufacturers and pharmaceutical wholesalers—filed the instant action on July 6, 2012. (Doc. No. 1, Compl.) The gravamen of their **[*18]** Complaint was that Defendants took improper advantage of the regulatory system by making "tactical modifications" to Doryx to thwart generic competition. (Mylan S.J. at 1.) In denying Defendants' Motions to Dismiss, I deferred until summary judgment addressing the question of whether product hopping is anticompetitive. (Doc. No. 280.)

On April 1, 2013, Direct Purchaser Plaintiffs and Indirect Purchaser Plaintiffs filed Motions for Class Certification, which Defendants opposed. (Doc. Nos. 151, 155, 228, 247.) While the Motions were pending, the Parties began settlement discussions. Direct Purchaser Plaintiffs reached a settlement on December 24, 2013. (Doc. No. 452.) I provisionally certified a settlement class on February 18, 2014 and, after a final fairness hearing, granted final certification on September 15, 2014. (Doc. No. 665.) The Retailer Plaintiffs filed a Stipulation of Dismissal on May 27, 2014. (Doc. No. 638.) Indirect Purchaser Plaintiffs reached a settlement on June 27, 2014, which I preliminarily approved on September 4, 2014 and, after a fairness hearing, I granted final certification on January 23, 2015. (Doc. No. 679.)

As sole remaining Plaintiff, Mylan alleges: (1) monopolization **[*19]** under *Section 2* of the Sherman Act; (2) attempted monopolization under *Section 2*; (3) an agreement between Warner Chilcott and Mayne in restraint of trade under *Section 1* of the Sherman Act; and (4) tortious interference under Pennsylvania state law. (Compl.) The Parties have filed cross motions for summary judgment.

SUMMARY JUDGMENT STANDARDS

Upon motion of any party, summary judgment is warranted "if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. The moving party must show the absence of any genuine issue of material fact. *Celotex, 477 U.S. at 323*. An issue is material only if it could affect the result of the suit under governing law. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. I "must view the facts in the light most favorable to the non-moving party," and make every reasonable inference in that party's favor. *Hugh v. Butler Cnty. Family YMCA, 418 F.3d 265, 267 (3d Cir. 2005)*. If I then determine that the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. *Celotex, 477 U.S. at 322*.

DISCUSSION

I. *Section 2* Claim

It is unlawful to monopolize, attempt to monopolize, or conspire to monopolize interstate or international commerce. *15 U.S.C. § 2*. The Sherman Act protects competition, not competitors. *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*; *Brunswick Corp. v. Pueblo Bowl O-Mat, Inc., 429 U.S. 477, 484, 488-89, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. Indeed, conduct that makes it more difficult for competitors to keep pace—even **[*20]** conduct that actively harms competitors—is not proscribed by the Sherman Act unless it harms competition itself. *Eichorn v. AT&T Corp., 248 F.3d 131, 140 (3d Cir. 2001)* ("[A]n individual plaintiff personally aggrieved by an alleged anti-competitive agreement has not suffered an antitrust injury unless the activity has a wider impact on the competitive market.").

A. Monopolization Claim

To establish monopolization, Mylan must prove: (1) possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power by means other than a superior product, business acumen, or historic accident. *Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 306 (3d Cir. 2007)*. Here, Mylan can prove neither element.

1. Monopoly Power

A company has monopoly power if it can profitably raise prices without causing competing firms to expand output and drive down prices. *Harrison Aire, Inc. v. Aerostar Int'l, Inc., 423 F.3d 374, 380 (3d Cir. 2005)*. Such power can be proven directly—through evidence of control over prices and the ability to exclude competition—or indirectly through evidence of a high market share. *Broadcom Corp., 501 F.3d at 307 n.3*. To survive a motion for summary judgment, Mylan must present "economically plausible evidence" supporting its claim that Defendants held monopoly power. *Harrison Aire, Inc., 423 F.3d at 380*.

Direct evidence of monopoly power is "only rarely available." *Id. at 381*. Nonetheless, "[t]he existence of monopoly power may **[*21]** be proven through direct evidence of supracompetitive prices and restricted output." *Broadcom Corp., 501 F.3d at 307*. "[T]o support a claim that defendants set supra-competitive prices, antitrust plaintiffs must provide an analysis of the defendant's costs, and show that the defendant had an 'abnormally high price-cost margin' and that they 'restricted output.'" *Carpenter Tech. Corp. v. Allegheny Technologies Inc., No. 08-2907, 2011 U.S. Dist. LEXIS 112556, 2011 WL 4528303, at *12 (E.D. Pa. Sept. 30, 2011)* (quoting *Geneva Pharms. Tech. Corp. v. Barr Labs, Inc., 386 F.3d 485, 500 (2d Cir. 2004))*. "[W]ithout evidence that sheds light on material factors such as [the alleged monopolist's] price relative to its total costs (marginal and fixed) and whether output was restricted, monopoly power cannot be found as a matter of law." *In re Remeron Direct Purchaser Antitrust Litig., 367 F. Supp. 2d 675, 681 n.10 (D.N.J. 2005)*.

Mylan has not made a serious effort to present direct evidence of Defendants' monopoly power. To begin, Mylan offers no evidence of Defendants' "price-cost margins" for Doryx, nor does it explain whether those margins were abnormally high. (Mylan S.J. at 32.) Mylan's economic expert, Dr. Rubenfeld, elected to forego any analysis of Defendants' margins because, as he opined, other available evidence of monopoly power was "more compelling," and margins are "difficult to measure" and "imperfect indicators of market power." (Mylan Ex. 2, Rubenfeld Rep. at 34-35.) Dr. Rubenfeld nonetheless states that at least some of Defendants' data suggested a margin of 83% in the **[*22]** second quarter of 2006—without explaining whether that figure is abnormally high. (Id. at 35.) Regardless of whether or not evidence of Defendants' marginal and fixed costs was "compelling" or "difficult to measure," it is still required to prove monopoly power directly. *Carpenter Tech. Corp., 2011 U.S. Dist. LEXIS 112556, 2011 WL 4528303, at *12*. Mylan has not made such a showing. Mylan also fails to show that Defendants restricted Doryx output to maintain monopoly profits, and fails to discuss the quantity of Doryx Defendants manufactured during the relevant period. (Mylan S.J. at 32.) In these circumstances, Mylan has not presented plausible direct evidence of market power.

Mylan thus must prove with indirect evidence that Defendants possessed monopoly power. *Harrison Aire, Inc., 423 F.3d at 381*. Mylan must first define the relevant market in which Defendants were alleged monopolists. *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997)*; see also *Broadcom Corp., 501 F.3d at 307* ("The scope of the market is a question of fact as to which the plaintiff bears the burden of proof."). Mylan must then produce evidence of Defendants' "dominant share of that market, and of high barriers to entry." *Harrison Aire, Inc., 423 F.3d at 381*.

The boundaries of the relevant product market are determined by a product's reasonable interchangeability of use between the product and its substitutes. *Queen City Pizza, Inc., 124 F.3d at 436*. "Interchangeability implies that one product is roughly **[*23]** equivalent to another for the use to which it is put; while there may be some degree of preference for the one over the other, either would work effectively." Id. (quoting *Allen-Myland, Inc. v. Int'l Bus. Mach. Corp., 33 F.3d 194, 206 (3d Cir.1994))*. Products in a relevant market are also characterized by cross-elasticity of demand; that is, whether "the rise in the price of a good within a relevant product market would tend to create a greater demand for other like goods in that market." Id. (quoting *Tunis Bros. Co., Inc. v. Ford Motor Co., 952 F.2d 715, 722 (3d Cir. 1991))*. Courts are reluctant to find single-product markets, noting that every manufacturer in a single-product market will have monopoly power. *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 480 (3d Cir. 1992)* (en banc) ("Except in rare circumstances, courts reject market definitions consisting of one supplier's products where other brands compete."); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 118 (3d Cir. 1980)*. A proposed market is legally insufficient if it "clearly does not encompass all interchangeable substitute products." *Queen City Pizza, 124 F.3d at 436*.

Mylan urges a single-product market: branded and generic Doryx. (Mylan S.J. at 34.) Within this "market," Defendants held 100% of sales until generic entry, and currently "hold over 60% of sales." (Id. at 36.) Mylan excludes from its proposed market all other oral tetracyclines prescribed for acne, including branded and generic forms of immediate-release doxycycline hyclate, doxycycline monohydrate, **[*24]** and minocycline hydrochloride. Defendants counter that the relevant market necessarily includes these oral tetracyclines. (W.C. S.J. at 22.) Within this market, it appears that Defendants' market share never exceeded 18%. (Id. at 29.)

In seeking to prove the relevant market, Mylan relies almost entirely on two expert reports. One is authored by economist Phillip Nelson, who opines that acne treatment is "highly individualized" and that Doryx has "unique characteristics that differentiate it from other antibiotics," including a distinct gastrointestinal side-effect profile due to Doryx's delayed-release coating. (Mylan Ex. 19, Nelson Rep. at 18, 21, 26.) Dr. Nelson acknowledges, however, that these "other" drugs are "similarly effective" at treating acne. (Id. at 21.) The second report, prepared by dermatologist Mark Jackson, makes many of the same points. Dr. Jackson opines that effective acne treatment must be "tailored to the patient." (Mylan Ex. 239, Jackson Rep. at 13.) Dr. Jackson believes that Doryx is not "functionally interchangeable" with other tetracyclines given differences in "tolerability and side effects." (Id. at 24.) Mylan argues that its evidence, "at a minimum" establishes that Doryx is a "relevant antitrust submarket under *Brown Shoe Co. v. United States, 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*." (Mylan S.J. at 34.)

An expert report that **[*25]** has no record support cannot defeat summary judgment. *Advo, Inc. v. Philadelphia Newspapers, Inc., 51 F.3d 1191, 1198 (3d Cir. 1995)* (expert testimony without a factual foundation cannot defeat a motion for summary judgment); *Rosefielde v. Falcon Jet Corp., 701 F. Supp. 1053, 1070 (D.N.J. 1988)* ("[A]ntitrust plaintiff may not be allowed to defeat a motion for summary judgment with an expert report that lacks factual support in the record." (citing *Pennsylvania Dental Ass'n v. Med. Serv. Ass'n of Pennsylvania, 745 F.2d 248, 262 (3d Cir. 1984)))*.

The record abounds with uncontradicted evidence—some of it Mylan's—confirming and reconfirming the interchangeability of Doryx with other oral tetracyclines. There is a consensus among dermatologists that all oral tetracyclines treat acne with similar effectiveness and so are interchangeable for that purpose. (See, e.g., W.C. Ex. 38 at 10.) The FDA has approved virtually identical labeling for most of these drugs, stating that in cases of "severe acne" the drugs "may be useful adjunctive therapy." (W.C. App. 2 (collecting label information).)

Managed care organizations have sought to constrain patients to substitute Doryx with other, less costly tetracyclines to treat acne. Some organizations have removed Doryx as a reimbursable medication; others have limited any reimbursement. (W.C. S.J. at 26.) A number of managed care organizations sent notices to healthcare providers urging them to substitute other oral **[*26]** tetracyclines for Doryx. (Id. at 26-27.) The University of Pittsburgh Health Plan, for instance, characterized generic immediate-release doxycycline, tetracycline, and minocycline as "substitutes for Doryx," and actively encouraged physicians to switch from Doryx to these other drugs. (W.C. Ex. 64; see also W.C. Ex. 45 (Cigna); W.C. Ex. 39 (BCBS Florida); W.C. Ex. 21.).) Indeed, Mylan's own expert confirmed that Doryx is but one of a class of antibiotics used to treat acne. (See, e.g., Mylan Ex. 22 at 16 (noting other oral antibiotics used to treat acne).)

Years of internal marketing documents further confirm that tetracyclines are reasonable substitutes for one another. Defendants consistently defined the market in which Doryx competed as including other tetracyclines. In 1997, when Defendants began planning the branded strategy for Doryx and the development of Doryx tablets, they noted that capturing 20% of the then 800,000 prescriptions for Vibramycin (the branded version of immediate-release doxycycline) would result in "over $13 million in annualized Doryx sales." (W.C. Ex. 131.) The Doryx 2008 Brand Plan noted that Doryx had a 12% market share among its competitors—Adoxa, Dynacin, Solodyn, **[*27]** Oracea, generic minocycline, and generic doxycycline. (W.C. Ex. 92.) Defendants' competitors defined the market in the same fashion. (See, e.g., W.C. Ex. 70 (internal Foguera documents describing Adoxa as competing with Doryx and other tetracyclines); W.C. Ex. 72 (internal Aqua documents describing Monodox as competing with Doryx and other tetracyclines); W.C. Ex. 83 (internal Medicis documents describing Solodyn/Dyancin as competiting with Doryx and other tetracyclines).) Finally, Mylan itself repeatedly listed different tetracyclines in the "Same/Similar" product category in internal product analyses. (W.C. App. 4H, 4I & 4J.)

Advertising also confirms that oral tetracyclines are effective substitutes for each other. In an advertisement titled "Facts Don't Lie," Adoxa stated that there "is no clinical data to support the efficacy of Doryx over any other doxycycline product." (W.C. Ex. 69.) When Adoxa introduced a single-scored 150 mg tablet before Doryx, it boasted that Adoxa was the "1st and only doxycycline scored tablet." (W.C. Ex. 87; see also W.C. Ex. 71 (Oracea ads attacking Doryx); W.C. Ex. 72 (Mondox ad campaign attacking Doryx).) In response, Defendants emphasized that Doryx **[*28]** is superior to other oral tetracyclines. A 2006 Doryx ad, for example, touted the advantages of Doryx over Oracea, including dosing flexibility, safety, and value. (W.C. Ex. 60.)

Finally, Defendants produced evidence of cross-elasticity of demand between Doryx and other oral tetracyclines. (W.C. Ex. 53, Addanki Rep. at 41-46.) From July 2005 to February 2008, Defendants offered a "fixed-amount coupon" for Doryx to help patients offset their co-pays. (Id. at 41.) In February 2009, Defendants discontinued the fixed-amount coupon and began offering "pay no more" cards, which paid all but $25 of a patient's Doryx costs. (Id.) Defendants switched back to a less generous fixed-amount coupon in 2011, after concluding that the pay no more cards were too expensive. (Id. at 42) In response, doctors, pharmacists, and patients switched from Doryx to other oral tetracyclines. These decreased sales caused Defendants to reverse course; in August 2011, they went back to the pay no more cards. (Id. at 42.) A regression analysis of these events confirms the cross-elasticity of demand: when Defendants increased the price of Doryx, its sales decreased and the sales of other oral tetracyclines increased. There was "a statistically significant decline **[*29]** in the new prescriptions for Doryx during the first seven months of 2011 when the fixed subsidy coupon program structure was in effect," and a "statistically significant increase in the new prescriptions for Adoxa, generic immediate-release doxycycline hyclate, and generic immediate-release doxycycline monohydrate, as well as generic delayed-release doxycycline hyclate." (Id. at 44.) Mylan argues that this evidence is insufficient because there was "no clear pattern of substitution," ignoring that Mylan itself carries the burden of defining the relevant market. (Mylan Resp. to W.C. S.J. at 23.) Mylan cannot dispute, however, that an increase in Doryx's price in 2011 caused a statistically significant increase in the sales of at least some oral tetracyclines that ostensibly could not serve as Doryx substitutes.

Mylan argues that Doryx is not reasonably interchangeable with other oral tetracyclines because doctors have unique preferences in prescribing antibiotics to treat acne, and Doryx has a unique side effect profile that differentiates it from other oral tetracyclines. (Mylan S.J. at 34-36.) These subtle differences, however, do not mean that other oral tetracyclines are not a reasonable substitute for Doryx. **[*30]** Interchangeability is defined by rough equivalence, not perfect correspondence. *Queen City Pizza, Inc., 124 F.3d at 436*; see also *Town Sound & Custom Tops, Inc., 959 F.2d at 480* ("[U]niqueness confers economic power only when other competitors are in some way prevented from offering the distinctive product themselves."). Moreover, even if there are patients for whom Doryx is a preferred treatment, the "test for a relevant market is not commodities reasonably interchangeable by a particular plaintiff, but 'commodities reasonably interchangeable by consumers for the same purposes.'" *Queen City Pizza, Inc., 124 F.3d at 438* (quoting *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395, 76 S. Ct. 994, 100 L. Ed. 1264 (1956))*.

The record thus makes plain that the market in which Doryx competes includes other oral tetracyclines. No reasonable juror could find otherwise. *Harrison Aire, Inc., 423 F.3d at 380*. Defendants' share of this market—some 18%—is not predominant. *United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187 (3d Cir. 2005)* ("Absent other pertinent factors, a share significantly larger than 55% has been required to established prima facie market power.").

In the absence of a predominant market share, I may consider other factors that might establish that Defendants held monopoly power: the size and strength of competing firms, freedom of entry, pricing trends and practices in the industry, the ability of consumers to substitute comparable goods, and consumer demand. *Id. at 187*. These factors weigh against finding **[*31]** that Defendants have monopoly power. As I have discussed, Mylan—Defendants' competitor in this market—is more than twice the size of Warner Chilcott, and 100 times the size of Mayne. (Doc. No. 84 at 1.) There is also freedom of entry into the oral tetracycline market. Since 2005—when Defendants purportedly were monopolists dominating the market—nearly forty oral tetracyclines gained FDA approval. (W.C. App. 5.) As I have described, the market for oral tetracyclines is quite competitive and consumers are able to substitute "comparable goods."

Finally, Mylan's argument that Doryx is an antitrust "submarket" within the market for oral tetracyclines also fails. *Brown Shoe Co., 370 U.S. at 325*. A submarket's boundaries are determined by "such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." Id. I have already explained why Doryx's features, however "unique," still allow the substitution of other oral tetracyclines. Moreover, Mylan has presented no evidence that the industry or public identifies Doryx **[*32]** as a "separate economic entity." On the contrary, the undisputed evidence shows that the industry and public identify Doryx as just one product in the crowded, competitive market for oral tetracyclines. Mylan has also failed to produce evidence suggesting that Doryx has distinct customers, distinct prices, or specialized vendors. Again, the evidence shows just the opposite: Doryx is therapeutically equivalent to other oral tetracyclines.

In sum, Mylan has failed to produce economically plausible evidence to prove that Defendants hold monopoly power in the relevant market. Nor has Mylan shown that other factors might support finding that Defendants exercise monopoly power in the absence of predominant market share. In these circumstances, Mylan has not made out a *Section 2* claim. *Broadcom Corp., 501 F.3d at 307*. Accordingly, I will enter summary judgment for Defendants on that claim. See *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 468-69, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* ("If the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted."); *Harrison Aire, Inc., 423 F.3d at 380*.

2. Anticompetitive Conduct

Because Mylan's *Section 2* claim fails in the absence of Defendants' monopoly power, in other circumstances I would not address whether Defendants engaged in anticompetitive conduct. **[*33]** See *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* ("To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*."). Because Mylan's remaining claims require me to determine if Defendants' conduct was anticompetitive, however, I will do so now.

In sum, I conclude that Mylan has failed to produce initial evidence of anticompetitive conduct. I thus need not proceed with the burden-shifting framework and determine whether Defendants have proffered nonpretextual, procompetitive justifications for their product changes, whether Mylan has rebutted those justifications, or whether the product changes were, on balance, procompetitive or anticompetitive. *United States v. Microsoft Corp., 253 F.3d 34, 58-59, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)*.

"Anticompetitive conduct may take a variety of forms, but it is generally defined as conduct to obtain or maintain monopoly power as a result of competition on some basis other than the merits." *Broadcom Corp., 501 F.3d at 308*. "[I]t is not necessary that all competition be removed from the market. The test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit." *Dentsply Int'l, Inc., 399 F.3d at 191*. When an alleged monopolist introduces a new product, the question is whether **[*34]** it is "engaging in exclusionary conduct as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Microsoft, 253 F.3d at 58*. "As a general rule, any firm, even a monopolist, may . . . bring its products to market whenever and however it chooses." *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 925 n.7 (3d Cir. 1999)* (quoting *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 286 (2d Cir. 1979))*.

Mylan offers no evidence of anticompetitive conduct. Defendants did not exclude competition when they reformulated Doryx, introduced new versions of Doryx into the marketplace, marketed the new versions of Doryx, and withdrew old versions. The undisputed evidence shows that Mylan competes with Defendants and that Defendants have not excluded Mylan from competition on the merits. Doryx capsules have been available without patent protection since 1985, and in 2006, Sandoz introduced a generic Doryx capsule. (W.C. Ex. 382.) Although Mylan had been developing its own generic Doryx capsule since 2003, it chose to abandon that effort in January 2006. (W.C. Resp. to Mylan S.J. at 19-21.) After Defendants introduced the Doryx tablet in September 2005, Mylan began generic development and—after addressing problems raised in several FDA deficiency notices—launched its own generic 75 and 100 mg Doryx **[*35]** tablets in December 2010 and benefitted from 180 days of exclusivity for the tablets. (W.C. Ex. 377); see *F.T.C. v. Actavis, Inc., 133 S. Ct. 2223, 2229, 186 L. Ed. 2d 343 (2013)* (noting value of 180 day exclusivity period and that "vast majority" of generic profits materialize during exclusivity period). In 2011, Mylan became the sole producer of 75 and 100 mg Doryx after Defendants stopped selling those dosages. (W.C. Resp. to Mylan S.J. at 23.) Remarkably, during this time, Mylan raised the price of its generic 75 and 100 mg Doryx to a higher price than the last reported price of branded Doryx. (Id.) After Defendants introduced the 150 mg tablet, Mylan was able to develop and sell its own 150 mg generic tablet at a gross profit of $146 million over three years. (W.C. S.J. at App. 7.)

Throughout this period, doctors remained free to prescribe generic Doryx; pharmacists remained free to substitute generics when medically appropriate; and patients remained free to ask their doctors and pharmacists for generic versions of the drug. As I have described, undisputed evidence shows that managed care organizations promoted the substitution of lower-cost generics for branded Doryx even though they are not AB-rated. (W.C. Ex. 64.) When the price of Doryx increased, **[*36]** patients, pharmacists, and physicians switched to other drugs. (See, e.g., W.C. Ex. 53 at 43.)

Insofar as branded Doryx maintained market share, the record confirms that this was a function of Defendants' considerable efforts to promote Doryx. Since 2007, Warner Chilcott's promotional expenditures have increased each year, averaging approximately 10% of its net revenue from the sale of Doryx. (W.C. Ex. 53, Addanki Rep. at 30.) These efforts include advertising and promoting sales through contact with health care professionals. In 2011, these costs were approximately $23 million. (Id., Att. 3.). In 2012 (the latest year for which figures were provided), these costs were approximately $22 million. (Id.)

It is undisputed that Mylan expended no funds to promote its generic versions of Doryx. Mylan explains that "[n]o rational company would have undertaken [promotional expenses]" because

> the cost associated with detailing physicians and other extraordinary marketing tactics would essentially eliminate the cost savings associated with generic entry and any marketing of a generic would likely redound to the benefit of manufacturers.

(Mylan S.J. at 51.) Mylan thus seeks to transform its own refusal to incur promotion costs into Defendants' **[*37]** anticompetitive conduct. As I have described, however, Mylan's generic 150 mg Doryx tablet generated a gross profit of $146 million over three years—without Mylan spending a cent on "extraordinary tactics," such as promoting its product to doctors and the public. (W.C. S.J. at App. 7.) In 2010, Mylan took full advantage of the 180 days of exclusivity provided by statute, and, after Defendants stopped making 75 and 100 mg Doryx tablets, Mylan significantly raised the price of generic Doryx. *21 U.S.C. § 355*; (W.C. Ex. 377; W.C. Resp. to Mylan S.J. at 23). Spending some of its revenue on advertising would have lessened Mylan's now-increased profits. Mylan chose not to do so, relying instead on the "promotion" provided by state automatic substitution laws. Mylan is thus a "victim" of its own business strategy, not Defendants' "predatory" conduct.

The gravamen of Mylan's complaint is that Defendants' "anticompetitive product changes" were exclusionary because Mylan's generic would not automatically be substituted unless Mylan redesigned the generic to match the new version of Doryx and secured an AB-rating from the FDA. (Mylan S.J. at 39.) The Third Circuit has never ruled that this kind of conduct is anticompetitive. It has **[*38]** repeatedly held that "[c]onduct that merely harms competitors . . . while not harming the competitive process itself is not anticompetitive." *Broadcom 501 F.3d at 308*; accord *Dentsply Int'l, Inc., 399 F.3d at 187* ("There must be proof that competition, not merely competitors, has been harmed."). Moreover, where the Third Circuit has found exclusionary conduct, the excluded party is invariably smaller than the excluder. See, e.g., *Dentsply Int'l, Inc., 399 F.3d at 191* ("Consumer injury results from the delay that the dominant firm imposes on the smaller rival's growth." (quoting Herbert Hovenkamp, ***Antitrust Law*** ¶ 1802c, at 64 (2d ed. 2002))). As I have described, Mylan is considerably larger than either Defendant.

To establish anticompetitive conduct, "it is not necessary that all competition be removed from the market. The test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit." *Dentsply Int'l, Inc., 399 F.3d at 191*. Even if Defendants' product changes prevented Mylan from taking advantage of more profitable means of distributing its generic Doryx, the changes did not "bar" Mylan from the market or "severely restrict the market's ambit." Id.

The Third Circuit's rulings respecting exclusionary conduct are instructive. In Dentsply, the alleged **[*39]** monopolist manufactured and controlled over 90% of the market for prefabricated artificial teeth, which it sold to dental labs through dealers—middlemen who were the labs' "preferred source" of artificial teeth. *399 F.3d at 192*. Dentsply required exclusive contracts with its dealers: if they sold other manufacturers' artificial teeth, they could not sell Dentsply products. *Id. at 185*. The Third Circuit concluded that these contracts were exclusionary because they prevented competitors from accessing the only practicable means of reaching customers. *Id. at 193* (noting that dealers had "controlling degree of access" to the customers). In LePage's Inc., the Third Circuit ruled that 3M's "bundled rebates" across its product lines were akin to "tying" contracts that had the practical effect of completely excluding LePage's products from the market. *LePage's Inc. v. 3M, 324 F.3d 141, 157 (3d Cir. 2003)* (en banc). In Broadcom Corp., Qualcomm falsely committed to license its proprietary mobile wireless technology on "fair, reasonable, and non-discriminatory" terms—thus "locking in" the market. It then refused to license the proprietary technology to competitors on the promised terms. *Broadcom Corp., 501 F.3d at 314*. The Third Circuit ruled that because the practical effect of Qualcomm's **[*40]** deceptive conduct was to exclude competition, it was anticompetitive. Id.

Here, there was no exclusionary conduct. Mylan remains able to reach consumers through, *inter alia*, advertising, promotion, cost competition, or superior product development. Mylan instead seeks to take advantage of generic substitution laws and thus increase its profits. Defendants have no duty to facilitate Mylan's business plan by keeping older versions of branded Doryx on the market. See *Verizon Commc'ns Inc., 540 U.S. at 415* (no general duty to aid competitors). Defendants certainly did not exclude competition by denying Mylan the opportunity to take advantage of a regulatory "bonus."

Mylan relies on decisions addressing the anticompetitive effects of changes to complementary products in separate markets. See *Microsoft, 253 F.3d at 87* (Microsoft eliminated consumer choice by bundling together its Windows operating system and its Internet Explorer web browser); *C.R. Bard, Inc. v. M3 Systems, Inc., 157 F.3d 1340, 1382 (Fed. Cir. 1998)* (sustaining jury verdict where Bard modified its biopsy gun to render it incompatible with its competitors' replacement needles and thus excluded competition in the complementary market for replacement needles); but see *Berkey Photo, Inc., 603 F.2d at 279* (rejecting antitrust liability when Kodak introduced a new camera that **[*41]** was incompatible with existing film). These decisions are inapposite because Mylan does not produce a complementary product or compete with Defendants in a complementary market. As I have explained, Mylan and Defendants vigorously compete in a single market for oral tetracyclines

Mylan also cites to a handful of procedurally inapposite decisions respecting whether product hopping in the pharmaceutical industry is a *Section 2* violation. See *New York v. Actavis, PLC, No. 14-7473, 2014 U.S. Dist. LEXIS 172918, 2014 WL 7015198 (S.D.N.Y. Dec. 11, 2014)* (entering preliminary injunction that prevents a branded drug manufacturer from withdrawing an older version of its Alzheimers drug from the market); *In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig., No. 13-2445, 64 F. Supp. 3d 665, 2014 U.S. Dist. LEXIS 167204, 2014 WL 6792663, at *10 (E.D. Pa. Dec. 3, 2014)* (denying branded drug manufacturer's motion to dismiss); *Walgreen Co. v. AstraZeneca Pharm. L.P., 534 F. Supp. 2d 146, 151 (D.D.C. 2008)* (granting branded drug manufacturer's motion to dismiss); *Abbott Labs. v. Teva Pharms. USA, Inc., 432 F. Supp. 2d 408, 422 (D. Del. 2006)* (denying branded drug manufacturer's motion to dismiss). These courts addressed whether the introduction of a new product combined with other, exclusionary conduct can state a claim for relief under the Sherman Act. See, e.g., *In re Suboxone, 2014 U.S. Dist. LEXIS 167204, 2014 WL 6792663, at *10* ("The key question is whether the defendant combined the introduction of a new product with some other wrongful conduct, such that the comprehensive effect is likely to stymie competition, prevent consumer choice and reduce the market's ambit."). These decisions thus establish, **[*42]** at most, that a generic manufacturer can plead a plausible antitrust violation when a branded drug manufacturer redesigns the branded drug.

I, too, denied Defendants' motions to dismiss Mylan's Complaint. *Mylan Pharms., Inc. v. Warner Chilcott Pub. Co., No. 12-3824, 2013 U.S. Dist. LEXIS 152467, 2013 WL 5692880, at *2 (E.D. Pa. June 12, 2013)*. Given the absence of controlling authority (and *any* appellate authority), I thought it prudent to consider the legality of product hopping with the benefit of a fully developed record. That record now underscores that Defendants have not violated *Section 2*.

Adoption of Mylan's theory of "anticompetitive product redesign" could well have adverse, unintended consequences. *Any* time a pharmaceutical manufacturer changes the formulation of a branded drug and so compels a manufacturer to reformulate (or, as in the instant case, formulate for the first time) its generic, this could trigger a Microsoft burden-shifting contest. *Microsoft Corp., 253 F.3d at 58*; *In re Suboxone, 2014 U.S. Dist. LEXIS 167204, 2014 WL 6792663 at *7*. Once the branded drug manufacturer offered a procompetitive justification for the product change that the generic manufacturer could not rebut, courts and juries would have to determine which product changes were "sufficiently innovative" to justify their anticompetitive effects. *Microsoft Corp., 253 F.3d at 58-59*. Mylan has failed to offer an intelligible test of innovation "sufficiency," and I doubt that **[*43]** courts could ever fashion one. See *Allied Orthopedic Appliances, Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 1000 (9th Cir. 2010)* ("To weigh the benefits of an improved product design against the resulting injuries to competitors is not just unwise, it is unadministrable. There are no criteria that courts can use to calculate the "right" amount of innovation, which would maximize social gains and minimize competitive injury."); *United States v. Microsoft Corp., 147 F.3d 935, 948, 331 U.S. App. D.C. 121 (D.C. Cir. 1998)* ("Antitrust scholars have long recognized the undesirability of having courts oversee product design, and any dampening of technological innovation would be at cross-purposes with ***antitrust law***."); *Berkey Photo, Inc., 603 F.2d at 287* ("[N]o one can determine with any reasonable assurance whether one product is 'superior' . . . .").

Mylan's theory also risks slowing or even stopping pharmaceutical innovation. The prospect of costly and uncertain litigation every time a company reformulates a brand-name drug would likely increase costs and discourage manufacturers from seeking to improve existing drugs. Cf. *Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57, 73 (3d Cir. 2010)* ("The entry of summary judgment in favor of an antitrust defendant may actually be required in order to prevent lengthy and drawn-out litigation, which may have a chilling effect on competitive market forces.").

With Hatch-Waxman, Congress sought to encourage innovation and provide generic **[*44]** drug manufacturers a quick, less costly pathway to FDA approval. Indeed, Congress sought to "compensate" research drug companies and promote continued research amidst increased generic competition. (W.C. S.J. at 20 (citing statement of a Hatch-Waxman sponsor).) Yet, the Act is silent on product hopping. (Id. at 17.) Congress certainly could have created barriers to brand-name drug changes that could delay generic entry, but, perhaps understanding the adverse effects this could have on innovation, it did not. Courts should not seek to substitute their "legislative judgment" for that of Congress. See *Tri-Bio Labs. Inc. v. United States, 836 F.2d 135, 139 (3d Cir. 1987)* (Hatch-Waxman reflects a "statutory compromise of . . . competing concerns"); *Teva Pharm. Indus. Ltd. v. Crawford, 410 F.3d 51, 54, 366 U.S. App. D.C. 203 (D.C. Cir. 2005)* ("Because the balance struck between these competing goals is a quintessentially a matter for legislative judgment, the court must attend closely to the terms in which the Congress expressed that judgment.").

Finally, because I have decided that Defendants' product changes are not anticompetitive, I need not address Defendants' remaining arguments: that Mylan lacks antitrust standing, that Mylan's claims are time-barred, and that because Defendants petitioned the FDA to make the Doryx changes, they are covered by Noerr antitrust immunity. **[*45]** (W.C. S.J. at 9, 39-50, 50-53.) *B. Attempted Monopolization Claim* To demonstrate attempted monopolization, Mylan must show (1) that Defendants engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*. Mylan's claim of attempted monopolization necessarily fails. Because Defendants' conduct was not anticompetitive, it could not constitute attempted monopolization. *California Computer Products, Inc. v. Int'l Bus. Machines Corp., 613 F.2d 727, 738 (9th Cir. 1979)* ("[C]onduct lawful for a monopolist must, a fortiori, be excluded as a basis for the attempt offense.").

II. Section 1 Claim

Mylan also challenges Defendants' exclusive licensing agreement as a restraint of trade in violation of *Section 1* of the Sherman Act. (Compl. ¶ 88.) The Third Circuit has held that:

> [t]o establish a violation of *Section 1*, a plaintiff must prove: (1) concerted action by the defendants; (2) that produced anticompetitive effects within the relevant product and geographic markets; (3) that the concerted actions were illegal; and (4) that it was injured as a proximate result of the concerted action.

Gordon v. Lewistown Hosp., 423 F.3d 184, 207 (3d Cir. 2005) (citations omitted). Because I have concluded that Defendants' development and introduction of the Doryx tablet were not anticompetitive, Mylan has not established the second prong of the **[*46]** Gordon test. Accordingly, I need not reach Defendants' argument that they are together a single economic entity incapable of antitrust conspiracy. (Mayne S.J. at 23-32.)

III. Tortious Interference Claim

Under Pennsylvania law, to prevail on a claim for tortious interference with prospective contractual relationships, Mylan must prove:

> (1) the existence of a contractual or prospective contractual or economic relationship between the plaintiff and a third party; (2) purposeful action by the defendant, specifically intended to harm an existing relationship or intended to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; (4) legal damage to the plaintiff as a result of the defendant's conduct; and (5) for prospective contracts, a reasonable likelihood that the relationship would have occurred but for the defendant's interference.

Acumed LLC v. Advanced Surgical Servs., Inc., 561 F.3d 199, 212 (3d Cir. 2009). Plaintiff's claim fails on third element: Defendants' conduct was privileged. *Id. at 215* (Pennsylvania law recognizes "that competitors, in certain circumstances, are privileged in the course of competition to interfere with others' prospective contractual relationships"). The privilege applies when: (1) the relation **[*47]** concerns a matter involved in the competition between the actor and the other; (2) the actor does not employ wrongful means; (3) his action does not create or continue an unlawful restraint of trade; and (4) his purpose is at least in part to advance his interest in competing with the other. Id.; *Restatement (Second) of Torts § 768* (1979).

These criteria underscore the privileged nature of Defendants' product changes. The relation between Defendants and their customers—whether direct or indirect purchasers—concerns a matter of competition among pharmaceutical companies such as Mylan, Warner Chilcott, and Mayne. Moreover, Defendants did not employ wrongful means: I have concluded that Defendants' product development was not anticompetitive. For the same reasons, I find that the changes to Doryx were not wrongful and were not an unlawful restraint on trade. Finally, Defendants' actions were meant, at least in part, to advance their interest in competing with Mylan. In these circumstances, Mylan's tortious interference claim is not viable.

CONCLUSION

Although Mylan had numerous opportunities to market generic Doryx, it waited until the sales of branded Doryx were so great that huge generic sales—buoyed by regulatory compulsion—were **[*48]** assured. Defendants' efforts to deny Mylan this regulatory windfall were hardly predatory. On the contrary, these efforts have compelled pharmaceutical giant Mylan to compete against much smaller Warner Chilcott and Mayne on the merits and price of its products. Mylan's reading of the Sherman Act would not only require federal courts to serve as FDA adjuncts, it would strongly discourage pharmaceutical development and innovation. Finally, giving generics a regulatory "preferred place" would not necessarily reduce drug prices. Once Mylan was the exclusive seller of generic 75 and 100 mg Doryx tablets, it raised prices so that they were higher than those of branded Doryx. Presumably, it would seek to do the same once its generic sales were assured by automatic substitution laws. I cannot allow Mylan, solely for its own benefit, to thus stand the Sherman Act on its head.

Accordingly, I will enter summary judgment in Defendants' favor.

An appropriate Order follows.

/s/ Paul S. Diamond

Paul S. Diamond, J.

April 16, 2015

JUDGMENT

AND NOW, this 16th day of April, 2015, upon consideration of Plaintiff Mylan Pharmaceuticals' Motion for Summary Judgment (Doc. No. 509), Defendant Warner Chilcott's Motion **[*49]** for Summary Judgment (Doc. No. 511), Defendant Mayne Pharmaceuticals' Motion for Summary Judgment (Doc. No. 493), and all related submissions, it is hereby **ORDERED** that Defendants' Motions are **GRANTED** and Plaintiff's Motion is **DENIED** for the reasons stated in today's Memorandum Opinion. Plaintiff Mylan Pharmaceutical's Complaint is **DISMISSED with prejudice**, and **JUDGMENT** is hereby entered as to all of Plaintiff's claims in favor of Defendants Warner Chilcott and Mayne Pharmaceuticals and against Plaintiff Mylan Pharmaceuticals. The Clerk shall mark this case as **CLOSED**.

AND IT IS SO ORDERED.

/s/ Paul S. Diamond

Paul S. Diamond, J.

Tri State Advanced Surgery Ctr., LLC v. Health Choice, LLC

United States District Court for the Eastern District of Arkansas, Jonesboro Division

April 16, 2015, Decided; April 16, 2015, Filed

No. 3:14cv143-JM

Reporter
2015 U.S. Dist. LEXIS 50164 *; 2015-1 Trade Cas. (CCH) P79,138; 2015 WL 1737410

TRI STATE ADVANCED SURGERY CENTER, LLC, GLENN A. CROSBY II, M.D., F.A.C.S., and MICHAEL HOOD, M.D., PLAINTIFFS v. HEALTH CHOICE, LLC and CIGNA HEALTHCARE OF TENNESSEE, INC., DEFENDANTSCONNECTICUT GENERAL LIFE INSURANCE COMPANY, CIGNA HEALTH AND LIFE INSURANCE COMPANY, AND CIGNA HEALTHCAR E OF TENNESSEE, INC., COUNTERCLAIM-PLAINTIFFS v. SURGICAL CENTER DEVELOPMENT, INC D/B/A SURGCENTER DEVELOPMENT and TRI STATE ADVANCED SURGERY CENTER, LLC, COUNTERCLAIM-DEFENDANTS

Subsequent History: Motion denied by, in part, Dismissed by, in part *Tri State Advanced Surgery Ctr., LLC v. Surgical Ctr. Dev., Inc., 112 F. Supp. 3d 809, 2015 U.S. Dist. LEXIS 167417 (E.D. Ark., 2015)*

Motion denied by *Tri State Advanced Surgery Ctr. v. Choice, 2016 U.S. Dist. LEXIS 15669 (E.D. Ark., Feb. 9, 2016)*

Core Terms

patients, allegations, geographic, metropolitan, referrals, network, market power, insurers, motion to dismiss, competitors, Antitrust, consumers, surgical, surgery, detrimental effect, Sherman Act, statistical, Healthcare, facilities, suppliers, terminate, medicine, provider

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For Cigna Health and Life Insurance Company, Connecticut General Life Insurance Company, Counter Claimants: Chad W. Pekron, John E. Tull, III, Robert Ryan Younger, LEAD ATTORNEYS, Quattlebaum, Grooms & Tull PLLC, Little Rock, AR; Christian Reigstad, Dmitriy G. Tishyevich, Joshua B. Simon, Terence Y. Leong, Warren Haskel, LEAD ATTORNEYS, PRO HAC VICE, Kirland & Ellis LLP, New York, NY.

For Surgical Center Development Inc, agent of SurgCenter Development, Counter Defendant: W. Tucker Brown, LEAD ATTORNEY, PRO HAC VICE, Whatley Kallas, LLP, Birmingham, AL.

For Tri State Advanced Surgery Center LLC, Counter Defendant: Corey Darnell McGaha, Scott E. Poynter, William Thomas Crowder, LEAD ATTORNEYS, Emerson Poynter LLP, Little Rock, AR; Deborah J. Winegard, LEAD ATTORNEY, PRO HAC VICE, Whatley Kallas, LLP, Atlanta, GA; Edith M. Kallas, LEAD ATTORNEY, PRO HAC VICE, Whatley Kallas, LLP, New York, NY; Joe R. Whatley, Jr., LEAD ATTORNEY, Whatley Kallas, LLP, Birmingham, AL; John G. Emerson, Jr., LEAD ATTORNEY, Emerson Poynter LLP, Houston, TX; W. Tucker Brown, LEAD ATTORNEY, PRO HAC VICE, Whatley Kallas, LLP, Birmingham, AL.

Judges: James M. Moody Jr., United States District Judge. **[*3]**

Opinion by: James M. Moody Jr.

Opinion

ORDER

Plaintiffs Tri State Advanced Surgery Center, LLC ("Tri State"), Glenn A. Crosby II, M.D. ("Crosby"), and Michael Hood, M.D. ("Hood") bring this action against Health Choice, LLC ("Health Choice") and Cigna Healthcare of Tennessee, Inc. ("Cigna") alleging anti-trust violations of the Sherman Act, *15 U.S.C. §1*; tortious interference with contract; intentional interference with business relationships; and violations of the Tennessee Consumer Protection Act. In addition, Cigna and two additional parties, Connecticut General Life Insurance Company and Cigna Health and Life Insurance Company, have filed what they title counterclaims against Tri State and an additional party, Surgical Center Development, Inc., d/b/a SurgCenter Development ("SurgCenter"). Both Defendants have filed motions to dismiss all of the claims against them for failure to state a claim pursuant to Rule 12(b)(6). Tri State and SurgCenter have also filed a motion to dismiss the counterclaims. This order only addresses Defendants' motions to dismiss. Jurisdiction is proper in this Court on the basis of the claims brought under the Sherman Act and the Court's supplemental jurisdiction over Plaintiffs' state law claims. *28 U.S.C. §1331* and **[*4]** *28 U.S.C. §1367*.

Rule 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." In reviewing the sufficiency of a plaintiff's allegations when challenged with a motion to dismiss, the court must determine whether the complaint states a claim for relief that is "plausible on its face." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868*. The court must accept as true all of the factual allegations contained in the complaint and draw all reasonable inferences in favor of the nonmoving party. *Cole v. Homier Distributing Co., Inc. 599 F.3d 856, 861 (8th Cir. 2010)*.

Factual Allegations

This is a concerted refusal to deal case brought by two doctors and an ambulatory surgery center against a physician-hospital organization and an insurer. Plaintiffs allege that Defendants attempted to run Tri State out of business by preventing Tri State from contracting with insurers in the Memphis metropolitan area and by preventing referrals to Tri State.

The facts, as drawn from the complaint, are as follows. Plaintiff Tri State is an ambulatory surgery center (ASC) located in Crittenden County, Arkansas. It treats **[*5]** patients from Arkansas, Mississippi, and Tennessee. Plaintiff Crosby is a neurosurgeon who practices medicine with the Crosby Clinic in Memphis, Tennessee and at Tri State. Plaintiff Hood is a surgeon specializing in sports medicine and general orthopaedics who practices medicine with Delta Orthopaedics & Sports Medicine in West Memphis, Arkansas and at Tri State. Defendant Cigna acted as either the third-party administrator of various employers' healthcare plans or as an insurer of various healthcare insurance policies. Defendant Health Choice is a joint venture physician-hospital organization (PHO) between

MetroCare Physicians, an independent physician association (IPA) and Methodist LeBonheur Healthcare ("Methodist"), "the dominant hospital system in the Memphis metropolitan area." Health Choice contracts with health insurers, like Cigna, to provide networks of medical providers and provides managed care contracting services for medical providers. Both Crosby and Hood are members of MetroCare.

Pursuant to an agreement, Health Choice and Cigna mutually decide which Health Choice doctors should be included in Cigna's provider network. Tri State does not have a participating provider **[*6]** agreement with Cigna and is thus considered out-of-network for Cigna's members.

In letters dated June 27, 2013, Cigna notified physicians who treated patients at Tri State, including Crosby and Hood, that they had been "engaging in a pattern and practice of consistent and repeated referrals of Cigna patients to [Tri State], which is a non-network facility that does not participate with Cigna." The letter demanded that the physicians attest that they would "refer Cigna patients to in-network facilities" or Cigna would evaluate whether the physicians' continued participation with Cigna "is in our mutual benefit." Plaintiff alleges that Cigna and Health Choice illegally agreed that Cigna would send the letters "in order to coerce the physicians into directing the vast majority of these patients to Methodist-affiliated facilities and away from Tri State."

On October 2, 2013, Cigna sent a letter to Health Choice's CEO, Mitch Graves, that it was terminating Crosby and Hood, among others, from its network effective December 1, 2013. The letter stated that Cigna was invoking the without-cause termination provision, but Crosby and Hood allege that they were terminated for refusing to sign the **[*7]** attestation. Plaintiffs further allege that a Cigna representative advised Hood's office manager on November 4, 2013, that Health Choice had sent a letter to Cigna requesting that Cigna terminate Hood from its network and that Cigna agreed to do so. Crosby was also advised that Health Choice and Cigna had agreed to terminate him from Cigna's network unless he attested that he would only refer patients to in-network facilities.

The complaint further alleges that in July of 2013, another doctor was given notice by Cigna that if he did not stop referring patients to Tri State, he and his partners would not be permitted to perform a new office procedure, balloon sinuplasty, even though Cigna had permitted other doctors to perform this procedure in their offices. This same doctor received a letter from Cigna demanding that he disclose his financial interest in Tri State to his patients, though he had a financial interest in other ASCs and had never had to disclose his interest in those. These actions by Cigna were part of Health Choice and Cigna's "anti-competitive effort to dry up referrals to Tri State and to stymie any competition from Tri State."

Plaintiffs make further separate allegations **[*8]** against Health Choice. The complaint states that Health Choice committed other illegal conduct by making agreements with non-party insurers Aetna and Blue Cross Blue Shield of Tennessee in which these insurers agreed to advise doctors that they could not refer patients to Tri State in a "further effort to dry up referrals to Tri State and to stymie competition from the facility." Also, Plaintiffs state that at a Health Choice board meeting, Tri State was denied membership in Health Choice even though it had not yet submitted an application to join.

Sherman Act Claims

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." *15 U.S.C. §1*. The Supreme Court has explained that the prohibition is not to be taken literally, and that only "unreasonable restraints" are prohibited. *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. There are two ways to evaluate whether an agreement violates *Section 1*: using the so-called "rule of reason" analysis or making the determination that the agreement is a *per se* violation.[1] Under the rule of reason, the " true test of legality is whether

[1] The Eighth Circuit has recognized a third method of analysis, the "quick look," which is closer on the analysis spectrum to the *per se* analysis, but neither party has argued its application here. See *Craftsmen Limousine, Inc. v. Ford Motor Co., 491 F.3d 380 (8th Cir. 2007)*.

the restraint imposed is such as merely regulates **[*9]** and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Chicago Board of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918)*. "Rule-of-reason analysis guides the inquiry unless the challenged action falls into the category of 'agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.'" *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 289, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985)* (quoting *Northern Pacific R. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)* (internal citations omitted).

The *per se* rule is limited to agreements that are so inherently anticompetitive as to be illegal per se, such as horizontal agreements among direct competitors. *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)*. The Supreme Court has acknowledged that there is some confusion surrounding the application of the *per se* rule against group boycotts such that "[s]ome care is therefore necessary in defining the category of concerted refusals to deal that mandate *per se* condemnation." *Id. at 294*. Furthermore, the Supreme Court **[*10]** has expressed its reluctance to extend *per se* analysis "to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious." *F.T.C. v. Indiana Federation of Dentists, 476 U.S. 447, 458-459, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*.

Plaintiffs argue that their allegations of both Defendants' concerted refusal to deal with them falls within a recognized category of a *per se* violation of *Section 1*. Relying on language from *Northwest, supra*, they categorize the alleged illegal agreements as "joint efforts by a firm or firms to disadvantage competitors by 'either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.'" *Id. at 294* (quoting L. Sullivan, Law of Antitrust 229-230(1977)). Plaintiffs also rely on *Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*, where the Supreme Court applied the per se rule (without calling it by that name) to a boycott arranged by a single competitor but carried out by a "wide combination consisting of manufacturers, distributors, and a retailer." *Id. at 213*. But unlike the complaint in *Klor's*, the Plaintiffs' complaint does not contain sufficient factual matter plausibly suggesting that the competitor at issue, Methodist, entered into an illegal agreement. The complaint states that **[*11]** "on information and belief, Health Choice made this agreement on behalf of its joint venture partner Methodist in an attempt to eliminate competition to Methodist, while Cigna made this agreement in an attempt to obtain better terms in its contract with Health Choice and to keep Methodist in its provider Network." However, the only factual allegations involved action by Health Choice or Cigna, both of whom are in a vertical relationship with Plaintiffs, not horizontal competitors. Nor are Health Choice and Cigna in a horizontal relationship with each other. The Court agrees with Defendants, therefore, that the rule of reason is the appropriate vehicle to analyze Plaintiffs' complaint against both Defendants. Plaintiffs' efforts to bootstrap this into a horizontal agreement by including conclusory allegations against non-party Methodist are insufficient to state a *per se* illegal boycott claim against Defendants.

Under the rule of reason analysis, a plaintiff must show that an agreement has the potential for genuine adverse effects on competition, which can be shown by either market power or by proof of actual detrimental effects. *Flegel v. Christian Hospital, Northeast-Northwest, 4 F.3d 682, 688 (8th Cir. 1993)*. "Since the purpose of the inquiries into market definition **[*12]** and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, "proof of actual detrimental effects, such as a reduction of output," can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" *F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447, 460-61, 106 S. Ct. 2009, 90 L. Ed. 2d 445(1986)* (quoting 7 P. Areeda, ***Antitrust Law*** ¶ 1511, p. 429 (1986)).

Plaintiffs argue that they have alleged actual detrimental effects on competition. They allege that consumer choices have been limited by Defendants' actions because doctors have been forced to stop referring patients to Tri State. Also, they allege that "consumers and competition have also been harmed by [Defendants'] actions which have precluded patients from using their [Out of Network] benefits for which they have paid additional insurance premiums." (Docket No. 1, ¶66). The complaint also alleges a number of benefits offered by Tri State over the same procedures being offered at hospitals (less expensive, better scheduling, closer parking). As compared to Methodist facilities, Plaintiffs argue that Tri State offers quicker treatment.

Defendants each challenge that Plaintiffs' allegations are sufficient to show actual detrimental **[*13]** effect on competition. The Court agrees. Plaintiffs do not allege that patients cannot receive Tri State's services absent in-network referrals or that patients cannot obtain ambulatory surgical services elsewhere in the market. They do not allege that there has been a decline in the number of facilities that perform surgical procedures which do not require hospitalization or in the actual quality of these procedures. Tri State is still open for business and all its services available to patients. Therefore, a more thorough analysis of market power is required.

To establish that Defendants have market power, Plaintiffs must allege that Defendants have a dominant share in a well-defined relevant market defined in both terms of product market and geographical market. *Minnesota Ass'n of Nurse Anesthetists v. Unity Hosp., 208 F.3d 655 (8th Cir. 2000)*; *Flegel at 689*. "Antitrust claims often rise or fall on the definition of the relevant market." *Bathke v. Casey's Gen. Stores, Inc., 64 F.3d 340, 345 (8th Cir. 1995)*. While there is no absolute prohibition against dismissal of antitrust claims for failure to plead a relevant market, "[a] dismissal on the pleadings should be granted sparingly and with caution" and most often "only after a factual inquiry into the commercial realities faced by consumers." *Double D Spotting Service, Inc. v. Supervalu, Inc., 136 F.3d 554, 560 (8th Cir. 1998)* (internal quotations and citations omitted). **[*14]**

"A court's determination of the limits of a relevant product market requires inquiry into the choices available to consumers." *Little Rock Cardiology Clinic, PA v. Baptist Health, 591 F.3d 591, 599 (8th Cir. 2009)* ("*LRCC*"). "The relevant product market includes all reasonably interchangeable products." *Double D, at 560*. Plaintiffs in the instant case define the relevant product market as "the market for surgical services or procedures which do not require hospitalization, including orthopaedic surgery, sports medicine, spinal surgery, otolaryngology, and interventional pain management." (Docket No. 1, ¶29). Both Defendants challenge this definition as being fatally deficient, relying on the Eighth Circuit's opinion in *LRCC*, which summed up the issue of product market as follows: "LRCC's claims boil down to the allegation that, due to Baptist Health's allegedly unlawful actions, LRCC has access to fewer patients. The relevant question, then, is to whom might the cardiologist at LRCC potentially provide medical service?" *Id. at 597*. The Eighth Circuit found that LRCC's product market definition was fatally deficient in part because it defined the product market in terms of how consumers paid for services; it was undisputed that the definition was limited to patients covered by private **[*15]** insurance and excluded patients paying by any other method. *LRCC, at 596*.

Here, Plaintiffs state emphatically that their definition does not limit the relevant product market to patients covered by private insurance. The Court agrees with the argument made by Health Choice, however, and finds that Plaintiffs' silence on the issue of how patients pay for services does not cure the defect that exists in the allegations. Although deliberately excluded from the definition they presented on product market, the market for which Plaintiffs seek to make an anti-trust injury claim is, in fact, limited to the market for surgical services or procedures obtained by patients covered by Cigna health insurance which do not require hospitalization. It is from this impermissibly circumscribed market that they claim to have been shut-out. Plaintiffs' chief complaint is that by drying up referrals to Tri State, Defendants have engaged in anticompetitive conduct; the referrals at issue are referrals from doctors in the Cigna network. As in *LRCC*, the relevant inquiry, and thus the relevant market, must include all alternative patients available to Plaintiffs and not be limited to those who pay by private insurance **[*16]** bought from Cigna or any other insurer. The product market put forth by Plaintiffs is narrower than the product market that was found lacking in *LRCC*. Omitting the red-flagged phrase "covered by private insurance" from the proposed product market definition does not save the complaint from the Eighth Circuit's holding in *LRCC*.

In addition to relying on an impermissibly defined product market, the complaint also lacks a well-defined relevant geographic market, which is defined by considering the commercial realities faced by consumers. *Flegel v. Christian Hosp., Northeast-Northwest, 4 F. 3d 682, 690 (8th Cir. 1993)* (citations omitted). The Eighth Circuit outlined the nature of a court's inquiry into the proper geographic market in a medical setting in *LRCC*:

> Broken down, the test requires a court to first determine whether a plaintiff has alleged a geographic market that includes the area in which a defendant supplier draws a sufficiently large percentage of its business—"the

> market area in which the seller operates," its trade area. A court must then determine whether a plaintiff has alleged a geographic market in which only a small percentage of purchasers have alternative suppliers to whom they could practicably turn in the event that a defendant supplier's anticompetitive **[*17]** actions result in a price increase. The end goal in this analysis is to delineate a geographic area where, in the medical setting, "'few' patients leave ... and 'few' patients enter."

LRCC, at 598 (8th Cir. 2009) (internal citations omitted). "This crucial first step serves as a limitation, preventing antitrust plaintiffs from delineating arbitrarily narrow geographic markets." *LRCC, at 599*.

The complaint in this case defines the relevant geographic market as "the Memphis, Tennessee metropolitan area, including the adjacent counties in Mississippi and Arkansas." (Docket No. 1, ¶31). Health Choice argues that this definition is deficient as a matter of law because if fails to define the "adjacent counties" abutting the alleged market. Plaintiffs respond to this argument by stating that "[a]s Plaintiffs' allegations make clear, the market is the Memphis metropolitan statistical area ("MSA") as defined by the federal government." The Court finds that while the MSA is mentioned in the complaint in connection with Cigna's share in the health insurance market, the allegations of the complaint do not make clear that the MSA is the geographic market covered by the Section 1 claims. For the most part, the allegations refer to the "Memphis metropolitan **[*18]** area," not the Memphis metropolitan statistical area, and nowhere in the complaint are the "adjacent counties" mentioned by name, though Plaintiffs' response to Defendants' motions to dismiss lists nine specific counties covered by the MSA.[2]

The Court finds that Plaintiffs have failed to adequately allege a relevant geographic market. A careful review of the complaint fails to reveal a delineated geographic area in which only a small percentage of patients have alternative suppliers in the market for surgical services or procedures which do not require hospitalization to whom they could practicably turn the event that Methodist's actions result in a price increase. (This is assuming that the market of Methodist—rather than one of the named defendants—is relevant to this analysis.) The complaint provides a lot of statistics and trade area information. For example, Tri State, as its name implies, treats patients from three states: **[*19]** Arkansas, Tennessee, and Mississippi. Plaintiffs also allege that Cigna has control of 42% of the commercial health insurance market in the Memphis metropolitan statistical area, which leads them to conclude that Cigna has market power in the Memphis metropolitan statistical area. Regarding Methodist, Plaintiffs allege that "[i]n 2012, Methodist reported having a 40 percent market share in the metropolitan Memphis market," and, therefore, they conclude, Methodist has market power in the Memphis metropolitan market. But none of these allegations suggest the geographic area to be considered in analyzing patients' choices in the defined product market of outpatient surgeries.

Therefore, in the absence of sufficient allegations to plead a proper product market or a proper geographic market, and given that the deficiencies are inherent in the nature of the claims and not likely to be cured by further pleading, Plaintiffs' claims in Count I for violations of the Sherman Act against Cigna and Health Choice are dismissed with prejudice. Because the Court has dismissed all of Plaintiffs' federal claims, the Court declines to exercise supplemental jurisdiction over the remaining state law claims. **[*20]** *28 U.S.C. §1367(c)*.

THEREFORE, IT IS CONSIDERED, ORDERED, AND ORDERED that:

(1) Defendant Health Choice, LLC's Motion to Dismiss the Complaint (Docket No. 43) is GRANTED. As against this defendant, Count I is dismissed with prejudice, and Counts II, III, and IV are dismissed without prejudice.

(2) Defendant Cigna Healthcare of Tennessee, Inc.'s Motion to Dismiss the Complaint (Docket No. 45) is GRANTED. As against this defendant, Count I is dismissed with prejudice, and Count II is dismissed without prejudice.

(3) This resolves all of Plaintiffs' claims against Defendants. Cigna's counterclaims remain pending at this time.

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[2] Plaintiffs' response states: "The Memphis TN-MS-AR Metropolitan Statistical Area includes Fayette, Shelby and Tipton Counties in Tennessee; Benton, DeSoto, Marshall, Tate and Tunica Counties in Mississippi; and Crittenden County, Arkansas." (Docket No. 60, p. 14).

IT IS SO ORDERED this 16th day of April, 2015.

/s/ James M. Moody Jr.

James M. Moody Jr.

United States District Judge

Go Computer v. Microsoft Corp.

Superior Court of California, County of San Francisco

April 18, 2015, Filed

Case No. CGC-05-442684

Reporter
2015 Cal. Super. LEXIS 10947 *

GO COMPUTER, INC., a Washington Corporation; S. JERROLD KAPLAN, an individual, Plaintiff, v. MICROSOFT CORPORATION, a Washington corporation, Defendants.

Core Terms

operating system, software, products, consumers, monopoly power, restrictions, license, relevant market, collateral estoppel, middleware, anticompetitive, exclusionary, customers, programs, innovation, interfaces, judicial estoppel, pre-installed, invoking, monopoly, exposed, removal, user, former proceeding, developers, technology, foreclose, positions, promotion, browsing

Opinion

[*1] STATEMENT OF DECISION THAT CERTAIN FINDINGS WERE NECESSARY TO A JUDGMENT AGAINST DEFENDANT MICROSOFT CORPORATION

INTRODUCTION

This court set this bifurcated trial to determine whether certain findings of fact and conclusions of law ("Findings") in the federal antitrust litigation known as *United States v. Microsoft Corp.*, ("the Microsoft Litigation") were necessary to the judgment in that litigation. The Microsoft Litigation was brought by a number of governmental entities against Microsoft Corporation ("Microsoft"), the defendant here, for allegedly violating Federal ***antitrust law*** and various state statutes, including California's Cartwright Act (*Cal. Bus. & Prof. Code §§ 16720 et seq). Certain findings that were made in the Microsoft Litigation are claimed by the plaintiffs in this case to have both relevance to and a preclusive effect on this litigation. This trial phase was solely to determine whether for the purpose of collateral estoppel, the Findings were necessary to the judgment in the Microsoft Litigation. This trial did not seek to establish any other element of collateral estoppel or of relevance that might apply to the use of the Findings in this case.

The Findings which this court determines to be necessary and **[*2]** essential to the judgment in the Microsoft Litigation are set forth in Appendix A to this Statement of Decision.

BACKGROUND

On May 18, 1998, the United States Department of Justice and 19 states commenced the Microsoft Litigation in the United States District Court for the District of Columbia as cases numbered 98-1232 (TPJ) and 98-1233 (TPJ). The two cases alleged, among other things, that Microsoft engaged in conduct that violated *Section 2* of the Sherman Act (*15 U.S.C. § 2*) ("*Section 2*"), as well as the Cartwright Act. After a 76-day bench trial, United States District

Judge Thomas Penfield Jackson determined that Microsoft had maintained a monopoly in the market for Intel-compatible operating systems ("relevant market") in violation of *Section 2*. *United States v. Microsoft Corp. (D.D.C. 1999), 84 F. Supp. 2d 9* and *United States v. Microsoft Corp (D.D.C. 2000) 87 F. Supp. 2d 30*.

The District of Columbia Circuit, sitting *en banc*, affirmed the judgment that Microsoft violated *Section 2*. The Court upheld Judge Jackson's finding that Microsoft possessed monopoly power in the relevant market. *United States v. Microsoft Corp. (D.C. Cir. 2001), 253 F.3d 34, 54, 346 U.S. App. D.C. 330*, *cert, denied* (2001; *534 U.S. 952, 122 S. Ct. 350, 151 L. Ed. 2d 264*, finding that "Windows accounted] for a greater than 95% share" of the market. It also affirmed the conclusion that Microsoft engaged in anticompetitive conduct in maintaining its monopoly by undertaking "a variety of exclusionary acts… to maintain **[*3]** its monopoly by preventing the effective distribution and use of products that might threaten that monopoly." *Id. at 58*. The court listed twelve such exclusionary acts that fell into the broad categories of: (I) using license restrictions, incentives, threats, and other methods to foreclose certain competitors from access to OEMs and ISVs; (2) making it impractical for OEMs and consumers to use competing products by integrating Microsoft's products into core Windows files and making removal impossible; and (3) coercing other companies, such as Intel, into withholding support to Microsoft's competitors and rivals. *Id. at 58-78*.

The Court of Appeals reversed other findings of liability against Microsoft that are not at issue here and remanded the matter to the District Court. On remand, United States District Judge Colleen Kollar-Kotelly (who replaced Judge Jackson on the case) approved the parties' proposed consent decree. *New York v. Microsoft Corp. (D.D.C. 2002), 224 F. Supp. 2d 76, 226*.

ANALYSIS

A. Requirements for Collateral Estoppel

Collateral estoppel precludes re-litigation of issues decided in a prior action. *Lucido v. Superior Court (1990), 51 Cal.3d 335, 341, 272 Cal. Rptr. 767, 795 P.2d 1223*. It is applied in order to "promote judicial economy by minimizing repetitive litigation, to prevent inconsistent judgments which undermine the integrity of **[*4]** the judicial system, or to protect against vexatious litigation." *Clemmer v. Hartford Ins. Co. (1978) 22 Cal.3d 865, 151 Cal. Rptr. 285, 587 P.2d 1098*. Collateral estoppel "is based on the sound public policy of limiting litigation when a party has already had one fair trial on an issue" (*Vezina v. Continental Cas. Co. (1977), 66 Cal. App. 3d 665, 670, 136 Cal. Rptr. 198)*, and it "causes no injustice when the party to be bound had a full and fair opportunity to litigate the issue to be foreclosed." *Vandenberg v. Superior Court (1999), 21 Cal. 4th 815, 834, 88 Cal. Rptr. 2d 366, 982 P.2d 229*.

Several threshold requirements must be met for collateral estoppel to apply. "First, the issue sought to be precluded from re-litigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, the issue must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding." *Lucido, 51 Cal. 3d at 341*. Further, "the public policies underlying collateral estoppel-preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation-strongly influence whether its application in a particular circumstance would be fair **[*5]** to the parties and constitute sound judicial policy." *Id. at 343*. The judgment of a federal court has the same preclusive effect in California state courts as it would h)ve in a federal court. *Levy v. Cohen, (1977) 19 Cal. 3d 165, 173, 137 Cal. Rptr. 162, 561 P.2d 252*.

At issue in this bifurcated trial is the third element of the collateral estoppel inquiry: whether the issue was "necessarily decided" by a court in the prior proceeding. *Lucido, 51 Cal. 3d at 341*; *Martin v. Dep't of Justice (D.C. Cir. 2007) 488 F.3d 446, 376 U.S. App. D.C. 293*. Requiring that findings and conclusions were necessary to the judgment ensures that "the tribunal that decided the first [took] sufficient care in determining an issue that… affect[ed] the result" and that "appellate review [is] available." 18 Wright & Miller, Federal Practice & Procedure:

Jurisdiction § 4421 (2d ed.). The D.C. Circuit considers an issue to be necessary to a prior judgment if its disposition "was the basis for the holding with respect to the issue and not mere dictum." *McLaughlin v. Bradlee (D.C. Cir. 1986), 803 F.2d 1197, 1204, 256 U.S. App. D.C. 119* *Jahr v. District of Columbia (D.D.C. 2013), 968 F. Supp. 2d 186, 191* ("Collateral estoppel applies… where the determination was essential to the judgment, and not merely dictum." (quoting *Modiri v. 1342 Rest. Group, Inc. (D.C. 2006), 904 A.2d 391, 394)*.

B. Elements of a *Section 2* Violation

Two elements of a *Section 2* claim which are central to the issue before this court are (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as **[*6]** distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *United States v. Grinnell Corp. (1966), 384 U. S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778*; *Eastman Kodak Co. v. Image Tech. Servs., Inc., (1992) 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265*. For the purposes of the first of these two elements, monopoly power is "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co (1956), 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264*. The second central element of a *Section 2* claim entails "the use of monopoly power 'to foreclose competition, to gain a competitive advantage, or to destroy a competitor.'" *Eastman Kodak, 504 U.S. at 482-83* (quoting *United States v. Griffith (1948) 334 U.S. 100, 107, 68 S. Ct. 941, 92 L. Ed. 1236)*. If a defendant "adopted its … policies as part of a scheme of willful…maintenance of monopoly power, it will have violated *§ 2*." *Id. at 483*.

Further, in order to establish an antitrust violation under *Section 2*, it is necessary to prove an anti-competitive effect or actual harm to competition., *Bunker Ramo Corp. v. United Bus. Forms, Inc., (7th Cir.1983) 713 F.2d 1272, 1283*.

C. Analysis of the Findings at Issue

The necessity of specific findings to judgment in the Microsoft Litigation requires an analysis of the elements of the *Section 2* violation set forth above. Also important to this analysis is the position Microsoft took in the Court of Appeals regarding these elements. Microsoft argued that the trial court had improperly defined the relevant market and that due to what it asserted was a unique and dynamic market, there was insufficient evidence that Microsoft wielded monopoly **[*7]** power. *United States v. Microsoft, supra, 253 F.3d at 51*. As a result of these arguments, the Court thoroughly analyzed the; District Court's findings of fact and conclusions of law in the context of the elements of the relevant violation of law, thus demonstrating how and why the findings were essential to the District Court's decisions which were upheld on appeal.

The Findings that this court concludes were essential to the definition of the relevant market are numbers 2, 4 and 10.

The Findings that this court concludes were essential to whether Microsoft possessed and wielded monopoly power are numbers 35, 66, 67, 132, 203, 214, 215, 228, 229, 338, and 339.

The Findings that this court concludes were essential to the *Section 2* element of an anti-competitive effect in the relevant market are numbers 410 and 412.

All of the Conclusions set forth in Appendix A were essential to the matters set forth above.

Microsoft argues that Findings 2, 4, and 10, "only provide background information and define technical terms." The argument is somewhat curious in that background information such as the specification of the products in the releyant market, the identity of the accused violator of *Section 2*, and the activities that create the behavior in violation of **[*8]** law provide the context and substance for a conclusion that an antitrust violation occurred. True, these facts can be viewed as "background," but they also provide the substjance necessary to understand who did what to violate *Section 2*. In other words, these "background" facts are all necessary to establish the relevant market and to show the essential elements that "that the defendant holds market power over the relevant market."

Sky Angel U.S., LLC v. Nat'l Cable Satellite Corp. (D.D.C. 2013), 947 F. Supp.2d 88, 102; *Southern Pac. Communications Co. v. American Tel. & Tel. Co. (D.C. Cir. 1984), 740 F.2d 980, 1000, 238 U.S. App. D.C. 309* ("[C]ourts frequently approach the problem of measuring market power by defining the relevant product… and computing the defendant's market share. Monopoly power is then ordinarily inferred from a predominant share of the market.").

Microsoft asserts that a number of the Findings at best relate to sweeping anticompetitive behavior that goes well beyond what it argues is a far narrower determination of its liability in the Microsoft Litigation. These Findings deal with behavior toward OEMs, restrictions on ISVs, and behavior relating to middleware products such as Netscape and Java (Findings 203, 214-215, 228-229, and 338-339 and conclusions 3 and 4). The Findings regarding middleware were termed "of importance" by the Court in its analysis of the relevant market and appeared **[*9]** essential to the Court's rejection of Microsoft's argument that the trial court had incorrectly defined the relevant market (*253 F.3d at 53-54*). Also, these Findings demonstrate restrictions and other conditions imposed by Microsoft on OEMs and ISVs, which were necessary to the second element of a *Section 2* violation: that Microsoft engaged in exclusionary conduct and "use[d its] monopoly power 'to foreclose competition, to gain a competitive advantage, or to destroy a competitor,'" *Eastman Kodak, 504 U.S. at 482-83* (quoting *Griffith, 334 U.S. at 107*), and that the imposed restrictions were not procompetitive. *Grinnell, 384 F.3d at 571* (distinguishing unlawful monopolization from one that developed "as à consequence of a superior product, business acumen, or historic accident"). The middleware product findings are essential in that they relate to the factors rejected in the Microsoft Litigation as a threat to Microsoft's monopoly (even though those products were not operating systems). Given these issues, these Findings were essential to the judgment. *E.I. du Pont de Nemours & Co., 351 U.S. at 395* ("In considering what is the relevant market for determining the control oi price and competition, no more definite rule can be declared than that [products] reasonably interchangeable by consumers for the same purposes make up that part of **[*10]** the trade or commerce, monopolization of which may be illegal.").

Microsoft argues that several of the Findings at issue should be rejected because they relate to a finding of a violation of the Cartwfight Act, which Microsoft argues was not included in a final judgment against it. (Findings (perhaps) 132, (perhaps 338-339, 410, 412, Conclusions 2 and 7). Here, so long as the finding is essential to the judgment in the Microsoft Litigation (e.g., the use of monopoly power), then the fact that it also might support a violation of the Cartwright Act (i.e., using monopoly power to coerce other market participants to become coconspirators) does not render it not essential to the final judgment.

Microsoft also objects to the Findings jregarding the harm caused by Microsoft's conduct (Findings 410 and 412 and Conclusions 2 and 7) as being overbroad relative to the actual violations found. These Findings, however, were necessary to the element of anti-competitive effect, an essential element to the judgment. *United States v. Microsoft, 253 F. 3d at 80* (explaining that "Microsoft's concerns over causation have more purchase in connection with the appropriate remedy issue, i.e., whether the court should impose a structural remedy or merely **[*11]** enjoin the offensive conduct… [but that] causation affords Microsoft no defense to liability for its unlawful actions undertaken to maintain its monopoly in the operating system market"). Similarly, the findings and conclusions made by Judge Kollar-Kotelly once the case was remanded by the Court of Appeals were necessarily decided because they formed the basis for her judgment: the entry of an order enjoining Microsoft from continuing certain practices found to be anticompetitive. [1] *See New York v. Microsoft Corp., 224 F. Supp. 2d at 152*. The fact that Microsoft's licensing restrictions were exclusionary was a necessary factor in the court's determination that its remedial decree must prohibit such exclusionary practices and protect OEMs and ISVs from Microsoft's conduct going forward. Likewise, the District Court's conclusion (conclusion 8) with respect to Cartwright Act liability was necessary to the remedy order that the District Court entered on remand, which granted the California Attorney General remedial power over Microsoft. *United States v. Microsoft Corp (D.D.C. 2002), 231 F. Supp. 2d 144, 198 & n.30*.

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[1] The fact that some of the conclusions on remand restate and summarize the court of appeals' conclusions is of no moment in the determination of necessity. *See* *Yamaha Corp. of Am. v. United States, (D.C. Cir. 1992) 961 F.2d 245, 254, 295 U.S. App. D.C. 158* ("In issue preclusion, it is the prior **[*12]** *judgment* that matters, not the court's opinion explicating the judgment. 'Even in the absence of *any* opinion, a judgment bars re-litigation of an issue necessary to the judgment.'" [quoting *Am. Iron & Steel Inst, v. EPA, (D.C. Cir. 1989) 886 F.2d 390, 397, 280 U.S. App. D.C. 373]*.

D. Microsoft's Claimed Concession

Plaintiffs' assert that Microsoft conceded that 20 of the findings at issue here were necessary to the judgment in the Microsoft Litigation. The basis for this claimed concession was Microsoft's Memorandum Contesting 117 out of 383 Findings of Fact for Which Plaintiffs Seek Offensive Nonmutual Collateral Estoppel ("Microsoft's Memo") filed on June 6, 2004 in the California JCCP Case No. 4106, called the "Microsoft Cases." This Court has taken judicial notice of Microsoft's Memo for purposes of this trial only as Exhibit 7 to the Stipulation and Order filed herein on August 8, 2014(the "Stipulated Order").

Plaintiffs' argument is based on a claim of judicial estoppel, i.e., that Microsoft's Memo conceded that 20 of the findings at issue here were necessary to the judgment in the Microsoft Litigation and that it should not be permitted to take the opposite position now.

California's law of judicial estoppel was summarized in *The Swahn Group, Inc. v. Segal (2010), 183 Cal.App.4th 831, 841, 108 Cal. Rptr. 3d 651*:

> The doctrine of Judicial estoppel precludes **[*13]** a party from taking inconsistent positions in separate proceedings… It is invoked to prevent a party from changing its position in the course of judicial proceedings when such positional changes have an adverse impact on the judicial process…The policies underlying preclusion of inconsistent positions are general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings… Judicial estoppel is intended to protect against the litigant from playing fast and loose with the courts…It seems patently wrong to allow a person to abuse the judicial process by first [advocating] one position, and later, if it becomes beneficial, to assert the opposite… [citations and internal quotation marks omitted.]

There are five requirements for the application of judicial estoppel: (1) the same party has taken two positions, (2) the positions were taken injudicial or quasi-administrative administrative proceedings, (3) the party was successful in asserting the first position, (4) the two positions are totally inconsistent, and (5) the first position was not taken as the result of ignorance, fraud or mistake. *Id. at 842*.

Judicial estoppel does not apply to the position **[*14]** that Microsoft took in the Microsoft Memo as compared with that it has taken in this bifurcated trial. First and foremost, Microsoft's position in the Microsoft Memo was expressly "subject to all of its ongoing objections" and thus was not totally inconsistent with its position here where objections to the Findings are raised. Further, the Court in the Microsoft cases did not adopt the position of Microsoft in the sense of accepting it over an opponent's contrary position. Instead, the Court had adopted the opponent's position that collateral estoppel would be applied, directing the parties to reach an accommodation as to the scope of that application (Stipulated Order, Ex. 6, p. 8, lines 3-p. 10, line 23). Microsoft's "concession in the Microsoft Memo is expressly made "based on that ruling" (Microsoft's Memo, page 1, lines 16-18). Finally, in light of how the Court handled the "necessary findings" issue (i.e., to decide that collateral estoppel would apply and to leave it up to the parties to work out the specific findings to be applied, it cannot be said that Microsoft's compliance with that process impugned the integrity of the judicial process or can be viewed as playing "fast **[*15]** and loose" with the court.

CONCLUSION

Based upon the foregoing, this court finds that the Findings set forth in Appendix A were necessary to the judgment in the Microsoft Litigation.

Dated: April 13, 2015

/s/ [Signature]

Judge of the Superior Court

APPENDIX A

United States v. Microsoft Corp., ***84 F. Supp. 2d 9 (D.D.C. 1999)***

Finding of Fact ("FOF") 2: An "operating system" is a software program that controls the allocation and use of computer resources (such as central processing unit time, main memory space, disk space, and input/output channels). The operating system also supports the functions of software programs, called "applications," that perform specific user-oriented tasks. The operating system supports the functions of applications by exposing interfaces, called "application programming interfaces," or "APIs." These are synapses at which the developer of an application can connect to invoke pre-fabricated blocks of code in the operating system. These blocks of code in turn perform crucial tasks, such as displaying text on the computer screen. Because it supports applications while interacting more closely with the PC system's hardware, the operating system is said to serve as a "platform."

FOF 4: An operating system designed to run on an Intel-compatible **[*16]** PC will not function on a non-Intel-compatible PC, nor will an operating system designed for a non-Intel-compatible PC function on an Intel-compatible one. Similarly, an application that relies on APIs specific to one operating system will not, generally speaking, function on another operating system unless it is first adapted, or "ported," to the APIs of the other operating system.

FOF 10: Microsoft licenses copies of its software programs directly to consumers. The largest part of its MS-DOS and Windows sales, however, consists of licensing the products to manufacturers of PCs (known as "original equipment manufacturers" or "OEMs"), such as the IBM PC Company and the Compaq Computer Corporation ("Compaq"). An OEM typically installs a copy of Windows onto one of its PCs before selling the package to a consumer under a single price.

FOF 35: Microsoft possesses a dominant, persistent, and increasing share of the worldwide market for Intel-compatible PC operating systems. Every year for the last decade, Microsoft's share of the market for Intel-compatible PC operating systems has stood above ninety percent. For the last couple of years, the figure has been at least ninety-five percent, **[*17]** and analysts project that the share will climb even higher over the next few years. Even if Apple's Mac OS were included in the relevant market, Microsoft's share would still stand well above eighty percent.

FOF 66: Furthermore, Microsoft expends a significant portion of its monopoly power, which could otherwise be spent maximizing price, on imposing burdensome restrictions on its customers — and in inducing them to behave in ways — that augment and prolong that monopoly power. For example, Microsoft attaches to a Windows license conditions that restrict the ability of OEMs to promote software that Microsoft believes could weaken the applications barrier to entry. Microsoft also charges a lower price to OEMs who agree to ensure that all of their Windows machines are powerful enough to run Windows NT for Workstations. To the extent this provision induces OEMs to concentrate their efforts on the development of relatively powerful, expensive PCs, it makes OEMs less likely to pursue simultaneously the opposite path of developing "thin client" systems, which could threaten demand for Microsoft's Intel-compatible PC operating-system products. In addition, Microsoft charges a lower price to **[*18]** OEMs who agree to ship all but a minute fraction of their machines with an operating system pre-installed. While this helps combat piracy, it also makes it less likely that consumers will detect increases in the price of Windows and renders operating systems not pre-installed by OEMs in large numbers even less attractive to consumers. After all, a consumer's interest in a non-Windows operating system might not outweigh the burdens on system memory and performance associated with supporting two operating systems on a single PC. Other such restrictions and incentives are described below.

FOF 67: Microsoft's monopoly power is also evidenced by the fact that, over the course of several years, Microsoft took actions that could only have been advantageous if they operated to reinforce monopoly power. These actions are described below.

FOF 132: In sum, from 1994 to 1997, Microsoft consistently pressured IBM to reduce its support for software products that competed with Microsoft's offerings, and it used its monopoly power in the market for Intel-compatible PC operating systems to punish IBM for its refusal to cooperate. Whereas, in the case of Netscape, Microsoft tried to induce a company to **[*19]** move its business away from offering software that could weaken the applications barrier to entry, Microsoft's primary concern with IBM was to reduce the firm's support for software products that competed directly with Microsoft's most profitable products, namely Windows and Office. That being said, it must be noted that one of the IBM products to which Microsoft objected, Notes, was like Navigator in that will exposed middleware APIs. In any event, Microsoft's interactions with Netscape, IBM, Intel, Apple, and RealNetworks all reveal Microsoft's business strategy of directing its monopoly power toward inducing other companies to abandon projects that threaten Microsoft and toward punishing those companies that resist.

FOF 203: If OEMs removed the most visible means of invoking Internet Explorer, and pre-installed Navigator with facile methods of access, Microsoft's purpose in forcing OEMs to take Internet Explorer — capturing browser usage share from Netscape — would be subverted. The same would be true if OEMs simply configured their machines to promote Navigator before Windows had a chance to promote Internet Explorer. Decision-makers at Microsoft believed that as Internet Explorer **[*20]** caught up with Navigator in quality, OEMs would ultimately conclude that the costs of pre-installing and promoting Navigator, and removing easy access to Internet Explorer, outweighed the benefits. Still, those decision-makers did not believe that Microsoft could afford to wait for the several large OEMs that represented virtually all Windows PCs shipped to come to this desired conclusion on their own. Therefore, in order to bring the behavior of OEMs into line with it: strategic goals quickly, Microsoft threatened to terminate the Windows license of any OEM that removed Microsoft's chosen icons and program entries from the Windows desktop or the “Start” menu. It threatened similar punishment for OEMs that added programs that promoted third-party software to the Windows “boot” sequence. These inhibitions soured Microsoft's relations with OEMs and stymied innovation that might have made Windows PC systems more satisfying to users. Microsoft would not have paid this price had it not been convinced that its actions were necessary tc ostracize Navigator from the vital OEM distribution channel.

FOF 214: The several OEMs that in the aggregate represented over ninety percent of Intel-compatible **[*21]** PC sales believed that the new restrictions would make their PC systems more difficult and more confusing to use, and thus less acceptable to consumers. They also anticipated that the restrictions would increase product returns and support costs and generally lower the value of their machines. Those OEMs that had already spent millions of dollars developing and implementing tutorial and registration programs and/or automatically-loading graphical interfaces in the Windows boot sequence lamented that their investment would, as a result of Microsoft's policy, be largely wasted. Gateway, Hewlett-Packard, and IBM communicated their opposition forcefully and urged Microsoft to lift the restrictions. Emblematic of the reaction among large OEMs was a letter that the manager of research and development at Hewlett-Packard sent to Microsoft in March 1997. He wrote:

> Microsoft's mandated removal of all OEM boot-sequence and auto-start programs for OEM licensed systems has resulted in significant and costly problems for the HP-Pavilion line of retail PC's.
>
> Our data (as of 3/10/97) shows a 10% increase in W[indows]95 calls as a % of our total customer support calls…
>
> Our registration rate has also dropped **[*22]** from the mid-80% range to the low 60% range. There is also subjective data from several channel partners that our system return rate has increased from the lowest of any OEM (even lower than Apple) to a level comparable to the other Microsoft OEM PC vendors. This is a major concern in that we are taking a step backward in meeting customer satisfaction needs.
>
> These three pieces of data confirm that we have been damaged by the edicts that □ Microsoft issued last fall.
>
> From the consumer perspective, we are hurting our industry and our customers. PC's can be frightening and quirky pieces of technology into which they invest a large sum of their money. It is vitally important that the PC suppliers dramatically improve the consumer buying experience, out of box experience as well as the longer term product usability and reliability. The channel feedback as well as our own data shows that we are going in the wrong direction. This causes consumer dissatisfaction in complex telephone support process, needless in-home repair visits and ultimately in product returns. Many times the cause is user misunderstanding of a product that presents too much complexity to the common user…

> Our Customers hold **[*23]** HP accountable for their dissatisfaction with our products. We bear □ the cost of returns of our products. We are responsible for the cost of technical support of our customers, including the 33% of calls we get related to the lack of quality or confusion generated by your product. And finally we are responsible for our success or failure in the retail PC market.
> We must have more ability to decide how our system is presented to our end users.
> If we had a choice of another supplier, based on your actions in this area, I assure you [that you] would not be our supplier of choice.
> I strongly urge you to have your executives review these decisions and to change this unacceptable policy.

FOF 215: Even in the face of such strident opposition from its OEM customers, Microsoft refused to relent on the bulk of its restrictions. It did, however, grant Hewlett-Packard and other OEMs discounts off the royalty price of Windows as compensation for the work required to bring their respective alternative user interfaces into compliance with Microsoft's requirements. Despite the high costs that Microsoft's demands imposed on them, the OEMs obeyed the restrictions because they perceived no alternative to **[*24]** licensing Windows for pre-installation on their PCs. Still, the restrictions lowered the value that OEMs attached to Windows by the amount of the costs that the restrictions imposed on them. Furthermore, Microsoft's intransigence damaged the goodwill between it and several of the highest-volume OEMs.

FOF 228: Like most other software products, Windows 95 and Windows 98 are covered by copyright registrations. Since they are copyrighted, Microsoft distributes these products to OEMs pursuant to license agreements. By early 1998, Microsoft had made these licenses conditional on OEMs' compliance with the restrictions described above. Notwithstanding the formal inclusion of these restrictions in the license agreements, the removal of the Internet Explorer icon and the promotion of Navigator in the boot sequence would not have compromised Microsoft's creative expression or interfered with its ability to reap the legitimate value of its ingenuity and investment in developing Windows. More generally, the contemporaneous Microsoft documents reflect concern with the promotion of Navigator rather than the infringement of a copyright. Also notable is the fact that Microsoft did not adjust its OEM **[*25]** pricing guidelines when it lifted certain of the restrictions in the spring of 1998.

FOF 229: Finally, it is significant that, while all vendors of PC operating systems undoubtedly share Microsoft's stated interest in maximizing consumer satisfaction, the prohibitions that Microsoft imposes on OEMs are considerably more restrictive than those imposed by other operating system vendors. For example, Apple allows its retailers to remove applications that Apple has pre-installed and to reconfigure the Mac OS desktop. For its part, IBM allows its OEM licensees to override the entire OS/2 desktop in favor of a customized shell or to set an application to start automatically the first time the PC is turned on. The reason is that these firms do not share Microsoft's interest in protecting the applications barrier to entry.

FOF 338: Because of the importance of “time-to-market” in the software industry, ISVs developing software to run on Windows products seek to obtain beta releases and other technical information relating to Windows as early and as consistently as possible. Since Microsoft decides which ISVs receive betas and other technical support, and when they will receive it, the ability **[*26]** of an ISV to compete in the market-place for software running on Windows products is highly dependent on Microsoft's cooperation. Netscape learned this lesson in 1995.

FOF 339: In dozens of “First Wave” agreements signed between the fall of 1997 and the spring of 1998, Microsoft has promised to give preferential support, in the form of early Windows 98 and Windows NT betas, other technical information, and the right to use certain Microsoft seals of approval, to important ISVs that agree to certain conditions. One of these conditions is that the ISVs use Internet Explorer as the default browsing software for any software they develop with a hypertext-based user interface. Another condition is that the ISVs use Microsoft's “HTML Help,” which is accessible only with Internet Explorer, to implement their applications' help systems.

FOF 410: By refusing to offer those OEMs who requested it a version of Windows without Web browsing software, and by preventing OEMs from removing Internet Explorer — or even the most obvious means of invoking it — prior to shipment, Microsoft forced OEMs to ignore consumer demand for a browserless version of Windows. The same actions forced OEMs either to ignore **[*27]** consumer preferences for Navigator or to give them a Hobson's choice of both browser products at the cost of increased confusion, degraded system performance, and restricted memory.

By ensuring that Internet Explorer would launch in certain circumstances in Windows 98 even if Navigator were set as the default, and even if the consumer had removed all conspicuous means of invoking Internet Explorer, Microsoft created confusion and frustration for consumers, and increased technical support costs for business customers. Those Windows purchasers who did not want browsing software — businesses, or parents and teachers, for example, concerned with the potential for irresponsible Web browsing on PC systems — not only had to undertake the effort necessary to remove the visible means of invoking Internet Explorer and then contend with the fact that Internet Explorer would nevertheless launch in certain cases; they also had to (assuming they needed new, non-browsing features not available in earlier versions of Windows) content themselves with a PC system that ran slower and provided less available memory than if the newest version of Windows came without browsing software. By constraining the **[*28]** freedom of OEMs to implement certain software programs in the Windows boot sequence, Microsoft foreclosed an opportunity for OEMs to make Windows PC systems less confusing and more user-friendly, as consumers desired. By taking the actions listed above, and by enticing firms into exclusivity arrangements with valuable inducements that only Microsoft could offer and that the firms reasonably believed they could not do without, Microsoft forced those consumers who otherwise would have elected Navigator as their browser to either pay a substantial price (in the forms of downloading, installation, confusion, degraded system performance, and diminished memory capacity) or content themselves with Internet Explorer. Finally, by pressuring Intel to drop the development of platform-level NSP software, and otherwise to cut back on its software development efforts, Microsoft deprived consumers of software innovation that they very well may have found valuable, had the innovation been allowed to reach the marketplace. None of these actions had pro-competitive justifications.

FOF 412: Most harmful of all is the message that Microsoft's actions have conveyed to every enterprise with the potential **[*29]** to innovate in the computer industry. Through its conduct toward Netscape, IBM, Compaq, Intel, and others, Microsoft has demonstrated that it will use its prodigious market power and immense profits to harm any firm that insists on pursuing initiatives that could intensify competition against one of Microsoft's core products. Microsoft's past success ir hurting such companies and stifling innovation deters investment in technologies and businesses that exhibit the potential to threaten Microsoft. The ultimate result is that some innovations that would truly benefit consumers never occur for the sole reason that they do not coincide with Microsoft's self-interest.

Conclusion of Law ("COL") 2, ***id. at 39*****:** Because Microsoft achieved this result through exclusionary acts that lacked procompetitive justification, the Court deems Microsoft's conduct the maintenance of monopoly power by anticompetitive means.

COL 3, ***id. at 43*****:** With respect to the ISV agreements, Microsoft has put forward no procompetitive business ends whatsoever to justify their exclusionary terms.

COL 4, ***id. at 43*****:** Microsoft used its monopoly power to prevent firms such as Intel from aiding in the creation of cross-platform interfaces.

COL 7, ***id. at 44*****:** Microsoft's **[*30]** anticompetitive actions trammeled the competitive process through which the computer software industry generally stimulates innovation and conduced to the optimum benefit of consumers.

COL 8, ***id. at 54 n.7***: The facts proving that Microsoft unlawfully maintained its monopoly power in violation of *§ 2* of the Sherman Act are sufficient to meet analogous elements of causes of action arising under the laws of each Plaintiff'state. *See Cal. Bus. & Prof. Code §§ 16720*, *16726*, *17200*.

D.C. Circuit Op. 1, ***id. at 53*****:** Operating systems also function as platforms for software applications. They do this by "exposing"-i.e., making available to software developers-routines or protocols that perform certain widely-used functions. These are known as Application Programming Interfaces, or "APIs."

D.C. Circuit Op. 2, ***id. at 53*****:** Software developers wishing to include that function in an application need not duplicate it in their own code. Instead, they can "call"-i.e., use-the Windows API.

D.C. Circuit Op. 3, *id. at 53*: Windows contains thousands of APIs, controlling everything from data storage to font display.

D.C. Circuit Op. 4, *id. at 53*: [A] middleware product written for Windows could take over some or all of Windows's valuable platform functions-that is, developers might begin to rely upon APIs **[*31]** exposed by the middleware for basic routines rather than relying upon the API set included in Windows. If middleware were written for multiple operating systems, its impact could be even greater. The more developers could rely upon APIs exposed by such middleware, the less expensive porting to different operating systems would be. Ultimately, if developers could write applications relying exclusively on APIs exposed by middleware, their applications would run on any operating system on which the middleware was also present.

D.C. Circuit Op. 5, *id. at 56*: Because the applications barrier to entry protects a dominant operating system irrespective of quality, it gives Microsoft power to stave off even superior new rivals. The barrier is thus a characteristic of the operating system market, not of Microsoft's popularity, or, as asserted by a Microsoft witness, the company's efficiency.

New York v. Microsoft Corp., ***224 F. Supp. 2d 76 (D.D.C. 2002)***

Remedies Op. 1, *id. at 152*: A significant portion of the liability findings concerns Microsoft's treatment of OEMs, specifically with regard to Microsoft's imposition of exclusionary restrictions in conjunction with the Windows operating system licenses provided to OEMs. The licenses sharply limited OEMs' flexibility and choices **[*32]** in configuring the PC desktop. The limitations were exclusionary in that they bound OEMs' configuration of the desktop in a manner which tended to favor Microsoft software and services at the expense of software and services offered by other entities.

Remedies Op. *2, id. at 159*: Specifically, the removal of end-user access to certain Microsoft technologies will eliminate, or at least substantially reduce, the deterrent effect of the presence of the Microsoft technology upon the OEM's inclination to install an alternative technology.

Remedies Op. 3, *id. at 166*: The Windows license is fundamental to an OEM's ability to conduct business, and hence, the threat of termination is a powerful tool which Microsoft can utilize to exert undue influence over a particular OEM.

Remedies Op. 4, *id. at 169*: Accordingly, the Court's remedial decree will limit Microsoft's ability to enter into agreements in which the other party agrees to support Microsoft's operating system products exclusively or in a fixed percentage. This provision will address those industry participants with whom Microsoft entered into unlawful and anticompetitive exclusive agreements, namely ISVs, IAPs, and OEMs, as well as those industry participants, such **[*33]** as ICPs and IHVs, who are ready targets for the imposition of similarly unlawful exclusive agreements.

Oneok, Inc. v. Learjet, Inc.

Supreme Court of the United States

January 12, 2015, Argued; April 21, 2015, Decided

No. 13-271

Reporter

575 U.S. 373 *; 135 S. Ct. 1591 **; 191 L. Ed. 2d 511 ***; 2015 U.S. LEXIS 2808 ****; 83 U.S.L.W. 4249; 2015-1 Trade Cas. (CCH) P79,135; 183 Oil & Gas Rep. 678; 25 Fla. L. Weekly Fed. S 197; 2015 WL 1780926

ONEOK, INC., et al. Petitioners v. LEARJET, INC., et al.

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Learjet, Inc. v. Oneok, Inc. (In re W. States Wholesale Natural Gas Antitrust Litig.), 715 F.3d 716, 2013 U.S. App. LEXIS 7234 (9th Cir. Nev., 2013)

Disposition: Affirmed.

Core Terms

regulation, pipelines, natural gas, wholesale, pre-emption, rates, pre-empted, natural-gas, interstate, state law, sales, retail, manipulation, state regulation, transportation, prices, antitrust, practices, aimed, wholesale sale, producers, state ***antitrust law***, indices, sellers, trades, cases, purchasers, effects, resale, conditions

LexisNexis® Headnotes

Constitutional Law > Supremacy Clause > Federal Preemption

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

Energy & Utilities Law > Natural Gas Industry > Marketing & Transportation > General Overview

HN1[] **Supremacy Clause, Federal Preemption**

The United States Supreme Court has said that, in passing the Natural Gas Act, 52 Stat. 821, Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce.

Constitutional Law > Supremacy Clause > Federal Preemption

Constitutional Law > Supremacy Clause > Supreme Law of the Land

HN2[] Supremacy Clause, Federal Preemption

The *Supremacy Clause* provides that the laws of the United States (as well as treaties and the Constitution itself) shall be the supreme law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding. *U.S. Const. art. VI, cl. 2*. Congress may consequently preempt, i.e., invalidate, a state law through federal legislation. It may do so through express language in a statute. But even where a statute does not refer expressly to preemption, Congress may implicitly preempt a state law, rule, or other state action. It may do so either through "field" preemption or "conflict" preemption. As to the former, Congress may have intended to foreclose any state regulation in an area, irrespective of whether state law is consistent or inconsistent with federal standards. In such situations, Congress has forbidden the States to take action in the field that the federal statute preempts. By contrast, conflict preemption exists where compliance with both state and federal law is impossible, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. In either situation, federal law must prevail.

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

Energy & Utilities Law > Natural Gas Industry > Marketing & Transportation > General Overview

HN3[] Natural Gas Industry, Distribution & Sale

In the early 20th century, the United States Supreme Court held that the *Commerce Clause* forbids the States to regulate the interstate shipment and sale of gas to local distributors for resale. Those holdings left a regulatory gap. Congress enacted the Natural Gas Act, 52 Stat. 821, to fill it. The Act, in § 5(a), *15 U.S.C.S. § 717d(a)*, gives rate-setting authority to the Federal Energy Regulatory Commission (FERC). That authority allows FERC to determine whether any rate, charge, or classification collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of FERC, or any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential. Section 5(a) limits the scope of FERC's authority to activities in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission. And the Act, in § 1(b), *15 U.S.C.S. § 717(b)*, limits FERC's jurisdiction to (1) the transportation of natural gas in interstate commerce, (2) the sale in interstate commerce of natural gas for resale, and (3) natural-gas companies engaged in such transportation or sale. The Act leaves regulation of other portions of the industry, such as production, local distribution facilities, and direct sales, to the States.

Constitutional Law > Supremacy Clause > Federal Preemption

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

HN4[] Supremacy Clause, Federal Preemption

As the United States Supreme Court has repeatedly stressed, the Natural Gas Act, 52 Stat. 821, was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way. Accordingly, where a state law can be applied to nonjurisdictional as well as jurisdictional sales, courts must proceed cautiously, finding preemption only where detailed examination convinces a court that a matter falls within the preempted field as defined by Supreme Court precedents.

Constitutional Law > Supremacy Clause > Federal Preemption

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

Energy & Utilities Law > Natural Gas Industry > Marketing & Transportation > General Overview

HN5[] **Supremacy Clause, Federal Preemption**

United States Supreme Court precedents emphasize the importance of considering the target at which a state law aims in determining whether that law is preempted under the Natural Gas Act, 52 Stat. 821. The Court consistently recognized that the significant distinction for purposes of preemption in the natural-gas context is the distinction between measures aimed directly at interstate purchasers and wholesales for resale, and those aimed at subjects left to the States to regulate. The Natural Gas Act does not preempt a state regulation concerning the timing of gas production from a gas field within the State, even though the regulation might have affected the costs of and the prices of interstate wholesale sales, i.e., jurisdictional sales. In reaching this conclusion, the Court explained that the state regulation aimed primarily at protecting producers' rights—a matter firmly on the States' side of that dividing line. The Court contrasted this state regulation with the state orders at issue in Northern Natural, which invalidly invaded the federal agency's exclusive domain precisely because they were unmistakably and unambiguously directed at purchasers.

Constitutional Law > Supremacy Clause > Federal Preemption

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Natural Gas Industry > Marketing & Transportation > General Overview

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

HN6[] **Supremacy Clause, Federal Preemption**

The target to which United States Supreme Court cases that interpret the Natural Gas Act, 52 Stat. 821, refer must mean more than just the physical activity that a State regulates. After all, a single physical action, such as reporting a price to a specialized journal, could be the subject of many different laws—including tax laws, disclosure laws, and others. No one can claim that the Federal Energy Regulatory Commission's regulation of this physical activity for purposes of wholesale rates forecloses every other form of state regulation that affects those rates.

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > State Regulation

Constitutional Law > Supremacy Clause > Federal Preemption

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Natural Gas Industry > Marketing & Transportation > General Overview

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

HN7[] **Energy & Utilities, State Regulation**

Antitrust laws, like blue sky laws, are not aimed at natural-gas companies in particular, but rather all businesses in the marketplace.

Constitutional Law > Supremacy Clause > Federal Preemption

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

Energy & Utilities Law > Natural Gas Industry > Marketing & Transportation > General Overview

HN8[] **Supremacy Clause, Federal Preemption**

To find field preemption of state regulation under the Natural Gas Act, 52 Stat. 821, merely because purchasers' costs and hence rates might be affected would be largely to nullify § 1(b), *15 U.S.C.S. § 717(b)*, of the Act.

Constitutional Law > Supremacy Clause > Federal Preemption

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Natural Gas Industry > Marketing & Transportation > General Overview

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

HN9[] **Supremacy Clause, Federal Preemption**

The enumeration of the Federal Energy Regulatory Commission's powers in § 5(a), *15 U.S.C.S. § 717d(a)*, of the Natural Gas Act, 52 Stat. 821, is circumscribed by a reference back to the limitations in § 1(b), *15 U.S.C.S. § 717(b)*. Those limits are key to understanding the careful balance between federal and state regulation that Congress struck when it passed the Natural Gas Act. That Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way. States have a long history of providing common-law and statutory remedies against monopolies and unfair business practices.

Constitutional Law > Supremacy Clause > Federal Preemption

HN10[] **Supremacy Clause, Federal Preemption**

Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U. S. 354 (1988), is best read as a conflict preemption case, not a field preemption case.

Lawyers' Edition Display

Decision

[*511]** Natural Gas Act (*15 U.S.C.S. § 717 et seq.*) held not to pre-empt state-law claims challenging industry practices that directly affected wholesale natural gas market, when claims were asserted by litigants who purchased gas in retail transactions.

Summary

Overview: HOLDINGS: [1]-Manufacturers, hospitals, and other institutions that bought natural gas directly from interstate pipelines were not pre-empted under the Natural Gas Act, *52 Stat. 821*, from suing the pipelines under state antitrust statutes, claiming that they violated state law when they engaged in behavior that affected both wholesale and retail prices of natural gas; [2]-The Act was drawn with meticulous regard for the continued exercise of state power, it did not pre-empt the States from regulating issues involving the retail sale of natural gas, and no one could claim that the FERC's regulation of natural gas transmission for purposes of wholesale rates foreclosed every form of state regulation that affected those rates; [3]-To the extent conflicts arose between state ***antitrust law*** and the federal rate-setting process, the doctrine of conflict pre-emption was available to address them.

Outcome: Judgment affirmed. 7-2 decision; 1 concurrence; 1 dissent.

Headnotes

COMMERCE §138 > NATURAL GAS ACT -- FEDERAL PRE-EMPTION > Headnote:
LEdHN[1][] [1]

The United States Supreme Court has said that, in passing the Natural Gas Act, *52 Stat. 821*, Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce. (Breyer, J., joined by Kennedy, Thomas, Ginsburg, Alito, Sotomayor, and Kagan, JJ.)

[*512]**

STATES, TERRITORIES, AND POSSESSIONS §18 STATES, TERRITORIES, AND POSSESSIONS §19 > SUPREMACY CLAUSE -- STATE LAW -- FEDERAL PRE-EMPTION > Headnote:
LEdHN[2][] [2]

The *supremacy clause* provides that the laws of the United States (as well as treaties and the Constitution itself) shall be the supreme law of the land, anything in the Constitution or laws of any state to the contrary notwithstanding. *U.S. Const. Art. VI, cl. 2*. Congress may consequently preempt, i.e., invalidate, a state law through federal legislation. It may do so through express language in a statute. But even where a statute does not refer expressly to pre-emption, Congress may implicitly pre-empt a state law, rule, or other state action. It may do so either through “field” pre-emption or “conflict” pre-emption. As to the former, Congress may have intended to foreclose any state regulation in an area, irrespective of whether state law is consistent or inconsistent with federal standards. In such situations, Congress has forbidden the states to take action in the field that the federal statute pre-empts. By contrast, conflict pre-emption exists where compliance with both state and federal law is impossible, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. In either situation, federal law must prevail. (Breyer, J., joined by Kennedy, Ginsburg, Alito, Sotomayor, and Kagan, JJ.)

[*513]**

COMMERCE §138 > NATURAL GAS -- SHIPMENT AND SALE -- FEDERAL AND STATE REGULATION > Headnote:
LEdHN[3][] [3]

In the early 20th century, the United States Supreme Court held that the *commerce clause* forbids the states to regulate the interstate shipment and sale of gas to local distributors for resale. Those holdings left a regulatory gap.

Congress enacted the Natural Gas Act, *52 Stat. 821*, to fill it. The Act, in § 5(a), *15 U.S.C.S. § 717d(a)*, gives rate-setting authority to the Federal Energy Regulatory Commission (FERC). That authority allows FERC to determine whether any rate, charge, or classification collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of FERC, or any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential. *Section 5(a)* limits the scope of FERC's authority to activities in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission. And the Act, in § 1(b), *15 U.S.C.S. § 717(b)*, limits FERC's jurisdiction to (1) the transportation of natural gas in interstate commerce, (2) the sale in interstate commerce of natural gas for resale, and (3) natural-gas companies engaged in such transportation or sale. The Act leaves regulation of other portions of the industry, such as production, local distribution facilities, and direct sales, to the states. (Breyer, J., joined by Kennedy, Thomas, Ginsburg, Alito, Sotomayor, and Kagan, JJ.)

STATES, TERRITORIES, AND POSSESSIONS §45.8 > NATURAL GAS ACT -- STATE AND FEDERAL POWERS > Headnote:
LEdHN[4][] [4]

As the United States Supreme Court has repeatedly stressed, the Natural Gas Act, *52 Stat. 821*, was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way. Accordingly, where a state law can be applied to nonjurisdictional as well as jurisdictional sales, courts must proceed cautiously, finding pre-emption only where detailed examination convinces a court that a matter falls within the pre-empted field as defined by Supreme Court precedents. (Breyer, J., joined by Kennedy, Thomas, Ginsburg, Alito, Sotomayor, and Kagan, JJ.)

STATES, TERRITORIES, AND POSSESSIONS §45.8 > NATURAL GAS ACT -- STATE LAW -- FEDERAL PRE-EMPTION > Headnote:
LEdHN[5][] [5]

United States Supreme Court precedents emphasize the importance of considering the target at which a state law aims in determining whether that law is pre-empted under the Natural Gas Act, *52 Stat. 821*. The court consistently recognized that the significant distinction for purposes of pre-emption in the natural-gas context is the distinction between measures aimed directly at interstate purchasers and wholesales for resale, and those aimed at subjects left to the states to regulate. The Natural Gas Act does not pre-empt a state regulation concerning the timing of gas production from a gas field within the state, even though the regulation might have affected the costs of and the prices of interstate wholesale sales, i.e., jurisdictional sales. In reaching this conclusion, the Court explained that the state regulation aimed primarily at protecting producers' rights--a matter firmly on the states' side of that dividing line. The court contrasted this state regulation with the state orders at issue in Northern Natural, which invalidly invaded the federal agency's exclusive domain precisely because they were unmistakably and unambiguously directed at purchasers. (Breyer, J., joined by Kennedy, Thomas, Ginsburg, Alito, Sotomayor, and Kagan, JJ.)

STATES, TERRITORIES, AND POSSESSIONS §38.7 STATES, TERRITORIES, AND POSSESSIONS §45.8 > NATURAL GAS ACT -- STATE LAW -- FEDERAL PRE-EMPTION > Headnote:
LEdHN[6][] [6]

The target to which United States Supreme Court cases that interpret the Natural Gas Act, *52 Stat. 821*, refer must mean more than just the physical activity that a state regulates. After all, a single physical action, such as reporting a price to a specialized journal, could be the subject of many different laws--including tax laws, disclosure laws, and others. No one can claim that the Federal Energy Regulatory Commission's regulation of this physical activity for purposes of wholesale rates forecloses every other form of state regulation that affects those rates. (Breyer, J., joined by Kennedy, Thomas, Ginsburg, Alito, Sotomayor, and Kagan, JJ.)

STATES, TERRITORIES, AND POSSESSIONS §36 > NATURAL GAS -- STATE AND FEDERAL REGULATION > Headnote:
LEdHN[7][] [7]

Antitrust laws, like blue sky laws, are not aimed at natural-gas companies in particular, but rather all businesses in the marketplace. (Breyer, J., joined by Kennedy, Thomas, Ginsburg, Alito, Sotomayor, and Kagan, JJ.)

STATES, TERRITORIES, AND POSSESSIONS §45.8 > NATURAL GAS ACT -- FIELD PRE-EMPTION > Headnote:
LEdHN[8][] [8]

To find field pre-emption of state regulation under the Natural Gas Act, *52 Stat. 821*, merely because purchasers' costs and hence rates might be affected would be largely to nullify § 1(b), *15 U.S.C.S. § 717(b)*, of the Act. (Breyer, J., joined by Kennedy, Thomas, Ginsburg, Alito, Sotomayor, and Kagan, JJ.)

[*514]**

STATES, TERRITORIES, AND POSSESSIONS §45.8 > NATURAL GAS ACT -- STATE POWER > Headnote:
LEdHN[9][] [9]

The enumeration of the Federal Energy Regulatory Commission's powers in § 5(a), *15 U.S.C.S. § 717d(a)*, of the Natural Gas Act, *52 Stat. 821*, is circumscribed by a reference back to the limitations in § 1(b), *15 U.S.C.S. § 717(b)*. Those limits are key to understanding the careful balance between federal and state regulation that Congress struck when it passed the Natural Gas Act. That Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way. States have a long history of providing common-law and statutory remedies against monopolies and unfair business practices. (Breyer, J., joined by Kennedy, Thomas, Ginsburg, Alito, Sotomayor, and Kagan, JJ.)

STATES, TERRITORIES, AND POSSESSIONS §45.8 > PUBLIC UTILITY -- STATE LAW -- PRE-EMPTION > Headnote:
LEdHN[10][] [10]

Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 108 S. Ct. 2428, 101 L. Ed. 2d 322 (1988), is best read as a conflict pre-emption case, not a field pre-emption case. (Breyer, J., joined by Kennedy, Thomas, Ginsburg, Alito, Sotomayor, and Kagan, JJ.)

Syllabus

[*373] [1592] [***515]** Respondents, a group of manufacturers, hospitals, and other institutions that buy natural gas directly from interstate pipelines, sued petitioner interstate pipelines, claiming that the pipelines had engaged in behavior that violated state antitrust laws. In particular, respondents alleged that petitioners reported false information to the natural-gas indices on which respondents' natural-gas contracts were based. The indices affected not only retail natural-gas prices, but also wholesale natural-gas prices.

After removing the cases to federal court, the petitioner pipelines sought summary judgment on the ground that the Natural Gas Act pre-empted respondents' state-law claims. That Act gives the Federal Energy Regulatory Commission (FERC) the authority to determine whether rates charged by natural-gas companies or practices affecting such rates are unreasonable. 15 U. S. C. §717d(a). But it also limits FERC's jurisdiction to the transportation of natural gas in interstate commerce, the sale in interstate commerce of natural gas for resale, and natural-gas companies engaged in such transportation or sale. §717(b). The **[****2]** Act leaves regulation of other portions of the industry--such as retail sales--to the States. *Ibid.*

The District Court granted petitioners' motion for summary judgment, reasoning that because petitioners' challenged practices directly affected wholesale as well as retail prices, they were pre-empted by the Act. The Ninth Circuit reversed. While acknowledging that the pipelines' index manipulation increased wholesale prices as well as retail prices, it held that the state-law claims were not pre-empted because they were aimed at obtaining damages only for excessively high retail prices.

Held: Respondents' state-law antitrust claims are not within the field of matters pre-empted by the Natural Gas Act. Pp. 384-391, 191 L. Ed. 2d, at 521-525.

(a) The Act "was drawn with meticulous regard for the continued exercise of state power." Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Ind., 332 U. S. 507, 517-518, 68 S. Ct. 190, 92 L. Ed. 128. Where, as here, a practice affects nonjurisdictional as well as jurisdictional sales, pre-emption **[*374]** can be found only where a detailed examination convincingly demonstrates that a matter falls within the pre-empted field as defined by this Court's precedents. Those precedents emphasize the importance of considering the target at which **[****3]** the state-law claims aim. See, *e.g.,* Northern Natural Gas Co. v. State Corporation Comm'n of Kan., 372 U. S. 84, 83 S. Ct. 646, 9 L. Ed. 2d 601; Northwest Central Pipeline Corp. v. State Corporation Comm'n of Kan., 489 U. S. 493, 109 S. Ct. 1262; 103 L. Ed. 2d 509. Here, respondents' claims are aimed at practices affecting retail prices, a matter "firmly on the States' side of [the] dividing line." Id., at 514, 109 S. Ct. 1262; 103 L. Ed. 2d 509.

Schneidewind v. ANR Pipeline Co., 485 U. S. 293, 108 S. Ct. 1145, 99 L. Ed. 2d 316, is not to the contrary. That opinion explains that the Act does not pre-empt "traditional" state regulation, such as blue sky laws. Id., at 308, n. 11, 108 S. Ct. 1145, 99 L. Ed. 2d 316. Antitrust laws, like blue sky laws, are not aimed at natural-gas companies in particular, **[**1593]** but rather **[***516]** all businesses in the marketplace. The broad applicability of state antitrust laws supports a finding of no pre-emption here.

So, too, does the fact that States have long provided "common-law and statutory remedies against monopolies and unfair business practices," California v. ARC America Corp., 490 U. S. 93, 101, 109 S. Ct. 1661, 104 L. Ed. 2d 86. As noted earlier, the Act circumscribes FERC's powers and preserves traditional areas of state authority. §717(b). Pp. 384-388, 191 L. Ed. 2d, at 521-524.

(b) Neither Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U. S. 354, 108 S. Ct. 2428, 101 L. Ed. 2d 322, nor FPC v. Louisiana Power & Light Co., 406 U. S. 621, 92 S. Ct. 1827, 32 L. Ed. 2d 369, supports petitioners' position. *Mississippi Power* is best read as a conflict pre-emption case, not a field pre-emption case. In any event, the state inquiry in *MississippiPower* was pre-empted because it was directed at jurisdictional sales in a way that **[****4]** respondents' state antitrust suits are not. *Louisiana Power* is also a conflict pre-emption case, and thus does not significantly help petitioners' field pre-emption argument. Pp. 388-390, 191 L. Ed. 2d, at 524-525.

(c) Because the parties have not argued conflict pre-emption, questions involving conflicts between state antitrust proceedings and the federal ratesetting process are left for the lower courts to resolve in the first instance. Pp. 390, 191 L. Ed. 2d, at 525.

(d) While petitioners and the Government argue that this Court should defer to FERC's determination that field pre-emption bars respondents' claims, they fail to point to a specific FERC determination that state antitrust claims fall within the field pre-empted by the Natural Gas Act. Thus, this Court need not consider what legal effect such a determination might have. *P. 390, 191 L. Ed. 2d, at 525*.

715 F. 3d 716, affirmed.

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Judges: Breyer, J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Alito, Sotomayor, And Kagan, JJ., joined, and in which Thomas, J., joined as to all but Part I-A. Thomas, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 391. Scalia, J., filed a dissenting opinion, in which Roberts, C. J., joined, *post*, p.392.

Opinion by: BREYER

Opinion

[1594]**

[*376] Justice **Breyer** delivered the opinion of the Court.

In this **[****5]** case, a group of manufacturers, hospitals, and other institutions that buy natural gas directly from interstate pipelines sued the pipelines, claiming that they engaged in behavior that violated state antitrust laws. The pipelines' behavior affected *both* federally regulated *wholesale* natural-gas prices *and* nonfederally regulated *retail* natural-gas prices. The question is whether the federal Natural Gas Act pre-empts these lawsuits. ***HN1***[] ***LEdHN[1]***[] [1] We have said that, in passing the Act, "Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce." *Schneidewind v. ANR Pipeline Co., 485 U. S. 293, 305, 108 S. Ct. 1145, 99 L. Ed. 2d 316 (1988)*. Nevertheless, for the reasons given below, we conclude that the Act does not pre-empt the state-law antitrust suits at issue here.

[*517]** I

A

HN2[] ***LEdHN[2]***[] [2] The *Supremacy Clause* provides that "the Laws of the United States" (as well as treaties and the Constitution itself) "shall be the supreme Law of the Land . . . any **[**1595]** Thing in the Constitution or Laws of any state to the Contrary notwithstanding." *Art. VI, cl. 2*. Congress may consequently pre-empt, *i.e.*, invalidate, a state law through federal legislation. It may do so through express language in a statute. But even where, as here, a statute does not refer expressly to pre-emption, **[****6]** Congress may implicitly pre-empt **[*377]** a state law, rule, or other state action. See *Sprietsma v. Mercury Marine, 537 U. S. 51, 64, 123 S. Ct. 518, 154 L. Ed. 2d 466 (2002)*.

It may do so either through "field" pre-emption or "conflict" pre-emption. As to the former, Congress may have intended "to foreclose any state regulation in the *area*," irrespective of whether state law is consistent or inconsistent with "federal standards." *Arizona v. United States, 567 U. S. 387, 401, 132 S. Ct. 2492, 2502, 183 L. Ed. 2d 351, 370 (2012)* (emphasis added). In such situations, Congress has forbidden the State to take action in the *field* that the federal statute pre-empts.

By contrast, conflict pre-emption exists where "compliance with both state and federal law is impossible," or where "the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *California v. ARC America Corp., 490 U. S. 93, 100, 101, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)*. In either situation, federal law must prevail.

No one here claims that any relevant federal statute expressly pre-empts state antitrust lawsuits. Nor have the parties argued at any length that these state suits conflict with federal law. Rather, the interstate pipeline companies (petitioners here) argue that Congress implicitly "'occupied *the field of matters* relating to wholesale sales and transportation of natural gas in interstate commerce.'" Brief for Petitioners 18 (quoting **[****7]** *Schneidewind, supra, at 305, 108 S. Ct. 1145, 99 L. Ed. 2d 316* (emphasis added)). And they contend that the state antitrust claims advanced by their direct-sales customers (respondents here) fall within that field. The United States, supporting the pipelines, argues similarly. See Brief for United States as *Amicus Curiae* 15. Since the parties have argued this case almost exclusively in terms of field pre-emption, we consider only the field pre-emption question.

B

1

Federal regulation of the natural-gas industry began at a time when the industry was divided into three segments. **[*378]** See 1 Regulation of the Natural Gas Industry §1.01 (W. Mogel ed. 2008) (hereinafter Mogel); *General Motors Corp. v. Tracy, 519 U. S. 278, 283, 117 S. Ct. 811, 136 L. Ed. 2d 761 (1997)*. First, natural-gas producers sunk wells in large oil and gas fields (such as the Permian Basin in Texas and New Mexico). They gathered the gas, brought it to transportation points, and left it to interstate gas pipelines to transport the gas to distant markets.

Second, interstate pipelines shipped the gas from the field to cities and towns across the Nation. Third, local gas distributors bought the gas from the interstate pipelines and resold it to business and residential customers within their localities.

[*518]** Originally, the States regulated all three segments of the industry. **[****8]** See 1 Mogel §1.03. But ***HN3***[] ***LEdHN[3]***[] [3] in the early 20th century, this Court held that the *Commerce Clause* forbids the States to regulate the second part of the business—*i.e.*, the interstate shipment and sale of gas to local distributors for resale. See, *e.g.*, *R. I. v. Public Util. Comm'n of Attleboro Steam & Elec. Co., 273 U. S. 83, 89-90, 47 S. Ct. 294, 71 L. Ed. 549 (1927)*; **[**1596]** *Missouri ex rel. Barrett v. Kansas Natural Gas Co., 265 U. S. 298, 307-308, 44 S. Ct. 544, 68 L. Ed. 1027 (1924)*. These holdings left a regulatory gap. Congress enacted the Natural Gas Act, *52 Stat. 821*, to fill it. See *Phillips Petroleum Co. v. Wisconsin, 347 U. S. 672, 682-684, and n. 13, 74 S. Ct. 794, 98 L. Ed. 1035 (1954)* (citing H. R. Rep. No. 709, 75th Cong., 1st Sess., 1-2 (1937); S. Rep. No. 1162, 75th Cong., 1st Sess., 1-2 (1937)).

The Act, in *§5(a)*, gives ratesetting authority to the Federal Energy Regulatory Commission (FERC, formerly the Federal Power Commission (FPC)). That authority allows FERC to determine whether "any rate, charge, or classification . . . collected by any natural-gas company in connection with any transportation or sale of natural gas, *subject to the jurisdiction of* [*FERC*]," or "any rule, regulation, practice, or contract affecting *such* rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential." *15 U. S. C. §717d(a)* (emphasis added). As the italicized words make clear, *§5(a)* limits the scope of FERC's authority **[*379]** to activities "in connection with any transportation or sale of natural gas, *subject to the jurisdiction of the Commission* ***[****9]*** ." *Ibid.* (emphasis added). And the Act, in *§1(b)*, limits FERC's "jurisdiction" to (1) "the transportation of natural gas in interstate commerce," (2) "the sale in interstate commerce of natural gas for resale," and (3) "natural-gas companies engaged in such transportation or sale." *§717(b)*. The Act leaves regulation of other portions of the industry—such as production, local distribution facilities, and direct sales—to the States. See *Northwest Central Pipeline Corp. v. State Corporation Comm'n of Kan., 489 U. S. 493, 507, 109 S. Ct. 1262, 103 L. Ed. 2d 509 (1989)* (*Section 1(b)* of the Act "expressly" provides that "States retain jurisdiction over *intrastate* transportation, local distribution, and distribution facilities, and over 'the production or gathering of natural gas'").

To simplify our discussion, we shall describe the firms that engage in interstate transportation as "jurisdictional sellers" or "interstate pipelines" (though various brokers and others may also fall within the Act's jurisdictional scope). Similarly, we shall refer to the sales over which FERC has jurisdiction as "jurisdictional sales" or "wholesale sales."

2

Until the 1970's, natural-gas regulation roughly tracked the industry model we described above. Interstate pipelines would typically buy gas from **[****10]** field producers and resell it to local distribution companies for resale. See *Tracy, supra, at 283, 117 S. Ct. 811, 136 L. Ed. 2d 761*. FERC (or FPC), acting under the authority of the Natural Gas Act, would set interstate pipeline wholesale rates using classical "cost-of-service" ratemaking methods. See *Public Serv. Comm'n of N. Y. v. Mid-Louisiana Gas Co., 463 U. S. 319, 328, 103 S. Ct. 3024, 77 L. Ed. 2d 668 (1983)*. That is, FERC would determine a pipeline's revenue **[***519]** requirement by calculating the costs of providing its services, including operating and maintenance expenses, depreciation expenses, taxes, and a reasonable profit. See FERC, Cost-of-Service Rates Manual **[*380]** 6 (June 1999). FERC would then set wholesale rates at a level designed to meet the pipeline's revenue requirement.

Deregulation of the natural-gas industry, however, brought about changes in FERC's approach. In the 1950's, this Court had held that the Natural Gas Act required regulation of prices at the interstate pipelines' *buying* end—*i.e.*, the prices at which field producers sold natural gas to interstate pipelines. *Phillips Petroleum Co., supra, at 682, 685, 74 S. Ct. 794, 98 L. Ed. 1035*. By the 1970's, many in Congress thought that such efforts to regulate field prices **[**1597]** had jeopardized natural-gas supplies in an industry already dependent "on the caprice of nature." *FPC v. Hope Natural Gas Co., 320 U. S. 591, 630, 64 S. Ct. 281, 88 L. Ed. 333 (1944)* (opinion of Jackson, J.); see *id., at 629, 64 S. Ct. 281, 88 L. Ed. 333* (recognizing that "the **[****11]** wealth of Midas and the wit of man cannot produce . . . a natural gas field"). Hoping to avoid future shortages, Congress enacted forms of field price deregulation designed to rely upon competition, rather than regulation, to keep field prices low. See, *e.g.*, Natural

Gas Policy Act of 1978, 92 Stat. 3409, codified in part at *15 U. S. C. §3301 et seq.* (phasing out regulation of wellhead prices charged by producers of natural gas); Natural Gas Wellhead Decontrol Act of 1989, *103 Stat. 157* (removing price controls on wellhead sales as of January 1993).

FERC promulgated new regulations designed to further this process of deregulation. See, *e.g.*, Regulation of Natural Gas Pipelines After *Partial Wellhead Decontrol, 50 Fed. Reg. 42408 (1985)* (allowing "open access" to pipelines so that consumers could pay to ship their own gas). Most important here, FERC adopted an approach that relied on the competitive marketplace, rather than classical regulatory ratesetting, as the main mechanism for keeping *wholesale* natural-gas rates at a reasonable level. Order No. 636, issued in 1992, allowed FERC to issue blanket certificates that permitted jurisdictional sellers (typically interstate pipelines) to charge market-based rates for gas, provided that FERC had first determined that the sellers lacked **[****12]** market **[*381]** power. See *57 Fed. Reg. 57957-57958* (1992); *id.*, at 13270.

After the issuance of this order, FERC's oversight of the natural-gas market largely consisted of (1) ex ante examinations of jurisdictional sellers' market power, and (2) the availability of a complaint process under *§717d(a)*. See Brief for United States as *Amicus Curiae* 4. The new system also led many large gas consumers—such as industrial and commercial users—to buy their own gas directly from gas producers, and to arrange (and often pay separately) for transportation from the field to the place of consumption. See *Tracy, 519 U. S., at 284, 117 S. Ct. 811, 136 L. Ed. 2d 761*. Insofar as interstate pipelines sold gas to such consumers, they sold it for direct consumption rather than resale.

3

The free-market system for setting interstate pipeline rates turned out to be less than perfect. Interstate pipelines, distributing companies, and many of the customers who bought directly from the pipelines found that **[***520]** they had to rely on privately published price indices to determine appropriate prices for their natural-gas contracts. These indices listed the prices at which natural gas was being sold in different (presumably competitive) markets across the country. The information on which these indices were based was voluntarily **[****13]** reported by natural-gas traders.

In 2003, FERC found that the indices were inaccurate, in part because much of the information that natural-gas traders reported had been false. See FERC, Final Report on Price Manipulation in Western Markets (Mar. 2003), App. 88-89. FERC found that false reporting had involved "inflating the volume of trades, omitting trades, and adjusting the price of trades." *Id.*, at 88. That is, sometimes those who reported information simply fabricated it. Other times, the information reported reflected "wash trades," *i.e.*, "*prearranged* pair[s] of trades of the same good between the same parties, involving no economic risk and no net change in beneficial **[*382]** ownership." *Id.*, at 215. FERC concluded that these "efforts to manipulate **[**1598]** price indices compiled by trade publications" had helped raise "to extraordinary levels" the prices of both jurisdictional sales (that is, interstate pipeline sales for resale) and nonjurisdictional direct sales to ultimate consumers. *Id.*, at 86, 85.

After issuing its final report on price manipulation in western markets, FERC issued a Code of Conduct. That code amended all blanket certificates to prohibit jurisdictional sellers "from engaging in actions without a legitimate business **[****14]** purpose that manipulate or attempt to manipulate market conditions, including wash trades and collusion." *68 Fed. Reg. 66324 (2003)*. The code also required jurisdictional companies, when they provided information to natural-gas index publishers, to "provide accurate and factual information, and not knowingly submit false or misleading information or omit material information to any such publisher." *Id., at 66337*. At the same time, FERC issued a policy statement setting forth "minimum standards for creation and publication of any energy price index" and "for reporting transaction data to index developers." *Price Discovery in Natural Gas and Elec. Markets, 104 FERC ¶61,121*, pp. 61,407, 61,408 (2003). Finally, FERC, after finding that certain jurisdictional sellers had "engaged in wash trading . . . that resulted in the manipulation of [natural-gas] prices," terminated those sellers' blanket marketing certificates. *Enron Power Marketing, Inc., 103 FERC ¶61,343*, p. 62,303 (2003).

Congress also took steps to address these problems. In particular, it passed the Energy Policy Act of 2005, *119 Stat. 594*, which gives FERC the authority to issue rules and regulations to prevent "any manipulative or deceptive device or contrivance" by "any entity . . . in connection with the purchase or sale of natural gas or the purchase or sale of transportation **[****15]** services subject to the jurisdiction of" FERC, *15 U. S. C. §717c-1*.

[*383] C

We now turn to the cases before us. Respondents, as we have said, bought large quantities of natural gas directly from interstate pipelines for their own consumption. They believe that they overpaid in these transactions due to the interstate pipelines' manipulation of the natural-gas indices. Based on this belief, they filed state-law antitrust suits against petitioners **[***521]** in state and federal courts. See App. 244-246 (alleging violations of *Wis. Stat. §§133.03*, *133.14*, *133.18*); see also App. 430-433 (same); *id.*, at 519-521 (same); *id.*, at 362-364 (alleging violations of Kansas Restraint of Trade Act, *Kan. Stat. Ann. §50-101 et seq.*); App. 417-419 (alleging violations of Missouri ***Antitrust Law***, *Mo. Rev. Stat. §§416.011-416.161*). The pipelines removed all the state cases to federal court, where they were consolidated and sent for pretrial proceedings to the Federal District Court for the District of Nevada. See *28 U. S. C. §1407*.

The pipelines then moved for summary judgment on the ground that the Natural Gas Act pre-empted respondents' state-law antitrust claims. The District Court granted their motion. It concluded that the pipelines were "jurisdictional sellers," *i.e.*, "natural gas companies engaged in" the "transportation of natural gas in interstate commerce." **[****16]** Order in No. 03-cv-1431, (D Nev., July 18, 2011), pp. 4, 11. And it held that respondents' claims, which were "aimed at" these sellers' "alleged practices of false price reporting, wash trades, and anticompetitive collusive behavior" were pre-empted because "such practices" not only affected nonjurisdictional direct-sale prices but also "directly affect[ed]" jurisdictional (*i.e.*, wholesale) rates. *Id.*, at 36-37.

[1599]** The Ninth Circuit reversed. It emphasized that the price-manipulation of which respondents complained affected not only jurisdictional (*i.e.*, wholesale) sales but also nonjurisdictional (*i.e.*, retail) sales. The court construed the Natural Gas Act's pre-emptive scope narrowly in light of Congress' intent—manifested in *§1(b)* of the Act—to preserve **[*384]** for the States the authority to regulate nonjurisdictional sales. And it held that the Act did not pre-empt state-law claims aimed at obtaining damages for excessively high *retail* natural-gas prices stemming from interstate pipelines' price manipulation, even if the manipulation raised *wholesale* rates as well. See *In re Western States Wholesale Natural Gas Antitrust Litigation, 715 F. 3d 716, 729-736 (2013)*.

The pipelines sought certiorari. They asked us to resolve confusion in the lower courts as to whether the Natural Gas Act pre-empts retail customers' **[****17]** state ***antitrust law*** challenges to practices that also affect wholesale rates. Compare *id., at 729-736*, with *Leggett v. Duke Energy Corp., 308 S. W. 3d 843 (Tenn. 2010)*. We granted the petition.

II

Petitioners, supported by the United States, argue that their customers' state antitrust lawsuits are within the field that the Natural Gas Act pre-empts. See Brief for Petitioners 18 (citing *Schneidewind, 485 U. S., at 305, 108 S. Ct. 1145, 99 L. Ed. 2d 316*); Brief for United States as *Amicus Curiae* 13 (same). They point out that respondents' antitrust claims target anticompetitive activities that affected wholesale (as well as retail) rates. See Brief for Petitioners 2. They add that the Natural Gas Act expressly grants FERC authority to keep wholesale rates at reasonable levels. See *ibid.* (citing *15 U. S. C. §§717(b)*, *717d(a)*). In exercising this authority, FERC has prohibited the very kind of anticompetitive conduct that the state actions attack. See Part I-B-3, *supra*. And, petitioners contend, letting these actions proceed will permit state antitrust courts to reach conclusions about that conduct that differ from those that FERC **[***522]** might reach or has already reached. Accordingly, petitioners argue, respondents' state-law antitrust suits fall within the pre-empted field.

A

Petitioners' arguments are forceful, but we cannot accept their conclusion. ***HN4***[] ***LEdHN[4]***[] [4] As we **[****18]** have repeatedly stressed, the Natural **[*385]** Gas Act "was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Ind., 332 U. S. 507, 517-518, 68 S. Ct. 190, 92 L. Ed. 128 (1947)*; see also *Northwest Central, 489 U. S., at 511, 109 S. Ct. 1262, 103 L. Ed. 2d 509* (the "legislative history of the [Act] is replete with assurances that the Act 'takes nothing from the State [regulatory] commissions'" (quoting 81 Cong. Rec. 6721 (1937))). Accordingly, where (as here) a state law can be applied to nonjurisdictional as well as jurisdictional sales, we must proceed cautiously, finding pre-emption only where detailed examination convinces us that a matter falls within the pre-empted field as defined by our precedents. See *Panhandle Eastern, supra, at 516-518, 68 S. Ct. 190, 92 L. Ed. 128*; *Interstate Natural Gas Co. v. FPC, 331 U. S. 682, 689-693, 67 S. Ct. 1482, 91 L. Ed. 1742 (1947)*.

HN5[] ***LEdHN[5]***[] [5] Those precedents emphasize the importance of considering the *target* at which the state law *aims* in determining whether that law is pre-empted. For example, in *Northern Natural Gas Co. v. State Corporation Comm'n of Kan., 372 U. S. 84, 83 S. Ct. 646, 9 L. Ed. 2d 601 (1963)*, the Court said that it had "consistently recognized" **[**1600]** that the "significant distinction" for purposes of pre-emption in the natural-gas context is the distinction between "measures *aimed directly at* interstate purchasers and wholesales for resale, and those aimed at" subjects left to the **[****19]** States to regulate. *Id., at 94, 83 S. Ct. 646, 9 L. Ed. 2d 601* (emphasis added). And, in *Northwest Central*, the Court found that the Natural Gas Act did not pre-empt a state regulation concerning the timing of gas production from a gas field within the State, even though the regulation might have affected the costs of and the prices of interstate wholesale sales, *i.e.*, jurisdictional sales. *489 U. S., at 514, 109 S. Ct. 1262, 103 L. Ed. 2d 509*. In reaching this conclusion, the Court explained that the state regulation aimed primarily at "protect[ing] producers' . . . rights—a matter firmly on the States' side of that dividing line." *Ibid.* The Court contrasted this state regulation with the state orders at issue in *Northern Natural*, which "'invalidly invade[d] the federal **[*386]** agency's exclusive domain' precisely because" they were "'unmistakably and unambiguously *directed at purchasers*.'" *Id., at 513, 109 S. Ct. 1262, 103 L. Ed. 2d 509* (quoting *Northern Natural, supra, at 92, 83 S. Ct. 646, 9 L. Ed. 2d 601*; emphasis added). Here, too, the lawsuits are directed at practices affecting *retail* rates—which are "firmly on the States' side of that dividing line."

Petitioners argue that *Schneidewind* constitutes contrary authority. In that case, the Court found pre-empted a state law that required public utilities, such as interstate pipelines crossing the State, to obtain state approval before issuing long-term **[****20]** securities. *485 U. S., at 306-309, 108 S. Ct. 1145, 99 L. Ed. 2d 316*. But the Court there thought that the State's securities regulation was aimed directly at interstate pipelines. **[***523]** It wrote that the state law was designed to keep "a natural gas company from raising its equity levels above a certain point" in order to keep the company's revenue requirement low, thereby ensuring lower *wholesale* rates. *Id., at 307-308, 108 S. Ct. 1145, 99 L. Ed. 2d 316*. Indeed, the Court expressly said that the state law was pre-empted because it was "*directed at* . . . the control of rates and facilities of natural gas companies," "precisely the things over which FERC has comprehensive authority." *Id., at 308, 108 S. Ct. 1145, 99 L. Ed. 2d 316* (emphasis added).

The dissent rejects the notion that the proper test for purposes of pre-emption in the natural-gas context is whether the challenged measures are "aimed directly at interstate purchasers and wholesales for resale" or not. *Northern Natural, supra, at 94, 83 S. Ct. 646; 9 L. Ed. 2d 601*. It argues that this approach is "unprecedented," and that the Court's focus should be on "*what* the State seeks to regulate . . ., not *why* the State seeks to regulate it." *Post, at 397, 191 L. Ed. 2d, at 529* (opinion of Scalia, J.). But ***HN6***[] ***LEdHN[6]***[] [6] the "target" to which our cases refer must mean more than just the physical activity that a State regulates. After all, a single physical action, such as reporting a price **[****21]** to a specialized journal, could be the subject of many different laws—including tax laws, disclosure laws, and others. To repeat the point we made above, no one could claim that FERC's regulation **[*387]** of this physical activity for purposes of wholesale rates forecloses every other form of state regulation that affects those rates.

Indeed, although the dissent argues that *Schneidewind* created a definitive test for pre-emption in the natural-gas context that turns on whether "the matter on which the State asserts the right to act is in any way regulated by the Federal Act," *post, at 394, 191 L. Ed. 2d, 527* (quoting *485 U. S., at 310, n. 13, 108 S. Ct. 1145, 99 L. Ed. 2d 316*), *Schneidewind* could not mean this statement as an absolute test. It goes on to explain that the Natural Gas Act does not pre-empt "traditional" state regulation, such as state blue sky laws (which, of course, raise wholesale—as well as retail—investment **[**1601]** costs). *Id., at 308, n. 11, 108 S. Ct. 1145, 99 L. Ed. 2d 316*.

HN7[] LEdHN[7][] [7] Antitrust laws, like blue sky laws, are not aimed at natural-gas companies in particular, but rather all businesses in the marketplace. See *ibid.* They are far broader in their application than, for example, the regulations at issue in *Northern Natural*, which applied only to entities buying gas from fields within the State. See 372 U. S., at 85-86, n. 1, 83 S. Ct. 646, 9 L. Ed. 2d 601; contra, **[****22]** post, at 396, 191 L. Ed. 2d, at 529 (stating that *Northern Natural* concerned "background market conditions"). This broad applicability of state ***antitrust law*** supports a finding of no pre-emption here.

Petitioners and the dissent argue that there is, or should be, a clear division between areas of state and federal authority in natural-gas regulation. See Brief for Petitioners 18; post, at 397-398, 191 L. Ed. 2d, 530. But that Platonic ideal does not describe the natural-gas regulatory world. Suppose FERC, when setting wholesale rates in the former cost-of-service ratemaking days, had denied cost recovery for pipelines' failure to recycle. Would that fact deny States the power to enact and apply recycling laws? These state laws might well raise pipelines' operating costs, **[***524]** and thus the costs of wholesale natural gas transportation. But in *Northwest Central* we said that HN8[] LEdHN[8][] [8] "[t]o find field pre-emption of [state] regulation merely because purchasers' costs and hence rates might be **[*388]** affected would be largely to nullify . . . §1(b)." 489 U. S., at 514, 109 S. Ct. 1262, 103 L. Ed. 2d 509.

The dissent barely mentions the limitations on FERC's powers in §1(b), but HN9[] LEdHN[9][] [9] the enumeration of FERC's powers in §5(a) is circumscribed by a reference back to the limitations in §1(b). See post, at 392-394, 191 L. Ed. 2d, at 526-528. As we explained above, see Part **[****23]** I-B-1, *supra*, those limits are key to understanding the careful balance between federal and state regulation that Congress struck when it passed the Natural Gas Act. That Act "was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." Panhandle Eastern, 332 U. S., at 517-518, 68 S. Ct. 190, 92 L. Ed. 128. Contra, post, at 399, 191 L. Ed. 2d, at 531. States have a "long history of" providing "common-law and statutory remedies against monopolies and unfair business practices." ARC America, 490 U. S., at 101, 109 S. Ct. 1661, 104 L. Ed. 2d 86; see also Watson v. Buck, 313 U. S. 387, 404, 61 S. Ct. 962, 85 L. Ed. 1416 (1941) (noting the States' "long-recognized power to regulate combinations in restraint of trade"). Respondents' state-law antitrust suits relied on this well-established state power.

B

Petitioners point to two other cases that they believe support their position. The first is Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U. S. 354, 108 S. Ct. 2428, 101 L. Ed. 2d 322 (1988). There, the Court held that the Federal Power Act—which gives FERC the authority to determine whether rates charged by public utilities in electric energy sales are "just and reasonable," 16 U. S. C. §824d(a)—pre-empted a state inquiry into the reasonableness of FERC-approved prices for the sale of nuclear power to wholesalers of electricity (which led to higher retail electricity rates). 487 U. S., at 373-377, 108 S. Ct. 2428, 101 L. Ed. 2d 322. Petitioners argue that this case shows that state regulation of similar sales here—*i.e.*, by a pipeline **[****24]** to a direct consumer—must also be pre-empted. See Reply Brief 11-12. HN10[] LEdHN[10][] [10] *Mississippi Power*, however, is best read as a conflict pre-emption case, not a field pre-emption case. See 487 U. S., at 377, 108 S. Ct. 2428, 101 L. Ed. 2d 322 ("[A] **[*389]** state agency's 'efforts to regulate commerce must fall when they conflict with or interfere with federal authority over the same activity'" (quoting **[**1602]** Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co., 450 U. S. 311, 318-319, 101 S. Ct. 1124, 67 L. Ed. 2d 258 (1981))).

Regardless, the state inquiry in *Mississippi Power* was pre-empted because it was directed at jurisdictional sales in a way that respondents' state antitrust lawsuits are not. Mississippi's inquiry into the reasonableness of FERC-approved purchases was effectively an attempt to "regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates." 487 U. S., at 374, 108 S. Ct. 2428, 101 L. Ed. 2d 322. By contrast, respondents' state antitrust lawsuits do not seek to challenge the reasonableness of any rates expressly approved by FERC. Rather, they seek to challenge the background **[***525]** marketplace conditions that affected both jurisdictional and nonjurisdictional rates.

Petitioners additionally point to FPC v. Louisiana Power & Light Co., 406 U. S. 621, 92 S. Ct. 1827, 32 L. Ed. 2d 369 (1972). In that case, the Court held that federal law gave FPC the authority to allocate natural gas during shortages by ordering interstate pipelines to curtail gas deliveries **[****25]** to all customers, *including retail customers.* This latter fact, the pipelines argue, shows that FERC has authority to regulate index manipulation insofar as that manipulation affects *retail* (as well as wholesale) sales. Brief for Petitioners 26. Accordingly, they contend that state laws that aim at this same subject are pre-empted.

This argument, however, makes too much of too little. The Court's finding of pre-emption in *Louisiana Power* rested on its belief that the state laws in question *conflicted* with federal law. The Court concluded that "FPC has authority to effect orderly curtailment plans involving both direct sales and sales for resale," *406 U. S., at 631, 92 S. Ct. 1827, 32 L. Ed. 2d 369*, because otherwise there would be "unavoidable conflict between" state regulation of direct sales and the "uniform federal **[*390]** regulation" that the Natural Gas Act foresees, *id., at 633-635, 92 S. Ct. 1827, 32 L. Ed. 2d 369*. Conflict pre-emption may, of course, invalidate a state law even though field pre-emption does not. Because petitioners have not argued this case as a conflict pre-emption case, *Louisiana Power* does not offer them significant help.

C

To the extent any conflicts arise between state ***antitrust law*** proceedings and the federal rate-setting process, the doctrine of conflict pre-emption **[****26]** should prove sufficient to address them. But as we have noted, see Part I-A, *supra*, the parties have not argued conflict pre-emption. See also, *e.g.*, Tr. of Oral Arg. 24 (Solicitor General agrees that he has not "analyzed this [case] under a conflict preemption regime"). We consequently leave conflict pre-emption questions for the lower courts to resolve in the first instance.

D

We note that petitioners and the Solicitor General have argued that we should defer to FERC's determination that field pre-emption bars the respondents' claims. See Brief for Petitioners 22 (citing *Arlington v. FCC, 569 U. S. 290, 301-305, 133 S. Ct. 1863, 185 L. Ed. 2d 941, 963-968 (2013)*); Brief for United States as *Amicus Curiae* 32 (same). But they have not pointed to a specific FERC determination that state antitrust claims fall within the field pre-empted by the Natural Gas Act. Rather, they point only to the fact that FERC has promulgated detailed rules governing manipulation of price indices. Because there is no determination by FERC that its regulation pre-empts the field into which respondents' state-law antitrust **[**1603]** suits fall, we need not consider what legal effect such a determination might have. And we conclude that the detailed federal regulations here do not offset the other considerations that weigh against **[****27]** a finding of pre-emption in this context.

[*391] ***

For these reasons, the judgment of the Court of Appeals for the Ninth Circuit is affirmed.

It is so ordered.

Concur by: THOMAS

Concur

[*526]** Justice **Thomas**, concurring in part and concurring in the judgment.

I agree with much of the majority's application of our precedents governing pre-emption under the Natural Gas Act. I write separately to reiterate my view that "implied pre-emption doctrines that wander far from the statutory text are inconsistent with the Constitution." *Wyeth v. Levine, 555 U. S. 555, 583, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009)* (Thomas, J., concurring in judgment). The *Supremacy Clause* of our Constitution "gives 'supreme' status only to those [federal laws] that are 'made in Pursuance'" of it. *555 U.S., at 585, 129 S. Ct. 1187, 173 L. Ed. 2d 51* (quoting *Art. VI, cl. 2*). And to be "made in Pursuance" of the Constitution, a law must fall within one of Congress' enumerated powers and be promulgated in accordance with the lawmaking procedures set forth in that document. *Id., at 585-586, 129 S. Ct. 1187, 173 L. Ed. 2d 51*. "The Supremacy Clause thus requires that pre-emptive effect be given only to those federal standards and policies that are set forth in, or necessarily follow from, the statutory text that was produced through the constitutionally required bicameral and presentment procedures." *Id., at 586, 129 S. Ct. 1187, 173 L. Ed. 2d 51*.

In light of this constitutional requirement, I have **[****28]** doubts about the legitimacy of this Court's precedents concerning the pre-emptive scope of the Natural Gas Act, see, *e.g.*, *Northern Natural Gas Co. v. State Corporation Comm'n of Kan., 372 U. S. 84, 91-92, 83 S. Ct. 646, 9 L. Ed. 2d 601 (1963)* (defining the pre-empted field in light of the "objective[s]" of the Act). Neither party, however, has asked us to overrule these longstanding precedents or "to overcome the presumption of *stare decisis* that attaches to" them. *Kurns v. Railroad Friction Products Corp., 565 U. S. 625, 633, 132 S. Ct. 1261, 1267, 182 L. Ed. 2d 116, 125 (2012)*. And even under these precedents, the challenged state antitrust laws fall outside the **[*392]** pre-empted field. Because the Court today avoids extending its earlier questionable precedents, I concur in its judgment and join all but Part I-A of its opinion.

Dissent by: SCALIA

Dissent

Justice **Scalia**, With Whom The Chief Justice joins, dissenting.

The Natural Gas Act divides responsibility over trade in natural gas between federal and state regulators. The Act and our cases interpreting it draw a firm line between national and local authority over this trade: If the Federal Government may regulate a subject, the States may not. Today the Court smudges this line. It holds that States may use their antitrust laws to regulate practices already regulated by the Federal Energy Regulatory Commission whenever "other considerations **[****29]** . . . weigh against a finding of pre-emption." *Ante, at 390, 191 L. Ed. 2d, at 525*. The Court's make-it-up-as-you-go-along approach to preemption has no basis in the Act, contradicts our cases, and will prove unworkable in practice.

I

Trade in natural gas consists of three parts. A drilling company collects gas from the earth; a pipeline company then carries the gas to its destination and sells **[**1604]** it at wholesale to a local distributor; and the local distributor sells the gas at retail to industries and households. See *ante, at 377-378, 191 L. Ed. 2d, at 517*. **[***527]** The Natural Gas Act empowers the Commission to regulate the middle of this three-leg journey—interstate transportation and wholesale sales. *15 U. S. C. §717 et seq.* But it does not empower the Commission to regulate the opening and closing phases—production at one end, retail sales at the other—thus leaving those matters to the States. *§717(b)*. (Like the Court, I will for simplicity's sake call the sales controlled by the Commission wholesale sales, and the companies controlled by the Commission pipelines. See *ante, at 379, 191 L. Ed. 2d, at 518*.)

Over 70 years ago, the Court concluded that the Act confers "exclusive jurisdiction upon the federal regulatory **[*393]** agency." *Public Util. Comm'n of Ohio v. United Fuel Gas Co., 317 U. S. 456, 469, 63 S. Ct. 369, 87 L. Ed. 396 (1943)*. The Court thought it "clear" that the Act contemplates **[****30]** "a harmonious, dual system of regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere," "without any confusion of functions." *Id., at 467, 63 S. Ct. 369, 87 L. Ed. 396*. The Court drew this inference from the law's purpose and legislative history, though it could just as easily have relied on the law's terms and structure. The Act grants the Commission a wide range of powers over wholesale sales and transportation, but qualifies only some of these powers with reservations of state authority over the same subject. See *§717g(a)* (concurrent authority over recordkeeping); *§717h(a)* (concurrent authority over depreciation and amortization rates). Congress's decision to include express reservations of state power alongside these grants of authority, but to omit them alongside other grants of authority, suggests that the other grants are exclusive. Right or wrong, in any event, our inference of exclusivity is now settled beyond debate.

United Fuel rejected a State's regulation of wholesale rates. *Id., at 468, 63 S. Ct. 369, 87 L. Ed. 396*. But our later holdings establish that the Act makes exclusive the Commission's powers in general, not just its rate-setting power in particular. We have again and again set aside **[****31]** state laws—even those that do not purport to fix wholesale rates—for regulating a matter already subject to regulation by the Commission. See, *e.g.*, *Northern Natural Gas Co. v. State Corporation Comm'n of Kan., 372 U. S. 84, 89, 83 S. Ct. 646, 9 L. Ed. 2d 601 (1963)* (state regulation of pipelines' gas purchases preempted because it "invade[s] the exclusive jurisdiction which the Natural Gas Act has conferred upon the [Commission]"); *Exxon Corp. v. Eagerton, 462 U. S. 176, 185, 103 S. Ct. 2296, 76 L. Ed. 2d 497 (1983)* (state law prohibiting producers from passing on production taxes preempted because it "trespasse[s] upon FERC's authority"); *Schneidewind v. ANR Pipeline Co., 485 U. S. 293, 309, 108 S. Ct. 1145, 99 L. Ed. 2d 316 (1988)* (state securities regulation directly affecting **[*394]** wholesale rates and gas transportation facilities preempted because it regulates "matters that Congress intended FERC to regulate"). The test for preemption in this setting, the Court has confirmed, "'is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act.'" *Id., at 310, n. 13, 108 S. Ct. 1145, 99 L. Ed. 2d 316*.

Straightforward application of these precedents would make short work of the case at hand. The Natural **[***528]** Gas Act empowers the Commission to regulate "practice[s] . . . affecting [wholesale] rate[s]." *§717d*. Nothing in the Act suggests that the States share power to regulate these practices. The Commission has reasonably determined that this power allows it **[**1605]** to regulate the behavior **[****32]** involved in this case, pipelines' use of sham trades and false reports to manipulate gas price indices. Because the Commission's exclusive authority extends to the conduct challenged here, state antitrust regulation of that conduct is preempted.

II

The Court agrees that the Commission may regulate index manipulation, but upholds state antitrust regulation of this practice anyway on account of "other considerations that weigh against a finding of pre-emption in this context." *Ante, at 390, 191 L. Ed. 2d, at 525*. That is an unprecedented decision. The Court does not identify a single case—not one—in which we have sustained state regulation of behavior already regulated by the Commission. The Court's justifications for its novel approach do not persuade.

A

The Court begins by considering "the *target* at which the state law *aims*." *Ante, at 385, 191 L. Ed. 2d, at 522*. It reasons that because this case involves a practice that affects both wholesale and retail rates, the Act tolerates state regulation that takes aim at the practice's retail-stage effects. *Ante, at 386*.

This analysis misunderstands how the Natural Gas Act divides responsibilities between national and local regulators. The Act does not give the Commission the power to aim at **[*395]** particular **[****33]** effects; it gives it the power to regulate particular activities. When the Commission regulates those activities, it may consider their effects on *all* parts of the gas trade, not just on wholesale sales. It may, for example, set wholesale rates with the aim of encouraging producers to conserve gas supplies—even though production is a state-regulated activity. See *Colorado Interstate Gas Co. v. FPC, 324 U. S. 581, 602-603, 65 S. Ct. 829, 89 L. Ed. 1206 (1945)*; *id., at 609-610, 65 S. Ct. 829, 89 L. Ed. 1206* (Jackson, J., concurring). Or it may regulate wholesale sales with an eye toward blunting the sales' anticompetitive effects in the retail market—even though retail prices are controlled by the States. See *FPC v. Conway Corp., 426 U. S. 271, 276-280, 96 S. Ct. 1999, 48 L. Ed. 2d 626 (1976)*. The Court's ad hoc partition of authority over index manipulation—leaving it to the Commission to control the practice's consequences for wholesale sales, but allowing the States to target its consequences for retail sales—thus clashes with the design of the Act.

To justify its fixation on aims, the Court stresses that this case involves regulation of "background marketplace conditions" rather than regulation of wholesale rates or sales themselves. *Ante, at 389, 191 L. Ed. 2d, at 524*. But the Natural Gas Act empowers the Commission to regulate wholesale rates *and* "background" practices affecting such rates. It grants both powers in the same **[****34]** clause: "Whenever the Commission . . . find[s] that a [wholesale] rate, charge, or classification . . . [or] any rule, regulation, *practice*, or contract affecting such rate, charge, or classification is unjust [or] unreasonable, . . . the Commission shall determine **[***529]** the just and reasonable rate, charge, classification, rule, regulation, *practice*, or contract to be thereafter observed." §717d(a) (emphasis added). Nothing in this provision, and for that matter nothing in the Act, suggests that federal authority over practices is a second-class power, somehow less exclusive than the authority over rates.

The Court persists that the background conditions in this case affect *both* wholesale and retail sales. Ante, at 389, 191 L. Ed. 2d, at 525. This observation adds atmosphere, but nothing more. The **[*396]** Court concedes that index manipulation's dual effect does not weaken the Commission's power to regulate it. **[**1606]** Ante, at 384-385, 191 L. Ed. 2d, at 521. So too should the Court have seen that this simultaneous effect does not strengthen the claims of the States. It is not at all unusual for an activity controlled by the Commission to have effects in the States' field; production, wholesale, and retail are after all interdependent stages of a single trade. We have **[****35]** never suggested that the rules of field preemption change in such situations. For example, producers' ability to pass production taxes on to pipelines no doubt affects both producers and pipelines. Yet we had no trouble concluding that a state law restricting producers' ability to pass these taxes impermissibly attempted to manage "a matter within the sphere of FERC's regulatory authority." Exxon, supra, at 185-186, 103 S. Ct. 2296, 76 L. Ed. 2d 497.

The Court's approach makes a snarl of our precedents. In *Northern Natural*, the Court held that the Act preempts state regulations requiring pipelines to buy gas ratably from gas wells. 372 U. S., at 90, 83 S. Ct. 646, 9 L. Ed. 2d 601. The regulations in that case shared each of the principal features emphasized by the Court today. They governed background market conditions, not wholesale prices. Id., at 90-91, 83 S. Ct. 646, 9 L. Ed. 2d 601. The background conditions in question, pipelines' purchases from gas wells, affected both the federal field of wholesale sales and the state field of gas production. Id., at 92-93, 83 S. Ct. 646, 9 L. Ed. 2d 601. And the regulations took aim at the purchases' effects on production; they sought to promote conservation of natural resources by limiting how much gas pipelines could take from each well. Id., at 93, 83 S. Ct. 646, 9 L. Ed. 2d 601. No matter; the Court still concluded that the regulations "invade[d] the federal agency's **[****36]** exclusive domain." Id., at 92, 83 S. Ct. 646, 9 L. Ed. 2d 601. The factors that made no difference in *Northern Natural* should make no difference today.

Contrast *Northern Natural* with Northwest Central Pipeline Corp. v. State Corporation Comm'n of Kan., 489 U. S. 493, 109 S. Ct. 1262, 103 L. Ed. 2d 509 (1989), which involved state regulations that restricted the times when producers could take gas from wells. On **[*397]** this occasion the Court upheld the regulations—not because the law aimed at the objective of gas conservation, but because the State pursued this end by regulating "'the physical ac[t] of drawing gas from the earth.'" Id., at 510, 109 S. Ct. 1262, 103 L. Ed. 2d 509. Our precedents demand, in other words, that the Court focus in the present case upon *what* the State seeks to regulate (a pipeline practice that is subject to regulation by the Commission), not *why* the State seeks to regulate it (to curb the practice's effects on retail rates).

[*530]** Trying to turn liabilities into assets, the Court brandishes statements from *Northern Natural* and *Northwest Central* that (in its view) discuss where state law was "aimed" or "directed." Ante, at 385, 386, 191 L. Ed. 2d, at 522. But read in context, these statements refer to the entity or activity that the state law regulates, not to which of the activity's effects the law seeks to control by regulating it. See, *e.g.*, ***[****37]*** Northern Natural, supra, at 94, 83 S. Ct. 646; 9 L. Ed. 2d 601 ("[O]ur cases have consistently recognized a significant distinction . . . between conservation measures aimed directly at interstate purchasers and wholesales . . ., and those aimed at producers and production"); Northwest Central, supra, at 512, 109 S. Ct. 1262, 103 L. Ed. 2d 509 ("[This regulation] is directed to the behavior of gas producers"). The lawsuits at hand target pipelines (entities regulated by the Commission) for their manipulation of indices (behavior regulated by the Commission). That should have sufficed to establish preemption.

B

The Court also tallies several features of state ***antitrust law*** that, it believes, weigh **[**1607]** against preemption. Ante, at 387-388, 191 L. Ed. 2d, at 523-524. Once again the Court seems to have forgotten its precedents. We have said before that "'Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction'" over the gas trade. Nantahala Power & Light Co. v. Thornburg, 476 U. S. 953, 966, 106 S. Ct. 2349, 90 L. Ed. 2d 943 (1986) (quoting FPC v. Southern Cal. Edison Co., 376 U. S. 205, 215-216, 84 S. Ct. 644, 11 L. Ed. 2d 638 (1964)). Our decisions have therefore "'squarely rejected'" **[*398]** the theory, endorsed by the Court today, that the boundary between national and local authority turns on "'a case-by-case analysis of the impact of state regulation upon the national interest.'" *Ibid.*

State ***antitrust law***, the Court begins, applies to "all businesses in the marketplace" rather than just "natural-gas companies **[****38]** in particular." *Ante, at 387, 191 L. Ed. 2d, at 523*. So what? No principle of our natural-gas preemption jurisprudence distinguishes particularized state laws from state laws of general applicability. We have never suggested, for example, that a State may use general price-gouging laws to fix wholesale rates, or general laws about unfair trade practices to control wholesale contracts, or general common-carrier laws to administer interstate pipelines. The Court in any event could not have chosen a worse setting in which to attempt a distinction between general and particular laws. Like their federal counterpart, state antitrust laws tend to use the rule of reason to judge the lawfulness of challenged practices. Legal Aspects of Buying and Selling §10:12 (P. Zeidman ed. 2014-2015). This amorphous standard requires the reviewing court to consider "a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *State Oil Co. v. Khan, 522 U. S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. Far from authorizing across-the-board application of a uniform requirement, therefore, the Court's decision will invite state antitrust courts to engage in targeted regulation of the **[****39]** natural-gas industry.

The Court also stresses the "'long history'" of state antitrust regulation. *Ante, at 388, 191 L. Ed. 2d, at 524*. **[***531]** Again, quite beside the point. States have long regulated public utilities, yet the Natural Gas Act precludes them from using that established power to fix gas wholesale prices. *United Fuel, 317 U. S., at 468, 63 S. Ct. 369, 87 L. Ed. 396*. States also have long enacted laws to conserve natural resources, yet the Act precludes them from deploying that power to control purchases made by gas pipelines. *Northern* ***[*399]*** *Natural, 372 U. S., at 93-94, 83 S. Ct. 646, 9 L. Ed. 2d 601*. The Court's invocation of the pedigree of state ***antitrust law*** rests on air.

One need not launch this unbounded inquiry into the features of state law in order to preserve the States' authority to apply "tax laws," "disclosure laws," and "blue sky laws" to natural-gas companies, *ante, at 386, 387, 191 L. Ed. 2d, at 523*. One need only stand by the principle that if the Commission has authority over a subject, the States lack authority over that subject. The Commission's authority to regulate gas pipelines "in the public interest," *§717a*, is a power to address matters that are traditionally the concern of utility regulators, not "a broad license to promote the general public welfare," *NAACP v. FPC, 425 U. S. 662, 669, 96 S. Ct. 1806, 48 L. Ed. 2d 284 (1976)*. We have explained that the Commission does not, for example, have power to superintend **[****40]** "employment discrimination" or "unfair labor practices." *Id., at 670-671, 96 S. Ct. 1806, 48 L. Ed. 2d 284*. So the Act does not preempt state employment discrimination or labor laws. But the Commission does have power to consider, say, "conservation, **[**1608]** environmental, and *antitrust* questions." *Id., at 670, n. 6, 96 S. Ct. 1806, 48 L. Ed. 2d 284* (emphasis added). So the Act does preempt state antitrust laws.

C

At bottom, the Court's decision turns on its perception that the Natural Gas Act "'was drawn with meticulous regard for the continued exercise of state power.'" *Ante, at 385, 191 L. Ed. 2d, at 522* No doubt the Act protects state authority in a variety of ways. It gives the Commission authority over only some parts of the gas trade. *§717(b)*. It establishes procedures under which the Commission may consult, collaborate, or share information with States. *§717p*. It even provides that the Commission may regulate practices affecting wholesale rates "upon its own motion *or upon complaint of any State*." *§717d(a)* (emphasis added). It should have gone without saying, however, that no law pursues its purposes at all costs. Nothing in the Act and nothing in our cases suggests that Congress protected state power in the way imagined **[*400]** by today's decision: by licensing state sorties into the Commission's domain whenever judges conclude **[****41]** that an incursion would not be too disruptive.

The Court's preoccupation with the purpose of preserving state authority is all the more inexpiable because that is not the Act's only purpose. The Act also has competing purposes, the most important of which is promoting "uniformity of regulation." *Northern Natural, supra, at 91-92, 83 S. Ct. 646;9 L. Ed. 2d 601*. The Court's decision impairs *that* objective. Before today, interstate pipelines knew that their practices relating to price indices had to comply with one set of regulations **[***532]** promulgated by the Commission. From now on, however, pipelines will have to ensure that their behavior conforms to the discordant regulations of 50 States—or more accurately, to the discordant verdicts of untold state antitrust juries. The Court's reassurance that pipelines may still invoke conflict preemption, see *ante, at 390, 191 L. Ed. 2d, at 525*, provides little comfort on this front. Conflict preemption will resolve only discrepancies between state and federal regulations, not the discrepancies among differing state regulations to which today's opinion subjects the industry.

***

"The Natural Gas Act was designed . . . to produce a harmonious and comprehensive regulation of the industry. Neither state nor federal regulatory body was to **[****42]** encroach upon the jurisdiction of the other." *FPC v. Panhandle Eastern Pipe Line Co., 337 U. S. 498, 513, 69 S. Ct. 1251, 93 L. Ed. 1499 (1949)* (footnote omitted). Today, however, the Court allows the States to encroach. Worse still, it leaves pipelines guessing about when States will be allowed to encroach again. May States aim at retail rates under laws that share none of the features of ***antitrust law*** advertised today? Under laws that share only some of those features? May States apply their antitrust laws to pipelines *without* aiming at retail rates? But that is just the start. Who knows what other "considerations that weigh against a finding of pre-emption" remain **[*401]** to be unearthed in future cases? The Court's all-things-considered test does not make for a stable background against which to carry on the natural-gas trade.

I would stand by the more principled and more workable line traced by our precedents. The Commission may regulate the practices alleged in this case; the States therefore may not. I respectfully dissent.

References

15 U.S.C.S. § 717 et seq.

1 Antieau on Local Government Law § 12.02 (Matthew Bender 2d ed.)

L Ed Digest, States, Territories, and Possessions § 45.8

L Ed Index, Natural Gas Acts

State tax as inconsistent with federal law so as to violate *supremacy clause* *(Art. VI, cl. 2)* of Federal Constitution--Supreme Court cases. *93 L. Ed. 2d 1056*.

Validity, under *commerce clause of Federal Constitution*, of state statutes regulating **[****43]** securities transactions--federal cases. *73 L. Ed. 2d 1454*.

Validity, under *commerce clause of Federal Constitution*, of state restrictions on interstate movement of goods, products, and natural resources originating from within state--Supreme Court cases. *71 L. Ed. 2d 890*.

Garrison v. Oracle Corp.

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

April 22, 2015, Decided; April 22, 2015, Filed

Case No. 14-CV-04592-LHK

Reporter

2015 U.S. Dist. LEXIS 53653 *; 2016-1 Trade Reg. Rep. (CCH) P79,513; 2015 WL 1849517

GREG GARRISON, individually and on behalf of all others similarly situated, Plaintiff, v. ORACLE CORPORATION, Defendant.

Prior History: *Garrison v. Oracle Corp., 2015 U.S. Dist. LEXIS 31301 (N.D. Cal., Mar. 13, 2015)*

Core Terms

pleadings, allegations, employees, Hiring, continuing violation, antitrust, settlement, fraudulent concealment, leave to amend, conspiracy, quotation, marks, statute of limitations, motion for judgment, plaintiff's claim, injury-in-fact, toll, factual allegations, class action, defendants', Cold, summary judgment motion, preliminary approval, limitations period, cause of action, fiduciary duty, overt act, concealment, misleading, recruiting

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Judges: LUCY H. KOH, United States District Judge.

Opinion by: LUCY H. KOH

Opinion

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR JUDGMENT ON THE PLEADINGS

Re: Dkt. No. 17

Plaintiff Greg Garrison ("Plaintiff") brings this putative class action against Defendant Oracle Corporation ("Oracle") for alleged violations of federal and California antitrust laws. ECF No.[1] ("Compl.").1 Before the Court is Oracle's Motion for Judgment on the Pleadings. ECF No. 17. Having considered the parties' submissions, **[*2]** the relevant

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[1] Unless otherwise indicated, all ECF references are from the docket of No. 14-04592 in the Northern District of California.

law, and the record in this case, the Court hereby GRANTS in part and DENIES in part Oracle's Motion for Judgment on the Pleadings with leave to amend. The case management conference scheduled for April 23, 2015, at 1:30 p.m. remains as set.

I. BACKGROUND

A. Factual Background

1. The Parties

Plaintiff is a former employee of Oracle. Compl. ¶ 14. Plaintiff worked for Oracle as a senior account manager from approximately December 2008 to June 2009. *Id.* ¶¶ 14, 23. In that capacity, Plaintiff managed regional sales of Oracle's Crystal Ball software, a spreadsheet-based software used for predictive modeling, forecasting, simulation, and optimization across various business industries. *Id.* ¶ 23.

Oracle, a Delaware corporation with its principal place of business in Redwood Shores, California, is a multinational computer technology corporation. Compl. ¶¶ 15-16. The world's second-largest software producer by revenue, Oracle specializes in developing and marketing computer hardware systems and enterprise software products, including its own brands of database management **[*3]** systems. *Id.* ¶ 16.

2. *In re High-Tech Employee Antitrust Litigation*

Plaintiff alleges here that Oracle conspired with Google Inc. ("Google") to enter into a "Restricted Hiring Agreement" (the "Agreement"). Compl. ¶ 19. There appears to be significant factual overlap between Plaintiff's allegations and the related action *In re High-Tech Employee Antitrust Litigation* ("*High-Tech*"), No. 11-02509. *See id.* ¶¶ 25-27 (discussing the alleged *High-Tech* conspiracy). As the factual and procedural history of *High-Tech*, as well as the U.S. Department of Justice's ("DOJ") investigations and complaints, are relevant to this action, the Court briefly summarizes the background of that litigation below.

From 2009 to 2010, DOJ's Antitrust Division investigated the employment and recruitment practices of various Silicon Valley technology companies, including Adobe Systems, Inc. ("Adobe"), Apple Inc. ("Apple"), Intel Corp. ("Intel"), Intuit Inc. ("Intuit"), and Google. *See* *In re High-Tech Emp. Litig., 856 F. Supp. 2d 1103, 1109 (N.D. Cal. 2012)*. In September 2010, DOJ filed civil complaints against the above-mentioned technology companies, in addition to Pixar and Lucasfilm Ltd. ("Lucasfilm"). *Id.* DOJ filed its complaint against Adobe, Apple, Google, Intel, Intuit, and Pixar **[*4]** on September 24, 2010. *Id.* On December 21, 2010, DOJ filed another complaint against Pixar and Lucasfilm. *See* No. 11-02509, ECF No. 65 ¶ 114. All of the technology company defendants stipulated to proposed final judgments in which they agreed that DOJ's complaints had stated claims under federal ***antitrust law*** and agreed to be "enjoined from attempting to enter into, maintaining or enforcing any agreement with any other person or in any way refrain from . . . soliciting, cold calling, recruiting, or otherwise competing for employees of the other person." *High-Tech, 856 F. Supp. 2d at 1109-10*. The D.C. District Court entered the stipulated proposed final judgments on March 17, 2011, and June 2, 2011, respectively. *Id. at 1110*.

The *High-Tech* plaintiffs filed five separate state court actions between May and July 2011. Following removal, transfer to San Jose to the undersigned judge, and consolidation, the *High-Tech* plaintiffs filed a consolidated amended complaint on September 13, 2011. *856 F. Supp. 2d at 1112-13*. In their complaint, the *High-Tech* plaintiffs alleged antitrust claims against their employers, claiming that the defendants had conspired "to fix and suppress employee compensation and to restrict employee mobility." *Id. at 1108*. More specifically, the **[*5]** *High-Tech* plaintiffs alleged a conspiracy comprised of "an interconnected web of express bilateral agreements." *Id. at 1110*. One such agreement, the "Do Not Cold Call" agreement involved one company placing the names of another company's employees on a "Do Not Cold Call" list and instructing its recruiters not to cold call the employees of the other company. *Id.* In addition to the "Do Not Cold Call" agreements, the *High-Tech* plaintiffs also alleged that Pixar and Lucasfilm entered into express, written agreements (1) not to cold call each other's employees, (2) to notify the other company whenever making an offer to an employee of the other company, and (3) not to engage in "bidding wars." *Id. at 1111*.

On May 17, 2013, the *High-Tech* plaintiffs publicly filed a number of documents in support of their supplemental motion for class certification. No. 11-02509, ECF Nos. 418, 428. One of those documents was an internal Google memo describing Google's hiring protocols and practices as of "1.7.2008." No. 11-02509, ECF No. At one point, the Google memo refers to certain companies on the "'Restricted Hiring' list," including Microsoft, Novell, Sun Microsystems, and, as relevant here, Oracle. *Id.*

3. Instant Lawsuit [*6]

As indicated above, Plaintiff alleges here that starting in May 2007, Oracle and Google entered into the Agreement. Compl. ¶ 19. Pursuant to the Agreement, Oracle, Google, and other technology companies agreed to the following:

> 1) Not to pursue manager level and above candidates for Product, Sales, or [General and Administrative] roles—even if they have applied to [any of the other companies who are parties to the Restricted Hiring Agreement];
> 2) However, there are no restrictions to our recruiting from these companies at individual contributor levels for PSG&A; [and]
> 3) Additionally, there are no restrictions at any level for engineering candidates.

Id. (second and third alterations in original). According to Plaintiff, Oracle entered into the Agreement with "the intent and effect of fixing the compensation of the employees of participating companies at artificially low levels." *Id.* ¶ 31; *see also id.* ¶ 8 ("The intended and actual effect of the Restricted Hiring Agreement was to fix and suppress employee compensation, and to impose unlawful restrictions on employee mobility."). Other than the senior executives who "actively managed and enforced" the Agreement, "Oracle employees were not **[*7]** apprised and did not consent to this restriction on their mobility of employment." *Id.* ¶¶ 20-22. Accordingly, Plaintiff seeks to represent the following class of Oracle employees in this action:

> All persons who worked at any time from May 10, 2007 to the present for Oracle in the United States in any manager level or above positions for Product, Sales, or General and Administrative roles, excluding engineers.

Id. ¶ 34.

B. Procedural History

In light of the relationship between the instant case and *High-Tech*, the Court briefly summarizes the relevant procedural history in *High-Tech* before turning to the instant case.

1. *High-Tech*

The *High-Tech* defendants removed the first state court action on May 23, 2011. No. 11-02509, ECF No. 1. On April 18, 2012, the Court granted in part and denied in part the *High-Tech* defendants' joint motion to dismiss and denied Lucasfilm's motion to dismiss. No. 11-02509, ECF No. 119. On April 5, 2013, the Court granted in part and denied in part the *High-Tech* plaintiffs' motion for class certification with leave to amend. No. 11-02509, ECF No. 382. The Court granted the *High-Tech* plaintiffs' supplemental motion for class certification on October 24, 2013. No. 11-02509, **[*8]** ECF No. 531. On November 13, 2013, the *High-Tech* defendants filed a Rule 23(f) petition before the Ninth Circuit, requesting permission to appeal this Court's October 24, 2013 class certification order. No. 13-80223 (9th Cir.), ECF No. 1. The Ninth Circuit denied the defendants' petition on January 14, 2014. No. 13-80223 (9th Cir.), ECF No. 18.

In the interim, three of the *High-Tech* defendants—Intuit, Lucasfilm, and Pixar—reached an early settlement with the plaintiffs. On September 21, 2013, the *High-Tech* plaintiffs filed a motion for preliminary approval of a proposed class action settlement as to defendants Intuit, Lucasfilm, and Pixar. No. 11-02509, ECF No. 501. On October 30, 2013, the Court preliminarily approved the proposed settlement with Intuit, Lucasfilm, and Pixar. No. 11-02509, ECF No. 540. The Court granted final approval as to that settlement on May 16, 2014. No. 11-02509, ECF No. 915. The Court entered a final judgment with regards to Lucasfilm, Pixar, and Intuit on June 9, 2014. No. 11-02509, ECF No. 936. At the request of Intuit, the Court entered an amended final judgment on June 20, 2014. No. 11-02509, ECF No. 947.

The remaining *High-Tech* defendants—Adobe, Apple, Google, and **[*9]** Intel—filed individual motions for summary judgment, and joint motions for summary judgment and to strike certain expert testimony on January 9, 2014. No. 11-02509, ECF Nos. 554 (Intel), 556 and 557 (joint motions), 560 (Adobe), 561 (Apple), 564 (Google). The Court denied the *High-Tech* defendants' individual motions for summary judgment on March 28, 2014. No. 11-02509, ECF No. 771. On April 4, 2014, the Court granted in part and denied in part the *High-Tech* defendants' motion to strike, and denied the defendants' joint motion for summary judgment. No. 11-02509, ECF No. 788. On May 22, 2014, the *High-Tech* plaintiffs filed a motion for preliminary approval of class action settlement as to the remaining defendants. No. 11-02509, ECF No. 920. On August 8, 2014, the Court denied the *High-Tech* plaintiffs' motion for preliminary approval, concluding that the proposed settlement did not fall "within the range of reasonableness." No. 11-02509, ECF No. 974 at 30. On September 4, 2014, the *High-Tech* defendants filed a petition for a writ of mandamus with the Ninth Circuit. No. 14-72745 (9th Cir.), ECF No. 1. On January 13, 2015, the *High-Tech* defendants filed correspondence with the Ninth Circuit **[*10]** referring to a new proposed settlement agreement. No. 14-72745 (9th Cir.), ECF No. 21. On January 30, 2015, the defendants filed an unopposed motion to dismiss the petition, which the Ninth Circuit granted on February 2, 2015. No. 14-72745 (9th Cir.), ECF Nos. 23, 24.

On January 15, 2015, the *High-Tech* plaintiffs filed a motion for preliminary approval of class action settlement as to the remaining defendants. No. 11-02509, ECF No. 1032. In this second proposed class action settlement, the parties had reached a settlement amount exceeding the previously rejected settlement by approximately $90.5 million. *Id.* at 1. Following a fairness hearing on March 2, 2015, the Court granted preliminary approval to the January 2015 settlement agreement on March 3, 2015. No. 11-02509, ECF Nos. 1051, 1054. A final approval hearing is scheduled for July 9, 2015.

2. Instant Lawsuit

Plaintiff here filed his class action complaint on October 14, 2014. The complaint asserts four causes of action under the following statutes: (1) Section 1 of the Sherman Act, *15 U.S.C. § 1*; (2) California's Cartwright Act, *Cal. Bus. & Prof. Code § 16720 et seq.*; (3) California's Unfair Competition Law ("UCL"), *Cal. Bus. & Prof. Code § 17200 et seq.*; and (4) *California Business & Professions Code § 16600 et seq.* ("*Section 16600*"). Compl. ¶¶ 49-80. Plaintiff seeks damages, **[*11]** pre- and post-judgment interest, attorney's fees and expenses, and injunctive relief. *Id.* at 14-15.

On October 22, 2014, the Court related this action to *High-Tech*. ECF No. 6. After initially answering the complaint on November 10, 2014, ECF No. 9, Oracle filed an amended answer on December 1, 2014, ECF No. 12.

On January 5, 2015, Oracle filed the instant Motion for Judgment on the Pleadings. ECF No. 17 ("Mot."). Oracle also filed a request for judicial notice in connection with its motion. ECF No. 18. Plaintiff opposed Oracle's motion on January 20, 2015. ECF No. 21 ("Opp."). Plaintiff also filed a request for judicial notice in connection with its opposition. ECF No. 22.[2] Oracle filed its reply on January 27, 2015. ECF No. 29 ("Reply").

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[2] The Court GRANTS the parties' unopposed requests for judicial notice. ECF Nos. 18, 22. The Court may take notice of facts not subject to reasonable dispute that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Fed. R. Evid. 201(b)*. Oracle asks the Court to take judicial notice of certain documents filed publicly in other proceedings. *See* *Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir. 2006)* (taking

II. LEGAL STANDARD

A. *Rule 12(c)*

"After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." *Fed. R. Civ. P. 12(c)*. "Judgment on the pleadings is properly granted when, accepting all factual allegations in the complaint as true, there is no issue of material fact in dispute, and the moving party is entitled to judgment as a matter of law." *Chavez v. United States, 683 F.3d 1102, 1108 (9th Cir. 2012)* (brackets and internal quotation marks omitted). Like a motion to dismiss under *Rule 12(b)(6)*, a motion under *Rule 12(c)* challenges the legal sufficiency of the claims asserted in the complaint. *See id.* Indeed, a *Rule 12(c)* motion is "functionally identical" to a *Rule 12(b)(6)* motion, and courts apply the "same standard." *Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1192 (9th Cir. 1989)* (explaining that the "principal difference" between *Rule 12(b)(6)* and *Rule 12(c)* "is the timing of filing"); *see also* *U.S. ex rel. Cafasso v. Gen. Dynamics C4 Sys., 637 F.3d 1047, 1054 n.4 (9th Cir. 2011)*.

Judgment on the pleadings should thus be entered when a complaint does not plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the plaintiff pleads factual content **[*13]** that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (internal quotation marks omitted). For purposes of ruling on a *Rule 12(c)* motion, the Court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008)*.

The Court, however, need not accept as true allegations contradicted by judicially noticeable facts, *see Shwarz v. United States, 234 F.3d 428, 435 (9th Cir. 2000)*, and it "may look beyond the plaintiff's complaint to matters of public record" without converting the *Rule 12(c)* motion into a motion for summary judgment, *Shaw v. Hahn, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995)*. Nor must the Court "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Fayer v. Vaughn, 649 F.3d 1061, 1064 (9th Cir. 2011)* (per curiam) (internal quotation marks omitted). Mere "conclusory allegations of law and unwarranted inferences are insufficient" to defeat a motion for judgment on the pleadings. *Adams v. Johnson, 355 F.3d 1179, 1183 (9th Cir. 2004)*.

B. Leave to Amend

If the Court determines that judgment on the pleadings is warranted, it must then decide whether to grant leave to amend. *See* *Harris v. Cnty. of Orange, 682 F.3d 1126, 1131, 1134-35 (9th Cir. 2012)* (affirming district **[*14]** court's dismissal under *Rule 12(c)* but reversing for failure to grant leave to amend). Under *Rule 15(a) of the Federal Rules of Civil Procedure*, leave to amend "shall be freely given when justice so requires," bearing in mind "the underlying purpose of Rule 15 to facilitate decisions on the merits, rather than on the pleadings or technicalities." *Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000)* (en banc) (alterations and internal quotation marks omitted). When granting judgment on the pleadings, "a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Id. at 1130* (internal quotation marks omitted). Accordingly, leave to amend generally shall be denied only if allowing amendment would unduly prejudice the opposing party, cause undue delay, or be futile, or if the moving party has acted in bad faith. *Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 532 (9th Cir. 2008)*.

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judicial notice of documents filed in other courts). Plaintiff asks **[*12]** the Court to take judicial notice of DOJ documents that are publicly available on government websites. *See* *Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998-99 (9th Cir. 2010)* (taking judicial notice of information on a publicly available government website).

III. DISCUSSION

Oracle offers three bases for the Court to enter judgment on the pleadings as to all of Plaintiff's antitrust claims: (1) Plaintiff's claims are barred by the applicable statutes of limitations; (2) Plaintiff has failed to plead injury-in-fact sufficient to establish Article III standing; and (3) Plaintiff fails to adequately allege an agreement between **[*15]** Oracle and Google. Mot. at 8-20. Oracle also contends that Plaintiff has failed to state a UCL claim because he is ineligible for restitution or disgorgement. *Id.* at 20-22. Lastly, Oracle argues that Plaintiff, as a former Oracle employee, lacks standing to seek injunctive and declaratory relief. *Id.* at 22-24.

As the Court concludes that Plaintiff's claims are time barred, the Court does not reach the remainder of Oracle's arguments, except for Oracle's Article III standing argument, which the Court addresses first. *See* *Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 93-95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)* (explaining that Article III jurisdiction must be established "as a threshold matter"); *see also* *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens, 529 U.S. 765, 771, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000)* ("We first address the jurisdictional question whether respondent Stevens has standing under Article III of the Constitution to maintain this suit.").

A. Article III Standing: Injury-in-Fact

A federal court must ask whether a plaintiff satisfies the "case or controversy" requirement of Article III of the U.S. Constitution. "One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue." *Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146, 185 L. Ed. 2d 264 (2013)* (internal quotation marks omitted). To establish Article III standing, a plaintiff must allege: injury-in-fact that is (1) concrete and particularized, as well as actual and imminent; (2) fairly traceable to the challenged action of the defendant; **[*16]** and (3) redressable by a favorable ruling. *See* *Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 149, 130 S. Ct. 2743, 177 L. Ed. 2d 461 (2010)*. "For Article III purposes, an antitrust plaintiff establishes injury-in-fact when he has suffered an injury which bears a causal connection to the alleged antitrust violation." *Gerlinger v. Amazon.com Inc., 526 F.3d 1253, 1255 (9th Cir. 2008)*. While Plaintiff bears the burden of establishing Article III injury-in-fact, *see* *Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*, at this stage he "need only show that the facts alleged, if proven, would confer standing," *Krottner v. Starbucks Corp., 628 F.3d 1139, 1141 (9th Cir. 2010)*.

Oracle contends that Plaintiff "has not pled any facts demonstrating that *he* actually suffered any concrete or particularized injury caused by the alleged Restricted Hiring Agreement." Mot. at 15. In particular, Oracle argues, Plaintiff "does not allege that he ever applied to work for Google, desired to work for Google, or was even qualified for a managerial-level position at Google." *Id.* Because Plaintiff "never alleges that *he actually* faced any obstacles in mobility or that *he* applied to Google and was not considered for a job because of the alleged agreement," Oracle says "Plaintiff's allegations of injury are thus only hypothetical and conjectural and he lacks standing to pursue his antitrust claims." *Id.* at 15-16.

The Court disagrees. Oracle fails to appreciate the gravamen of Plaintiff's alleged injury: that **[*17]** Oracle and Google engaged in a conspiracy "to fix and suppress *the compensation* of their employees," Plaintiff included, "by way of [the] Restricted Hiring Agreement." Compl. ¶ 2 (emphasis added); *see also id.* ¶ 31 ("Oracle entered into, implemented, and policed the Restricted Hiring Agreement with the knowledge of the overall conspiracy, and did so with the intent and effect of fixing the compensation of the employees of participating companies at artificially low levels."); *id.* ¶ 32 (alleging that Plaintiff "was harmed by the Restricted Hiring Agreement" through "elimination of competition and suppression of compensation and mobility"); *id.* ¶ 52 (claiming that "Defendant's conduct injured and damaged Plaintiff . . . by suppressing compensation to levels lower than the [employees] otherwise would have received in the absence of the Restrictive Hiring Agreements"). Plaintiff, who worked for and was paid by Oracle from December 2008 to June 2009, alleges that Oracle's anticompetitive conduct artificially depressed his compensation during that period. Plaintiff, therefore, has alleged a cognizable injury for purposes of Article III. *See* *High-Tech, 856 F. Supp. 2d at 1123 n.11* (explaining that "Plaintiffs meet the requirements **[*18]** for Article III standing" because "Plaintiffs allege that their salaries were artificially reduced as a result of Defendants' alleged anticompetitive conduct and that their injury can be redressed through the payment of damages should Plaintiffs establish liability").

As a result, the Court DENIES Oracle's Motion for Judgment on the Pleadings on grounds that Plaintiff has failed to allege an Article III injury-in-fact.

B. Statutes of Limitations

Oracle argues that Plaintiff's claims are all time barred by the applicable statutes of limitations. Mot. at 8-13; Reply at 2-7. For the reasons stated below, the Court agrees.

1. Four-Year Limitations Period

As a threshold matter, Plaintiff does not dispute that his claims under the Sherman Act, Cartwright Act, UCL, and Section 16600 are all subject to a four-year statute of limitations. *See* *15 U.S.C. § 15b* (Sherman Act); *Cal. Bus. & Prof. Code § 16750.1* (Cartwright Act); *Cal. Bus. & Prof. Code § 17208* (UCL); *Cal. Civ. Proc. Code § 343* (catch-all limitations statute applicable to *Section 16600*); *see also* *Ryan v. Microsoft Corp., No. 14-CV-04634-LHK, 2015 U.S. Dist. LEXIS 47753, 2015 WL 1738352, at *10-12 (N.D. Cal. Apr. 10, 2015)* (concluding that these four statutes are all subject to a four-year limitations period). Nor does Plaintiff dispute that the applicable statutes of limitations began to run in May 2007 (i.e., when Plaintiff alleges Oracle and Google entered into the Agreement); that the limitations **[*19]** period would have ended in May 2011 absent statutory tolling during the pendency of the DOJ investigation, *see* *15 U.S.C. § 16(i)*; or that, as a result, Plaintiff had until March 18, 2012, at the latest to file suit in this action. *See* Mot. at 8.[3]

Rather, in hopes of avoiding the time bar, Plaintiff argues that two doctrines apply to toll the statutes of limitations: (1) the "continuing violation" doctrine; and (2) fraudulent concealment. **[*20]** Opp. at 6-13. The Court addresses each in turn.

2. Continuing Violation Doctrine

Under the "continuing violation" doctrine, "each overt act that is part of the [antitrust] violation and that injures the plaintiff . . . starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times." *Klehr v. A.O. Smith Corp., 521 U.S. 179, 189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)* (internal quotation marks omitted); *see also* *Pace Indus. v. Three Phoenix Co., 813 F.2d 234, 237 (9th Cir. 1987)* ("A continuing violation is one in which the plaintiff's interests are repeatedly invaded and a cause of action arises each time the plaintiff is injured."). In the Ninth Circuit, an overt act restarts the statute of limitations in an antitrust action if it: (1) is "a new and independent act that is not merely a reaffirmation of a previous act"; and (2) "inflict[s] new and accumulating injury on the plaintiff." *Samsung Elecs. Co. v. Panasonic Corp., 747 F.3d 1199, 1202 (9th Cir. 2014)* (internal quotation marks omitted), *cert. denied*, *135 S. Ct. 1157, 190 L. Ed. 2d 912 (2015)*.

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[3] Federal ***antitrust law*** provides:

> Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under *section 15a* of this title, the running of the statute of limitations in respect to every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter.

15 U.S.C. § 16(i). Since the parties do not dispute that this provision extended the statute of limitations period to March 18, 2012, and because the outcome is the same whether the limitations period expired in May 2011 or March 2012, the Court assumes without deciding that the parties are correct.

At the outset, the Court notes that Plaintiff spends only two brief paragraphs in his complaint alleging a "continuing violation." Compl. ¶¶ 43-44. The Court notes further that these two paragraphs are virtually identical to the two paragraphs in the plaintiffs' complaint in *Ryan v. Microsoft* that the Court recently found "woefully lacking" in alleging a continuing **[*21]** violation. *See* 2015 U.S. Dist. LEXIS 47753, 2015 WL 1738352, at *13; *see also* No. 14-04634, ECF No. 1 ¶¶ 55-56 (virtually identical paragraphs in the *Ryan* complaint).

Similarly, the Court concludes here that the bald assertion that "[Oracle's] conspiracy was a continuing violation through which [Oracle] repeatedly invaded Plaintiff and Plaintiff Class' interests by adhering to, enforcing, and reaffirming the anticompetitive agreements described herein" is insufficient to show a continuing violation. Compl. ¶ 43. A review of the specific factual allegations in Plaintiff's complaint reveals no alleged wrongful communications or specific conduct during the limitations period. Other than Plaintiff's allegation that Oracle and Google entered into the Agreement in May 2007, the complaint is largely bereft of *any* dates or details with regards to Oracle's specific conduct. *See generally* Compl. There are no allegations of any new or independent actions taken by Oracle after October 14, 2010—i.e., within four years of the filing date of this complaint—that caused Plaintiff any new or accumulating injury. *See* Pace, 813 F.2d at 237. This is not entirely surprising given the complaint's conspicuous absence of specific factual allegations regarding Oracle's alleged conduct **[*22]** before, during, or after the limitations period, with the exception of the allegation that Oracle entered into the Agreement in May 2007.

In opposition, Plaintiff relies on his allegation that Oracle communicated "by phone and e-mail and through in-person meetings to further the conspiracy and the secrecy of the conspiracy." Opp. at 9 (quoting Compl. ¶ 44). The Court is not convinced. Again, Plaintiff offers no facts detailing when, where, or with whom these alleged phone calls, emails, and in-person meetings took place. Plaintiff also cites a number of cases describing what type of conduct has been found to be a continuing violation. *Id.* at 7-8 (citing Columbia Steel Casting Co. v. Portland Gen. Elec. Co., 111 F.3d 1427 (9th Cir. 1996); Hennegan v. Pacifico Creative Serv., Inc., 787 F.2d 1299 (9th Cir. 1986); Process Specialties, Inc. v. Sematech, Inc., No. CIV. S-00-414FCD PAN, 2001 U.S. Dist. LEXIS 26261, 2001 WL 36105562 (E.D. Cal. Nov. 8, 2001); Red Lion Med. Safety, Inc. v. Ohmeda, Inc., 63 F. Supp. 2d 1218 (E.D. Cal. 1999)). These cases are inapposite, however, because they do not change the reality that Plaintiff has simply failed to allege any facts indicating *when* the supposed continuing violations took place, let alone that they took place on or after October 14, 2010.

At bottom, Plaintiff must allege more than a continuing violation; he must also allege an overt act:

> A continuing violation is one in which the plaintiff's interests are repeatedly invaded and a cause of action arises each time the plaintiff **[*23]** is injured. *However, even when a plaintiff alleges a continuing violation, an overt act by the defendant is required* to restart the statute of limitations and the statute runs from the last overt act.

Pace, 813 F.2d at 237 (emphasis added). Plaintiff's bare allegation that his interests were "repeatedly invaded" is therefore insufficient as a matter of law. Compl. ¶ 43. Consequently, the Court finds that Plaintiff has failed to plead a continuing violation—namely, that Oracle engaged in a "new and independent act that is not merely a reaffirmation of a previous act," which "inflict[ed] new and accumulating injury" on Plaintiff. Samsung, 747 F.3d at 1202; *see also* Ryan, 2015 U.S. Dist. LEXIS 47753, 2015 WL 1738352, at *13-14 (finding nearly identical allegations insufficient to plead a continuing violation); In re Animation Workers Antitrust Litig., ___ F.3d ___, 2015 U.S. Dist. LEXIS 44922, 2015 WL 1522368, at *12 (N.D. Cal. Apr. 3, 2015) (holding that the plaintiffs had failed to plead a continuing violation because "Plaintiffs do not allege that any Defendant abided by, attempted to enforce, or otherwise 'reaffirmed' the anti-solicitation scheme or salary range setting on or after September 8, 2010, i.e., four years prior to the first-filed complaint in this consolidated action").

3. Fraudulent Concealment

"A statute of limitations may be tolled if the defendant fraudulently concealed the existence of a cause of action in such a **[*24]** way that the plaintiff, acting as a reasonable person, did not know of its existence." Hexcel Corp. v. Ineos Polymers, Inc., 681 F.3d 1055, 1060 (9th Cir. 2012). The plaintiff bears the burden of pleading and proving fraudulent concealment. *Id.;see also* Conmar v. Mitsui & Co. (U.S.A.), Inc., 858 F.2d 499, 502 (9th Cir. 1988). To plead fraudulent concealment, the plaintiff must allege that: (1) the defendant took affirmative acts to mislead the plaintiff; (2) the plaintiff did not have "actual or constructive knowledge of the facts giving rise to [his] claim" as a result of the defendant's affirmative acts; and (3) the plaintiff acted diligently in trying to uncover the facts giving rise to his claim. Hexcel, 681 F.3d at 1060. Moreover, allegations of fraudulent concealment must be pled with particularity. Conmar, 858 F.2d at 502.

To start, Plaintiff says he need not plead affirmative acts of concealment because Oracle had a "duty to disclose" its participation in the alleged anticompetitive conspiracy to Plaintiff. Opp. at 12. In the Ninth Circuit, "[p]assive concealment of information is not enough to toll the statute of limitations, unless the defendant had a fiduciary duty to disclose information to the plaintiff." Conmar, 858 F.2d at 505 (citation omitted). Plaintiff relies on a single case for the proposition that Oracle owed Plaintiff, and all of Oracle's employees, a fiduciary duty. Opp. at 12 (citing Harris v. Duty Free Shoppers Ltd. P'ship, 940 F.2d 1272, 1276 (9th Cir. 1991)). *Harris*, however, is inapposite. **[*25]** Indeed, the Ninth Circuit in *Harris* held that tour guides did *not* owe fiduciary duties to tourists under California law. Id. at 1275. Furthermore, as a general matter, the fact of an employer-employee relationship alone is insufficient to create a fiduciary relationship. *See, e.g.,* Salsgiver v. Am. Online, Inc., 32 F. App'x 894, 897 (9th Cir. 2002) (citing O'Dell v. Freightliner Corp., 10 Cal. App. 4th 645, 659, 12 Cal. Rptr. 2d 774 (1992)) ("[T]here is generally no fiduciary relationship between employee and employer."). Plaintiff offers no other argument or authority for the proposition that Oracle owes a fiduciary duty to Plaintiff, much less to all of Oracle's employees. As Plaintiff has provided no basis for the Court to conclude that Oracle owed Plaintiff a fiduciary duty, the Court concludes that Oracle had no obligation to affirmatively disclose its alleged illicit conduct.

Additionally, having reviewed Plaintiff's complaint, the Court finds that Plaintiff's allegations with respect to Oracle's alleged fraudulent concealment of Plaintiff's claims fail to pass muster under Rule 9(b). To satisfy the heightened standard under Rule 9(b), Plaintiff must allege "an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007) (internal quotation marks omitted). However, Plaintiff **[*26]** fails to allege sufficient facts showing the "who, what, where, when, and how" of Oracle's alleged fraudulent concealment. For instance, Plaintiff alleges that Oracle "provided pretextual, incomplete, or materially false and misleading explanations for hiring, recruiting, and compensation decisions made under the conspiracy." Compl. ¶ 46. Plaintiff does not allege when, where, or to whom Oracle allegedly provided these false and misleading explanations, or the content of these allegedly misleading explanations. This conclusory allegation devoid of factual content does not satisfy Rule 12(b)(6)'s pleading standard, much less Rule 9(b)'s heightened pleading standard. *See* Animation Workers, 2015 U.S. Dist. LEXIS 44922, 2015 WL 1522368, at *16 (finding a verbatim allegation insufficient to support a claim of fraudulent concealment under Rule 9(b)).

The only allegation with any detail—also, the only allegation differentiating this portion of Plaintiff's complaint from the virtually identical complaint the Court has already dismissed against Microsoft in *Ryan, see* No. 14-04634, ECF No. 1 ¶¶ 57-61—involves former Oracle CEO, Larry Ellison ("Ellison"), and current Oracle CEO, Safra Catz ("Catz"). According to Plaintiff, "during meetings concerning the acquisition of new employees," Ellison **[*27]** and Catz "personally ensured that the division of Oracle engaging in the employee acquisitions was not hiring employees from companies who were co-participants in the Restrictive Hiring Agreement." Compl. ¶ 46. Critically, however, Plaintiff makes no allegation as to when any of these supposed "meetings" took place. Nor is there any allegation regarding what was said at those meetings, let alone that what was said was in any way misleading to Plaintiff, as is required to plead fraudulent concealment. *See* Conmar, 858 F.2d at 505. If anything, the complaint suggests the opposite—to wit, that Ellison and Catz told the truth about the alleged conspiracy by "personally ensur[ing]" that Oracle "was *not* hiring employees from companies" that were party to the Agreement. Compl. ¶ 46 (emphasis added).

Even if Plaintiff's allegation with respect to Ellison and Catz was sufficient under Rule 9(b), which it isn't, Plaintiff has still failed to plead an "affirmative act" of concealment. Indeed, the Court does not even understand what Plaintiff is alleging when he says in the very next sentence, "In order to keep the Restrictive Hiring Agreement secretive, Oracle's officers refrained from delegating such tasks." Compl. ¶ 46. To what "tasks" **[*28]** is Plaintiff referring? Who are "Oracle's officers"? As the Ninth Circuit explained in *Conmar*, the fact that a defendant's acts are "by nature self-concealing" is insufficient to show that the defendant has affirmatively misled the plaintiff as to the existence of the plaintiff's claim. *See* *858 F.2d at 505*; *see also* Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law****: An Analysis of Antitrust Principles and Their Application* ¶ 320e (2014) ("Of course, regarding every secret conspiracy as sufficiently self-concealing to toll the statute would often force the courts to deal with stale, if not ancient, evidence."). The same is true here.

In the absence of any factual allegations regarding Oracle's alleged wrongful conduct in affirmatively concealing the existence of Plaintiff's claims, the Court concludes that Plaintiff has failed to adequately allege an essential element of fraudulent concealment. *See* *Hexcel, 681 F.3d at 1060*. As such, the Court finds that Plaintiff has failed to plead fraudulent concealment.

4. Conclusion

In sum, the Court finds that all of Plaintiff's antitrust claims are time barred, and that Plaintiff has failed to adequately allege a plausible tolling theory. Accordingly, the Court GRANTS Oracle's Motion **[*29]** for Judgment on the Pleadings. The Court does so with leave to amend because the Court concludes that amendment would not necessarily be futile, as Plaintiff may be able to allege sufficient facts to support his tolling theories. *See* *Lopez, 203 F.3d at 1127* (holding that "a district court should grant leave to amend . . . unless it determines that the pleading could not possibly be cured by the allegation of other facts" (internal quotation marks omitted)).

IV. CONCLUSION

For the foregoing reasons, the Court rules as follows:

- The Court hereby DENIES Oracle's Motion for Judgment on the Pleadings on grounds that Plaintiff has failed to allege an Article III injury-in-fact; and
- The Court hereby GRANTS Oracle's Motion for Judgment on the Pleadings with leave to amend on grounds that Plaintiff's claims are time barred by the applicable statutes of limitations.

Should Plaintiff elect to file an amended complaint curing the deficiencies identified herein, Plaintiff shall do so within thirty (30) days of the date of this Order. Failure to meet the thirty-day deadline to file an amended complaint or failure to cure the deficiencies identified in this Order will result in a dismissal with prejudice of Plaintiff's claims. **[*30]** Plaintiff may not add new causes of action or parties without leave of the Court or stipulation of the parties pursuant to Rule 15 of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

Dated: April 22, 2015

/s/ Lucy H. Koh

LUCY H. KOH

United States District Judge

Superior Prod. P'ship v. Gordon Auto Body Parts Co.

United States Court of Appeals for the Sixth Circuit

June 10, 2014, Argued; April 22, 2015, Decided; April 22, 2015, Filed

File Name: 15a0075p.06

No. 13-4466

Reporter

784 F.3d 311 *; 2015 U.S. App. LEXIS 6652 **; 2015 FED App. 0075P (6th Cir.) ***; 2015-1 Trade Cas. (CCH) P79,142

SUPERIOR PRODUCTION PARTNERSHIP, dba PBSI, Plaintiff-Appellant, v. GORDON AUTO BODY PARTS CO., LTD.; GORDON AUTO BODY PARTS USA CORP., Defendants-Appellees.

Prior History: [1]** Appeal from the United States District Court for the Southern District of Ohio at Columbus. No. 2:06-cv-00916—Edmund A. Sargus, Chief District Judge.

Superior Prod. P'ship v. Gordon Auto Body Parts Co., Ltd., 2010 U.S. Dist. LEXIS 96491 (S.D. Ohio, Aug. 25, 2010)

Core Terms

prices, district court, predatory, hoods, costs, discovery, recoupment, variable, predation, summary judgment, replacement, truck, documents, monopolization, manufacturers, losses, below-cost, quotation, marks, competitor, conspiracy, appropriate measure, expert testimony, magistrate judge, motion to compel, economic sense, total cost, antitrust, markets, relevant market

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

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

HN1[] **Sherman Act, Claims**

Sections 1 and *2* of the Sherman Act, *15 U.S.C.S. §§ 1*, *2*, address concerted and independent action, respectively. Because Congress perceived different risks from multilateral and unilateral conduct, it set different standards for liability under each section.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

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

HN2[] Monopolies & Monopolization, Actual Monopolization

Section 2 of the Sherman Act prohibits three types of actions: monopolization, attempted monopolization, and a conspiracy to monopolize. 15 U.S.C.S. § 2. A monopolization claim has two elements: (1) the possession of monopoly power in a relevant market; and (2) the willful acquisition, maintenance, or use of that power by anti-competitive or exclusionary means as opposed to growth or development resulting from a superior product, business acumen, or historic accident.

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

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

HN3[] Attempts to Monopolize, Elements

An attempted monopolization under § 2 of the Sherman Act occurs when a competitor, with a dangerous probability of success, engages in anti-competitive practices the specific design of which are, to build a monopoly or exclude or destroy competition.

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

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

HN4[] Conspiracy to Monopolize, Elements

Conspiracy to monopolize entails proof of concerted activity, but, like the other two § 2 of the Sherman Act claims, requires an initial identification of the relevant markets.

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

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

HN5[] Actual Monopolization, Claims

For a completed monopolization claim to succeed, the plaintiff must prove a general intent on the part of the monopolist to exclude; while by contrast, to prevail on a mere attempt claim, the plaintiff must prove a specific intent to destroy competition or build a monopoly. But since no monopolist monopolizes unconscious of what he is doing improper exclusion is always deliberately intended.

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

HN6[] Regulated Practices, Market Definition

The definition of a market for antitrust purposes has two components: the relevant product market and the relevant geographic market.

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

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

HN7[] **Scope, Monopolization Offenses**

The United States Supreme Court has operationalized *§ 2* of the Sherman Act in the context of predatory pricing claims to focus on the economic essence of predatory pricing: that a business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market. The Supreme Court has established two prerequisites to liability. The first of these requires that the defendant's prices be shown to be below an appropriate measure of its costs. The Sixth Circuit applies a burden-shifting framework to determine the appropriate measure of a rival's cost. Specifically, if the defendant's prices were below average total cost but above average variable cost, the plaintiff bears the burden of showing defendant's pricing was predatory. If, however, the plaintiff proves that the defendant's prices were below average variable cost, the plaintiff has established a prima facie case of predatory pricing and the burden shifts to the defendant to prove that the prices were justified without regard to any anticipated destructive effect they might have on competitors. Notably, the court has also required that predatory prices be at least below average total cost.

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

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

HN8[] **Scope, Monopolization Offenses**

The United States Supreme Court's second prerequisite to liability for predatory pricing is a demonstration that the competitor had a reasonable prospect, under the Robinson-Patman Act, or, under *§ 2* of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices. This recoupment element requires at least two showings. Recoupment first implies that the below-cost pricing must be capable of producing the intended effects on the firm's rivals, whether driving them from the market, or causing them to raise their prices to supra-competitive levels within a disciplined oligopoly. Additionally, even if the target is forced to exit or is disciplined, determining whether recoupment of predatory losses is likely requires an estimate of the cost of the alleged predation and a close analysis of both the scheme and the structure and conditions of the relevant market. Most notable among these structures and conditions of the market are barriers to entry that protect the monopolistic profits of a successful predator.

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

HN9[] **Regulated Practices, Price Fixing & Restraints of Trade**

The text of *§ 1* of the Sherman Act declares illegal every contract, combination or conspiracy, in restraint of trade. *15 U.S.C.S. § 1*. Where the plaintiff relies on circumstantial evidence of illicit collusion, that evidence must tend to exclude the possibility that the alleged conspirators acted independently, which assumes that the inferences of conspiracy from that evidence are plausible as a matter of economic theory. In other words, courts are more likely to infer an illegal agreement as the economic plausibility of anticompetitive conduct grows. Broader inferences of an agreement are permitted, and the tends to exclude standard is more easily satisfied, when the conspiracy is economically sensible for the alleged conspirators to undertake and the challenged activities could not reasonably be perceived as procompetitive. More evidence is required the less plausible the charge of collusive conduct. Additionally, the illegal conspiracy must produce antitrust injury, namely, an injury to competition itself.

Civil Procedure > ... > Summary Judgment > Opposing Materials > Motions for Additional Discovery

HN10[] **Opposing Materials, Motions for Additional Discovery**

A party that has not had the opportunity to obtain evidence in support of its opposition to a motion for summary judgment should not have that inability held against it.

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

Civil Procedure > Discovery & Disclosure > Discovery

HN11[] **Standards of Review, Abuse of Discretion**

The appellate court reviews a trial court ruling limiting or denying discovery for an abuse of discretion.

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

HN12[] **Standards of Review, Abuse of Discretion**

An abuse of discretion occurs if the district court relies on clearly erroneous findings of fact, applies the wrong legal standard, misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment.

Civil Procedure > Discovery & Disclosure > Discovery > Relevance of Discoverable Information

HN13[] **Discovery, Relevance of Discoverable Information**

The parties may demand any nonprivileged material that is relevant to any party's claim or defense, so long as that material appears reasonably calculated to lead to the discovery of admissible evidence. *Fed. R. Civ. P. 26(b)(1)*. But the trial court may limit discovery where the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues. *Rule 26(b)(2)(C)(iii)*. In sum, although a plaintiff should not be denied access to information necessary to establish her claim, neither may a plaintiff be permitted to go fishing and a trial court retains discretion to determine that a discovery request is too broad and oppressive.

Civil Procedure > Judicial Officers > Magistrates > Objections

Civil Procedure > Judicial Officers > Magistrates > Waiver of Appeals

HN14[] **Magistrates, Objections**

On a non-dispositive issue, a party must object to a magistrate's order within 14 days of receiving a copy of the order. *Fed. R. Civ. P. 72(a)*. Failure to do so risks losing the right to appeal the underlying issue to the court.

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN15[] **Judgments, Relief From Judgments**

It would be inappropriate to permit a party to sidestep an order merely by filing a similar motion and forcing the district court to respond anew.

Civil Procedure > Judicial Officers > Magistrates > Objections

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

Civil Procedure > Judicial Officers > Magistrates > Waiver of Appeals

HN16[] **Magistrates, Objections**

Failure to object is not a jurisdictional bar on appellate review, so the court may excuse the default in the interest of justice.

Civil Procedure > Discovery & Disclosure > Discovery > Undue Burdens in Discovery

HN17[] **Discovery, Undue Burdens in Discovery**

Parties may need some focused discovery, which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery. *Fed. R. Civ. P. 26(b)(2)* advisory committee's notes.

Civil Procedure > ... > Discovery > Methods of Discovery > Inspection & Production Requests

HN18[] **Methods of Discovery, Inspection & Production Requests**

Fed. R. Civ. P. 34(a) permits sampling of documents or electronically stored information.

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

Evidence > Admissibility > Expert Witnesses

HN19[] **Standards of Review, Abuse of Discretion**

The appellate court reviews the district court's decision to admit expert testimony, including its decisions about how to determine reliability and its ultimate conclusion, for abuse of discretion.

Evidence > Admissibility > Expert Witnesses

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN20[] **Admissibility, Expert Witnesses**

Under *Fed. R. Evid. 702*, a proposed expert's opinion is admissible, at the discretion of the trial court, if the opinion satisfies three requirements. First, the witness must be qualified by knowledge, skill, experience, training, or education. Second, the testimony must be relevant, meaning that it will assist the trier of fact to understand the evidence or to determine a fact in issue. Third, the testimony must be reliable.

Evidence > Admissibility > Expert Witnesses

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN21[] Admissibility, Expert Witnesses

The *Fed. R. Evid. 702* inquiry is a flexible one and its focus must be solely on principles and methodology, not on the conclusions they generate. Similarly, *Rule 702* directs courts to focus on the reliability of expert testimony, rather than the credibility and accuracy of that testimony.

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

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

HN22[] Scope, Monopolization Offenses

A firm only acts as a "predator" to the extent that it sells at prices below an appropriate measure of cost and stands to recoup its losses through later supracompetitive profits.

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

Evidence > Admissibility > Expert Witnesses

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

HN23[] Scope, Monopolization Offenses

Admitting an expert opinion on predation relying on either a disturbing proximity test or a no economic sense test is flatly contrary to law. A plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs. While the appropriate measure of cost has some flexibility (as, say, between average variable and average total cost), this flexibility extends only to costs directly incurred, not all conceivable opportunity costs.

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

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

HN24[] Standards of Review, De Novo Review

The appellate court reviews a grant of summary judgment de novo.

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

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

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

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

HN25[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is appropriate where the evidence on record shows no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*, *(c)*. The moving party must first demonstrate to the court that an essential element of the nonmoving party's case is absent; upon that showing, the non-moving party must then present sufficient evidence to demonstrate that there is a factual controversy as to that element, or at least explain why such evidence is not available. The court grants all reasonable inferences in favor of the non-moving party. But the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient to defeat summary judgment.

Counsel: ARGUED: James Allison Wilson, Jr., VORYS, SATER, SEYMOUR & PEASE LLP, Columbus, Ohio, for Appellant.

J. Scott Ballenger, LATHAM & WATKINS LLP, Washington, D.C., for Appellees.

ON BRIEF: James Allison Wilson, Jr., Kenneth J. Rubin, VORYS, SATER, SEYMOUR & PEASE LLP, Columbus, Ohio, Amanda M. Roe, VORYS, SATER, SEYMOUR & PEASE LLP, Cleveland, Ohio, for Appellant.

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Judges: Before: MERRITT, GIBBONS, and DONALD, Circuit Judges.

Opinion by: JULIA SMITH GIBBONS

Opinion

[*315] [*2]** JULIA SMITH GIBBONS, Circuit Judge. Gordon Auto Body Parts ("Gordon"), a Taiwanese company, was one of several early entrants into the United States market for replacement truck hoods. For a while, it faced competition solely from a handful of other Taiwanese manufacturers, at least some of whom participated in joint ventures with Gordon. Superior Production **[**2]** Partnership (trade name "PBSI") eventually entered the market for certain replacement hoods but found that it could not match the prices of Gordon and the Taiwanese firms. Believing that Gordon and the other firms were conspiring to drive it out of business with predatory prices, PBSI brought antitrust claims against Gordon.

The district court granted Gordon's motion for summary judgment after ruling on several discovery disputes. PBSI appeals both the resolution of the discovery disputes and the grant of summary judgment. Because PBSI has failed to make any showing that Gordon's prices were below an appropriate measure of cost, we affirm.

I.

Gordon and a handful of other Taiwanese manufacturers produce an array of replacement parts for automobiles that have been in collisions. Before the mid-2000s, they were the only producers of replacement hoods for certain models of trucks in the American market. Gordon and at least two of the other Taiwanese manufacturers had formal agreements or joint ventures related to shared investments in plant equipment and production of parts.

PBSI started making replacement bumpers as early as the 1980s. In the early 2000s, its management decided to expand **[**3]** into the market for replacement hoods, eventually beginning production on its first hood in 2006. The company soon began manufacturing replacement hoods for four different trucks. Sometime before or shortly after PBSI's entry into these markets, Gordon and other Taiwanese manufacturers reduced their prices on the same hoods. Though PBSI had planned to expand into production of other replacement parts, it found the **[***3]** price competition in these first four markets sufficiently discouraging to nix those plans. PBSI's management now claims that it may be forced to exit the replacement hood market altogether.

[*316] Believing its competitors' price changes to be illegal, PBSI filed a suit in federal district court with several antitrust claims, including violations of *Sections 1* and *2* of the Sherman Act and *Section 13(a)* of the Clayton Act as amended by the Robinson-Patman Act. The core allegations of the complaint described a predatory pricing scheme among Gordon and other Taiwanese manufacturers to force PBSI to cease production of truck hoods. The complaint defined the relevant markets as those for the four replacement truck hood models in the United States.

After discovery commenced, PBSI served requests for production **[**4]** on Gordon. Of particular relevance here, PBSI sought (i) "[a]ll documents and communications relating to the cost of production and manufacture of" the four types of hoods for several years in each market and (ii) "[a]ll documents which evidence, relate to, or refer to communications between or among Gordon" and other Taiwanese manufacturers or "any agreement regarding pricing, sharing or use of tooling or refraining from competition" in the United States or elsewhere. Gordon responded to the cost documentation request with what were apparently summaries of its manufacturing costs and contracts with suppliers; PBSI rejected this production as inadequate to determine Gordon's cost-calculation methods and verify its actual costs incurred. PBSI therefore moved to compel production of all cost documentation—including invoices and accounts payable records—underlying the summaries. Gordon objected that this scale of production would be unduly burdensome.

Gordon did produce tooling[1] and production agreements among the Taiwanese firms covering two of the four truck hoods but objected to the requests for agreements covering other parts as irrelevant. Gordon claimed that any such agreements did not concern **[**5]** the "relevant markets." Gordon also insisted that the remaining agreements "only involve[d] the equal sharing of the cost to produce the manufacturing tool/die for [other parts], and do not involve pricing of the part[s]." PBSI moved to compel production of these agreements as well.

[*4]** The magistrate judge granted PBSI's motion in part. As to cost documentation, the judge agreed that PBSI was "entitled to do some comparison of the documents from which the summaries ha[d] been drawn . . . to identify the frequency with which the summaries do not reflect information correctly[,]" but he also expressed concern at the burden of producing "every single piece of paper generated by Gordon over the relevant time period which relates to the costs of the products at issue." Faced with significant uncertainty about the relative merits of these claims, the judge settled on an "auditing" procedure by which the parties would agree on a subset of the underlying cost data necessary to "allow [PBSI] to verify or dispute the accuracy of the summary information[.]" If the "results . . . reveal[ed] substantial discrepancies between the summary information **[**6]** and the backup documents," the judge would be willing to compel further production. As to the agreements among the Taiwanese competitors, the magistrate essentially agreed with Gordon that any agreements relating to joint tooling or die production were irrelevant to predatory pricing of the truck hoods, but the judge admitted that he "c[ould not] tell" whether any parts "production agreements" outside of tooling arrangements, namely, "pricing agreements and [other] agreements which might limit competition," had been turned over. The **[*317]** magistrate "assume[d] either that any such agreements [had] already been produced, or that they do not exist."

With respect to the cost data, there is no indication in the record that PBSI objected to this order or asked for reconsideration by the district court until approximately 18 months later when it filed a second, separate motion to

[1] "Tooling" (or "tools and dies") refers to metal dies used to manufacture metal goods.

compel. In that motion, PBSI reasserted its position that Gordon should produce "all [b]ackup [c]ost [d]ocumentation." By this time, Gordon had produced cost data for five fiscal quarters under an agreement with PBSI negotiated pursuant to the magistrate judge's initial decision. When the magistrate judge denied this second motion to compel, PBSI filed an **[**7]** objection with the district court. The district court construed the second motion to compel as an attack on the conclusion of the magistrate's order denying in part the *first* motion to compel, found the "auditing procedure" in the magistrate's first order to be a "reasonable compromise between [the parties'] competing interests," and affirmed denial of the second motion to compel.

[*5]** With respect to the competitor agreements, PBSI filed a motion to "Compel[] Compliance with, or for Clarification of," the magistrate's order on the initial motion to compel. PBSI specifically sought clarification that Gordon should produce any competitor agreements relating to production of parts other than the four truck hoods, as evidence of a "proclivity" for collusion. The magistrate admitted that the previous order "did not address directly the relevance of production agreements for other parts." But he nonetheless refused to compel production of any agreements for other parts. The judge thought it "extremely unlikely that PBSI can make a convincing argument that such evidence is admissible under either *Fed. R. Evid. 403* or *406*, so that the request is not reasonably likely to lead to the discovery of relevant evidence **[**8]** based" on PBSI's "proclivity" theory. PBSI filed a timely objection with the district court, but the district court affirmed the decision for essentially the same reasons articulated by the magistrate.

PBSI and Gordon also submitted expert reports from economists Henry McFarland and Robert Hall, respectively. Both experts submitted second reports addressing each other's initial findings. We explain these reports in more detail below. Each party moved to exclude the expert testimony of the other. The district court denied PBSI's motion to exclude Hall's reports, but granted in part Gordon's motion to exclude McFarland's reports. The court specifically excluded McFarland's opinions on "predatory intent" and recoupment, the latter of which, in the court's view, was intertwined with McFarland's comparison of prices and costs.

Gordon then moved for summary judgment on all antitrust claims, claiming there was no genuine dispute of material fact on either the issue of below-cost pricing or recoupment of losses. In the same opinion in which it resolved the motions to exclude expert testimony, the district court granted Gordon summary judgment. The court stated that its conclusion rested on a **[**9]** lack of evidence that Gordon could recoup its costs and that it would "not analyze and resolve whether PBSI presents evidence . . . [of] below-cost pricing[.]" However, as with the motions to exclude, the district court essentially subsumed its analysis of below-cost pricing into its examination of recoupment.

PBSI timely appealed the grant of summary judgment as well as the district court's rulings on discovery and the expert reports.

[*6] [*318] II.**

We begin with the framework of ***antitrust law***. ***HN1***[] *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1-2*, address "concerted" and "independent" action, respectively. *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-68, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*. Because Congress perceived different risks from multilateral and unilateral conduct, it set different standards for liability under each section. *Id. at 768-69*.

A.

The law on predatory pricing claims under *§ 2* is significantly clearer, so we begin there.[2] ***HN2***[] *Section 2* prohibits three types of actions: monopolization, attempted monopolization, and a conspiracy to monopolize. *See 15*

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[2] For the purposes of this case, the analysis of PBSI's *§ 2* claims extends to its claims under the Robinson-Patman Act, *15 U.S.C. § 13(a)—(b)*. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 219, 221-22, 113 S. Ct. 2578,*

U.S.C. § 2. A monopolization claim has two elements: "(1) the possession of monopoly power in a relevant market; and (2) the willful acquisition, maintenance, or use of that power by anti-competitive or exclusionary means as opposed to 'growth or development resulting from a superior **[**10]** product, business acumen, or historic accident.'" Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768, 782 (6th Cir. 2002) (quoting Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 595-96, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)). ***HN3***[] "An attempted monopolization [under § 2] occurs when a competitor, with a dangerous probability of success, engages in anti-competitive practices the specific design of which are, to build a monopoly or exclude or destroy competition." Id. at 782 (alteration in original) (quoting Smith v. N. Mich. Hosps., Inc., 703 F.2d 942, 954 (6th Cir. 1983)). ***HN4***[] Conspiracy to monopolize entails "proof of concerted activity," but, like the other two § 2 claims, requires an initial identification of the relevant markets.[3] Potters Med. Ctr. v. City Hosp. Ass'n, 800 F.2d 568, 574 (6th Cir. 1986). Finally, ***HN5***[] "for a completed monopolization claim to succeed, the plaintiff must prove a general intent on the part of the monopolist to exclude; while by contrast, to prevail on a mere attempt claim, the plaintiff must prove a specific intent to destroy competition or build a monopoly." Conwood Co., 290 F.3d at 782 (internal quotation marks omitted). But since "'no monopolist **[***7]** monopolizes unconscious of what he is doing . . . [i]mproper exclusion . . . is always deliberately intended.'" *Id.* (alteration in original) (quoting Aspen Skiing Co., 472 U.S. at 602-03).

Helpfully, ***HN7***[] the Supreme Court has operationalized § 2 in this context to focus on the economic "essence" of predatory pricing: that "[a] business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market." Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993). The Court established two prerequisites to liability. *See* id. at 222-24. The first of these requires that the defendant's **[*319]** prices be shown to be "below an appropriate measure of [its] costs." Id. at 222. This circuit applies a burden-shifting framework to determine the "appropriate measure of a rival's cost." Spirit Airlines, Inc. v. Nw. Airlines, Inc., 431 F.3d 917, 938 (6th Cir. 2005). Specifically:

> If the defendant's prices were below average total cost but above average variable cost, the plaintiff bears the burden of showing defendant's pricing was predatory. If, however, the plaintiff proves that the defendant's prices were below average variable cost, the plaintiff has established a *prima facie* case of predatory pricing and the burden shifts to the defendant to prove that the prices were justified without regard to any anticipated destructive effect they might have on competitors.

Id. (internal quotation marks **[**12]** omitted). Notably, this court has also required that predatory prices be at least below average total cost. Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 729 F.2d 1050, 1055-56 (6th Cir. 1984).

HN8[] The Supreme Court's second prerequisite to liability is "a demonstration that the competitor had a reasonable prospect, [under the Robinson-Patman Act], or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices." Brooke Group Ltd., 509 U.S. at 224. This recoupment element requires at least two showings. Recoupment first implies that the "below-cost pricing must be capable . . . of producing the intended effects on the firm's rivals, whether driving them from the market, or . . . causing them to raise their prices to supracompetitive levels within a disciplined oligopoly." Id. at 225. Additionally, even if the target is forced to exit or is disciplined, "[d]etermining whether recoupment of predatory losses is likely requires an estimate of the cost of the alleged predation and a close analysis of both the scheme . . . and the structure and conditions of the relevant **[***8]** market." Id. at 226. Most notable among these "structure[s] and conditions" of the market are barriers to entry that protect the monopolistic profits of a successful predator. *See* Spirit Airlines, Inc., 431 F.3d at 946.

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125 L. Ed. 2d 168 (1993); Spirit Airlines, Inc. v. Nw. Airlines, Inc., 431 F.3d 917, 938 (6th Cir. 2005) (citing Schwartz v. Sun Co., 276 F.3d 900, 903-04 (6th Cir. 2002)).

[3] ***HN6***[] The definition of a market for antitrust purposes has two components: "the relevant **[**11]** product market and the relevant geographic market." E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 441 (4th Cir. 2011).

B.

HN9[] The text of *§ 1* of the Sherman Act declares illegal "[e]very contract, **[**13]** combination . . . or conspiracy, in restraint of trade[.]" *15 U.S.C. § 1*. Where, as here, the plaintiff relies on circumstantial evidence of illicit collusion, that evidence must "tend[] to exclude the possibility that the alleged conspirators acted independently"—which assumes that the inferences of conspiracy from that evidence are plausible as a matter of economic theory. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 593-94, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (internal quotation marks omitted). In other words, courts are more likely to infer an illegal agreement as the economic plausibility of anticompetitive conduct grows. *See In re Publ'n Paper Antitrust Litig., 690 F.3d 51, 62-63 (2d Cir. 2012)* ("[B]roader inferences [of an agreement] are permitted, and the 'tends to exclude' standard is more easily satisfied, when the conspiracy is economically sensible for the alleged conspirators to undertake and the challenged activities could not reasonably be perceived as procompetitive.") (internal quotation marks omitted); *In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 661 (7th Cir. 2002)* (Posner, J.) ("More evidence is required the less plausible the charge of collusive conduct."). Additionally, the illegal conspiracy must produce antitrust injury, namely, an injury to competition itself. **[*320]** *In re Se. Milk Antitrust Litig., 739 F.3d 262, 284 (6th Cir. 2014)*.

Courts have rarely addressed the application of *§ 1* to the scenario before us. *Matsushita*, undoubtedly the leading case, declared single-firm **[**14]** predatory pricing generally implausible and a *conspiracy* to charge predatory prices even more so. *475 U.S. at 589-91*. But *Matsushita* did not make it entirely clear if *§ 1* liability required a showing of prices below some "appropriate" level of cost, as in *Brooke Group. See Matsushita, 475 U.S. at 584 n.8* (noting that, for that particular case, the Court would view the threshold as either "(i) pricing below the level necessary to sell [plaintiff's] products, or (ii) pricing below some appropriate measure of cost" without deciding if those tests applied to future cases). Nor did *Matsushita* expressly lay out a recoupment requirement.

[*9]** Nonetheless, we think it best to infer these same elements in a *§ 1* predatory pricing claim. *Matsushita* clearly considered both below-cost pricing and the likelihood of recoupment to impact, if not fully determine, the plausibility of a predatory pricing conspiracy. *See id. at 590-91*. And whether predation and recoupment are merely considerations that inform the plausibility of inferring an agreement, as PBSI suggests, or are formally independent requirements beyond a *§ 1* agreement and antitrust injury, as Gordon argues, is a technicality we need not address here. Either way, a plaintiff must grapple with these concepts in **[**15]** proving its case under *§ 1*. *See R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!, 462 F.3d 690, 695-96 (7th Cir. 2006)* (Easterbrook, J.).

As explained below, neither PBSI's *§ 1* claim, *§ 2* claim, nor its Robinson-Patman Act claim can survive summary judgment on the issue of below-cost pricing. We therefore analyze each assignment of error solely for its illumination of the relationship between Gordon's prices for the hoods and its costs of production.

III.

We turn first to the district court's discovery orders, as any significant errors here would offer a clear reason to reverse summary judgment. *See, e.g., Tenn. Valley Auth. v. United States, 60 Fed. Cl. 665, 675-76 (Fed. Cl. 2004)* (*HN10*[] "A party that has not had the opportunity to obtain evidence in support of its opposition to a motion for summary judgment should not have that inability held against it."). *HN11*[] We review a trial court ruling limiting or denying discovery for an abuse of discretion. *Robertson v. Lucas, 753 F.3d 606, 623 (6th Cir. 2014)*; *see also Louzon v. Ford Motor Co., 718 F.3d 556, 560 (6th Cir. 2013)* (reviewing denial of a motion to compel for abuse of discretion). *HN12*[] "An abuse of discretion occurs if the district court relies on clearly erroneous findings of fact, applies the wrong legal standard, misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment." *Louzon, 718 F.3d at 560* (internal quotation marks omitted).

HN13[] The parties may demand "any nonprivileged material that is relevant to **[**16]** any party's claim or defense," so long as that material "appears reasonably calculated to lead to the discovery of admissible evidence."

Fed. R. Civ. P. 26(b)(1). But the trial court may limit discovery where "the burden or expense of the proposed discovery outweighs its likely benefit, considering the **[***10]** needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." *Fed. R. Civ. P. 26(b)(2)(C)(iii)*. In sum, "[a]lthough a plaintiff should not be denied access to **[*321]** information necessary to establish her claim, neither may a plaintiff be permitted to 'go fishing' and a trial court retains discretion to determine that a discovery request is too broad and oppressive." *Surles ex rel. Johnson v. Greyhound Lines, Inc., 474 F.3d 288, 305 (6th Cir. 2007)* (internal quotation marks omitted).

A.

PBSI argues that the district court should have compelled production "of all documents showing Gordon's costs to produce the four hoods at issue, including the cost of materials, labor, and administrative overhead." Gordon does not dispute the relevance of this cost data; it responds instead that PBSI waived this argument below and that the district court reasonably exercised its discretion by requiring limited production of cost documents. **[**17]**

We agree with Gordon that PBSI waived its right to appeal this issue for failure to object to the magistrate judge's order in a timely fashion. ***HN14***[] On a non-dispositive issue, a party must object to a magistrate's order within 14 days of receiving a copy of the order. *Fed. R. Civ. P. 72(a)*. Failure to do so risks losing the right to appeal the underlying issue to this court. *Stemler v. City of Florence, 126 F.3d 856, 866 n.9 (6th Cir. 1997)*.

Here, the magistrate judge entered an order in December 2008 granting in part PBSI's motion to compel. That order quite clearly set up a scheme for initially limited production of cost documentation based on the reasonable compromises of both parties, but PBSI did not raise this issue again until a year and a half later when it moved to compel production of the same documents. PBSI's later motion might have been permissible had it "alleged failure to comply with the prior order of the Court," or had it been based on materials reviewed as a result of Gordon's compliance with the first order, but that is not the tack it took. Instead—and as the magistrate judge and district court recognized—the second motion to compel effectively sought full reconsideration of the initial order. In the words of its own motion, PBSI argued that "[t]he information **[**18]** provided by Gordon does not allow PBSI [to] *fully* evaluate *every* element of Gordon's costs over the relevant time period. . . . PBSI must be allowed to look at the *entire* ***[***11]*** *period* of time for which Gordon's pricing was extraordinarily low." This is far beyond the limits of the magistrate judge's original decision.

PBSI did timely object to the denial of its second motion to compel. But ***HN15***[] it would be inappropriate to permit PBSI to sidestep the 2008 order merely by filing a similar motion and forcing the district court to respond anew. *See Daley v. Marriott Int'l, Inc., 415 F.3d 889, 892-93, 893 n.9 (8th Cir. 2005)* (denying appellate review where plaintiff failed to object to a magistrate's ruling in time but later filed a motion to reconsider); *Key Energy Res., Inc. v. Merrill (In re Key Energy Res., Inc.), 230 F.3d 1197, 1200-01, 1201 n.3 (10th Cir. 2000)* (finding waiver even where the district court reached the merits of the magistrate judge's ruling on a motion to reconsider filed after the window for objecting).

HN16[] Failure to object is not a jurisdictional bar on appellate review, however, so we may "excuse the default in the interest of justice[.]" *Alspaugh v. McConnell, 643 F.3d 162, 166 (6th Cir. 2011)* (internal quotation marks omitted). But we do not think PBSI has shown an injustice or abuse of discretion regarding the production of cost data. The magistrate judge faced plausible, competing claims about the need to verify **[**19]** the summary **[*322]** data already produced, and the potential for "extreme hardship" of fully depicting manufacturing costs in four markets across several years. So the magistrate judge sensibly allowed the burden of discovery to escalate only as a greater benefit became apparent. In this case (and as agreed to by the parties), that meant initial production of cost documentation for five fiscal quarters to allow PBSI to "verify or dispute the accuracy of the summary information[.]" If this limited production suggested flaws in Gordon's summaries, PBSI could return to court to compel further production.

Although the magistrate judge and district court referred to this scheme as an "auditing procedure," it might better be described as sampling[4]—a discovery method often thought well within the discretion of a trial court. *See, e.g., Larson v. AT&T Mobility LLC, 687 F.3d 109, 130 n.33 (3d Cir. 2012)* ("[T]he **HN17**[] parties may need some focused discovery, which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light **[***12]** of information that can be obtained by exhausting other opportunities for discovery." (alteration in original) **[**20]** (quoting *Fed. R. Civ. P. 26(b)(2)* advisory committee notes)); *see also* **HN18**[] *Fed. R. Civ. P. 34(a)* (permitting sampling of documents or electronically stored information). In fact, sampling may have been a permissible approach to discovery of cost information even if Gordon had never produced any cost summaries whatsoever. *See Soto v. Castlerock Farming & Transp., Inc., 282 F.R.D. 492, 503-04 (E.D. Cal. 2012)* (collecting cases approving sampling as a discovery compromise). And even if this sampling did not produce PBSI's desired results *ex post*, this does not make it an impermissible method for the trial court to manage discovery *ex ante*.

B.

PBSI also argues that the district court should have compelled production of the competitor agreements relating to automobile parts other than the four truck hoods. PBSI points to deposition testimony of Gordon employees that appears to confirm the existence of production agreements the Taiwanese firms made to establish artificially high prices in other product and geographic markets. But PBSI contends only that these agreements are relevant to recoupment—not the relationship **[**21]** between the costs and prices of the truck hoods. We simply see no indication—and PBSI gives us no reason—that the agreements among Taiwanese firms about addressing joint production of *other* parts meaningfully influenced Gordon's cost of producing, or revenue from selling, the four truck hoods at the heart of this case. Those agreements that did concern the truck hoods were produced during initial discovery, and, notably, PBSI does not rely on them to defeat summary judgment on below-cost pricing. Consequently, any error in the discovery orders covering these agreements does not warrant remand.

IV.

We turn next to the expert reports. **HN19**[] We review the "district court's decision to admit expert testimony, including its 'decisions about how to determine reliability' and 'its ultimate conclusion,' for abuse of discretion." *Surles ex rel. Johnson, 474 F.3d at 293* (quoting *Kumho Tire **[*323]** Co. v. Carmichael, 526 U.S. 137, 152, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*). We have summarized the substantive test for admissibility as follows:

> **[***13]** **HN20**[] Under *Rule 702 of the Federal Rules of Evidence*, "a proposed expert's opinion is admissible, at the discretion of the trial court, if the opinion satisfies three requirements. First, the witness must be qualified by 'knowledge, skill, experience, training, or education.' Second, the testimony must be relevant, meaning that it 'will **[**22]** assist the trier of fact to understand the evidence or to determine a fact in issue.' Third, the testimony must be reliable."

*Burgett v. Troy-Bilt LLC, 579 Fed. Appx. 372, 2014 WL 4290109, at *3 (6th Cir. 2014)* (quoting *In re Scrap Metal Antitrust Litig., 527 F.3d 517, 528-29 (6th Cir. 2008)*). **HN21**[] "The *Rule 702* inquiry is a flexible one and its focus must be solely on principles and methodology, not on the conclusions they generate." *Lee v. Smith & Wesson Corp., 760 F.3d 523, 526 (6th Cir. 2014)* (quoting *Daubert v. Merrell Dow Pharms., 509 U.S. 579, 595, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*) (internal alterations and quotation marks omitted). Similarly, *Rule 702* directs courts to focus on the reliability of expert testimony, rather than the "credibility and accuracy" of that testimony. *In re Scrap Metal Antitrust Litig., 527 F.3d 517, 529 (6th Cir. 2008)*.

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[4] We do not mean to suggest that the court's method was a truly random sample used to make a statistical inference about a larger population. Rather, we use this term in the sense used in the ***Fed. R. Civ. P. 26(b)(2)*** advisory committee notes.

Before applying these standards, we describe in more detail the expert testimony at issue. Hall's report found, *inter alia*, that Gordon's prices never fell below average avoidable cost and that the risk of future entry would undermine any attempt to recoup predatory losses in the markets for the hoods. McFarland attempted to calculate average variable costs in his first report but found this "very difficult to measure" given gaps and ambiguities in the data; ultimately, though, he concluded that Gordon's "prices are often above the estimated level of [average variable] costs, but the difference . . . is often very small." He found this "aggressive pricing" "disturbing" and potentially suggestive of a predatory scheme. McFarland **[**23]** also addressed the prospects of a predator recouping its losses in his first report. In his analysis, Gordon might recoup its losses either through higher prices for the hoods after PBSI's exit, or "if [the scheme] discouraged PBSI from entering the production of other hoods," Gordon might enjoy "higher sales and prices[.]"

In his second report, McFarland revamped his theory of predation. Rather than focus on average variable or average avoidable cost, he opted instead for what he called the "no economic sense" test, under which the losses from predation are measured as *any* downward deviation from a profit-maximizing price. McFarland's second analysis also addressed the likelihood that PBSI would be forced out of the four markets for replacement hoods, and it provided more **[***14]** quantitative explanation of Gordon's recoupment prospects, even comparing those to the "losses" under the "no economic sense" test.

A.

As relevant here, the district court excluded as unreliable McFarland's opinion on two issues: (i) predatory intent and (ii) below-cost pricing. PBSI contests both exclusions. We find no abuse of discretion.

1.

McFarland opined in both reports that Gordon's pricing strategy reflected **[**24]** an intent to force PBSI out of the markets for replacement hoods. The district court excluded this part of the report under *Rule 702(a)* because, in its view, specialized knowledge would not aid the factfinder in **[*324]** determining intent. We see no meaningful error on this particular ruling.

If the district court used "intent" to mean either the "general" intent required for "completed" monopolization or the "specific" intent required for attempted monopolization, *see Conwood Co., 290 F.3d at 782*, there is certainly no need for expert assistance. As noted above, the Supreme Court has virtually eliminated the substance of this element, or at least folded it into the other elements of a predatory pricing claim.[5] *See Aspen Skiing Co., 472 U.S. at 602-03* ("[T]here is agreement on the proposition that no monopolist monopolizes unconscious of what he is doing. . . . Improper exclusion (exclusion not the result of superior efficiency) is always deliberately intended." (internal quotation marks omitted)). And if the district court used "predatory intent" as shorthand for injury to competition, *see, e.g., D.E. Rogers Assocs., Inc. v. Gardner-Denver Co., 718 F.2d 1431, 1439 (6th Cir. 1983)*, that question collapses into the predation and recoupment analyses in McFarland's report. Post-*Brooke Group*, ***HN22***[] a firm only acts as a "predator" to the extent that it sells at prices **[**25]** below an appropriate measure of cost and stands to recoup its losses through later supracompetitive profits. *509 U.S. at 222-24*. And as discussed below, McFarland's report has serious infirmities relating to the cost-price relationship.

[*15]** Thus, no expert testimony is truly needed on the question of intent, at least assuming that all other elements have been established, and the court therefore did not abuse its discretion in barring McFarland from testifying on this narrow question.

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[5] We also note that, in the case of predatory pricing, intent to harm competition itself can often accrue to the benefit of consumers. When a would-be predator sets its prices too low but later finds that it cannot recoup those losses, consumers have gained. *Brooke Group Ltd., 509 U.S. at 223-24*. ***Antitrust law*** should not pose an obstacle to this sort of inept predation. *Id. at 224*.

2.

The district court's second quarrel with McFarland's report also has merit. The court framed the problem as a flaw in McFarland's recoupment analysis, but we think the court's reasoning is more applicable to below-cost pricing. We conclude that McFarland's opinion does not apply a permissible test for this issue.

In his initial report, McFarland concluded that he could only say that Gordon's **[**26]** "prices are often above the estimated level of costs, but the difference between price and cost[] is often very small." Though he found this proximity "disturbing," he admitted in his second report that Gordon's "aggressive pricing strategy" could not be shown to fall below average variable or average avoidable costs. He therefore analyzed Gordon's short-term losses using what he termed the "no economic sense test," which calculates losses as possible profits foregone by not charging a higher price. Under this test, a predator does not necessarily price below average variable, average avoidable, or average total cost; rather, it simply charges something less than the profit-maximizing price. McFarland then compared his estimate of these foregone profits with his calculations of what Gordon and its alleged conspirators stood to gain by forcing PBSI out of the market for replacement truck hoods to reach his conclusion about the likelihood of recoupment.

The district court and Gordon are correct that ***HN23***[] admitting an expert opinion on predation relying on either a "disturbing" **[*325]** proximity test or a "no economic sense" test is flatly contrary to law. *See Brooke Group Ltd., 509 U.S. at 222-23* ("[A] plaintiff seeking to establish **[**27]** competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs."). While the appropriate measure of cost has some flexibility (as, say, between average variable and average total cost), *see Spirit Airlines, Inc., 431 F.3d at 938*, this flexibility extends only to costs directly incurred, not all conceivable **[***16]** opportunity costs.[6] *See Arthur S. Langenderfer, Inc., 729 F.2d at 1058* (rejecting a "profit maximization" theory of predation similar to that used here); *see also United States v. AMR Corp., 335 F.3d 1109, 1118 (10th Cir. 2003)* ("Courts and scholars have observed that such a sacrifice test would necessarily involve a great deal of speculation and often result in injury to the consumer and a chilling of competition."). Consequently, McFarland's analysis of putative losses from predation is inadmissible, and the district court did not abuse its discretion in rejecting the "no economic sense" test. Nor are prices close to, but above, some measure of cost permissible evidence of anticompetitive conduct. Rather, they are the essence of competition. *Brooke Group Ltd., 509 U.S. at 223-24*.

B.

As it did in the district court proceedings, PBSI now contends that Hall's opinion is contrary to law, and therefore inadmissible, because he compared Gordon's prices only to average variable cost. Relying on a few stray remarks in the 200 or so pages of material from Hall, PBSI claims that his entire analysis is tainted by the lack of references to average total cost, another metric for predation. The district court, reading Hall's report as a whole, disagreed. In its view, the remarks identified by PBSI referred to common practice among economists, not lawyers, and, more importantly, did not purport to "find that predatory pricing may never exist if a firm's pricing is above" average variable cost.

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[6] As the Fifth Circuit explains in more detail:

> It must be noted that the expert relied on an erroneous interpretation of the law regarding predatory pricing. The opinion clearly indicated that the expert **[**28]** believed the law of this Circuit allowed a finding of predation when prices are above a firm's variable costs but below a "short-run profit maximizing price." As we explained above, this position is no longer tenable in the wake of *Brooke Group*. This error may explain, but does not excuse, the expert's failure to address the question of variable cost. In affirming summary judgment, we may disregard the conclusions of an expert opinion grounded in an error of law.

Stearns Airport Equip. Co. v. FMC Corp., 170 F.3d 518, 533 n.14 (5th Cir. 1999).

The district court was **[**29]** well within its discretion to admit Hall's testimony. We agree that no statement identified by PBSI categorically excludes average total cost as a legal criterion for predation. And since average variable cost is clearly relevant to and consistent with this court's case law on predation, *see* *Spirit Airlines, Inc., 431 F.3d at 938*, any supposed risk of confusion **[***17]** to the factfinder would be easily outweighed by the utility of Hall's (concededly reliable) analysis.

V.

Having addressed and approved the procedural and evidentiary rulings by the district court, we now consider the ultimate issue in this case: whether Gordon should have received summary judgment based on the record before the district court.

HN24[] We review a grant of summary judgment *de novo. Payne v. Novartis Pharms.* ***[*326]*** *Corp., 767 F.3d 526, 530 (6th Cir. 2014)*. ***HN25***[] Summary judgment is appropriate where the evidence on record shows no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*, *(c)*. The moving party must first demonstrate to the court that an essential element of the nonmoving party's case is absent; upon that showing, the non-moving party must then present sufficient evidence to demonstrate that there is a factual controversy as to that element, or at least explain why such evidence is **[**30]** not available. *See* *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. We grant all reasonable inferences in favor of the non-moving party. *Matsushita, 475 U.S. at 587-88*. But "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient" to defeat summary judgment. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

Our conclusions on the discovery and expert testimony issues go a long way toward resolving PBSI's appeal of the grant of summary judgment. PBSI, without the benefit of McFarland's "no economic sense" analysis, has little to support an essential part of its case. Rather than pointing to evidence in the record, PBSI primarily argues that vague inferences about "predatory intent" or a "scheme's predatory nature" can replace a cost-price comparison under its reading of *Spirit Airlines*.

While *Spirit Airlines* did not lay out a cost test that *must* be used to show predation, *431 F.3d at 938-39*, it is untenable to suggest that a plaintiff can skate by without *any* method for comparing prices to cost. *See* *Arthur S. Langenderfer, Inc., 729 F.2d at 1056*; *see also* *R.J. Reynolds Tobacco Co., 462 F.3d at 695-96*. Since price cuts are generally *pro-competitive*, some comparison to cost is necessary to determine injury to competition; without a cost-based **[***18]** test of predation, courts would inevitably punish firms for being the most efficient producers. *See* *Brooke Group Ltd., 509 U.S. at 222-24*. *Spirit Airlines* is therefore **[**31]** best read to allow plaintiffs the flexibility to apply a cost-based test other than average variable cost (or variations on average variable cost). *See* *431 F.3d at 945* (finding an issue of material fact given an "intellectual disagreement" over the proper calculation of average variable costs); *see also* *AMR Corp., 335 F.3d at 1116* ("[W]e do not favor [average variable cost] to the exclusion of other proxies for marginal cost. Whatever the proxy used to measure marginal cost, it must be accurate and reliable in the specific circumstances of the case at bar."). Plaintiffs can proffer any number of proxies for the marginal cost of production. *See* *AMR Corp., 335 F.3d at 1115-20* (discussing several alternatives).

But without McFarland's "no economic sense" test, PBSI has not offered such a metric. And even if there is a reasonable inference from the expert reports that Gordon's prices were below average *total* cost, that inference still leaves the burden of production on PBSI. *Spirit Airlines, Inc., 431 F.3d at 938*. Thus, PBSI's claims, under both the Sherman Act and the Robinson-Patman Act, succeed or fail based on an analysis of average variable cost. *See* *AMR Corp., 335 F.3d at 1120-21* (affirming summary judgment on a predatory pricing claim where plaintiff's cost metrics were unreliable and no one disputed that prices were above **[**32]** average variable cost). It is not helpful to the plaintiff that Gordon's prices may have a "close proximity" to average variable cost, or that any price cuts merely coincided with competitive entry. So long as prices are still **[*327]** above cost, those actions simply suggest *pro-competitive* behavior. *Brooke Group Ltd., 509 U.S. at 224*.

Finally, PBSI provides only a *single* record citation, across both of its briefs, to support its assertion that Gordon priced below its variable costs. That citation purports to compare costs discussed in deposition testimony with a table of prices in McFarland's initial report. On our review of that deposition testimony, we simply do not see any cost figures with sufficient specificity to construct a meaningful comparison. The deposition transcript does provide one aggregate cost figure for a single truck hood in 2006. But it does not at all illuminate how costs varied throughout the year or how sales of the hoods were distributed across time—at least one of which is necessary to comparing Gordon's costs to its highly fluctuating prices. To infer from **[***19]** this evidence that Gordon sold below cost, we would be forced to assume that it sold the overwhelming majority of its output only during the few **[**33]** months with the absolutely lowest prices in McFarland's table. Even putting aside the issue of whether a predatory pricing scheme could succeed in such a short period of time, PBSI points to no evidence that Gordon's output was concentrated in this interval. We do not find this assumption reasonable. PBSI's last-gasp citation, then, is no more than a "scintilla" of evidence on an essential element of each of its antitrust claims, and summary judgment was therefore appropriate. *Anderson, 477 U.S. at 252*.

VI.

The judgment of the district court is affirmed.

End of Document

Netlist, Inc. v. Diablo Techs., Inc.

United States District Court for the Northern District of California

April 24, 2015, Decided; April 24, 2015, Filed

Case No.: 13-cv-5962 YGR

Reporter
2015 U.S. Dist. LEXIS 54109 *

NETLIST, INC., Plaintiff, vs. DIABLO TECHNOLOGIES, INC., Defendant.

Subsequent History: Affirmed without opinion by Netlist, Inc. v. Diablo Techs., 2016 U.S. App. LEXIS 13257 (Fed. Cir., July 11, 2016)

Prior History: Netlist, Inc. v. Smart Storage Sys., 2014 U.S. Dist. LEXIS 124345 (N.D. Cal., Sept. 4, 2014)

Core Terms

unfair, breach of contract, trademark infringement, advertising, false and misleading, unfair competition, trade secret, injunction, equitable

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Judges: HON. YVONNE GONZALEZ ROGERS, UNITED STATES DISTRICT JUDGE.

Opinion by: YVONNE GONZALEZ ROGERS

Opinion

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON EQUITABLE RELIEF UNDER UCL CLAIM [*3]

On July 1, 2013, Plaintiff Netlist Inc. ("Netlist") brought this action against Defendant Diablo Technologies, Inc. ("Diablo"). In the operative Second Amended Complaint, filed March 21, 2014, Netlist alleged claims against Diablo for misappropriation of trade secrets, breach of contracts, and unfair competition under the California Unfair Competition Law ("UCL"), *California Business & Professions Code section 17200*, based on that alleged conduct, in addition to claims for correction of inventorship of a patent, and claims under the Lanham Act for trademark infringement and false and misleading advertising.

Netlist's claims were tried to a jury, with the exception of its UCL claim. Netlist now seeks a permanent injunction based on violation of the UCL. In accordance with the jury's verdict, and after considering all of the testimony, documentary evidence,[1] and arguments of counsel presented during and after trial, the Court makes the following findings of fact and conclusions of law:

PROCEDURAL BACKGROUND

1. Netlist moved for and was granted a preliminary injunction, which commenced on January 12, 2015. The preliminary injunction and was stayed by the Federal Circuit on March 26, 2015.

2. A jury trial commenced on March 9, 2015. Both parties presented witness testimony and the Court admitted documentary and physical exhibits.

3. On March 25, 2015, the jury returned its verdict in favor of Diablo on the claims for breach of contracts, trade secret misappropriation, and correction of inventorship, and in favor of Netlist on its claims of trademark infringement and Lanham Act false advertising. (Dkt. No. 420.) The jury's verdict provided as follows:

On Netlist's Claims for Breach of Contract:

a. Netlist and Diablo entered into a contract referred to as the Mutual Non-Disclosure Agreement.
b. Diablo did not breach the Mutual Non-Disclosure Agreement.
c. Netlist was not harmed by Diablo's conduct with respect to the Mutual Non-Disclosure Agreement.
d. Netlist and Diablo entered into a contract referred to as the Development and Supply Agreement.

e. Diablo did not breach the Development and **[*5]** Supply Agreement.
f. Netlist was not harmed by Diablo's conduct.

On Netlist's Claim for Misappropriation of Trade Secrets:

g. None of the eight alleged trade secrets was "secret" information.

On Netlist's Claim for Correction of Inventorship:

h. Netlist did not prove that Dr. Hyun Lee should be added as a named inventor of the '917 patent.

On Netlist's Claim for Trademark Infringement

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[1] The Court SUSTAINS the objections of Netlist (Dkt. No. 452) and **STRIKES** the Declaration of Lou Marchant, Senior Solution Sales Executive for Lenovo (United States), Inc. (Dkt. No. 450-3), as well as the brief and Declaration of Steven J. Corr filed on behalf **[*4]** of Non-parties SanDisk Corporation and Smart Storage Systems, Inc. (Dkt. No. 448, 449).

i. Netlist proved its claim for trademark infringement against Diablo and was entitled to nominal damages in the amount of $1.00.

On Netlist's Claim for False and Misleading Advertisement

j. Netlist proved its claim for false and misleading advertisement against Diablo and was entitled to nominal damages in the amount of $1.00.

4. Upon motion by Diablo and full briefing by the parties, as well as the parties' arguments at the hearing on April 24, 2015, the Court dissolved the preliminary injunction in light of the jury's verdict, by order issued April 24, 2015.

5. Remaining for decision by the Court is Netlist's claim under *California Business & Professions Code section 17200* ("UCL claim").

6. Netlist's post-trial briefing rests its UCL claim entirely on the theory that Diablo breached the parties' Supply Agreement and that the breach gave Diablo a "head start" which constitutes **[*6]** "unfair" competitive conduct in violation of the UCL. Based on this theory, Netlist contends that it is entitled to a permanent injunction for a period of 10 months and 27 days enjoining the manufacture and sale of Diablo's Rush and Bolt chips, and any integrated circuits derived from or based on the current versions of the Rush and Bolt chips.

7. Netlist asserts that the Court may "set aside the jury's erroneous breach of contract verdict based on Netlist's reserved 50(a) motion or its forthcoming 50(b) motion for judgment as a matter of law." (Dkt. No. 446 at 3 n.1.). The Court denied all the parties' oral Rule 50(a) motions (TR 1982:2-13). The Court declined to rule on Netlist's written Rule 50(a) motion filed at the close of all the evidence in the case in favor of waiting for a jury verdict. (TR 1969-70.) The Court has no Rule 50(b) motion before it at this time.[2]

FINDINGS OF FACT

1. Netlist is a Delaware corporation with its principal place of business at 175 Technology Drive, Irvine, California 92618. The company was founded in 2000 by C.K. "Chuck" Hong, Christopher Lopes and Jay Bhakta. The company's mission is to create high performance memory products technologies for the computing industry.

2. Defendant Diablo is a Canadian corporation with its principal place of business at 80 Aberdeen Street, Suite 401, Ottawa, Ontario, K1S 5R5, Canada. It is a developer of customized semiconductor memory chips for the computing server industry.

3. Netlist and Diablo entered into a Mutual Non-Disclosure Agreement on March 20, 2008, to discuss a possible collaboration between the two companies. (Exh. 25.)

4. Netlist and Diablo entered into a Development and Supply Agreement ("Supply Agreement") with an effective date of September 10, 2008. (Exh. 53.)

5. By its verdict, the jury found that there was no breach **[*8]** of either the Mutual Non-Disclosure Agreement or the Supply Agreement. (Jury Verdict, Dkt. No. 420, at 2.)

CONCLUSIONS OF LAW

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[2] The Court follows the "desirable" practice of refraining from ruling on a 50(a) motion until the jury has returned a verdict, in favor of a renewed 50(b) motion post-verdict. ***Therrell v. Georgia Marble Holdings Corp., 960 F.2d 1555, 1569 (11th Cir. 1992)*** quoting 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2533, at 586 (1971) ("the appellate courts have repeatedly said that it is usually desirable to take **[*7]** a verdict, and then pass on the sufficiency of the evidence on a post-verdict motion"). The Court notes that no briefing or hearing schedule on the written Rule 50(a) motion was ever set, nor was one sought by Netlist. Remaining issues can be raised in a Rule 50(b) motion.

The UCL authorizes the Court to "make such orders or judgments... as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." *Cal. Bus. & Prof. Code § 17203*. Because a UCL claim is equitable in nature, the Court, rather than a jury, must decide whether there was a UCL violation. *Bradstreet v. Wong, 161 Cal.App.4th 1440, 1458, 75 Cal. Rptr. 3d 253 (2008)*. "[I]n a case where legal claims are tried by a jury and equitable claims are tried by a judge, and the claims are 'based on the same facts,' in deciding the equitable claims 'the *Seventh Amendment* requires the trial judge to follow the jury's implicit or explicit factual determinations.'" *Los Angeles Police Protective League v. Gates, 995 F.2d 1469, 1473 (9th Cir. 1993)* (quoting *Miller v. Fairchild Indus., 885 F.2d 498, 507 (9th Cir. 1989)*, *cert. denied*, *494 U.S. 1056, 110 S. Ct. 1524, 108 L. Ed. 2d 764 (1990))*.

A "common law violation such as breach of contract is insufficient," standing alone, to support a UCL claim. *Shroyer v. New Cingular Wireless Servs., Inc., 622 F.3d 1035, 1044 (9th Cir. 2010)*. "A breach of contract claim...may only form the basis of a *section 17200* [UCL] claim if the breach itself is 'unlawful, unfair, or fraudulent.'" *Puentes v. Wells Fargo Home Mortg., Inc., 160 Cal.App.4th 638, 645, 72 Cal. Rptr. 3d 903 (2008)*.

Under the UCL, an "unfair" act is **[*9]** one which "threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law." *Cel-Tech Commc'ns v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. In determining what is "unfair" under the UCL, courts look to parallel provisions in the Federal Trade Commission Act, *15 U.S.C. § 45(a)*, particularly where the claims at issue allege unfair competition between business competitors. *Id. at 185*. The "antitrust laws... were enacted for the protection of *competition*, not *competitors*." *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 110, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)* (internal citations omitted) (emphasis in original). Thus, "injury to a competitor is not equivalent to injury to competition," and standing alone does not establish an "unfair" act under the UCL. *Cel-Tech, 20 Cal. 4th at 186*. Rather, a *Section 17200* claim based on the unfair prong must "be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." *Id. at 186-87*; *see also* *Marolda v. Symantec Corp., 672 F. Supp. 2d 992, 1005 (N.D. Cal. 2009)* ("breach of contract claim...could constitute an unfair business practice... [where it alleged] systematic breach of contract and unauthorized renewal of obsolete products [that] would directly and serious impact competition in defendant's industry"). "[W]hen the plaintiff is a direct competitor of the defendant and invokes **[*10]** *Section 17200*'s 'unfair' prong, the word 'unfair'... means conduct that... otherwise significantly threatens or harms competition." *Worldwide Travel, Inc. v. Travelmate US, Inc., 2015 U.S. Dist. LEXIS 28517, 2015 WL 1013704, at *11 (S.D. Cal. 2015)* (internal citations omitted).

Here, the Court does not disturb the jury's findings that Diablo did not breach the Supply Agreement and accepts those findings for the UCL claim. It follows from the jury's findings that Netlist cannot establish the threshold showing of a predicate breach of contract for purposes of relief under the UCL.

CONCLUSION

Netlist failed to establish a predicate breach of contract to support its UCL claim. Consequently, Diablo is entitled to have judgment entered in its favor on Netlist's UCL claim. The Court will enter judgment on this claim, as well as the others decided by the jury's verdict, forthwith.

It Is So Ordered.

Dated: April 24, 2015

/s/ Yvonne Gonzalez Rogers

Hon. Yvonne Gonzalez Rogers

UNITED STATES DISTRICT JUDGE

JUDGMENT

On March 25, 2015, the jury rendered its verdict in awarding Plaintiff Netlist, Inc. ("Netlist") nominal damages on its claims against Defendant Diablo Technologies, Inc. ("Diablo") under the Lanham Act for trademark infringement and false and misleading advertising. The jury found in favor of Diablo on all other claims **[*11]** submitted to it. On April 24, 2015, based on the verdict, the Court found in favor of Diablo on Netlist's equitable claim for violation of *California Business & Professions Code § 17200 et seq.* ("UCL"). Therefore,

IT IS ORDERED, ADJUDGED AND DECREED that Diablo shall pay to Netlist the sum of $2.00 for liability under the Lanham Act for trademark infringement and false and misleading advertising.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that judgment shall be entered in favor of Diablo and against Netlist, and that Netlist shall take nothing, on its claims for misappropriation of trade secrets, breach of contracts, violation of the UCL, and correction of inventorship of a patent.

IT IS SO ORDERED.

Date: April 24, 2015

/s/ Yvonne Gonzalez Rogers

YVONNE GONZALEZ ROGERS

UNITED STATES DISTRICT COURT JUDGE

Woodman's Food Mkt., Inc. v. The Clorox Co.

United States District Court for the Western District of Wisconsin

April 27, 2015, Decided; April 27, 2015, Filed

14-cv-734-slc

Reporter

2015 U.S. Dist. LEXIS 54421 *; 2015-1 Trade Cas. (CCH) P79,143; 2015 WL 1915071

WOODMAN'S FOOD MARKET, INC., Plaintiff, v. THE CLOROX COMPANY and THE CLOROX SALES COMPANY, Defendants.

Prior History: *Woodman's Food Mkt., Inc. v. Clorox Co., 2015 U.S. Dist. LEXIS 11656 (W.D. Wis., Feb. 2, 2015)*

Core Terms

purchaser, wholesalers, customer, seller's, retailer, amend, products, subject matter jurisdiction, buyers, moot, allowances, parties, motion to dismiss, contends

Counsel: **[*1]** For Woodman's Food Market, Inc., Plaintiff: John Alan Kassner, III, Kraig A. Byron, LEAD ATTORNEYS, Von Briesen & Roper, S.C., Madison, WI.

For The Clorox Company, The Clorox Sales Company, Defendants: Joshua H. Soven, LEAD ATTORNEY, Michael Robert Huston, Gibson Dunn & Crutcher LLP, Washington, DC; Donald Karl Schott, Stacy Ann Alexejun, Quarles & Brady, Madison, WI; Rachel Anne Graham, Quarles & Brady LLP, Madison, WI.

Judges: STEPHEN L. CROCKER, Magistrate Judge.

Opinion by: STEPHEN L. CROCKER

Opinion

OPINION AND ORDER

In this civil action for declaratory and injunctive relief, plaintiff Woodman's Food Market, Inc. alleges that defendants The Clorox Company and The Clorox Sales Company ("Clorox") have violated the price discrimination provisions of the Robinson-Patman Act, *15 U.S.C. § 13(a)*, *(d)* and *(e)*, by offering to sell "large pack" products only to "club" retailers such as Costco and Sam's Club and not "general market" stores like Woodman's. In an order entered on February 2, 2015, I denied Clorox's motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, finding that even though Clorox legally may refuse to deal with a particular retailer, the use of special packaging and package sizes to benefit only certain customers stated a claim sufficient to survive front-end **[*2]** dismissal. Dkt. 50. Since then, things have zigged and zagged a bit:

On February 24, 2015, Clorox unilaterally chose to end all business dealings with Woodman's. That same day, Clorox moved to dismiss Woodman's complaint as moot because Woodman's no longer was a purchaser of its products and therefore could not suffer any further alleged discrimination. Dkt. 63. Woodman's opposes that motion, arguing that it remains a "purchaser" under the act because now it will buy Clorox products through one or more wholesalers. Dkt. 69. In addition, Woodman's now seeks to amend its complaint to add claims under *§ 1 of the Sherman Act*. Dkt. 68. Clorox rejoins that its decision to terminate its business relationship with Woodman's has deprived this court of subject matter jurisdiction in this case, which in turn prevents the court from granting Woodman's leave to amend.

Because Woodman's has shown that it may still qualify as a purchaser with standing under the Act, I am denying Clorox's motion to dismiss and granting Woodman's motion for leave to file an amended complaint.

OPINION

I. Legal Standard

As an initial matter, the parties dispute how the court should characterize Clorox's pending motion to dismiss. **[*3]** Clorox contends that the complaint is moot, but it does not identify in its motion or brief which rule of civil procedure it is relying on. Woodman's apparently construed the motion as a *Rule 12(b)(6)* motion to dismiss for failure to state a claim and argues that the motion should be converted to a motion for summary judgment under *Rule 12(d)* because Clorox relies on matters outside the pleadings.

In its reply brief, Clorox states that it is moving for dismissal for lack of subject matter jurisdiction under *Rule 12(b)(1)* and may rely on affidavits and other materials supporting its motion. *See* *United Phosphorus Ltd. v. Angus Chem. Co., 322 F.3d 942, 946 (7th Cir. 2003)*; *Sapperstein v. Hager, 188 F.3d 852, 855 (7th Cir. 1999)* ("[W]here evidence pertinent to subject matter jurisdiction has been submitted . . . the district court may properly look beyond the jurisdictional allegations of the complaint . . . to determine whether in fact subject matter jurisdiction exists.") (internal quotation marks and citation omitted). The Court of Appeals for the Seventh Circuit has made clear that "[f]ederal courts lack subject matter jurisdiction when a case becomes moot." *Pakovich v. Verizon LTD Plan, 653 F.3d 488, 492 (7th Cir. 2011)*. Therefore, Clorox's motion is properly characterized as a motion brought pursuant to *Rule 12(b)(1)*, and it is unnecessary to convert the motion to a motion for summary judgment under *Rule 12(d)*.

II. Analysis

Clorox contends that Woodman's **[*4]** action for declaratory and injunctive relief[1] has become moot because Clorox has ended its customer relationship with Woodman's, a decision that Clorox says was within its rights under the Robinson-Patman Act, *15 U.S.C. § 13*. *See* *Harper Plastics, Inc. v. Amoco Chemicals Corp., 617 F.2d 468, 470-71 (7th Cir. 1980)* (agreeing with district court that the Act does not prohibit seller from choosing its customers or from refusing to deal with purchasers to whom it does not wish to sell); *Mullis v. Arco Petroleum Corp., 502 F.2d 290, 294 (7th Cir. 1974)* (statute does not require seller to create or maintain customer relationship with any buyer). Therefore, contends Clorox, no live controversy remains in this lawsuit because Woodman's cannot claim protection under *§§ 13(d)* and *(e)* of the Act because only a "purchaser" may do so. *Harper Plastics, 617 F.2d at 470-71*; *see also* *Wisconsin Right to Life State Political Action Comm. v. Barland, 664 F.3d 139, 149 (7th Cir. 2011)* ("A case must present a live controversy at the time of filing, contain a live dispute through all stages of litigation, and the parties must continue to have a personal stake in the outcome of the lawsuit throughout its duration.). Extending that reasoning, Clorox contends that without continuing jurisdiction, the court cannot even grant Woodman's leave to amend its complaint to add a separate claim under the Sherman Act.

Generally, a case may become moot where the defendant **[*5]** has completely discontinued the challenged activity, the discontinued activity has no present effects, and the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated. *Chicago United Indus., Ltd. v. City of Chicago, 445 F.3d 940, 947 (7th Cir. 2006)*; 13C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3533.5 (3d ed. 2013). Clorox points out that because it has ceased all sales to Woodman's, there no longer is any danger that it will sell to Woodman's on discriminatory terms. Woodman's responds that notwithstanding this freeze-out,

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[1] Woodman's does not seek monetary damages in this case.

Woodman's continues to be a purchaser within the meaning of the Act because it continues to purchase Clorox products through one or more wholesalers. Dkt. 71 (affidavit of Woodman's procurement director).

The two price discrimination provisions at issue in this case prohibit certain actions by sellers with respect to promotions offered to their buyers. Although *§ 13(d)* refers to "customers" and *§ 13(e)* refers to "purchasers" in describing who is protected by the Act, the two terms are used interchangeably. *16 C.F.R. § 240.4* ("The word 'customer' which is used in section 2(d) of the Act includes 'purchaser' which is used in section 2(e)."); Areeda Hovenkamp, XIV ***Antitrust Law*** ¶ 2363b (3d ed. 2012). Woodman's points out **[*6]** that in the *Guides for Advertising Allowances and Other Merchandising Payments and Services*, the Federal Trade Commission (FTC) has broadly defined a "customer" to include "any person who buys for resale directly from the seller, or the seller's agent or broker" and "any buyer of the seller's product for resale who purchases from or through a wholesaler or other intermediate reseller." *16 C.F.R. § 240.4*. Clorox contends that the guidelines are not entitled to deference because the commission has stated that they "do not carry the force of law," *79 Fed. Reg. 58245, 58253 (Sept. 29, 2014)*; multiple agencies share responsibility for enforcing the Robinson-Patman Act, creating a risk that the same statutory provision will be interpreted differently by different agencies, *Rapaport v. U.S. Dep't of Treasury, Office of Thrift Supervision, 59 F.3d 212, 216, 313 U.S. App. D.C. 216 (D.C. Cir. 1995)*; and the courts and not federal agencies are charged with interpreting broadly worded statutes. But even though the *Guides* may not have the force of law, they are instructive in this case, particularly in light of Supreme Court precedent on this issue.

Shortly before the FTC issued the guidelines in 1969, the Supreme Court addressed the definition of "customer" in *F.T.C. v. Fred Meyer, Inc., 390 U.S. 341, 88 S. Ct. 904, 19 L. Ed. 2d 1222 (1968)*. There, the seller had paid preferential promotional allowances to a direct-buying retailer but did not make the **[*7]** same allowances available to retailers that purchased through wholesalers. The Court found that the seller's program should have made comparable allowances, presumably through the wholesalers, to the indirect purchasers:

> If we were to read "customer" as excluding retailers who buy through wholesalers and compete with direct buyers, we would frustrate the purpose of s 2(d). We effectuate it by holding that the section includes such competing retailers within the protected class.
>
> *F.T.C. v. Fred Meyer, Inc., 390 U.S. 341, 351, 88 S. Ct. 904, 19 L. Ed. 2d 1222 (1968)*.

Woodman's seeks—but does not obtain—additional support from a decision by the Court of Appeals for the Sixth Circuit in which the court discussed the reach of the *Fred Meyer* decision in a case where both the favored and disfavored parties purchased through intermediaries. *Lewis v. Philip Morris Inc., 355 F.3d 515 (6th Cir. 2004)*. In *Lewis*, cigarette vending machine operators, some of whom purchased indirectly through wholesalers, alleged that Phillip Morris offered promotions directly to convenience stores but did not offer any such promotions to the vending machine operators, either directly or indirectly through the wholesaler. Although Woodman's cites language from *Lewis* that appears to grant standing to the cigarette vendors who purchased through wholesalers, this **[*8]** is not the court's actual holding. The opinion in *Lewis* was entered per curiam by a sharply divided panel. Although the majority confirmed *Fred Meyer*'s definition of the term "customer" in *§§ 13(d)* and *(e)*, it actually refused to grant standing to the cigarette vendors who purchased through wholesalers. The majority found that an action cannot be maintained where both the favored and disfavored parties are indirect purchasers. *Id. at 526-27*. Thus the Sixth Circuit "would limit *Fred Meyer* to its actual situation—namely, where the defendant offered [promotions] to a large retailer who purchased directly but failed to offer them either to a wholesaler intermediary, or to the retailer customers of that intermediary." Hovenkamp ¶ 2363d2 at p. 291. That said, Woodman's overselling of *Lewis* is of no consequence to this court's analysis because the facts here align more tightly with the facts in *Fred Meyer*. Woodman's alleges that Clorox offers special packaging to large club stores that purchase directly from Clorox but fails to offer the same special packaging to general market stores like Woodman's, even when they purchase Clorox products through wholesalers.

Clorox posits without elaboration that *Fred Meyer* and **[*9]** *Lewis* are distinguishable because neither case involved a seller's refusal to deal directly with a customer. Without more, it is unclear how this distinction would have made a difference in either case. The Supreme Court explained in *Fred Meyer* that

> We hold only that, when a supplier gives allowances to a direct-buying retailer, he must also make them available on comparable terms to those who buy his products through wholesalers and compete with the direct buyer in resales. Nothing we have said bars a supplier, consistently with other provisions of the antitrust laws, from utilizing his wholesalers to distribute payments or administer a promotional program, so long as the supplier takes responsibility, under rules and guides promulgated by the Commission for the regulation of such practices, for seeing that the allowances are made available to all who compete in the resale of his product.
>
> *Fred Meyer, 390 U.S. at 358*.

If the wholesalers from which Woodman's now purchases Clorox products are constrained by Clorox's decision to sell large-size products only to club stores, then the rule announced in *Fred Meyer* would apply to Woodman's. *See also* Hovenkamp ¶ 2363d2 at p. 289 ("*Fred Meyer* stands for the proposition **[*10]** that a seller's duty to provide proportionally equal promotional services or facilities, or payment therefor, extends downstream to buyers competing with each other at the same functional level, even if one set of buyers purchases directly from the defendant while another set purchases through intermediaries.").

Because it is possible that Woodman's can be considered a "customer" and "purchaser" with standing under the act, at least at this early stage in the litigation, Clorox is not entitled to have this lawsuit dismissed. To the extent that Clorox has additional bases to challenge whether Woodman's qualifies as a purchaser given the specific facts of this case, Clorox may raise these points at summary judgment or trial after the parties have had an opportunity to develop the record.

III. Motion for Leave to Amend Complaint

Clorox opposes Woodman's motion for leave to amend solely on the ground that the case became moot when Clorox stopped selling to Woodman's on February 24, 2015, thereby depriving the court of subject matter jurisdiction. On March 17, 2015, Woodman's notified Clorox that it intended to file an amended complaint, but Clorox asked Woodman's to delay filing the proposed **[*11]** amended complaint so that the parties could attempt settlement. In return, Clorox agreed not to challenge the motion to amend as untimely. Because I have found that the case is not moot and there is no other apparent reason for denying Woodman's leave to amend, I will grant leave. *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)* ("In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given'"); *Fed. R. Civ. P. 15(a)(2)* ("court should freely give leave [to amend] when justice so requires").

ORDER

IT IS ORDERED that:

(1) Defendants' motion to dismiss this lawsuit for lack of subject matter jurisdiction, dkt. 63, is DENIED; and,

(2) Plaintiff's motion for leave to amend its complaint, dkt. 68, is GRANTED.

Entered this 27th day of April, 2015.

BY THE COURT:

/s/ STEPHEN L. CROCKER

Magistrate Judge

Debjo Sales, LLC v. Houghton Mifflin Harcourt Publ'g Co.

United States District Court for the District of New Jersey

April 29, 2015, Decided; April 29, 2015, Filed

Civil Action No. 14-4657

Reporter

2015 U.S. Dist. LEXIS 56504 *; 2015 WL 1969380

DEBJO SALES, LLC, Plaintiff, v. HOUGHTON MIFFLIN HARCOURT PUBLISHING CO., Defendant.

Notice: NOT FOR PUBLICATION

Subsequent History: Motion denied by, Motion granted by *Debjo Sales, LLC v. Houghton Mifflin Harcourt Publ. Co., 2017 U.S. Dist. LEXIS 164829 (D.N.J., Oct. 4, 2017)*

Core Terms

antitrust, delivery, school district, products, educational material, unjust enrichment, policy change, market power, market share, allegations, textbooks, consumer, shipping, contractual relationship, motion to dismiss, alleged facts, contracts, tortious interference, interstate commerce, commerce, argues, antitrust violation, substantial effect, cause of action, interchangeability, competitor

Counsel: **[*1]** For DEBJO SALES, LLC, doing business as BOOK-IT DISTRIBUTION, Plaintiff: RANDY T. PEARCE, LEAD ATTORNEY, PEARCE LAW, LLC, HACKENSACK, NJ.

For HOUGHTON MIFFLIN HARCOURT PUBLISHING COMPANY, Defendant: MATTHEW M. OLIVER, MICHAEL THOMAS GRAY LONG, LEAD ATTORNEYS, LOWENSTEIN SANDLER, PC, ROSELAND, NJ; STACEY J. RAPPAPORT, LEAD ATTORNEY, MILBANK TWEED HADLEY & MCCLOY LLP, NEW YORK, NY.

Judges: Hon. Madeline Cox Arleo, UNITED STATES DISTRICT JUDGE.

Opinion by: Madeline Cox Arleo

Opinion

ARLEO, UNITED STATES DISTRICT JUDGE

This matter comes before this Court on Defendant's Motion to Dismiss Plaintiff's Amended Complaint for failure to state a claim, pursuant to *Federal Rule of Civil Procedure 12(b)(6)* [Dkt. No. 34]. The Court decides the motion without oral argument pursuant to *Federal Rule of Civil Procedure 78* and *Local Civil Rule 78.1*. For the reasons set forth below, the motion is **GRANTED**.

I. FACTS

This dispute concerns a textbook manufacturer's policy requiring that its textbooks and other educational materials must be shipped by the manufacturer, a policy stringently objected to by a delivery service. The manufacturer here, Defendant Houghton Mifflin Harcourt Publishing Company ("Defendant"), sells and ships educational materials throughout the United States, including in New Jersey, and controls approximately 38% **[*2]** of the market share in the national K12 educational material market. Am. Compl. at 1 ¶ 2, 4 ¶ 4, 5 ¶ 5. The delivery service, Plaintiff Debjo Sales, LLC ("Plaintiff"), was founded in 2007 with the goal of entering into agreements with school districts to pick up and deliver textbooks ordered by such districts from Defendant. Id. at 2 ¶ 3.

It is unclear whether Plaintiff succeeded. Plaintiff had agreements with multiple school districts in New Jersey to pick up school books from Defendant and deliver them to the school districts. Id. at 6 ¶ 2. Plaintiff was also recently awarded "a Time and Materials contract through Educational Data Services, Inc., for 650 school districts in New Jersey and 150 school districts in New York," which approved Plaintiff's services for use by school districts throughout New Jersey and New York. Id. at 4 ¶ 2. However, whether Plaintiff was paid for these agreements, the agreements' terms, when these agreements began, and whether these agreements constituted enforceable contracts is never stated in the Amended Complaint.

The disputed policy change was implemented by Defendant on or around July 3, 2014. Id. at 2 ¶ 5. Beginning on that date, Defendant required all orders under $500,000 to be **[*3]** shipped by Defendant and charged a 5% handling fee for orders over $500,000 that were picked up by customers. Id. This allegedly prevents schools from negotiating the best price for delivery of textbooks or from choosing different modes of delivery when purchasing Defendant's books. Id. at 2 ¶ 6, 4 ¶ 3. Defendant was able to charge 10.5% of the total order when it shipping its books, even though usual shipping prices are approximately 5% for this service. Id. at 3 ¶ 7.

Defendant's policy change "caused damage" to Plaintiff's agreements with at least twenty-three schools, which Plaintiff lists in its Amended Complaint. Id. at 7 ¶ 3. Plaintiff also alleges that some agreements with school districts were "nullified" or "rendered nullities" by Defendant's policy change. Id. at 3 ¶ 8, 5 ¶ 6. Other than to say that several of its agreements were damaged or nullified, Plaintiff does not explain the effect of Defendant's policy change. On at least one occasion, a school district wrote Defendant and informed it that Plaintiff was to deliver its purchases. Id. at 6 ¶ 2.

Plaintiff now sues on four counts: illegal tying in violation of the Sherman Act *§ 1*,[1] intentional interference with contract, unjust enrichment, and tortious interference **[*4]** with contractual relations. Defendant moves to dismiss these counts as inadequately pled. Because Plaintiff has failed to plead adequate facts to state a claim under any of these causes of action, the Court dismisses Plaintiff's Amended Complaint without prejudice to Plaintiff's right to refile.

II. Standard of Review

In considering a *Rule 12(b)(6)* motion to dismiss on the pleadings, the court accepts as true all of the facts in the complaint and draws all reasonable inferences in favor of the plaintiff. *Phillips v. Cnty. of Allegheny, 515 F.3d 224, 231 (3d Cir. 2008)*. Moreover, dismissal is inappropriate even where "it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits." Id.

The facts alleged, however, must be "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. The allegations in the complaint "must **[*5]** be enough to raise a right to relief above the speculative level." Id. Accordingly, a complaint will survive a motion to dismiss if it provides a sufficient factual basis such that it states a facially plausible claim for relief. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

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[1] Though Plaintiff also mentions *N.J.S.A. 56:9-3* in its pleading, the New Jersey statute's language is virtually identical to the first statement of the Sherman Act, and each party's briefing analyzes Plaintiff's claims only under *Section 1* of the Sherman Act. This Court therefore analyzes this count solely under *Section 1* of the Sherman Act, *15 U.S.C. § 1*.

The Court must here detour from its description of routine and universally-accepted pleading standards to address Plaintiff's reliance on the rejected "no set of facts" pleading standard of *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*. Conley was explicitly abrogated by Twombly, which stated that Conley's "no set of facts" statement "has earned its retirement" and "is best forgotten as an incomplete, negative gloss on an accepted pleading standard . . . ." *Twombly, 550 U.S. at 563*. Plaintiff makes much of the fact that this is an antitrust case, so the pleading standard should be lower. But Twombly was an antitrust case. Id. Under current law, Plaintiff must plead facts sufficient to render a cause of action plausible. *Id. at 557*.

III. ANALYSIS

A. Antitrust Violation (Count I)

1. Antitrust Standing

Private parties may only bring antitrust claims if they have antitrust standing. Under current law, competitors or consumers of the defendant in the relevant market have antitrust standing. See *Ethypharm S.A. Fr. v. Abbott Labs., 707 F.3d 223, 233 (3d Cir. 2013)* (dismissing claim for lack of standing because **[*6]** "antitrust injury . . . is limited to consumers and competitors in the restrained market and to those whose injuries are the means by which the defendants seek to achieve their anticompetitive ends") (citation and internal quotation marks omitted).

Defendant argues that Plaintiff has failed to allege facts sufficient to show that it is a competitor or consumer. Plaintiff argues that it was a competitor because it had "contractual agreements" which were nullified or damaged by Defendant's policy change, and its business model of delivery service for educational materials was rendered inoperable by Defendant's policy change. Am. Compl. at3 ¶ 8, 5 ¶ 6, 6 ¶ 2.

In Barton & Pittinos, the Third Circuit amalgamated the Supreme Court's analysis in *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*, into a formulation of factors that are relevant for this Court to consider when antitrust standing is challenged:

> (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, **[*7]** which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

Barton & Pittinos, Inc. v. SmithKline Beecham Corp., 118 F.3d 178, 181 (3d Cir. 1997). Considering these factors, the Court finds Plaintiff has antitrust standing.

Under factor one, although Plaintiff has demonstrated a causal connection between the antitrust violation and harm to Plaintiff—the change in policy substantially decreased the value proposition of Plaintiff's service—it has failed adequately to plead facts showing that Defendant intended to cause the harm. The second factor weighs strongly in favor of Plaintiff. Using market power in one product to preclude competition in a distinct product to the disadvantage of the consumer is precisely the concern antitrust tying restrictions are designed to address. Directness of injury is less clear. The chain of causation between the policy and harm to Plaintiff is not attenuated, but Plaintiff's failure adequately to allege that enforceable contracts existed before Defendant's policy change and were invalidated by that change render any injury somewhat **[*8]** speculative. Factor four slightly supports Plaintiff, as there are unlikely to be more direct victims of a delivery policy change than Plaintiff, a company which specializes in delivery. Finally, the potential for duplicative recovery here, though present due to the alleged harm to school districts, does not excessively complicate this dispute, and so does not weigh strongly in either direction.

On balance, the Court finds that the Barton factors indicate that Plaintiff has antitrust standing due to the combination of the causal connection of harm under the theory alleged, the type of injury of which Plaintiff complains, and the lack of powerful mitigating factors counseling a contrary finding.

Defendant argues that Plaintiff does not have antitrust standing because it failed to show injury to competition rather than merely to a competitor. The Court again disagrees.

Defendant cites to Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. for support. *429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. But Brunswick was decided on a drastically different fact pattern. There, the disputed conduct increased competition in bowling centers, and a competing bowling center sued to recover lost profits due to the increased competition. *Id. at 488*. On those facts, **[*9]** the plaintiff did not have antitrust standing.

This case is quite different. Plaintiff does not allege a pro-competitive action that harms only it. The alleged conduct here—prohibiting or imposing high fees on third-party shipping—has a plainly anticompetitive effect, and Defendant does not argue otherwise. This dispute is one for which antitrust laws were made: preventing the tying of unrelated products by a market leader to decrease competition. As such, Plaintiff has antitrust standing.

2. Tying

Though Plaintiff has standing to bring an antitrust claim, it still must plead facts sufficient to state a claim in order to survive a motion to dismiss. The antitrust claim here alleges that Defendant tied distinct products or services, in violation of the Sherman Act, *15 U.S.C. § 1*. To prove a per se tying violation, Plaintiff must allege facts plausibly showing that: "(1) a defendant seller ties two distinct products; (2) the seller possesses market power in the tying product market; and (3) a substantial amount of interstate commerce is affected . . . ." *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 477 (3d Cir. 1992)*; see also *Marchese v. Cablevision Sys. Corp., No. 10-2190, 2012 U.S. Dist. LEXIS 2799, 2012 WL 78205, at *2 (D.N.J. Jan. 9, 2012)*. Alternatively, Plaintiff may rely on the rule of reason by replacing the second prong above—market power—with proof that the defendant **[*10]** "unreasonably restrained competition in the tied product market." *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 511 (3d Cir. 1998)*. In its threadbare Amended Complaint, Plaintiff fails adequately to plead any of these components.[2]

a. Distinct Products

Defendant argues that no alleged facts indicate that K-12 educational materials and delivery of the same are separate and distinct articles of commerce. The Court agrees.

Tying products (or services) together only violates ***antitrust law*** if the products are separate and distinct. Products are distinct where there is sufficient demand for each product separately to make it efficient for a firm to provide the

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[2] As a preliminary matter, the Court rejects Defendant's argument that control over delivery of one's own product can never violate antitrust tying laws. The cases Defendant cites do not support that proposition. Rather, they simply hold that a company must have an economic interest in the alleged tie to violate tying laws. See *Crawford Transp. Co. v. Chrysler Corp., 338 F.2d 934, 939 (6th Cir. 1964)* (Chrysler did not violate antitrust tying laws by requiring its cars to be shipped through approved shipping companies because it had no financial interest in and received no profit from the shipping companies); *Venzie Corp. v. U.S. Mineral Prods. Co., 521 F.2d 1309, 1317-18 (3d Cir. 1975)* ("The absence of a direct interest in the tied product market leaves open the possibility of a nonpredatory justification for requiring sales only through Armstrong and distinguishes this situation from the solely anti-competitive arrangements which have been branded as per se antitrust violations."); *Carl Sandburg Vill. Condo. Ass'n No. 1 v. First Condo. Dev. Co., 758 F.2d 203, 207 (7th Cir. 1985)* ("[A]n illegal tying arrangement will not be found where the alleged tying company has absolutely no economic interest in the sales of the tied seller, whose products are favored by the tie-in."). **[*11]** Here, by contrast, Defendant has an economic interest. Defendant allegedly receives substantial remuneration from its policy—either a 10.5% fee for direct delivery or a 5% fee if a third party is used. Am. Compl. at 2 ¶ 5, 3 ¶ 7. Delivery of one's own product is not categorically exempt from antitrust laws.

products separately. See *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 462, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* ("For service and parts to be considered two distinct products, there must be sufficient consumer demand so that it is efficient for a firm to provide service separately from parts."); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 21-22, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)* (there must be "sufficient demand for the purchase of [the tied product] separate from [the tying product] to identify a distinct product market in which it is efficient to offer [the tied product] separately from [the tying product]."). In this case, **[*12]** therefore, Plaintiff must allege facts sufficient to show that consumer demand for delivery of educational materials makes it efficient to separate the materials from their delivery.

Plaintiff's only relevant factual allegation is that at least one school district told Defendant that Plaintiff would deliver the books. That is not enough. Alone, that does not show consumer demand, much less sufficient demand to make separation of the materials and their delivery efficient. Plaintiff also alleges it had agreements with school districts to pick up and drop off books, Am. Compl. at 6 ¶ 2, but the content and number of these agreements is left to the imagination, so these allegations do not show sufficient consumer demand for delivery of the textbooks. Plaintiff has thus not adequately alleged facts demonstrating that K-12 educational materials and their delivery are separate and distinct products.[3]

b. Market Power or Unreasonable Restraint of [*13] Competition

Defendant argues that Plaintiff has failed adequately to plead that Defendant has market power because (1) Defendant's market share is insufficient, as a matter of law, to show market power in the national K-12 educational materials market and (2) Plaintiff's alleged market is facially implausible.

i. Market Share

Defendant's first argument, that 38% is not enough market share to create market power, is unpersuasive. Defendant cites to several cases which indicate that 38% market share is insufficient to demonstrate a per se antitrust violation. See *Times-Picayune Pub. Co. v. U.S., 345 U.S. 594, 612-13, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)* (newspaper's 33%-40% share of advertising market insufficient to invoke per se rule); *Greene Cnty. Mem'l Park v. Behm Funeral Homes, Inc., 797 F. Supp. 1276, 1287 (W.D. Pa. 1992)* (funeral home with 33%-43% of alleged market insufficient to constitute per se violation). But these cases were not decided on a motion to dismiss. Because the effect of market share on market power varies from industry to industry, this Court cannot conclude at this stage that 38% market share is insufficient to plead market power. See *United States v. Columbia Steel Co., 334 U.S. 495, 528, 68 S. Ct. 1107, 92 L. Ed. 1533 (1948)* ("The relative effect of percentage command of a market varies with the setting in which that factor is placed."). Taking all inferences in favor of the Plaintiff, the Court finds that Plaintiff's allegation **[*14]** that Defendant has 38% market share is sufficient plausibly to infer that Defendant has market power here.[4]

ii. Market Definition

Plaintiff's allegation of 38% market share, however, means nothing if the market is not plausibly defined. The Amended Complaint does not provide facts sufficient to make a K-12 educational materials market plausible.

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[3] Any renewed pleading must provide facts which show consumer demand for delivery of educational materials independent from the materials' sale, such that it would be efficient for a firm to separate purchase of educational materials from their delivery.

[4] Though Defendant also challenges the accuracy of Plaintiff's statistics concerning Defendant's market share, this is a factual dispute, and so is misplaced at this stage of the case.

When considering the relevant product market, courts examine whether products are reasonably interchangeable by the consumer for the same purpose. *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 482, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* (considering "commercial realities" and reasonable interchangeability to determine the relevant market); *United States v. Grinnell Corp., 384 U.S. 563, 584, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)* (using reasonable interchangeability to distinguish central station monitoring from watchmen services or audible alarms); *United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 404, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)* (stating that "[t]he market is composed of products that have reasonable interchangeability").

Plaintiff's alleged product market of K-12 educational materials is facially implausible without additional facts. A kindergarten textbook is not interchangeable with a high school textbook. The Court does not **[*15]** here conclude that this product market is impossible-it is conceivable that school districts purchase these materials as a unit and that consistent practice indicates that demand for these products is not split into discrete units based on educational level. Plaintiff, however, has failed to allege any facts sufficient to support a finding of a K-12 educational materials market.

Plaintiff's national geographic market is also unsupported by any alleged facts. When considering the relevant geographic market, courts identify "the area in which a potential buyer may rationally look for the goods or services he or she seeks." *Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 726 (3d Cir. 1991)*; see also *Grinnell, 384 U.S. at 570-71*.

Here, there are no alleged facts indicating that school districts look to publishers across the nation when purchasing educational materials. Again, the Court does not conclude such a market is impossible, only that Plaintiff has failed to plead any facts providing support for Plaintiff's geographic market definition.

Without a plausible relevant market (both geographic and product), the Court cannot determine that Plaintiff alleges that Defendant has market power.

iii. Unreasonable Restraint on Competition

Though Plaintiff has not pled market power, its claim **[*16]** may proceed under rule of reason analysis if Plaintiff has adequately alleged that Defendant unreasonably restrained competition. See *Brokerage Concepts, Inc., 140 F.3d 494, 511 (3d Cir. 1998)*. Plaintiff does not so plead. Indeed, the Amended Complaint contains no facts regarding the reasonableness of Defendant's policy change. In the absence of any facts showing an unreasonable restraint on competition, Plaintiff cannot rely on rule of reason analysis here to survive a motion to dismiss.

c. Substantial Effect on Interstate Commerce

Defendant also argues that Plaintiff has failed sufficiently to allege a substantial effect on interstate commerce. The Court agrees.

In tying cases, "[P]laintiffs [must] show a substantial and adverse effect on commerce." *Cardio-Med. Assoc., Ltd. v. Crozer-Chester Med. Ctr., 721 F.2d 68, 72 (3d Cir. 1983)*. "[S]ubstantiality of effect . . . is to be viewed on a case-by-case, practical economic basis, from the perspective of whether the local activity has a significant impact on competition in commerce and whether the commerce so affected is substantial in volume." Id. (quoting *Harold Friedman, Inc. v. Thorofare Markets Inc., 587 F.2d 127, 132 (3d Cir. 1978))*.

The only relevant allegation in the Amended Complaint is that Defendant is a national company that ships textbooks throughout the nation. Am. Compl. at 5 ¶ 5. Though this implicates interstate commerce, it does not show a "substantial and adverse effect" **[*17]** on such commerce. Nor does Plaintiff's allegation concerning Defendant's market share satisfy the substantial-effects pleading requirement. The pleadings do not aver the size of the textbook delivery service market or even the market for K-12 educational materials generally. The Court declines to speculate in the absence of a pleading that provides some basis from which to infer a substantial effect on interstate commerce. Plaintiff therefore fails adequately to plead that Defendant's actions have a substantial effect on interstate commerce.

For the reasons mentioned above—Plaintiff's failure to plead facts adequate plausibly to show (1) distinct products, (2) market power over the relevant market or unreasonable restraint on competition in violation of the rule of reason, and (3) a substantial effect on interstate commerce—Plaintiff's Amended Complaint is dismissed without prejudice as to Count I.

B. Tortious Interference with Contractual Relationships (Counts II and IV)[5]

To plead tortious interference with contractual relations, Plaintiff must provide facts sufficient reasonably to infer: "(1) actual interference with a contract; (2) that the interference was inflicted intentionally by a defendant who is not a party to the contract; (3) that the interference was without justification; and (4) that the interference caused damage." *Dello Russo v. Nagel, 358 N.J. Super. 254, 268, 817 A.2d 426 (App. Div. 2003)*. Plaintiff does not do so here.

1. Contractual Relationships

Plaintiff fails to allege valid contracts with sufficient specificity to satisfy its burden to plead facts showing actual interference with a contract.

This case is similar to *Plasticware, LLC v. Flint Hills Res., LP, 852 F. Supp. 2d 398 (S.D.N.Y 2012)*. In Plasticware, the plaintiff alleged it had "agreements" with its customers, without providing specifics about any of those agreements. *Id. at 404*. The court held that plaintiff's failure to "allege[] adequate details about a specific contract" justified dismissal of the claim for **[*19]** tortious interference with contractual relationships. Id. Many other cases agree. See *Only v. Ascent Media Grp., LLC, No. 06-2123, 2006 U.S. Dist. LEXIS 72676, 2006 WL 2865492, at *8 (D.N.J. Oct. 5, 2006)* (general allegations that plaintiff had valid contractual relationships were insufficient to identify existing contracts with required specificity to state a claim for tortious interference under New Jersey law); *Commerce Ins. Servs. v. Szczurek, No. 05-3565, 2006 U.S. Dist. LEXIS 515, at *26-27 (D.N.J. Jan. 6, 2006)* (dismissing a claim for tortious interference when complaint failed to identify existing contracts).

Here too, Plaintiff has alleged only that it had "contractual agreements" or "agreements" with various entities. Plaintiff provides a list of twenty-three school districts with which it had "agreements," but does not provide adequate specifics concerning these agreements. As an example of this deficiency, it is not clear whether any of these agreements were actual paying contracts. Plaintiff also fails to identify the date any of these agreements became effective, so it is unclear whether any of these agreements predate the policy change. Given the ambiguity of Plaintiff's Amended Complaint, the Court finds that Plaintiff has failed to identify valid relevant contracts with reasonable specificity.

2. Intentionality

Plaintiff also fails to provide any facts plausibly **[*20]** indicating that Defendant changed its policy to harm Plaintiff intentionally.

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[5] Count II, "intentional interference with contract," and Count IV, "tortious interference with contract," are pled almost identically and, insofar as is relevant to this opinion, appear to apply the same law. See *Norwood-Jeb, L.L.C. v. N. River Mews Assocs., L.L.C., No. 1259-07T3, 2009 N.J. Super. Unpub. LEXIS 1558, 2009 WL 1010963, at *9 (N.J. Super. App. Div. Apr. 15, 2009)* **[*18]** (analyzing an "intentional interference with contract" claim under "tortious interference with contractual rights"). Plaintiff does not contest Defendant's characterization that these counts are identical, in law and in fact, so the Court analysis applies to both.

Interference is intentional when "the actor desires to bring it about or if he knows that the interference is certain or substantially certain to occur as a result of his action." *Dello Russo, 358 N.J. Super. at 268*; *Cargill Global Trading v. Applied Dev. Co., 706 F. Supp. 2d 563, 575 (D.N.J. 2010)*. Plaintiff's only relevant allegation is that Defendant's intent to harm Plaintiff is "evidenced by the fact" that the change in policy "was enacted at the commencement of plaintiff's busiest shipping season of the year." Am. Compl. at 8 ¶ 4. It is not plausible to infer that Defendant intended to hurt Plaintiff based solely on the fact that the timing of the disputed policy change hurt Plaintiff. This element is not sufficiently pled.

3. Lack of Justification or Excuse

In the context of intentional interference with contractual relationships, Plaintiff must allege malice—i.e. intentionally inflicting harm without justification or excuse. See *Lamorte Burns & Co. v. Walters, 167 N.J. 285, 306, 770 A.2d 1158 (2001)*. A "bare recital that Defendants' alleged interference was carried out with 'malice' falls short" of the required allegations to sustain a claim under this count. *Mu Sigma, Inc. v. Affine, Inc., No. 12-1323, 2013 U.S. Dist. LEXIS 99538, 2013 WL 3772724, at *5 (D.N.J. July 17, 2013)* (citation omitted). Thus, irrespective of other deficiencies, Plaintiff's allegations here fail unless Plaintiff alleges that **[*21]** Defendant had no justification or excuse for its policy change.

Plaintiff makes no such allegation. Defendant, for its part, identifies several justifications for its policy change—including unrecovered costs due to inept external shipping companies. Because Plaintiff does not plead that Defendant changed its policy without any justification, this claim must be dismissed.

The Court dismisses Counts II and IV without prejudice.

C. Unjust Enrichment (Count III)

To plead unjust enrichment, Plaintiff "must show both that defendant received a benefit and that retention of that benefit without payment would be unjust." *VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554, 641 A.2d 519 (1994)*. Plaintiff must also show that Plaintiff "expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights." Id. Plaintiff's Amended Complaint fails to plead these requirements.

Under New Jersey law, unjust enrichment cannot provide an independent tort claim. *Castro v. NYT Television, 370 N.J. Super. 282, 299, 851 A.2d 88 (App. Div. 2004)* ("[T]he role of unjust enrichment in the law of torts is limited for the most part to its use as a justification for other torts such as fraud or conversion."); *Nelson v. Xacta 3000 Inc., No. 08-5426, 2009 U.S. Dist. LEXIS 109580, 2009 WL 4119176, at *7 (D.N.J. Nov. 24, 2009)* ("New Jersey law does not recognize unjust **[*22]** enrichment as an independent tort cause of action"). Thus, the only basis on which Plaintiff could theoretically rely for an independent cause of action for unjust enrichment is a contractual relationship between the Plaintiff and Defendant. Plaintiff does not allege any such relationship here. Facially, then, the unjust enrichment claim in this case has no basis under New Jersey law and must be dismissed.

The unjust enrichment claim must be dismissed on yet another basis. In an unjust enrichment claim, the plaintiff must be the party who provides the benefit to the defendant. See *Eli Lilly & Co. v. Roussel Corp., 23 F. Supp. 2d 460, 496 (D.N.J. 1998)* (unjust enrichment claim failed to state a claim "because [plaintiff] had not alleged (nor could it prove) that it conferred a benefit on defendants"). The benefit that Defendant allegedly received from its change of policy was approximately 10% in delivery fees. Plaintiff did not pay that money to Defendant, nor does it confer any benefit upon Defendant in any meaningful way. Plaintiff may be injured here, but there is no doubt that, as pled, Plaintiff does not confer any benefit on Defendant. Because of these deficiencies, the Court dismisses Plaintiff's unjust enrichment claim without prejudice to Plaintiff's **[*23]** right to refile.

IV. CONCLUSION

For the foregoing reasons, this Court dismisses Plaintiff's Amended Complaint in its entirety without prejudice to Plaintiff's right to refile within twenty-one days. Plaintiff is on notice of the defects with its current complaint. If these defects are not remedied in any subsequent pleading, the Court will deny further amendment as futile. An appropriate Order accompanies this Opinion.

Date: April 29, 2015

/s/ Madeline Cox Arleo

Hon. Madeline Cox Arleo

UNITED STATES DISTRICT JUDGE

ORDER

This matter comes before the Court on Defendant Houghton Mifflin Harcourt Publishing Company's ("Defendant") Motion to Dismiss Plaintiff Debjo Sales, LLC's ("Plaintiff") Amended Complaint [Dkt. No. 34]. For the reasons articulated in this Court's accompanying Opinion,

IT IS on this 29th day of April, 2015,

ORDERED that Defendant's Motion to Dismiss is hereby **GRANTED** without prejudice to Plaintiff's right to move to replead by **May 21, 2015**.

/s/ Madeline Cox Arleo

Hon. Madeline Cox Arleo

UNITED STATES DISTRICT JUDGE

Swanson v. North Carolina

United States District Court for the Eastern District of North Carolina, Southern Division

April 29, 2015, Decided; April 29, 2015, Filed

No. 7:14-cv-00144-FL

Reporter
2015 U.S. Dist. LEXIS 66814 *

Gary Swanson, Plaintiff, v. State of North Carolina, Defendant.

Subsequent History: Adopted by, Dismissed by, Dismissed without prejudice by, in part *Swanson v. N.C., 2015 U.S. Dist. LEXIS 65958 (E.D.N.C., May 20, 2015)*

Core Terms

criminal proceeding, monetary relief, allegations, recommended, anti-trust, violations, courts, rights, exercise jurisdiction, fail to state a claim, adequate opportunity, abstention doctrine, alleged violation, government entity, injunctive relief, district court, Detention, amenable, progress, ongoing, vital

Counsel: **[*1]** Gary Swanson, Plaintiff, Pro se, Castle Haynes, NC.

Judges: ROBERT T. NUMBERS, II, UNITED STATES MAGISTRATE JUDGE.

Opinion by: ROBERT T. NUMBERS, II

Opinion

Memorandum & Recommendation

Plaintiff Gary Swanson is currently the defendant in four criminal matters pending in North Carolina Superior Court related to the alleged violation of the terms of a domestic violence protective order. While being held in pre-trial detention in the New Hanover County Detention Facility, Swanson filed a Complaint against the State of North Carolina. He claims that local law enforcement violated his civil rights and federal anti-trust law in the course of his arrest and prosecution. Swanson seeks an order dismissing the criminal proceedings against him and monetary damages from the State of North Carolina for the alleged violations of his rights.

Pursuant to the Prison Litigation Reform Act, the court is required to review complaints filed by prisoners[1] which raise claims against "governmental entity or officer or employee of a governmental entity." *28 U.S.C. § 1915A(a)*. The court is required to identify any cognizable claims contained in the complaint and dismiss any portion of the complaint that is frivolous, malicious, fails to state a claim upon which **[*2]** relief may be granted, or seeks monetary relief against a party who is immune from such relief. *Id.* at *§ 1915(b)*. By reviewing prisoner complaints,

[1] Although Swanson is a pre-trial detainee, his Complaint is still subject to screening under the PLRA. *Section 1915A(c)* defines prisoner to include "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law...."

the courts are attempting to effectuate "Congress' dual goals of reducing prisoner litigation and, at the same time, preserving meaningful access to the courts for prisoners with potentially meritorious claims." *McLean v. United States, 566 F.3d 391, 400 (4th Cir. 2009)*.

Here, it is appropriate for the court to dismiss Swanson's Complaint in its entirety. Under the *Younger* abstention doctrine, the court should decline to exercise jurisdiction over his request that the court enjoin or dismiss the criminal actions pending against him in North Carolina Superior Court. His claim for monetary relief against the State of North Carolina must also be dismissed because the state is not amenable to suit under *Section 1983*. Finally, Swanson's allegations of a violation of anti-trust law must be dismissed because it is completely lacking in factual **[*3]** support. The court will address each of these claims in more detail below.

Initially, Swanson seeks an order from this court which would require the State of North Carolina to dismiss the criminal proceedings pending against him. However, under the *Younger* abstention doctrine, federal courts should refuse to inhibit the progress of state criminal proceedings "if there is (1) an ongoing state judicial proceeding, instituted prior to any substantial progress in the federal proceeding; that (2) implicates important, substantial, or vital state interests; and (3) provides an adequate opportunity for the plaintiff to raise the federal constitutional claim advanced in the federal lawsuit." *Nivens v. Gilchrist, 319 F.3d 151, 154 (4th Cir. 2003)*.

All three *Younger* factors are satisfied in this case. First, Swanson's Complaint indicates that there are multiple ongoing state criminal proceedings that were filed well before he initiated this action. Second, "North Carolina has a very important, substantial, and vital interest in preventing violations of its criminal laws." *Id. at 154*. Finally, Swanson has an adequate opportunity to raise issues related to his allegations of coercion and unreasonable searches and seizures in the state court action. Therefore, **[*4]** the court should decline to exercise jurisdiction over Swanson's request that the court require the dismissal of the criminal claims pending against him in North Carolina's General Courts of Justice and it is recommended that the district court dismiss Swanson's claim for injunctive relief.

Swanson's Complaint also seeks monetary relief from the State of North Carolina under *42 U.S.C. § 1983*. *Section 1983* provides for liability against "every person" who, under color of state law, violates a plaintiff's constitutional rights. However, the State of North Carolina is not amenable to suit under *Section 1983* because it is not a "person" within the meaning of that statute. *Will v. Michigan Dep't of State Police, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989)*. *See* *Kentucky v. Graham, 473 U.S. 159, 165, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985)*. Therefore, the court should dismiss Swanson's claim for monetary relief because he has failed to state a claim against the State of North Carolina.

Finally, Swanson claims that the State should be held liable for violations of federal ***antitrust law***. However, the Complaint fails to include any factual allegations whatsoever that would establish such a violation. This claim should also be dismissed. *See* *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (holding that to state a claim a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on **[*5]** its face.'")

Therefore, it is recommended that the district court dismiss Swanson's claim for injunctive relief without prejudice due to lack of subject matter jurisdiction and dismiss his remaining claims with prejudice due to failure to state a claim upon which relief may be granted.

Dated: April 29, 2015

/s/ Robert T. Numbers, II

ROBERT T. NUMBERS, II

UNITED STATES MAGISTRATE JUDGE

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United States v. Am. Express Co.

United States District Court for the Eastern District of New York

April 30, 2015, Decided; April 30, 2015, Filed

10-CV-4496 (NGG) (RER)

Reporter

2015 U.S. Dist. LEXIS 56945 *; 2015-1 Trade Cas. (CCH) P79,148; 2015 WL 1966362

UNITED STATES OF AMERICA, et al., Plaintiffs, -against- AMERICAN EXPRESS COMPANY and AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC., Defendants.

Prior History: United States v. Am. Express Co., 2011 U.S. Dist. LEXIS 83085 (E.D.N.Y., June 20, 2011)

Core Terms

merchants, permanent injunction, steering, brands, customers, Card, provisions, parties, consent decree, terminate, rights, debit card, communicate, compliance, proposals, Toys, antitrust, general purpose, credit card, notice, accepting, argues, Sherman Act, disparaging, violations, district court, Non-Party, signage, point of sale, mischaracterizing

Counsel: **[*1]** For American Express Anti-Steering Rules Antitrust Litigation (NO II), In Re: Philip C. Korologos, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY.

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For Jasa, Inc. on behalf of themselves, Plaintiff: Benjamin D. Brown, PRO HAC VICE, Cohen, Milstein, Sellers & Toll, P.L.L.C, Washington, DC; Christopher William Hellmich, PRO HAC VICE, Hellmich Law Offices, Costa Mesa, CA; David A. Young, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Dean Martin Solomon, Levitt & Kaizer, New York, NY; Douglas A Millen, PRO HAC VICE, FREED KANNER LONDON & MILLEN LLC, Bannockburn, IL; Gary B. Friedman, Friedman Law Group LLP, New York, NY; J. Douglas Richards, Cohen Milstein Sellers and Toll PLLC, New York, NY; Mark Reinhardt, ReinhardtWendorf & Blanchfield, St. Paul, MN; Noah Shube, 434 Broadway, New York, NY; Read K. McCaffrey, Patton Boggs LLP, Washington, DC; Richard P. Rouco, Quinn Connor Weaver Davies & Rouco, Birmingham, AL; Scott H. Levy, Friedman Law Group LLP, New York, NY.

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For National Supermarkets Association on behalf of its membership, and all other similarly situated persons, Inc. Plaintiff: Benjamin D. Brown, Cohen, Milstein, Sellers & Toll, P.L.L.C, Washington, DC; David A. Young, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Gary B. Friedman, Friedman Law Group LLP, New York, NY; J. Douglas Richards, Cohen Milstein Sellers and Toll PLLC, New York, NY; Noah Shube, 434 Broadway, New York, NY; Tracey L. Kitzman, Friedman Law Group, LLP, New York, NY.

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Judges: NICHOLAS G. GARAUFIS, United States District Judge.

Opinion by: NICHOLAS G. GARAUFIS

Opinion

MEMORANDUM

I. INTRODUCTION

Following a lengthy bench trial, the court issued Findings of Fact and Conclusions of Law (the "Decision") on February 19, 2015, finding that the Non-Discrimination Provisions (the "NDPs") maintained by American Express Company and American Express Travel Related Services Company (collectively, "Defendants," "American Express," or "Amex") constitute an unlawful restraint on trade under *Section 1* of the Sherman Act, *15 U.S.C. § 1*. (Decision (Dkt. 619).) Pursuant to a Scheduling Order also issued on February 19, 2015 ("Scheduling Order") (Dkt. 620), **[*16]** the parties made submissions to the court concerning the proper scope of permanent injunctive relief in this case. (See Joint Submission as to Remedy ("Joint Submission") (Dkt. 621); Pls.' Mem. in Supp. of Proposed Final J. ("Gov't's Br.") (Dkt. 622); Defs.' Mem. of Law in Supp. of Defs.' Proposed Final J. ("Defs.' Br.") (Dkt. 623); Pls.' Reply Mem. in Supp. of Proposed Final J. ("Gov't's Reply") (Dkt. 626); Defs.' Reply Mem. of Law in Further Supp. of Defs.' Proposed Final J. ("Defs.' Reply") (Dkt. 627).) The Government and Defendants each submitted proposed remedial orders (see Gov't's Proposed J. (Joint Submission, App. 1 (Dkt. 621-1)); Defs.' Proposed J. (Joint Submission, App. 2 (Dkt. 621-2))), as well as an appendix reflecting a comparison of the two proposals (see Joint Submission, App. 3 (Dkt. 621-3)). In addition, the court granted leave to two sets of non-party merchants and to merchant Southwest Airlines to submit comments concerning the proposed remedy. (See Not. by Non-Party Merchants Concerning Proposed Remedy (Dkt. 631); Not. by Class Pls. in 11-MD- 2211 (E.D.N.Y.) Concerning Gov't's Proposed J. (Dkt. 634); Not. by Southwest Airlines Regarding Proposed Relief (Dkt. 635).) **[*17]** With leave of court, American Express and the Government each filed consolidated responses to the three merchant comments. (See Pls.' Mem. in Reply to Non-Party Filings Regarding Remedy (Dkt. 636); Resp. of Defs. to Non-Party Comments (Dkt. 637).)

Having considered the submissions, including the specific remedies proposed by the Government and American Express, and on the basis of the well-developed factual record introduced during the trial, the Court issues this Memorandum to explain certain of the provisions contained in the Order Entering Permanent Injunction as to the American Express Defendants (the "Permanent Injunction") that the court enters concurrently with this Memorandum.

As the court has explained on numerous occasions, the court believes that given the complexity of the general purpose credit and charge card network services industry, "the parties themselves are likely best equipped to determine how American Express's merchant regulations might be rewritten so as to satisfy American Express's interests and yet comport with the Sherman Act." (Scheduling Order at 2.) The court therefore encouraged the parties to jointly propose a remedy. (See id. at 1-3.) Unfortunately, as demonstrated **[*18]** by the competing proposed orders, the parties have reached only limited common ground. Thus, the court must resolve numerous disputes, concerning both core and collateral issues. This Memorandum explains the reasoning behind the court's resolution of the parties' core disputes.[1]

As discussed more fully below, with some exceptions and with certain modifications, the court generally adopts proposals made by the Government and rejects competing proposals made by Defendants. Although the court invited American Express to play an active role in the construction of the Permanent Injunction, American Express's core proposals were, considering the record before the court, too narrow or unwieldy to effectuate the remedial objectives of a permanent injunction under the Sherman Act. Through its proposals, American Express would have the court ignore the Supreme Court's guidance in the antitrust context that:

> [t]he District Court is not obliged to assume, contrary to common experience, that a violator **[*20]** of the antitrust laws will relinquish the fruits of his violation more completely than the court requires him to do. And advantages already in hand may be held by methods more subtle and informed, and more difficult to prove, than those which, in the first place, win a market. When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed.

Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 698, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978) (quoting *Int'l Salt Co. v. United States, 332 U.S. 392, 400, 68 S. Ct. 12, 92 L. Ed. 20 (1947))*.

The Permanent Injunction is designed to eliminate the consequences of Defendants' past violation of the Sherman Act and to encourage a functional and fair market in the future. It is structured to clarify which rights merchants now have, and confirms which powers American Express retains. The Permanent Injunction contains detailed notice provisions to ensure that Amex-accepting merchants receive notification of the changes to the NDPs and of their nascent ability to steer customers toward particular credit card brands. It also contains thorough compliance provisions to guarantee that American Express meets its obligations and changes its perception of and response to steering by merchants. The court does not seek **[*21]** to punish Defendants or to impose punitive terms upon them, and the court is cognizant of the fact that the implementation of the Permanent Injunction will require Defendants to expend significant efforts and to alter the ways in which they engage with merchants. This result flows from the findings contained in the court's Decision, and is a result that the Sherman Act is designed to provide.

II. LEGAL STANDARD

In an antitrust case, "courts have an obligation, once a violation of the antitrust laws has been established, to protect the public from a continuation of the harmful and unlawful activities." *United States v. Parke, Davis & Co., 362 U.S. 29, 48, 80 S. Ct. 503, 4 L. Ed. 2d 505 (1960)*. An antitrust remedy should "pry open to competition a market that has been closed by defendants' illegal restraints." *Int'l Salt Co. v. United States, 332 U.S. 392, 401, 68 S. Ct. 12, 92 L. Ed. 20 (1947)*, abrogated on other grounds by *Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28,*

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[1] This Memorandum does not provide a detailed explanation for the court's resolution of less significant disputes between the parties. These include the court's adoption of the Government's proposed definition of "Merchant" (see Permanent Injunction § I.M), adoption of the Government's proposed provision authorizing exclusive-steering agreements between Amex and merchants under certain circumstances (see Permanent Injunction §§ III.B.3, IV.D), adoption (as modified by the court) of American Express's proposed provision confirming its right to steer cardholders toward particular merchants (see Permanent Injunction § III.B.6), adoption (as modified by the court) of the Government's proposed provisions governing notice to merchants of the court's Decision and Permanent Injunction (see Permanent Injunction § IV.C), rejection of American Express's proposed definition of "Rule" (see Defs.' Proposed J. § I.22), rejection **[*19]** of American Express's proposed provision regarding marketing benefits and other services (see Defs.' Proposed J. § III.B.6), and rejection of American Express's proposal that would have required merchants engaging in steering to provide notice to Amex (see Defs.' Proposed J. § III.B.9). Finally, the court notes that while it has drawn largely from the parties' proposals, it has also made its own additions and subtractions to the language, including adjustments to certain time periods.

126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006). The remedy should seek "both to avoid a recurrence of the violation and to eliminate its consequences," Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 697, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978), and to "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance," United States v. U.S. Gypsum Co., 340 U.S. 76, 88, 71 S. Ct. 160, 95 L. Ed. 89, 1951 Dec. Comm'r Pat. 580 (1950). See also Ford Motor Co. v. United States, 405 U.S. 562, 573, 92 S. Ct. 1142, 31 L. Ed. 2d 492 (1972) ("The relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition.'" (quoting United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 326, 81 S. Ct. 1243, 6 L. Ed. 2d 318 (1956))). The relief ordered should be based "on some clear 'indication of a significant causal connection **[*22]** between the conduct enjoined or mandated and the violation found directed toward the remedial goal intended.'" United States v. Microsoft Corp., 253 F.3d 34, 105, 346 U.S. App. D.C. 330 (D.C. Cir. 2001) (quoting 3 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 653(b) (1996)). The punishment of a defendant for its prior transgressions is not, however, a proper remedial purpose. See, e.g., Hartford-Empire Co. v. United States, 323 U.S. 386, 409, 65 S. Ct. 373, 89 L. Ed. 322, 1945 Dec. Comm'r Pat. 607 (1945) ("[W]e may not impose penalties in the guise of preventing future violations."). Thus, the remedy should not "adopt overly regulatory requirements which involve the judiciary in the intricacies of business management." New York v. Microsoft Corp., *224 F. Supp. 2d 76, 100 (D.D.C. 2002)* (citing United States v. Paramount Pictures, 334 U.S. 131, 163, 68 S. Ct. 915, 92 L. Ed. 1260 (1948)), aff'd sub. nom Massachusetts v. Microsoft Corp., 373 F.3d 1199, 362 U.S. App. D.C. 152 (D.C. Cir. 2004).

Absent an adequate remedy in an antitrust case, the Government may have "won a lawsuit [but] lost a cause." Int'l Salt, 332 U.S. at 401. Accordingly, district courts "are invested with large discretion to model their judgments to fit the exigencies of the particular case." Int'l Salt, 332 U.S. at 400-01. It "is entirely appropriate" for an antitrust remedy to "go[] beyond a simple proscription against the precise conduct previously pursued." Nat'l Soc'y of Prof'l Eng'rs, 435 U.S. at 698. A district court thus has "broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future unless enjoined, may fairly be anticipated from the defendant's conduct **[*23]** in the past.'" Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 132, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969) (quoting N.L.R.B. v. Express Publ'g Co., 312 U.S. 426, 435, 61 S. Ct. 693, 85 L. Ed. 930 (1941)). "[I]t is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." F. Hoffmann-La Roche Ltd v. Empagran S.A., 542 U.S. 155, 171, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (2004) (quoting E.I. du Pont de Nemours, 366 U.S. at 334)).

More generally, as Defendants emphasize in their submissions, a court entering a permanent injunction in any case must not misuse its equitable powers under Rule 65 of the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 65(d); City of New York v. Mickalis Pawn Shop, LLC, 645 F.3d 114, 144 (2d Cir. 2011) ("Although a district court has 'a wide range of discretion in framing an injunction in terms it deems reasonable to prevent wrongful conduct,' it is nonetheless 'the essence of equity jurisdiction' that a court is only empowered 'to grant relief no broader than necessary to cure the effects of the harm caused by the violation.'" (quoting Forschner Group v. Arrow Trading Co., 124 F.3d 402, 406 (2d Cir. 1997))). While the Second Circuit has warned, generally, that "[i]njunctive relief should be narrowly tailored to fit specific legal violations" and "should not impose unnecessary burdens on lawful activity," Waldman Publ'g Corp. v. Landoll, Inc., 43 F.3d 775, 785 (2d Cir. 1994) (citation omitted), in the antitrust context, the Supreme Court has made clear that a court issuing an antitrust remedy is authorized to constrain a defendant's otherwise protected conduct, see, e.g., Nat'l Soc'y of Prof'l Eng'rs, 435 U.S. at 697-98 ("In fashioning a remedy, the District Court may, of course, consider the **[*24]** fact that its injunction may impinge upon rights that would otherwise be constitutionally protected, but those protections do not prevent it from remedying the antitrust violations."); F.T.C. v. Nat'l Lead Co., 352 U.S. 419, 430, 77 S. Ct. 502, 1 L. Ed. 2d 438 (1957) ("[D]ecrees often suppress a lawful device when it is used to carry out an unlawful purpose.").

III. DISCUSSION

The court now turns to the core disputes between the parties concerning the scope of the Permanent Injunction. Although the parties have agreed on certain definitions and provisions, the most significant aspects of the remedy require judicial resolution.

A. The NDPs

In its Scheduling Order, the court invited the parties to propose new language for the NDPs, noting that "[f]ashioning appropriate relief in this case will require certain of the provisions in the NDPs to be excised entirely," while "[i]t may be possible . . . for other challenged clauses to be revised, amended, or recharacterized in such a way that considers the interests of both Plaintiffs and Defendants." (Scheduling Order at 2.) The Government's proposed judgment not only identifies language that, in the Government's view, must be excised, but also proposes affirmative contractual language informing merchants of their right to engage in steering. (See **[*25]** Gov't's Proposed J. § V.B.) American Express, on the other hand, argues that the Government's proposal to include specific changes to the contractual language is "unnecessary," since "American Express will be subject to the Final Judgment that is entered in this case and . . . will have every incentive to ensure that it remains in compliance with that order." (Defs.' Br. at 49.) American Express further argues that its "able transactional counsel," and not the court or the Government, "are in the best position to draft the specific language that would be necessary to effectuate the Court's order while protecting American Express's legitimate business interests." (Id.; see also id. ("American Express has not found any precedent in which a Court unilaterally made specific, wide-ranging edits to a firm's contractual language as part of a final judgment in a Section 1 case.").)

The court agrees in part with the Government and in part with Defendants. After years of litigation between the parties (in addition to ongoing litigation between American Express and non-party merchants), a remedy that does not identify specific contractual language that is no longer enforceable merely kicks the can down the proverbial road. The Permanent Injunction must, at a minimum, identify the language currently contained in the NDPs rendered unenforceable by the court's Decision. Thus, in **[*26]** § IV.B of the Permanent Injunction, the court identifies language, currently contained in the NDPs, that is no longer enforceable.

The court does not, however, find it appropriate, for lack of a better phrase, to put words into American Express's mouth. Thus, the Permanent Injunction does not mandate Amex to include specific language in its contracts with merchants. (Compare, e.g., Permanent Injunction § IV.B.2 (striking unenforceable language), with Gov't's Proposed J. § V.B.2 (proposing that Amex include affirmative language in contracts notifying merchants of their right to steer and providing examples of such steering).) Other provisions of the Permanent Injunction ensure that (1) merchants will be aware of their rights, and (2) American Express will not undermine the remedy by including improper or overly restrictive language in its revised contracts. First, all merchants will receive ample notice of the court's Decision and Permanent Injunction (see Permanent Injunction § IV.C), and any merchant that is terminated by Amex or threatened with termination will receive additional notice (see Permanent Injunction § IV.F). Second, whenever American Express plans to implement changes **[*27]** to the way it regulates merchants' acceptance of other brands of credit cards or of debit cards, it must provide notice to the Government. (See Permanent Injunction § IV.H.)

In one, limited context, the court does include specific language that American Express may include in its contracts with merchants without violating the terms of the Permanent Injunction. (See Permanent Injunction § IV.B.4.) Pursuant to § III.B.5 of the Permanent Injunction, American Express remains authorized to require a merchant engaged in steering to indicate, in a limited manner, its acceptance of American Express. See also infra Part III.D.1. Thus, where the NDPs before required all merchants communicating payment methods to customers to "display [Amex] Marks according to [its] guidelines and as prominently and in the same manner as any Other Payment Products," Amex's merchant contracts can still (if Amex chooses) require merchants that engage in steering to "post limited signage at the point of sale (including online or on mobile services) or store entry or communicate orally that the Merchants accept [Amex]." (See Permanent Injunction § IV.B.4.) As discussed in more detail below, this language strikes an **[*28]** appropriate balance between allowing merchants to effectively steer, and protecting Defendants' legitimate interest in requiring merchants who steer away from Amex to at least inform customers that they also accept American Express.[2] As with other provisions of its merchant contracts, Amex is authorized to instead draft alternative language that comports with the Permanent Injunction, upon notice to the Government. (See Permanent Injunction § IV.H.) The court includes affirmative contractual language in § IV.B.4 to provide the parties a "safe harbor" of acceptable language concerning merchant signage and oral communications.

B. Boundaries of Permitted Steering

The parties sharply dispute the boundaries of permitted merchant steering. American Express argues that, based on the court's Decision and the trial record, steering should be allowed only to a "Less Expensive General Purpose Card," as determined on a transaction-by transaction basis. In other words, **[*29]** under Amex's proposal, steering would be allowed only if the merchant—using a calculation of "All-In Merchant Fee" supplied by Defendants—determines that for the particular transaction, accepting the customer's particular non-Amex-branded credit card would cost the merchant less money. In addition, under Amex's proposal, the Permanent Injunction would not protect a merchant's right to steer to products outside of credit and charge card products, including debit cards. In response, the Government argues that Amex's "Less Expensive Card" and transaction-based approach would undermine the remedy and allow Defendants, rather than merchants, to determine when a merchant may steer. In addition, the Government argues that although the court's Decision held that the relevant market for purposes of its market power analysis excludes debit cards, allowing steering only between general purpose credit and charge cards "would only deter merchants from engaging in steering in the first place, including steering among general purpose cards, and would hinder restoration of competition among general purpose card networks." (Gov't's Br. at 14.) Accordingly, the Government proposes a remedy that would **[*30]** allow steering to any "Form of Payment," a term defined by the Government to include cash, check, debit, "or any other means by which Customers pay for goods or services." (See Gov't's Proposed J. § II.I.)

For the reasons discussed below, the court rejects American Express's proposals that steering be permitted only on a transaction-by-transaction basis and only to a "Less Expensive General Purpose Card." In addition, although the court agrees that the implementation of an effective remedy in this case must allow a merchant to steer, in certain circumstances, to brands of debit, the court rejects the Government's overly broad proposal that the remedy also protect steering to other forms of payment, such as cash and check.[3]

1. Amex's "Less Expensive General Purpose Card" Proposal

Amex argues that the "Decision—and the Government's entire theory of competitive effects—is premised on the theory that merchants need the ability to steer to lower cost [general purpose credit and charge] cards to enhance competition **[*31]** among the [general purpose credit and charge] card networks for merchant business." (Defs.' Br. at 9.) While true that in most instances, rational merchants will want to steer customers toward credit cards that cost them less money to accept, it is not American Express's right to perform such a calculation, or to force merchants to make such a calculation on the basis of American Express's pre-defined terms. The trial record demonstrated that merchants are able to make price comparisons, and that certain merchants care about non-price features, such as speed of pay or treatment of refunds. In other words, as the court noted in its Decision, "the law does not permit American Express to decide on behalf of the entire market which legitimate forms of interbrand competition should be available and which should not." (Decision at 136.) Cf. *F.T.C. v. Ind. Fed'n of Dentists, 476 U.S. 447, 452, 106 S.*

[2] In addition, the court did not strike from the NDPs language that makes clear that American Express can require all merchants to indicate their acceptance of Amex whenever a customer affirmatively asks what forms of payment are accepted.

[3] Of course, other sources of law outside of the scope of the Permanent Injunction, such as the Durbin Amendment to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, may protect certain forms of steering to certain forms of payment. (See generally Decision at 30-31.)

Ct. 2009, 90 L. Ed. 2d 445 (1986) ("The [defendant] is not entitled to pre-empt the working of the market by deciding for itself that its customers do not need that which they demand.").[4]

2. Amex's Transaction-Based Approach

In tandem with its "Less Expensive General Purpose Card" proposal, Amex posits that "the only way to ensure that merchants are steering to lower cost cards, and thereby acting in a manner consistent with the Court's . . . Decision, is to require that the cost comparison be done at the transaction level." (Defs.' Br. at 11.) Again, Amex seeks to continue its control of merchant decision-making, rather than to allow merchants to decide what is best for themselves. It is the merchant's prerogative to determine whether to steer on a general, brand level (and increase its own costs for those transactions where it happens to steer to a particular Visa card that ultimately costs more to accept than the customer's Amex card), or whether to steer on a transactional basis. The trial record and the Decision include many examples of general, brand-specific steering, and a limitation on steering to the level of a specific, anticipated transaction would severely undermine the remedy.

3. Steering to Debit Brands

The parties dispute whether American Express should be permitted to bar merchants from steering customers toward debit cards and other forms of **[*33]** payment, such as cash and check. American Express argues that, "consistent with the Court's market definition findings, . . . the conduct that the Court's remedy should redress has nothing to do with non-[general purpose credit card] payment forms," such as debit. (Defs.' Br. at 17, 19.) The Government responds that "Amex has no basis for demanding the right, unavailable to Visa or MasterCard, to block merchants from attempting to steer customers to payment forms outside the relevant market, including to particular brands of those payment forms." (Gov't's Br. at 13.)

As reflected in § III.A of the Permanent Injunction, the court has determined that in order to implement an effective remedy in this case—in other words, "to allow Merchants to attempt to influence the General Purpose Cards that a Customer uses by providing choices and information in a competitive market"—merchants must be allowed to steer toward particular brands of debit cards, in addition to steering between brands of credit cards. (Permanent Injunction § III.A.) The Permanent Injunction does not, however, expressly protect steering to other forms of payment, such as cash and check, although other sources of law provide **[*34]** such protection in certain circumstances.

The court acknowledges, as Amex emphasizes, that it determined in its Decision that debit and credit network services comprise separate markets. (See Decision at 37-61.) However, the mere fact that debit cards are not part of the general purpose credit and charge card network services market does not mean that the court lacks the power to include brands of debit cards within the scope of the Permanent Injunction. In tailoring the terms of the remedy to this particular case, a pragmatic approach is necessary. The fact of the matter is that the major brands of credit cards (such as Visa and MasterCard) also sponsor debit cards—it is therefore impossible for merchants to effectively steer between brands of credit without the authority to, in certain cases, in effect steer a customer toward a debit card. Under American Express's proposal, a merchant would be constrained to state that it "prefers Visa credit cards," or that customers who use "MasterCard credit cards" receive an upgrade. But a merchant may want to steer by stating simply that it "prefers Visa," or that customers who use a "MasterCard" receive an upgrade, or even by prominently displaying just the **[*35]** Discover logo. Excluding brands of debit cards from the scope of the permitted steering would chill merchant steering and could render illusory the rights provided by the Permanent Injunction. Thus, Amex cannot prohibit a merchant from posting a sign stating that it prefers a particular brand, where that brand name encompasses both credit and debit cards.[5]

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[4] If American Express believes that merchants and/or consumers do not understand the true relative costs of accepting Amex credit cards compared to other credit cards, it is of course permitted to educate merchants and **[*32]** consumers.

[5] This is not the first case in which an antitrust injunction has covered a product not within the relevant market. See, e.g., Int'l Boxing Club of N.Y. v. United States, 358 U.S. 242, 262, 79 S. Ct. 245, 3 L. Ed. 2d 270 (1959) (upholding injunction that "went beyond the relevant market which has been considered for purposes of determining the Sherman Act violations," because "the

Finally, the court expressly does not include brands of debit cards within the scope **[*36]** of § III.A.7 of the Permanent Injunction. Thus, while a merchant has the right under the Permanent Injunction to communicate to customers the cost of accepting American Express, or the relative costs of accepting different brands of credit cards (and the merchant may do so on an average, rather than transaction-specific, basis), American Express can prohibit merchants from including costs associated with acceptance of debit cards in this calculation, since blending the costs of accepting credit cards and debit cards would likely overstate the difference between the merchant's overall cost of accepting American Express and its cost of accepting other brands, such as Visa and MasterCard, that have both credit and debit cards. (See Permanent Injunction § III.A.7; Defs.' Br. at 16-17.)

C. Termination of Merchants Engaged in Steering

Defendants seek an express provision in the Permanent Injunction that would "confirm . . . that American Express is entitled to exercise its right not to do or continue to do business with a merchant that chooses to steer Card Members away from its Cards." (Defs.' Br. at 26; see also Defs.' Proposed J. § III.B.8.) American Express relies on United States v. Colgate **[*37]** & Co., in which the Supreme Court stated that the Sherman Act "does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1910)*; see also, e.g., *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)* ("A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." (citing *Colgate, 250 U.S. at 307*)); *United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 728-29, 64 S. Ct. 805, 88 L. Ed. 1024 (1944)* ("But in no instance has [Congress] indicated an intention to interfere with ordinary commercial practices. In a business, such as [defendant's], which deals in a specialty of a luxury or near-luxury character, the right to select its customers may well be the most essential factor in the maintenance of the highest standards of service.").

The Government responds that allowing American Express to terminate a merchant who opts to lawfully steer would amount to "explicit Court authorization" for Amex "to achieve the same anticompetitive objective that the Court condemned in its Decision." (Gov't's Br. at 14.) Even where the Supreme Court has recognized the Colgate doctrine, the Government argues, it has also described the breadth of the district court's equitable **[*38]** power and the authority of the district court to take "action [that] reasonably tends to dissipate the restraints and prevent evasions." *Bausch & Lomb, 321 U.S. at 726*.

The court recognizes that, in the abstract, Defendants' argument is appealing. But it would be an absurd result if the Colgate doctrine completely suppressed the district court's authority under the Sherman Act to issue appropriate relief, and thereby authorized Amex to continue, through its market power and a non-contractual "refusal to deal," the very practice deemed unlawful in the court's Decision.

In its Decision, the court concluded that one of American Express's core business practices—the maintenance and enforcement of the NDPs—violated the Sherman Act. Thus, American Express is not similarly situated to the general "manufacturer" or "trader" described in *Colgate*, and does not enjoy the same presumptive rights. In other words:

> The law violator who would oppose a remedy imposed against him as itself a violation of the law does not stand in the same position as an innocent party; those whom the court has found in the wrong may not oppose a remedy on the ground that it would constitute a wrong if leveled at a non-participant in the litigation. **[*39]** "In fashioning a remedy, the District Court may, of course, consider the fact that its injunction may impinge upon

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relief [] must be broader than the [relevant market] because the evil to be remedied is broader." (internal quotation marks and alterations omitted)). Indeed, debit was included within the terms of the injunction in the Visa litigation, even though the court, like this one, determined that credit and debit comprised separate markets. See *United States v. Visa U.S.A., Inc., 163 F. Supp. 2d 322, 408 (S.D.N.Y. 2001)* ("Moreover, including debit as a necessary part of the remedy does not put it in the same product market with general purpose cards.").

> rights that would otherwise be constitutionally protected, but those protections do not prevent it from remedying" the violations.

United States v. Paradise, 480 U.S. 149, 193 n.3, 107 S. Ct. 1053, 94 L. Ed. 2d 203 (1987) (quoting Nat'l Soc'y of Prof'l Eng'rs, 435 U.S. at 697-98). Thus, a district court has discretion under the Sherman Act "to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests." E.I. du Pont de Nemours, 366 U.S. at 326; see also Nat'l Lead, 352 U.S. at 430 ("[D]ecrees often suppress a lawful device when it is used to carry out an unlawful purpose."). Indeed, the Supreme Court has previously approved of antitrust remedies that restricted a violator's rights, including First Amendment rights, see Nat'l Soc'y of Prof'l Eng'rs, 435 U.S. at 698, and patent rights, see United States v. Glaxo Grp. Ltd., 410 U.S. 52, 58-60, 93 S. Ct. 861, 35 L. Ed. 2d 104 (1973) (holding that district court properly limited defendant's patent rights in antitrust injunction).

Here, the court found that the existence and enforcement of the NDPs was an anticompetitive restraint on trade; Colgate cannot stand for the proposition that a firm's ordinary right to refuse to deal is sacrosanct under circumstances where that firm could use its market power to impose the same exact harm on competition. Moreover, in its Decision, the court found that cardholder insistence significantly **[*40]** limits a merchant's ability to cease acceptance of American Express (see Decision at 71-78), and that Amex has actively monitored merchant activity and enforced the NDPs, including terminating merchants for steering (see id. at 31-32). In this particular case, and based on American Express's prior willingness to stop merchant steering at all costs, granting Amex's request for an unconditional right to refuse to deal would make the Government's vindication of the public's rights entirely illusory. Cf. Int'l Salt, 332 U.S. at 401 ("A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints. If [an antitrust] decree accomplishes less than that, the Government has won a lawsuit and lost a cause.")

The court also finds persuasive the reasoning of Toys "R" Us, Inc. v. FTC, 221 F.3d 928 (7th Cir. 2000), although, as Defendants note, there are differences between that case and this one. Like this case, which the court has previously described as "not fit[ting] neatly into the standard taxonomy of federal ***antitrust law***" (Decision at 34), Toys "R" Us involved a complicated series of vertical and horizontal agreements, in which Toys "R" Us (a traditional retailer) attempted to influence the business activities of toy **[*41]** manufacturers and the relationships between toy manufacturers and discount retailers. 221 F.3d at 930-35. An administrative law judge entered a remedy that, inter alia, prohibited Toys "R" Us from "refusing to purchase toys and related products from a supplier because, in whole or in part, that supplier offered to sell or sold toys and related products to any toy discounter." See id. at 939. Toys "R" Us argued to the administrative law judge (and again on appeal to the Seventh Circuit) that the remedy "trampled on its ability to exercise its rights under Colgate to choose unilaterally the companies with which it wanted to deal." Id. at 934. The Seventh Circuit rejected this argument, explaining that "unilateral actions of the sort protected by Monsanto and Colgate are not the same thing as a retailer's request to the manufacturer to change the latter's business practice." Id. at 939. In other words, the remedial order barred Toys "R" Us from "tell[ing] the manufacturer what to do," but still permitted Toys "R" Us "to decide which toys it want[ed] to carry and which ones to drop, based on business considerations such as the expected popularity of the item." Id. at 939-40. In addition, the Seventh Circuit explained that a remedial provision barring **[*42]** Toys "R" Us from refusing to deal with suppliers that also sold their products to discounters was proper under Colgate, since "[t]hese refusals to deal were the means [Toys "R" Us] used to accomplish the unlawful result, and as such, they are subject to regulation." Id. at 939, 940 (citing Nat'l Lead, 352 U.S. at 425).

Here, given Amex's market power, cardholder insistence, and Amex's prior enforcement of the NDPs, and given the court's "obligation, once a violation of the antitrust laws has been established, to protect the public from a continuation of the harmful and unlawful activities," Parke, Davis & Co., 362 U.S. at 48, the court agrees with the Seventh Circuit's reasoning in Toys "R" Us that a remedial order can, in this particular circumstance, limit a violator's right to refuse to deal without running afoul of Colgate. Of course, like Toys "R" Us, American Express remains free to terminate a merchant for reasons other than merchant steering; but, consistent with the court's findings that Amex has violated the Sherman Act, it is not free to dictate merchants' business practices (and perpetuate the status quo of merchants not engaging in steering) by threatening to refuse to deal with merchants who exercise their rights pursuant to the Permanent Injunction. **[*43]** Accordingly, the Permanent Injunction does not contain the provision American Express seeks.

In addition, Amex is concerned that it will risk violating the Permanent Injunction if it terminates a steering merchant for a reason other than steering; it also contends that a requirement of pre-termination notice to the Government is contrary to a public policy that favors termination of merchants engaged in illegal activities. (See, e.g., Defs.' Br. at 29-30 n.15 ("If American Express faces a contempt proceeding every time it cancels a merchant that also happens to be steering, American Express would uniquely be penalized for exercising cancellation rights even when cancellation would be required by law, regulation or prudent business judgment.").) The court is confident, however, that under the modified notice and reporting requirements imposed by the Permanent Injunction, Amex maintains its ability to terminate merchants for reasons other than steering, including where required by other applicable law. (See Permanent Injunction §§ IV.E (requiring quarterly reporting by Amex to Government of all terminations or suspensions and the reasoning for the actions), IV.F (requiring notice from **[*44]** Amex to any merchant it terminates or threatens with termination).) The court has rejected the Government's proposal that Amex give advanced notice to the Government whenever it plans to threaten or terminate a merchant that is engaged in steering, no matter the reason for the termination. (Compare Permanent Injunction § IV.F, with Gov't's Proposed J. § V.F.)

D. Additional Clarifications

1. Visa and MasterCard Consent Decree

The parties dispute the significance of the Visa and MasterCard Consent Decree previously entered in this case. (See Final J. as to Defs. MasterCard Int'l Inc. and Visa Inc. ("Consent Decree") (Dkt. 143).) Amex argues that because a court has greater flexibility in approving a proposed consent decree, "while withholding rights from American Express that were granted to Visa and MasterCard in the Consent Decree in this case would be inappropriately punitive, the fact that the decree with Visa and MasterCard includes certain restrictions on their activity cannot, on its own, form the basis for imposing those same restrictions on American Express." (Defs.' Br. at 7.) The Government, on the other hand, argues that "[a] settlement is often a compromise, and thus may encompass **[*45]** less relief than a litigated judgment." (Gov't's Reply at 4 (emphasis in original).) In other words, "when a consent decree is brought to a district judge, because it is a settlement, there are no findings that the defendant has actually engaged in illegal practices. It is therefore inappropriate for the judge to measure the remedies in the decree as if they were fashioned after trial." *United States v. Microsoft Corp., 56 F.3d 1448, 1460-61, 312 U.S. App. D.C. 378 (D.C. Cir. 1995)* (emphasis in original).

The court appreciates that in their submissions, both parties noted where their proposals parallel or differ from the Consent Decree, and the justifications for those parallels or differences. (See, e.g., Gov't's Br., Ex. 2 (table comparing each provision of the parties' proposed judgments to the Consent Decree); Defs.' Br. at 41 (arguing that compliance provisions from the Consent Decree are sufficient).) While the court recognizes the interplay between the Permanent Injunction and the Consent Decree, it also recognizes that the Permanent Injunction must be based on the evidence submitted at trial. The court further recognizes that American Express's business model differs in important ways from that of Visa and MasterCard. Thus, the Permanent Injunction parallels the Consent **[*46]** Decree in some respects, and deviates from the Consent Decree in other respects. The fact that the Permanent Injunction contains a provision that Amex opposes because it does not appear in the Consent Decree does not render such a provision "punitive" (see Defs.' Br. at 37); the fact that the Permanent Injunction contains a provision not in the Consent Decree that the Government opposes does not mean that Amex is inequitably granted rights not available to Visa and MasterCard (see, e.g., Gov't's Br. at 5 ("Thus, the judgment should not provide Amex with opportunities to restrict steering in ways Visa and MasterCard cannot and thus perpetuate the market impediments that this Court found unlawful.")).

2. Communicating Acceptance of Amex

As discussed above, see supra Part III.A, American Express has a legitimate interest in requiring that merchants who steer customers away from Amex cards also communicate to those customers that they accept American Express. The Government argues that Amex should only be allowed to require such a communication where the merchant otherwise communicates to customers which brands it accepts (for example, on a small display at the point of sale indicating all **[*47]** brands accepted). Where a merchant only communicates its preference for certain brands (for example, a sign at the point of sale stating that a merchant prefers Visa, or a sign at the point of sale offering a discount to customers who use a MasterCard, but nothing more), the Government appears to argue that Amex cannot compel a merchant to communicate, in some way, that it also accepts American Express.

The purpose of the Permanent Injunction is not to mislead consumers into believing that a particular merchant that chooses to engage in steering does not, in fact, accept American Express. Rather, as the court explained in the Decision, the removal of the NDPs should increase the flow of truthful information between merchants and customers. (See Decision at 30.) Thus, at the threshold, the court agrees with Defendants that they should have the authority to require merchants that engage in steering to also communicate to customers that they accept American Express. Similarly, the court does not agree with the Government that a provision protecting Amex's ability to enforce signage rules is "unnecessary" and gives Amex an "undue influence with merchant steering." (Gov't's Br. at 18.)

Under § III.B.5 **[*48]** of the Permanent Injunction, American Express has authority to impose signage requirements, but this authority is limited, and in no event is Amex authorized to use rules concerning signage or other merchant communications regarding Amex acceptance to deter or undermine the efficacy of merchant steering. (Permanent Injunction § III.B.5.) Accordingly, at most, Defendants can require that merchants post signage at the point of sale (including online or on mobile services) or store entry or communicate orally that they accept American Express. For example, Amex cannot compel a merchant to do more than post a sticker at the point of sale or store entry indicating all accepted brands, including the preferred brand(s). The power to require anything greater would chill efforts by merchants to steer, and would dilute the effectiveness of steering (for example, it would go too far if a rule required merchants engaging in steering to place an Amex logo on the actual sign attempting to influence customer choice). With respect to online or mobile transactions, the court rejects American Express's proposal that it "shall be entitled to require that the signage indicating American Express acceptance **[*49]** must appear at the earliest point within the payment path at which any such practice occurs." (Defs.' Proposed J. § III.B.6.) Like traditional merchants (who, under the Permanent Injunction, can indicate their acceptance of Amex at the point of sale or store entry), online and mobile merchants that choose to steer are entitled to determine the appropriate way of reasonably communicating their acceptance of American Express, so long as they communicate to customers at some point in the process that they, in fact, accept American Express.

Finally, as discussed above, under § IV.H of the Permanent Injunction, American Express must give notice to the Government of any changes to its rules governing merchants' acceptance of other credit card brands or debit cards before implementation of those rules. Thus, the Government will be on notice should American Express take a position regarding signage that is contrary to the terms of the Permanent Injunction and this Memorandum, and will be able to seek relief from this court should the Government believe American Express has done so.

3. Disparagement and Surcharging

The parties agree that Defendants should retain the right to prohibit merchants **[*50]** from disparaging or mischaracterizing the Amex brand, but disagree on remedial language. Defendants seek a provision that permits them to adopt rules that "prohibit Merchants from disparaging or mischaracterizing its Brand or making untrue statements about American Express or the Merchant's All-In Merchant Fee for accepting American Express General Purpose Cards." (Defs.' Proposed J. § III.C.) The Government proposes that Amex be permitted only to "prohibit Merchants from disparaging its Brand, including (1) mischaracterizing American Express General Purpose Cards, or (2) engaging in activities that harm American Express's business or its Brand." (Gov't's Proposed J. § IV.C.) The Non-Party Merchants go further, proposing that the Permanent Injunction expressly define "disparaging" so that Amex cannot take the future position that novel forms of steering not expressly included in the Permanent Injunction are, in fact, activities that "harm American Express's business or its Brand." (Non-Party Merchants' Comment at 9-10.)

In § III.C of the Permanent Injunction, the court clarifies that Amex is permitted to enforce both rules that prohibit merchants from disparaging its brand and rules that prohibit merchants from mischaracterizing **[*51]** its brand. (Permanent Injunction § III.C.) Included within the umbrella of "mischaracterization" are rules that prohibit merchants from making untrue statements about Amex, or untrue statements about the merchant's cost for accepting American Express credit cards or other credit cards, or untrue statements about the relative costs of accepting the cards of different brands. (Permanent Injunction § III.C.) The court does not adopt the Non-Party Merchants' proposal to define "disparaging," as what conduct constitutes disparagement was not part of the trial in this case. However, the Permanent Injunction does include language, for the avoidance of any doubt, providing that engaging in authorized steering practices—including a merchant communicating the reasonably estimated (including average) cost incurred when a customer uses a particular brand of credit card—cannot constitute a practice that "disparages," "mischaracterizes," or "harms" the Amex brand. (See Permanent Injunction § III.C.) The court is confident that the parties and merchants will understand the conduct captured by the concepts of disparagement and mischaracterization. And the Permanent Injunction includes mechanisms for **[*52]** a merchant to file a complaint with the Government should that merchant believe that Defendants are taking an overly broad view of these concepts. (See Permanent Injunction §§ IV.F, V.F.)

Similarly, the court does not adopt the Non-Party Merchants' proposal to define the concept of "surcharges." The court is confident that merchants will understand the difference between a discount and a surcharge, and the definition of surcharging was not part of the trial in this case.

4. Timing

Considering that this is a permanent injunction entered after a full trial, the court rejects American Express's proposal that it have the later of (a) 90 days from the date of entry of the Permanent Injunction, or (b) 90 days following the expiration of any stay of the Permanent Injunction entered by this court or an appellate court, to implement the required changes to its business. (See Defs.' Proposed J. § I.9.) Rather, in the Permanent Injunction, the court orders that within the later of 30 days from the date of entry of the Permanent Injunction, or 30 following the expiration of a stay, Amex (a) cease to engage in the Prohibited Conduct and (b) commence the Required Conduct and notice/compliance requirements. **[*53]** (See, e.g., Permanent Injunction §§ I.G, III.A, IV.A.) The 30-day period of implementation gives Defendants ample time to seek an additional stay of the Permanent Injunction, while also providing that, absent a stay, the process of remedying the instant antitrust violation will begin in earnest.

The court agrees with the Government that a ten-year termination provision (with the possibility for one-year extensions) is appropriate, and rejects Defendants' proposal that would terminate the Permanent Injunction upon the adoption of rules by Visa and MasterCard that prohibit forms of steering authorized by the Permanent Injunction. (Compare Permanent Injunction § VI.C, with Defs.' Proposed J. § VI.C.) If circumstances change, and/or if upon the expiration of the Consent Decree Visa and MasterCard attempt to again bar merchant steering, Amex can, consistent with the Permanent Injunction, seek relief from this court. (See Permanent Injunction § VI.A (reserving the court's jurisdiction over the Permanent Injunction and authorizing the parties to seek further orders or modifications).)

E. Compliance Provisions

Finally, the Government proposes significant compliance provisions, arguing that "Amex **[*54]** should be required to devote as least as much attention to monitoring compliance with the Final Judgment as it did to monitoring merchants' compliance with its anticompetitive restraints." (Gov't's Br. at 33.) Defendants respond that the "onerous, unnecessary, and unreasonable" compliance provisions are punitive and premised on the Government's "baseless" assumption that "American Express cannot be trusted to comply with the Court's Final Judgment." (Defs.' Br. at 41, 42.) Defendants propose compliance provisions that parallel those in the Consent Decree, but nothing more.

The court agrees with the Government; considering American Express's previous, aggressive enforcement of the NDPs, and certain of the positions that it took at trial, robust compliance provisions are necessary to ensure that Amex complies with the Permanent Injunction. It is not yet clear to the court whether American Express has a positive compliance attitude, particularly in light of its unwillingness to agree to some of the Government's more modest proposals. Contrary to Defendants' argument, compliance provisions are not reserved only for antitrust violators who engaged in criminal, intentional, or malfeasant **[*55]** conduct. (See Defs.' Br. at 45; Gov't's Reply at 18 & n.12.) For a company of the size of American Express, the compliance provisions included in the Permanent Injunction are not overly costly or burdensome—for example, the court has not appointed an independent, external monitor, although it certainly has the authority to do so. In addition, should Defendants (or the Government, for that matter) believe that the compliance provisions are unworkable, or require adjustments once implemented, they are permitted under the Permanent Injunction to seek modifications from the court.

IV. CONCLUSION

As set forth above, and as embodied in the court's seperate Order Entrering Permanent Injunction as to the American Express Defendants, the court adopts many of proposals made by the Government with respect to the proper scope of injuctive relief in this case, with some exceptions, and with certain modifications.

SO ORDERED.

/s/ Nicholas G. Garaufis

NICHOLAS G. GARAUFIS

United States District Judge

Dated: Brooklyn, New York

April 30, 2015

End of Document

Sukumar v. Nautilus, Inc.

United States Court of Appeals for the Federal Circuit

May 4, 2015, Decided

2014-1205

Reporter
785 F.3d 1396 *; 2015 U.S. App. LEXIS 7329 **; 114 U.S.P.Q.2D (BNA) 1626 ***

PONANI SUKUMAR, AN INDIVIDUAL, SOUTHERN CALIFORNIA STROKE REHABILITATION ASSOCIATES, INC., A CALIFORNIA CORPORATION, Plaintiffs-Appellants v. NAUTILUS, INC., A WASHINGTON CORPORATION, Defendant-Appellee

Prior History: [1]** Appeal from the United States District Court for the Western District of Virginia in No. 7:11-cv-00218-JCT, Senior Judge James C. Turk.

Sukumar v. Nautilus, Inc., 2013 U.S. Dist. LEXIS 172005 (W.D. Va., Dec. 6, 2013)

Disposition: AFFIRMED.

Core Terms

marking, machines, district court, competitive injury, competitors, patent, compete, summary judgment, rehabilitation, senior, parties, entity, rehabilitation center, manufacturing, modified, grant of summary judgment, state law claim, qui tam, disadvantage, causation, deterred, products, license

LexisNexis® Headnotes

Civil Procedure > ... > Justiciability > Standing > General Overview

Patent Law > Infringement Actions > Infringing Acts > General Overview

Governments > Federal Government > Claims By & Against

Governments > Legislation > Effect & Operation > Retrospective Operation

Governments > Legislation > Statutory Remedies & Rights

HN1[] **Justiciability, Standing**

On September 16, 2011, President Obama signed the America Invents Act ("AIA") into law. The AIA amended *35 U.S.C.S. § 292* to eliminate qui tam false marking suits and require that an entity suffer a "competitive injury" to bring a private right of action to enforce the false marking statute. America Invents Act, Pub. L. No. 112-29, § 16, 125 Stat. 284, 329 (2011). In Rogers v. Tristar Prods., Inc., the United States Court of Appeals for the Federal

Circuit held in a nonprecedential opinion that the amendment applied retroactively to a suit pending at the time the AIA was enacted.

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

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

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

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

HN2[] **Entitlement as Matter of Law, Appropriateness**

A district court's grant of summary judgment is reviewed de novo. Summary judgment is appropriate if, viewing the evidence in the light most favorable to the nonmoving party, the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56*.

Governments > Legislation > Statutory Remedies & Rights

Patent Law > Infringement Actions > Infringing Acts > General Overview

HN3[] **Legislation, Statutory Remedies & Rights**

35 U.S.C.S. § 292(a) prohibits, in part, marking upon in connection with any unpatented article, the word "patent" or any word or number importing that the same is patented, for the purpose of deceiving the public. *35 U.S.C.S. § 292(b)* provides a private right of action to enforce *§ 292(a)* to any person who has suffered a competitive injury as a result of a violation of *§ 292*.

Civil Procedure > ... > Justiciability > Standing > General Overview

Governments > Legislation > Statutory Remedies & Rights

Patent Law > Remedies > General Overview

HN4[] **Justiciability, Standing**

35 U.S.C.S. § 292(b)'s "competitive injury" standing requirement was added in 2011 by the America Invents Act, Pub. L. No. 112-29, § 16, 125 Stat. 284, 329 (2011). A potential competitor may suffer competitive injury if it has attempted to enter the market. An attempt is made up of two components: (1) intent to enter the market with a reasonable possibility of success; and (2) an action to enter the market. Satisfaction of this competitive injury requirement, however, does not mean that a party necessarily has standing under *§ 292(b)*. The statute also imposes a causation requirement. Standing under *§ 292(b)* is limited to those who have suffered a competitive injury as a result of a violation of *35 U.S.C.S. § 292(a)*.

Civil Procedure > ... > Justiciability > Standing > General Overview

HN5[] **Justiciability, Standing**

A plaintiff must possess standing as of the time the plaintiff files its lawsuit.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

HN6[] **Regulated Practices, Trade Practices & Unfair Competition**

Law dictionaries define "competitive injury" as a wrongful economic loss caused by a commercial rival, such as the loss of sales due to unfair competition, or a disadvantage in a plaintiff's ability to compete with a defendant caused by a defendant's unfair competition. A potential competitor would generally not be considered a "commercial rival," but a potential competitor may suffer a disadvantage in its ability to compete if another's actions impair its ability to enter the market. Still, this definition does not include all potential competitors. To suffer a disadvantage in the "ability to compete," an entity must have some present ability to compete—if only in part—that is disadvantaged. Therefore, law dictionaries define "competitive injury" to encompass some potential competitors, but only those that suffer a disadvantage in their ability to compete.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Governments > Legislation > Statutory Remedies & Rights

Patent Law > Infringement Actions > Infringing Acts > General Overview

HN7[] **Regulated Practices, Trade Practices & Unfair Competition**

A source to inform the meaning of "competitive injury," as that term is used in *35 U.S.C.S. § 292*, is the term's use in analogous areas of law. Although the phrase is not identical, "injury to competition" is a common concept in ***antitrust law***. In that context, preventing market entry unquestionably qualifies as "injury to competition." For example, the United States Supreme Court has held that injury to competition includes creating barriers to entry of new competitors in the market. In addition, the United States Court of Appeals for the Ninth Circuit has stated that vertical agreements that foreclose competitors from entering or competing in a market can injure competition by reducing the competitive threat those competitors would pose. Similarly, on another occasion the Ninth Circuit reasoned that tying arrangements are forbidden on the theory that, if a seller has market power over a tying product, the seller can leverage that market power through tying arrangements to exclude other sellers of the tied product.

Governments > Federal Government > Claims By & Against

Patent Law > Infringement Actions > Infringing Acts > General Overview

Patent Law > Remedies > General Overview

Governments > Legislation > Statutory Remedies & Rights

HN8[] **Federal Government, Claims By & Against**

The United States Court of Appeals for the Federal Circuit finds persuasive the argument that "competitive injury" in *35 U.S.C.S. § 292* must include what is arguably the most egregious type of competitive injury: the prevention of market entry altogether. Competition is certainly harmed when a market participant's false marking deters a would-be competitor from attempting to enter the market. This was recognized as one of the original rationales for allowing qui tam actions to remedy false marking. The America Invents Act's ("AIA's"), Pub. L. No. 112-29, § 16, 125 Stat. 284, 329 (2011), removal of qui tam claims for false marking did not indicate disapproval of this rationale. Rather, the AIA recalibrated the enforcement mechanism for false marking in response to a flood of false marking claims that did little to achieve the original objective of minimizing anticompetitive conduct.

Civil Procedure > ... > Justiciability > Standing > General Overview

Governments > Legislation > Statutory Remedies & Rights

Patent Law > Infringement Actions > Infringing Acts > General Overview

HN9[] **Justiciability, Standing**

From a review of the statutory text, legislative history, analogous areas of law, and policy rationale, the United States Court of Appeals for the Federal Circuit concludes that *35 U.S.C.S. § 292(b)* extends standing to sue for a violation of *35 U.S.C.S. § 292(a)* to some potential competitors. Nevertheless, it is equally clear that the amended statute does not confer standing upon any entity that claims a subjective intent to compete. Rather, *§ 292* limits standing to entities that have suffered a competitive injury as a result of a violation of *§ 292(a)*. A potential competitor can only suffer a competitive injury if it engages in competition. Dreaming of an idea but never attempting to put it into practice is insufficient. Otherwise, market entry is too speculative and, thus, competition cannot be harmed by false marking. Likewise, sometimes a falsely marked product is also properly marked with other patents. In that case, a potential competitor must show that the falsely marked patents deterred market entry, but that—for some reason—the properly marked patents did not deter market entry.

Civil Procedure > ... > Justiciability > Standing > General Overview

Patent Law > Infringement Actions > Infringing Acts > General Overview

Governments > Legislation > Statutory Remedies & Rights

HN10[] **Justiciability, Standing**

For purposes of *35 U.S.C.S. § 292*, an injury is only a "competitive injury" if it results from competition, and a potential competitor is engaged in competition if it has attempted to enter the market, which includes intent to enter the market and action to enter the market. And, for the sake of completeness, an entity has standing under *§ 292(b)* if it can demonstrate competitive injury that was caused by the alleged false marking.

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

HN11[] **Burdens of Proof, Nonmovant Persuasion & Proof**

A party may not overcome a grant of summary judgment by merely offering conclusory statements.

Counsel: STEFFEN NATHANAEL JOHNSON, Winston & Strawn LLP, Washington, DC, argued for plaintiffs-appellants. Also represented by GEOFFREY P. EATON; MICHAEL A. TOMASULO, Los Angeles, CA.

PATRICK J. KEARNS, Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, San Diego, CA, argued for defendant-appellee. Also represented by ROBERT W. HARRISON.

Judges: Before PROST, Chief Judge, NEWMAN and REYNA, Circuit Judges.

Opinion by: PROST

Opinion

[*1398] **[***1627]** PROST, *Chief Judge*.

Ponani Sukumar and Southern California Stroke Rehabilitation Associates, Inc. (collectively, "Sukumar") appeal from the district court's grant of summary judgment for Nautilus, Inc. ("Nautilus"). The district court held that Sukumar had not suffered "competitive injury" necessary to have standing to assert a false marking claim. *See* *35 U.S.C. § 292(b)*. The district court also granted summary judgment on Sukumar's state law unfair competition claims. We affirm.

I. BACKGROUND

In 1994, Sukumar began caring for his aging father after Sukumar's father became ill and lost much of his mobility. Sukumar assisted his father with his rehabilitation, but, according to **[**2]** Sukumar, he noticed that the rehabilitation fitness machines used by his father did not adequately suit frail seniors. As a result, Sukumar resolved to learn more about rehabilitation for seniors, and he went to trade shows in the late 1990s where he met Nautilus representatives.

Soon afterward, in 1998 and 1999, Sukumar ordered Nautilus machines and asked for certain modifications to cater to elderly users' needs. When Nautilus delivered the custom fitness machines, Sukumar was dissatisfied, and Sukumar filed a breach of contract action against Nautilus and Med-Fit Systems, Inc., the distributor of the products. That case was the first of several legal actions between Sukumar and Nautilus.[1]

In 2004, Sukumar founded Southern California Stroke Rehabilitation Associates ("SCSRA"), the other plaintiff in this action. Although somewhat unclear, SCSRA's business was likely to include opening and running the senior rehabilitation facilities in which Sukumar was to use modified Nautilus fitness machines. However, SCSRA's **[**3]** operations have been quite limited. SCSRA has acquired over 100 Nautilus fitness machines and, according to Sukumar's deposition testimony, SCSRA has twice attempted to negotiate a patent license from Nautilus. At least one of these license negotiations was proposed by Sukumar in settlement of litigation. Sukumar filed this case on October 21, 2010. As of that date, SCSRA had no business plan, no employees other than Sukumar, no office space, and no prototype designs.

On February 10, 2012, Sukumar moved for partial summary judgment on the issue of whether the Nautilus machines were **[*1399]** falsely marked. The district court granted Sukumar's motion. Specifically, the district court found that eight of the twenty-four patents marked on the 2006 Nitro Plus Biceps Curl, the 2007 Nitro V-Triceps Extension, the 2008 F2 Lat Pulldown, the 2008 Studio Pec Fly, the 2009 One Triceps Press, and the 2009 XPLoad Compound Row did not cover the machines. In addition, eight of the sixteen patents marked on the 2006 Nautilus Commercial Series E916 Elliptical, 2006 Nautilus Commercial Series EV 916 Elliptical, and 2006 StairMaster StepMill 7000PT were found to not cover the machines.

After the district court's **[**4]** partial summary judgment decision, Sukumar became substantially more active. Sukumar retained John Whitman to create a business plan for selling fitness equipment, hired a design firm to create initial renderings of a fitness machine, and consulted with engineers in the industry. At least as of August 2013, Sukumar was in talks to acquire land for offices and a manufacturing facility.

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[1] The other legal actions are relevant because depositions and a settlement offer from those cases include evidence that contradicts portions of Sukumar's testimony in this case.

In the meantime, the law concerning who could bring an action for false marking had changed. ***HN1***[] On September 16, 2011, President **[***1628]** Obama signed the America Invents Act ("AIA") into law. The AIA amended *35 U.S.C. § 292* to eliminate qui tam false marking suits and require that an entity suffer a "competitive injury" to bring a private right of action to enforce the false marking statute. America Invents Act, Pub. L. No. 112-29, § 16, 125 Stat. 282, 329 (2011). Soon after, this court held in a nonprecedential opinion that this amendment applied retroactively to a suit pending at the time the AIA was enacted. *See Rogers v. Tristar Prods., Inc., 559 F. App'x 1042, 1044 (Fed. Cir. 2012)*.

After a period of discovery to inform issues of standing and causation, the district court allowed a second round of summary judgment motions, and the parties brought cross-motions for summary judgment. On December 6, 2013, the district court granted Nautilus' motion **[**5]** for summary judgment on all claims and denied Sukumar's motion. Sukumar appeals.

II. Discussion

HN2[] The district court's grant of summary judgment is reviewed de novo. *Grober v. Mako Prods., Inc., 686 F.3d 1335, 1344 (Fed. Cir. 2012)*; *Bruckelmyer v. Ground Heaters, Inc., 445 F.3d 1374, 1377 (Fed. Cir. 2006)*. Summary judgment is appropriate if, viewing the evidence in the light most favorable to the non-moving party, the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. We first consider Sukumar's false marking claim, followed by Sukumar's state law claims.

A. False Marking Claim

HN3[] *Title 35 section 292(a)* prohibits, in part, "mark[ing] upon . . . in connection with any unpatented article, the word 'patent' or any word or number importing that the same is patented, for the purpose of deceiving the public." *35 U.S.C. § 292(a)*. *Section 292(b)* provides a private right of action to enforce *§ 292(a)* to any "person who has suffered a competitive injury as a result of a violation of this section." *35 U.S.C. § 292(b)*. The district court granted Nautilus summary judgment on Sukumar's false marking claim because it found that Sukumar had not suffered a competitive injury, and thus lacked standing to enforce *§ 292(a)*.

[*1400] 1. The Competitive Injury Requirement

HN4[] *Section 292(b)*'s "competitive injury" standing requirement was added in 2011 by the AIA. The parties do not **[**6]** dispute that Sukumar was not selling products in competition with Nautilus at the time this suit was filed.[2] This case thus presents the question of whether (or to what extent) an entity that has not entered the relevant market can suffer "competitive injury." Nautilus argues that an entity cannot suffer competitive injury unless it actively sells products in the market. Sukumar contends that a potential competitor may suffer competitive injury if it intends to enter the market. We hold that a potential competitor may suffer competitive injury if it has attempted to enter the market. An attempt is made up of two components: (1) intent to enter the market with a reasonable possibility of success, and (2) an action to enter the market.[3]

This court has yet to address the meaning of "competitive injury," so we begin with its plain meaning. **[**7]** ***HN6***[] Black's Law Dictionary defines "competitive injury" as "[a] wrongful economic loss caused by a commercial rival, such as the loss of sales due to unfair competition; a disadvantage in a plaintiff's ability to compete with a defendant, caused by the defendant's unfair competition." Black's Law Dictionary (9th ed. 2009). This definition,

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[2] ***HN5***[] A plaintiff must possess standing as of the time the suit was filed. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 191, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)*.

[3] Satisfaction of this competitive injury requirement, however, does not mean that a party necessarily has standing under *§ 292(b)*. The statute also imposes a causation requirement. Standing under *§ 292(b)* is limited to those who have suffered a competitive injury "as a result of a violation of *[section 292(a)]*." *35 U.S.C. § 292(b)*.

while hardly conclusive, lends some support for Sukumar's position. A potential competitor would generally not be considered a "commercial rival," but a potential competitor may suffer "a disadvantage in [its] ability to compete" if another's actions impair its ability to enter the market. Still, this definition does not include all potential competitors. To suffer a disadvantage in the "ability to compete," an entity must have some present ability to compete—if only in part—that is disadvantaged. Therefore, Black's Law Dictionary defines "competitive injury" to encompass some **[***1629]** potential competitors, but only those that suffer "a disadvantage in [their] ability to compete."

Because the text of the statute is inconclusive, we next consider the legislative history. The House of Representatives' report on the AIA provides the most succinct summary of congressional **[**8]** intent with respect to the amendments to *§ 292*. The report notes a recent "surge in false-marking qui tam litigation" and explains that most of the new suits involve a product that was originally properly marked, but no longer was once the patent expired. H.R. Rep. 112-98, 53, 2011 U.S.C.C.A.N. 67, 84. According to the report, "[i]t is doubtful that the Congress that originally enacted this section anticipated that it would force manufacturers to immediately remove marked products from commerce once the patent expired, given that the expense to manufacturers of doing so will generally greatly outweigh any conceivable harm of allowing such products to continue to circulate in commerce." *Id.* The report concludes that

> [t]o address the recent surge in litigation, the bill replaces the qui tam remedy for false marking with a new action that allows a party that has suffered a competitive injury as a result of such **[*1401]** marking to seek compensatory damages. The United States would be allowed to seek the $500-per-article fine, and competitors may recover in relation to actual injuries that they have suffered as a result of false marking, but the bill would eliminate litigation brought by unrelated, private third **[**9]** parties.[4]

Id.

Nautilus seizes on the language that "competitors may recover in relation to actual injuries that they have suffered as a result of false marking" to argue that only current market participants have standing to bring a false marking action. But the use of the word "competitors" just begs the question of what "competitors" means. In the same sentence, the report juxtaposes "competitors" with "unrelated, private third parties." Entities actively attempting to enter the market are not "unrelated, private third parties." As such, the legislative history is inconclusive.

HN7[] Another source to inform the meaning of "competitive injury" is the term's use in analogous areas of law. Although the phrase is not identical, "injury to competition" is a common concept in ***antitrust law***. *See, e.g., Razorback Ready Mix Concrete Co. v. Weaver, 761 F.2d 484, 488 (8th Cir. 1985)*; *Midwest Underground Storage, Inc. v. Porter, 717 F.2d 493, 498 (10th Cir. 1983)*. In that context, preventing market entry unquestionably qualifies as "injury to competition." For example, **[**10]** the Supreme Court has held that injury to competition includes "creat[ing] barriers to entry of new competitors in the market." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 14, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*, *abrogated in part on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)*. In addition, the Ninth Circuit has stated that "[v]ertical agreements that foreclose competitors from entering or competing in a market can injure competition by reducing the competitive threat those competitors would pose." *Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1198 (9th Cir. 2012)*. Similarly, on another occasion the Ninth Circuit has reasoned that "[t]ying arrangements are forbidden on the theory that, if the seller has market power over the tying product, the seller can leverage this market power through tying arrangements to exclude other sellers of the tied product." *Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 912 (9th Cir. 2008)*.

HN8[] We also find persuasive Sukumar's argument that "competitive injury" in *§ 292* must include what is arguably the most egregious type of competitive injury: the prevention of market entry altogether. The rule Nautilus proposes would exclude this important circumstance. Indeed, competition is certainly harmed when a market

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[4] Congress explicitly preserved the ability to seek a $500-per-article fine in *§ 292(a)*, but limited enforcement to the government. As such, the statute uses the threat of a government suit—rather than the previous mechanism of qui tam actions—to deter businesses from falsely marking their products.

participant's false marking deters a would-be competitor from attempting to enter the market. This was recognized as one of the original rationales for allowing qui tam actions to remedy false marking. *See* *Forest Grp., Inc. v. Bon Tool Co., 590 F.3d 1295, 1303 (Fed. Cir. 2009)* ("If an article **[**11]** that is within the public domain is falsely marked, potential competitors may be dissuaded from entering the same market."). The AIA's removal of qui tam claims for false marking did not indicate **[***1630]** disapproval of this rationale. Rather, the AIA recalibrated the enforcement mechanism for false marking in response to a flood of false marking claims that did little **[*1402]** to achieve the original objective of minimizing anticompetitive conduct.

HN9[] From the above review of the statutory text, legislative history, analogous areas of law, and policy rationale, we conclude that *§ 292(b)* extends standing to sue for a violation of *§ 292(a)* to some potential competitors. Nevertheless, it is equally clear that the amended statute does not confer standing upon any entity that claims a subjective intent to compete. Rather, *§ 292* limits standing to entities that have "suffered a competitive injury as a result of a violation of *[section 292(a)]*." A potential competitor can only suffer a *competitive* injury if it engages in competition. Dreaming of an idea but never attempting to put it into practice is insufficient. Otherwise, market entry is too speculative and, thus, competition cannot be harmed by the false marking. Likewise, sometimes a falsely **[**12]** marked product is also properly marked with other patents. In that case, a potential competitor must show that the falsely marked patents deterred market entry, but that—for some reason—the properly marked patents did not deter market entry. Therefore, ***HN10***[] an injury is only a "competitive injury" if it results from competition, and a potential competitor is engaged in competition if it has attempted to enter the market, which includes intent to enter the market and action to enter the market. And, for the sake of completeness, an entity has standing under *§ 292(b)* if it can demonstrate competitive injury that was caused by the alleged false marking.

2. Application to Sukumar

a. Intent to enter the market

Sukumar alleges that he developed the intent to compete with Nautilus in the mid- to late-1990s. Nautilus responds that Sukumar never intended to sell fitness machines in competition with Nautilus, and that, if anything, Sukumar intended to operate senior rehabilitation centers. According to Nautilus, these rehabilitation centers would use modified Nautilus fitness machines, which would make Sukumar a customer of Nautilus', not a competitor.

To support his argument, Sukumar cites his declaration, **[**13]** which was prepared for the purposes of summary judgment; the summary judgment declaration of Frank Smith, a former Nautilus employee hired as a consultant by Sukumar; and some excerpts of Sukumar's deposition testimony in this case. These three sources claim that, beginning in the late 1990s, Sukumar intended to modify Nautilus machines and sell the modified machines in competition with Nautilus.

The district court properly found that other evidence, including nearly all of the objective evidence, tends to support Nautilus. *Sukumar v. Nautilus, Inc., No. 7:11-CV-00218, 2013 U.S. Dist. LEXIS 172005, 2013 WL 6408351, at *10-12 (W.D. Va. Dec. 6, 2013)*. In 1998 and 1999, Sukumar placed orders for custom Nautilus fitness machines with certain modifications requested by Sukumar. When Sukumar was dissatisfied with the machines Nautilus eventually delivered, he commenced litigation against Nautilus. There is no evidence that Sukumar intended to mass produce the designs Nautilus produced for him in competition with Nautilus.

Several years later, in 2004, Sukumar incorporated SCSRA. It is unclear what, if any, business activities SCSRA or Sukumar undertook with respect to the fitness machines market over the next half-decade apart from litigating against Nautilus and purchasing **[**14]** several modified fitness machines from a company called MedX Corporation. Both parties direct the court to a litigation settlement proposed by Sukumar **[*1403]** as evidence of Sukumar's intent during this time. In this settlement proposal, which Sukumar communicated to Nautilus in 2009, Sukumar attempted to negotiate a license to Nautilus patents. The license offer explained that Sukumar and Southern California Stroke Rehabilitation Associates, Inc. were "interested in developing and operating a series of rehabilitation centers that would provide physical therapy and other rehabilitation services to stroke victims and patients suffering from stroke-like symptoms." The proposed patent license extended only for Sukumar "to make and have made for use exclusively in Sukumar-owned rehabilitation centers equipment and parts that are covered by a claim of Nautilus' patent rights."

The district court also noted that the bulk of Sukumar's testimony confirms that Sukumar's intent was always to use modified fitness machines in senior rehabilitation and spa centers. **[***1631]** *2013 U.S. Dist. LEXIS 172005, [WL] at *12*. At his deposition in this case, Sukumar spoke at length about his plans to devote SCSRA to open senior rehabilitation centers and senior **[**15]** spa centers. *Id.* In addition, the district court found that this testimony comports with testimony Sukumar has given in previous cases between the parties. *2013 U.S. Dist. LEXIS 172005, [WL] at *11*. For example, in another lawsuit Sukumar testified that SCSRA would have started senior rehabilitation centers were it not for Nautilus' failure to provide Sukumar seven fitness machines.

In response to this glut of evidence, Sukumar points to numerous activities he has undertaken since the district court found that some of Nautilus' machines were falsely marked as evidence of his earlier intent to compete with Nautilus. As an example, Sukumar has recently commissioned the development of a business plan and design of a prototype, and engaged in discussions to purchase land for a manufacturing facility. However, the district court did not err in finding that this evidence has minimal probative value for several reasons. *See* *2013 U.S. Dist. LEXIS 172005, [WL] at *11, *11 n.14, *12*. First, crediting it would allow parties in litigation to manufacture evidence after the suit has been filed. Second, in this case Sukumar's logic makes little sense. Sukumar says he was deterred from entering the market by Nautilus' patent labels. Apparently now that a court has confirmed that some of **[**16]** the patent labels on some of Nautilus' machines were inappropriate, Sukumar is no longer deterred, even though the vast majority of Nautilus' machines—including all those released prior to 2006—have not been adjudicated as falsely marked.

In sum, we agree with the district court that Sukumar's evidence of his intent to compete with Nautilus is weak. Sukumar and Frank Smith's assertions as to Sukumar's subjective intent are contradicted by Sukumar's statements in both this case and others. The documentary evidence suggests that Sukumar intended only to open senior rehabilitation centers, which would not operate in competition with Nautilus. Still, on summary judgment, as did the district court, we must view the evidence in the light most favorable to Sukumar. Therefore, we must consider the second component of an at tempt to enter the market: whether Sukumar took action to enter the market.

b. Action to enter the market

Consistent with the district court, we conclude that, even if Sukumar subjectively intended to enter the market for fitness machines, he took insufficient action to pursue that intent. *See* *2013 U.S. Dist. LEXIS 172005, [WL] at *10-12*. Thus, no genuine issue of material fact remains—Sukumar did not attempt to compete **[**17]** with Nautilus, so Sukumar did not suffer a competitive injury. Sukumar possesses a Master of Business Administration **[*1404]** degree and previously held a career as an investment banker. Sukumar has little to no engineering knowledge of fitness machines or business experience in the fitness machine market. Sukumar contends that, to gain familiarity with Nautilus fitness machines, he purchased over 100 exercise machines from Nautilus. But Sukumar's alleged attempt to compete with Nautilus ends here. Sukumar placed the Nautilus machines he purchased in storage for years. And despite the fact that over a decade passed between when Sukumar claims he developed the intent to compete with Nautilus and when Sukumar filed this case, the list of basic steps Sukumar did not take is long:

Sukumar did not develop a business plan.
Sukumar did not attempt to design a prototype.
Sukumar did not hire any employees.
Sukumar did not gain engineering knowledge.
Sukumar did not investigate developing manufacturing capacity.

As the district court noted, the undisputed evidence establishes that, at the time Sukumar filed the suit, Sukumar had not taken sufficient action to enter the market for fitness machines. *2013 U.S. Dist. LEXIS 172005, [WL] at *10*. Therefore, **[**18]** Sukumar was not engaged in competition with Nautilus and did not suffer a competitive injury. Accordingly, the district court properly granted summary judgment for Nautilus because Sukumar lacks standing to bring a claim for false marking under *§ 292*.

B. State Law Claims

Sukumar also appeals the district court's grant of summary judgment for Nautilus on Sukumar's unfair competition claims, which were brought under Washington and California law. Sukumar contends that the district **[***1632]** court applied the wrong causation standard to the state law claims. Specifically, Sukumar argues that the district court required Nautilus' false marking to be the sole cause of his damages, rather than an "immediate cause" (the standard in California) or a "but-for cause" (the standard in Washington).

In arguing that the district court applied the wrong legal standard for causation, Sukumar cites a single sentence from the district court's opinion: "It simply defies common sense to conclude that, for more than ten years, Plaintiffs have not entered the market to compete with Nautilus and that the sole item holding them back was their fear of infringing patents that were falsely listed on the accused machines' patent **[**19]** labels." *Id.* Apparently based on the district court's usage of the word "sole" in one sentence, Sukumar contends that the district court employed an improperly stringent causation standard throughout the district court's entire twenty-eight page opinion.

Sukumar takes a single word of the district court's opinion out of context. The district court used the word "sole" for emphasis in demonstrating the absurdity of Sukumar's causation claim. While the district court's particular word choice in that sentence may be imprecise, it does not negate the district court's two-page recital of what even Sukumar admits is the correct law. Nor does a single use of the word "sole" nullify the district court's faithful application of the correct law throughout the rest of the opinion.

Furthermore, as to Sukumar's argument that Nautilus' false marking caused his alleged damages, we agree with the district court that Sukumar does not present sufficient evidence. For example, the district court found that "Sukumar has repeatedly blamed other actions of Nautilus—not any false patent labels—for the **[*1405]** years of delay in accomplishing his business objectives and he has done so both in prior litigation and in **[**20]** his deposition in this case." *2013 U.S. Dist. LEXIS 172005, [WL]at *11*. Such actions include Nautilus' alleged "unwillingness or inability to provide satisfactorily-modified equipment" to Sukumar and "oral representations by Nautilus regarding patent protection generally on its machines." *2013 U.S. Dist. LEXIS 172005, [WL] at *11, *13*. We also note that Sukumar never attempted to develop a capacity to enter the market. As discussed above, the district court properly found that Sukumar's intent was to open senior rehabilitation and spa centers, not to compete with Nautilus. *2013 U.S. Dist. LEXIS 172005, [WL] at *11-12*. Finally, at bottom, Sukumar cannot create a genuine issue of material fact by simply submitting a conclusory declaration against overwhelming evidence to the contrary. *Moore U.S.A., Inc. v. Standard Register Co., 229 F.3d 1091, 1112 (Fed. Cir. 2000)* (***HN11***[] "A party may not overcome a grant of summary judgment by merely offering conclusory statements."). Thus, the district court did not err in granting summary judgment for Nautilus on Sukumar's state law claims.

III. CONCLUSION

Accordingly, we affirm the district court's grant of summary judgment for Nautilus on Sukumar's false marking and state law claims.

AFFIRMED

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In re Lidoderm Antitrust Litig.

United States District Court for the Northern District of California

May 5, 2015, Decided; May 5, 2015, Filed

Case No. 14-md-02521-WHO

Reporter

103 F. Supp. 3d 1155 *; 2015 U.S. Dist. LEXIS 58979 **; 2015-1 Trade Cas. (CCH) P79,161

In re Lidoderm Antitrust Litigation

Prior History: *In re Lidoderm Antitrust Litig., 11 F. Supp. 3d 1344, 2014 U.S. Dist. LEXIS 46615 (J.P.M.L., Apr. 3, 2014)*

Core Terms

unjust enrichment, allegations, consumer protection, consumers, purchaser, antitrust, deceptive, indirect, cases, defendants', unconscionable, patches, commerce, unfair, misrepresentations, prices, motion to dismiss, direct benefit, courts, plaintiffs', prohibits, price-fixing, conspiracy, practices, patent, retail, generic, absence of authority, trade practice, deceptive act

LexisNexis® Headnotes

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

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

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

A motion to dismiss is proper under *Fed. R. Civ. P. 12(b)(6)* where the pleadings fail to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*. A complaint may be dismissed if it does not allege enough facts to state a claim to relief that is plausible on its face. A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. However, a complaint does not suffice if it tenders naked assertions devoid of further factual enhancement. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. If a motion to dismiss is granted, a court should normally grant leave to amend unless it determines that the pleading could not possibly be cured by allegations of other facts.

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

Civil Procedure > ... > Pleadings > Complaints > Prelitigation Notices

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

For purposes of Mass. Gen. Laws ch. 93A, § 9, in order to avoid the pre-suit notice requirement, a plaintiff must plead that defendants do not maintain a place of business or keep assets in Massachusetts.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN3[] Public Enforcement, State Civil Actions

See AS 45.50.577(i).

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Civil Procedure > Preliminary Considerations > Justiciability > Standing

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

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

HN4[] Purchasers, Indirect Purchasers

Mass. Gen. Laws ch. 93A, § 11 focuses on the persons engaged in the conduct of any trade or commerce. Massachusetts courts have struggled with identifying the line between a consumer claim — which can be brought on behalf of an indirect purchasers — and a business claim — which can not. The choice appears to turn on whether a given party has undertaken the transaction in question for business reasons, or has engaged in it for purely personal reasons (such as the purchase of an item for personal use), and any transaction in which the plaintiff is motivated by business considerations gives rise to claims only under the statute's business section.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

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

HN5[] Purchasers, Indirect Purchasers

The District of Columbia's consumer protection statute allows causes of action on behalf of a consumer who does or would purchase, lease (as lessee), or receive and normally use consumer goods or services for personal, household, or family purposes. D.C. Code § 28-3901(a)(2)(B)(i). The relevant distinction is one between retail and wholesale transactions. Transactions along the distribution chain that do not involve the ultimate retail customer are not consumer transactions that the Consumer Protection Procedures Act seeks to reach. Rather, it is the ultimate retail transaction between the final distributor and the individual member of the consuming public that the Act covers. Accordingly, it is not the use to which the purchaser ultimately puts the goods or services, but rather the nature of the purchaser that determines the nature of the transaction.

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

HN6[] Deceptive & Unfair Trade Practices, State Regulation

Montana's Unfair Trade Practices and Consumer Protection Act defines a consumer as a person who purchases or leases goods, services, real property, or information primarily for personal, family, or household purposes. Mont. Code Ann. § 30-14-102(1). The statute excludes persons who buy goods for resale.

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

Governments > Legislation > Interpretation

HN7[] Deceptive & Unfair Trade Practices, State Regulation

The Arkansas Deceptive Trade Practices Act (DTPA) prohibits deceptive and unconscionable trade practices including any unconscionable, false, or deceptive act or practice in business, commerce, or trade. *Ark. Code Ann. § 4-88-107(a)(10)*. The legislature's use of "unconscionable" illustrates that liberal construction of the DTPA is appropriate. *Ark. Code Ann. § 4-88-107(a)(10)* was intended to expand and not limit the types of unfair trade practices actionable at common law or under other statutes of Arkansas. The Arkansas Supreme Court has defined "unconscionable" as an act that affronts the sense of justice, decency, or reasonableness.

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

HN8[] Deceptive & Unfair Trade Practices, State Regulation

Like *Idaho Code Ann. § 48-603C*, *Idaho Code Ann. § 48-603(17)* prohibits practices which are misleading, false, or deceptive to the consumer.

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

HN9[] Deceptive & Unfair Trade Practices, State Regulation

To be actionable under *Idaho Code Ann. § 48-603(17)*, the conduct at issue must be directed to consumers.

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

HN10[] Deceptive & Unfair Trade Practices, State Regulation

Under Maine's Unfair Trade Practices Act, unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are declared unlawful. *Me. Rev. Stat. Ann. tit. 5, § 207*. The Maine Supreme Court has held in pricing cases under the Act the inquiry is whether the price has the effect of deceiving the consumer, or inducing her to purchase something that she would not otherwise purchase. Courts in the Northern District of California have relied on the Maine case law to dismiss antitrust-based consumer protection claims where higher prices alleged could not have deceived or induced consumers into buying a product.

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

HN11[] Deceptive & Unfair Trade Practices, State Regulation

The Michigan Consumer Protection Act prohibits specifically identified unfair, unconscionable, or deceptive methods, acts or practices. *Mich. Comp. Laws § 445.903(1)*.

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

HN12[] Deceptive & Unfair Trade Practices, State Regulation

Minnesota's Uniform Deceptive Trade Practices Act prohibits acts involving deceptive trade practices. *Minn. Stat. § 325D.44*.

Antitrust & Trade Law > Consumer Protection > Likelihood of Confusion

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

HN13[] Consumer Protection, Likelihood of Confusion

Actionable conduct under the Minnesota Uniform Deceptive Trade Practices Act includes prohibiting sellers from passing off goods, causing likelihood of confusion as to product qualities/origin, false representations about goods. It appears that each of the prohibited acts focuses on affirmative representations made by the sellers to consumers. *Minn. Stat. § 325D.44(1)-(13)*.

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

HN14[] Deceptive & Unfair Trade Practices, State Regulation

The Minnesota Prevention of Consumer Fraud Act prohibits fraud, misrepresentation, deceptive practices with the intent that others rely thereon in connection with the sale of any merchandise. *Minn. Stat. § 325F.69*.

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

HN15[] Deceptive & Unfair Trade Practices, State Regulation

Oregon's Unlawful Trade Practices Act, *Or. Rev. Stat. § 646.605*, prohibits any unconscionable tactic in connection with selling, renting or disposing of real estate, goods or services, or collecting or enforcing an obligation. *Or. Rev. Stat. § 646.607*. Unconscionable tactics include, but are not limited to, actions by which a person (a) knowingly takes advantage of a customer's physical infirmity, ignorance, illiteracy or inability to understand the language of the agreement; (b) knowingly permits a customer to enter into a transaction from which the customer will derive no material benefit; (c) permits a customer to enter into a transaction with knowledge that there is no reasonable probability of payment of the attendant financial obligation in full by the customer when due. *Or. Rev. Stat. § 646.605(9)*.

Antitrust & Trade Law > Consumer Protection > Likelihood of Confusion

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

HN16[] Consumer Protection, Likelihood of Confusion

The Pennsylvania Unfair Trade Practices and Consumer Protection Law prohibits specific unfair methods of competition and unfair or deceptive trade practices, including engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding. *73 Pa. Stat. Ann. § 201-2(4)(xxi)*.

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

HN17[] Deceptive & Unfair Trade Practices, State Regulation

Under South Dakota's Deceptive Trade Practices and Consumer Protection statute, it is a deceptive practice to knowingly act, use, or employ any deceptive act or practice, fraud, false pretense, false promises, or misrepresentation or to conceal, suppress, or omit any material fact in connection with the sale or advertisement of any merchandise. *S.D. Codified Laws § 37-24-6(1)*. Proof of an intentional misrepresentation or concealment of a fact on which plaintiff relied and that caused an injury to plaintiff is required to state a claim under *§ 37-24-6*.

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

HN18[] Deceptive & Unfair Trade Practices, State Regulation

For purposes of South Dakota's Deceptive Trade Practices and Consumer Protection statute, *S.D. Codified Laws § 37-24-6*, where affirmative misrepresentations are made by a defendant and passed along to consumers by a third-party, those misrepresentations are actionable.

Antitrust & Trade Law > Consumer Protection > Likelihood of Confusion

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

HN19[] Consumer Protection, Likelihood of Confusion

West Virginia's Consumer Credit and Protection Act (WCCCPA) prohibits unfair methods of competition and unfair or deceptive acts or practices and defines trade or commerce as advertising, offering for sale, sale or distribution of any goods or services, and shall include any trade or commerce, directly or indirectly, affecting the people of West Virginia. *W. Va. Code § 46A-6-102*. One judge in the Northern District of California has found that general antitrust allegations are insufficient to establish a violation of WCCCPA. Reading the list literally, nothing on the list targets what might be called traditional antitrust conduct - e.g., price-fixing and market allocation, or conduct otherwise constituting a horizontal or vertical restraint on trade or commerce. Rather, the list is aimed at conduct that, in one way or another, creates a likelihood of confusion or of misunderstanding with respect to goods, services or businesses, or involves deceptive, false, or misleading statements and representations in connection with goods, services and businesses.

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

HN20[] Deceptive & Unfair Trade Practices, State Regulation

New York's consumer protection statute, *N.Y. Gen. Bus. Law § 349*, applies only to commercial conduct occurring within New York and for it to apply, the transaction in which the consumer is deceived must occur in New York.

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

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Doing Business

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Placement of Product in Commerce

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

HN21[] Deceptive & Unfair Trade Practices, State Regulation

Under North Carolina's Unfair and Deceptive Trade Practices Act (NCUDTPA), only conduct that has a substantial effect on in-state business is actionable. NCUDPTA allows personal jurisdiction over defendants in a case involving foreign acts if an injury to person or property occurs within North Carolina and, at or about the time of the injury, the defendants were either working in North Carolina or had products in the North Carolina commerce through the ordinary course of business. In order not to unduly burden interstate commerce, courts should not allow the NCUDPTA to have extra-territorial effect and be used by a foreign plaintiff with no operations in the state because to do so would raise due process concerns. The NCUDPTA itself does not contain or mandate a substantial effects analysis.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN22[] Types of Contracts, Quasi Contracts

For an unjust enrichment claim under Arizona law, the critical inquiry is not whether a benefit was conferred directly, but whether the plaintiff can establish the relationship between his detriment and the defendant's benefit flow from the challenged conduct.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

HN23[] Purchasers, Indirect Purchasers

Indirect purchasers are allowed to pursue their unjust enrichment claims under District of Columbia law despite the lack of a direct benefit.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

HN24[] Purchasers, Indirect Purchasers

A direct benefit from a plaintiff directly to a defendant is required for unjust enrichment claims under North Dakota law. A number of district courts have — relying on North Dakota case law — concluded that indirect purchaser allegations are insufficient to establish a direct benefit under North Dakota law.

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For City of Providence, **[**8]** Rhode Island, on behalf of itself and all others similarly situated, Plaintiff: Brian O. O'Mara, LEAD ATTORNEY, David W. Mitchell, Robbins Geller Rudman & Dowd LLP, San Diego, CA; Christina H Sharp, LEAD ATTORNEY, Girard Gibbs LLP, San Francisco, CA; Donald A. Migliori, LEAD ATTORNEY, Motley Rice LLC; Gregory S. Asciolla, LEAD ATTORNEY, Labaton Sucharow LLP, New York, NY J. Douglas Richards, Sharon K. Robertson, LEAD ATTORNEYS, Cohen, Milstein, Sellers and Toll PLLC, New York, NY; Jeffrey L. Kodroff, LEAD ATTORNEY, Spector Roseman & Kodroff & Willis,P.C., Philadelphia, PA; Renae Diane Steiner, Vincent J. Esades, LEAD ATTORNEYS, Heins Mills & Olson, P.L.C., Minneapolis, MN; Robert Samuel Kitchenoff, LEAD ATTORNEY, Weinstein Kitchenoff and Asher LLC, Philadelphia, PA; Robert William Sink, LEAD ATTORNEY, Law Offices of Robert W. Sink, Philadelphia, PA; Andrew Michael Purdy, Joseph Saveri Law Firm, San Francisco, CA; Daniel C. Girard, Girard Gibbs LLP, San Francisco, CA; David S. Nalven, Thomas M. Sobol, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Deborah R. Willig, Willig Williams & Davidson, Philadelphia, PA; Derek Yeats Brandt, Simmons Browder Gianaris Angelides Barnerd LLC, Alton, **[**9]** IL; Domenico Minerva, Peter G.A. Safirstein, Morgan & Morgan, New York, NY; Douglas R. Plymale, The Dugan Law Firm, New Orleans, LA; Elizabeth Gentry Arthur, Hilliard Shadowen LLP, Austin, TX; Garrett D. Blanchfield, Jr., Reinhardt Wendorf &

Blanchfield, St. Paul, MN; Jacob A. Goldberg, PRO HAC VICE, Faruqi & Faruqi, LLP, Huntingdon Valley, PA; James R. Dugan, II, The Dugan Law Firm, New Orleans, LA.

For Roofers Local 96 Health and Welfare Fund, on their behalf and on behalf of all others similarly situated, Minnesota Cement Masons Health & Welfare Fund, Plaintiffs: David Richard Woodward, LEAD ATTORNEY, Heins Mills and Olson, P.L.C., Minneapolis, MN; Jeffrey L. Kodroff, LEAD ATTORNEY, Spector Roseman & Kodroff & Willis, P.C., Philadelphia, PA; Renae Diane Steiner, Vincent J. Esades, LEAD ATTORNEYS, Heins Mills & Olson, P.L.C., Minneapolis, MN; David S. Nalven, Hagens Berman Sobol Shapiro LLP, Cambridge, MA.

For Greater Metropolitan Hotel Employers-Employees Health and Welfare Fund, Plaintiff: David Richard Woodward, LEAD ATTORNEY, Heins Mills and Olson, P.L.C., Minneapolis, MN; Jeffrey L. Kodroff, LEAD ATTORNEY, Spector Roseman & Kodroff & Willis, P.C., Philadelphia, PA; Renae Diane **[**10]** Steiner, Vincent J. Esades, LEAD ATTORNEYS, Heins Mills & Olson, P.L.C., Minneapolis, MN; Daniel C. Girard, Girard Gibbs LLP, San Francisco, CA; David S. Nalven, Hagens Berman Sobol Shapiro LLP, Cambridge, MA.

For Painters District Council No.30 Health & Welfare Fund, on behalf of itself and all others similarly situated, Plaintiff: William J. O'Brien, LEAD ATTORNEY Attorney at Law, Los Angeles, CA; Daniel C. Girard, Girard Gibbs LLP, San Francisco, CA; David S. Nalven, Hagens Berman Sobol Shapiro LLP, Cambridge, MA. Marvin Alan Miller, Miller Law LLC, Chicago, IL.

For PHILADELPHIA FEDERATION OF TEACHERS HEALTH & WELFARE FUND, on behalf of itself and all others similarly situated, Plaintiff: STEWART L. COHEN, LEAD ATTORNEY, COHEN TAUBER SPIEVACK & WAGNER, LLP, NEW YORK, NY; Daniel C. Girard, Girard Gibbs LLP, San Francisco, CA; David S. Nalven, Hagens Berman Sobol Shapiro LLP, Cambridge, MA. Jacob A. Goldberg, PRO HAC VICE, Faruqi & Faruqi, LLP, Huntingdon Valley, PA; MICHAEL COREN, COHEN PLACITELLA & ROTH, PHILADELPHIA, PA; Michael D. Donovan, Donovan Searles, LLC, Philadelphia, PA; Noah I. Axler, Donovan Searles and Axler, Philadelphia, PA.

For INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS **[**11]** LOCAL 22 HEALTH & WELFARE FUND, on behalf of itself and all others similarly situated, Plaintiff: Krishna Brian Narine, LEAD ATTORNEY, Meredith Narine, Philadelphia, PAl; Daniel C. Girard, Girard Gibbs LLP, San Francisco, CA; David S. Nalven, Hagens Berman Sobol Shapiro LLP, Cambridge, MA.

For TEAMSTERS UNION LOCAL 115 HEALTH & WELFARE FUND, on behalf of itself and all others similarly situated, Plaintiff: MINDEE J. REUBEN, LEAD ATTORNEY, WEINSTEIN KITCHENOFF & ASHER, LLC, PHILADELPHIA, PA; Robert Samuel Kitchenoff, LEAD ATTORNEY, Weinstein Kitchenoff and Asher LLC, Philadelphia, PA; Daniel C. Girard, Girard Gibbs LLP, San Francisco, CA; David S. Nalven, Hagens Berman Sobol Shapiro LLP, Cambridge, MA.

For IRENE KAMPANIS, on behalf of herself and all others similarly situated, Plaintiff: Robert William Sink, LEAD ATTORNEY, Law Offices of Robert W. Sink, Philadelphia, PA; Christina H Sharp, LEAD ATTORNEY, Girard Gibbs LLP, San Francisco, CA; Daniel C. Girard, Girard Gibbs LLP, San Francisco, CA; David S. Nalven, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Joseph C Kohn, Kohn, Swift and Graf, P.C., Philadelphia, PA; William E. Hoese, Kohn Swift & Graf PC, Philadelphia, PA.

For Welfare **[**12]** Plan of the International Union of Operation Engineers Locals 137, 137A, 137B, 137C, 137R, on behalf of itself and all others similarly situated, Plaintiff: Brian O. O'Mara, LEAD ATTORNEY, David W. Mitchell, Robbins Geller Rudman & Dowd LLP, San Diego, CA; Christina H Sharp, LEAD ATTORNEY, Daniel C. Girard, Girard Gibbs LLP, San Francisco, CA; Frank R. Schirripa, LEAD ATTORNEY, Hach Rose Schirripa & Cheverie, LLP, New York, NY; Gregory S. Asciolla, LEAD ATTORNEY, Labaton Sucharow LLP, New York, NY; J. Douglas Richards, LEAD ATTORNEY, Cohen, Milstein, Sellers and Toll PLLC, New York, NY; James Gerard Stranch, III, James Gerard Stranch, IV, LEAD ATTORNEYS, Branstetter, Stranch & Jennings, Nashville, TN; Jeffrey L. Kodroff, LEAD ATTORNEY, Spector Roseman & Kodroff & Willis, P.C., Philadelphia, PA; Meghan Boone, LEAD ATTORNEY, Cohen, Milstein, Sellers & Toll PLLC, Washington, DC; Michael A. Rose, LEAD ATTORNEY, Hach Rose Schirripa & Cheverie, LLP, New York, NY; Renae Diane Steiner, Vincent J. Esades, LEAD ATTORNEYS, Heins Mills & Olson, P.L.C., Minneapolis, MN; Robert Samuel Kitchenoff, LEAD ATTORNEY, Weinstein Kitchenoff and Asher LLC, Philadelphia, PA; Robert William Sink, LEAD ATTORNEY, **[**13]** Law Offices of Robert W. Sink, Philadelphia, PA; Sharon K. Robertson, LEAD ATTORNEY, Cohen, Milstein, Sellers and Toll PLLC, New York, NY;

Andrew Michael Purdy, Joseph Saveri Law Firm, San Francisco, CA; David S. Nalven, Hagens Berman Sobol Shapiro LLP, Cambridge, MA. Deborah R. Willig, Willig Williams & Davidson, Philadelphia, PA; Domenico Minerva, Morgan & Morgan, New York, NY; Douglas R. Plymale, James R. Dugan, II, The Dugan Law Firm, New Orleans, LA; Elizabeth Gentry Arthur, Hilliard Shadowen LLP, Austin, TX, United Sta; Garrett D. Blanchfield, Jr., Reinhardt Wendorf & Blanchfield, St. Paul, MN; Jacob A. Goldberg, PRO HAC VICE, Faruqi & Faruqi, LLP, Huntingdon Valley, PA; Jayne Arnold Goldstein, PRO HAC VICE, Pomerantz LLP, Weston, FL; John Andrew Ioannou, PRO HAC VICE, New York State Attorney General's Office, Antitrust Bureau, New York, NY; Joseph C Kohn, Kohn, Swift and Graf, P.C., Philadelphia, PA; Joseph R. Saveri, Joseph Saveri Law Firm, Inc., San Francisco, CA; Joshua P. Davis, University of San Francisco School of Law, San Francisco, CA; Krishna Brian Narine, Meredith Narine, Philadelphia, PA; Lee Albert, Glancy Prongay & Murray LLP, New York, NY; Lori A. Fanning, PRO **[**14]** HAC VICE, Marvin Alan Miller, Miller Law LLC, Chicago, IL; Michael Morris Buchman, PRO HAC VICE, Motley Rice LLC, New York, NY; Michael P. Thorton, Thornton Naumes LLP, Boston, MA; Natalie Finkelman Bennett, Shepherd, Finkelman, Miller & Shah, LLP, Media, PA; Noah I. Axler, Donovan Axler LLC, Philadelphia, PA; Ralph B. Kalfayan, Krause Kalfayan Benink & Slavens, San Diego, CA; Stephen E. Connolly, Connolly Wells & Gray LLP, King of Prussia, PA; Steve D. Shadowen, Hilliard & Shadowen LLP, Mechanicsburg, PA; William E. Hoese, Kohn Swift & Graf PC, One South Broad Street, Philadelphia, PA; William H. London, Freed Kanner London & Millen LLC, Bannockburn, IL.

For Allied Services Division Welfare Fund, on behalf of itself and all others similarly situated, Plaintiff: Brian O. O'Mara, LEAD ATTORNEY, Robbins Geller Rudman & Dowd LLP, San Diego, CA; Christina H Sharp, LEAD ATTORNEY, Girard Gibbs LLP, San Francisco, CA; Dianne M. Nast, LEAD ATTORNEY, NastLaw LLC, Philadelphia, PA; Gregory S. Asciolla, LEAD ATTORNEY, Labaton Sucharow LLP, New York, NY; J. Douglas Richards, Sharon K. Robertson, LEAD ATTORNEYS, Cohen, Milstein, Sellers and Toll PLLC, New York, NY; Jeffrey L. Kodroff, LEAD ATTORNEY, **[**15]** Spector Roseman & Kodroff & Willis,P.C., Philadelphia, PA; Renae Diane Steiner, Vincent J. Esades, LEAD ATTORNEYS, Heins Mills & Olson, P.L.C., Minneapolis, MN; Robert Samuel Kitchenoff, LEAD ATTORNEY, Weinstein Kitchenoff and Asher LLC, Philadelphia, PA; Robert William Sink, LEAD ATTORNEY, Law Offices of Robert W. Sink, Philadelphia, PA; Andrew Michael Purdy, Joseph Saveri Law Firm, San Francisco, CA; Daniel C. Girard, Girard Gibbs LLP, San Francisco, CA; David Baylis Franco, The Dugan Law Firm, APLC, New Orleans, LA; David W. Mitchell, Robbins Geller Rudman & Dowd LLP, San Diego, CA; David S. Nalven, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Deborah R. Willig, Willig Williams & Davidson, Philadelphia, PA; Domenico Minerva, Morgan & Morgan, New York, NY; Douglas R. Plymale, The Dugan Law Firm, New Orleans, LA; Elizabeth Gentry Arthur, Hilliard Shadowen LLP, Austin, TX; Garrett D. Blanchfield , Jr., Reinhardt Wendorf & Blanchfield, St. Paul, MN; Jacob A. Goldberg, PRO HAC VICE, Faruqi & Faruqi, LLP, Huntingdon Valley, PA; James R. Dugan , II, The Dugan Law Firm, New Orleans, LA; Jayne Arnold Goldstein, PRO HAC VICE, Pomerantz LLP, Weston, FL; John Andrew Ioannou, PRO HAC VICE, **[**16]** New York State Attorney General's Office, New York, NY; Joseph C Kohn, Kohn, Swift and Graf, P.C., Philadelphia, PA; Joseph R. Saveri, Joseph Saveri Law Firm, Inc., San Francisco, CA; Joshua P. Davis, University of San Francisco School of Law, San Francisco, CA; Krishna Brian Narine, Meredith Narine, Philadelphia, PA; Lee Albert, Glancy Prongay & Murray LLP, New York, NY; Lori A. Fanning, PRO HAC VICE, Miller Law LLC, Chicago, IL; Marvin Alan Miller, Miller Law LLC, Chicago, IL; Michael Morris Buchman, PRO HAC VICE, Motley Rice LLC, New York, NY; Michael P. Thorton, Thornton Naumes LLP, Boston, MA; Michael P. Thorton, Thornton Naumes LLP, Boston, MA; Natalie Finkelman Bennett, Shepherd, Finkelman, Miller & Shah, LLP, Media, PA; Noah I. Axler, Donovan Axler LLC, Philadelphia, PA; Peter G.A. Safirstein, Morgan & Morgan, New York, NY; Ralph B. Kalfayan, Krause Kalfayan Benink & Slavens, San Diego, CA; Ryan James McEwan, Joseph Saveri Law Firm, Inc., San Francisco, CA; Stephen E. Connolly, Connolly Wells & Gray LLP, King of Prussia, PA; Stephen C. Richman, Markowitz & Richman, Philadelphia, PA; Steve D. Shadowen, Hilliard & Shadowen LLP, Mechanicsburg, PA; William E. Hoese, Kohn Swift **[**17]** & Graf PC, Philadelphia, PA; William H. London, Freed Kanner London & Millen LLC, Bannockburn, IL.

For TWIN CITY IRON WORKERS HEALTH AND WELFARE FUND, on behalf of itself and all others similarly situated, Plaintiff: Jeffrey L. Kodroff, LEAD ATTORNEY, Spector Roseman & Kodroff & Willis,P.C., Philadelphia, PA; Daniel C. Girard, Girard Gibbs LLP, San Francisco, CA; David S. Nalven, Hagens Berman Sobol Shapiro LLP, Cambridge, MA.

For Cesar Castillo, Inc., Plaintiff: Linda Phyllis Nussbaum, LEAD ATTORNEY, Nussbaum Law Group, P.C., New York, NY; Bradley Demuth, Grant & Eisenhofer P.A., New York, NY; Brent William Landau, Hausfeld LLP, Philadelphia, PA; Charles F. Barrett, Charles Barrett, P.C., Nashville, TN; Juan R. Rivera Font, Juan R. Rivera Font LLC, Guaynabo, PR; Linda P. Nussbaum, PRO HAC VICE, Supreme Court, State of New York, Brooklyn, NY; Thomas M. Sobol, David S. Nalven, Hagens Berman Sobol Shapiro LLP, Cambridge, MA.

For American Sales Company, LLC, on behalf of itself and all others similarly situated, Plaintiff: David S. Nalven, LEAD ATTORNEY, Thomas M. Sobol, Donna M Evans, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; John Radice, LEAD ATTORNEY, Radice Law Firm, Long Beach, **[**18]** NJ; Charles F. Barrett, Charles Barrett, P.C., Nashville, TN.

For Government Employees Health Association, Inc, Plaintiff: Todd Anthony Seaver, LEAD ATTORNEY, Berman DeValerio, San Francisco, CA; Barbara J. Hart, Lowey Dannenberg Cohen & Hart PC, White Plains, NY; David S. Nalven, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Noelle Ruggiero, Peter St. Phillip, Uriel Rabinovitz, Lowey Dannenberg Cohen and Hart P.C., White Plains, NY.

For Iron Workers District Council of New England Welfare Fund, on Behalf of Itself and All Others Similarly Situated, Plaintiff: Brian O. O'Mara, LEAD ATTORNEY, Robbins Geller Rudman & Dowd LLP, San Diego, CA; Gregory S. Asciolla, LEAD ATTORNEY, Labaton Sucharow LLP, New York, NY; J. Douglas Richards, Sharon K. Robertson, LEAD ATTORNEYS, Cohen, Milstein, Sellers and Toll PLLC, New York, NY; Jeffrey L. Kodroff, LEAD ATTORNEY, Spector Roseman & Kodroff & Willis,P.C., Philadelphia, PA; Renae Diane Steiner, Vincent J. Esades, LEAD ATTORNEYS, Heins Mills & Olson, P.L.C., Minneapolis, MN; Robert Samuel Kitchenoff, LEAD ATTORNEY, Weinstein Kitchenoff and Asher LLC, Philadelphia, PA; Robert William Sink, LEAD ATTORNEY, Law Offices of Robert W. Sink, Philadelphia, **[**19]** PA; Andrew Michael Purdy, Joseph Saveri Law Firm, San Francisco, CA; Christina H Sharp, Girard Gibbs LLP, San Francisco, CA; Daniel C. Girard, Girard Gibbs LLP, San Francisco, CA; David W. Mitchell, Robbins Geller Rudman & Dowd LLP, San Diego, CA; David S. Nalven, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Deborah R. Willig, Willig Williams & Davidson, Philadelphia, PA; Domenico Minerva, Morgan & Morgan, New York, NY; Douglas R. Plymale, The Dugan Law Firm, New Orleans, LA; Elizabeth Gentry Arthur, Hilliard Shadowen LLP, Austin, TX; Garrett D. Blanchfield , Jr., Reinhardt Wendorf & Blanchfield, St. Paul, MN; Jacob A. Goldberg, PRO HAC VICE, Faruqi & Faruqi, LLP, Huntingdon Valley, PA; James R. Dugan , II, The Dugan Law Firm, New Orleans, LA; Jayne Arnold Goldstein, PRO HAC VICE, Pomerantz LLP, Weston, FL; John Andrew Ioannou, PRO HAC VICE, New York State Attorney General's Office, New York, NY; Joseph C Kohn, Kohn, Swift and Graf, P.C., Philadelphia, PA; Joseph R. Saveri, Ryan James McEwan, Joseph Saveri Law Firm, Inc., San Francisco, CA; Joshua P. Davis, University of San Francisco School of Law, San Francisco, CA; Krishna Brian Narine, Meredith Narine, Philadelphia, PA; Lee **[**20]** Albert, Glancy Prongay & Murray LLP, New York, NY; Lori A. Fanning, PRO HAC VICE, Marvin Alan Miller, Miller Law LLC, Chicago, IL; Michael Morris Buchman, Motley Rice LLC, New York, NY; Michael P. Thorton, Thornton Naumes LLP, Boston, MA; Natalie Finkelman Bennett, Shepherd, Finkelman, Miller & Shah, LLP, Media, PA; Noah I. Axler, Donovan Axler LLC, Philadelphia, PA; Peter G.A. Safirstein, Domenico Minerva, Morgan & Morgan, New York, NY; Ralph B. Kalfayan, Krause Kalfayan Benink & Slavens, San Diego, CA; Stephen E. Connolly, Connolly Wells & Gray LLP, King of Prussia, PA; Stephen C. Richman, Markowitz & Richman, Philadelphia, PA; Steve D. Shadowen, Hilliard & Shadowen LLP, Mechanicsburg, PA; William E. Hoese, Kohn Swift & Graf PC, One South Broad Street, Philadelphia, PA; William H. London, Freed Kanner London & Millen LLC, Bannockburn, IL.

For International Union of Operating Engineers Local 49 Health and Welfare Fund, Plaintiff: Brian O. O'Mara, LEAD ATTORNEY, David W. Mitchell, Robbins Geller Rudman & Dowd LLP, San Diego, CA; Christina H Sharp, LEAD ATTORNEY, Daniel C. Girard, Scott M. Grzenczyk, Girard Gibbs LLP, San Francisco, CA; David Richard Woodward, LEAD ATTORNEY, Heins Mills **[**21]** and Olson, P.L.C., Minneapolis, MN; Gregory S. Asciolla, Labaton Sucharow LLP, New York, NY; Heidi M Silton, LEAD ATTORNEY, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; J. Douglas Richards, Sharon K. Robertson, LEAD ATTORNEY, Cohen, Milstein, Sellers and Toll PLLC, New York, NY; Jeffrey L. Kodroff, LEAD ATTORNEY, Spector Roseman & Kodroff & Willis,P.C., Philadelphia, PA; Karen Hanson Riebel, LEAD ATTORNEY, Lockridge Grindal Nauen, Minneapolis, MN; Kristen G. Marttila, LEAD ATTORNEY, Lockridge Grindal Nauen PLLP, Mpls, MN; Renae Diane Steiner, Vincent J. Esades, LEAD ATTORNEY, Heins Mills & Olson, P.L.C., Minneapolis, MN; Robert William Sink, LEAD ATTORNEY, Law Offices of Robert W. Sink, Philadelphia, PA; Andrew Michael Purdy, Joseph Saveri Law Firm, San Francisco, CA;

David S. Nalven, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Deborah R. Willig, Willig Williams & Davidson, Philadelphia, PA; Peter G.A. Safirstein, Domenico Minerva, Morgan & Morgan, New York, NY; Douglas R. Plymale, James R. Dugan, II, The Dugan Law Firm, New Orleans, LA; Elizabeth Gentry Arthur, Hilliard Shadowen LLP, Austin, TX; Garrett D. Blanchfield, Jr., Reinhardt Wendorf & Blanchfield, St. Paul, MN; **[**22]** Jacob A. Goldberg, PRO HAC VICE, Faruqi & Faruqi, LLP, Huntingdon Valley, PA; Jayne Arnold Goldstein, PRO HAC VICE, Pomerantz LLP, Weston, FL; John Andrew Ioannou, PRO HAC VICE, New York State Attorney General's Office, New York, NY; Joseph C Kohn, Kohn, Swift and Graf, P.C., Philadelphia, PA; Joseph R. Saveri, Ryan James McEwan, Joseph Saveri Law Firm, Inc., San Francisco, CA; Joshua P. Davis, University of San Francisco School of Law, San Francisco, CA; Krishna Brian Narine, Meredith Narine, Philadelphia, PA; Lee Albert, Glancy Prongay & Murray LLP, New York, NY; Lori A. Fanning, PRO HAC VICE, Marvin Alan Miller, Miller Law LLC, Chicago, IL; Michael Morris Buchman, Motley Rice LLC, New York, NY; Michael P. Thorton, Thornton Naumes LLP, Boston, MA; Natalie Finkelman Bennett, Shepherd, Finkelman, Miller & Shah, LLP, Media, PA; Noah I. Axler, Donovan Axler LLC, Philadelphia, PA; Ralph B. Kalfayan, Krause Kalfayan Benink & Slavens, San Diego, CA; Stephen E. Connolly, Connolly Wells & Gray LLP, King of Prussia, PA; Stephen C. Richman, Markowitz & Richman, Philadelphia, PA; Steve D. Shadowen, Hilliard & Shadowen LLP, Mechanicsburg, PA; William E. Hoese, Kohn Swift & Graf PC, One South **[**23]** Broad Street, Philadelphia, PA; William H. London, Freed Kanner London & Millen LLC, Bannockburn, IL.

For International Union of Operating Engineers Local 132 Health and Welfare Fund, Plaintiff: Brian O. O'Mara, LEAD ATTORNEY, David W. Mitchell, Robbins Geller Rudman & Dowd LLP, San Diego, CA; Christina H Sharp, LEAD ATTORNEY, Daniel C. Girard, Scott M. Grzenczyk, Girard Gibbs LLP, San Francisco, CA; Gregory S. Asciolla, Labaton Sucharow LLP, New York, NY; J. Douglas Richards, Sharon K. Robertson, LEAD ATTORNEY, Cohen, Milstein, Sellers and Toll PLLC, New York, NY; Jeffrey L. Kodroff, LEAD ATTORNEY, Spector Roseman & Kodroff & Willis,P.C., Philadelphia, PA; Renae Diane Steiner, Vincent J. Esades, LEAD ATTORNEY, Heins Mills & Olson, P.L.C., Minneapolis, MN; Robert Samuel Kitchenoff, LEAD ATTORNEY, Weinstein Kitchenoff and Asher LLC, Philadelphia, PA; Robert William Sink, LEAD ATTORNEY, Law Offices of Robert W. Sink, Philadelphia, PA; Andrew Michael Purdy, Joseph Saveri Law Firm, San Francisco, CA; David S. Nalven, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Deborah R. Willig, Willig Williams & Davidson, Philadelphia, PA; Douglas R. Plymale, James R. Dugan, II, The Dugan Law Firm, **[**24]** New Orleans, LA; Elizabeth Gentry Arthur, Hilliard Shadowen LLP, Austin, TX; Garrett D. Blanchfield, Jr., Reinhardt Wendorf & Blanchfield, St. Paul, MN; Jacob A. Goldberg, PRO HAC VICE, Faruqi & Faruqi, LLP, Huntingdon Valley, PA; Jayne Arnold Goldstein, PRO HAC VICE, Pomerantz LLP, Weston, FL; John Andrew Ioannou, PRO HAC VICE, New York State Attorney General's Office, New York, NY; Joseph C Kohn, Kohn, Swift and Graf, P.C., Philadelphia, PA; Joseph R. Saveri, Ryan James McEwan, Joseph Saveri Law Firm, Inc., San Francisco, CA; Joshua P. Davis, University of San Francisco School of Law, San Francisco, CA; Krishna Brian Narine, Meredith Narine, Philadelphia, PA; Lee Albert, Glancy Prongay & Murray LLP, New York, NY; Lori A. Fanning, PRO HAC VICE, Marvin Alan Miller, Miller Law LLC, Chicago, IL; Michael Morris Buchman, Motley Rice LLC, New York, NY; Michael P. Thorton, Thornton Naumes LLP, Boston, MA; Natalie Finkelman Bennett, Shepherd, Finkelman, Miller & Shah, LLP, Media, PA; Noah I. Axler, Donovan Axler LLC, Philadelphia, PA; Peter G.A. Safirstein, Domenico Minerva, Morgan & Morgan, New York, NY; Ralph B. Kalfayan, Krause Kalfayan Benink & Slavens, San Diego, CA; Stephen E. Connolly, **[**25]** Connolly Wells & Gray LLP, King of Prussia, PA; Stephen C. Richman, Markowitz & Richman, Philadelphia, PA; Steve D. Shadowen, Hilliard & Shadowen LLP, Mechanicsburg, PA; William E. Hoese, Kohn Swift & Graf PC, One South Broad Street, Philadelphia, PA; William H. London, Freed Kanner London & Millen LLC, Bannockburn, IL.

For End-Payor Plaintiffs', Plaintiff: Christina H Sharp, LEAD ATTORNEY, Daniel C. Girard, Scott M. Grzenczyk, Girard Gibbs LLP, San Francisco, CA.

For Walgreen Co, The Kroger Co., Safeway Inc., HEB Grocery Company LP, ALBERTSONS LLC, Plaintiffs: Anna Theresa Neill, Scott Eliot Perwin, LEAD ATTORNEY, Kenny Nachwalter, P.A., Miami, FL.

For Rite Aid Corporation, Rite Aid Hdqtrs. Corp., Plaintiffs: Eric L Bloom, Hangley Aronchick Segal Pudlin Schiller, Harrisburg, PA; Monica L. Rebuck, Hangley Aronchick Segal & Pudlin, Harrisburg, PA.

For Teikoku Pharma USA, Inc., Teikoku Seiyaku Co., Ltd., Defendants: David S. Elkins, Joseph Anthony Meckes, Nathan Lane, III, Noriyuki Shimoda, LEAD ATTORNEYS, Squire Patton Boggs (US) LLP, Palo Alto, CA; Amy L.

Brown, PRO HAC VICE, Squire Sanders, Washington, DC; Daniel B. Asimow, Arnold & Porter LLP, San Francisco, CA; Rafael Matias Langer-Osuna, **[**26]** Squire Patton Bogg (US) LLP, San Francisco, CA; Steven C. Sunshine, PRO HAC VICE, Skadden Arps Slate Meagher and Flom LLP, Washington, DC.

For Endo Pharmaceuticals, Inc, Defendant: Brigid M. Carpenter, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC (Nash), Nashville, TN; Daniel B. Asimow, Emily H. Wood, LEAD ATTORNEYS, Arnold & Porter LLP, San Francisco, CA; John A. Tarantino, LEAD ATTORNEY, Adler Pollock & Sheehan P.C., Providence, RI; David S. Elkins, Squire Patton Boggs (US) LLP, Palo Alto, CA; Jonathan L. Stern, PRO HAC VICE, Arnold & Porter LLP, Washington, DC; MAHNU V. DAVAR, ARNOLD & PORTER LLP, WASHINGTON, DC; Ryan Z. Watts, Arnold and Porter LLP, Washington, DC; Steven C. Sunshine, PRO HAC VICE, Skadden Arps Slate Meagher and Flom LLP, Washington, DC.

For Watson Pharmaceuticals, Inc., Watson Laboratories, Inc., Actavis Plc., Anda, Inc, ANDA Pharmaceuticals, Inc., Valmed Pharmaceuticals, Inc., Defendants: James Patrick Schaefer, LEAD ATTORNEY, Skadden Arps Slate Meagher & Flom LLP, Palo Alto, CA; Daniel B. Asimow, Arnold & Porter LLP, San Francisco, CA; David S. Elkins, Squire Patton Boggs (US) LLP, Palo Alto, CA; Karen Hoffman Lent, Sean M Tepe, PRO HAC VICE, **[**27]** Skadden Arps Slate Meagher Flom LLP, New York, NY; Steven C. Sunshine, PRO HAC VICE, Skadden Arps Slate Meagher and Flom LLP, Washington, DC.

For All Parties, Miscellaneous: Daniel C. Girard, LEAD ATTORNEY, Christina H Sharp, Girard Gibbs LLP, San Francisco, CA; David S. Nalven, Hagens Berman Sobol Shapiro LLP, Cambridge, MA.

Judges: WILLIAM H. ORRICK, United States District Judge.

Opinion by: WILLIAM H. ORRICK

Opinion

[*1160] ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINTS

Re: Dkt. No. 139

INTRODUCTION

This case concerns the alleged antitrust and anticompetitive impact of a July 2012 settlement agreement between defendants Endo Pharmaceuticals Inc., Teikoku Seiyaku Co., Teikoku Pharma USA (collectively "Endo defendants") and defendant Watson Pharmaceuticals, Inc. (collectively "defendants"), which terminated Watson's patent litigation lawsuit against the Endo defendants in exchange for the provision of brand-name Lidoderm patches to Watson and giving Watson a period of exclusivity to market its generic version of Lidoderm patches without competition from the Endo defendants' generic patch.[1] Following my prior Order granting in part and denying in part the defendants' motion **[**28]** to dismiss, the End-Payor Plaintiffs (EPPs) and the Government Employees Health

[1] The factual background and procedural background in these consolidated antitrust cases was explained in depth in my prior Order, granting in part and denying in part defendants' prior motion to dismiss. November 17, 2014 Order [Dkt. No. 117] at 1-9. That discussion is incorporated into this Order. In this Order I will refer to brand name and generic Lidoderm patches as "Lidoderm" or "Lidoderm patches."

Organization (GEHA) filed Second Amended Complaints (SACs) on December 19, 2014. Dkt Nos. 22, 23.[2] Defendants move to dismiss specific state law antitrust, consumer protection, and unjust enrichment claims.[3]

Each state's statutes and case law, to the extent the latter exists, must be analyzed independently to determine the merits of the motion-it is not helpful, for example, to look to cases in Michigan to determine the reach of the consumer protection statute in Maine. Following oral argument on the motion, and having analyzed the pleadings requirements under each of the state law claims at issue, I GRANT in part and DENY in part the motion to dismiss.

LEGAL STANDARD

HN1[] A motion to dismiss is proper under *Federal Rule of Civil Procedure 12(b)(6)* where the pleadings fail to state a claim upon which relief can be granted. *FED. R. CIV. P. 12(b)(6)*. A complaint may be **[*1161]** dismissed if it does not allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. However, "a complaint [does not] suffice if it tenders naked assertions devoid of further factual enhancement." *Id.* (quotation marks and brackets omitted). "Threadbare recitals of the elements of a cause **[**30]** of action, supported by mere conclusory statements, do not suffice." *Id.* If a motion to dismiss is granted, a court should normally grant leave to amend unless it determines that the pleading could not possibly be cured by allegations of other facts. *Cook, Perkiss & Liehe v. N. Cal. Collection Serv., 911 F.2d 242, 247 (9th Cir. 1990)*.

DISCUSSION

I. END-PAYOR SECOND AMENDED COMPLAINT

Defendants move only to dismiss the EPPs' claims asserted under Massachusetts and Utah laws. In opposition, the EPPs agree to dismiss their claim under Utah law, asking that the dismissal be without prejudice to amending to bring in a Utah resident as a class representative in the future. EPP Oppo. [Dkt. No. 143] at 1. The EPPs' claim under Utah law is DISMISSED WITHOUT PREJUDICE.

With respect to the EPPs' claim under Massachusetts law, the question is whether End-Payor plaintiff Letizia Galloto, who is bringing her claim under *Section 9* of the Massachusetts Consumer Protection Act (CPA), was required to provide pre-suit notice to defendants prior to bringing her claim. *Mass. Gen. Law ch.93A § 9*. Plaintiff Galloto is a resident of Massachusetts who pleads that she indirectly purchased Lidoderm and/or the generic version at supracompetitive prices during the Class Period. EPP SAC, ¶ 17. In their Opposition, **[**31]** the EPPs argue that Galloto does not need to comply with the pre-suit notice requirement because none of the defendants maintain a place of business or keep assets in Massachusetts. EPP Oppo. at 2; *CPA, § 9(3)*.

Defendants counter that ***HN2***[] in order to avoid the pre-suit notice requirement, a plaintiff must plead that defendants do not maintain a place of business or keep assets in Massachusetts and the EPP SAC is devoid of those allegations. *See* *Bean v. Bank of New York Mellon, No. CIV.A. 12-10930-JCB, 2012 U.S. Dist. LEXIS*

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[2] In my November 17, 2014 Order, some of the claims of the direct purchaser plaintiffs were also dismissed with leave to amend. The DPPs filed their Second Amended Complaint on December 19, 2014. Dkt. No. 121. Defendants have not moved to dismiss any claims asserted by the DPPs in their SAC.

[3] Defendants challenge the following claims: EPPs' state antitrust and monopolization claims under Utah and Massachusetts law; GEHA's state antitrust and monopolization claims under Rhode Island and Massachusetts law; GEHA's **[**29]** state consumer protection claims under 17 states' laws; and GEHA's unjust enrichment claims under 38 states' laws.

*132447, 2012 WL 4103913, at *7 (D. Mass. Sept. 18, 2012)* ("Although Bean is not required to allege the legal conclusion that the demand letter requirement is inapplicable, she must allege facts that BNY does not maintain a place of business or keep assets in Massachusetts to show the exception to the demand letter requirement applies to plead a Chapter 93A claim."); *Sumner v. Mortgage Elec. Registration Sys., Inc., No. CIV.A. 11-11910-DJC, 2012 U.S. Dist. LEXIS 104416, 2012 WL 3059429, at *6 (D. Mass. July 26, 2012)*.

Because the EPP SAC does not allege that none of the defendants maintain a place or business or have assets in Massachusetts — which would excuse the pre-suit demand requirement — defendants' motion to dismiss the EPPs' claim under Massachusetts law is GRANTED with leave to amend. The Third Amended Complaint shall be filed within 35 days of the date of this **[**32]** Order.[4]

[*1162] II. GEHA'S SECOND AMENDED COMPLAINT

Defendants challenge GEHA's state law antitrust, consumer protection, and unjust enrichment claims for various states.

A. State Law Antitrust and Consumer Protection Claims[5]

1. Rhode Island

In dismissing the EPPs' antitrust and monopolization claims under Rhode Island law, I concluded that the *Illinois Brick* repealer statute passed by Rhode Island in July 2013 was not retroactive and therefore that the EPPs' claims, including claims for injuries occurring after July 2013, were barred. Dkt. No. 117 at 45. GEHA challenges that conclusion and contends, at a minimum, that injuries resulting from purchases of Lidoderm after July 2013 should be actionable. GEHA Oppo. [Dkt. No. 146] at 4-5. GEHA argues that in cases where there is a continuing conspiracy to violate the federal antitrust laws, "this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to **[**33]** recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act." *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*. That, plus the fact that Rhode Island's antitrust statute prohibits "a construction of the Antitrust Act that is not in harmony with federal ***antitrust law***," *Siena v. Microsoft Corp., 796 A.2d 461, 464 (R.I. 2002)*, means, according to GEHA, that it should be able to pursue injuries suffered after July 2013, even though the antitrust conduct at issue was effectuated by the 2012 agreement.

The issue here is not a statute of limitations defense or a continuing conspiracy to commit antitrust conduct between the defendants. It is whether injury that occurred *after* Rhode Island passed legislation allowing indirect purchaser actions is barred because the only alleged antitrust conduct — the May 2012 agreement — occurred well before the repealer statute was passed. In effect, GEHA is attempting to overcome my prior conclusion that Rhode Island's repealer statute is not retroactive. I conclude, as before, that because the antitrust conduct identified by GEHA occurred before the Rhode Island legislature passed the law allowing for indirect purchaser actions, GEHA's claims under Rhode Island's ***antitrust law*** are barred. **[**34]** *See, e.g., Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, 737 F. Supp. 2d 380, 430 (E.D. Pa. 2010)* (looking to date of alleged antitrust conduct and not date of damage to determine whether claims were barred because conduct occurred before repealer statute passed); *see also In re Relafen Antitrust Litig., 225 F.R.D. 14, 26 (D. Mass. 2004)* (focusing

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[4] At oral argument, the EPPs indicated that in addition to filing a Third Amended Complaint, they will also serve a demand letter on defendants in accordance with the statute.

[5] GEHA voluntarily withdraws its claims under the New Hampshire Consumer Protection Act. GEHA Oppo. at 2, fn. 2.

on alleged date of antitrust conduct, not date of resulting injury, where repealer statutes were prospective in application).[6] GEHA's claim under Rhode Island's antitrust statute is DISMISSED WITH PREJUDICE.

[*1163] *2.* Alaska

Defendants move to dismiss GEHA's claim under the Alaska consumer protection statute, arguing that it is barred by *Illinois Brick*. They note that Alaska's antitrust statute was amended in **[**35]** 2003 to clarify that only the Alaska Attorney General may seek monetary relief on behalf of indirect purchasers. *Alaska Stat. Ann. § 45.50.577(i)* (***HN3***[] "Only the attorney general, in a suit brought under this section, may seek monetary relief for injury indirectly sustained for a violation."). They point out that no court has construed Alaska's consumer protection statute (*Alaska Stat. Ann. § 45.50.531(a)*) to permit claims based on alleged antitrust and monopolization conduct by indirect purchasers. And a judge in this District has addressed this exact question and rejected the plaintiffs' attempt to circumvent the *Illinois Brick* bar by reliance on the more general Alaska Consumer Protection statute. *See In re Dynamic Random Access Memory (Dram) Antitrust Litig., 516 F. Supp. 2d 1072, 1108 (N.D. Cal. 2007)* ("recognizing that this court is not in the best position to decide unresolved legal issues for the state of Alaska, the court chooses to adopt the interpretation that will wreak the least amount of havoc on the existing law in Alaska. To that end, the court therefore declines to read the AUTPCPA to permit indirect purchaser standing, since no court has affirmatively found to the contrary, and since, under the current status of the law in Alaska, only the attorney general may sue **[**36]** for money damages on behalf of indirect purchasers as a result of antitrust violations.").

In opposition, GEHA relies only on the broad language of the Alaska consumer protection statute and on *Fed. Trade Comm'n v. Mylan Labs., Inc., 99 F. Supp. 2d 1, 5 (D.D.C. 1999)*. In *Mylan*, the court simply allowed the Alaska Attorney General to seek restitution on behalf of indirect purchasers under the Alaska consumer protection act for alleged anticompetitive acts. *Id.* That case was decided prior to the 2003 amendment to Alaska's antitrust statute and rests on the authority of the Alaska Attorney General.[7]

In absence of any persuasive authority from Alaska, and in light of the clear intent of the Alaska antitrust statute reserving to the Alaska Attorney General the ability to seek damages on behalf of indirect purchasers, I agree with the analysis of *In re Dram*, and DISMISS WITH PREJUDICE GEHA's claim under Alaska law.

3. Massachusetts

Defendants contend that GEHA **[**37]** lacks standing under *section 11* of Massachusetts' Consumer Protection Act because indirect purchasers who are engaged in "trade or commerce" cannot bring claims under *section 11* of the Massachusetts CPA. In my November 17, 2014 Order, I dismissed the EPPs' claims under *section 11* as to the City of Providence and the Iron Workers District Council or New England Welfare Fund ("Iron Workers," a health and welfare fund) because I found both entities were engaged in "trade or commerce" when paying for the Lidoderm patches on behalf of their employees or members. Dkt. No. 117 at 40-43. In that Order, I recognized that ***HN4***[] the Massachusetts statute focuses on the persons engaged in the "conduct of any trade or commerce" and that Massachusetts courts had struggled with identifying the line between **[*1164]** a consumer claim — which could be brought on behalf of an indirect purchasers — and a business claim — which could not. *Id.* I relied on the decision

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[6] At the hearing, GEHA relied on a recent decision in *In re Aggrenox Antitrust Litigation* from the District Court of Connecticut, Case No. 14-md-2516 SRU. In that case, the court agreed that the Rhode Island repealer statute was not retroactive but then — in one sentence without any analysis of authority — held without explanation that indirect purchaser claims based on "overcharges incurred after" the date the Rhode Island repealer statute was passed could continue. In absence of any persuasive analysis that supports the court's conclusion, I will not follow that case.

[7] In *California v. Infineon Technologies AG, 531 F. Supp. 2d 1124, 1142 (N.D. Cal. 2007)*, the court addressed *Mylan* and concluded that in light of the 2003 amendment to Alaska's antitrust statute, the Attorney General was *only* allowed to seek recovery for indirect purchasers under Alaska's consumer protection statute after the 2003 amendment.

in *Frullo v. Landenberger, 61 Mass. App. Ct. 814, 814 N.E.2d 1105 (2004)*, which explained that "the choice appears to turn on whether a given party has undertaken the transaction in question for business reasons, or has engaged in it for purely personal reasons (such as the purchase of an item for personal use)" and that "any transaction in which the plaintiff is motivated by business **[**38]** considerations gives rise to claims only under the statute's business section." *Id. at 821*. Given that holding, I concluded that the city and the health and welfare plan who bought Lidoderm patches for their employees or members (or reimbursed them for those purchases) did so for business reasons and not for "purely personal" reasons. Dkt. No. 117 at 42.

GEHA does not attempt to distinguish itself from the Iron Workers. Instead, GEHA asserts that it was not engaged in trade or commerce when purchasing or reimbursing its members because it was acting solely as a "dual end payor along with its plan members in consumer retail transactions." GEHA Oppo. at 7-8, n.15. However, because GEHA did not engage in the transactions for its own "purely personal reasons" but instead acted in its business interests of providing health care coverage for its members, I find that GEHA's purchases were for business reasons that fall within the "business or trade" exception for indirect purchaser actions.[8] GEHA's claim under Massachusetts' CPA is DISMISSED WITH PREJUDICE.

4. Can GEHA be considered to have purchased Lidoderm for "personal, family, or household" purposes under consumer protection statutes of specific states?

Somewhat relatedly, defendants move to dismiss a number of state law consumer protection claims, arguing that as a health plan GEHA cannot be considered to have purchased Lidoderm patches for "personal, family, or household" purposes as required under various states' statutes. I will only address the arguments regarding the District of Columbia and Montana in this section because I am dismissing the claims for Maine and Pennsylvania on separate grounds (plaintiffs' failure to plausibly allege fraud or deception, as discussed in section 5, below).

a. District of Columbia

HN5[] The District of Columbia's consumer protection statute allows causes of action on behalf of a "consumer" who "does or would purchase, lease (as lessee), or receive and normally use" consumer goods or services "for personal, household, or family purposes." *D.C. Code § 28-3901(a)(2)(B)(i)*. As explained **[**40]** by the District of Columbia Court of Appeals, "the relevant distinction is one between retail and wholesale transactions. Transactions along the distribution chain that do not involve the ultimate retail customer are not 'consumer transactions' that the Act seeks to reach. Rather, it is the ultimate retail transaction between the final distributor and the individual member of the consuming public that the Act covers. Accordingly, **[*1165]** it is not the use to which the purchaser ultimately puts the goods or services, but rather the nature of the purchaser that determines the nature of the transaction." *Adam A. Weschler & Son, Inc. v. Klank, 561 A.2d 1003, 1005 (D.C. 1989)*; *see also* *Julian Ford v. ChartOne, Inc., 908 A.2d 72, 81 (D.C. 2006)* ("the CPPA 'was designed to police trade practices arising only out of consumer-merchant relationships,' . . . and does not apply to commercial dealings outside the consumer sphere." (citation omitted)).

Here the purchaser at issue — the one trying to secure a recovery for its indirect purchases — is GEHA. It is true that GEHA has pled it is a joint "end payor" for the Lidoderm patches, GEHA SAC ¶ 50, and that it has paid retail and mail order pharmacies in the District of Columbia $13,432.85 for Lidoderm patches during the relevant period. *Id.* ¶ 23. However, GEHA was not part of the **[**41]** "retail" transaction, in terms of deciding to purchase the product or actually purchasing it. It, instead, was required to pay the pharmacies for a portion of the expenses for the

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[8] GEHA also argues, as the EPPs did on the prior motion to dismiss, that even if GEHA is considered to be engaged in "trade or commerce," it can still pursue a *Section 11* indirect **[**39]** purchaser claim under the rationale of *Blue Cross & Blue Shield v. AstraZeneca Pharms. LP (In re Pharm. Indus. Average Wholesale Price Litig.), 582 F.3d 156 (1st Cir. 2009)*. I specifically rejected that argument in my prior Order (Dkt. No. 117 at 42) and GEHA offers no persuasive reason why I should revisit that determination on this motion.

patches because its members filled personal prescriptions for Lidoderm patches. Although GEHA played a role in the retail transaction, its own transactions with the pharmacies were more akin to "wholesale" than retail transactions. Following the guidance of courts in the jurisdiction, I conclude that GEHA is not a consumer under the District of Columbia's statute and GEHA's claim is DISMISSED WITH PREJUDICE.[9]

b. Montana

HN6[] Montana's Unfair Trade Practices and Consumer Protection Act defines a "consumer" as "a person who purchases or leases goods, services, real property, or information primarily for personal, family, or household purposes." *Mont. Code Ann. § 30-14-102(1)*. The statute excludes persons who buy goods for resale. *See, e.g., In re Auto. Parts Antitrust Litig., No. 12-MD-02311, 2013 U.S. Dist. LEXIS 80338, 2013 WL 2456612, at *30 (E.D. Mich. June 6, 2013)* (automotive dealer plaintiffs could not bring a claim under Montana's UTPCA). In the absence of any authority from Montana, I find that GEHA is not a "consumer" **[**42]** under Montana's statute and I DISMISS WITH PREJUDICE GEHA's claims under Montana law.

5. GEHA's Allegations of Fraud or Deception

Defendants argue that under specific states' statutes, GEHA has failed to allege false, fraudulent, or deceptive conduct on the part of defendants to state a consumer protection claim. GEHA responds that in its SAC it added allegations about defendant Teikoku Seiyaku's fraud on the United States Patent and Trademark Office; specifically that during the prosecution of the '529 Patent, Teikoku failed to disclose multiple instances of prior art which would have prevented the patent from issuing. GEHA SAC ¶¶ 80-114, 227. GEHA also relies more generally on its allegations that defendants deceived the public by selling Lidoderm patches at prices that were not the result of fair and open market competition, but rather the result of the illegal payoffs to Watson. GEHA SAC ¶¶ 124-181.

As the pleading requirements under each state's law differs, I will address each jurisdiction in turn.[10]

[*1166] a. Arkansas

HN7[] The Arkansas Deceptive Trade Practices Act prohibits deceptive and unconscionable trade practices including any "unconscionable, false, or deceptive act or practice in business, commerce, or trade." *Ark. Code Ann. § 4-88-107(a)(10)*. The court in *State ex rel. Bryant v. R & A Inv. Co., 336 Ark. 289, 985 S.W.2d 299 (1999)* held that the legislature's use of "unconscionable" "illustrates that liberal construction of the DTPA is appropriate" and that *section (a)(10)* was intended to expand and not "limit the types of unfair trade practices actionable at common law or under other statutes of this state." *Id. at 302* ; *see also* *Baptist Health v. Murphy, 365 Ark. 115, 128 n.6, 226 S.W.3d 800 (2006)* (Arkansas Supreme Court relying on Black's Law Dictionary to define unconscionable as "an act that 'affront[s] the sense of justice, decency, or reasonableness.'").

GEHA relies on *Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, 737 F. Supp. 2d 380, 405 (E.D. Pa. 2010)* which held that "plaintiffs' allegation that GSK engaged in a scheme designed to maintain its monopoly over the Wellbutrin SR market and prevent generic manufacturers from entering the market does fall under the catch all provision in *subsection (a)(10)*." *See also* *In re Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d 538, 583 (M.D. Pa. 2009)* (allowing indirect end users of chocolate to pursue price fixing claims under

[9] GEHA's reliance on *In re Processed Egg Prods. Antitrust Litig., 851 F. Supp. 2d 867, 898 (E.D. Pa. 2012)* is misplaced, as that case does not discuss who is a "consumer" under the statute.

[10] GEHA argues that defendants are "implicitly" challenging its consumer protection claim under Arizona law. GEHA Oppo. at 3, n. 9. However as defendants clarified at the hearing, they did not challenge the Arizona consumer **[**43]** protection claim and, as such, GEHA may continue to pursue it.

ADTPA) and *In re New Motor Vehicles Canadian Exp. Antitrust Litig., 350 F. Supp. 2d 160, 178-179 (D. Me. 2004)* (finding that allegations of a conspiracy to keep Canadian cars out of the United **[**44]** States' market "unconscionable" under ADTPA, but failure to disclose conspiracy insufficient to constitute "false or deceptive" act). Three judges in this District have likewise held that price fixing allegations are sufficient to state "unconscionable" conduct under the ADTPA. *See* *In re Lithium Ion Batteries Antitrust Litig., Case No. 13-md-2420 YGR, 2014 U.S. Dist. LEXIS 141358, *124-125 (N.D. Cal. Oct. 2, 2014)* (relying on broad definition of "unconscionable" conduct adopted by Arkansas Supreme Court in *Baptist Health v. Murphy* as conduct that "affront[s] the sense of justice, decency, or reasonableness," and "includes conduct violative of public policy or statute."); *In re Flash Memory Antitrust Litig., 643 F. Supp. 2d 1133, 1156-57 (N.D. Cal. 2009)*; *see also* *In re Dynamic Random Access Memory Antitrust Litig., 516 F. Supp. 2d 1072, 1108-09 (N.D. Cal. 2007)* (allowing indirect purchaser claim to proceed under ADTPA based on allegations that acts were unconscionable, including misleading consumers into believing price were set by a free market and that conduct was substantively unconscionable because it was one-sided and unfairly benefitted defendants at the expense of plaintiffs).

However, three other judges in this District have found that even in light of the broad definition of unconscionability adopted by the Arkansas Supreme **[**45]** Court, in absence of authority from Arkansas courts that the ADTPA extends to price fixing claims, those claims should be dismissed. *See* *In re TFT-LCD Antitrust Litig., 787 F. Supp. 2d 1036, 1042 (N.D. Cal. 2011)* (addressing *Baptist Health* but declining to recognize indirect purchaser claim for price fixing "in light of this split among federal authorities, and the lack of any cases from Arkansas state or federal courts recognizing a price-fixing claim under the ADTPA."); *In re Static Random Access Memory Antitrust Litig. (SRAM), Case No. 07-md-0819 CW, 2010 U.S. Dist. LEXIS 131002, *51 **[*1167]** (N.D. Cal. Dec. 8, 2010)* ("The Court has found no Arkansas case law indicating that the ADTPA reaches price-fixing conduct of the nature presented in this lawsuit. Thus, the Court declines to extend the statute to permit indirect purchasers to sue manufacturers for a conspiracy to fix prices); *In re Graphics Processing Units Antitrust Litig., 527 F. Supp. 2d 1011, 1029-30 (N.D. Cal. 2007)*; *see also* *In re Graphics Processing Units Antitrust Litig., 540 F. Supp. 2d 1085, 1101 (N.D. Cal. 2007)* (dismissing claim under ADTPA where there were no allegations other than the price fixing allegations).

In light of the split in federal authority and the absence of authority from Arkansas, I conclude — as Judges Illston, Wilken, and Alsup have — that the ADTPA does not extend **[**46]** to the monopoly and price inflation claims at issue here. GEHA's allegations regarding Teikoku's conduct at the PTO does not change this conclusion; GEHA has not cited any authority from Arkansas that would extend the reach of the consumer protection statute to allegedly fraudulent conduct that occurred *exclusively* before the PTO and was not directed to consumers. GEHA's consumer protection claims under Arkansas law are DISMISSED WITH PREJUDICE.

b. Idaho

Defendants move to dismiss GEHA's claims under the Idaho Consumer Protection Act, *Idaho Code § 48-601*, arguing that the antitrust conduct alleged does not fall within any of the categories of conduct specifically prohibited by the ICPA. *Idaho Code § 48-603*. GEHA responds that under *Section 48-603(17)* — prohibiting "any act or practice which is otherwise misleading, false, or deceptive to the consumer" — the allegations regarding Teikoku's fraud in securing the patent and defendants' overall scheme to charge inflated prices are covered.

Defendants point out that in *State ex rel. Wasden v. Daicel Chem. Indus., Ltd., 141 Idaho 102, 107-08, 106 P.3d 428, 433-34 (2005)*, the Idaho Supreme Court concluded that "there is nothing in the wording of *Idaho Code § 48-603* indicating that the list of conduct is merely illustrative. Price-fixing is not listed in *§ 48-603* as conduct that constitutes either an unfair method of competition **[**47]** or an unfair or deceptive act or practice." The court also specifically rejected the argument that the price-fixing conduct at issue (price fixing by sorbate manufacturers) could be covered by *48-603(18)*, which prohibits "unconscionable method, act or practice in the conduct of trade or commerce, as provided in *section 48-603C*" because the antitrust conduct was not directed to consumers. Following *Wasden, Judge Hamilton in In re Static Random Access Memory (SRAM) Antitrust Litig., 580 F. Supp. 2d*

896, 907 (N.D. Cal. 2008), dismissed indirect purchaser claims under the Idaho statute because the Idaho Supreme Court "expressly held that indirect purchasers may not bring suit under the Idaho Consumer Protection Act."

Neither the *Wasden* Court nor Judge Hamilton considered whether antitrust conduct could be pursued under Section 48-603(17), as asserted by GEHA here. ***HN8***[] Like section 48-603C, examined by the Idaho Supreme Court in *Wasden*, Section 48-603(17) prohibits practices which are "misleading, false, or deceptive *to* the consumer." (emphasis added). Defendants argue that none of the conduct alleged--neither Teikoku's alleged fraudulent conduct before the PTO nor the agreement to settle the patent litigation in exchange for payments of product and a period of generic exclusivity to Watson--was "misleading, false, or deceptive" to consumers.

Two conflicting cases have addressed this **[**48]** question. GEHA relies on *In re DDAVP Indirect Purchaser Antitrust Litig.,* ***[*1168]*** *903 F. Supp. 2d 198, 225 (S.D.N.Y. 2012)*, where the court construed the ICPA liberally and because defendants had "not cited case law in which a court has dismissed consumers' claims under the ICPA if they suffered monetary loss as a result of a defendant's deceptive acts toward a third party," allowed the ICPA claim to proceed under section 48-603(17) based on plaintiffs' allegations that defendants committed fraud at the PTO and filed a baseless citizen petition with the FDA. *Id. at 214, 225*. The defendants point to *Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, 737 F. Supp. 2d 380 (E.D. Pa. 2010)*, where the court held that conduct in violation of section 48-603(17) must be directed to consumers. The allegations in that case —defendants committed fraud at PTO and filed sham litigation against generic drug manufacturers in an attempt to preserve defendants' monopoly power — were not directed to consumers, but were directed to the PTO and genetic drug manufacturers. *Id. at 411*.

Sheet Metal Workers is more persuasive. Contrary to the *DDVAP* court's attempt to distinguish *Sheet Metal Workers*, the same subsection of 48-603(17) was at issue and discussed in both cases. I agree with the *Sheet Metal Workers* court that ***HN9***[] to be actionable, the conduct at issue must be directed to consumers. None of the conduct alleged here **[**49]** satisfies that requirement. GEHA's claims under the Idaho statute are DISMISSED WITH PREJUDICE.

c. Maine

HN10[] Under Maine's Unfair Trade Practices Act, "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are declared unlawful." *5 M.R.S. § 207*. The Maine Supreme Court has held "[i]n pricing cases under the Act the inquiry is whether the price has the effect of deceiving the consumer, or inducing her to purchase something that she would not otherwise purchase." *Tungate v. MacLean-Stevens Studios, Inc., 1998 ME 162, 714 A.2d 792, 797 (Me. 1998)*. Courts in this District have relied on *Tungate* to dismiss antitrust-based consumer protection claims where higher prices alleged could not have deceived or induced consumers into buying a product. *See, e.g., In re TFT-LCD Antitrust Litig., 586 F. Supp. 2d 1109, 1126 (N.D. Cal. 2008)* ("the complaint does not allege that the prices of LCD products had the effect of deceiving plaintiffs or inducing them to purchase something they would not otherwise purchase."); *In re Graphics Processing Units Antitrust Litig., 527 F. Supp. 2d 1011, 1031 (N.D. Cal. 2007)* ("Here, the higher prices plaintiffs allegedly paid for GPUs because of the price-fixing conspiracy could not have induced plaintiffs to purchase them. Arguing that higher prices induced consumers to make purchases simply does not make sense."). **[**50]**

At oral argument, GEHA attempted to get around *Tungate* by arguing that in addition to inflated prices, the allegations here also include the intentional delay of competing generic products. But GEHA admits in its SAC that the result of the agreement to delay the Endo defendants' generic was inflated prices. GEHA SAC ¶ 17.

GEHA also relies on its allegations that defendants' deceptive conduct with respect to the PTO is sufficient "deception" to allow this claim to go forward. GEHA Oppo. at 10-11, n.20. However, GEHA presents no case law discussing what constitutes "deceptive" conduct under the Maine statute to support its augment that deceptive conduct before the PTO — which allegedly resulted in the issuance of the '529 Patent — suffices.[11] In absence of any persuasive authority that Maine would recognize the fraud committed by Teikoku at the PTO as a ground for **[*1169]** "deception" under its consumer protection statute, the claim under Maine's UTPA is DISMISSED WITH PREJUDICE.

d. Michigan

HN11[] The Michigan Consumer Protection Act (MICPA) prohibits specifically identified "[u]nfair, unconscionable, or deceptive methods, acts or practices." *Mich. Comp. Laws § 445.903(1)*. Defendants cite *In re New Motor Vehicles Canadian Exp. Antitrust Litig., 350 F. Supp. 2d 160, 176 (D. Me. 2004)*, which rejected the argument that defendants' failure to inform consumers of the antitrust conspiracy (to keep out Canadian cars, resulting in inflated new car prices in the United States) was actionable "deception" under MICPA. *Id. at 189*.

GEHA relies on *In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig., 64 F. Supp. 3d 665, 2014 U.S. Dist. LEXIS 167204, *80 (E.D. Pa. Dec. 3, 2014)*. However, in *In re Suboxone*, the court refused to dismiss the end payor's claim under MICPA because the complaint adequately alleged fraudulent and deceptive conduct; namely that (i) defendant fabricated a safety issue regarding its drug for the purpose of impairing generic competition and eliciting monopoly proceeds from consumers, **[**52]** (ii) broadcast the false safety issue to the FDA, doctors, industry participants, and the public, and (iii) made misrepresentations in a Citizen Petition to the FDA. *Id. at *77-78*. Here, the only falsity relied on by GEHA is defendants' conduct in prosecuting of the '529 Patent. There is not the sort of wide-spread dissemination of false information to the *public* that was alleged in *In re Suboxone*.

I conclude that the deceptive conduct alleged is more similar to the omissions at issue in *New Motor Vehicles* as opposed to the broad dissemination of false safety concerns at issue in *In re Suboxone*. GEHA's claims under Michigan's statute are DISMISSED WITH PREJUDICE.

e. Minnesota

HN12[] Minnesota's Uniform Deceptive Trade Practices Act (MUDTPA) prohibits acts involving "deceptive trade practice[s]." *Minn. Stat. § 325D.44*. GEHA argues that its allegations satisfy *subsection (13)*, which makes actionable conduct that "similarly creates a likelihood of confusion or of misunderstanding." *Minn. Stat. § 325D.44(13)*. The only case relied on by GEHA is *State by Humphrey v. Philip Morris, Inc., 551 N.W.2d 490, 497 (Minn. 1996)*. However, that case is inapposite because it addressed a different question (standing) and rested on far different allegations regarding deception.[12]

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[11] In support of its general argument that allegations of fraud before the PTO is sufficient to be actionable deception and fraud under state's consumer protection laws, GEHA relies on three cases: *In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig., 64 F. Supp. 3d 665, 2014 U.S. Dist. LEXIS 167204, 1 (E.D. Pa. Dec. 3, 2014)*; *In re DDAVP Indirect Purchaser Antitrust Litig. v. Ferring Pharms. Inc., 903 F. Supp. 2d 198, 224 (S.D.N.Y. 2012)*; *Abbott Labs. v. Teva Pharms. USA, Inc., 432 F. Supp. 2d 408, 433 (D. Del. 2006)*. In each of these three cases, the courts found that allegations **[**51]** that defendants committed fraud on the PTO, filed sham patent litigation and/or filed sham Citizen Petitions with the FDA were sufficient to remove the cases from the scope of preemption under the patent laws and *Noerr-Pennington* immunity for petitioning the government. However, none of those cases addressed Maine's UPTA and GEHA does not argue why the language of Maine's UPTA would be specifically covered by the rationale in any of these cases.

[12] In *State by Humphrey*, the Minnesota Supreme Court addressed only Blue Cross's standing to sue for consumer **[**53]** protection and antitrust claims against tobacco companies on the theory that Blue Cross paid inflated costs due to the tobacco companies' conduct. *Id. at 495-97*. The allegations of deceptive conduct by the tobacco companies included that the tobacco companies illegally conspired to suppress research on the deleterious effects of smoking, manipulated nicotine levels in cigarettes, undertook a duty but failed to protect the public health by its assertions that it would cooperate with public health

Looking more broadly at the types of ***HN13***[] actionable conduct under MUDTPA — **[*1170]** prohibiting sellers from passing off good, causing likelihood of confusion as to product qualities/origin, false representations about goods — it appears that each of the prohibited acts focuses on affirmative representations made by the sellers to consumers. *Minn. Stat. § 325D.44(1) — (13)*. In absence of any authority directly on point, I find that the conduct alleged by GEHA — antitrust conduct and fraud before the PTO — are not acts which create a "likelihood of confusion" or "misunderstanding" on the part of consumers under MUDTPA. **[**54]**

GEHA also relies on Minnesota's Prevention of Consumer Fraud Act (MPCFA). *See* GEHA SAC ¶ 243. Defendants did not mention MPCFA in their motion to dismiss, but in reply argue that they inadvertently omitted a citation to MPCFA and that for the same reasons that the MUDPTA claim must be dismissed, so must the MPCFA claim. Reply at 11, n. 15. ***HN14***[] The MPCFA prohibits "fraud, misrepresentation, deceptive practices" "with the intent that others rely thereon in connection with the sale of any merchandise." *Minn. Stat. § 325F.69*. I find that in absence of any authority interpreting the breadth of MPCFA, the alleged fraudulent and deceptive conduct at issue — which occurred only in negotiations between defendants and before the PTO — is not the type of fraud, misrepresentation or deceptive practices covered by MPCFA. GEHA's claim is DISMISSED WITH PREJUDICE.

f. Oregon

HN15[] Oregon's Unlawful Trade Practices Act, *Or. Rev. Stat. § 646.605*, prohibits "any unconscionable tactic in connection with selling, renting or disposing of real estate, goods or services, or collecting or enforcing an obligation." *Or. Rev. Stat. § 646.607*. "Unconscionable" tactics "include, but are not limited to, actions by which a person" "(a) [k]nowingly takes advantage of a customer's physical infirmity, ignorance, **[**55]** illiteracy or inability to understand the language of the agreement; (b) [k]nowingly permits a customer to enter into a transaction from which the customer will derive no material benefit; (c) [p]ermits a customer to enter into a transaction with knowledge that there is no reasonable probability of payment of the attendant financial obligation in full by the customer when due." *Or. Rev. Stat. Ann. § 646.605(9)*.

Defendants argue that because the conduct alleged — conspiracy to maintain prices/profits and fraud on the PTO — are not the sorts of acts covered by the definition of "unconscionable" in the statute, GEHA cannot state a claim under OUTPA. GEHA responds that the types of unconscionable acts listed in the statute are examples but not an exclusive list.

In *In re Dynamic Random Access Memory (Dram) Antitrust Litig., 516 F. Supp. 2d 1072, 1115 (N.D. Cal. 2007)*, the court did not address the "unconscionability" subsection of the statute, but instead the catchall provision which prohibits "other unfair or deceptive conduct in trade or commerce." *Or. Rev. Stat. § 646.608(1)(u)*. The court concluded that the horizontal price fixing allegations did not state a claim under OUTPA because none "of the **[*1171]** allegations of plaintiffs' complaint specifically allege false and misleading representations made by **[**56]** defendants to plaintiffs, or set forth conduct that caused plaintiffs confusion or misunderstanding, as is intended by OUTPA." *Id. at 1115*.

While a different subsection of the statute is being asserted by GEHA in this case, Judge Hamilton's approach makes sense. GEHA has failed to cite to any authority applying the "unconscionable" tactics provision and the conduct alleged here is not sufficiently similar to the examples provided in the statute of actionable unconscionable acts. In absence of authority from Oregon, I will not extend the statute to cover the allegations of GEHA asserted here. GEHA's claim is DISMISSED WITH PREJDUICE.

g. Pennsylvania

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authorities, and utilized false advertising. *Id. at 492, 495*. Those are starkly different allegations than the "deception" alleged in this case.

HN16[] The Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL) prohibits specific unfair methods of competition and unfair or deceptive trade practices, including "[e]ngaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding." *73 Penn. Stat. § 201-2(4)(xxi)*. GEHA argues that its allegations are actionable under the catchall provision, and for support relies on *Grimes v. Enter. Leasing Co. of Phila., LLC, 2013 PA Super 57, 66 A.3d 330, 332 (Pa. Superior Ct. 2013)*, *reversed on other grounds by* *105 A.3d 1188, 1190 (Pa. 2014)*.

In *Grimes*, the allegations were not simply that defendants charged a consumer "inflated prices," but that defendants made intentionally **[**57]** inflated the cost of the damage to a rental car, failed to explain justification for the inflated charges, and improperly sought to collect those charges. *Id. at 336-37*. There are no similar facts alleged here to demonstrate that defendants' conduct created a "likelihood of confusion or of misunderstanding" on behalf of purchasers of Lidoderm patches. *See also* *In re New Motor Vehicles Canadian Exp. Antitrust Litig., 350 F. Supp. 2d 160, 200 (D. Me. 2004)* (finding the language of the UPTCPL catchall section "requires fraud or deception" and allegations of conspiracy to prevent less expensive Canadian vehicles from entering the American market insufficient to state a claim). Accordingly, in the absence of authority from Pennsylvania to extend the statute to cover GEHA's allegations here, its claim is DISMISSED WITH PREJUDICE.

h. South Dakota

HN17[] Under South Dakota's Deceptive Trade Practices and Consumer Protection statute, it is a deceptive practice to "[k]nowingly act, use, or employ any deceptive act or practice, fraud, false pretense, false promises, or misrepresentation or to conceal, suppress, or omit any material fact in connection with the sale or advertisement of any merchandise." *S.D. Codified Laws § 37-24-6(1)*. In *In re New Motor Vehicles Canadian Exp. Antitrust Litig., 350 F. Supp. 2d 160 (D. Me. 2004)*, the court determined that the SDDTPA required proof of an affirmative misrepresentation, and the allegations **[**58]** in that complaint — that consumers suffered injury because defendants conspired to keep Canadian cars out of the market — were insufficient to state a claim of fraud or deception under the statute. *Id. at 202-03*.

This analysis is consistent with *Nw. Pub. Serv., a Div. of Nw. Corp. v. Union Carbide Corp., 236 F. Supp. 2d 966 (D.S.D. 2002)*,which held that "proof of an intentional misrepresentation or concealment of a fact on which plaintiff relied and that caused an injury to plaintiff" is required to state a claim under *§ 37-24-6*. *Id. at 973-74*. Here, there are no allegations that defendants made affirmative **[*1172]** misrepresentations that were passed along to the purchasers of Lidoderm.

GEHA relies on *In re DDAVP Indirect Purchaser Antitrust Litig. v. Ferring Pharms. Inc., 903 F. Supp. 2d 198 (S.D.N.Y. 2012)*. There, the court concluded that because defendants "made misrepresentations to the PTO and FDA, which in turn allowed Defendants to manufacture and market DDAVP to consumers on the premise that the patent underlying DDVAP was legally obtained, Plaintiffs were 'adversely affected' by the fraud committed by Defendants within the meaning of the SDDTPA when they relied on such representations and paid supra-competitive prices for the drug." *Id. at 229* (misrepresentations to the PTO included submitting declarations from purported non-interested parties who were in fact interested/aligned with defendants' interests and FDA citizen **[**59]** petition was alleged to be baseless). However, the only South Dakota case the *DDAVP* court relied on is *Brookings Mun. Utils., Inc. v. Amoco Chem. Co., 103 F. Supp. 2d 1169 (D.S.D. 2000)*, which is distinguishable. The *Brookings* court held that **HN18**[] where *affirmative* misrepresentations were made by defendant and passed along to the consumers by a third-party, those misrepresentations were nonetheless actionable. *See* *id. at 1178* ("Defendants cannot escape liability to plaintiffs for their alleged misrepresentations simply because they did not make any statements directly to plaintiffs. Defendants may be liable to plaintiffs, even if plaintiffs only received misrepresentations through" a third party."). Here, there are no similar allegations that affirmative misrepresentations or concealment of a fact were passed along to or relied upon by GEHA.

Following the more in-depth analysis of the *New Motor Vehicles* and *Brookings* cases, GEHA's claims under South Dakota law are DISMISSED WITH PREJUDICE.

i. West Virginia

HN19[] West Virginia's Consumer Credit and Protection Act prohibits "unfair methods of competition and unfair or deceptive acts or practices" and defines trade or commerce as "advertising, offering for sale, sale or distribution of any goods or services and shall include any trade or **[**60]** commerce, directly or indirectly, affecting the people of this state." W. Va. Code § 46A-6-102. One judge in this District has found that general antitrust allegations are insufficient to establish a violation of WCCCPA. In re Dynamic Random Access Memory Antitrust Litig., 516 F. Supp. 2d 1072, 1118 (N.D. Cal. 2007) ("reading the list literally, nothing on the list targets what might be called traditional antitrust conduct - e.g., price-fixing and market allocation such as that alleged by plaintiffs here, or conduct otherwise constituting a horizontal or vertical restraint on trade or commerce. Rather, the list is aimed at conduct that, in one way or another, 'creates a likelihood of confusion or of misunderstanding' with respect to goods, services or businesses, or involves deceptive, false, or misleading statements and representations in connection with goods, services and businesses."). The court also concluded that "[w]hile the WVCCP expressly states that the list of enumerated acts and practices is not meant to be exclusive, it is nonetheless clear that the statute is aimed at conduct different from the allegations of price-fixing asserted by plaintiffs here." Id. at 1072.

The *DRAM* Court also expressly distinguished the one case relied on by GEHA **[**61]** here, FTC v. Mylan Lab., Inc., 99 F. Supp. 2d 1 (D.D.C. 1999). In *Mylan*, the court allowed direct and indirect purchaser claims for antitrust conduct to continue under WVCCP. Id. at 10. The *DRAM* **[*1173]** court declined to follow *Mylan* because that decision did "not contain any detailed rationale for finding indirect purchaser standing under the statute, or how price-fixing allegations fall within the purview of the statute." Id. at 1119.

In absence of any West Virginia cases defining unfair methods of competition and unfair or deceptive acts or practices to include the types of antitrust allegations and fraud on the PTO allegations asserted here, I will follow Judge Hamilton's analysis in *DRAM*. GEHA's claim under West Virginia law is DISMISSED WITH PREJUDICE.

6. Intrastate Commerce

Defendants contend that for two states, GEHA has failed to allege sufficient intrastate commerce to state actionable consumer protection claims. I disagree.

a. New York

Defendants argue that **HN20**[] New York's consumer protection statute, N.Y. Gen. Bus. Law § 349, applies only to commercial conduct occurring within New York and for it to apply, "the transaction in which the consumer is deceived must occur in New York." Goshen v. Mut. Life Ins. Co., 98 N.Y.2d 314, 324, 774 N.E.2d 1190, 746 N.Y.S.2d 858 (2002). Defendants argue that because GEHA's SAC does not allege any conduct took place in New York, this claim **[**62]** must be dismissed.

The court in Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, 263 F.R.D. 205 (E.D. Pa. 2009) dismissed plaintiffs' claim under New York consumer protection statute because plaintiffs' allegations of fraud on patent examiners and filling of sham litigation was not deception that took place in New York. Id. at 214. However, in In re Suboxone, 64 F. Supp. 3d 665, 2014 U.S. Dist. LEXIS 167204 (E.D. Pa. Dec. 3, 2014), the court concluded that allegations that overcharges for drugs occurred in New York, were sufficient to establish an intrastate nexus. Id. at *83; *see also* In re DDAVP Indirect Purchaser Antitrust Litig. v. Ferring Pharms. Inc., 903 F. Supp. 2d 198, 228 (S.D.N.Y. 2012) (finding that defendants' fraudulent conduct before the PTO and FDA in effort to maintain drug prices "was plausibly 'imbued with a degree of subterfuge,' . . . . and the fraud was plausibly designed to prevent competitors' entry into the market, thereby allowing Defendants to overcharge consumers for DDAVP, Plaintiffs have stated a claim under Section 349.").

Here, GEHA alleges that it paid retail and mail order pharmacies in New York $21,464.46 for Lidoderm. GEHA SAC ¶ 23. That is sufficient to state an intrastate nexus under New York's statute.

b. North Carolina

Defendants move to dismiss GEHA's claim ***HN21***[] under North Carolina's Unfair and Deceptive Trade Practices Act (NCUDTPA) because only conduct that has a "substantial effect on in-state business" is actionable, and **[**63]** the allegations here amount only to incidental, not substantial, effect.

The "substantial effects" test was first applied under the NCUDPTA by a district court in North Carolina considering whether a foreign corporation who had no operations and suffered no injury in North Carolina could bring an unfair practices claim under NCUDPTA consistent with jurisdictional and *commerce clause* concerns. *See The 'In' Porters, S.A. v. Hanes Printables, Inc., 663 F. Supp. 494, 501 (M.D.N.C. 1987)* (finding that the UDPTA is not available "to a foreign plaintiff suing a resident defendant over alleged foreign injuries having a negligible effect, if any, **[*1174]** on North Carolina trade or commerce."). That case found that NCUDPTA "allows personal jurisdiction over defendants in a case involving foreign acts if an injury to person or property occurs within North Carolina and, at or about the time of the injury, the defendants were either working in North Carolina or had products in the North Carolina commerce through the ordinary course of business." *Id. at 501*. The court also held that in order not to unduly burden interstate commerce, courts should not allow the Act to have extra-territorial effect and be used by a foreign plaintiff with no operations in the state because to do so would raise due process concerns. **[**64]** *Id. at 502*.[13]

As GEHA points out, the NCUDPTA itself does not contain or mandate a "substantial effects" analysis. The case law relied on by defendants is inapposite. Like *The 'In' Porters, S.A. v. Hanes Printables, Inc.*, a number of the cases on which they rely did not address claims of in-state injury by plaintiffs.[14] Defendants cite another case where the district court relied on *The 'In' Porters* reasoning to dismiss indirect purchaser claims where there were no allegations of "substantial wrongful conduct" in North Carolina.[15] I decline to follow that case because it did not recognize the specific type of cases that call for application of the "substantial effects" requirement, *e.g.*, a foreign plaintiff with no in-state **[**65]** injury or attempted extra-territorial application of NCUDTPA.

B. Unjust Enrichment Claims[16]

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[13] The *The 'In' Porters, S.A. v. Hanes Printables, Inc., 663 F. Supp. 494, 501 (M.D.N.C. 1987)* court relied extensively on *Am. Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411, 1428 (E.D.N.C. 1986)* for imposing a "substantial" injury requirement to determine whether the NCUDTPA could be asserted by the foreign plaintiff. The *Am. Rockwool* case determined whether North Carolina law could be applied by a plaintiff to seek recovery for "multi-state conduct" and not just acts occurring in North Carolina. *Id. at 1428*. None of those issues are involved in *this* case, where GEHA seeks to apply North Carolina law only to remedy injuries suffered in North Carolina.

[14] *See, e.g., Duke Energy Int'l, L.L.C. v. Napoli, 748 F. Supp. 2d 656, 677 (S.D. Tex. 2010)* (dismissing NCUDTPA where plaintiff failed to explain how it "experienced harm in North Carolina as a the result of the alleged wrongful conduct" and failed to allege any harm to North Carolina consumers); *In re Parmalat, 383 F. Supp. 2d 587, 603 (S.D.N.Y. 2005)*(dismissing claim where plaintiff failed to allege any in-state injury); *Merck & Co. Inc. v. Lyon, 941 F. Supp. 1443, 1463 (M.D.N.C. 1996)* (dismissing claim where foreign plaintiffs failed to allege in-state injury); *Dixie Yarns, Inc. v. Plantation Knits, Inc., No. 3:93CV301-P, 1994 U.S. Dist. LEXIS 21725, 1994 WL 910955, at *2 (W.D.N.C. July 12, 1994)* (declining to apply NCUDTPA where unclear whether plaintiff suffered injury in North Carolina and defendants did not manufacture or sell their product in North Carolina).

[15] *See In re Refrigerant Compressors Antitrust Litig., No. 2:09-MD-02042, 2013 U.S. Dist. LEXIS 50737, 2013 WL 1431756, at *19 (E.D. Mich. Apr. 9, 2013)* (where "alleged conspiracy caused manufacturers to pay inflated prices for compressors and, any retail customers who ultimately purchased finished products containing compressors paid an inflated price for those products," such effect is merely "an incidental in-state injury" absent allegations that defendants "engaged in any wrongful conduct in North Carolina.").

1. Unjust Enrichment Claims for States that Have Not Passed *Illinois Brick* Repealers

In my November 17, 2014 Order, I reviewed the split in authority among district **[*1175]** courts concerning whether the EPPs could assert unjust enrichment claims for states which had not passed an *Illinois Brick* repealer statute and followed the majority of courts that found they could not. Dkt. 117 at 46-48. GEHA asks me to reconsider that decision, arguing that it ignores the lack of Sherman Act preemptive force over state ***antitrust law*** as well as the interplay between state common law and statutory law. GEHA Oppo. at 14-15.

GEHA does not rely on any authority that I did not address in my prior opinion or address the district court decisions I relied on. It cannot make an "end run" around *Illinois Brick* by relying on its unjust enrichment claim for states that have not enacted an *Illinois Brick* repealer statute absent authority from the courts of those states that would allow unjust enrichment claims to proceed. Therefore, **[**67]** GEHA's unjust enrichment claims under the laws of Alaska, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Montana, New Jersey, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Texas, Virginia, Washington, and Wyoming are DISMISSED WITH PREJUDICE.

2. Autonomous Unjust Enrichment Claims

Relatedly, defendants argue that GEHA's "autonomous" unjust enrichment claims must be dismissed where the recovery is prohibited by *Illinois Brick* or under the particular requirements of a state's consumer protection statute. *See, e.g., In re Flonase Antitrust Litig., 692 F. Supp. 2d 524, 542 (E.D. Pa. 2010)* (discussing distinction between autonomous and parasitic unjust enrichment claims and concluding that allowing autonomous unjust enrichment claims where plaintiffs were unable to state antitrust or consumer protection claims "would undermine state legislative policies and an entire body of substantive law."); *In re New Motor Vehicles Canadian Exp. Antitrust Litig., 350 F. Supp. 2d 160, 208 n.13 (D. Me. 2004)* (same).[17]

I agree that to the extent GEHA has been unable to assert a claim under a state's antitrust or consumer protection statute, GEHA cannot assert an unjust enrichment claim unless it has support for that proposition from authority in that state. Without such support, I will not allow an autonomous claim for restitution to proceed.[18]

3. Autonomous Unjust Enrichment Claims in States with Repealer Statutes

Defendants make a number of additional arguments why GEHA's remaining unjust enrichment claims fail under specific state laws. I address each in turn.

a. Arizona

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[16] GEHA voluntarily withdraws its unjust enrichment claims under Idaho and New **[**66]** Jersey common law. GEHA Oppo. at 2, fn. 3. Here, GEHA has alleged in-state injury and that defendants' products were being sold in North Carolina. GEHA SAC ¶ 23. That is sufficient at this juncture to state a claim under the NCUDTPA.

[17] Defendants also argue that to the extent GEHA's claims are "parasitic" unjust enrichment claims — claims which rely on a violation of a state's antitrust or consumer protection statutes — then those claims must fail where GEHA has failed to adequately plead a claim under either **[**68]** the antitrust or consumer protection statutes of those states. In its opposition brief, GEHA clarifies that the unjust enrichment claims it intends to pursue are "autonomous" claims that are not tethered to its allegations of antitrust or consumer protection violations. GEHA Oppo. at 15-16.

[18] The unjust enrichment claims DISMISSED WITH PREJUDICE on this basis are Alabama and Arkansas.

Defendants assert that Arizona requires that a "direct benefit" pass from a plaintiff to the defendant to state an unjust enrichment claim under Arizona law. Defendants rely *on* *In re Refrigerant Compressors Antitrust Litig. (Compressors* ***[*1176]*** *II), No. 2:09-MD-02042, 2013 U.S. Dist. LEXIS 50737, 2013 WL 1431756, at *26 (E.D. Mich. Apr. 9, 2013)*, which dismissed **[**69]** unjust enrichment claims under Arizona and other jurisdictions' laws because "[a]ny benefit that the IP Plaintiffs conferred would be on others in the chain of distribution from whom they purchased, not on Defendants." *2013 U.S. Dist. LEXIS 50737, [WL] at *26*. However, the *Compressors II* court did not cite or rely on *any* cases from Arizona or any cases applying Arizona's unjust enrichment statute in reaching its conclusion.

GEHA relies on *In re Auto. Parts Antitrust Litig., 50 F. Supp. 3d 836, 2014 U.S. Dist. LEXIS 136404, 232 (E.D. Mich. Sept. 25, 2014)*, which denied a motion to dismiss ***HN22***[] an unjust enrichment claim under Arizona law, finding that the " critical inquiry" was not whether a benefit was conferred directly, but whether plaintiff "'can establish the relationship between his detriment and the defendant's benefit "flow from the challenged conduct."'" *Id. at *232* (quoting *In re Cardizem CD Antitrust Litig., 105 F. Supp. 2d 618, 669 (E.D. Mich. 2000))*.[19] Similarly, in *D.R. Ward Constr. Co. v. Rohm & Haas Co., 470 F. Supp. 2d 485 (E.D. Pa. 2006)*, the court declined to dismiss an unjust enrichment claim under Arizona law where plaintiffs alleged that defendants were enriched by colluding to inflate prices, plaintiffs were impoverished by paying the inflated price, and that plaintiffs' overpayment flowed up the distribution chain to inure to defendants' financial benefit. *Id. at 507-08*. The court reached its conclusion after reviewing Arizona unjust enrichment cases. *Id. at 507, n.10*.

I will follow *In re Auto Parts* and *D.R. Ward*, which relied on cases decided by Arizona courts. GEHA has adequately alleged a traceable benefit to defendants from their co-payments for Lidoderm patches.

b. California

In my November 17, 2014 Order, I dismissed the EPPs' unjust enrichment claim under California law finding that the weight of authority in California state and federal court decisions is that unjust enrichment does not state an independent claim under California law. Dkt. No. 117 at 50. GEHA argues that in light of the split on this issue, the court should reconsider and allow its claim to go forward. Oppo. at 23-24. In absence of any newly decided authority on the issue, I will not reconsider. GEHA's stand-alone claim for unjust enrichment under California law is DISMISSED WITH PREJUDICE.

c. District of Columbia

Defendants contend that GEHA fails **[**71]** to allege a sufficient direct benefit under District of Columbia law, but their authorities are not helpful. Defendants rely on *Minebea Co. v. Papst, 444 F. Supp. 2d 68 (D.D.C. 2006)*, where the court dismissed the unjust enrichment claim because plaintiff never "afforded any direct benefit" to the defendant. *Id. at 186*. However, no benefit was conferred because there was no evidence plaintiff ever paid anything to the defendant with respect to the patent portfolio at issue and the defendant actually paid substantial consideration for the patents to a third-party. *Id.* Defendants also cite *Compressors II, 2013 U.S. Dist. LEXIS 50737, 2013 WL 1431756, at *26*, which dismissed an unjust enrichment claim under District of Columbia law without **[*1177]** any analysis or citation to any case decided under District of Columbia law. In addition, defendants point to *Sabre Int'l Sec. v. Torres Advanced Enter. Solutions, LLC, 60 F. Supp. 3d 36, 2014 U.S. Dist. LEXIS 116761, 2014 WL 4162236, at *4 (D.D.C. Aug. 21, 2014)*. The unjust enrichment claim there was dismissed as to individual defendants because there were no factual allegations that connected the individual defendants' salaries or bonuses

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[19] The *In re Auto Parts* court also relied **[**70]** on a district court case from Arizona, *Yee v. Nat'l Gypsum Co., 2010 U.S. Dist. LEXIS 61488 (D. Ariz. June 22, 2010)*, which dismissed an unjust enrichment claim absent an allegation that plaintiff conferred some benefit on defendant — the manufacturer of a product plaintiff indirectly purchased. *Id. at * 12*. However, there was no discussion of a need for that benefit to have been conferred "directly" to the defendant from plaintiff.

to the monies plaintiff paid the individual defendants' company. *Cf.* [Danny Lynn Elec. & Plumbing, LLC v. Veolia ES Solid Waste Se., Inc., 2011 U.S. Dist. LEXIS 78557, 2011 WL 2893629 (M.D. Ala. July 19, 2011)].

GEHA relies on *In re TFT-LCD (Flat Panel) Antitrust Litig., Case No. 07-1827 SI, 2011 U.S. Dist. LEXIS 110635, 49 (N.D. Cal. Sept. 28, 2011)*, which distinguished *Minebea Co.* and allowed ***HN23***[] indirect purchasers to pursue their unjust enrichment claims under District of Columbia law despite the **[**72]** lack of a "direct benefit" that defendants claim is required. *Id. at *48-49*; *see also* *In re Auto. Parts Antitrust Litig., 50 F. Supp. 3d 836, 2014 U.S. Dist. LEXIS 136404, 235 (E.D. Mich. Sept. 25, 2014)* (following *In re TFT-LCD* and allowing unjust enrichment claims under District of Columbia law to proceed). I find that in absence of cases arising under District of Columbia law that support defendants' proposed narrow definition of direct benefit, the claims under District of Columbia law can proceed.

d. Kansas

Defendants contend that under Kansas law, the premise of an unjust enrichment claim is that defendant received a benefit without providing consideration. Because GEHA has not asserted that it failed to receive the Lidoderm patches, defendants argue that GEHA cannot assert this claim. GEHA responds that a plaintiff's unjust enrichment claim is not vitiated where a plaintiff received some consideration (here the Lidoderm patches) as long as the consideration was not adequate, *e.g.*, the defendant was paid more than it should have been and was still unjustly enriched. *In re K-Dur Antitrust Litig., 338 F. Supp. 2d 517, 545 (D.N.J. 2004)* (Plaintiffs' receipt of valuable medicine for their payments does not, as Defendants contend, bar an unjust enrichment claim."); *see also* *In re Auto. Parts Antitrust Litig., 50 F. Supp. 3d 836, 2014 U.S. Dist. LEXIS 136404, 229 (E.D. Mich. Sept. 25, 2014)* ("the Court disagrees with Defendants that the exchange of Bearings for payment bars IPPs' unjust enrichment **[**73]** claims.

The issue is whether the transaction was unjust."). The cases defendants rely on are inapposite, dealing mostly with the situation where a property owner is sued by an unpaid subcontractor hired by a tenant. In *Senne & Co. v. Simon Capital Ltd. P'ship, 155 P.3d 1220 (Kan. Ct. App. 2007)* the court recognized the unremarkable proposition that a "claim for unjust enrichment is that the defendant received a benefit without having paid for it." The court there dismissed the claim for unjust enrichment because the defendant — the mall property owner — had not contracted for plaintiff's construction work (the property lessor had) and had not benefitted from it or from the lessors' failure to pay plaintiff. *Id.* The court's analysis does not bar the type of unjust enrichment claim at issue here. *See also* [Tradesmen Int'l, Inc. v. U.S. Postal Serv., 234 F. Supp. 2d 1191, 1204 (D. Kan. 2002)] (addressing the "special circumstances" where "under which an unjust enrichment claim may be brought by a subcontractor against an owner, absent privity," may proceed). Absent any case law on point to support defendants' attempt to limit the unjust enrichment **[*1178]** claim under Kansas law, this claim may proceed.

e. New York

As defendants point out, in *Fenerjian v. Nongshim Co., Ltd, Case No. 13-CV-04115-WHO, 72 F. Supp. 3d 1058, 2014 U.S. Dist. LEXIS 156229, 2014 WL 5685562 (N.D. Cal. Nov. 4, 2014)*, I held that "the transactions and relationships between the **[**74]** indirect purchaser plaintiffs and the defendants" — where plaintiffs indirectly purchased allegedly price-fixed noodles — were "too attenuated to state an unjust enrichment claim under New York law" after considering cases decided by New York's highest court. *2014 U.S. Dist. LEXIS 156229, [WL] at *22-23*. GEHA does not provide any basis on which to distinguish my conclusion in *Fenerjian* based on the facts alleged here. Therefore, GEHA's unjust enrichment claim under New York law is DISMISSED WITH PREJUDICE. ***f. North Carolina***

There is a split in authority whether North Carolina requires the type of narrowly defined direct benefit proposed by defendants (i.e., direct payment, not through a third-party) to state an unjust enrichment claim. Defendants rely on *In re Aftermarket Filters Antitrust Litig., 2010 U.S. Dist. LEXIS 32652, 2010 WL 1416259, at *3 (N.D. Ill. Apr. 1, 2010)* and *In re Flonase Antitrust Litig., 692 F. Supp. 2d 524, 546 (E.D. Pa. 2010)*, both of which adopted a narrow definition of "direct benefit" as requiring a plaintiff to confer a benefit directly on a defendant, and not through a third-party.[20]

However, more recently the court in *In re Processed Egg Products Antitrust Litig., 851 F. Supp. 2d 867, 932 (E.D. Pa. 2012)*, rejected that argument. In doing so, the court reviewed the North Carolina appellate cases relied **[**75]** on by the *Aftermarket* and *Flonase* courts, found those cases to be unpersuasive, and instead relied on North Carolina Supreme Court cases which had taken a more expansive view of unjust enrichment claims under North Carolina law. *In re Processed Egg Products Antitrust Litig., 851 F. Supp. 2d 867 at 931-32* (discussing *Booe v. Shadrick, 322 N.C. 567, 369 S.E.2d 554 (1988)* and *Embree Const. Group, Inc. v. Rafcor, Inc., 330 N.C. 487, 411 S.E.2d 916 (1992)*, which did not require a benefit to flow from plaintiff directly to defendant). This analysis is consistent with the decision of a court in this district. In *In re TFT-LCD Antitrust Litig., 599 F. Supp. 2d 1179 (N.D. Cal. 2009)*, the court likewise rejected the narrow definition applied in *Effler* and accepted the broader application of unjust enrichment from the North Carolina Supreme Court in *Booe. Id. at 1190*. The court concluded that plaintiffs' allegations that they conferred a benefit on defendants by paying higher prices for LCD products than they would have absent the alleged price-fixing conspiracy, was sufficient under North Carolina law. *Id. at 1190*.

I agree with the more expansive analysis applied by the courts in *In re TFT-LCD Antitrust Litig.* and *In re Processed Egg Products Antitrust Litig.* — which rely on North Carolina Supreme Court cases — and find that the allegations here are sufficient under North Carolina law.

g. North Dakota

Defendants argue that ***HN24***[] a "direct benefit" from a plaintiff directly to a **[**76]** defendant **[*1179]** is required under North Dakota law. A number of district courts have — relying on North Dakota case law[21] — concluded that indirect purchaser allegations are insufficient to establish a "direct benefit" under North Dakota law. *See, e.g., In re DDAVP Indirect Purchaser Antitrust Litig., 903 F. Supp. 2d 198, 235 (S.D.N.Y. 2012)* ("Plaintiffs have not and cannot plead a direct benefit of the kind that North Dakota law requires-in other words, something akin to an arms-length transaction between the Indirect Purchaser Plaintiffs and Defendants is required to state a claim."); *In re TFT-LCD (Flat Panel) Antitrust Litig., 599 F. Supp. 2d 1179, 1191 (N.D. Cal. 2009)* (finding that the "broader language of *Apache* suggests that a 'direct benefit' is required under North Dakota law . . . . Plaintiffs have not cited any authority holding that North Dakota law does not require a direct benefit, and in the face of *Apache*."); *In re Relafen Antitrust Litig., 225 F.R.D. 14, 28 (D. Mass. 2004)* ("Here, the benefits that SmithKline received were obtained most directly from wholesalers, who, in turn, obtained benefits from end payors. Because [North Dakota] precedent casts doubt on the end payors' unjust enrichment claims," were dismissed).

GEHA does not distinguish these district court cases or cite any more recent North Dakota authority. Accordingly, I will follow the **[**77]** courts that have addressed this issue directly and DISMISS WITH PREJUDICE GEHA's unjust enrichment claim under North Dakota law.

h. Tennessee

Similar to the argument raised with respect to Kansas law, defendants contend that under Tennessee law as long as a defendant has provided any benefit (here the Lidoderm patches), plaintiffs are precluded from bringing unjust enrichment claims, even if the amount paid was inflated. In support, defendants cite cases that stand for the general proposition that a claim for unjust enrichment is not stated where defendant paid compensation to a third party

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[20] The *Aftermarket* and *Flonase* cases relied on two North Carolina Court of Appeals decisions: *Effler v. Pyles, 94 N.C. App. 349, 380 S.E.2d 149, 152 (N.C. Ct. App. 1989)* and ***Baker Constr. Co., Inc. v. City of Burlington, 200 N.C. App. 435, 683 S.E.2d 790, 2009 WL 3350747, at *6 (N.C. Ct. App., 2009)*** (unpublished).

[21] *See Apache Corp. v. MDU Res. Grp., Inc., 1999 ND 247, 603 N.W.2d 891, 895 (N.D. 1999)*.

(usually under a contract), even though the plaintiff did not receive compensation. *See, e.g.,* *McKee v. Meltech, Inc., No. 10-2730, 2011 U.S. Dist. LEXIS 49612, 2011 WL 1770461, at *10 (W.D. Tenn. May 9, 2011)* (where wife of plaintiff under contract with, and compensated by defendant, plaintiff could not being unjust enrichment claim because he was not directly compensated); W*eather* *Doctor Servs. Co. v. Stephens, 2001 Tenn. App. LEXIS 553, 2001 WL 849540, at *1 (Tenn. Ct. App. July 27, 2001)* (where property owner defendant testified he had paid contractor for materials, subcontractor could not allege an unjust enrichment claim against property owner); *Paschall's, Inc. v. Dozier, 219 Tenn. 45, 57, 407 S.W.2d 150 (1966)* ("Consequently, if the landowner has given any consideration to any person for the improvements, it would not be unjust for him to retain the benefit without paying the **[**78]** furnisher.").

As I discussed with respect to Kansas, these cases are different from the situation alleged here, where GEHA alleges that it paid inflated prices for the Lidoderm patches and that it would be unjust for defendants to retain the excess. *See* *In re Auto. Parts Antitrust Litig., 50 F. Supp. 3d 869, 2014 WL 4793850, at *19 (E.D. Mich. 2014)* (sustaining unjust enrichment claim under Tennessee law where "allegations create an inference that the consideration was not reasonable, valuable, or adequate."); *see also* *In re K-Dur Antitrust Litig., 338 F. Supp. 2d 517, 545 (D.N.J. 2004)* ("Plaintiffs' receipt of valuable medicine for their payments does not, as Defendants contend, bar an unjust enrichment claim."). **[*1180]** In absence of any on point authority under Tennessee law, GEHA's unjust enrichment claim may proceed.

CONCLUSION

Defendants' motion to dismiss is GRANTED in part and DENIED in part.

The EPPs' consumer protection claim under Utah law is DISMISSED without prejudice. The EPPs' consumer protection claim under Massachusetts law on behalf of plaintiff Gallato is DISMISSED WITH LEAVE TO AMEND. Any amended complaint shall be filed within thirty days of this Order.

GEHA's antitrust claim under Rhode Island law is DISMISSED WITH PREJUDICE.

GEHA's consumer protection claims under Alaska, Arkansas, District of Columbia, and Idaho, Maine, Massachusetts, **[**79]** Michigan, Minnesota, Montana, New Hampshire, Oregon, Pennsylvania, South Dakota, West Virginia law are DISMISSED WITH PREJUDICE.

GEHA's unjust enrichment claims under Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Montana, New Jersey, New York, North Dakota, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Texas, Virginia, Washington and Wyoming law are DISMISSED WITH PREJUDICE.

In all other respects, defendants' motion is DENIED.

IT IS SO ORDERED.

Dated: May 5, 2015

/s/ William H. Orrick

WILLIAM H. ORRICK

United States District Judge

End of Document

Hemlock Semiconductor Corp. v. Deutsche Solar GmbH

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

May 7, 2015, Decided; May 7, 2015, Filed

Case No. 13-cv-11037

Reporter

116 F. Supp. 3d 818 *; 2015 U.S. Dist. LEXIS 97956 **

HEMLOCK SEMICONDUCTOR CORPORATION, Plaintiff, v. DEUTSCHE SOLAR GmbH, f/k/a DEUTSCHE SOLAR AG, Defendant.

Subsequent History: Related proceeding at *Hemlock Semicondutor Corp. v. Kyocera Corp., 2015 U.S. Dist. LEXIS 138018 (E.D. Mich., Oct. 9, 2015)*

Reconsideration denied by *Hemlock Semiconductor Corp. v. Deutsche Solar GmbH, 2015 U.S. Dist. LEXIS 178311 (E.D. Mich., Oct. 28, 2015)*

Summary judgment granted by, Motion denied by *Hemlock Semiconductor Corp. v. Deutsche Solar GmbH, 2016 U.S. Dist. LEXIS 90640 (E.D. Mich., July 13, 2016)*

Costs and fees proceeding at, Motion granted by *Hemlock Semiconductor Corp. v. SolarWorld Indus. Sachsen GmbH, 2016 U.S. Dist. LEXIS 151759 (E.D. Mich., Nov. 2, 2016)*

Motion granted by, Motion granted by, in part *Hemlock Semiconductor Corp. v. SolarWorld Indus. Sachsen GmbH, 2016 U.S. Dist. LEXIS 173205 (E.D. Mich., Dec. 15, 2016)*

Core Terms

Solar, affirmative defense, illegality, Steel, anti trust law, defenses, franchisee, parties, coal, antitrust, stricken, excused, discovery, enforcing, museum, contracts, promise, silicon, onions, motion to strike, impracticability, documents, polycrystalline, figures, frustration of purpose, financial statement, motion to compel, counterclaim, franchise, argues

LexisNexis® Headnotes

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

HN1[] **Defenses, Demurrers & Objections, Motions to Strike**

A court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. *Fed. R. Civ. P. 12(f)*. A defense is insufficient if as a matter of law, the defense cannot succeed under any circumstances. A *Rule 12(f)* motion is also proper if it aids in eliminating spurious issues before trial, thereby streamlining the litigation. Generally, however, a *Rule 12(f)* motion should not be granted if the insufficiency of the defense is not clearly apparent, or if it raises factual issues that should be determined on a hearing on the merits.

Motions seeking to strike an affirmative defense are disfavored and should be used sparingly. As observed by the Sixth Circuit, a motion to strike is a drastic remedy to be resorted to only when required for purposes of justice. The motion to strike should be granted only when the pleading to be stricken has no possible relation to the controversy.

Contracts Law > Defenses > Illegal Bargains

HN2[ ] **Defenses, Illegal Bargains**

The U.S. Supreme Court has twice addressed when a contract's illegality under antitrust laws and regulations can serve as an affirmative defense in a contract-enforcement action. The two opinions are in seeming conflict with each other. The earlier of the cases, Kelly v. Kosuga, holds, at its broadest, that the illegality of a contract under federal antitrust laws does not serve as a defense to a contract enforcement action. The later of the opinions, Kaiser Steel Corp. v. Mullins, at its broadest, distinguishes Kosuga and holds that, under certain conditions, the illegality of a contract under federal ***antitrust law*** can furnish an affirmative defense of illegality.

Contracts Law > Defenses > Illegal Bargains

HN3[ ] **Defenses, Illegal Bargains**

Illegality under antitrust laws is not a defense when the illegality is not related to the transaction seeking to be enforced.

Antitrust & Trade Law > Sherman Act > Scope

HN4[ ] **Antitrust & Trade Law, Sherman Act**

Sections 1 and *2 of the Sherman Act* prohibit contracts, combinations, and conspiracies in restraint of trade, as well as monopolization and attempts to monopolize.

Contracts Law > Defenses > Illegal Bargains

HN5[ ] **Defenses, Illegal Bargains**

If a contract provision is patently illegal and is not severable from the sued-upon provision, the defense of illegality is permitted.

Contracts Law > Defenses > Illegal Bargains

HN6[ ] **Defenses, Illegal Bargains**

The question that courts must ask is not simply whether the agreement to be enforced is illegal under federal antitrust laws (the Kosuga question) but whether the agreement to be enforced is itself a mechanism to enforce a collateral agreement or provision that violates federal antitrust laws.

Business & Corporate Compliance > ... > Standards of Performance > Impossibility of Performance > Frustration of Purpose

HN7[] **Impossibility of Performance, Frustration of Purpose**

The doctrines of frustration of purpose and supervening impossibility/impracticability are related excuses for nonperformance of contractual obligations and are governed by similar principles.

Business & Corporate Compliance > ... > Standards of Performance > Impossibility of Performance > Frustration of Purpose

HN8[] **Impossibility of Performance, Frustration of Purpose**

For a party to avail itself of the defense of frustration of purpose under Michigan law it must prove the following conditions: (1) the contract must be at least partially executory; (2) the frustrated party's purpose in making the contract must have been known to both parties when the contract was made; (3) this purpose must have been basically frustrated by an event not reasonably foreseeable at the time the contract was made, the occurrence of which has not been due to the fault of the frustrated party and the risk of which was not assumed by him.

Contracts Law > Defenses > Affirmative Defenses

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Affirmative Defenses

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

HN9[] Affirmative defenses, even if predicated on facts found insufficient or inadequate to withstand scrutiny on a dispositive motion, will only be stricken on a *Fed. R. Civ. P. 12(f)* motion when the pleading to be stricken has no possible relation to the controversy.

Civil Procedure > Discovery & Disclosure > Disclosure > Motions to Compel

Civil Procedure > Discovery & Disclosure > Discovery > Relevance of Discoverable Information

HN10[] **Disclosure, Motions to Compel**

Parties are permitted under *Fed. R. Civ. P. 37* to move for an order compelling disclosure or discovery. The Federal Rules of Civil Procedure are in place to facilitate discovery of all relevant evidence. *Fed. R. Civ. P. 26* authorizes a broad scope of discovery, provided the material sought has some probative value in proving or disproving a claim or defense.

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

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

A court should freely give leave to amend when justice so requires. *Fed. R. Civ. P. 15(a)(2)*. Undue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment are all factors which may affect the decision. Delay by itself is not sufficient reason to deny a motion to amend. A court must also evaluate the notice and possible prejudice to the opposing party when considering whether to permit amendment. Decisions as to when justice requires amendment are left to the sound discretion of the trial judge.

Counsel: **[**1]** For Hemlock Semiconductor Corporation, Plaintiff: Colin M. Battersby, Emma T. Chen, Richard C. Sanders, Miller, Canfield, Detroit, MI; Craig W. Horn, Braun, Kendrick, Saginaw, MI.

For Deutsche Solar GmbH, formerly known as Deutsche Solar AG, Defendant: Anthony Cillo, David F. Russey, Cohen & Grigsby, P.C., Pittsburgh, PA; Daniel P. Malone, Butzel Long (Detroit), Detroit, MI; Joseph E. Richotte, BUTZEL LONG, P.C., Bloomfield Hills, MI; Larry K. Elliott, Cohen & Grisgsby, Pittsburgh, PA.

Judges: Honorable THOMAS L. LUDINGTON, United States District Judge.

Opinion by: THOMAS L. LUDINGTON

Opinion

[*820] ORDER GRANTING IN PART AND DENYING IN PART MOTION TO STRIKE, STRIKING AFFIRMATIVE DEFENSES, GRANTING IN PART AND DENYING IN PART MOTION TO COMPEL, DIRECTING PRODUCTION, ADJOURNING DISCOVERY CUTOFF, DENYING MOTION FOR LEAVE TO AMEND, AND DIRECTING SUBMISSION OF SCHEDULING PROPOSALS

Hemlock Semiconductor and Deutsche Solar are each significant actors in the **[*821]** global solar energy industry. Their immediate dispute arises from a series of contracts for the sale of large quantities of industrial-grade polycrystalline silicon from Hemlock to Deutsche Solar. Following changes in global solar market conditions, Deutsche Solar ceased making **[**2]** polycrystalline silicon purchases under the Supply Agreements with Hemlock, some of which continued until 2019. When Deutsche Solar discontinued making further purchases or payments under the Supply Agreements, Hemlock initiated this suit.

Hemlock filed its complaint on March 7, 2013. The parties engaged in discovery until August 22, 2014, at which point the parties requested a status conference. During the conference, the parties informed the Court of a dispute regarding discovery requests that could potentially relate to a number of Deutsche Solar's affirmative defenses. These defenses, as identified in Deutsche Solar's Answer, are:

> 6. The Supply Contracts as Plaintiff seeks to enforce them are illegal, and/or the enforcement of the Supply Contracts would make the Court a party to a violation of European Union ***antitrust law***.
> . . .
> 12. Any required performance on the part of Deutsche Solar is excused by the doctrine of commercial impracticability.
> 13. Any required performance on the part of Deutsche Solar is excused by the doctrine of frustration of purpose.
> 14. Any required performance on the part of Deutsche Solar is excused by the doctrine of force majeure.
>
> 15. Any required performance **[**3]** on the part of Deutsche Solar is excused by the supervening intervention of one or more third parties.
> 16. Any required performance on the part of Deutsche Solar is excused by the illegal dumping of solar panels by the Chinese Government and Chinese producers, which caused a fundamental disruption in the market that was not foreseen or foreseeable by the parties at the time of their agreements.

Def.'s Answer, ECF No. 14 at 11-12.

Hemlock indicated that it had insufficient information regarding these defenses and would, on that basis, not be making the requested disclosures. As a result, on September 24, 2014, Deutsche Solar filed a Motion to Compel. ECF No. 30. In response, and as contemplated in conference with the Court, Hemlock cross-moved to strike

Deutsche Solar's affirmative defenses upon which its discovery requests were predicated. ECF No. 36. Those motions are now before the Court.

I.

Hemlock Semiconductor, Plaintiff in this action, is a Michigan corporation involved in the manufacture and sale of polycrystalline silicon and photovoltaic solar cells and modules. ECF No. 1 at ¶¶ 2, 3, 7.

Deutsche Solar GmbH, Defendant in this action, is a German limited liability company involved **[**4]** in the production of multicrystalline silicon wafers, "which are the building blocks of photovoltaic solar cells and modules." ECF No. 1 at ¶ 8.

A.

Hemlock and Deutsche Solar, beginning "[i]n or about August 2005, . . . entered into [four] Long Term Supply Agreement[s], pursuant to which Deutsche Solar agreed to purchase and Hemlock agreed to supply, polycrystalline silicon[.]" ECF No. 1 at ¶ 9. Deutsche Solar agreed to purchase certain defined quantities of polycrystalline silicon in accordance with a schedule outlined in the agreements. *Id.* The parties agree that the effective dates found in the supply agreements are as follows:

> **[*822]** The first Long Term Supply Agreement . . . is effective from August 30, 2005 to December 31, 2015. The second Long Term Supple Agreement . . . is effective from June 10, 2006 to December 31, 2018. The third Long Term Supply Agreement . . . is effective from June 27, 2007 to December 31, 2019. The fourth Long Term Supply Agreement . . . was effective from January 1, 2010 to December 31, 2012.

ECF No. 1 at ¶ 10.

Hemlock alleges that these agreements took the form of "take or pay" contracts "such that Deutsche Solar is required to pay the full purchase price for [polycrystalline **[**5]** silicon] scheduled to be purchased each year, regardless of whether Deutsche Solar actually takes delivery of the product." ECF No. 1 at ¶ 11. Under this construction of the agreements, "Deutsche Solar's scheduled purchases over the respective terms of the four Supply Agreements totaled 24,390,000 kilograms" of polycrystalline silicon. Id. at ¶12.

Deutsche Solar denies that the Supply Agreements were of the "take or pay" type and so also contests the amount of polycrystalline silicon they agreed to take in delivery. ECF No. 14 at ¶¶ 11, 12. According to Deutsche Solar, the parties "subsequently modified the agreements by agreement and by their conduct." *Id.* at ¶ 10. Hemlock confirms in its motion to strike that "[t]he parties occasionally amended and restated the Supply Agreements between 2008 and 2011." ECF No. 36 at 1.

B.

In March of 2012, Deutsche Solar communicated with Hemlock that it was no longer comfortable with the pricing terms of the Supply Agreements. The parties disagree as to the interpretation of the two letters, sent by Deutsche Solar's CEO to Hemlock management, attached to Hemlock's complaint as Exhibits 5 & 6. The parties do agree, however, that "Deutsche Solar . . . has **[**6]** not purchased any [polycrystalline silicon] from Hemlock since March 31, 2012 and that it has placed no purchase orders for [polycrystalline silicon] with Hemlock." ECF No. 14 at ¶ 18.

On October 12, 2012, Hemlock sent a letter to Deutsche Solar seeking "adequate assurance that Deutsche Solar will fully perform its obligations under its four [Supply Agreements with Hemlock.]" ECF No. 8, Ex. 7. On October 16, 2012, Deutsche Solar responded to Hemlock's letter and stated, among other things, that "Deutsche Solar is committed to fulfill its obligations under the Long Term Supply Agreements as amended from time to time." *Id.*, Ex. 8. In a reply to this letter, Hemlock expressed its belief that Deutsche Solar's assurances were inadequate and that

"Deutsche Solar's October 16 response fails to provide the requisite assurances contemplated by *MCLA § 440.2609* and applicable Michigan law[.]" *Id.*, Ex. 9.

Five months later, on March 4, 2013, Hemlock issued Deutsche Solar an invoice in the amount of $83,971,500.00, which it believed represented the value of polycrystalline silicon that Deutsche Solar did not purchase during 2012. ECF No. 1 at ¶ 25. Hemlock alleges that "on March 5, 2013, Deutsche Solar responded **[**7]** by letter, formally objected to the invoice, and claimed the Supply Agreements are 'null and void.'" *Id.*[1] Deutsche Solar admits that Hemlock issued such an invoice and that it "disputed the accuracy and validity of the invoice." ECF No. 14 at ¶ 25.

II.

HN1[] A "court may strike from a pleading an insufficient defense or any redundant, **[*823]** immaterial, impertinent, or scandalous matter." *Fed. R. Civ. P. 12(f)*. A defense is insufficient "if as a matter of law, the defense cannot succeed under any circumstances." *Hahn v. Best Recovery Servs., LLC, 2010 U.S. Dist. LEXIS 116136, 2010 WL 4483375, *2 (E.D. Mich. Nov. 1, 2010)* (internal quotation marks and citations omitted). A *Rule 12(f)* motion is also proper "if it aids in eliminating spurious issues before trial, thereby streamlining the litigation." *Id.* (internal quotation marks and citation omitted). "Generally, however, a *Rule 12(f)* motion should not be granted if the insufficiency of the defense is not clearly apparent, or if it raises factual issues that should be determined on a hearing on the merits." *Id.* (internal quotation marks and citation omitted). Motions seeking to strike an affirmative defense are disfavored and should be used sparingly. As observed by the Sixth Circuit, a motion to strike "is a drastic remedy to be resorted **[**8]** to only when required for purposes of justice. The motion to strike should be granted only when the pleading to be stricken has no possible relation to the controversy." *Brown & Williamson Tobacco Corp. v. United States, 201 F.2d 819, 822 (6th Cir. 1953)* (internal quotation marks and citations omitted).

III.

Although the current round of briefing before the Court was set in motion by Deutsche Solar's Motion to Compel, Hemlock's Motion to Strike is analytically precedent. If Hemlock's motion succeeds in striking certain affirmative defenses from Deutsche Solar's answer, then Deutsche Solar would no longer have a ground on which to advance the relevance of its discovery request. Because of the posture of the motions, Hemlock's Motion to Strike will be considered first and then, if any of Deutsche Solar's affirmative defenses survive, its Motion to Compel will be taken up.

Hemlock attacks Deutsche Solar's affirmative defenses in two groups. First, Hemlock takes up Deutsche Solar's affirmative defense of illegality. The grounds for that illegality, according to Deutsche Solar, lie in European Union ***antitrust law***. Deutsche Solar alleges that its contract with Hemlock violates EU antitrust laws and so should not be enforced by this Court. Hemlock answers this assertion in **[**9]** its motion to strike by claiming that illegality under foreign antitrust laws is not the type of illegality cognizable as an affirmative defense. As a result, Hemlock claims, the affirmative defense is legally insufficient and should be stricken.

Hemlock next challenges a series of Deutsche Solar's defenses, all of which are based in a single nucleus of facts. Deutsche Solar contends that their performance under the Supply Agreements was excused because of China's illegal intervention into the international solar market, which led to the decline and eventual collapse of the market. Deutsche Solar suggests that the risk associated with China's conduct is thus, appropriately, allocated to Hemlock. Hemlock responds that a price collapse is not a recognized basis for defenses to contract actions in Michigan and so the defenses related to that set of facts should be stricken.

A.

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[1] A copy of this letter was not attached to Hemlock's complaint.

HN2[] The Supreme Court has twice addressed when a contract's illegality under antitrust laws and regulations can serve as an affirmative defense in a contract-enforcement action. The two opinions, in seeming conflict with each other, have engendered a great degree of discussion in the lower federal courts. The earlier of **[**10]** the cases, *Kelly v. Kosuga, 358 U.S. 516, 79 S. Ct. 429, 3 L. Ed. 2d 475 (1959)*, holds, at its broadest, that the illegality of a contract under federal antitrust laws does not serve **[*824]** as a defense to a contract enforcement action. The later of the opinions, *Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 102 S. Ct. 851, 70 L. Ed. 2d 833 (1982)*, at its broadest, distinguishes *Kosuga* and holds that, under certain conditions, the illegality of a contract under federal ***antitrust law*** can furnish an affirmative defense of illegality.

Hemlock relies on the applicability of *Kosuga* to the current dispute. According to Hemlock, *Kosuga* bars Deutsche Solar from asserting its illegality affirmative defense. Hemlock reads *Kosuga* to hold that permitting the affirmative defense of illegality, where the illegality arises under antitrust laws, is the equivalent of a court enforcing antitrust laws. Enforcing EU antitrust laws is, Hemlock claims, something United States courts have refused to do on the grounds of international comity. Deutsche Solar, in response, argues that the interplay between *Kosuga* and *Kaiser Steel* is important to addressing Hemlock's motion. Deutsche Solar argues that *Kaiser Steel*, not *Kosuga*, controls the analysis in this case. After *Kaiser Steel*, the affirmative defense of illegality under antitrust laws is expressly permitted.

As **[**11]** discussed further hereafter, the reasons offered by Hemlock for why Deutsche Solar's affirmative defense of illegality should be stricken are without merit. There is, however, sufficient independent authority requiring that the defense be stricken. Specifically, *Kaiser Steel* and later cases foreclose the defense. For that reason, Hemlock's motion will be granted. The authority generated by *Kaiser Steel* and its conclusion that Deutsche Solar's affirmative defense cannot succeed will be analyzed first. Due to Hemlock's assertion of the interrelatedness of its argument and the grounds on which the affirmative defense will indeed be stricken, the alternative argument advanced by Hemlock will be addressed as well.

1.

The starting point in this analysis requires understanding the relationship between *Kosuga* and *Kaiser Steel. Kosuga* concerned two individuals involved in the onion trade. The respondent, Kosuga, brought suit against Kelly when Kelly "fail[ed] to complete payment of the purchase price of 50 cars of onions which the respondent had sold to the petitioner in December 1955." *Kosuga, 358 U.S. at 516*. "The petitioner interposed the defense that the sale was made pursuant to and as an indivisible part of an agreement **[**12]** which violated *§ 1 of the Sherman AntiTrust [sic] Act*." *Id.* (internal statutory citations omitted). The petitioner was an onion grower who had purchased onions from the respondent in the past. The petitioner alleged that the basis of his agreement with respondent was a threat by respondent and respondent's business associate that they were in control of large quantities of onions and would flood the market (thus depressing prices) if onion growers such as the petitioner did not purchase from them. *Id. at 517*.

Eventually, the petitioner and other growers agreed to purchase a percentage of the respondent's onion store in exchange for the respondent agreeing not to flood the market. *Id.* The portion of the agreement applicable to the petitioner contemplated that the petitioner would purchase 50 cars of onions from the respondent. *Id. at 518*. The petitioner began making payments on that purchase but eventually fell into default and repudiated the agreement. *Id.* The respondent then brought suit for the unpaid purchase price (and the cost of storing the cars of onions of which the petitioner did not take physical possession). *Id.*

[*825] The concern expressed by the Supreme Court in *Kosuga* was for the potential of **[**13]** upsetting a contract dispute because an unrelated provision of the contract that may violate federal antitrust laws. *Id.* ("As a defense to an action based on contract, the plea of illegality based on violation of the *Sherman Act* has not met with much favor in this Court."). Thus, the Supreme Court held for the respondent in deciding that it would not nullify an agreement between the parties where the alleged violation of the *Sherman Act* was unrelated to the immediate transaction. *Id. at 520-21*. The Court wrote that "[p]ast the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, 'of preventing people from getting other people's property for nothing when they purport to be buying it.'" *Kosuga, 358 U.S. at 520-21* (quoting *Cont'l Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227, 271, 29 S. Ct. 280, 53 L. Ed. 486, 6 Ohio L. Rep. 665, (1909)* (Holmes, J. dissenting).

Kosuga generated confusion in the lower federal courts because it did not completely foreclose the possibility that the affirmative defense of illegality could be sustained when it relates to illegality under antitrust laws. In *Kosuga*, the Court noted that it was only enforcing the agreed-upon sale of onions. *Id.* The Court held that it **[**14]** "c[ould] hardly be said to enforce a violation of the Act to give legal effect to a completed sale of onions at a fair price." *Id.* By contrast, "the nondelivery agreement between the parties could not be enforced by a court if its unlawful character under the *Sherman Act* be assumed." *Id.* That is, the Court would not be able to enforce a provision of the contract if the provision itself is unlawful under the *Sherman Act*. *Id.* Courts are not barred from enforcing a separable provision—in *Kosuga* the agreement to sell onions—merely because that provision appears in a contract alongside a provision that is unlawful under the *Sherman Act*. *Id.* Thus, *Kosuga* only holds that ***HN3***[] illegality under antitrust laws is not a defense when the illegality is not related to the transaction seeking to be enforced. *358 U.S. at 521*.

When and under what circumstances an illegal promise contained in the sued-upon contract could be said to be sufficiently related to the promise seeking to be enforced, such that the two rise and fall together, was a question that was left unaddressed by *Kosuga*. The question was taken up twenty-three years later when *Kaiser Steel* was decided. As the Supreme Court explained:

> Respondents construe *Kosuga* as **[**15]** standing for two general propositions: first, that when a contract is wholly performed on one side, the defense of illegality to enforcing performance on the other side will not be entertained; and second, that the express remedies provided by the *Sherman Act* are not to be added to by including the avoidance of contracts as a sanction. It is apparent from the opinion in that case, however, that both propositions were subject to the limitation that the illegality defense should be entertained in those circumstances where its rejection would be to enforce conduct that the antitrust laws forbid. In *Kosuga*, there were two promises, one to pay for purchased onions and the other to withhold onions from the market. The former was legal and could be enforced, the latter illegal and unenforceable.

Kaiser Steel, 455 U.S. at 81-82 (footnotes omitted).

Kaiser Steel involved an agreement "between the United Mine Workers of America ("UMW") and hundreds of coal producers, including steel companies such as **[*826]** petitioner Kaiser Steel Corp." *Id. at 74*. The agreement—the National Bituminous Coal Wage Agreement of 1974—"required signatory employers to contribute to specified employee health and retirement funds." *Id.* A subsection of the agreement **[**16]** "required employers to pay specified amounts for each ton of coal produced and for each hour worked by covered employees." *Id.* That subsection also "included a purchased-coal clause [that] requir[ed] employers to contribute to the trust specified amounts" for each ton of post-production coal that the employers acquired from other coal producers that had not already made UMW trust contributions on that coal. *Id. at 74-75*. In other words, if employers acquired coal that they did not produce, they had to pay specified amounts into the employee trust to compensate for the amounts they would have paid in if that coal had been produced by their own UMW workers.

Kaiser Steel Corporation "operate[d] a steel mill in California and coal mines in Utah and New Mexico. Its mines produce[d] only high-volatile coal, so it [had to] purchase mid-volatile coal used in steel manufacturing from another producer." *Id. at 75*. The employees of the producer from which Kaiser Steel purchased mid-volatile coal were not represented by UMW. *Id.* As a result, Kaiser Steel was required to "report the coal that it acquired from others or make contributions based on such purchased coal." *Id. at 76*. It did not. When the agreement between UMW and the coal producers expired, **[**17]** "the trustees of the UMW Health and Retirement Funds . . . sued Kaiser seeking to enforce the latter's obligation to report and contribute with respect to coal not produced by Kaiser but acquired from others." *Id.*

Kaiser Steel conceded that it violated the agreement "but defended on the ground, among others, that the agreement in these respects was void and unenforceable as violative of §§ 1 and 2 of the Sherman Act[.]" *Id.*[2] **HN4**[] "Sections 1 and 2 of the Sherman Act prohibit contracts, combinations, and conspiracies in restraint of trade, as well as monopolization and attempts to monopolize." *Id. at 78*. According to Kaiser Steel, the purchased-coal clause was an unlawful restraint on trade "because it puts non-UMW producers at a disadvantage in competing for sales to concerns like Kaiser and because it penalizes Kaiser for shopping among sellers for the lowest available price." *Id. at 78*. Kaiser Steel argued that it would not be able to search the market for the most affordable post-production coal because non-UMW coal came with a market-distorting surcharge: the payment by Kaiser Steel of monies into the union funds. The district court and the court of appeals both "declined to pass on the legality of the purchased-coal **[**18]** clause under . . . the Sherman Act." *Id. at 78*.

The Supreme Court reversed. First, the Court noted that, assuming the purchased-coal agreement were unlawful under the Sherman Act, a court could not enforce the related promise by Kaiser Steel to pay money into the UMW trust. *Id. at 79*. The UMW trustee argued that, in isolation, the requirement that Kaiser Steel, and other employers, pay money into the UMW trust is not illegal. *Id.* But the Court observed that "Kaiser . . . did not make a naked promise to pay money to the union funds." *Id.* The **[*827]** promise to pay money into the union funds under the purchased-coal agreement was inseparable from the conditions of contribution that offended the Sherman Act. "The purchased-coal provision obligated [Kaiser Steel] to pay only if it purchased coal from other employers and then only if contributions to the UMW funds had not been made with respect to that coal." *Id.* If a court directed Kaiser Steel to pay money into the union fund it would be "command[ing] conduct **[**19]** that assertedly renders the promise an illegal undertaking under the federal statutes." *Id. at 79*.

The Court next turned to an analysis of *Kosuga*. It rejected respondent Mullins' assertion that the case compelled a holding that Kaiser Steel's defense should be rejected. Rather, the *Kaiser Steel* court explained, *Kosuga* addressed a situation where there were two separate and distinct promises contained in a single contract. One promise "was legal and could be enforced, the [other] illegal and unenforceable." *Id. at 82*. The *Kosuga* court did not confront a situation where the promise being enforced would result in, at a minimum, the condonation of behavior offensive to the Sherman Act. The Court recognized that *Kosuga* did, however, note that such a situation was distinct from the facts before it:

> The [*Kosuga*] Court went on to say that "[p]ast the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act, the courts are to be guided by the overriding general policy . . . of preventing people from getting other people's property for nothing when they purport to be buying it."

Kaiser Steel, 455 U.S. at 80 (quoting *Kosuga, 358 U.S. at 520-21*) (internal quotation marks omitted). After making this observation, the **[**20]** *Kaiser Steel* court noted that *Kosuga* held it was not "inappropriate or violative of the intent of the parties to give it effect even though it furnished the occasion for a restrictive agreement of the sort here in question." *Id. at 80-81* (quoting *Kosuga, 358 U.S. at 521*). The Court in *Kaiser Steel* concluded its analysis of *Kosuga* by stating that "*Kosuga* thus contemplated that the defense of illegality would be entertained in a case such as this." *Id. at 82*.

Thus, by the time *Kaiser Steel* was decided, the question of when patent illegality in a contract could be used as a defense to a collateral contract provision was settled.***HN5***[] If the provision is patently illegal and is not severable from the sued-upon provision, the defense of illegality is permitted. The next issue to be resolved, and one that is important for this case, is the types of illegality that are cognizable by the defense. Put differently, could something short of patent illegality substantiate the defense? While *Kaiser Steel* is helpful, it is not dispositive of situations where a sued-upon contract provision has an inextricably intertwined collateral obligation that is not patently illegal, but which could be illegal if certain conditions are met. Thus, could **[**21]** the conditions that would render that collateral obligation illegal be so certain to actualize that a court should permit the defense in light of *Kaiser Steel*?

[2] Kaiser Steel also argued that the agreement was illegal under the *National Labor Relations Act*, but the Court's adjudication of that argument is not germane to the present case so discussion of it has been omitted.

That question confounds this case. Deutsche Solar contends that the illegality of the supply agreements under EU law is sufficient under *Kaiser Steel* to sustain their affirmative defense of illegality. But *Kaiser Steel* did not sweep so broadly. Indeed, the Court held: "Here, employer contributions to union welfare funds may be quite legal more often than not, but an agreement linking contributions to purchased coal, if illegal, is subject to the defense of illegality." *Id.* Thus, the Court specifically noted the direct linkage in the **[*828]** substance of the agreement between the promise and the illegal condition. In *Kaiser Steel*, the infirmity was the actual linkage (with no concern for the propriety of the employer contribution payments), not the fact that employer contributions themselves could be illegal. That issue remained for another day.

Here, there is no patent illegality in the supply agreements. Rather, Deutsche Solar argues that if Hemlock meets certain market capitalization requirements the take-or-pay supply agreement would **[**22]** violate EU ***antitrust law***. The District of Columbia Circuit addressed contracts that do not contain patent antitrust illegality in *National Souvenir Center, Inc. v. Historic Figures, Inc., 728 F.2d 503, 234 U.S. App. D.C. 222 (D.C. Cir. 1984)*. That appeal arose out of "a series of pre-trial rulings by the district court in three consolidated anti-trust cases involving wax museums[.]" *Id. at 506*. The origin of the dispute was an agreement between a wax museum in Washington, D.C. and a supplier of wax figures. *Id.* The supplier entered an agreement with the operating company "to provide the figures for the Washington museum and to assist in installing them in appropriate historical settings. In return, [the museum] agreed to purchase figures exclusively from [the supplier] and, for a five year period, to act as [the supplier's] sales agent to other wax museums." *Id. at 506-07*.

The museum began franchising museums throughout the United States. The first franchise was established by an agreement between the franchisee and a subsidiary of the original museum. *Id. at 507*. That agreement obligated the franchisor to provide the franchisee with figures from the supplier at cost and to furnish other services related to establishing the franchisee museum. *Id.* The franchisee contended that the franchisor also had to provide certain **[**23]** franchisor services over the life of the 20-year franchise agreement. *Id.* During that period the franchisee agreed to pay 5% of its annual gross receipts. *Id.*

The franchisor then established two more franchisee museums. *Id.* The agreements with these museums were similar in their required royalty payments. *Id.* The agreements varied, however, in how the franchisees would acquire wax figures. The second franchise did not acquire the figures through the franchisor but instead leased them directly from the supplier. The third franchise agreement did not specify how the museum would acquire wax figures.

The franchisee museums[3] eventually challenged the franchise agreements. They claimed that the agreements violated the *Sherman Act* because they impermissibly tied the supplier's figures to the museum franchise. *Id. at 506*. The second franchisee, the museum required to lease figures directly from the supplier, argued that the franchisor and its owner "unlawfully exercised their monopoly power in the wax figure market to require leasing rather than selling the figures." *Id.* "Upon filing suit, [the franchisees] stopped paying the franchise fees and rents required by the allegedly illegal agreements. **[*829]** Appellees **[**24]** then counterclaimed for recovery of overdue payments and interest." *Id. at 506*.

The franchisees defended against the franchisor and owners' contract counterclaim by alleging that the agreements were illegal tying agreements under the *Sherman Act*. The district court dismissed the franchisees' affirmative claims under federal antitrust laws because they were barred by the *Clayton Act's* statute of limitations. *Id. at 509*. The district court also granted summary judgment on the franchisor's contract **[**25]** counterclaim. *Id. at 508-09*. Despite dismissing the franchisees' affirmative antitrust claims as untimely, the district court analyzed the validity of

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[3] The opinion does not make clear whether only the first and second franchisees—the museums that were obligated to acquire wax figures from the franchisor or supplier, respectively—or all franchisees challenged the agreements. It would appear that only the first franchisee, or possibly just the first and second franchisee, would have standing to challenge the agreements since there is no reference in the opinion to the fact that the third franchisee's franchise agreement contained any requirements that the third franchise museum acquire wax figures from the franchisor or the supplier. While the opinion is not clear on this point, it is not material to the discussion of the District of Columbia Circuit's analysis.

their affirmative defense to the contract counterclaim of illegality under federal ***antitrust law***. The district court concluded that, under *Kaiser Steel*, the defense could not be sustained because "the promise being sued on is not itself illegal under the antitrust laws, [and so] *Kaiser* did not require recognition of the defense. *Id. at 508* (quoting opinion below) (internal quotation marks omitted). The District of Columbia Circuit affirmed the district court's dismissal of the franchisees' illegal tying claims as time-barred. The circuit court reversed the district court's ruling that the second franchisee's monopoly leasing claims—related to leasing the wax figures—were time barred. The court then turned to the issue of the contract counterclaim and the franchisees' defense of illegality.

Although the District of Columbia Circuit affirmed the dismissal of the franchisees' antitrust claims as untimely brought, the issue of the franchisees' affirmative defense of illegality was not mooted. The time bar on the antitrust claims was not a merits determination **[**26]** of the agreements' legality. Thus, it was possible for the franchisees to contend that even though their affirmative cause of action could not be brought, a judgment in favor of the franchisor would still "require[] a federal court to enforce an illegal contract and that result is contrary to the rule governing antitrust defenses recently laid down in *Kaiser Steel*[.]" *Id. at 514*. The district court had rejected the franchisees' affirmative defense because it "read [*Kaiser Steel*] as allowing antitrust defenses to contract suits only where the promise being sued on is itself illegal under the antitrust laws." *Id.* (quoting opinion below) (internal quotation marks omitted). The District of Columbia Circuit affirmed, albeit on a different rationale.

The circuit court analyzed the interplay between *Kosuga* and *Kaiser Steel* and concluded that "*Kosuga* was generally viewed as permitting antitrust defenses in only a very narrow class of contract suits, courts being understandably hesitant to interpose complex antitrust issues in a simple suit for breach of contract." *Id.* In fact, the District of Columbia Circuit was tasked with applying this rationale from *Kosuga* when it heard the first appeal of Kaiser **[**27]** Steel as it made its way to the Supreme Court. *See* *Mullins v. Kaiser Steel Corp., 642 F.2d 1302, 206 U.S. App. D.C. 334 (D.C. Cir. 1980)*. In Mullins, the court "read *Kosuga* to limit antitrust defenses to situations where the requested enforcement was of agreements not to compete or other direct market restrictions, *that* made 'the court . . . a party to an anticompetitive scheme.'" *Nat'l Souvenir Ctr., Inc., 728 F.2d 503, 514-15 (D.C. Cir. 1984)* (quoting *Mullins, 642 F.2d at 1310*).

Since, in *Mullins*, "the promise to contribute to the welfare fund would not have directly impeded competition at that point in time[,]" enforcement by the court would not have made it a party to an antitrust violation. As such, the District of Columbia Circuit reasoned, *Kosuga* was not offended. *Id. at 515*. But the court acknowledged **[*830]** that this understanding was corrected by *Kaiser Steel* when the Supreme Court allowed the defense to proceed: "[I]n permitting the defendant to raise its antitrust defense in [*Kaiser Steel*], the Court opened the window only a notch to antitrust defenses, i.e., it refused to enforce a promise to pay that was itself a mechanism to police anticompetitive conduct." *Id.* Thus,***HN6***[] the question that courts must ask following *Kaiser Steel* is not simply whether the agreement to be enforced is illegal under federal antitrust laws (the *Kosuga* question) but whether the agreement **[**28]** to be enforced is itself a mechanism to enforce a collateral agreement or provision that violates federal antitrust laws.

In the case before it, the District of Columbia Circuit determined that "the promises to pay franchise fees in this case do not appear on their face to be primarily means to enforce the allegedly illegal tie-ins between the wax figures and start-up services." *Id.* Rather, they appeared to be merely consideration for goods and services, or nothing more than an inoffensive market transaction. *Id.* Importantly, the court held:

> To transform the contracts here into illegal tie-ins would require complex proof of monopoly power in the tying market and leverage of that power in the tied market. Even then, their vice would extend only to the amount that the agreed prices exceeded the fair value of the goods and services received and consumed—the portion of the prices that could be traced to the illegal practice. The complexity of proof and speculative nature of appellants' defenses seem to us to place them outside of the [*Kaiser Steel*] exception and clearly within the ambit of disfavor for such defenses articulated in *Kosuga*.

Id. at 515-16. Stated differently, not only was the promise **[**29]** the court was asked to enforce not illegal, fulfilling the promise did not force the franchisees to comply with another portion of the agreement that itself was illegal. Any illegality under a collateral provision of the agreement would only arise under the presence of specific market conditions external to the agreement and upon which the agreement does not rely.

The situation that Deutsche Solar alleges exists here is no different. Deutsche Solar does not claim that the market transactions contemplated under the agreements are inherently illegal under EU ***antitrust law***.[4] Instead, Deutsche Solar claims that the agreements are illegal under EU ***antitrust law*** *if* Hemlock's market conduct transgresses certain EU-defined market conditions. As a result, it requests discovery on that point. But this is the exact type of "complex proof of monopoly power" that *National Souvenir* held to be outside the narrow exception to *Kosuga* that *Kaiser Steel* created. *National Souvenir, 728 F.2d at 515*. For Deutsche Solar's affirmative defense to be sustainable they would need to show that that the take-or-pay transaction requirement under the agreements was inherently offensive to antitrust laws (the *Kosuga* prohibition) or that it is inextricably **[**30]** intertwined with a provision that is offensive to antitrust laws (the *Kaiser Steel* prohibition) such that it operates as a means of enforcing the illegal collateral provision. Deutsche Solar has not made this claim.

Deutsche Solar only argues that the take-or-pay agreement—that is, the bare transaction requirement—would be offensive **[*831]** to EU antitrust laws if Hemlock's European market capitalization exceeds the size restriction in the EU's take-or-pay prohibition.[5] In that respect the present case is distinguishable from *Kaiser Steel* and *National Souvenir* because the illegality would be inherent in the very transaction Hemlock seeks to enforce. In *Kaiser Steel* and *National Souvenir*, the illegality was present in a collateral provision that is intertwined with the transaction to be enforced.

This is a distinction without a difference. First, neither *Kaiser Steel* nor *National Souvenir* held that a situation where contingent antitrust illegality is present in the enforceable transaction, rather than a collateral transaction, is outside the scope of *Kosuga*. Second, *National Souvenir* does specifically address such a situation. In *National Souvenir* the claim by appellants was that the franchise contracts were illegal tying agreements. The nature of a tying agreement is such that the act of purchasing the tying product forces the acquisition of the tied product. So in that case, as would be the case here, the primary transaction itself would be illegal. But the District of Columbia Circuit did not find that distinction to be of relevance to the *Kosuga-Kaiser Steel* inquiry since the agreements could not be said to be per se illegal tying agreements. It was the contingency of the illegality that drew the case within *Kosuga'*s prohibition. Here, the agreements are not per se illegal. The Supreme Court has determined that in such circumstances, the possibility of illegality, when that illegality resides in a violation of antitrust **[**32]** laws, cannot sustain an affirmative defense of illegality. Deutsche Solar's defense will be stricken.

2.

Rather than directly addressing the application of *Kosuga* and *Kaiser Steel* Hemlock proposes what it believes is an independent bar to Deutsche Solar's affirmative defense. Because this separate line of authority that Hemlock argues would lead to Deutsche Solar's affirmative defense being stricken Hemlock devotes no attention to the applicability of *Kaiser Steel*. But Hemlock's alternative argument rests on an interpretation of *Kelly v. Kosuga* which is less than compelling.

Hemlock relies on *Kosuga* for a narrower point, seemingly left undisturbed by *Kaiser Steel*. Hemlock asserts that, separate from any distinction made by *Kaiser Steel, Kelly v. Kosuga* stands for the proposition that permitting an affirmative defense of illegality under antitrust laws is the equivalent of enforcing antitrust laws. *Kosuga, 358 U.S. at 520*. *Kaiser Steel'*s holding, Hemlock proceeds, does nothing to upset this proposition. In fact, according to Hemlock, *Kaiser Steel* endorses it. *455 U.S. at 80-83*.

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[4] These are the transactions whereby Duetsche Solar must pay for and take delivery of certain quantities of polycrystalline silicon or otherwise pay Hemlock the value of the agreed upon amount in the event it does not take delivery.

[5] The European Union's antitrust laws make it illegal for firms above a certain European market capitalization to enter into take-or-pay contracts. Treaty Establishing the European **[**31]** Community, Rome Treaty, March 25, 1957, Articles 81 & 82.

In the present case the illegality alleged by Deutsche Solar is of an altogether different character than that considered in any case from the *Kosuga* - *Kaiser* **[**33]** *Steel* line because it arises under EU, not United States, ***antitrust law***. Because permitting the affirmative defense of antitrust illegality is the equivalent of enforcing antitrust laws, Hemlock's argument runs, allowing Deutsche Solar's defense would be enforcing EU antitrust laws. And doing so is something from which United States courts have abstained for reasons of international comity. As a result, the application of *Kosuga* and *Kaiser Steel* need not be reached. If, in the first instance, this **[*832]** Court cannot, or will not, enforce foreign law that could purportedly govern the contracts, the outcome of the *Kosuga-Kaiser Steel* analysis would be unduly burdensome since the international comity issue would still need to be confronted.

Indeed, if the law is as Hemlock states, this principle from *Kosuga* would clearly pose a separate and distinct preliminary hurdle for Deutsche Solar's affirmative defense to clear. But *Kosuga* does not speak as clearly as Hemlock contends to the issue of whether permitting an affirmative defense actually places a court in a position equivalent to that of actively enforcing antitrust laws. In *Kosuga*, the Supreme Court wrote: "If the defense of illegality is **[**34]** to be allowed as a collateral method of enforcement of the antitrust laws, as the breadth of the petitioner's argument suggests, it must be said that his theory creates a very strange class of private attorneys general." *Kosuga, 358 U.S. at 520*. But this sounds as a hypothetical assumption in light of the arguments petitioner, Kelly, had made in support of his claim that his affirmative defense should be permitted. Indeed, the Court followed this remark and opened its next paragraph: "In any event, an analysis of the narrow scope in which the defense is allowed in respect of the *Sherman Act* indicates that the principle of distinction is not what the petitioner claims it to be." *Id.*

Nothing in the language of the *Kosuga* opinion supports Hemlock's assertion that the Supreme Court intended to, or did, hold that an affirmative defense of illegality grounded in the antitrust laws necessarily equates to enforcing antitrust laws. The Supreme Court was specifically addressing the manner in which Kelly was attempting to construe authority that addressed the affirmative defense of illegality. Kelly took the position those seemingly applicable prior cases actually involved defendants who were not a party to the illegal **[**35]** agreement nevertheless attempting to use the agreement's illegality against the plaintiff/seller. Here, Kelly claimed, he was a party to the illegal agreement and the illegal agreement bore at least some relation to the suit. Because of this distinction his defense should be sustained. *Id. at 519*.

But in the passage Hemlock cites, the Court was merely noting that Kelly's position would permit any party to allege, in defense of a contract action, that an agreement violated the antitrust laws as long as that agreement bore some cognizable factual relation to the dispute, even though the agreement was otherwise legally irrelevant to the claim. That was the very conclusion Kelly sought. While the transaction upon which Kosuga brought suit was contemplated by the same instrument that contained a provision that violated the *Sherman Act*, neither provision had any legal relevance to the enforcement of the other. Kelly still thought the agreement's illegality should sustain his affirmative defense. But, to support his affirmative defense Kelly proposed a rule even broader than necessary to apply to his own circumstance. His rule would have allowed a defendant to interpose a claim that some tangentially **[**36]** related agreement violated the antitrust laws. This would leave federal courts with what was actually an antitrust violation counterclaim lurking in the guise of an affirmative defense. The Court observed that permitting such a defense would be closer to deputizing private individuals as antitrust regulators than it would be an appropriate extension of the contract illegality defense. The Court was not articulating a general rule that entertaining an affirmative defense of antitrust illegality is always the equivalent of enforcing antitrust laws. Instead, it was actively warning against the adoption of theories **[*833]** producing that result, such as the rule proposed by Kelly.

Thus, the starting-point for Hemlock's argument is without merit. Kosuga does not hold that by allowing an affirmative defense of illegality under ***antitrust law*** a court is essentially enforcing the antitrust laws. But, because there is an independent ground that requires Deutsche Solar's affirmative defense be stricken, the fact that Hemlock's argument is not meritorious is not fatal to its motion.

B.

In further response to Deutsche Solar's Motion to Compel, Hemlock moves to strike a number of other contract defenses of **[**37]** Deutsche Solar's. Specifically, Deutsche Solar contends that it should be excused from performance of its contractual obligations, at least temporarily, because of the conduct of the Chinese government and the altered polycrystalline silicon market. Deutsche Solar manifested this theory as five distinct affirmative defenses:

> 12. Any required performance on the part of Deutsche Solar is excused by the doctrine of commercial impracticability.
> 13. Any required performance on the part of Deutsche Solar is excused by the doctrine of frustration of purpose.
> 14. Any required performance on the part of Deutsche Solar is excused by the doctrine of force majeure.
> 15. Any required performance on the part of Deutsche Solar is excused by the supervening intervention of one or more third parties.
> 16. Any required performance on the part of Deutsche Solar is excused by the illegal dumping of solar panels by the Chinese Government and Chinese producers, which caused a fundamental disruption in the market that was not foreseen or foreseeable by the parties at the time of their agreements.

ECF No. 14 at 12. Hemlock claims that all of these defenses are legally insufficient and should, like Deutsche Solar's **[**38]** illegality defense, be stricken.

1.

Hemlock, in its Motion to Strike, argues that Deutsche Solar's fourteenth affirmative defense of force majeure should be stricken because majeure is not a recognized contract defense under Michigan law. ECF No. 36 at 19. In its response, "Deutsche Solar concedes that the defense of force majeure is inapplicable and withdraws that defense[.]" ECF No. 53 at 1. The defense will be deemed withdrawn and need not be addressed.

2.

Hemlock's arguments for striking Deutsche Solar's defenses numbered twelve, thirteen, fifteen, and sixteen all relate to Deutsche Solar's assertion that "dumping" activities by China and possibly other third party actors caused objectively unforeseeable market disruptions that excuse its contractual performance. Accordingly, it claims that the risk of loss associated with China's conduct should be allocated to Hemlock. Hemlock counters that Deutsche Solar's theory is legally insufficient to substantiate any of these four excuses to performance, pled as affirmative defenses, and so they must be stricken. Hemlock, in its motion to strike, addressed defenses twelve, thirteen, and sixteen as a single group. Hemlock addressed defense fifteen **[**39]** separately and claims that "Supervening Intervention of Third Parties" does not exist as a defense under Michigan Law. ECF No. 36 at 20. But as Deutsche Solar construes the defense they contend that "intervention in the market by a third party may result in impracticability or frustration of purpose." ECF No. 53 at 20. Since Deutsche Solar does not **[*834]** view illegal intervention in a market as a distinct excuse to contract performance, but instead a description of circumstances that give rise to a legally cognizable defense, it will be addressed in conjunction with defenses twelve, thirteen, and sixteen.

Hemlock contends that Deutsche Solar may not be excused because "deteriorating market conditions cannot, as a matter of law, satisfy the requirements of either impracticability of [sic: or] frustration of purpose." ECF No. 36. Deutsche Solar identifies impracticability and frustration of purpose as defenses twelve and thirteen. Defenses fifteen and sixteen, it alleges, describe factual circumstances that can establish impracticability and frustration of purpose. Indeed, ***HN7***[] "[t]he doctrines of frustration of purpose and supervening impossibility/impracticability are related excuses for nonperformance **[**40]** of contractual obligations and are governed by similar principles." *Liggett Rest. Grp., Inc. v. City of Pontiac, 260 Mich. App. 127, 676 N.W.2d 633, 637 (Mich. Ct. App. 2003)*. Thus, the central question presented by Hemlock's motion to strike is whether Michigan recognizes either one or both of those two defenses.

Hemlock argues that Michigan law does not recognize either of these defenses as excuses for contract performance when they are predicated on a change in market price for a product or the financial inability of a party to meet its commitments. ECF No. 36 at 16. Deutsche Solar counters that this principle gives way "in situations where a contracting party was the source of the frustrating event . . . [or][6] where the frustrating event was the result of an action outside the contracting parties' control." ECF No. 53 at 20 (citations omitted). ***HN8***[] For a party to avail itself of the defense of frustration of purpose under Michigan law it must prove the following conditions:

> (1) the contract must be at least partially executory; (2) the frustrated party's purpose in making the contract must have been known to both parties when the contract was made; (3) this purpose must have been basically frustrated by an event not reasonably foreseeable at the time the contract was made, the occurrence **[**41]** of which has not been due to the fault of the frustrated party and the risk of which was not assumed by him.

Molnar v. Molnar, 110 Mich. App. 622, 313 N.W.2d 171, 173 (Mich. Ct. App. 1981). Deutsche Solar's claim, as currently pled, in less than clear particular terms, appears to be that the entry of China and the Chinese solar industry into the global solar market was not reasonably foreseeable when Deutsche Solar and Hemlock entered into the supply agreements. Deutsche Solar believes that it may be able to offer evidence that China's conduct and its impact on the market was completely unforeseeable and more than a simple market risk, even to a sophisticated industry participant.

Hemlock responds that asserting a defense of frustration of purpose and supervening impossibility/impracticability of performance fails as a matter of law when the argument supporting the defense is that a contracting party did not anticipate events having an impact on a product's price. While the facts Deutsche Solar currently contends support defenses twelve, thirteen, fifteen, and sixteen may not withstand later scrutiny, the consideration of such facts is inappropriate at this stage given the standard of review. ***HN9***[] Affirmative defenses, **[**42]** even if predicated on facts found insufficient or inadequate to withstand scrutiny on a dispositive motion, will only be stricken on a *Rule 12(f)* motion "when the pleading to be stricken **[*835]** has no possible relation to the controversy." *Brown & Williamson Tobacco Corp. v. United States, 201 F.2d 819, 822 (6th Cir. 1953)* (internal quotation marks and citations omitted). All that needs be demonstrated at this stage is that Michigan recognizes frustration of purpose and supervening impossibility/impracticability as excuses to contract performance and that the underlying controversy bears some relation to that defense. Presently, the ambit of review when considering a motion to strike is limited to the pleadings and documents incorporated therein. *See, e.g., Woodfield v. Bowman, 193 F.3d 354, 362 (5th Cir. 1999)* (explaining that affirmative defenses are subject to the same plain statement standards as the complaint but recognizing that simply naming affirmative defenses may be sufficient). The infirmities with the defense theory that Hemlock identifies depend on issues of fact "that should be determined on a hearing on the merits." *Hahn v. Best Recovery Servs., LLC, 2010 U.S. Dist. LEXIS 116136, 2010 WL 4483375, *2 (E.D. Mich. Nov. 1, 2010)* (internal quotation marks and citations omitted). But such a determination would be premature when deciding a motion to strike. Hemlock's motion will be denied with respect to defenses twelve, thirteen, fifteen, **[**43]** and sixteen.

Deutsche Solar notes in its response to Hemlock's motion that its affirmative defense of impracticability also relates to its claims regarding illegality under European Union antitrust regulations. ECF No. 53 at 24. This argument has already been addressed, *supra* § III.A, and has been found to be without merit. Thus, Deutsche Solar's affirmative defense of impracticability is stricken to the extent it relates to illegality under EU antitrust laws or regulations.

IV.

After resolving Hemlock's motion to strike, Deutsche Solar's motion to compel may now be properly considered. In its motion Deutsche Solar moves this Court to compel the production of answers to interrogatories and documents requested by Deutsche Solar of Hemlock. Deutsche Solar believes that this information is relevant or could

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[6] In its brief Deutsche Solar employs a disjunctive "and".

reasonably lead to the discovery of material relevant to its affirmative defenses and legal theories that correspond to those defenses. ECF No. 30.

HN10[] Parties are permitted under *Federal Rule of Civil Procedure 37* to move for an order compelling disclosure or discovery. "The Federal Rules of Civil Procedure are in place to facilitate discovery of all relevant evidence. *Rule 26* authorizes a broad scope of discovery, provided the **[**44]** material sought has some probative value in proving or disproving a claim or defense." *Gamby v. First Nat'l Bank of Omaha, 06-11020, 2009 U.S. Dist. LEXIS 29582, 2009 WL 963116 (E.D. Mich. Apr. 8, 2009)* (citing *FED. R. CIV. P. 26(b)(1)*).

A.

Because Deutsche Solar's affirmative defense of illegality and its affirmative defense of impracticability relating to the Supply Agreements violating EU antitrust laws will be stricken, Deutsche Solar's corresponding discovery requests will be denied. Deutsche Solar's motion to compel will also be denied with respect to Hemlock's general objections concerning Deutsche Solar's EU antitrust theory. ECF No. 30 at 5-6. Finally, Deutsche Solar's motion to compel will also be denied with respect to its Second Interrogatory No. 1, Second Interrogatory No. 2, and Second Request for Production No. 1, which all seek European market-share information. ECF No. 30 at 6-11.

B.

By contrast, Deutsche Solar's motion to compel will be granted with respect to the **[*836]** information it seeks pertaining to its general contract defenses and its theory that a third party, China, rendered its performance under the Supply Agreements impracticable. Specifically, Deutsche Solar requests the production by Hemlock of

> . . . all documents submitted by or on behalf of Hemlock in **[**45]** the trade proceeding before the People's Republic of China's Ministry of Commerce . . . referenced in a letter from Hemlock to Deutsche Solar . . . that refer, reflect, or relate to Deutsche Solar or any of its affiliates or to any agreement between the parties.

ECF No. 30 at 11.

Hemlock contends that "a review of [its] production shows that these requested documents have been produced in response to other requests." ECF No. 37 at 14. Deutsche Solar responds by claiming that Hemlock did not produce the documents they seek but instead "produced a list of documents maintained in a data room and, apparently, copies of certain schedules it provided [the Chinese Ministry of Commerce.]" ECF No. 46 at 5. To avoid the difficulties that this disagreement could pose, Hemlock will be directed to produce the documents consistent with those materials sought by Deutsche Solar in its Second Request for Production No. 2.[7]

C.

Lastly, Deutsche Solar seeks to compel Hemlock's quarterly and annual financial statements from January 1, 2005 to December 31, 2013. "Deutsche Solar believes that the financial statements contain information related to Hemlock's claim for damages and to its decision to terminate the contracts, an act that Deutsche Solar contends was made in bad faith." ECF No. 30 at 16. Deutsche Solar believes that "Hemlock's decision to terminate the contracts was motivated by financial concerns and not by any breach on the part of Deutsche Solar" and that Hemlock's financial statements evidence this ulterior motive. *Id.*

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[7] Hemlock briefly makes a subsidiary argument in its response to Deutsche Solar's Motion to Compel that "if there remains something that Deutsche Solar wants, the request is improper, because it has no viable defense premised on the 'trade cases.'" ECF No. 37 at 14. To the extent that **[**46]** this argument mirrors Hemlock's argument in its motion to strike it is either meritless or premature. In either event, Deutsche Solar's request is, at this stage, relevant to its affirmative defenses.

Hemlock, however, argues that Deutsche Solar's request for this information was untimely and should be denied. Deutsche Solar argues that its first Request for Production was sufficiently specific to encompass all of Hemlock's financial statements that it now seeks to compel. That Request reads, in relevant part:

> 3. All Documents and Communications Concerning, Referring or Related to **[**47]** (i) the negotiation, execution, or amendment of the Supply Agreements; (ii) Deutsche Solar's performance or non-performance under the Supply Agreements; and (iii) Deutsche Solar's purchase of Product under the Supply Agreements.
> 6. Copies of all Documents relating to all sales and deliveries of silicon by Hemlock to Deutsche Solar from the inception of the Supply Agreements to date.
> 13. All Documents that support the damages claimed by Hemlock.

ECF No. 37 at 12. Nothing in these requests can be read as specifically relating to financial statements of Hemlock that are unrelated to its dealings with Deutsche Solar. Hemlock represents in its response **[*837]** to Deutsche Solar's motion that the unproduced financial statements "contain no references to Deutsche Solar, any amounts paid by Deutsche Solar, or the Supply Agreements." ECF No. 37 at 12.

Hemlock further claims that to the extent the request can be considered, the financial statements have no bearing on the contract dispute since the Supply Agreements were "take or pay" contracts. ECF No. 37 at 12-13. The "take or pay" nature of the Agreements means that no reference needs to be made to Hemlock's financials to make a damage determination; **[**48]** the damages are evident on the face of the Agreements.

Deutsche Solar believes that the issue of damages is more nuanced. It has made, it claims, "millions of dollars in prepayments" which will only be apparent on review of Hemlock's financial statements. ECF No. 30 at 16. If this is the case, however, it is not clear how Deutsche Solar's own accounting records would not be an equally adequate point of reference for quantifying those prepayments.

As final reason for why the documents should be produced Deutsche Solar claims that Hemlock terminated the Supply Agreements in bad faith because it was experiencing financial hardship. ECF No. 30 at 16. Deutsche Solar does not explore this argument and states only that "[t]he financial statements . . . will show that Hemlock's decision to terminate the contracts was motivated by financial concerns and not by any breach on the part of Deutsche Solar." *Id.* But Deutsche Solar does not explain how the financial statements can themselves prove Hemlock's corporate motivation or even that they might reasonably lead to information that forms such proofs.

Since Deutsche Solar does not advance a theory that supports the production of Hemlock's remaining financial **[**49]** statements from the period of January 1, 2005 to December 31, 2013, Deutsche Solar's motion will be denied as to those materials.

V.

The last matter to be addressed is a motion for leave to file an amended answer, filed by Deutsche Solar on February 19, 2015. ECF No. 56. Deutsche Solar seeks to amend its answer to incorporate a counterclaim for declaratory relief. *Id.*, Ex. A. It claims that this amendment should be granted because it adds nothing to what was not already plain on the face of their affirmative defenses. Hemlock argues that the motion should be denied because it would cause them undue prejudice and Deutsche Solar should have availed itself earlier of the ability to amend if it indeed knew all facts pertinent to its counterclaim.

HN11[] A court should "freely give leave" to amend "when justice so requires." *FED. R. CIV. P. 15(a)(2)*. "Undue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment are all factors which may affect the decision." *Hageman v. Signal L.P. Gas, Inc., 486 F.2d 479, 484 (6th Cir. 1973)*. "Delay by itself is not sufficient reason to deny a motion to amend." *Id.* A court must also **[**50]** evaluate the notice and possible prejudice to the opposing party when considering whether to permit amendment. *Id.* "Decisions as to when justice requires amendment are left to the sound discretion of the trial judge[.]" *Robinson v. Michigan Consol. Gas Co. Inc., 918 F.2d 579, 591 (6th Cir. 1990)*.

Deutsche Solar's amendment will not be allowed. Although no dispositive action has been taken by the parties, discovery has long been closed. The disposition of the motions adjudicated in this **[*838]** opinion will require reopening discovery, but that will be done only for a limited purpose. While Deutsche Solar believes that Hemlock will not require discovery to defend against its proposed declaratory judgment action. But permitting a late pleading that has the effect of transforming a party from a plaintiff fielding affirmative defenses to defending a claim for declaratory relief—relief which, if successful, could lead to a judgment in the amount of $100 million—bespeaks prejudice. If the case were in its infancy, the prejudice would be minimized by the exploratory posture of the parties. By now, the legal theories and tactics employed by the parties should be known.

Furthermore, Deutsche Solar admits that its legal theories and tactics have been known: it claims that this **[**51]** counterclaim differs from its affirmative defenses only in the relief sought. This, it claims, should have had Hemlock on notice from the day Deutsche Solar first filed its Answer and Affirmative Defenses. But the inverse is true. While Deutsche Solar's Answer may have put Hemlock on notice of a possible counterclaim for return of the prepayments made on the agreements, the excess of eighteen months that have passed since that time have had the opposite effect.

This is not a situation where Deutsche Solar attempts only to "remedy pleading deficiencies" or refine its arguments. *Inge v. Rock Fin. Corp., 281 F.3d 613, 626 (6th Cir. 2002)*. Instead, it seeks to add an altogether new claim and fundamentally alter the adversarial posture of the parties. *See id.* (expressing concern with late amendments that sought to incorporate new claims). Such an amendment will not be permitted at this stage in the litigation. Deutsche Solar's motion will be denied.

VI.

Accordingly, it is **ORDERED** that Plaintiff Hemlock's Motion to Strike, ECF No. 36, is **GRANTED in part** and **DENIED in part**.

It is further **ORDERED** that Defendant Deutsche Solar's Affirmative Defense No. 6, ECF No. 14, is **STRICKEN**.

It is further **ORDERED** that Defendant Deutsche Solar's Motion to Compel, ECF **[**52]** No. 30, is **GRANTED in part** and **DENIED in part**.

It is further **ORDERED** that Plaintiff Hemlock is **DIRECTED** to produce all documents relevant and responsive to Defendant Deutsche Solar's requests relating to its defenses that rely on the theory of the illegal market intervention of a third party.

It is further **ORDERED** that these productions be completed **on or before May 29, 2015**.

It is further **ORDERED** that the discovery cutoff in this matter is adjourned until **May 29, 2015** for the limited purpose of completing the transfer of documents outlined in this order.

It is further **ORDERED** that Defendant Deutsche Solar's Motion for Leave to Amend, ECF No. 56, is **DENIED**.

It is further **ORDERED** that the parties are **DIRECTED** to submit to the Court, through the utilities function of CM/ECF or via facsimile, proposals for the scheduling of currently adjourned dates in this matter.

Dated: May 7, 2015

/s/ Thomas L. Ludington

THOMAS L. LUDINGTON

United States District Judge

In re Cipro Cases I & II

Supreme Court of California

May 7, 2015, Filed

S198616

Reporter

61 Cal. 4th 116 *; 348 P.3d 845 **; 187 Cal. Rptr. 3d 632 ***; 2015 Cal. LEXIS 2486 ****; 2015-1 Trade Cas. (CCH) P79,156

IN RE CIPRO CASES I & II. [Nine coordinated cases[*]]

Subsequent History: Reported at *In re Cipro Cases I & II, 2015 Cal. LEXIS 6556 (Cal., May 7, 2015)*

Time for Granting or Denying Rehearing Extended *In re Cipro Cases I & II, 2015 Cal. LEXIS 6583 (Cal., May 21, 2015)*

Rehearing denied by *In re Cipro Cases I & II, 2015 Cal. LEXIS 4886 (Cal., July 8, 2015)*

Dismissed by *In re Cipro Cases I & II, 2018 Cal. App. Unpub. LEXIS 3258 (Cal. App. 4th Dist., May 14, 2018)*

Dismissed by *In re Cipro Cases I & II, 2018 Cal. App. Unpub. LEXIS 3984 (Cal. App. 4th Dist., June 13, 2018)*

Prior History: [**1]** Superior Court of San Diego County, Nos. JCCP 4154/4220, Richard E. L. Strauss, Judge. Court of Appeal, Fouth Appellate District, Division One No. D056361

In re Cipro Cases I & II, 200 Cal. App. 4th 442, 134 Cal. Rptr. 3d 165, 2011 Cal. App. LEXIS 1353 (Cal. App. 4th Dist., Oct. 31, 2011)

Core Terms

patent, settlement, generic, antitrust, monopoly, invalid, brand, anti trust law, anticompetitive, challenger, Cartwright Act, patent law, rule of reason, patentee, parties, innovation, settle, litigation costs, effects, restraint of trade, infringement, courts, manufacturer, settlement agreement, profits, procompetitive, collateral, expiration, cases, consumers

LexisNexis® Headnotes

[*] *McGaughey v. Bayer Corp.* (Super. Ct. San Diego County, No. GIC752290); *Relles v. Bayer Corp.* (Super. Ct. L.A. County, No. BC239083); *Samole v. Bayer AG* (Super. Ct. S.F. City and County, No. 316349); *Garber v. Bayer AG* (Super. Ct. S.F. City and County, No. 316518); *Lee v. Bayer AG* (Super. Ct. S.F. City and County, No. 316670); *Patane v. Bayer* AG (Super. Ct. S.F. City and County, No. 318457); *Moore v. Bayer Corp.* (Super. Ct. Sonoma County, No. SCZ228356); *Moore v. Bayer Corp.* (Super. Ct. Sonoma County, No. 228384); *Senior Action Network v. Bayer AG* (Super. Ct. S.F. City and County, No. 400750).

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

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

Congress wrote into the Hatch-Waxman Act (*21 U.S.C. § 355*) a substantial incentive for generic drug manufacturers to enter markets earlier by offering a 180-day exclusivity period to the first generic filer, and only that filer, to challenge a patent (*21 U.S.C. § 355(j)(5)(B)(iv)*).

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

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN2[] **Regulated Practices, Price Fixing & Restraints of Trade**

The legislature enacted the state's principal ***antitrust law***, the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*), to rein in the burgeoning power of monopolies and cartels. The act's principal goal is the preservation of consumer welfare. The Act, like ***antitrust law*** in general, rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of democratic political and social institutions. At its heart is a prohibition against agreements that prevent the growth of healthy, competitive markets for goods and services and the establishment of prices through market forces. The Act generally outlaws any combinations or agreements that restrain trade or competition or that fix or control prices, and declares that, with certain exceptions, every trust is unlawful, against public policy and void.

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

Governments > Courts > Common Law

HN3[] **Regulated Practices, Price Fixing & Restraints of Trade**

The trusts the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) prohibits include any combination by two or more persons to create or carry out restrictions in trade or commerce (*Bus. & Prof. Code, § 16720, subd. (a)*) or to prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity (*§ 16720, subd. (c)*). Also prohibited is any contract by which two or more entities agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale of any such article or commodity, that its price might in any manner be affected. (*§ 16720, subd. (e)(4)*). Agreements in violation of the Act are absolutely void and not enforceable at law or in equity (*Bus. & Prof. Code, §§ 16722*, *16726*). Though the Cartwright Act is written in absolute terms, in practice not every agreement within the four corners of its prohibitions has been deemed illegal. *Bus. & Prof. Code, §§ 16720*, *16722*, and *16726*, draw upon the common law prohibition against restraints of trade.

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Governments > Legislation > Interpretation

Patent Law > Jurisdiction & Review > General Overview

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN4[] **Regulated Practices, Intellectual Property**

The patent laws are in pari materia with the antitrust laws and modify them pro tanto to that extent. To promote investment in invention and the public disclosure of new discoveries, Congress has seen fit to grant inventors limited statutory monopolies and the right to exclude competition in the manufacture, use, or sale of the patent's subject (*35 U.S.C. § 154(a)*). Accordingly, the issuance of a federal patent creates an exception to the general rule against monopolies and to the right of access to a free and open market. While the limited monopolies granted to patent owners do not exempt them from the prohibitions of ***antitrust law***, in a given case, possession of a patent may provide a defense to liability. Courts thus must reconcile the two bodies of law, making an adjustment between the lawful restraint on trade of the patent monopoly and the illegal restraint prohibited broadly by ***antitrust law***.

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

Governments > Legislation > Interpretation

HN5[] **Regulated Practices, Price Fixing & Restraints of Trade**

Interpretations of federal ***antitrust law*** are at most instructive, not conclusive, when construing the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*), given that the Cartwright Act was modeled not on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the twentieth century.

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

Governments > Courts > Judicial Precedent

Patent Law > Jurisdiction & Review > General Overview

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

HN6[] **Regulated Practices, Price Fixing & Restraints of Trade**

The United States Supreme Court is the final arbiter of questions of patent law and the extent to which interpretations of ***antitrust law***--whether state or federal--must accommodate patent law's requirements, and Actavis is its latest word on the subject. If, under Actavis, patent law demands extensive deference to patents' presumed validity and the consecration of a broad range of agreements otherwise facially illegal under state law, the California Supreme Court must abide by that judgment. Conversely, if the accommodation necessitated by patent policy is somewhat narrower than previously understood, the California Supreme Court again must treat that determination as conclusive and reconsider the proper domain of state ***antitrust law*** in light of that cession of territory.

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

Patent Law > Preclusion > Collateral Estoppel

Patent Law > ... > Defenses > Patent Invalidity > Presumption of Validity

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

HN7[] Inequitable Conduct, Anticompetitive Conduct

A finding that a patent is invalid operates in rem and estops the patentee from asserting validity against the world. In contrast, a finding that a patent is valid operates only on the parties and does not extend from one infringement case to the next. A future challenger with new or better information may subsequently raise, and succeed on, an invalidity defense to a charge of infringement. If the assertion of patent rights leads to a court injunction excluding a competitor from the marketplace, there is no antitrust problem. If instead the assertion leads to a private settlement agreement, there is a potential antitrust problem. With a settlement, any restraint arises directly from the private agreement and only indirectly from the patent, which remains in the background, motivating the parties' actions according to their assessments of its strength. That a patent has not (yet) been invalidated may allow some confidence about its fundamental enforceability, but does not allow a court to skip entirely an antitrust analysis of competitive restraints within the patent's scope on the assumption that its validity has been established. The scope of the patent test is flawed precisely because it assumes away whatever level of uncertainty a given patent may be subject to.

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

Governments > Legislation > Interpretation

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

HN8[] Regulated Practices, Price Fixing & Restraints of Trade

The scope of the patent test insulates from antitrust scrutiny virtually any agreement that restrains trade no more than the patent itself would have, if valid. State law must yield to federal, but courts cannot under the guise of patent law carve into the legislature's enactments a larger exception than federal law dictates, and Actavis shows such a broad exemption is not required. Accordingly, the scope of the patent test is inapplicable to Cartwright Act (Bus. & Prof. Code, § 16700 et seq.) claims.

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

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN9[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Under the traditional rule of reason, inquiry is limited to whether the challenged conduct promotes or suppresses competition. To determine whether an agreement harms competition more than it helps, a court may consider the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption. In a typical case, this may entail expert testimony on such matters as the definition of the relevant market and the extent of a defendant's market power. Rule of reason inquiry is not required in every case; the California Supreme Court and the United States Supreme Court have partially simplified the analysis by identifying categories of agreements or practices that can be said to always lack redeeming value and thus qualify as per se illegal. The per se rule reflects an irrebuttable presumption that, if the court were to subject the conduct in question to a full-blown inquiry, a violation would be found under the traditional rule of reason.

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

Evidence > Burdens of Proof > Allocation

HN10[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Under the quick look rule of reason analysis, applicable to cases where an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets, a defendant may be asked to come forward with procompetitive justifications for a challenged restraint without the plaintiff having to introduce elaborate market analysis first. There is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an inquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The emergence of quick look rule of reason analysis did not signal the supplanting of the traditional per se/rule of reason dichotomy with a new trichotomy, but rather a shift to something of a sliding scale in antitrust analysis.

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

Governments > Courts > Common Law

Governments > Legislation > Interpretation

HN11[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Nothing in the text of the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) dictates the precise details of the per se and rule of reason approaches; these are but useful tools the courts have developed over time to carry out the broad purposes and give meaning to the general phrases of the antitrust statutes. It is consistent with the common law tradition at the root of the antitrust laws to describe, as the United States Supreme Court now has, the analytic approach as involving a continuum, with the circumstances, details, and logic of a particular restraint dictating how the courts that confront the restraint should analyze it. In lieu of an undifferentiated one-size-fits-all rule of reason, courts may devise rules for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones. It follows that courts must consider not simply whether per se or rule of reason analysis applies to reverse payment patent settlements. To the extent rule of reason analysis applies, courts must also consider how the analysis should be structured to most efficiently differentiate between reasonable and unreasonable restraints of trade in this context.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

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

HN12[] **Price Fixing & Restraints of Trade, Horizontal Market Allocation**

Agreements to establish or maintain a monopoly are restraints of trade made unlawful by the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*). Under general antitrust principles, a business may permissibly develop monopoly power, i.e., the power to control prices or exclude competition, through the superiority of its product or business acumen. To acquire or maintain that power through agreement and combination with others, however, is quite a different matter. Pursuant to this rule, businesses may not engage in a horizontal allocation of markets, with would-be competitors dividing up territories or customers. Such allocations afford each participant an enclave, free from the danger of outside incursions, in which to exercise monopoly power and extract monopoly premiums. Similarly, a firm may not pay its only potential competitor not to compete in return for a share of the profits that firm can obtain by being a monopolist.

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

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

HN13[] **Cartels & Horizontal Restraints, Price Fixing**

Antitrust law condemns a patentee's payment to maintain supracompetitive prices to be shared among the patentee and the challenger rather than face what might have been a competitive market. This is so even when the patent is likely valid: The owner of a particularly valuable patent might contend that even a small risk of invalidity justifies a large payment. But, be that as it may, the payment (if otherwise unexplained) likely seeks to prevent the risk of competition. That consequence constitutes the relevant anticompetitive harm.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

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

Patent Law > Infringement Actions > Exclusive Rights > Limitations

Patent Law > ... > Defenses > Patent Invalidity > Presumption of Validity

HN14[] **Actual Monopolization, Anticompetitive & Predatory Practices**

For antitrust purposes, patents are no longer to be treated as presumptively ironclad. This means the period of exclusion attributable to a patent is not its full life, but its expected life had enforcement been sought. This expected life represents the baseline against which the competitive effects of any agreement must be measured. Because the relevant baseline is the result that would have occurred in the absence of any agreement, it is not a cognizable harm simply to show the parties might have elected a different settlement agreement more favorable to competition and consumers. There is no statutory right to have parties enter the agreement most favorable to competition, only a prohibition against entering agreements that harm competition. If an agreement only replicates the likely average result of litigation, any exclusion is a function of the underlying patent strength; if it extends exclusion beyond that point, this further exclusion from the marketplace-and the attendant anticompetitive effect-is attributable to the agreement. A patent owner cannot extend his statutory grant by contract or agreement. A patent affords no immunity for a monopoly not fairly or plainly within the grant. The measure of the statutory grant, and the limit on the monopoly that may be preserved by agreement, is the average expected duration that would have resulted from judicial testing.

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

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

HN15[] **Regulated Practices, Price Fixing & Restraints of Trade**

Every antitrust case involves a comparison of a challenged agreement against a prediction about--a probabilistic assessment of--the expected competition that would have arisen in its absence. Every restraint of trade condemned for suppressing market entry involves uncertainties about the extent to which competition would have come to pass. No matter; the law does not condone the purchase of protection from uncertain competition any more than it condones the elimination of actual competition. The antitrust laws foreclose agreements eliminating the risk of competition-the competitive market that might have been. Purchasing freedom from the possibility of competition, whether done by a patentee or anyone else, is illegal. An agreement to exchange consideration for elimination of any portion of the period of competition that would have been expected had a patent been litigated is a violation of the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*).

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

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

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

Evidence > Burdens of Proof > Allocation

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN16[] **Regulated Practices, Price Fixing & Restraints of Trade**

A third-party plaintiff challenging a reverse payment patent settlement must show four elements: (1) the settlement includes a limit on the settling generic challenger's entry into the market; (2) the settlement includes cash or equivalent financial consideration flowing from the brand to the generic challenger; and the consideration exceeds (3) the value of goods and services other than any delay in market entry provided by the generic challenger to the brand, as well as (4) the brand's expected remaining litigation costs absent settlement. That a plaintiff challenging a reverse payment settlement must establish the settlement limits the challenging generic's entry is self-evident. If the settlement contains no component of delay and permits the generic to enter the market and compete fully and immediately, there is no restraint of trade and no potential for antitrust concern.

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

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

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

HN17[] **Regulated Practices, Price Fixing & Restraints of Trade**

A third-party plaintiff challenging a reverse payment patent settlement must establish a reverse payment-financial consideration flowing from the brand to the generic challenger. In the absence of payment, one would expect rational parties that settle to select a market entry point roughly corresponding to their joint expectation as to when entry would have occurred, on average, if the patent's validity and infringement had been fully litigated. If market entry were substantially later than the generic thought it could obtain through litigation, the generic would be unwilling to settle and forgo the additional profits it thought it could earn from an earlier entry; conversely, if the entry were substantially earlier than the brand thought it could obtain through litigation, the brand would not settle and forgo an additional period of monopoly. Absent payment, one can accept an agreement to postpone market entry as a fair approximation of the expected level of competition that would have obtained had the parties litigated; absent payment, any delay in entry may be attributed to the effective strength of the challenged patent, rather than the settlement agreement.

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

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN18[] **Regulated Practices, Price Fixing & Restraints of Trade**

The concern that a reverse payment raises will depend in part on its independence from other services for which it might represent payment. A payment may reflect compensation for other services that the generic has promised to perform-such as distributing the patented item or helping to develop a market for that item. If payment is no more than would be expected as compensation for additional products or services, then the reverse payment patent agreement includes no additional consideration for delay and courts can trust that any limit on competition is a legitimate consequence of the patent's strength and the contracting parties' expectations concerning its exclusionary power. Considerable caution is in order in evaluating settlements that include side agreements for generic products or services. A side agreement involving difficult-to-value assets might conceivably be added to a patent settlement to provide cover for the purchase of additional freedom from competition. Side deals should not be permitted to serve as fig leaves for agreements to eliminate competition.

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

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

Evidence > Burdens of Proof > Allocation

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

HN19[] **Regulated Practices, Price Fixing & Restraints of Trade**

A third-party plaintiff challenging a reverse payment patent settlement must establish the amount of the payment, over and above the value of collateral products or services from the generic, also exceeds the brand's anticipated future litigation costs. In some cases, a reverse payment may amount to no more than a rough approximation of the litigation expenses saved through the settlement. Where a reverse payment reflects traditional settlement considerations, such as avoided litigation costs or fair value for services, there is not the same concern that a patentee is using its monopoly profits to avoid the risk of patent invalidation or a finding of noninfringement. In such cases, the parties may have provided for a reverse payment without having sought or brought about anticompetitive consequences. A rational brand might be indifferent as between (1) actually litigating or (2) settling, with market entry at the point expected, on average, from asserting its patent in litigation and a payment to the generic in an amount up to what would have been spent in that litigation. It is thus necessary to evaluate the reverse payment's scale in relation to the payor's anticipated future litigation costs.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Evidence > Burdens of Proof > Allocation

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

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

HN20[] **Private Actions, State Regulation**

Unless a challenged reverse payment patent settlement agreement includes both a restraint on generic competition and a reverse payment to the generic in excess of both brand litigation costs and generic collateral products and services, there is no reason to assume the settlement includes any element of purchased freedom from competition, as opposed to a limit on competition flowing naturally, and lawfully, from the perceived strength of the brand's patent. Accordingly, the burden of proof as to these elements rests with the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) plaintiff.

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

Evidence > Burdens of Proof > Allocation

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

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

Evidence > Burdens of Proof > Ultimate Burden of Persuasion

HN21[] **Regulated Practices, Price Fixing & Restraints of Trade**

Where the evidence necessary to establish a fact essential to a claim lies peculiarly within the knowledge and competence of one of the parties, that party has the burden of going forward with the evidence on the issue although it is not the party asserting the claim. This is so with regard to both a settling party's own litigation costs and the existence and value of any collateral products or services provided as part of a patent settlement; these are matters about which the settling parties will necessarily have superior knowledge. Accordingly, once a plaintiff has shown an agreement involving a reverse payment and delay, the defendants have the burden of coming forward with evidence of litigation costs and the value of collateral products and services. If the defendants fail to do so, because, e.g., there was no side agreement or because they do not dispute the collective amounts fall short of any payment to the generic, the plaintiff has satisfied its burden on these points. If instead the defendants do so, the plaintiff must carry the ultimate burden of persuasion that any reverse payment exceeds litigation costs and the value of collateral products or services.

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

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

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

HN22[] **Regulated Practices, Price Fixing & Restraints of Trade**

A showing of the four elements for challenging a reverse payment patent settlement is not only necessary but also sufficient to make out a prima facie case that the settlement is anticompetitive. If a brand is willing to pay a generic more than the costs of continued litigation, and more than the value of any collateral benefits, in order to settle and keep the generic out of the market, there is cause to believe some portion of the consideration is payment for exclusion beyond the point that would have resulted, on average, from simply litigating the case to its conclusion. Otherwise, the brand would have had little incentive to settle at such a high price. Moreover, the larger the gap, the stronger the inference one can draw.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

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

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

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

HN23[] **Private Actions, State Regulation**

Ordinarily, the fact that a large, unjustified reverse payment risks antitrust liability does not prevent litigating parties from settling their lawsuit. Parties can still use financial considerations to bridge small gaps arising from differing subjective perceptions of their probabilities of success in litigation; what they cannot do is use money to bridge their differences over the point when competitive entry is economically desirable, for that gap is not one ***antitrust law*** permits would-be competitors to bridge by agreement: If the basic reason the parties prefer a reverse payment settlement is a desire to maintain and to share patent-generated monopoly profits, then, in the absence of some other justification, the antitrust laws are likely to forbid the arrangement. That some settlements might no longer be possible absent a payment in excess of litigation costs is no concern if the ones now barred would simply have facilitated the sharing of monopoly profits.

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

Evidence > Inferences & Presumptions > Presumptions > Creation

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

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

HN24[] **Regulated Practices, Price Fixing & Restraints of Trade**

Proof of a reverse payment in excess of litigation costs and collateral products and services raises a presumption that the settling patentee has market power sufficient for the reverse payment patent settlement to generate significant anticompetitive effects.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

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

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

Evidence > Burdens of Proof > Burden Shifting

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

HN25[] **Private Actions, State Regulation**

Once a plaintiff has made out a prima facie case that a reverse payment patent settlement has anticompetitive effects, a court must weigh these anticompetitive effects against the possible justifications for the challenged restraint. At this point, it is appropriate to shift the burden to the defendants to offer legitimate justifications and come forward with evidence that the challenged settlement is in fact procompetitive. *Bus. & Prof. Code, § 16725*, provides that it is not unlawful to enter an agreement to promote, encourage, or increase competition. An antitrust defendant cannot argue a settlement is procompetitive simply because it allows competition earlier than would have occurred if the brand had won the patent action; the relevant baseline is the average period of competition that would have obtained in the absence of settlement.

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

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

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

HN26[] **Regulated Practices, Price Fixing & Restraints of Trade**

Reverse payment patent agreements must be assessed as of the time they are made, at which point the patent's validity is unknown and unknowable. Just as later invalidation of a patent does not prove an agreement when made was anticompetitive, later evidence of validity will not automatically demonstrate an agreement was procompetitive. ***Antitrust law*** condemns the purchase of freedom from competition; what matters is whether a settlement postpones market entry beyond the average point that would have been expected at the time in the absence of agreement. To determine whether such a settlement has occurred under state law, as under federal law, it is normally not necessary to litigate patent validity. An unexplained large reverse payment itself would normally suggest that the patentee has serious doubts about the patent's survival. And that fact, in turn, suggests that the payment's objective is to maintain supracompetitive prices to be shared among the patentee and the challenger rather than face what might have been a competitive market-the very anticompetitive consequence that underlies the claim of antitrust unlawfulness. In a word, the size of the unexplained reverse payment can provide a workable surrogate for a patent's weakness, all without forcing a court to conduct a detailed exploration of the validity of the patent itself.

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

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

Evidence > Burdens of Proof > Allocation

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN27[] **Regulated Practices, Price Fixing & Restraints of Trade**

The ultimate burden throughout rests with the plaintiff to show that a challenged reverse payment patent settlement agreement is anticompetitive. Once the plaintiff has made out a prima facie case that a reverse payment patent settlement is anticompetitive, however, the plaintiff thereafter need only show that any procompetitive justifications proffered by the defendants are unsupportable. The ultimate question in reverse payment settlement cases is whether an agreement involves significant unjustified anticompetitive consequences. The prima facie case requires the plaintiff to eliminate the possibility that litigation costs or other products or services could explain the consideration paid the generic. If a plaintiff does so and thereafter can dispel each additional justification the defendants put forward to explain the consideration, the conclusion follows that the settlement payment must include, in part, consideration for additional delay in entering the market. That payment for delay is condemned by the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*), as by federal ***antitrust law***, and its purchase as part of a settlement agreement is an unlawful restraint of trade.

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

Evidence > Burdens of Proof > Allocation

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

HN28[] **Per Se Rule & Rule of Reason, Per Se Rule Tests**

Under the structure of the rule of reason applicable to reverse payment patent settlements, to make out a prima facie case that a challenged reverse payment patent agreement is an unlawful restraint of trade, a plaintiff must show the agreement contains both a limit on the generic challenger's entry into the market and compensation from the patentee to the challenger. The defendants bear the burden of coming forward with evidence of litigation costs or valuable collateral products or services that might explain the compensation; if the defendants do so, the plaintiff has the burden of demonstrating the compensation exceeds the reasonable value of these. If a prima facie case has been made out, the defendants may come forward with additional justifications to demonstrate the settlement agreement nevertheless is procompetitive. A plaintiff who can dispel these justifications has carried the burden of demonstrating the settlement agreement is an unreasonable restraint of trade under the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*).

Constitutional Law > Supremacy Clause > Federal Preemption

HN29[] **Supremacy Clause, Federal Preemption**

Obstacle preemption arises when, under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

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

Constitutional Law > Supremacy Clause > Federal Preemption

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN30[] **Trade Practices & Unfair Competition, State Regulation**

State ***antitrust law*** ordinarily is fully compatible with federal law. States have regulated against monopolies and unfair competition for longer than the federal government, and federal law is intended only to supplement, not displace, state antitrust remedies. The Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) is broader in range and deeper in reach than the federal Sherman Act (*15 U.S.C. § 1 et seq.*); this greater domain has never been thought to pose Supremacy Clause problems. To the contrary, in light of the established state role, a presumption against preemption applies.

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

Constitutional Law > Supremacy Clause > Federal Preemption

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN31[] **Per Se Rule & Rule of Reason, Per Se Rule Tests**

Where the choice of a test rests solely on economic analysis, no patent law preemption concerns arise. Instead, the issue reduces to a problem in the relation between federal and state ***antitrust law***, and there the United States Supreme Court has been quite clear that states may depart from federal rules--or accept an invitation to develop a gap in the law explicitly left by the Supreme Court--absent evidence of a clear congressional purpose to the contrary. The structured rule of reason applicable to reverse payment patent settlements adopted by the California Supreme Court is consistent with, not an obstacle to, congressional patent and health care goals in two specific ways. First, considerable research and analysis suggests the broad availability of reverse payment settlements favors weak patents and channels investment resources toward suboptimal innovation prospects. To the extent careful scrutiny of such settlements promotes the very innovation the patent laws were intended to promote, it cannot stand as an obstacle to congressional objectives. Second, a fundamental goal of the Hatch-Waxman Act (*21 U.S.C. § 355*) is to enhance generic competition and thereby lower prices. By ferreting out anticompetitive agreements that limit generic market entry and sustain costly monopolies, a structured rule of reason serves those goals and poses no obstacle to congressional objectives.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

A reverse payment settlement between a brand-name drug manufacturer and a would-be generic competitor relating to a patent on the active ingredient in one of the manufacturer's antibiotic drugs resulted in nine coordinated class action suits brought against them by indirect purchasers of the drug in California. The purchasers alleged the settlement violated the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*), the unfair competition law (*Bus. & Prof. Code, § 17200 et seq.*), and the common law prohibition against monopolies. The trial court granted a defense summary judgment. (Superior Court of San Diego County, Nos. JCCP 4154 and 4220, Richard E. L. Strauss, Judge.) The Court of Appeal, Fourth Dist., Div. One, No. D056361, affirmed, holding that agreements restraining competition within the scope of a patent are lawful unless the patent was procured by fraud or the suit to enforce it was objectively baseless.

The Supreme Court reversed the Court of Appeal's judgment and remanded for further proceedings. The court held that the scope of the patent test is inapplicable to Cartwright Act claims. The patent test accords excess weight to the policies motivating patent law and gives insufficient consideration to the concerns animating ***antitrust law***. The court observed that, under federal ***antitrust law***, reverse payment settlements, under which brand-name drug manufacturers make reverse payments to generic drug manufacturers in exchange for the generics dropping their patent challenges and consenting to stay out of the market, are not immune from scrutiny, even if they limit competition no more than a valid patent would have. The court concluded the **[*117]** same is true under state ***antitrust law***. Some patents are valid; some are not. Sometimes competition would infringe; sometimes it would not. A third party plaintiff challenging a reverse payment patent settlement must show four elements: (1) the settlement includes a limit on the settling generic challenger's entry into the market; (2) the settlement includes cash or equivalent financial consideration flowing from the brand to the generic challenger; and the consideration exceeds (3) the value of goods and services other than any delay in market entry provided by the generic challenger to the brand, as well as (4) the brand's expected remaining litigation costs absent settlement.

Parties illegally restrain trade when they privately agree to substitute consensual monopoly in place of potential competition that would have followed a finding of invalidity or noninfringement. The court concluded that the structured rule of reason it adopted was consistent with, not an obstacle to, congressional patent and health care goals. Accordingly, the trial court and the Court of Appeal erred in treating the patent at issue as ironclad and using the entire period until its expiration as the relevant benchmark in order to assess whether the parties' settlement agreement had anticompetitive effects. (Opinion by Werdegar, J., expressing the unanimous view of the court.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1)[] **(1)**

Patents § 1—Hatch-Waxman Act—Generic Filer.

Congress wrote into the Hatch-Waxman Act (*21 U.S.C. § 355*) a substantial incentive for generic drug manufacturers to enter markets earlier by offering a 180-day exclusivity period to the first generic filer, and only that filer, to challenge a patent (*21 U.S.C. § 355(j)(5)(B)(iv)*).

CA(2)[] **(2)**

Monopolies and Restraints of Trade § 6—Cartwright Act—Scope.

The Legislature enacted the state's principal ***antitrust law***, the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*), to rein in the burgeoning power of monopolies and cartels. The act's principal goal is the preservation of consumer welfare. The act, like ***antitrust law*** in general, rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of democratic political and social institutions. At its heart is a prohibition against agreements that prevent the growth of healthy, competitive markets for goods and services and the establishment of prices through market forces. The act generally outlaws any combinations or agreements that restrain trade or competition or that fix or control prices, and declares that, with certain exceptions, every trust is unlawful, against public policy and void.

[*118]

CA(3)[] **(3)**

Monopolies and Restraints of Trade § 7—Cartwright Act—Prohibited Agreements and Combinations, Generally.

The trusts the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) prohibits include any combination by two or more persons to create or carry out restrictions in trade or commerce (*Bus. & Prof. Code, § 16720, subd. (a)*) or to prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity (*§ 16720, subd. (c)*). Also prohibited is any contract by which two or more entities agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale of any such article or commodity, that its price might in any manner be affected. (*§ 16720, subd. (e)(4)*). Agreements in violation of the act are absolutely void and not enforceable at law or in equity (*Bus. & Prof. Code, §§ 16722*, *16726*). Though the Cartwright Act is written in absolute terms, in practice not every agreement within the four corners of its prohibitions has been deemed illegal. *Bus. & Prof. Code, §§ 16720*, *16722*, and *16726*, draw upon the common law prohibition against restraints of trade.

CA(4)[] **(4)**

Patents § 1—Construction With Antitrust Laws.

The patent laws are in pari materia with the antitrust laws and modify them pro tanto to that extent. To promote investment in invention and the public disclosure of new discoveries, Congress has seen fit to grant inventors limited statutory monopolies and the right to exclude competition in the manufacture, use, or sale of the patent's subject (*35 U.S.C. § 154(a)*). Accordingly, the issuance of a federal patent creates an exception to the general rule against monopolies and to the right to access to a free and open market. While the limited monopolies granted to patent owners do not exempt them from the prohibitions of ***antitrust law***, in a given case, possession of a patent may provide a defense to liability. Courts thus must reconcile the two bodies of law, making an adjustment between the lawful restraint on trade of the patent monopoly and the illegal restraint prohibited broadly by ***antitrust law***.

CA(5)[] **(5)**

Monopolies and Restraints of Trade § 1—Federal *Antitrust Law* Interpretations—Effect on State Law.

Interpretations of federal ***antitrust law*** are at most instructive, not conclusive, when construing the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*), given that the Cartwright Act was modeled not on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the twentieth century.

CA(6)[] **(6)**

Courts § 39—Doctrine of Stare Decisis—Opinions of United States Supreme Court—Patent Law—Interpretations of *Antitrust Law*.

The United States Supreme Court is the final arbiter of questions of **[*119]** patent law and the extent to which interpretations of ***antitrust law***—whether state or federal—must accommodate patent law's requirements, and *Actavis* is its latest word on the subject. If, under *Actavis*, patent law demands extensive deference to patents' presumed validity and the consecration of a broad range of agreements otherwise facially illegal under state law, the California Supreme Court must abide by that judgment. Conversely, if the accommodation necessitated by patent policy is somewhat narrower than previously understood, the California Supreme Court again must treat that determination as conclusive and reconsider the proper domain of state ***antitrust law*** in light of that cession of territory.

CA(7)[] **(7)**

Patents § 1—Validity—Antitrust Issues—Patent Test.

A finding that a patent is invalid operates in rem and estops the patentee from asserting validity against the world. In contrast, a finding that a patent is valid operates only on the parties and does not extend from one infringement case to the next. A future challenger with new or better information may subsequently raise, and succeed on, an invalidity defense to a charge of infringement. If the assertion of patent rights leads to a court injunction excluding a competitor from the marketplace, there is no antitrust problem. If instead the assertion leads to a private settlement agreement, there is a potential antitrust problem. With a settlement, any restraint arises directly from the private agreement and only indirectly from the patent, which remains in the background, motivating the parties' actions according to their assessments of its strength. That a patent has not (yet) been invalidated may allow some confidence about its fundamental enforceability, but does not allow a court to skip entirely an antitrust analysis of competitive restraints within the patent's scope on the assumption that its validity has been established. The scope of the patent test is flawed precisely because it assumes away whatever level of uncertainty a given patent may be subject to.

CA(8)[] **(8)**

Monopolies and Restraints of Trade § 7—Cartwright Act—Applicability of Patent Test.

The scope of the patent test insulates from antitrust scrutiny virtually any agreement that restrains trade no more than the patent itself would have, if valid. State law must yield to federal, but courts cannot under the guise of patent law carve into the Legislature's enactments a larger exception than federal law dictates, and *FTC v. Actavis* shows such a broad exemption is not required. Accordingly, the scope of the patent test is inapplicable to Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) claims.

CA(9)[] **(9)**

Monopolies and Restraints of Trade § 2—Rule of Reason.

Under the traditional rule of reason, inquiry is limited to whether the challenged conduct promotes or suppresses competition. To determine whether an **[*120]** agreement harms competition more than it helps, a court may consider the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption. In a typical case, this may entail expert testimony on such matters as the definition of the relevant market and the extent of a defendant's market power. Rule of reason inquiry is not required in every case; the California Supreme Court and the United States Supreme Court have partially simplified the analysis by identifying categories of agreements or practices that can be said to always lack redeeming value and thus qualify as per se illegal. The per se rule reflects an irrebuttable presumption that, if the court were to subject the conduct in question to a full-blown inquiry, a violation would be found under the traditional rule of reason.

CA(10)[] **(10)**

Monopolies and Restraints of Trade § 2—Quick Look Rule of Reason.

Under the quick look rule of reason analysis, applicable to cases where an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets, a defendant may be asked to come forward with procompetitive justifications for a challenged restraint without the plaintiff having to introduce elaborate market analysis first. There is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an inquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The emergence of quick look rule of reason analysis did not signal the supplanting of the traditional per se/rule of reason dichotomy with a new trichotomy, but rather a shift to something of a sliding scale in antitrust analysis.

CA(11)[] **(11)**

Monopolies and Restraints of Trade § 7—Cartwright Act—Antitrust Analysis—Reverse Payment Patent Settlements.

Nothing in the text of the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) dictates the precise details of the per se and rule of reason approaches; these are but useful tools the courts have developed over time to carry out the broad purposes and give meaning to the general phrases of the antitrust statutes. It is consistent with the common law tradition at the root of the antitrust laws to describe, as the United States Supreme Court now has, the analytic approach as involving a continuum, with the circumstances, details, and logic of a particular restraint dictating how the courts that confront the restraint should analyze it. In lieu of an undifferentiated one-size-fits-all rule of reason, courts may devise rules for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones. It follows that courts must consider not **[*121]** simply whether per se or rule of reason analysis applies to reverse payment patent settlements. To the extent rule of reason analysis applies, courts must also consider how the analysis should be structured to most efficiently differentiate between reasonable and unreasonable restraints of trade in this context.

CA(12)[] **(12)**

Monopolies and Restraints of Trade § 7—Cartwright Act—Prohibited Agreements and Combinations.

Agreements to establish or maintain a monopoly are restraints of trade made unlawful by the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*). Under general antitrust principles, a business may permissibly develop monopoly power, i.e., the power to control prices or exclude competition, through the superiority of its product or business acumen. To acquire or maintain that power through agreement and combination with others, however, is quite a different matter. Pursuant to this rule, businesses may not engage in a horizontal allocation of markets, with would-be competitors dividing up territories or customers. Such allocations afford each participant an enclave, free from the danger of outside incursions, in which to exercise monopoly power and extract monopoly premiums. Similarly, a firm may not pay its only potential competitor not to compete in return for a share of the profits that firm can obtain by being a monopolist.

CA(13)[] **(13)**

Monopolies and Restraints of Trade § 3—Agreements Between Patentees and Challengers.

Antitrust law condemns a patentee's payment to maintain supracompetitive prices to be shared among the patentee and the challenger rather than face what might have been a competitive market. This is so even when the patent is likely valid: The owner of a particularly valuable patent might contend that even a small risk of invalidity justifies a large payment. But, be that as it may, the payment (if otherwise unexplained) likely seeks to prevent the risk of competition. That consequence constitutes the relevant anticompetitive harm.

CA(14)[] **(14)**

Patents § 1—Period of Exclusion—Antitrust Analysis.

For antitrust purposes, patents are no longer to be treated as presumptively ironclad. This means the period of exclusion attributable to a patent is not its full life, but its expected life had enforcement been sought. This expected life represents the baseline against which the competitive effects of any agreement must be measured. If an agreement only replicates the likely average result of litigation, any exclusion is a function of the underlying patent strength; if it extends exclusion beyond that point, this further exclusion from the marketplace-and the attendant anticompetitive effect-is attributable to the agreement. *FTC v. Actavis* thus represents an application of the settled principle that the owner of a patent cannot extend the owner's statutory grant by contract or agreement. A patent affords no **[*122]** immunity for a monopoly not fairly or plainly within the grant. The measure of the statutory grant, and the limit on the monopoly that may be preserved by agreement, is the average expected duration that would have resulted from judicial testing.

CA(15)[] **(15)**

Monopolies and Restraints of Trade § 7—Cartwright Act—Agreements Eliminating Risk of Competition—Patents.

Every antitrust case involves a comparison of a challenged agreement against a prediction about—a probabilistic assessment of—the expected competition that would have arisen in its absence. Every restraint of trade condemned for suppressing market entry involves uncertainties about the extent to which competition would have come to pass. No matter; the law does not condone the purchase of protection from uncertain competition any more than it condones the elimination of actual competition. The antitrust laws foreclose agreements eliminating the risk of competition-the competitive market that might have been. Purchasing freedom from the possibility of competition, whether done by a patentee or anyone else, is illegal. An agreement to exchange consideration for elimination of any portion of the period of competition that would have been expected had a patent been litigated is a violation of the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*).

CA(16)[] **(16)**

Monopolies and Restraints of Trade § 3—Reverse Payment Patent Settlements—Anticompetition Challenges—Elements.

A third party plaintiff challenging a reverse payment patent settlement must show four elements: (1) the settlement includes a limit on the settling generic challenger's entry into the market; (2) the settlement includes cash or equivalent financial consideration flowing from the brand to the generic challenger; and the consideration exceeds (3) the value of goods and services other than any delay in market entry provided by the generic challenger to the brand, as well as (4) the brand's expected remaining litigation costs absent settlement. That a plaintiff challenging a reverse payment settlement must establish the settlement limits the challenging generic's entry is self-evident. If the settlement contains no component of delay and permits the generic to enter the market and compete fully and immediately, there is no restraint of trade and no potential for antitrust concern. As well, plaintiff must establish a reverse payment-financial consideration flowing from the brand to the generic challenger. In the absence of payment, one would expect rational parties that settle to select a market entry point roughly corresponding to their joint expectation as to when entry would have occurred, on average, if the patent's validity and infringement had been fully litigated. If market entry were substantially later than the generic thought it could obtain through litigation, the generic would be unwilling to settle and forgo the additional profits it thought it could earn from an earlier entry; conversely, if the **[*123]** entry were substantially earlier than the brand thought it could obtain through litigation, the brand would not settle and forgo an additional period of monopoly. Absent payment, one can accept an agreement to postpone market entry as a fair approximation of the expected level of competition that would have obtained had the parties litigated; absent payment, any delay in entry may be attributed to the effective strength of the challenged patent, rather than the settlement agreement.

CA(17)[] **(17)**

Monopolies and Restraints of Trade § 3—Reverse Payment Patent Settlements—Consideration—Side Agreements.

The concern that a reverse payment raises will depend in part on its independence from other services for which it might represent payment. A payment may reflect compensation for other services that the generic has promised to perform—such as distributing the patented item or helping to develop a market for that item. If payment is no more than would be expected as compensation for additional products or services, then the agreement includes no additional consideration for delay and courts can trust that any limit on competition is a legitimate consequence of the patent's strength and the contracting parties' expectations concerning its exclusionary power. Considerable caution is in order in evaluating settlements that include side agreements for generic products or services. A side agreement involving difficult to value assets might conceivably be added to a patent settlement to provide cover for the purchase of additional freedom from competition. Side deals should not be permitted to serve as fig leaves for agreements to eliminate competition.

CA(18)[] **(18)**

Monopolies and Restraints of Trade § 3—Reverse Payment Patent Settlements—Amount of Payment—Anticompetition Challenges.

A third party plaintiff challenging a reverse payment patent settlement must establish the amount of the payment, over and above the value of collateral products or services from the generic, also exceeds the brand's anticipated future litigation costs. In some cases, a reverse payment may amount to no more than a rough approximation of the litigation expenses saved through the settlement. Where a reverse payment reflects traditional settlement considerations, such as avoided litigation costs or fair value for services, there is not the same concern that a patentee is using its monopoly profits to avoid the risk of patent invalidation or a finding of noninfringement. In such cases, the parties may have provided for a reverse payment without having sought or brought about anticompetitive consequences. A rational brand might be indifferent as between (1) actually litigating or (2) settling, with market entry at the point expected, on average, from asserting its patent in litigation and a payment to the generic in an amount up to what would have been spent in that litigation. It is thus necessary to evaluate the reverse payment's scale in relation to the payor's anticipated future litigation costs.

[*124] *CA(19)*[] **(19)**

Monopolies and Restraints of Trade § 3—Reverse Payment Patent Settlements—Anticompetition Challenges—Burden of Proof.

Unless a challenged reverse payment patent settlement agreement includes both a restraint on generic competition and a reverse payment to the generic in excess of both brand litigation costs and generic collateral products and services, there is no reason to assume the settlement includes any element of purchased freedom from competition, as opposed to a limit on competition flowing naturally, and lawfully, from the perceived strength of the brand's patent. Accordingly, the burden of proof as to these elements rests with the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) plaintiff.

CA(20)[] **(20)**

Monopolies and Restraints of Trade § 3—Reverse Payment Patent Settlements—Anticompetition Challenges—Burden of Proof.

Where the evidence necessary to establish a fact essential to a claim lies peculiarly within the knowledge and competence of one of the parties, that party has the burden of going forward with the evidence on the issue although it is not the party asserting the claim. This is so with regard to both a settling party's own litigation costs and the existence and value of any collateral products or services provided as part of a patent settlement; these are matters about which the settling parties will necessarily have superior knowledge. Accordingly, once a plaintiff has shown an agreement involving a reverse payment and delay, the defendants have the burden of coming forward with evidence of litigation costs and the value of collateral products and services. If the defendants fail to do so, because, e.g., there was no side agreement or because they do not dispute the collective amounts fall short of any payment to the generic, the plaintiff has satisfied its burden on these points. If instead the defendants do so, the plaintiff must carry the ultimate burden of persuasion that any reverse payment exceeds litigation costs and the value of collateral products or services.

CA(21)[] **(21)**

Monopolies and Restraints of Trade § 3—Reverse Payment Patent Settlements—Anticompetition Challenges—Prima Facie Case.

A showing of the four elements for challenging a reverse payment patent settlement is not only necessary but also sufficient to make out a prima facie case that the settlement is anticompetitive. If a brand is willing to pay a generic more than the costs of continued litigation, and more than the value of any collateral benefits, in order to settle and keep the generic out of the market, there is cause to believe some portion of the consideration is payment for exclusion beyond the point that would have resulted, on average, from simply litigating the case to its conclusion. Otherwise, the brand would have had little incentive to settle at such a high price. Moreover, the larger the gap, the stronger the inference one can draw.

[*125] *CA(22)*[] **(22)**

Monopolies and Restraints of Trade § 7—Cartwright Act—Reverse Payment Patent Settlements.

Ordinarily, the fact that a large, unjustified reverse payment risks antitrust liability does not prevent litigating parties from settling their lawsuit. Parties can still use financial considerations to bridge small gaps arising from differing subjective perceptions of their probabilities of success in litigation; what they cannot do is use money to bridge their differences over the point when competitive entry is economically desirable, for that gap is not one ***antitrust law*** permits would-be competitors to bridge by agreement: If the basic reason the parties prefer a reverse payment settlement is a desire to maintain and to share patent-generated monopoly profits, then, in the absence of some other justification, the antitrust laws are likely to forbid the arrangement. That some settlements might no longer be possible absent a payment in excess of litigation costs is no concern if the ones now barred would simply have facilitated the sharing of monopoly profits.

CA(23)[] **(23)**

Monopolies and Restraints of Trade § 3—Reverse Payment Patent Settlements—Presumptions.

Proof of a reverse payment in excess of litigation costs and collateral products and services raises a presumption that the settling patentee has market power sufficient for the reverse payment patent settlement to generate significant anticompetitive effects.

CA(24)[] **(24)**

Monopolies and Restraints of Trade § 3—Reverse Payment Patent Settlements—Anticompetition Challenges—Burden of Proof—Shifting.

Once a plaintiff has made out a prima facie case that a reverse payment patent settlement has anticompetitive effects, a court must weigh these anticompetitive effects against the possible justifications for the challenged restraint. At this point, it is appropriate to shift the burden to the defendants to offer legitimate justifications and come forward with evidence that the challenged settlement is in fact procompetitive. *Bus. & Prof. Code, § 16725*, provides that it is not unlawful to enter an agreement to promote, encourage or increase competition. An antitrust defendant cannot argue a settlement is procompetitive simply because it allows competition earlier than would have occurred if the brand had won the patent action; the relevant baseline is the average period of competition that would have obtained in the absence of settlement.

CA(25)[] **(25)**

Monopolies and Restraints of Trade § 3—Reverse Payment Patent Settlements—Amount of Payment.

Consideration of whether a reverse payment patent agreement is justified as procompetitive will not turn on whether the patent would ultimately have been proved valid or invalid. Agreements must be assessed as of the time they are made, at which point the patent's validity is unknown and unknowable. Just as later invalidation of a patent does not prove an agreement when made **[*126]** was anticompetitive, later evidence of validity will not automatically demonstrate an agreement was procompetitive. ***Antitrust law*** condemns the purchase of freedom from competition; what matters is whether a settlement postpones market entry beyond the average point that would have been expected at the time in the absence of agreement. To determine whether such a settlement has occurred under state law, as under federal law, it is normally not necessary to litigate patent validity. An unexplained large reverse payment itself would normally suggest that the patentee has serious doubts about the patent's survival. And that fact, in turn, suggests that the payment's objective is to maintain supracompetitive prices to be shared among the patentee and the challenger rather than face what might have been a competitive market—the very anticompetitive consequence that underlies the claim of antitrust unlawfulness. In a word, the size of the unexplained reverse payment can provide a workable surrogate for a patent's weakness, all without forcing a court to conduct a detailed exploration of the validity of the patent itself.

CA(26)[] **(26)**

Monopolies and Restraints of Trade § 3—Reverse Payment Patent Settlements—Anticompetition Challenges—Burden of Proof—Prima Facie Case.

The ultimate burden throughout rests with the plaintiff to show that a challenged reverse payment patent settlement agreement is anticompetitive. Once the plaintiff has made out a prima facie case that a reverse payment patent settlement is anticompetitive, however, the plaintiff thereafter need only show that any procompetitive justifications proffered by the defendants are unsupportable. The ultimate question in reverse payment settlement cases is whether an agreement involves significant unjustified anticompetitive consequences. The prima facie case requires the plaintiff to eliminate the possibility that litigation costs or other products or services could explain the consideration paid the generic. If a plaintiff does so and thereafter can dispel each additional justification the defendants put forward to explain the consideration, the conclusion follows that the settlement payment must include, in part, consideration for additional delay in entering the market. That payment for delay is condemned by the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*), as by federal ***antitrust law***, and its purchase as part of a settlement agreement is an unlawful restraint of trade.

CA(27)[] **(27)**

Monopolies and Restraints of Trade § 7—Cartwright Act—Reverse Payment Patent Settlements—Rule of Reason—Anticompetition Challenges—Burden of Proof—Prima Facie Case.

Under the structure of the rule of reason applicable to reverse payment patent settlements, to make out a prima facie case that a challenged reverse payment patent agreement is an unlawful restraint of trade, a plaintiff must show the agreement contains both a limit on the generic challenger's entry into the **[*127]** market and compensation from the patentee to the challenger. The defendants bear the burden of coming forward with evidence of litigation costs or valuable collateral products or services that might explain the compensation; if the defendants do so, the plaintiff has the burden of demonstrating the compensation exceeds the reasonable value of these. If a prima facie case has been made out, the defendants may come forward with additional justifications to demonstrate the settlement agreement nevertheless is procompetitive. A plaintiff who can dispel these justifications has carried the burden of demonstrating the settlement agreement is an unreasonable restraint of trade under the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*).

CA(28)[] **(28)**

Constitutional Law § 34—Distribution of Powers—Between Federal and State Governments—Obstacle Preemption.

Obstacle preemption arises when, under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

CA(29)[] **(29)**

Monopolies and Restraints of Trade § 1—Relation Between Federal and State Law—Presumption Against Preemption.

State ***antitrust law*** ordinarily is fully compatible with federal law. States have regulated against monopolies and unfair competition for longer than the federal government, and federal law is intended only to supplement, not displace, state antitrust remedies. The Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) is broader in range and deeper in reach than the federal Sherman Act (*15 U.S.C. § 1 et seq.*); this greater domain has never been thought to pose supremacy clause problems. To the contrary, in light of the established state role, a presumption against preemption applies.

CA(30)[] **(30)**

Monopolies and Restraints of Trade § 1—Relation Between Federal and State Law—Obstacle Preemption—Reverse Payment Patent Settlements—Structured Rule of Reason.

Where the choice of a test rests solely on economic analysis, no patent law preemption concerns arise. Instead, the issue reduces to a problem in the relation between federal and state ***antitrust law***, and there the United States Supreme Court has been quite clear that states may depart from federal rules—or accept an invitation to develop a gap in the law explicitly left by the Supreme Court—absent evidence of a clear congressional purpose to the contrary. The structured rule of reason applicable to reverse payment patent settlements adopted by the California Supreme Court is consistent with, not an obstacle to, congressional patent and health care goals in two specific ways. First, considerable research and analysis suggests the broad availability of reverse payment settlements favors weak patents and channels investment resources toward suboptimal innovation prospects. To the **[*128]** extent careful scrutiny of such settlements promotes the very innovation the patent laws were intended to promote, it cannot stand as an obstacle to congressional objectives. Second, a fundamental goal of the Hatch-Waxman Act (*21 U.S.C. § 355*) is to enhance generic competition and thereby lower prices. By ferreting out anticompetitive agreements that limit generic market entry and sustain costly monopolies, a structured rule of reason serves those goals and poses no obstacle to congressional objectives.

CA(31)[] **(31)**

Monopolies and Restraints of Trade § 3—Reverse Payment Patent Settlements—Anticompetition Challenges.

The trial court and Court of Appeal treated a drug manufacturer's patent on the active ingredient in one of its antibiotic drugs as ironclad and used the entire period until its expiration as the relevant benchmark in order to assess whether a reverse payment patent settlement agreement between the drug manufacturer and a would-be competitor had anticompetitive effects. That was error.

[Cal. Forms of Pleading and Practice (2015) ch. 411, Patents and Inventions, § 411.55; Simon et al., Matthew Bender Practice Guide: Cal. Unfair Competition and Business Torts (2015) § 5.36; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 592A; 13 Witkin, Summary of Cal. Law (10th ed. 2005) Personal Property, § 76.]

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Judges: Opinion by Werdegar, J., expressing the unanimous view of the court.

Opinion by: Werdegar

Opinion

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[*638] [**850] WERDEGAR, J.**—To protect competition in the marketplace, ***antitrust law*** prohibits agreements that create or perpetuate monopolies. Patent law, in **[*130]** contrast, grants temporary monopolies to inventors to encourage the development of useful innovations. We consider here a crucial question at the intersection of these two bodies of law: What limits, if any, does ***antitrust law*** place on the ability of a patent holder to make agreements restricting competition during the life of its patent? In particular, when another entity tries to invalidate a patent and enter the marketplace, can the patentee pay the would-be competitor to withdraw its challenge and refrain from competing until at or near the natural expiration of the potentially invalid patent's life?

The answer to this is of special moment to the pharmaceutical industry, which has seen a raft of **[****4]** suits in which generic drug manufacturers (generics), seeking to introduce lower priced alternatives to patented **[***639]** brand-name drugs, raise patent invalidity as a defense to claims of infringement. With increasing frequency these cases have settled, with the plaintiff brand-name drug manufacturer (brand) making a "reverse payment" to the defendant generic in exchange for the generic dropping its patent challenge and consenting to stay out of the market. This case involves just such a settlement agreement.

Under federal ***antitrust law***, these settlements are not immune from scrutiny, even if they limit competition no more than a valid **[**851]** patent would have. (*FTC v. Actavis, Inc. (2013) 570 U.S. ___, ___ [186 L. Ed. 2d 343, 356, 133 S. Ct. 2223, 2230]* (*Actavis*).) We conclude the same is true under state ***antitrust law***. Some patents are valid; some are not. Sometimes competition would infringe; sometimes it would not. Parties illegally restrain trade when they privately agree to substitute consensual monopoly in place of potential competition that would have followed a finding of invalidity or noninfringement. The Court of Appeal ruled to the contrary; we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Bayer AG and Bayer Corporation (collectively Bayer) market Cipro, an antibiotic that has been **[****5]** among the most prescribed and best-selling drugs in the world. (*Arkansas Carpenters Health & Welfare Fund v. Bayer AG (2d Cir. 2010) 604 F.3d 98, 100*; *In re Ciprofloxacin Hydrochloride Antitrust Litigation (E.D.N.Y. 2003) 261 F. Supp. 2d 188, 194*; *In re Ciprofloxacin Hydrochloride Antitrust Litigation (E.D.N.Y. 2001) 166 F. Supp. 2d 740, 743*.) In 1987, Bayer was issued a United States patent on the active ingredient in Cipro, ciprofloxacin hydrochloride, a patent that expired in December 2003. (U.S. Patent No. 4,670,444, col. 22, 11. 32–34, claim 12 (the '444 patent); see *In re Ciprofloxacin Hydrochloride Antitrust Litigation (Fed. Cir. 2008) 544 F.3d 1323, 1327–1328*.) A subsidiary and licensee of Bayer obtained Food and Drug Administration (FDA) approval to market Cipro in the United States. (*In re Ciprofloxacin Hydrochloride Antitrust Litigation, supra, 544 F.3d at p. 1328*; *In re Ciprofloxacin Hydrochloride Antitrust Litigation, supra,* ***[*131]*** *166 F. Supp. 2d at p. 743*.) Between 1987 and 2003, Bayer was the sole producer of Cipro in the United States and, between 1997 and 2003 alone, Cipro generated more than $ 6 billion in gross sales.

At one time, pioneer drugs like Cipro and the generic drugs that followed them were governed by the same FDA approval process. [1] Subjecting generic drugs to the same "cumbersome drug approval process [as pioneer drugs]

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* The nine coordinated cases whose appeals are addressed in this case are: *McGaughey v. Bayer Corp.* (Super. Ct. San Diego County, No. GIC752290); *Relles v. Bayer Corp.* (Super. Ct. L.A. County, No. BC239083); *Samole v. Bayer AG* (Super. Ct. S.F. City and County, No. 316349); *Garber v. Bayer AG* (Super. Ct. S.F. City and County, No. 316518); *Lee v. Bayer AG* (Super. Ct. S.F. City and County, No. 316670); *Patane v. Bayer AG* (Super. Ct. S.F. City and County, No. 318457); *Moore v. Bayer Corp.* (Super. Ct. Sonoma County, No. SCZ228356); *Moore v. Bayer Corp.* (Super. Ct. Sonoma County, No. 228384); *Senior Action Network v. Bayer AG* (Super. Ct. S.F. City and County, No. 400750).

[1] A generic drug is a drug designed to be identical to an already-FDA-approved pioneer drug in active ingredients, safety, and efficacy, and thus therapeutically equivalent to its brand-name counterpart. (See *PLIVA, Inc. v. Mensing (2011) 564 U.S. 604, 612, fn. 2 [180 L. Ed. 2d 580, 588, fn. 2, 131 S. Ct. 2567, 2574, fn. 2]*.)

delayed the entry of relatively inexpensive generic drugs into the market place," at substantial cost to consumers and the government. (*Mylan Pharmaceuticals, Inc. v. Shalala (D.D.C. 2000) 81 F. Supp. 2d 30, 32*; see H.R.Rep. No. 98-857, 2d Sess., pt. 1, p. 17 (1984), reprinted in 1984 U.S. Code Cong. & Admin. News, p. 2650.) To expedite the availability of low-cost generic drugs, Congress authorized an abbreviated approval process for drugs whose active ingredients had already been proven safe and effective **[****6]** in earlier clinical trials. (Drug Price Competition and Patent Term Restoration Act of 1984, *Pub.L. No. 98-417, tit. I, §§ 101–106 (Sept. 24, 1984) 98 Stat. 1585, 1585–1597*, codified as amended at *21 U.S.C. § 355* (the Hatch-Waxman **[***640]** Act); see H.R.Rep. No. 98-857, 2d Sess., pt. 1, pp. 14, 16–17 (1984), reprinted in 1984 U.S. Code Cong. & Admin. News, pp. 2647, 2649–2650.)

Under the *Hatch-Waxman Act*, a prospective generic drug manufacturer may file a streamlined application asserting the generic drug's bioequivalence with an existing pioneer drug, thus piggybacking on the safety and efficacy data already submitted to the FDA in connection with its approval of the original drug. (*21 U.S.C. § 355(j)(2)(A)(ii)*, *(iv)*; see *Actavis, supra, 570 U.S. at p. ___ [186 L. Ed. 2d at p. 354, 133 S. Ct. at p. 2228]*.) With respect to the patent implications of the application, the generic drug manufacturer must make one of four certifications: There is no patent for the underlying drug, the patent is expired, the patent will expire, or (relevant here) the patent is invalid or will not be infringed by the proposed manufacture and sale **[****7]** of the generic drug. (*21 U.S.C. § 355(j)(2)(A)(vii)*; *Actavis, at pp. ___–___ [186 L. Ed. 2d at pp. 353–354, 133 S. Ct. at p. 2228]*.) An applicant that certifies the affected patent is invalid or will not be infringed (a "paragraph IV" certification) must give notice to all affected patent owners. (*21 U.S.C. § 355(j)(2)(B)*.) Submission of an application to manufacture a generic version of a drug covered by a patent is a technical act of infringement (*35 U.S.C. § 271(e)(2)(A)*; *Actavis, at pp. ___–___ [186 L. Ed. 2d at p. 354, 133 S. Ct. at p. 2228]*); **[**852]** to stay approval of the generic version, a patent owner must file an infringement lawsuit against the generic drug manufacturer **[*132]** within 45 days (*21 U.S.C. § 355(j)(5)(B)(iii)*). To provide an incentive to assume the risks of exposure to such litigation, the first generic manufacturer to file an application and prevail is granted a potentially lucrative 180-day exclusivity window in which to market its drug without competition from any other generic manufacturer. (*21 U.S.C. § 355(j)(5)(B)(iv)*; *Actavis, at p. ___–___ [186 L. Ed. 2d at p. 354, 133 S. Ct. at pp. 2228–2229]*.)

In 1991, twelve years before the scheduled expiration of the '444 patent, defendant Barr Laboratories, Inc., filed an application to market a generic version of Cipro. (*In re Ciprofloxacin Hydrochloride Antitrust Litigation, supra, 544 F.3d at p. 1328*.) Barr's application included a paragraph IV certification that the '444 patent was invalid and unenforceable. (*Arkansas Carpenters Health & Welfare Fund v. Bayer AG, supra, 604 F.3d at pp. 101–102*; see *21 U.S.C. § 355(j)(2)(A)(vii)(IV)*.) Barr's statutory notice to Bayer contended Cipro's derivation was obvious in light of prior art, the '444 patent was an invalid double patent, and the patent was the product of inequitable **[****8]** conduct based on Bayer's withholding of information about preexisting patents from the patent examiner. (See *35 U.S.C. §§ 102*, *103*; *In re Longi (Fed. Cir. 1985) 759 F.2d 887, 892–893*.) Bayer responded with a patent infringement suit, staying FDA approval, and Barr counterclaimed for a declaratory judgment that the '444 patent was invalid. [2]

In early 1997, Bayer and Barr settled. Under the terms of the settlement, Barr agreed to postpone marketing a generic **[***641]** version of Cipro until the '444 patent expired. It also agreed to a consent judgment affirming the patent's validity and to modification of the certification in its FDA application from a paragraph IV certification, alleging invalidity, to a "paragraph **[****9]** III" certification, seeking to market a generic drug upon patent expiration. (*Arkansas Carpenters Health & Welfare Fund v. Bayer AG, supra, 604 F.3d at p. 102*; see *21 U.S.C. § 355(j)(2)(A)(vii)(III)*; *21 C.F.R. § 314.94(a)(12)(i)(A)(3) (2014)*.) In return, Bayer agreed to make payments to Barr and to supply it with Cipro for licensed resale beginning six months before patent expiration. (See *In re*

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[2] While the litigation was ongoing, Barr agreed to accept contribution to its litigation costs from another generic drug manufacturer, defendant The Rugby Group, Inc., a then subsidiary of defendant Hoechst Marion Roussel, Inc., in exchange for a share of the benefits of any settlement, judgment, or sale of generic ciprofloxacin hydrochloride. (*In re Ciprofloxacin Hydrochloride Antitrust Litigation, supra, 544 F.3d at p. 1328*.) In 1998, The Rugby Group, Inc., was acquired by defendant Watson Pharmaceuticals, Inc. Generic defendants Barr Laboratories, Inc., The Rugby Group, Inc., Watson, and Hoechst Marion Roussel, Inc., are referred to collectively as Barr.

Ciprofloxacin Hydrochloride Antitrust Litigation, supra, 544 F.3d at pp. 1328–1329.) This head start mirrored the 180-day duopoly the Hatch-Waxman Act would have provided Barr if it had succeeded in showing invalidity or noninfringement of Bayer's patent. (21 U.S.C. § 355(j)(5)(B)(iv).) Barr was to receive Cipro from Bayer at 85 percent of current price. **[*133]**

Pursuant to the settlement, between 1997 and 2003, Bayer paid Barr $ 398.1 million. In that same period, Bayer's profits from sales of Cipro exceeded $ 1 billion. (*In re Ciprofloxacin Hydrochloride Antitrust Litigation, supra, 261 F. Supp. 2d at p. 194*.)

The 1997 settlement between Bayer and Barr produced a wave of state and federal antitrust suits. (*Arkansas Carpenters Health & Welfare Fund v. Bayer AG, supra, 604 F.3d at p. 102*.) This case arises from nine such coordinated class action suits brought by indirect purchasers of Cipro in California against Bayer and Barr. (See *In re Cipro Cases I & II (2004) 121 Cal.App.4th 402, fn. *, 406–407 [17 Cal. Rptr. 3d 1]*.) The operative complaint in these coordinated proceedings alleges the Bayer-Barr reverse payment settlement violated the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*), unfair competition law (*id.*, *§ 17200 et seq.*), and common law prohibition against monopolies. The gravamen of the complaint is that the 1997 agreement preserved **[****10]** Bayer's monopoly and ability to charge supracompetitive **[**853]** prices at the expense of consumers, and Bayer in turn split these monopoly profits with Barr. Class certification was granted and upheld on appeal. (*In re Cipro Cases I & II, at p. 418*.) Thereafter, the parties stayed this action pending resolution of consolidated federal challenges to the Bayer-Barr settlement.

Following a Federal Circuit ruling in favor of Bayer and Barr on federal antitrust claims (*In re Ciprofloxacin Hydrochloride Antitrust Litigation, supra, 544 F.3d 1323*), [3] the trial court granted a defense summary judgment. It found decisional law under the federal Sherman Act (*15 U.S.C. § 1 et seq.*) dispositive and held that because the settlement agreement did not restrain competition longer than the exclusionary scope of the ’444 patent, it did not violate the Cartwright Act. The Court of Appeal affirmed, holding that agreements restraining competition within the scope of a patent are lawful unless the patent was procured by fraud or the suit to enforce it was objectively baseless. The court held further that, even if there were a disputed issue of material fact as to whether Bayer's suit to enforce the ’444 patent was objectively baseless, litigation **[***642]** of that theory would be foreclosed by exclusive federal court patent jurisdiction.

We granted review to resolve important unsettled issues of state ***antitrust law***. While the case was pending before this court, we entered an order formalizing Bayer's dismissal from the proceedings pursuant to an approved settlement. Barr remains as respondent.
[*134]

DISCUSSION

I. *Reverse Payment Settlements Under the Hatch-Waxman Act*

CA(1)[] **(1)** The Hatch-Waxman Act illustrates the law of unintended consequences. ***HN1***[] Congress wrote into the act a substantial incentive for generics to enter markets earlier by offering a 180-day exclusivity period to the first generic filer, and only that filer, to challenge a patent. (*21 U.S.C. § 355(j)(5)(B)(iv)*; see Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem* (2006) *81 N.Y.U. L.Rev. 1553, 1566, 1578–1579, 1583*.) The theory was that a generic would be more likely to challenge dubious patents if offered the carrot of an enormously valuable six-month period in which only it and the brand could produce a drug. (Carrier, *Unsettling Drug Patent Settlements: A Framework for Presumptive Illegality* (2009) *108 Mich. L.Rev. 37, 47*; Bulow,

[3] As discussed **[****11]** below, both *In re Ciprofloxacin Hydrochloride Antitrust Litigation, supra, 544 F.3d 1323* and a second decision rejecting a federal antitrust challenge to the Cipro settlement, *Arkansas Carpenters Health & Welfare Fund v. Bayer AG, supra, 604 F.3d 98*, were decided under principles later rejected by the United States Supreme Court in *Actavis, supra, 570 U.S. ___ [186 L. Ed. 2d 343, 133 S. Ct. 2223]*.

*The Gaming **[****12]** of Pharmaceutical Patents* in 4 Innovation Policy and the Economy (Jaffe et al. edits., 2004) 145, 163; Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition* (2009) 109 Colum. L.Rev. 629, 651.) Otherwise, "free rider" problems might arise: every generic would have an incentive to hold back and let some other generic be the one to shoulder the risk and litigation costs associated with challenging a patent. (Lemley & Shapiro, *Probabilistic Patents* (2005) 19 J. Econ. Persp. 75, 88; Hemphill, *Paying for Delay*, at p. 1605.)

This solution may well have encouraged more generics to file patent challenges, but not without creating a series of new problems. In other settings, a patentee might have little incentive to buy off a challenger in order to preserve its monopoly and continue reaping monopoly profits, for the simple reason that paying off the first challenger would simply encourage another challenger, and then another, and then another. (See *Actavis, supra, 570 U.S. at pp. ___–___ [186 L. Ed. 2d at pp. 361–362, 133 S. Ct. at p. 2235]*.) Two features of the Hatch-Waxman Act change this dynamic. First, the 180-day exclusivity period created a bottleneck; no one else could receive FDA approval until after its expiration. (*21 U.S.C. § 355(j)(5)(B)(iv)(I)*; Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem, supra, 81 N.Y.U. L.Rev. at pp. 1560–1561, 1586–1587*.) Second, other generics tempted to challenge **[****13]** a patent in the wake **[**854]** of a settlement with the first-filing generic would have to wait out an automatic 30-month stay the brand could obtain just by opposing their requests for FDA approval. (*21 U.S.C. § 355(j)(5)(B)(iii)*; *Actavis, at pp. ___–___ [186 L. Ed. 2d at pp. 361–362, 133 S. Ct. at p. 2235]*; Bulow, *The Gaming of Pharmaceutical Patents* in 4 Innovation Policy and the Economy, *supra*, at p. 164.) As a result, the brand could effectively pick off "'the most motivated challenger, and the one closest to introducing competition'" **[*135]** (*Actavis, at pp. ___–___ [186 L. Ed. 2d at pp. 361–362, 133 S. Ct. at p. 2235]*, quoting Hemphill, *Paying for Delay, at p. 1586*), with all others stuck in line behind that generic (Cotter, *Refining the "Presumptive Illegality" Approach to Settlements of Patent Disputes Involving Reverse Payments: A Commentary on Hovenkamp, Janis & Lemley* (2003) *87 Minn. L.Rev. 1789, 1801*). [4]

[*643]** This legal regime means that, regardless of the degree of likely validity of a patent, the brand and first-filing generic have an incentive to effectively establish a cartel through a reverse **[****14]** payment settlement. (12 Areeda & Hovenkamp, ***Antitrust Law***, *supra*, ¶ 2046, pp. 341–345; Hovenkamp, *Anticompetitive Patent Settlements and the Supreme Court's Actavis Decision (2014) 15 Minn. J. L. Sci. & Tech. 3, 8–13*; see Carrier, *Unsettling Drug Patent Settlements: A Framework for Presumptive Illegality*, *supra*, *108 Mich. L.Rev. at p. 73* [under Hatch-Waxman, "[g]enerics have powerful incentives to file the first patent challenge but little incentive to pursue the litigation"].) Rather than expend litigation costs on either side, the brand and generic can reach a settlement that reflects the likely validity or invalidity of the patent (stronger patent, smaller settlement; weaker patent, bigger settlement), grants the generic a share of monopoly profits, and leaves the brand the sole manufacturer of the product. (Hovenkamp, *Anticompetitive Patent Settlements and the Supreme Court's Actavis Decision, at pp. 12–13*.)

It is likely for this reason that reverse payment settlements, practically unheard of before the *Hatch-Waxman Act*, have proliferated in the years since its enactment. (*Actavis, supra, 570 U.S. at p. ___ [186 L. Ed. 2d at p. 362, 133 S. Ct. at p. 2235]*; Hovenkamp, *Anticompetitive Patent Settlements and the Supreme Court's Actavis Decision, supra, 15 Minn. J. L. Sci. & Tech. at pp. 13–16*; Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition, supra, 109 Colum. L.Rev. at pp. 647–656*.) This is probably not what Congress intended. (*Actavis, at p. ___ [186 L. Ed. 2d at p. 362, 133 S. Ct. at p. 2235]* [the Hatch-Waxman Act's provisions have "no doubt unintentionally … created special incentives for collusion"]); *570 U.S. at p. ___ [186 L. Ed. 2d at p. 360, 133 S. Ct. at p. 2234]* [quoting remarks of Sen. Hatch and Rep. Waxman decrying as an

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[4] Amendments to the Hatch-Waxman Act postdating the settlement in this case may have partially alleviated the complete bottleneck problem (Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, *supra*, *81 N.Y.U. L.Rev. at p. 1587*), although not issues arising from the 30-month stay or the reduced incentives for other generics, without the carrot of 180 days of duopoly, to bring patent challenges (12 Areeda & Hovenkamp, ***Antitrust Law*** (3d ed. 2012) ¶ 2046, p. 341).

unintended consequence of their legislation collusive agreements to delay competition].) The issue for us is what, if anything, state ***antitrust law*** has to say about these **[****15]** problems.
[*136]

II. *The Intersection Between Antitrust and Patent Law*

A. *The Cartwright Act*

HN2[] ***CA(2)***[] **(2)** The Legislature enacted the state's principal ***antitrust law***, the Cartwright Act, to rein in the burgeoning power of monopolies and cartels. (*Clayworth v. Pfizer, Inc. (2010) 49 Cal.4th 758, 772 [111 Cal. Rptr. 3d 666, 233 P.3d 1066]*.) The act's principal goal is the preservation of consumer welfare. (*Cianci v. Superior Court (1985) 40 Cal.3d 903, 918 [221 Cal. Rptr. 575, 710 P.2d 375]*; *Marin County Bd. of Realtors, Inc. v. Palsson (1976) 16 Cal.3d 920, 935 [130 Cal. Rptr. 1, 549 P.2d 833]*.) The act, like ***antitrust law*** in general, "rest[s] 'on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our **[**855]** democratic political and social institutions.'" (*Marin County Bd., at p. 935*; see *National Soc. of Professional Engineers v. U. S. (1978) 435 U.S. 679, 695 [55 L. Ed. 2d 637, 98 S. Ct. 1355]*.) **[***644]** At its heart is a prohibition against agreements that prevent the growth of healthy, competitive markets for goods and services and the establishment of prices through market forces. (See *Speegle v. Board of Fire Underwriters (1946) 29 Cal.2d 34, 44 [172 P.2d 867]*.) "The act 'generally outlaws any combinations or agreements which restrain trade or competition or which fix or control prices' [citation], and declares that, with certain exceptions, 'every trust is unlawful, against public policy and void … .'" (*Pacific Gas & Electric Co. v. County of Stanislaus (1997) 16 Cal.4th 1143, 1147 [69 Cal. Rptr. 2d 329, 947 P.2d 291]*.)

HN3[] ***CA(3)***[] **(3)** The "trust[s]" the act prohibits include any "combination … by **[****16]** two or more persons" to "create or carry out restrictions in trade or commerce" (*Bus. & Prof. Code, § 16720, subd. (a)*) or to "prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity" (*id., subd. (c)*). Also prohibited is any contract by which two or more entities "[a]gree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale … of any such article or commodity, that its price might in any manner be affected." (*Id., subd. (e)(4)*.) Agreements in violation of the act are "absolutely void and … not enforceable at law or in equity." (*Id.*, *§ 16722*; see *id.*, *§ 16726*.)

Though the Cartwright Act is written in absolute terms, in practice not every agreement within the four corners of its prohibitions has been deemed illegal. (*Morrison v. Viacom, Inc. (1998) 66 Cal.App.4th 534, 540 [78 Cal. Rptr. 2d 133]*.) *Business and Professions Code sections 16720*, *16722*, and *16726* draw upon the common law prohibition against restraints of trade. **[*137]** (*Corwin v. Los Angeles Newspaper Service Bureau, Inc. (1971) 4 Cal.3d 842, 852 [94 Cal. Rptr. 785, 484 P.2d 953]*; *People v. Building Maintenance etc. Assn. (1953) 41 Cal.2d 719, 727 [264 P.2d 31]*; *Speegle v. Board of Fire Underwriters, supra, 29 Cal.2d at p. 44*.) The earliest common law decisions imposed an absolute rule, voiding "all contracts … which in any degree tended to the restraint of trade." (*Wright v. Ryder (1868) 36 Cal. 342, 357*.) But the common law rule was soon modified and "as relaxed, tolerated such [restraints of trade] as were restricted in their operations within reasonable limits." (*Ibid.*; see *Vulcan Powder Co. v. Hercules Powder Co. (1892) 96 Cal. 510, 512 [31 P. 581]*.) **[****17]** The United States Supreme Court looked to the common law in embracing a rule of reason for determining which agreements violated federal ***antitrust law*** (see *Standard Oil Co. v. United States (1911) 221 U.S. 1, 60 [55 L. Ed. 619, 31 S. Ct. 502]*), and this court thereafter followed suit: "[I]t may be assumed that the broad prohibitions of the Cartwright Act are subject to an implied exception similar to the one that validates reasonable restraints of trade under the federal Sherman Antitrust Act." (*Building Maintenance etc. Assn., at p. 727*; see *Marin County Bd. of Realtors, Inc. v. Palsson, supra, 16 Cal.3d at p. 930*; *Corwin, at p. 853*.) [5] What was true under the common law, **[***645]** however, is true today: "[T]he difficulty lies in determining what are reasonable and what unreasonable restrictions … ." (*Wright, at p. 358*.)

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[5] As we noted in *People v. Building Maintenance etc. Assn., supra, 41 Cal.2d at pages 726–727*, a separate section of the Cartwright Act effectively codifies this principle: "It is not unlawful to enter into agreements or form associations or combinations,

B. *Patent Law*

CA(4)[] **(4)** That difficulty is all the greater because ***antitrust law*** does not exist in a vacuum. **HN4**[] The patent laws "are *in pari materia* with the antitrust laws and modify them *pro tanto* [(to that extent)]." (*Simpson v. Union Oil Co. (1964) 377 U.S. 13, 24 [12 L. Ed. 2d 98, 84 S. Ct. 1051]*.) To promote investment in invention and the public **[****18]** disclosure of new discoveries, Congress has seen fit to grant inventors limited statutory monopolies and the right to exclude competition in the **[**856]** manufacture, use, or sale of the patent's subject. (*35 U.S.C. § 154(a)*; see *Bonito Boats, Inc. v. Thunder Craft Boats, Inc. (1989) 489 U.S. 141, 150–151 [103 L. Ed. 2d 118, 109 S. Ct. 971]*; *Dawson Chemical Co. v. Rohm & Haas Co. (1980) 448 U.S. 176, 215 [65 L. Ed. 2d 696, 100 S. Ct. 2601]*; *Sears, Roebuck & Co. v. Stiffel Co. (1964) 376 U.S. 225, 229 [11 L. Ed. 2d 661, 84 S. Ct. 784]*.) Accordingly, the issuance of a federal patent creates "an exception to the general rule against monopolies and to the right to access to a free and open market." (*Precision Co. v. Automotive Co. (1945) 324 U.S. 806, 816 [89 L. Ed. 1381, 65 S. Ct. 993]*.) While "[t]he limited **[*138]** monopolies granted to patent owners do not exempt them from the prohibitions" of ***antitrust law*** (*Standard Oil Co. v. United States (1931) 283 U.S. 163, 169 [75 L. Ed. 926, 51 S. Ct. 421]*; see *United Shoe Mach. Co. v. United States (1922) 258 U.S. 451, 463–464 [66 L. Ed. 708, 42 S. Ct. 363]* ["the rights secured by a patent do not protect the making of contracts in restraint of trade"]), in a given case possession of a patent may provide a defense to liability (*United States v. Gen. Elec. Co. (1926) 272 U.S. 476, 488–490 [71 L. Ed. 362, 47 S. Ct. 192]*; *Valley Drug Co. v. Geneva Pharmaceuticals (11th Cir. 2003) 344 F.3d 1294, 1307*). Courts thus must reconcile the two bodies of law, making "an adjustment between the lawful restraint on trade of the patent monopoly and the illegal restraint prohibited broadly by" ***antitrust law***. (*United States v. Line Material Co. (1948) 333 U.S. 287, 310 [92 L. Ed. 701, 68 S. Ct. 550]*.)

At the extremes, this is easy. If a patent were known to be invalid, a private agreement nevertheless giving it effect would be plainly illegal. (See *Bus. & Prof. Code, §§ 16720*, *16722*, *16726*.) Conversely, if a patent were known to be valid, an agreement foreclosing competition no more than the statutory monopoly would not restrain trade beyond what federal law permitted, **[****19]** and the rights patent law affords the patentee would supersede any state law prohibition. Difficulties emerge when we move from a hypothetical patent known to be determinately valid or invalid to the real world, where validity may be unclear. When assessing the antitrust implications of an agreement arising from a patent, the truth about the patent's validity cannot always be known. The issue is how antitrust and patent law should accommodate each other under these conditions of uncertainty.

III. *The Scope of the Patent Test*

A. *The Court of Appeal and the Scope of the Patent Approach*

The particular accommodation this case calls for arises from an issue of virtual first impression under the Cartwright Act: how to apply the statutory bar against restraints of trade to patent settlement agreements that limit competition, but no more broadly than an injunction enforcing the patent would have, had one been obtained. (Cf. *In re Cardizem CD Antitrust Litigation (6th Cir. 2003) 332 F.3d 896, 904, fn. 8, 906–909* **[***646]** [deciding the issue under both federal law and the Cartwright Act, but without independently analyzing state law].) Rejecting plaintiffs' argument that agreements of this sort should be deemed uniformly illegal, the Court of Appeal resolved the issue by adopting one of several **[****20]** competing approaches courts had developed **[*139]** to solve the problem under federal ***antitrust law***, the scope of the patent test. [6] Under that test, the Court of Appeal held, "a settlement of a lawsuit to enforce a patent does not violate the Cartwright Act if the settlement restrains competition only within the scope of the patent, unless the patent was procured by fraud or the suit for its enforcement was objectively baseless." The scope of the patent test thus gives wide effect to patents by essentially presuming their validity in most cases. We conclude, as more recent United States Supreme Court authority has now made clear, that this

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the purpose and effect of which is to promote, encourage or increase competition in any trade or industry, or which are in furtherance of trade." (*Bus. & Prof. Code, § 16725*.)

[6] See *In re Tamoxifen Citrate Antitrust Litigation (2d Cir. 2006) 466 F.3d 187*; cf. *In re Cardizem CD Antitrust Litigation, supra, 332 F.3d at pages 907–909* (adopting per se rule); *In re K-Dur Antitrust Litigation (3d Cir. 2012) 686 F.3d 197* (adopting quick look rule of reason analysis).

test accords excess weight to the policies motivating patent law, gives insufficient consideration to the concerns animating ***antitrust law***, and must be rejected.

The federal cases the Court of Appeal followed identify three core rationales for **[**857]** concluding a patent litigation settlement restricting competition no more than a valid patent would is generally lawful. First, patents are presumed valid. (*35 U.S.C. § 282(a)*.) Given this presumption, many lower federal courts reasoned, an agreement that **[****21]** does not extend monopoly beyond what a patent grants imposes no additional injury to competition and, in the absence of anticompetitive effects, generally survives antitrust scrutiny. (See *In re Ciprofloxacin Hydrochloride Antitrust Litigation, supra, 544 F.3d at p. 1337*; *In re Tamoxifen Citrate Antitrust Litigation, supra, 466 F.3d at pp. 212–213*; *Schering-Plough Corp. v. FTC (11th Cir. 2005) 402 F.3d 1056, 1066–1068*.)

[858]** Second, the fundamental purpose of patent law is to promote innovation and the disclosure of inventions so that ultimately new discoveries may benefit the public at large. (*Bonito Boats, Inc. v. Thunder Craft Boats, Inc., supra, 489 U.S. at pp. 150–151*.) To subject exclusions within the scope of a patent to scrutiny and potential liability would, lower courts feared, chill innovation and give inventors pause in deciding whether to share their creations with the public. (See *In re Tamoxifen Citrate Antitrust Litigation, supra, 466 F.3d at p. 203*; *Schering-Plough Corp. v. FTC, supra, 402 F.3d at p. 1075*; *Valley Drug Co. v. Geneva Pharmaceuticals, supra, 344 F.3d at p. 1308*.)

Third, there is a general policy in favor of settlement, perhaps more so in patent litigation. (*In re Ciprofloxacin Hydrochloride Antitrust Litigation, supra, 544 F.3d at p. 1333*; *In re Tamoxifen Citrate Antitrust Litigation, supra, 466 F.3d at p. 202*; *Schering-Plough Corp. v. FTC, supra, 402 F.3d at pp. 1072–1073*.) Patent litigation settlements “may benefit the public by introducing a new rival into the market, facilitating competitive production, **[*140]** and encouraging further innovation.” (*Schering-Plough Corp., at p. 1075*.) Conversely, a legal regime that hampers settlement “may actually decrease product innovation by amplifying the period of uncertainty around a drug manufacturer's ability to research, develop, and market the patented product or allegedly infringing product.” (*Ibid.*; see *In re Tamoxifen Citrate Antitrust **[****22]** Litigation, at p. 203*.)

[*647]** B. Federal Trade Commission v. Actavis

The Court of Appeal's adoption of the scope of the patent test was the product not of an analysis of the Cartwright Act's text, policy, or history, but of an assessment of procedural and policy-based aspects of patent law. The soundness of its choice of test thus depends on the extent to which that patent law assessment was sound. In *Actavis, supra, 570 U.S. ___ [186 L. Ed. 2d 343, 133 S. Ct. 2223]*, issued after the Court of Appeal's decision and after our grant of review, the Supreme Court reversed a federal decision holding Hatch-Waxman reverse payment settlement agreements “‘immune from antitrust attack so long as [their] anticompetitive effects fall within the scope of the exclusionary potential of the patent.’” (*570 U.S. at p. ___ [186 L. Ed. 2d at p. 353, 133 S. Ct. at p. 2227]*.) In the course of its opinion, the Supreme Court dismantled the underpinning of each of the cases the Court of Appeal had found persuasive.

First, the Supreme Court rejected the scope of the patent test's foundational presumption that the holder of a challenged patent enjoys all the rights attendant to ownership of a valid patent: “to refer … simply to what the holder of a valid patent could do does not by itself answer the antitrust question. The patent here may or may not be **[****23]** valid, and may or may not be infringed.” (*Actavis, supra, 570 U.S. at pp. ___ – ___ [186 L. Ed. 2d at p. 356, 133 S. Ct. at pp. 2230–2231]*.) To be sure, a valid patent allows the patentee to exclude others from the market, “[b]ut an *invalidated* patent carries with it no such right.” (*Id. at p. ___ [186 L. Ed. 2d at p. 356, 133 S. Ct. at p. 2231]*.) Patent litigation “put[s] the patent's validity at issue, as well as its actual preclusive scope”; simply because a settlement curtails testing and ultimate resolution of that issue, courts should not thereafter treat patent law and its presumptions as conclusively establishing the challenged patent's legitimate scope. (*Id. at p. ___ [186 L. Ed. 2d at p. 357, 133 S. Ct. at p. 2231]*.)

Second, the core policies underlying patent law are more nuanced than the cases applying a scope of the patent test had recognized, and the incentives to innovate far sturdier than those courts had feared. Patents carry with them a frequent cost—monopoly premiums the public must bear. (See *Lear, Inc. v. Adkins (1969) 395 U.S. 653, 670 [23 L. Ed. 2d 610, 89 S. Ct. 1902]*.) The willingness to pay that cost depends upon a quid pro quo: "'[T]he public **[*141]** interest in granting patent monopolies' exists only to the extent that 'the public is given a novel and useful invention' in 'consideration for its grant.'" (*Actavis, supra, 570 U.S. at p. ___ [186 L. Ed. 2d at p. 358, 133 S. Ct. at p. 2232]*.) Accordingly, patent policy does not support unquestioned protection of every inventor's rights, but instead favors "eliminating unwarranted patent grants so the **[****24]** public will not 'continually be required to pay tribute to would-be monopolists without need or justification.' " (*Id. at p. ___ [186 L. Ed. 2d at p. 359, 133 S. Ct. at p. 2233]*.) Vigorous testing for validity is thus desirable in order to weed out patents that shield a monopoly without offering corresponding public benefits. (See *Aronson v. Quick Point Pencil Co. (1979) 440 U.S. 257, 264 [59 L. Ed. 2d 296, 99 S. Ct. 1096]*; *United States v. Glaxo Group Ltd. (1973) 410 U.S. 52, 58 [35 L. Ed. 2d 104, 93 S. Ct. 861]*; *Katzinger Co. v. Chicago Mfg. Co. (1947) 329 U.S. 394, 400–401 [91 L. Ed. 374, 67 S. Ct. 416]*.) [7]

Third, the Supreme Court explained that while the policy favoring settlement of **[***648]** patent litigation offers some support for limiting scrutiny of agreements restraining competition only within the scope of a patent, it ultimately is not dispositive. (*Actavis, supra, 570 U.S. at pp. ___, ___ [186 L. Ed. 2d at pp. 360, 364, 133 S. Ct. at pp. 2234, 2238]*.) Settlements are generally a positive good, but not always; settlements of the sort challenged in *Actavis*, the court observed, can amount to "payment in return for staying out of the market" and permit **[****25]** monopoly premiums still to be charged and simply divided up between the patent holder and patent challenger; "[t]he patentee and the challenger gain; the consumer loses." (*Id. at pp. ___, ___ [186 L. Ed. 2d at p. 361, 133 S. Ct. at pp. 2234, 2235]*.) Such anticompetitive effects will not always be justified, and an antitrust action to test a settlement's legality may be warranted and feasible. (*Id. at pp. ___–___ [186 L. Ed. 2d at pp. 361–364, 133 S. Ct. at pp. 2235–2237]*].) Fears of chilling even legitimate settlements are overstated; all that allowing antitrust scrutiny does is remove the incentive to settle as a way to split monopoly profits. (*Id. at p. ___ [186 L. Ed. 2d at p. 363, 133 S. Ct. at p. 2237]*.) Because the scope of the patent test overvalues the policies underlying patent law at the expense of the equally relevant policies underlying ***antitrust law***, the court concluded, it cannot stand under federal law. (*Id. at p. ___ [186 L. Ed. 2d at p. 357, 133 S. Ct. at p. 2231]*.) **[*142]**

C. *The Scope of the Patent Test's Validity Under State Law*

Barr contends *Actavis* is distinguishable because it involved a public prosecution under the Federal Trade Commission Act (*15 U.S.C. § 45 et seq.*), not a private antitrust suit, and this court should embrace the scope of the patent test as a matter of state ***antitrust law***.

CA(5)[] **(5)** We agree *Actavis* is not dispositive on matters of state law. Indeed, even if *Actavis* had been a private Sherman Act case, its conclusions would not dictate how the Cartwright **[****26]** Act must be read. ***HN5***[] "Interpretations of federal ***antitrust law*** are at most instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was modeled not on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the 20th century." (*Aryeh v. Canon Business Solutions, Inc. (2013) 55 Cal.4th 1185, 1195 [151 Cal. Rptr. 3d 827, 292 P.3d 871]*; **[**859]** see *State of California ex rel. Van de Kamp v. Texaco, Inc. (1988) 46 Cal.3d 1147, 1164 [252 Cal. Rptr. 221, 762 P.2d 385]*.) That said, nothing in the United States Supreme Court's discussion of the legal rules at the boundary between antitrust and patent law hinged on the happenstance that the case under review involved a public prosecutor. Accordingly, that circumstance neither adds to nor detracts from the persuasive force the discussion would otherwise have.

CA(6)[] **(6)** What does affect the weight to be accorded *Actavis* is the extent to which its analysis establishes the metes and bounds of patent law and policy. Patent law is federal law. (*U.S. Const., art. I, § 8, cl. 8*; see *Bonito*

[7] As commentators have noted, an excess of invalid patents is one of the principal problems in modern patent law. (See Ford, *Patent Invalidity Versus Noninfringement* (2013) *99 Cornell L.Rev. 71, 74* & fn. 11 [discussing substantial scholarship on the point].) The pro-patent-challenge policy is particularly strong in the Hatch-Waxman Act setting, given the 180-day exclusivity bounty Congress adopted as an incentive to bring such challenges. (See *21 U.S.C. § 355(j)(5)(B)(iv)*; 12 Areeda & Hovenkamp, ***Antitrust Law***, *supra*, ¶ 2046, p. 340; Carrier, *Unsettling Drug Patent Settlements: A Framework for Presumptive Illegality*, *supra*, *108 Mich. L.Rev. at pp. 43, 64*; *ante*, at p. 134.)

Boats, Inc. v. Thunder Craft Boats, Inc., supra, 489 U.S. at pp. 146–157.) **HN6**[] **[***649]** The United States Supreme Court is the final arbiter of questions of patent law and the extent to which interpretations of ***antitrust law***—whether state or federal—must accommodate patent law's requirements, and *Actavis* is its latest word on the subject. If under *Actavis* patent law demands extensive deference to patents' presumed validity and the consecration **[****27]** of a broad range of agreements otherwise facially illegal under state law, we must abide by that judgment. Conversely, if the accommodation necessitated by patent policy is somewhat narrower than previously understood, we again must treat that determination as conclusive and reconsider the proper domain of state ***antitrust law*** in light of that cession of territory.

Barr asserts *Actavis* is alternatively distinguishable on the ground the underlying patent there was far weaker than the underlying patent here. [8] But **[*143]** *Actavis*'s analysis was not contingent on a particular level of uncertainty surrounding the patent before it. Instead, the court simply recognized that any patent might, or might not, be valid. (Actavis, supra, 570 U.S. at p. ___ [186 L. Ed. 2d at p. 356, 133 S. Ct. at p. 2231]; see id. at p. ___ [186 L. Ed. 2d at p. 367, 133 S. Ct. at p. 2240] (dis. opn. of Roberts, C. J.) [recognizing the problem "that we're not quite certain if the patent is actually valid, or if the competitor is infringing it," a problem "that is always the case" in patent disputes].) Indeed, a critical insight undergirding *Actavis* is that patents are in a sense probabilistic, rather than ironclad: they grant their holders a potential but not certain right to exclude.

The uncertainty concerning a patent's validity is a by-product of the realities surrounding patent issuance and the legal regime Congress and the courts have established for patent enforcement. In the first instance, a patent "simply represents a legal conclusion reached by the Patent Office. Moreover, the legal conclusion is predicated on factors as to which reasonable men can differ widely. Yet the Patent Office is often obliged to reach its decision in an *ex parte* proceeding, without the aid of the arguments which could be advanced by parties interested in proving patent invalidity." (Lear, Inc. v. Adkins, supra, 395 U.S. at p. 670.) That decision is constrained by time and resource pressures; facing an enormous backlog, patent examiners may average less than 20 hours spent on each application. (Ford, *Patent Invalidity Versus Noninfringement*, *supra*, 99 Cornell L.Rev. at pp. 87–89; Lemley & Shapiro, *Probabilistic Patents*, *supra*, 19 J. Econ. Persp. at p. 79; Lemley, *Rational Ignorance at the Patent Office* (2001) 95 Nw.U. L.Rev. 1495, 1499–1500.) Given this underlying reality, Congress has elected not to make the issuance of a patent conclusive but, rather, subject to validation or invalidation in court proceedings. (35 U.S.C. § 282; see, e.g., **[****29]** Alice Corp. v. CLS Bank Int'l (2014) 573 U.S. ___ [189 L. Ed. 2d 296, 134 S. Ct. 2347]; Walker, Inc. v. Food Machinery (1965) 382 U.S. 172, 176 [15 L. Ed. 2d 247, 86 S. Ct. 347].) A patent is, in effect, a right to ask the government to exercise its power to keep others from **[**860]** using an invention without consent. (Zenith Corp. v. Hazeltine (1969) 395 U.S. 100, 135 [23 L. Ed. 2d 129, 89 S. Ct. 1562].) Whether a court will do **[***650]** so—whether it will issue an injunction—will depend on actual proof of validity.

CA(7)[] **(7)** The non-uniform application of collateral estoppel adds another layer of uncertainty. **HN7**[] A finding that a patent is invalid operates in rem and estops the patentee from asserting validity against the world. (Blonder-Tongue v. University Foundation (1971) 402 U.S. 313, 349–350 [28 L. Ed. 2d 788, 91 S. Ct. 1434].) In contrast, a finding that a patent is valid operates only on the parties and does not extend from one infringement case to the next. A future challenger with new or better information may subsequently raise, and succeed on, an invalidity defense to a charge of infringement. (In re Swanson (Fed. Cir. 2008) 540 F.3d 1368, 1377; Ethicon, Inc. v. Quigg (Fed. Cir. 1988) **[*144]** 849 F.2d 1422, 1429, fn. 3 [" 'A patent is not held valid for all purposes but, rather, not invalid on the record before the court'" and "'simply remains valid until another challenger carries'" the burden of showing invalidity.].) Each case may show only that a patent has not been invalidated, yet.

If the assertion of patent rights leads to a court injunction excluding a competitor from the marketplace, there is no antitrust problem. If instead the assertion leads to a private settlement **[****30]** agreement, there is a potential antitrust problem. With a settlement, any restraint arises directly from the private agreement and only indirectly from the patent, which remains in the background, motivating the parties' actions according to their assessments of its

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[8] After the settlement, Bayer submitted the '444 patent to the Patent and Trademark **[****28]** Office for reexamination and obtained reaffirmation that it was not invalid. (See 35 U.S.C. § 302.) Later patent challenges by litigants other than Barr were unsuccessful. (See In re Ciprofloxacin Hydrochloride Antitrust Litigation (E.D.N.Y. 2005) 363 F. Supp. 2d 514, 519–520.)

strength. That a patent has not (yet) been invalidated may allow some confidence about its fundamental enforceability, but does not allow a court to skip entirely an antitrust analysis of competitive restraints within the patent's scope on the assumption that its validity has been established. The scope of the patent test is flawed precisely because it assumes away whatever level of uncertainty a given patent—the '444 patent here, no less than the one at issue in *Actavis*—may be subject to. [9]

Aside from its attempts to distinguish *Actavis*, Barr argues a 1953 California decision predating the recent federal Hatch-Waxman Act decisions favors the scope of the patent test for Cartwright Act challenges to patent settlements. (See Fruit Machinery Co. v. F. M. Ball & Co. (1953) 118 Cal. App. 2d 748, 758 [258 P.2d 852].) We do not read that opinion so broadly.

In *Fruit Machinery*, six canning companies formed a corporation and licensed to it rights under a fruit pitter patent owned by one of the companies. In turn, the licensee contracted with each of the six, sublicensing to them the right to build and own a specified number of pitters and to lease additional pitters in exchange for payment of royalties. A dispute over nonpayment **[***651]** of royalties arose between the licensee and one of the six companies. The company raised as a defense to payment that the contractual arrangements **[*145]** gave the six companies an unlawful **[****32]** monopoly on pitter ownership and were thus unenforceable. The Court of Appeal found no antitrust violation, explaining: "Defendant has not shown that the parties, in executing and carrying out the sublicense agreement in suit, exercised rights or powers not accorded them by the patent law *or abused any rights or powers accorded them by that law*." **[**861]** (*Fruit Machinery Co. v. F. M. Ball & Co., supra, 118 Cal. App. 2d at p. 762*, italics added.) The Court of Appeal distinguished other cases involving antitrust violations as involving a "patentee or his assignee [who] went beyond that which was necessary or incidental to the scope of his patent and brought himself within the proscription of the antitrust laws." (*Id. at p. 763*.)

Fruit Machinery does not stand for the proposition that any restraints of trade within the scope of a patent are valid. Rather, it recognizes trade restraints that exceed those authorized by a patent may be invalid and, moreover, that the "abuse[]" of patent rights may *also* run afoul of ***antitrust law***. (*Fruit Machinery Co. v. F. M. Ball & Co., supra, 118 Cal. App. 2d at p. 762*.) The court responded to the concern that the corporate licensee might use its exclusive patent rights to charge far higher royalties for leased than owned pitters not by saying such a differential would automatically be lawful, as within the scope of **[****33]** any patent rights, but by saying only "that such has not happened yet" and it would not presume a "[f]uture violation … of the antitrust laws." (*Ibid.*)

CA(8)[] **(8)** No other California authority Barr has cited, nor any we have found, establishes the scope of the patent test is applicable under the Cartwright Act. Even if such precedent existed, we would be forced to reexamine it in light of *Actavis*. ***HN8***[] The scope of the patent test insulates from antitrust scrutiny virtually any agreement that restrains trade no more than the patent itself would have, if valid. State law must yield to federal, but we cannot under the guise of patent law carve into the Legislature's enactments a larger exception than federal law dictates, and *Actavis* shows such a broad exemption is not required. Accordingly, we conclude the scope of the patent test is inapplicable to Cartwright Act claims.

IV. *Analysis of Reverse Payment Patent Settlements*

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[9] The *Actavis* treatment of patents as in some sense probabilistic rests on a substantial body of scholarship suggesting patents are best understood this way. (See, e.g., Lemley & Shapiro, *Probabilistic Patents*, *supra*, 19 J. Econ. Persp. at pp. 75–76, 95; Shapiro, *Antitrust Analysis of Patent Settlements Between Rivals* (Summer 2003) 17 Antitrust 70, 75; Leffler & Leffler, *The Probabilistic Nature of Patent Rights: In Response to Kevin McDonald* (Summer 2003) 17 Antitrust 77; Shapiro, *Antitrust limits to patent settlements* (2003) 34 RAND J. Econ. 391, 395.) Others, including the *Actavis* dissenters, have disagreed, insisting a patent ultimately is always only valid or invalid, whether we know it yet **[****31]** or not. (*Actavis, supra, 570 U.S. at p. ___ [186 L. Ed. 2d at p. 372, 133 S. Ct. at p. 2244*] (dis. opn. of Roberts, C. J.); Schildkraut, *Patent-Splitting Settlements and the Reverse Payment Fallacy* (2004) 71 Antitrust L.J. 1033; McDonald, *Hatch-Waxman Patent Settlements and Antitrust: On "Probabilistic" Patent Rights and False Positives* (Spring 2003) 17 Antitrust 68.) The Supreme Court majority's views are conclusive as to which side of this philosophical divide over the proper treatment of patents is correct, and we follow them.

Having joined the United States Supreme Court in rejecting the scope of the patent test, we consider what rubric courts should instead apply under state law to reverse payment patent settlements.

A. *Antitrust Analysis Under the Cartwright Act*

As discussed, although the prohibitions of the **[****34]** Cartwright Act are framed in superficially absolute language, deciding antitrust illegality is not as simple as **[*146]** identifying whether a challenged agreement involves a restraint of trade. (See *Chicago Board of Trade v. United States (1918) 246 U.S. 231, 238 [62 L. Ed. 683, 38 S. Ct. 242]* [pointing out that "[*e*]*very* agreement concerning trade … restrains" (italics added)].) Instead, the Cartwright Act and Sherman Act carry forward the common law understanding that "only unreasonable restraints of trade are prohibited." (*Marin County Bd. of Realtors, Inc. v. Palsson, supra, 16 Cal.3d at p. 930*.)

HN9[] ***CA(9)***[] **(9)** Under the traditional rule of reason, "inquiry is limited to whether the challenged conduct promotes or suppresses **[***652]** competition." (*Fisher v. City of Berkeley (1984) 37 Cal.3d 644, 672 [209 Cal. Rptr. 682, 693 P.2d 261]*, affd. *sub nom.* *Fisher v. Berkeley (1986) 475 U.S. 260 [89 L. Ed. 2d 206, 106 S. Ct. 1045]*.) To determine whether an agreement harms competition more than it helps, a court may consider "the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption." (*United States v. Topco Associates (1972) 405 U.S. 596, 607 [31 L. Ed. 2d 515, 92 S. Ct. 1126]*; see *Corwin v. Los Angeles Newspaper Service Bureau, Inc., supra, 4 Cal.3d at p. 854*.) In a typical case, this may entail expert testimony on such matters as the definition of the relevant market (*Corwin, at p. 855*) and the extent of a defendant's market power (*Fisherman's Wharf Bay Cruise Corp. v. Superior Court (2003) 114 Cal.App.4th 309, 334–339 [7 Cal. Rptr. 3d 628]*; *Roth v. Rhodes (1994) 25 Cal.App.4th 530, 542–543 [30 Cal. Rptr. 2d 706]*).

Rule of reason inquiry is not required in every case; we and the United States Supreme Court have partially simplified **[**862]** the analysis by identifying categories of agreements **[****35]** or practices that can be said to always lack redeeming value and thus qualify as per se illegal. (See *Northern Pac. R. Co. v. United States (1958) 356 U.S. 1, 5 [2 L. Ed. 2d 545, 78 S. Ct. 514]*; *Marin County Bd. of Realtors, Inc. v. Palsson, supra, 16 Cal.3d at pp. 930–931*; *Oakland-Alameda County Builders' Exchange v. F. P. Lathrop Constr. Co. (1971) 4 Cal.3d 354, 360–362 [93 Cal. Rptr. 602, 482 P.2d 226]*.) "The per se rule reflects an irrebuttable presumption that, if the court were to subject the conduct in question to a full-blown inquiry, a violation would be found under the traditional rule of reason." (*Fisher v. City of Berkeley, supra, 37 Cal.3d at p. 666*.)

CA(10)[] **(10)** More recently, a third category, quick look rule of reason analysis, has emerged. (*California Dental Assn. v. FTC (1999) 526 U.S. 756, 769–770 [143 L.Ed.2d 935, 119 S.Ct. 1604]*; see *FTC v. Indiana Federation of Dentists (1986) 476 U.S. 447, 459–460 [90 L. Ed. 2d 445, 106 S. Ct. 2009]*; *NCAA v. Board of Regents of Univ. of Okla. (1984) 468 U.S. 85, 109–110 [82 L.Ed.2d 70, 104 S.Ct. 2948]*.) ***HN10***[] Under the quick look approach, applicable to cases where "an observer with even a rudimentary understanding of economics **[*147]** could conclude that the arrangements in question would have an anticompetitive effect on customers and markets," a defendant may be asked to come forward with procompetitive justifications for a challenged restraint without the plaintiff having to introduce elaborate market analysis first. (*California Dental Assn., at p. 770*.)

There was a time when this court and the United States Supreme Court treated the choice between per se and rule of reason analysis as a necessary threshold inquiry involving rigidly distinct analytic boxes. In more recent years, however, the Supreme Court has explained, "[t]he truth is that our categories of analysis of anticompetitive effect are less fixed **[****36]** than terms like '*per se*,' 'quick look,' and 'rule of reason' tend to make them appear." (*California Dental Assn. v. FTC, supra, 526 U.S. at p. 779*.) "[T]here is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint." (*Id. at pp. 780–781*.) **[***653]** The emergence of quick look rule of reason analysis did not signal the supplanting of the traditional per se/rule of reason dichotomy with a new trichotomy (*Polygram Holding, Inc. v. FTC (D.C. Cir. 2005) 416 F.3d 29, 35)*, but rather a shift to """something of a sliding scale"""" in antitrust analysis. (*Actavis, supra, 570 U.S. at p. ___ [186 L. Ed. 2d at p. 364, 133 S. Ct. at p. 2237]*.)

CA(11)[] **(11)** This more nuanced approach makes equal sense for claims under the Cartwright Act. Like the federal antitrust statutes, **HN11**[] nothing in the text of the Cartwright Act dictates the precise details of the per se and rule of reason approaches; these are but useful tools the courts have developed over time to carry out the broad purposes and give meaning to the general phrases of the antitrust statutes. (See *National Soc. of Professional Engineers v. U. S., supra, 435 U.S. at p. 688*.) It is consistent with the common law tradition at the root of our antitrust laws to describe, as the United States Supreme Court now has, **[****37]** the analytic approach as involving a continuum, with the "the circumstances, details, and logic" of a particular restraint (*California Dental Assn. v. FTC, supra, 526 U.S. at p. 781*) dictating how the courts that confront the restraint should analyze it. In lieu of an undifferentiated one-size-fits-all rule of reason, courts may "devise rules … for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones." (*Leegin Creative Leather Products, Inc. v. PSKS, Inc. (2007) 551 U.S. 877, 898–899 [168 L. Ed. 2d 623, 127 S. Ct. 2705]*; see *Fisher v. City of Berkeley, supra, 37 Cal.3d at pp. 671–677* [tailoring the rule of reason to account for differences between private and municipal government actions].)
[*148]

[863]** It follows that we must consider not simply whether per se or rule of reason analysis applies to reverse payment patent settlements. To the extent rule of reason analysis applies, as we will conclude it does, we must also consider how the analysis should be structured to most efficiently differentiate between reasonable and unreasonable restraints of trade in this context. (See *California Dental Assn. v. FTC, supra, 526 U.S. at p. 781*.)

B. *The Competitive Harm from Purchasing an Extension of Monopoly*

CA(12)[] **(12)** We begin with the proposition that **HN12**[] agreements to establish or maintain a monopoly are restraints of trade made unlawful by the Cartwright Act. (*Lowell v. Mother's **[****38]** Cake & Cookie Co. (1978) 79 Cal. App. 3d 13, 23 [144 Cal. Rptr. 664]*; *Dimidowich v. Bell & Howell (9th Cir. 1986) 803 F.2d 1473, 1478*.) Under general antitrust principles, a business may permissibly develop monopoly power, i.e., "the power to control prices or exclude competition" (*United States v. du Pont & Co. (1956) 351 U.S. 377, 391 [100 L. Ed. 1264, 76 S. Ct. 994]*), through the superiority of its product or business acumen. To acquire or maintain that power through agreement and combination with others, however, is quite a different matter. (*United States v. Grinnell Corp. (1966) 384 U.S. 563, 570–571 [16 L. Ed. 2d 778, 86 S. Ct. 1698]*.)

Pursuant to this rule, businesses may not engage in a horizontal allocation of markets, with would-be competitors dividing up territories or customers. (*United States v. Topco Associates, supra, 405 U.S. at pp. 608, 612*; *Vulcan Powder Co. v. Hercules Powder Co., supra, 96 Cal. at pp. 514–515*; **[***654]** *Guild Wineries & Distilleries v. J. Sosnick & Son (1980) 102 Cal. App. 3d 627, 633–635 [162 Cal. Rptr. 87]*.) Such allocations afford each participant an "enclave … , free from the danger of outside incursions," in which to exercise monopoly power and extract monopoly premiums. (*United States v. Sealy, Inc. (1967) 388 U.S. 350, 356 [18 L. Ed. 2d 1238, 87 S. Ct. 1847]*.)

Similarly, a firm may not "pay[] its only potential competitor not to compete in return for a share of the profits that firm can obtain by being a monopolist." (*Valley Drug Co. v. Geneva Pharmaceuticals, supra, 344 F.3d at p. 1304*.) In *Palmer v. BRG of Georgia, Inc. (1990) 498 U.S. 46 [112 L. Ed. 2d 349, 111 S. Ct. 401]*, for example, two competing bar review course providers did just that. One provider agreed to withdraw from a particular state market in exchange for the second provider paying the withdrawing provider a share of subsequent profits and agreeing in return not to compete outside that state market. In a *per curiam* opinion, the United States Supreme Court **[****39]** summarily declared the agreement unlawful on its face. (*Id. at pp. 49–50*; see *Getz Bros. & Co. v. Federal Salt Co. (1905) 147 Cal. 115, 119 [81 P. 416]* [payment for **[*149]** agreement not to compete and to discourage others from competing is illegal]; *Wright v. Ryder, supra, 36 Cal. at p. 359* [agreement not to compete in Cal. market violates common law prohibition on restraints of trade].)

CA(13)[] **(13)** Second, these principles extend into the patent arena to prohibit a patentee's purchase of a potential competitor's consent to stay out of the market. **HN13**[] ***Antitrust law*** condemns a patentee's payment "to maintain supracompetitive prices to be shared among the patentee and the challenger rather than face what might have been a competitive market." (*Actavis, supra, 570 U.S. at p. ___ [186 L. Ed. 2d at p. 363, 133 S. Ct. at p. 2236]*.) This is so even when the patent is likely valid: "The owner of a particularly valuable patent might contend, of course, that even a small risk of invalidity justifies a large payment. But, be that as it may, the payment (if otherwise unexplained) likely seeks to prevent the risk of competition. And, as we have said, that consequence constitutes the relevant anticompetitive harm." (*Ibid*.)

Actavis embraces the insights of Professor Carl Shapiro and others that the relevant benchmark in evaluating reverse payment patent settlements should be no different from the benchmark in evaluating **[****40]** any other challenged agreement: What would the state of competition have been without the agreement? In the case of a reverse payment **[**864]** settlement, the relevant comparison is with the average level of competition that would have obtained absent settlement, i.e., if the parties had litigated validity/invalidity and infringement/noninfringement to a judicial determination. (Shapiro, *Antitrust limits to patent settlements*, *supra*, 34 RAND J. Econ. at p. 396; see Addanki & Butler, *Activating Actavis: Economic Issues in Applying the Rule of Reason to Reverse Payment Settlements (2014) 15 Minn. J. L. Sci. & Tech. 77, 93*; Lemley & Shapiro, *Probabilistic Patents*, *supra*, 19 J. Econ. Persp. at p. 94; Willig & Bigelow, *Antitrust policy toward agreements that settle patent litigation* (2004) 49 Antitrust Bull. 655, 664, 677–679.) Consider a patent with a 50 percent chance of being upheld. After litigation, on average, consumers would be subject to a monopoly for half the remaining life of the patent. A settlement that allowed a generic market entry at the midpoint of the time remaining until expiration would replicate the expected level of competition; the period of exclusion would reflect the patent's **[***655]** strength. But a settlement that delayed entry still longer would extend the elimination of competition beyond what the patent's strength warranted; to the extent it did, the additional elimination of the possibility of **[****41]** competition would constitute cognizable anticompetitive harm. (See *Actavis, supra, 570 U.S. at p. ___ [186 L. Ed. 2d at p. 363, 133 S. Ct. at p. 2236]*.)

CA(14)[] **(14)** Barr argues that the procompetitive or anticompetitive effects of a settlement must be measured by comparison to the entire remaining life of a patent. We disagree. *Actavis* makes clear that ***HN14***[] for antitrust purposes patents are no longer to be treated as presumptively ironclad. This means the period **[*150]** of exclusion attributable to a patent is not its full life, but its expected life had enforcement been sought. This expected life represents the baseline against which the competitive effects of any agreement must be measured. [10] If an agreement only replicates the likely average result of litigation, any exclusion is a function of the underlying patent strength; if it extends exclusion beyond that point, this further exclusion from the marketplace—and the attendant anticompetitive effect—is attributable to the agreement. *Actavis* thus represents an application of the settled principle that "[t]he owner of a patent cannot extend his statutory grant by contract or agreement. A patent affords no immunity for a monopoly not fairly or plainly within the grant." (*U. S. v. Masonite Corp. (1942) 316 U.S. 265, 277 [86 L.Ed. 1461, 62 S.Ct. 1070]*.) The measure of the statutory grant, and the limit on the monopoly that **[****42]** may be preserved by agreement, is the average expected duration that would have resulted from judicial testing.

CA(15)[] **(15)** This method of analysis, and of assessing anticompetitive harm, is not materially different from that applied in any other garden-variety antitrust case. ***HN15***[] Every case involves a comparison of a challenged agreement against a prediction about—a probabilistic assessment of—the expected competition that would have arisen in its absence. (Shapiro, *Antitrust Analysis of Patent Settlements Between Rivals*, *supra*, 17 Antitrust at p. 70.) Every restraint of trade condemned for suppressing market entry involves uncertainties about the extent to which competition would have come to pass. (Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, *supra*, *109 Colum. L.Rev. at p. 637*.) No matter; as the leading antitrust treatise notes, "the law does not condone the purchase of protection from uncertain competition any more **[****43]** than it condones the elimination of actual competition." (12 Areeda & Hovenkamp, ***Antitrust Law***, *supra*, ¶ 2030b, p. 220; see *U.S. v. Microsoft Corp. (D.C. Cir. 2001) 253 F.3d 34, 79* (en banc) ["it would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will …"].) The antitrust laws foreclose agreements eliminating "the risk of competition"—the competitive market that "might **[**865]** have been." (*Actavis, supra, 570 U.S. at p. ___ [186 L. Ed. 2d at p. 363, 133 S. Ct. at p. 2236]*.) Purchasing freedom from the possibility of competition, whether done by a patentee or anyone else, is illegal. An

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[10] To be clear, because the relevant baseline is the result that would have occurred in the absence of any agreement, it is not a cognizable harm simply to show that the parties might have elected a different settlement agreement more favorable to competition and consumers. There is no statutory right to have parties enter the agreement most favorable to competition, only a prohibition against entering agreements that harm competition.

agreement to exchange consideration for elimination of any portion of the period of **[***656]** competition that would have been expected had a patent been litigated is a violation of the Cartwright Act.
[*151]

C. *The Structure of the Rule of Reason as Applied to Patent Settlements*

We consider next how to identify whether the parties' settlement agreement eliminates competition beyond the point at which competition would have been expected in the absence of an agreement. Only if the agreement limits competition beyond that point, the point the strength of the patent would have justified, is there an antitrust issue.

1. *Plaintiff's Prima Facie Case*

CA(16)[] **(16)** We conclude ***HN16***[] a third party plaintiff challenging a reverse payment patent settlement **[****44]** must show four elements: (1) the settlement includes a limit on the settling generic challenger's entry into the market; (2) the settlement includes cash or equivalent financial consideration flowing from the brand to the generic challenger; and the consideration exceeds (3) the value of goods and services *other* than any delay in market entry provided by the generic challenger to the brand, as well as (4) the brand's expected remaining litigation costs absent settlement. We explain these elements in turn.

That a plaintiff challenging a reverse payment settlement must establish the settlement limits the challenging generic's entry is self-evident. If the settlement contains no component of delay and permits the generic to enter the market and compete fully and immediately, there is no restraint of trade and no potential for antitrust concern.

As well, ***HN17***[] a plaintiff must establish a reverse payment—financial consideration flowing from the brand to the generic challenger. [11] In the absence of payment, one would expect rational parties that settle to select a market entry point roughly corresponding to their joint expectation as to when entry would have occurred, on average, if the patent's **[****45]** validity and infringement had been fully litigated. (Hovenkamp et al., *Anticompetitive Settlement of Intellectual Property Disputes* (2003) *87 Minn. L.Rev. 1719, 1762*.) If market entry were substantially later than the generic thought it could obtain through litigation, the generic would be unwilling to settle and forgo the additional profits it thought it could earn from an earlier entry; conversely, if the entry were **[*152]** substantially earlier than the brand thought it could obtain through litigation, the brand would not settle and forgo an additional period of monopoly. Absent payment, one can accept an agreement to postpone market entry as a fair approximation of the expected level of competition that would have obtained had the parties litigated; absent payment, any delay in entry may be attributed to the effective strength of the challenged patent, rather than the settlement agreement. (See *ibid.*; Carrier, *Payment After* Actavis (2014) *100 Iowa L.Rev. 7, 17*.)

CA(17)[] **(17)** **[***657]** Third, a plaintiff must establish the consideration to the generic challenger exceeds the value of any other collateral products or services provided by the generic to the brand. As the Supreme Court noted, ***HN18***[] the concern that a reverse payment raises will depend in part on "its independence from other services for which it might represent payment." (*Actavis, supra, 570 U.S. at p. ___ [186 L. Ed. 2d at p. 364, 133 S. Ct. at p. 2237]*.) A "payment may reflect compensation for other services that the generic has promised to perform—such as distributing the patented item or helping to develop a market for that item." (*Id. at p. ___ [186 L. Ed. 2d at p. 362, 133 S. Ct. at p. 2236]*.) **[**866]** If payment is no more than would be expected as compensation for additional products or services, then the agreement includes no additional consideration for delay and we can trust that any limit on competition is a legitimate consequence of the patent's strength and the contracting parties' expectations concerning its exclusionary power.

[11] To some extent, the settlement agreement challenged here is a relic. Cash reverse payments were not uncommon in the 1990s, but shortly thereafter brands and generics began using a wide range of other forms of consideration to accomplish reverse payment. (See Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition, supra, 109 Colum. L.Rev. at pp. 647–658*.) Because **[****46]** the Cipro settlement involved cash, we need not define precisely what noncash forms of consideration will qualify, but courts considering Cartwright Act claims should not let creative variations in the form of consideration result in the purchase of freedom from competition escaping detection.

Considerable caution is in **[****47]** order in evaluating settlements that include side agreements for generic products or services. Historically, it appears brands and generics have engaged in business dealings outside the settlement context far less often than in it. (Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition, supra, 109 Colum. L.Rev. at pp. 663–668*.) A side agreement involving difficult to value assets might conceivably be added to a patent settlement to provide cover for the purchase of additional freedom from competition. (*Id. at pp. 632–633, 669*; Bulow, *The Gaming of Pharmaceutical Patents* in 4 Innovation Policy and the Economy, *supra*, at pp. 169–171; Carrier, *Unsettling Drug Patent Settlements: A Framework for Presumptive Illegality*, *supra*, *108 Mich. L.Rev. at p. 79*.) This court long ago established that side deals should not be permitted to serve as fig leaves for agreements to eliminate competition. In *Getz Bros. & Co. v. Federal Salt Co., supra, 147 Cal. 115*, the parties entered an agreement to exchange money for (1) an agreement not to compete and to discourage competition in the salt trade and (2) more than 1,000 pounds of salt. Precisely how much of the payment was attributable to the actual provision of salt we could not say, but so long as any portion of the payment was attributable to the covenant not to compete—and we viewed it as "plain … that part of it, at least, was"—the deal as a whole was an illegal restraint of trade. (*Id. at p. 118*.)

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HN19[] ***CA(18)***[] **(18)** Fourth, a plaintiff must establish that the amount of the payment, over and above the **[****48]** value of collateral products or services from the generic, also exceeds the brand's anticipated future litigation costs. In some cases, a "reverse payment … may amount to no more than a rough approximation of the litigation expenses saved through the settlement. … Where a reverse payment reflects traditional settlement considerations, such as avoided litigation costs or fair value for services, there is not the same concern that a patentee is using its monopoly profits to avoid the risk of patent invalidation or a finding of noninfringement. In such cases, the parties may have provided for a reverse payment without having sought or brought about the anticompetitive consequences we mentioned above." (*Actavis, supra, 570 U.S. at p. ___ [186 L. Ed. 2d at p. 362, 133 S. Ct. at p. 2236]*.) A rational brand might be indifferent as between (1) actually litigating or (2) settling, with market entry at the point expected, on average, from asserting its patent in litigation and a payment to the generic in an amount up to what would have been spent in that litigation. **[***658]** It is thus necessary to evaluate the reverse payment's "scale in relation to the payor's anticipated future litigation costs." (*Id. at p. ___ [186 L. Ed. 2d at p. 364, 133 S. Ct. at p. 2237*].)

CA(19)[] **(19)** We consider briefly the allocation of burdens of proof and production. **[****49]** ***HN20***[] Unless a challenged settlement agreement includes both a restraint on generic competition and a reverse payment to the generic in excess of both brand litigation costs and generic collateral products and services, there is no reason to assume the settlement includes any element of purchased freedom from competition, as opposed to a limit on competition flowing naturally, and lawfully, from the perceived strength of the brand's patent. Accordingly, the burden of proof as to these elements rests with the Cartwright Act plaintiff. (See *Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 861 [107 Cal. Rptr. 2d 841, 24 P.3d 493]*.)

CA(20)[] **(20)** The burden of producing evidence (see *Evid. Code, §§ 110*, *550*) is a slightly different matter. ***HN21***[] "'Where the evidence necessary to establish a fact essential to a claim lies peculiarly within the knowledge and competence of one of the parties, that party has the burden of going forward with the evidence on the issue although it is not the party asserting the claim.'" (*Sanchez v. Unemployment Ins. Appeals Bd. (1977) 20 Cal.3d 55, 71 [141 Cal. Rptr. 146, 569 P.2d 740]*.) **[**867]** This is so with regard to both a settling party's own litigation costs and the existence and value of any collateral products or services provided as part of a patent settlement; these are matters about which the settling parties will necessarily have superior knowledge. [12] Accordingly, **[*154]** once a plaintiff has shown **[****50]** an agreement involving a reverse payment and delay, the defendants have the burden of coming forward with evidence of litigation costs and the value of collateral products and services. [13] If the defendants fail to do so, because, e.g., there was no side agreement or because they do not

[12] We do not suggest a defendant's testimony concerning the value conveyed in side agreements is entitled to any more weight than the plaintiff's, only that the defendants have the initial burden of introducing evidence of agreements for the purchase of other products or services sufficiently valuable to explain any payment.

dispute the collective amounts fall short of any payment to the generic, the plaintiff has satisfied its burden on these points. If instead the defendants do so, the plaintiff must carry the ultimate burden of persuasion that any reverse payment exceeds litigation costs and the value of collateral products or services.

CA(21)[] **(21)** We further conclude that ***HN22***[] a **[****51]** showing of the above elements is not only necessary but also sufficient to make out a prima facie case that the settlement is anticompetitive. If a brand is willing to pay a generic more than the costs of continued litigation, and more than the value of any collateral benefits, in order to settle and keep the generic out of the market, there is cause to believe some portion of the consideration is payment for exclusion beyond the point that would have resulted, on average, from simply litigating the case to its conclusion. Otherwise, the brand would have had little incentive to settle at such a high price. Moreover, the larger the gap, the stronger the inference one can draw.

A wealth of economic scholarship and analysis supports this inference. Because **[***659]** the profit that can be earned under monopoly conditions is greater than the combined profit that can be earned under duopoly conditions, [14] a brand and a generic have a substantial incentive to settle at the latest market entry date possible, with the brand paying a portion of monopoly profits to compensate the generic for what it would have earned with an earlier entry. [15] If the parties can share monopoly profits through a reverse payment **[****52]** from the **[*155]** brand to the generic, the generic no longer has motivation to hold out for its best estimate of the average entry point it could obtain through litigation. Instead, the parties' interests align in favor of maximizing their combined wealth by extending the monopoly for as long as possible. Once payment to the generic exceeds what the brand is otherwise receiving from it in **[**868]** products and services or would have spent to litigate, a court may fairly presume the settling parties have engaged in such conduct and should be put to the burden of coming forward with a procompetitive justification for their settlement. (Elhauge & Krueger, *Solving the Patent Settlement Puzzle*, *supra*, *91 Tex. L.Rev. at pp. 297–304*; see Edlin et al., *Activating* Actavis (2013) 28 Antitrust 16, 22, appen.; Lemley & Shapiro, *Probabilistic Patents*, *supra*, 19 J. Econ. Persp. at p. 93; Shapiro, *Antitrust limits to patent settlements*, *supra*, 34 RAND J. Econ. at p. 408.)

Barr argues this degree of scrutiny will stifle innovation. But Congress was not authorized to, and did not, grant inventors eternal monopolies; instead, it approved a scheme that presumptively represents the appropriate balance between promoting innovation and allowing competition. Reverse payment patent settlements may enable the parties to extend the monopoly beyond that point. (Elhauge & Krueger, *Solving the Patent Settlement Puzzle, supra, 91 Tex. L.Rev. at pp. 295–304*; Lemley & Shapiro, *Probabilistic Patents*, *supra* **[****54]** , 19 J. Econ. Persp. at p. 93; Leffler & Leffler, *Efficiency Trade-Offs in Patent Litigation Settlements: Analysis Gone Astray?* (2004) *39 U.S.F. L.Rev. 33, 37–38*; Shapiro, *Antitrust Analysis of Patent Settlements Between Rivals*, *supra*, 17 Antitrust at p.

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[13] Here, the brand, Bayer, settled out of the antitrust case, and Barr would not be in a superior position with regard to knowledge of Bayer's future patent litigation costs, so the burden of production on this point would remain with plaintiffs.

[14] While this is a broadly shared economic tenet, it has also been empirically demonstrated by the FDA in the current context. (See FDA, Center for Drug Evaluation and Research, Generic Competition and Drug Prices (2010) online at <*http://www.fda.gov/AboutFDA/CentersOffices/Officeofmedicalproductsandtobacco/CDER/ucm129385.htm*> [as of May 7, 2015].) Indeed, in its briefing Barr effectively concedes this is the case here: "[E]ach day of early entry would have cost **[****53]** Bayer more given the price of its branded product than it would have benefitted Barr given the price of its generic product."

[15] *Actavis, supra, 570 U.S. at pages ___–___ [186 L. Ed. 2d at pages 361–362, 133 S. Ct. at pages 2234–2235]*; see, e.g., Hovenkamp, *Anticompetitive Patent Settlements and the Supreme Court's* Actavis *Decision*, *supra*, *15 Minn. J. L. Sci. & Tech. at pages 8–13*; Mungan, *Reverse Payments, Perverse Incentives* (2013) *27 Harv. J. Law & Tech. 1, 5–6, 27, 34*; Elhauge & Krueger, *Solving the Patent Settlement Puzzle* (2012) *91 Tex. L.Rev. 283, 289*; Kades, *Whistling Past the Graveyard: The Problem with the* Per Se *Legality Treatment of Pay-for-Delay Settlements* (2009) 5 Competition Pol'y Int'l 143, 148–150; Leffler & Leffler, *Settling the Controversy over Patent Settlements: Payments by the Patent Holder Should Be Per Se Illegal* in ***Antitrust Law*** and Economics (Kirkwood edit., 2004) 475, 480–484; Willig & Bigelow, *Antitrust policy toward agreements that settle patent litigation*, *supra*, 49 Antitrust Bull. at page 659; Bulow, *The Gaming of Pharmaceutical Patents* in 4 Innovation Policy and the Economy, *supra*, at page 166; Shapiro, *Antitrust limits to patent settlements*, *supra*, 34 RAND J. Econ. at pages 394–395.

73.) Indeed, insufficient scrutiny of such settlements has the potential to hamper innovation by allowing weak patents to offer the exact same exclusionary potential and monopoly possibilities as **[***660]** strong ones, [16] thus steering innovator incentives away from more costly true innovation and toward cheaper, less socially valuable pseudoinnovation. (See Mungan, *Reverse Payments, Perverse Incentives, supra, 27 Harv. J. Law & Tech. at pp. 42–44*; Elhauge & Krueger, *Solving the Patent Settlement Puzzle, at pp. 294–295*.)
[*156]

Relatedly, Barr expresses concern that close scrutiny of reverse payment settlements will chill some generics from challenging patents, to the detriment of consumers. But any challenge that results in the brand simply paying the generic not to compete—a potentially common outcome absent scrutiny—does nothing to enhance competition, and deterring such challenges accordingly represents no loss to consumers. Moreover, standard economic theory suggests reducing unfettered access to reverse payment settlements would chill generic challenges to strong, **[****55]** likely valid patents more than challenges to weak patents. The effect would be to increase the value of strong patents, while still leaving generics incentives to challenge weak patents. (Mungan, *Reverse Payments, Perverse Incentives*, *supra*, *27 Harv. J. Law & Tech. at p. 7*.) This consequence presents no reason to scale back scrutiny of these settlements.

CA(22)[] **(22)** Finally, Barr argues that in some cases only a reverse payment can bridge the differences between the brand and the generic challenger and make settlement possible. Perhaps; but as the Supreme Court has made clear, ***HN23***[] ordinarily "the fact that a large, unjustified reverse payment risks antitrust liability does not prevent litigating parties from settling their lawsuit." (*Actavis, supra, 570 U.S. at p. ___ [186 L. Ed. 2d at p. 363, 133 S. Ct. at p. 2237]*.) Parties can still use financial considerations to bridge small gaps arising from differing subjective perceptions of their probabilities of success in litigation; what they cannot do is use money to bridge their differences over the point when competitive entry is economically desirable, for that gap is not one ***antitrust law*** permits would-be competitors to bridge by agreement: "If the basic reason [the parties prefer a reverse payment settlement] is a desire to maintain and to share patent-generated monopoly **[****56]** **[**869]** profits, then, in the absence of some other justification, the antitrust laws are likely to forbid the arrangement." (*Ibid.*) That some settlements might no longer be possible absent a payment in excess of litigation costs is no concern if the ones now barred would simply have facilitated the sharing of monopoly profits.

Barr relies on one commentary showing that some theoretically possible settlements involving payments exceeding the sum of expected litigation costs and the value of other products and services might enhance consumer welfare. (Harris et al., *Activating* Actavis*: A More Complete Story* (2014) 28 Antitrust 83.) The principal conclusion is that introducing brand risk aversion into the settlement model opens up a region of possible settlements involving supralitigation cost payments that nevertheless increase consumer welfare by enabling **[***661]** earlier generic market entry dates. [17] What is not shown is that such **[*157]** settlements are at all likely in practice. Although a brand and generic may through payment of money be able to settle on an earlier entry date than would arise from litigation, their incentive (if left undeterred by the antitrust regime) remains to settle on a far later entry date for still larger sums of money, as even some of the leading **[****57]** economists highlighting the relevance of risk aversion

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[16] See *In re Tamoxifen Citrate Antitrust Litigation, supra, 466 F.3d at page 211* (noting the "troubling dynamic" that "[t]he less sound the patent or the less clear the infringement, and therefore the less justified the monopoly enjoyed by the patent holder, the more a rule permitting settlement is likely to benefit the patent holder by allowing it to retain the patent"); Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition, supra, 109 Colum. L.Rev. at page 638* (treating patents as conclusively valid until expiration "produces the absurd result that an ironclad patent and a trivial patent have the same exclusionary force"); Bulow, *The Gaming of Pharmaceutical Patents* in Innovation Policy and the Economy, volume 4, *supra*, at page 167.

[17] The Harris model also addresses the effects of asymmetric information, but different perspectives on the likelihood of success are unlikely to alone render it possible for a supralitigation costs reverse payment settlement to be efficient. (Elhauge & Krueger, *Solving the Patent Settlement Puzzle, supra, 91 Tex. L.Rev. at pp. 300–303, 325–329*.) Money may be needed to bridge the gap between the parties' expectations, but a rational brand asked to pay more than its litigation costs to persuade a generic with different perceptions would, in the ordinary case, presumably just litigate.

recognize. (Willig & Bigelow, *Antitrust policy toward agreements that settle patent litigation*, *supra*, 49 Antitrust Bull. at p. 659.) Attempts to quantitatively estimate the frequency with which risk aversion would produce an efficient settlement despite payment in excess of litigation costs suggest such occurrences would be exceedingly rare. (Leffler & Leffler, *The Probabilistic Nature of Patent Rights: In Response to Kevin McDonald*, *supra*, 17 Antitrust at pp. 79–80; Leffler & Leffler, *Settling the Controversy over Patent Settlements: Payments by the Patent Holder Should Be Per Se Illegal* in ***Antitrust Law*** and Economics, *supra*, at p. 504; see Bulow, *The Gaming of Pharmaceutical Patents* in 4 Innovation Policy and the Economy, *supra*, at p. 167.) Thus, while we do not discount the possibility, it affords no reason to expand plaintiff's prima facie case beyond the elements discussed.

CA(23)[] **(23)** We also observe that the outlined prima facie showing will suffice, without more, **[****58]** to raise a presumption of the patentee's market power. Proving that a restraint has anticompetitive effects often requires the plaintiff to "'delineate a relevant market and show that the defendant plays enough of a role in that market to impair competition significantly,'" i.e., has market power. (*Roth v. Rhodes, supra, 25 Cal.App.4th at p. 542*.) Here, proof of a sufficiently large payment is a surrogate: "the 'size of the payment from a branded drug manufacturer to a prospective generic is itself a strong indicator of power'—namely, the power to charge prices higher than the competitive level." (*Actavis, supra, 570 U.S. at p. ___ [186 L. Ed. 2d at p. 362, 133 S. Ct. at p. 2236*].) Logically, a patentee would not pay others to stay out of the market unless it had sufficient market power to recoup its payments through supracompetitive pricing. (*Ibid*.) Consequently, ***HN24***[] proof of a reverse payment in excess of litigation costs and collateral products and services raises a presumption that the settling patentee has market power sufficient for the settlement to generate significant anticompetitive effects.

2. *Defendants' Rebuttal*

HN25[] ***CA(24)***[] **(24)** Once a plaintiff has made out a prima facie case that a reverse payment patent settlement has anticompetitive effects, a court "must weigh these anticompetitive effects against the possible justifications" **[****59]** for the challenged restraint. (*Marin County Bd. of Realtors, Inc. v. Palsson, supra, 16 Cal.3d at p. 937*.) At this point, we deem it appropriate to shift the burden to the defendants to offer legitimate justifications and come forward with **[*158]** evidence that the challenged settlement **[**870]** is in fact procompetitive. (See *Bus. & Prof. Code, § 16725* ["[i]t is not unlawful to enter" an agreement "to promote, encourage or increase **[***662]** competition"]; *Actavis, supra, 570 U.S. at p. ___ [186 L. Ed. 2d at p. 362, 133 S. Ct. at p. 2236]* ["An antitrust defendant may show in the antitrust proceeding that legitimate justifications are present … ."].) [18]

Plaintiffs argue we should declare every reverse payment in excess of litigation costs and collateral products and services a per se violation of the Cartwright Act. We are unwilling to declare every settlement payment of a certain size illegal. Like the United States Supreme Court, we cannot say with reasonable certainty—yet—that we have posited every possible justification that might render a particular reverse payment settlement procompetitive. (See *Actavis, supra, 570 U.S. at p. ___ [186 L. Ed. 2d at p. 362, 133 S. Ct. at p. 2236*].) The theoretical possibility that a settlement in excess of litigation costs and collateral services could be procompetitive, while insufficient to alter the plaintiff's prima facie case, is nevertheless **[****60]** sufficient for us to reject a categorical rule and instead afford defendants the opportunity to demonstrate a given settlement is the exception.

This does not mean any justification will do. An antitrust defendant cannot argue a settlement is procompetitive simply because it allows competition earlier than would have occurred if the brand had won the patent action; as *Actavis* and our previous discussion make clear, the relevant baseline is the average period of competition that would have obtained in the absence of settlement. (See *Actavis, supra, 570 U.S. at p. ___ [186 L. Ed. 2d at p. 363, 133 S. Ct. at p. 2236]*.) [19]

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[18] See *FTC v. Indiana Federation of Dentists, supra, 476 U.S. at pages 459–461*; *National Soc. of Professional Engineers v. U. S., supra, 435 U.S. at page 693*; 7 Areeda & Hovenkamp, ***Antitrust Law*** (3d ed. 2010) ¶¶ 1504b, 1507c, pages 402–403, 430.

[19] This point also addresses Barr's argument that causation is lacking in reverse payment cases because absent a settlement, the parties would have litigated, the patentee would likely or surely have won, and consumers would have been no better off. At the time of settlement, the outcome of future litigation is uncertain, and an agreement that "seeks to prevent the risk of

CA(25)[] **(25)** Likewise, consideration of whether the agreement is justified as procompetitive will not turn on whether the patent would ultimately have been proved valid or invalid. ***HN26***[] Agreements must be assessed **[****61]** as of the time they are made (*Valley Drug Co. v. Geneva Pharmaceuticals, supra, 344 F.3d at p. 1306*), at which point the patent's validity is unknown and unknowable. Just as later invalidation of a patent does not prove an agreement when made was anticompetitive (*id. at pp. 1306–1307*), later evidence of validity will not **[*159]** automatically demonstrate an agreement was procompetitive. [20] ***Antitrust law*** condemns the purchase of freedom from competition; what matters is whether a settlement postpones market entry beyond the average point that would have been expected at the time in the absence of agreement. (See *In re Aggrenox Antitrust Litigation (D.Conn. 2015) 94 F.Supp.3d 224, 241* ["The salient question is not whether the fully-litigated patent would ultimately be found valid or invalid—that may never be known—but whether the settlement included a large and unjustified reverse payment leading to the **[***663]** inference of profit-sharing to avoid the risk of competition."].)

To determine whether such a settlement has occurred under state law, as under federal **[****62]** law, "it is normally not necessary to litigate patent validity … ." (*Actavis, supra, 570 U.S. at p. ___ [186 L. Ed. 2d at p. 363, 133 S. Ct. at p. 2236]*.) "An unexplained large reverse payment itself would normally suggest that the patentee has serious doubts about the patent's survival. And that fact, in turn, suggests that the payment's objective is to maintain supracompetitive prices to be shared among the patentee and the challenger **[**871]** rather than face what might have been a competitive market—the very anticompetitive consequence that underlies the claim of antitrust unlawfulness. … In a word, the size of the unexplained reverse payment can provide a workable surrogate for a patent's weakness, all without forcing a court to conduct a detailed exploration of the validity of the patent itself." (*Id. at pp. ___–___ [186 L. Ed. 2d at p. 363, 133 S. Ct. at pp. 2236–2237]*.)

3. *The Plaintiff's Ultimate Burden*

HN27[] ***CA(26)***[] **(26)** The ultimate burden throughout rests with the plaintiff to show that a challenged settlement agreement is anticompetitive. (*Bert G. Gianelli Distributing Co. v. Beck & Co. (1985) 172 Cal. App. 3d 1020, 1048 [219 Cal. Rptr. 203]*.) Once the plaintiff has made out a prima facie case that a reverse payment patent settlement is anticompetitive, however, the plaintiff thereafter need only show that any procompetitive justifications proffered by the defendants are unsupportable. (See *Polygram Holding, Inc. v. FTC, supra, 416 F.3d at pp. 37–38*.)

The ultimate question in reverse payment settlement cases **[****63]** is whether an agreement involves "significant unjustified anticompetitive consequences." (*Actavis, supra, 570 U.S. at p. ___ [186 L. Ed. 2d at p. 364, 133 S. Ct. at p. 2238]*.) The prima facie case requires the plaintiff to eliminate the possibility that litigation costs or other products or services could explain the consideration paid the generic. If a plaintiff does so and thereafter can dispel each additional justification the defendants put forward to explain the consideration, the conclusion follows that the settlement payment must include, in **[*160]** part, consideration for additional delay in entering the market. That payment for delay is condemned by the Cartwright Act, as by federal ***antitrust law***, and its purchase as part of a settlement agreement is an unlawful restraint of trade.

* * *

CA(27)[] **(27)** We summarize ***HN28***[] the structure of the rule of reason applicable to reverse payment patent settlements. To make out a prima facie case that a challenged agreement is an unlawful restraint of trade, a plaintiff must show the agreement contains both a limit on the generic challenger's entry into the market and compensation from the patentee to the challenger. The defendants bear the burden of coming forward with evidence of litigation costs or valuable collateral products or services that **[****64]** might explain the compensation; if the defendants do so, the plaintiff has the burden of demonstrating the compensation exceeds the reasonable value of these. If a prima facie case has been made out, the defendants may come forward with additional justifications to demonstrate

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competition" causes, i.e., has as a "consequence … the relevant anticompetitive harm." (*Actavis, supra, 570 U.S. at p. ___ [186 L. Ed. 2d at p. 363, 133 S. Ct. at p. 2236]*.)

[20] Some kinds of evidence may also be suspect: Once a brand and a generic challenger settle, their incentives align in favor of arguing that the patent was stronger and more clearly infringed than it may have appeared at the time.

the settlement agreement nevertheless is procompetitive. A plaintiff who can dispel these justifications has carried the burden of demonstrating the settlement agreement is an unreasonable restraint of trade under the Cartwright Act.

D. *Preemption*

CA(28)[] **(28)** Barr argues federal preemption concerns narrowly constrain how reverse **[***664]** payment patent settlements must be analyzed under state law. According to Barr, any rule more stringent than the traditional, unstructured rule of reason would fall prey to ***HN29***[] obstacle preemption, which "arises when '"under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."'" (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc. (2007) 41 Cal.4th 929, 936 [63 Cal. Rptr. 3d 50, 162 P.3d 569]*.) We disagree; the rule we adopt is in harmony with *Actavis*, which offered only broad outlines and explicitly left to other courts the task of developing a framework for analyzing the anticompetitive effects **[****65]** of reverse payment patent settlements. (*Actavis, supra, 570 U.S. at p. ___ [186 L. Ed. 2d at p. 364, 133 S. Ct. at p. 2238]*.)

HN30[] ***CA(29)***[] **(29)** State ***antitrust law*** ordinarily is fully compatible with federal law. States have regulated against monopolies and unfair competition for longer than the federal government, and federal law is intended only "to supplement, not displace, state antitrust remedies." (*California v. ARC America Corp. (1989) 490 U.S. 93, 102 [104 L. Ed. 2d 86, 109 S. Ct. 1661]*; see *id. at pp. 101–102* & fn. 4; *Partee v. San Diego Chargers Football Co. (1983) 34 Cal.3d 378, 382 [194 Cal. Rptr. 367, 668 P.2d 674]*.) **[**872]** "[T]he Cartwright Act is broader in range and deeper in reach than the Sherman Act." (*Cianci v. **[*161]** Superior Court, supra, 40 Cal.3d at p. 920*); this greater domain has never been thought to pose supremacy clause problems. To the contrary, in light of the established state role, a presumption against preemption applies. (*ARC America Corp., at p. 101*.)

Barr argues that to avoid conflicting with federal patent law, state ***antitrust law*** must cohere with the federal rule that patents are presumed valid. (See *35 U.S.C. § 282*.) But as we have discussed, the patent act's allocation of a burden of proof is no more than a procedural device. It does not insulate settlements of patent disputes from federal antitrust scrutiny (*Actavis, supra, 570 U.S. at pp. ___–___ [186 L. Ed. 2d at p. 356, 133 S. Ct. at pp. 2230–2231]*), nor does it insulate them from state antitrust scrutiny. The agnostic stance toward patent validity our structured rule of reason adopts is identical to that embraced by the United States Supreme Court under federal ***antitrust law***: a **[****66]** patent may or may not be valid or infringed. (*Ibid.*) What matters instead is simply whether a payoff to eliminate the possibility of competition has occurred. (*Id. at p. ___ [186 L. Ed. 2d at p. 363, 133 S. Ct. at p. 2236]*.) If federal ***antitrust law*** can conduct that inquiry without offense to patent law, so too can the state ***antitrust law*** it was designed to supplement.

Additionally, Barr argues the rule we adopt must be no more favorable to reverse payment patent settlement challenges than would be the case under *Actavis*. The supposed rationale is that *Actavis* identifies precisely the accommodation patent law requires of ***antitrust law***, such that deviation would pose an obstacle to congressional patent objectives.

If *Actavis* had established a special rule limiting antitrust scrutiny of reverse payment settlements in order to preserve the incentives created by the patent system, we might agree. But the lesson of *Actavis* is that nothing in the patent laws or the Hatch-Waxman Act dictates such a special rule; that a settlement resolves a patent dispute does not "immunize the agreement from antitrust attack." (*Actavis, supra, 570 U.S. at p. ___ [186 L. Ed. 2d at p. 356, 133 S. Ct. at p. 2230]*.) **[***665]** Instead, such agreements may, like any other form of agreement restraining trade, be examined for unjustified anticompetitive effects. (*Id. at p. ___ [186 L. Ed. 2d at p. 364, 133 S. Ct. at p. 2238]* **[****67]** .) As for how such an examination is to be conducted, *Actavis* reverts solely to antitrust considerations. (*Id. at pp. ___–___ [186 L. Ed. 2d at p. 364, 133 S. Ct. at pp. 2237–2238]*.) In selecting a test to apply—to the extent the Supreme Court does, as opposed to "leav[ing] to the lower courts the structuring of the present rule-of-reason antitrust litigation" (*id. at p. ___ [186 L. Ed. 2d at p. 364, 133 S. Ct. at p. 2238]*)—the court looks to whether its experience with the economics of reverse payment settlements is sufficient to allow it, yet, to require particular modifications to rule of reason analysis (*id. at p. ___ [186 L. Ed. 2d at p. 363, 133 S. Ct. at p. 2237]*).

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HN31[] ***CA(30)***[] **(30)** Where the choice of a test rests solely on economic analysis, no patent law preemption concerns arise. Instead, the issue reduces to a problem in the relation between federal and state ***antitrust law***, and there the Supreme Court has been quite clear that states may depart from federal rules—or, here, accept an invitation to develop a gap in the law explicitly left by the Supreme Court—absent evidence of a clear congressional purpose to the contrary. (*California v. ARC America Corp., supra, 490 U.S. at p. 103*.)

We note as well that the structured rule of reason we adopt is consistent with, not an obstacle to, congressional patent and health care goals in two specific ways. First, considerable research and analysis suggests the broad availability of reverse payment settlements favors weak patents and channels investment resources toward suboptimal innovation prospects. (See *ante*, at p. 155.) To the extent careful scrutiny of such settlements promotes the very innovation the patent laws were intended to promote, it cannot stand as an obstacle to congressional objectives.

[873]** Second, a fundamental goal of the Hatch-Waxman Act is to enhance generic competition and thereby lower prices. **[****68]** Congress rued the "serious anti-competitive effects" of existing rules for generic drug approval, rules that resulted in "the practical extension of the monopoly position of the patent holder beyond the expiration of the patent." (H.R.Rep. No. 98-857, 2d Sess., pt. 2, p. 4 (1984), reprinted in 1984 U.S. Code Cong. & Admin. News, p. 2688.) The substantial reworking of those rules to ease generic approval was designed to "make available more low cost generic drugs" (*Id*., pt. 1, at p. 14, reprinted in 1984 U.S. Code Cong. & Admin. News, at p. 2647) and reduce costs for consumers and government-funded health care alike (*id*. at p. 17, reprinted in 1984 U.S. Code Cong. & Admin. News, at p. 2650). By ferreting out anticompetitive agreements that limit generic market entry and sustain costly monopolies, a structured rule of reason serves those goals and poses no obstacle to congressional objectives. [21]

[*666]** E. *Application*

CA(31)[] **(31)** The trial court and Court of Appeal treated the '444 patent as ironclad and used the entire period until its expiration as the relevant **[*163]** benchmark in order to assess whether the parties' settlement agreement had anticompetitive effects. This was error.

Barr argues we nevertheless should affirm because in the course of their respective opinions the trial court and Court of Appeal purported to apply the rule of reason in addition to the scope of the patent test. But the rule of reason these courts applied is not the structured rule of reason for reverse payment patent settlements we articulate today to effectuate the purposes of the Cartwright Act. Rather, in each instance the courts simply concluded that because the agreement did not exclude competition beyond what the '444 patent would have permitted (assuming it were valid), the agreement necessarily had no anticompetitive effect and was not unlawful under the rule of reason. The same misapprehension underlying the lower courts' scope of the patent analysis, that for antitrust purposes patents are ironclad, also underlay their rule of reason analysis. Accordingly, we must reverse.

V. *Unfair Competition Law and Common Law Monopoly* ***[****70]*** *Claims*

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[21] A second federalism concern raised by the Court of Appeal, that state antitrust scrutiny would intrude on the exclusivity of federal court patent jurisdiction (see *28 U.S.C. § 1338(a)*), likewise presents no issue. This exclusive jurisdiction does not prevent state courts from deciding state law claims incidentally touching on the validity **[****69]** of a patent. (*Caldera Pharmaceuticals, Inc. v. Regents of University of California (2012) 205 Cal.App.4th 338, 353–356 [140 Cal. Rptr. 3d 543]*.) Moreover, the "slim category" of state law claims subject to exclusive federal patent jurisdiction includes only those that "'necessarily raise'" a federal patent issue. (*Gunn v. Minton (2013) 568 U.S. ___, ___ [185 L.Ed.2d 72, 79, 133 S.Ct. 1059, 1065]*.) As we have discussed, it is entirely possible to resolve an antitrust challenge to a reverse payment patent settlement without adjudicating the patent's validity.

The trial court entered judgment against plaintiffs on their unfair competition and common law monopoly claims using the same reasoning it applied to the Cartwright Act claim. Because that reasoning was erroneous, we reverse on these claims as well.

Disposition

We reverse the Court of Appeal's judgment and remand for further proceedings consistent with this opinion.

Cantil-Sakauye, C. J., Chin, J., Corrigan, J., Liu, J., Cuéllar, J., and Kruger, J., concurred.

The petition of respondent Watson Pharmaceuticals, Inc., for a rehearing was denied July 8, 2015.

Alcon Labs., Inc. v. Reyes

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

May 11, 2015, Decided; May 11, 2015, Filed

Case No. 2:15cv252-DB; Case No. 2:15cv257-CW; Case No. 2:15cv259-DAK

Reporter
2015 U.S. Dist. LEXIS 82734 *; 2015-1 Trade Cas. (CCH) P79,175; 2015 WL 9236136

ALCON LABORATORIES, INC., Plaintiff, v. SEAN D. REYES, Attorney General of Utah, Defendant.JOHNSON & JOHNSON VISION CARE, Plaintiff, v. SEAN D. REYES, Attorney General of Utah, Defendant.BAUSH & LOMB, Plaintiff, v. SEAN D. REYES, Attorney General of Utah, Defendant.

Subsequent History: Injunction granted at *Johnson & Johnson Vision Care, Inc. v. Reyes, 2015 U.S. App. LEXIS 10759 (10th Cir. Utah, May 13, 2015)*

Affirmed by *Johnson & Johnson Vision Care v. Reyes, 2016 U.S. App. LEXIS 22444 (10th Cir., Dec. 19, 2016)*

Core Terms

contact lens, retailers, Manufacturers, consumers, interstate commerce, preliminary injunction, injunction, prescribe, out-of-state, prices, irreparable harm, prescription, patient, anti trust law, impermissible, discriminate, antitrust, in-state, injuries, public interest, policies, non-ECP, fixing, brand, extraterritorial effect, local benefit, burdened, succeed, lenses, attorney general

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For Sean D. Reyes, in his Official Capacity **[*2]** as Attorney General of the State of Utah (2:15cv252, 2:15cv259, 2:15-cv-00257-DB), Defendant: David N. Wolf, Parker Douglas, LEAD ATTORNEYS, Utah Attorney General's Office (160-6-140856), Litigation Unit, Salt Lake City, UT USA.

For 1-800 Contacts, Intervenor Defendant (2:15cv252): Brent O. Hatch, Phillip J. Russell, LEAD ATTORNEYS, HATCH JAMES & DODGE, Salt Lake City, UT USA; Garth T. Vincent, Gregory M. Sergi, LEAD ATTORNEYS, PRO HAC VICE, MUNGER TOLLES & OLSON LLP, Los Angeles, CA USA; Paul G. Cassell, LEAD ATTORNEY, SJ QUINNEY COLLEGE OF LAW, University Of Utah, Salt Lake City, UT USA.

For Costco Wholesale Corporation, Intervenor Defendant (2:15cv252): Brett L. Tolman, Mark M. Bettilyon, LEAD ATTORNEYS, RAY QUINNEY & NEBEKER (SLC), Salt Lake City, UT USA; David J. Burman, Shylah R. Alfonso, PRO HAC VICE, David S. Steele, LEAD ATTORNEYS, PERKINS COIE, Seattle, WA USA.

For Bausch & Lomb, Plaintiff (2:15cv259): Clifford M. Sloan, Steven C. Sunshine LEAD ATTORNEYS, SKADDEN ARPS SLATE MEAGHER & FLOM LLP, Washington, DC USA; Erik A. Christiansen LEAD ATTORNEY, Brian M. Rothschild PARSONS BEHLE & LATIMER (UT), Salt Lake City, UT USA; Maria Raptis, LEAD ATTORNEY, SKADDEN ARPS SLATE MEAGHER **[*3]** & FLOM LLP, New York, NY USA.

For 1-800 Contacts (2:15cv259, 2:15-cv-00257-DB), Movant: Brent O. Hatch, Phillip J. Russell, LEAD ATTORNEYS, HATCH JAMES & DODGE, Salt Lake City, UT USA.

For Costco Wholesale Corporation (2:15cv259, 2:15-cv-00257-DB), Movant: Brett L. Tolman, LEAD ATTORNEYS, Mark M. Bettilyon, RAY QUINNEY & NEBEKER (SLC), Salt Lake City, UT USA.

For Johnson & Johnson Vision Care, a Florida corporation, Plaintiff (2:15-cv-00257-DB): Kenneth B. Black, LEAD ATTORNEY, Timothy K. Conde, STOEL RIVES, SALT LAKE CITY, UT.

Judges: Dee V. Benson, United States District Court Judge. District Judge Clark Waddoups. District Judge Dale A. Kimball.

Opinion by: Dee V. Benson

Opinion

ORDER

This case is before the court on Plaintiffs Alcon Laboratories, Inc.'s ("Alcon") (Dkt. No. 5), Johnson & Johnson Vision Care, Inc.'s ("JJVC") (Dkt. No. 27), and Bausch & Lomb, Inc.'s ("B&L") (Dkt. No. 28) (collectively "Plaintiffs") motions for preliminary injunction. Plaintiffs' consolidated motions ask this court to enjoin enforcement of recently enacted *Utah Code Section 58-16a-905.1* ("*section 905.1*" or "the statute") pending final adjudication of its constitutionality. Plaintiffs assert that *section 905.1* is an unconstitutional overreach of state legislative powers in that it impermissibly **[*4]** interferes with the nationwide contact lens market in violation of the *Commerce Clause of the United States Constitution*. Absent an injunction, *section 905.1* is scheduled to take effect on May 12, 2015.

The court heard argument on the Plaintiffs' preliminary injunction motions on May 5, 2015. At the hearing, Plaintiff Alcon was represented by David R. Marriott, Jared Jenson, Amy Sorenson and Amber Mettler. Plaintiff JJVC was represented by Jonathan F. Cohn, Kwaku Akowuah and Tim Conde. Plaintiff B&L was represented by Clifford M. Sloan and Erik Christiansen. Defendant Sean D. Reyes, in his official capacity as Attorney General of Utah ("Utah"), was represented by Parker Douglas. Intervenor 1-800 CONTACTS, Inc. ("1-800") was represented by Paul G. Cassell, Brent Hatch, Garth Vincent and Greg Sergi. Intervenor Costco Wholesale Corporation ("Costco") was represented by Shylah R. Alfonso and Mark Bettilyon.

At the conclusion of the hearing the court took the matter under advisement. Since then, the court has further considered the law and facts relating to the motions and the arguments presented by counsel. Now, being fully advised, the court issues the following Memorandum Decision and Order.

BACKGROUND

The contact lens industry in the United States **[*5]** is roughly a $4 billion dollar-per-year industry. (Alcon Mem. in Supp. at 5.) It is controlled by four primary contact lens manufacturers — Alcon, JJVC, B&L, and CooperVision, Inc. (collectively the "Manufacturers") — who maintain an almost 100% market share of the industry. (Costco Opp'n at viii.) None of the four manufacturers are located in Utah.

The contact lens industry has two features that make it particularly susceptible to anticompetitive conduct. First, contact lenses may be sold only pursuant to a valid prescription from an eye care professional ("ECP"), and each prescription from the ECP is brand and model specific. Except in limited circumstances, neither the consumer nor a contact lens retailer has the power to substitute an alternative or cheaper option to the prescribed brand, such as a generic equivalent. Second, "[u]nlike medical doctors who are prohibited from selling the drugs they prescribe, [ECPs] . . . are able to fill the contact lens prescriptions they write." (1-800 Opp'n at 2-3.) In other words, an ECP is both a contact lens prescriber and a contact lens retailer. H.R. Rep. No. 108-318, at 5 (Fairness to Contact Lens Consumers Act) (Oct. 15, 2003). "In almost no other **[*6]** medical context does the prescriber of a medical device have the power to control both the brand the patient must use and also sell the particular medical device in the same breath." (Costco Opp'n at ix.)

Once prescribed, however, contact lenses may be purchased from either the prescribing ECP or from eye care retailers (e.g., LensCrafters), mass merchandise retailers (e.g., Costco, Wal-Mart), internet retailers (e.g., 1-800 Contacts), pharmacies, or any other person who sells the prescribed lenses.[1] However, because non-ECP retailers are unable to compete with ECPs by providing a different brand of contact lens than prescribed (such as a generic equivalent), the non-ECP retailer's only means of competing with an ECP retailer is to offer lower prices on the same brands and types of lenses.

Non-ECP retailers, such as Intervenors 1-800 and Costco, assert that because ECPs are the only contact lens retailers that are dual-positioned to both prescribe and sell contact lenses to consumers, **[*7]** ECPs can "leverage their control over prescriptions and brand selection to also control and monopolize contact lens sales." (Costco Opp'n at x.) The non-ECP retailers further assert that because of this control over the market, contact lens manufacturers have a strong interest in "incentivizing ECPs to prescribe their brands by assisting in various methods of shielding ECPs from retail competition by discounters." (1-800 Opp'n at 3.)

Conversely, the Manufacturers claim that they, alone, are burdened with the task of educating ECPs about innovative products and developments in the industry so that the ECPs can pass that information along to their patients. Accordingly, to foster good relationships with the ECPs, the Manufacturers have invested in programs that are extended only to ECPs and retailers associated with ECPs. These programs include but are not limited to manufacturer rebates, free trial lenses for ECPs, and launching new products exclusively with ECPs. (See Alcon Mem. in Supp. at 7.) According to the Manufacturers, these programs "improve patient access to better information and new technologies, and enhance access to better eye care." (Id.)

Prior Legislation and Litigation **[*8]**

Given the unique features of the contact lens business, the industry has a significant history of litigation and legislation. For example, in the 1990s, attorneys general from 32 states (including Utah) and a national class of consumers brought actions against the American Optometric Association and the contact lens manufacturers for conspiring with ECPs and others to restrain competition with "alternative retailers" such as online companies, pharmacies and big box retailers. See In re Disposable Contact Lens Antitrust Litig., MDL No. 1030, 2001 WL 493244 (M.D. Fla Feb. 1, 2001). In 2001 — after nearly seven years of litigation — MDL 1030 culminated in a settlement, with the contact lens manufacturers paying a substantial cash settlement to consumers and agreeing to broad injunctive relief requiring the Manufacturers to sell contact lenses to non-ECP retailers in a "commercially reasonable" and "nondiscriminatory" manner for at least five years. (See 1-800 Opp'n at 4.) After the injunctive provisions of the consent decree expired, the Utah Legislature, in 2006, essentially codified the "anti-discrimination" provisions of the MDL through the enactment of *Utah Code Section 58-16a-904*. See *Utah Code Ann. § 58-16a-904* (providing "a manufacturer of contact lenses doing business in the state" shall certify contact lenses to be "made available **[*9]** in a commercially reasonable and nondiscriminatory manner").

[1] Under Federal law, the ECP is required to give the patient her prescription so the patient can purchase the contact lenses from the retailer of her choice based on price and convenience, among other factors. *15 U.S.C. § 7601(a)*; *16 C.F.R. § 315.3*.

The business practices of the contact lens industry have also yielded federal legislation. In 2003, in response to allegations that the Manufacturers and ECPs were impeding consumers' ability to purchase contact lenses from discounters by (1) preventing consumers from obtaining copies of their prescriptions to purchase lenses elsewhere, and (2) erecting obstacles to non-ECP retailers' attempts to verify prescriptions, Congress enacted the Fairness to Contact Lens Consumers Act ("FCLCA").[2] The FCLCA requires that a contact lens prescriber, "whether or not requested by the patient, shall provide to the patient a copy of the contact lens prescription," and establishes a prescription verification process allowing retailers to sell lenses if the ECP does not respond to a verification request within a certain time period. *15 U.S.C. §§ 7601* & *7603*.

Manufacturer Uniform Pricing Policies ("UPPs")

Approximately two years ago, the Manufacturers began implementing unilateral resale pricing policies ("UPPs").[3] These UPPs set a minimum retail price below which retailers **[*10]** may not sell certain contact lenses to consumers. If a retailer thereafter sells or prices that particular contact lens below the manufacturer's UPP, the manufacturer punishes the retailer by terminating supply of contact lenses for one year.

The Manufacturers claim that the UPPs benefit everyone by "allow[ing] [ECPs] to refocus the critical doctor/patient conversation on eye health and product performance, rather than cost." (Angelini Letter). According to Alcon, the Manufacturers face the challenge of "educating ECPs, who alone are authorized to write prescriptions, about the attributes of the products, and of encouraging them, in turn, to inform patients of their potential benefits." (Alcon Mem. in Supp. at 7.) Alcon suggests that "ECPs may be reluctant to undertake these efforts if, once the patient receives a prescription, it may be filled by a low-cost contact lens reseller whose business model does not include those investments and who 'free rides' on the professional services the ECPs provide." (Id.) Additionally, the Manufacturers claim the UPPs are beneficial because **[*11]** they "eliminate[] the need for discussions with eye doctors about other retailers' prices. Consumers are assured that if their [ECP] or any other retailer is charging the minimum price, there is no need to shop around for a better bargain." (JJVC Mem. in Supp. at 4.)

Non-ECP retailers, such as Intervenors Costco and 1-800, contend that the practical and intended effect of the UPPs is to divert sales from more efficient, lower-cost retailers. (Costco Opp'n at xiv.) They claim that by restricting retail price competition, consumers now have fewer resulting in less competition and higher margins for ECPs. (Costco Opp'n at xv.) They claim that the Manufacturers' justifications for implementing the UPPs are pretextual given that the UPPs do not require or even encourage ECPs to invest in tangible or intangible services or promotional efforts that might improve patient care. (Costco Opp'n at xvi.)

Since implementation, the Manufacturers' UPPs have generated scrutiny. On July 30, 2014, the U.S. Senate Committee on the Judiciary, Subcommittee for Antitrust, Competition Policy and Consumer Rights held a hearing to examine the use of resale price maintenance programs (or UPPs) in the contact lens **[*12]** industry. The Committee noted their intent to revisit the issue once further evidence develops showing the impact of such policies on competition and consumer pricing. (1-800's Opp'n at 8 (providing citation to Senate's website for video recording of Senate hearing).) Additionally, in recent months roughly 40 consumer class action complaints have been filed, across the United States, against the Manufacturers, alleging violations of federal and/or state antitrust laws by engaging in an unlawful conspiracy to fix contact lens prices.[4]

Section 905.1

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[2] See H.R. Rep. No. 108-318, at 4; Pub. L. 108-164, Fairness to Contact Lens Consumer Act (2003), codified at *15 U.S.C. § 7601 et seq.*

[3] The State of Utah and the Intervenors refer to the Plaintiffs' UPPs as minimum resale price maintenance ("RPM") policies.

[4] There are motions pending to coordinate or consolidate the actions into a multidistrict litigation forum. In re Disposable Contact Lens Antitrust Litigation, MDL No. 2626 (2015).

On March 10, 2015, the Utah Legislature amended the Contact Lens Consumer Protection Act through the addition of *section 58-16a-905.1*. In doing so, Utah became the first state to enact legislation attempting to restrict UPPs for contact lenses. Similar legislation has been proposed in Mississippi, Washington, Arizona, Florida, New York, Idaho, Oregon, Illinois and California. (Costco Opp'n at xviii.)

Section 905.1 of the Contact Lens Consumer Protection Act provides as follows:

> A contact lens manufacturer or a contact **[*13]** lens distributor may not:
> (1) take any action, by agreement, unilaterally, or otherwise, that has the effect of fixing or otherwise controlling the price that a contact lens retailer charges or advertises for contact lenses; or
> (2) discriminate against a contact lens retailer based on whether the contact lens retailer:
> (a) sells or advertises contact lenses for a particular price;
> (b) operates in a particular channel of trade;
> (c) is a person authorized by law to prescribe contact lenses; or
> (d) is associated with a person authorized by law to prescribe contact lenses.

Utah Code Ann. Section 58-16a-905.1.

The Utah Legislature also amended *section 58-16a-906*, to provide that "the attorney general may bring a civil action or seek an injunction and a civil penalty" against any person "who violates *section 58-16a-905.1*." Id. Before approving *section 905.1*, the Utah Legislature held hearings with views presented from the various conflicting interests, including Alcon and JJVC, various Utah retailers, the Utah Real Merchants Association, the Utah Manufacturers Association, and the Utah Optometric Association.

The Present Lawsuit

On April 13, 2015, Alcon initiated a declaratory judgment action seeking to have *section 905.1* declared unconstitutional. Alcon accompanied the filing of its declaratory **[*14]** judgment action with the instant motion for preliminary injunctive relief. (Dkt. Nos. 2 & 5, respectively.) The next day, JJVC and B&L filed similar lawsuits and requests for injunctive relief. On April 21, 2015, the three separate actions were consolidated. (Dkt. No. 26.)

The State of Utah and Intervenors 1-800 and Costco assert that *section 905.1* — which they perceive as simply prohibiting Plaintiffs from fixing the retail price of contact lenses in Utah — merely restores fair competition and will result in lower contact lens prices for consumers. They claim *section 905.1* is akin to countless state statutes "enacted pursuant to the traditional powers in the area of antitrust and unfair competition to regulate conduct that directly affects in-state consumers and business." (1-800 Opp'n at 2.)

The Manufacturers assert that *section 905.1* violates the *Commerce Clause of the United States Constitution* because it impermissibly interferes with commercial conduct outside of Utah, discriminates against interstate commerce, and imposes an excessive burden on interstate commerce. (Alcon's Mem. in Supp. at 13-20.) They claim *section 905.1* will have the effect of removing Utah-based retailers, and only Utah-based retailers, from the scope of national policies like the UPP, allowing in-state retailers **[*15]** to sell at lower prices than out-of-state retailers who try to serve Utah customers. (See Alcon's Mem. in Supp. at 3.) The Manufacturers assert that *section 905.1* is unconstitutional and the injuries they will suffer when *section 905.1* goes into effect will be irreparable. Accordingly, the Manufacturers assert they are entitled to a preliminary injunction, to have effect only for so long as is necessary for this court to issue a final judgment.

DISCUSSION

"[A] preliminary injunction is an extraordinary remedy; it is the exception rather than the rule." *General Motors Corp. v. Urban Gorilla, LLC, 500 F.3d 1222, 1226 (10th Cir. 2007)* (internal quotation marks omitted). The movant must show: "(1) a substantial likelihood of success on the merits; (2) irreparable harm to the movant if the injunction is denied; (3) [that] the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) [that] the injunction, if issued, will not adversely affect the public interest." Id. "The party seeking the preliminary injunction must show that the . . . factors weigh heavily and compellingly in its favor" and "[t]he right to relief in a preliminary injunction must be clear and unequivocal." *VR Acquisitions LLC v. Wasatch County, 2015 U.S. Dist. LEXIS 11465, 2015 WL 417895, at *7 (D. Utah Jan. 30, 2015)* (internal quotation marks omitted). In the context of a request for a preliminary **[*16]** injunction against enforcement of a state law, enacted in the public interest, these already-demanding standards are applied rigorously. See *Heideman v. South Salt Lake City, 348 F.3d 1182, 1189 (10th Cir. 2003)*.

1. Likelihood of Success on the Merits

Plaintiffs have failed to convince the court that they are likely to succeed on the merits of this case. Plaintiffs argue that *section 905.1* clearly violates the *Commerce Clause*, which grants Congress the exclusive power to regulate interstate commerce. (Alcon Reply at 6.) Specifically, Plaintiffs assert that the statute has impermissible extraterritorial effects, impermissibly discriminates against out-of-state economic interests, and imposes excessive burdens on interstate commerce. (Id.)

Extraterritorial Effects

The court is not persuaded that Plaintiffs are likely to succeed in demonstrating that *section 905.1* has impermissible extraterritorial effects. The United States Supreme Court summarized what constitutes impermissible extraterritorial effects in *Healy v. Beer Inst., 491 U.S. 324, 336, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989)*: "[T]he '*Commerce Clause* . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.'" Id. (quoting *Edgar v. MITE Corp., 457 U.S. 624, 642-43, 102 S. Ct. 2629, 73 L. Ed. 2d 269 (1982))*.

Any assertion that *section 905.1* would impose such effects is circumvented by the Utah Supreme Court's recent **[*17]** explanation that, "[u]nder a deeply rooted and longstanding canon of construction, statutes are presumed not to have extraterritorial effect. This presumption is a gapfiller, operating under a 'clear statement' rule. It provides that unless a statute gives a 'clear indication of an extraterritorial application, it has none.'" *Nevares v. M.L.S., 2015 UT 34, 345 P.3d 719, 727 (Utah 2015)* (quoting *Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 262-65, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010))* (internal citation omitted). The court sees no clear indication of an extraterritorial application in the statute at issue here and, thus, no such application can be assumed at this point in the case.

Discrimination

Similarly, the court is not persuaded that Plaintiffs are likely to succeed in demonstrating that *section 905.1* inappropriately discriminates against out-of-state economic interests. The United States Supreme Court has stated that state laws are discriminatory and "violate the *Commerce Clause* if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Granholm v. Heald, 544 U.S. 460, 472, 125 S. Ct. 1885, 161 L. Ed. 2d 796 (2005)* (quoting *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore., 511 U.S. 93, 99, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994)*; see also *New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273, 108 S. Ct. 1803, 100 L. Ed. 2d 302 (1988)* ("This 'negative' aspect of the *Commerce Clause* prohibits economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.") However, "[n]ot every benefit or burden will suffice **[*18]** — only one that 'alters the competitive balance between in-state and out-of-state firms.'" *Kleinsmith v. Shurtleff, 571 F.3d 1033, 1041 (10th Cir. 2009)*.

Plaintiffs concede that "read literally, *[section 905.1]* applies to manufacturers and distributors both within and outside Utah . . . ." (Alcon Mem. in Supp. at 19.) See *Ass'n des Eleveurs de Canards et D'oies du Quebec v. Harris, 729 F.3d 937, 948 (9th Cir. 2013)*, cert. denied, *135 S. Ct. 398, 190 L. Ed. 2d 249 (2014)* ("A statute that 'treats all private companies exactly the same' does not discriminate against interstate commerce. . . . This is so even when only out-of-state businesses are burdened because there are no comparable in-state businesses.") (citing *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 342, 127 S. Ct. 1786, 167 L. Ed. 2d 655 (2007)*; *Exxon Corp. v. Gov. of Maryland, 437 U.S. 117, 119, 125, 98 S. Ct. 2207, 57 L. Ed. 2d 91))*. Plaintiffs argue instead that the statute is discriminatory because it "protects 'a [Utah] contact lens retailer,' but not a non-Utah contact lens retailer, from manufacturer pricing policies . . . [and] entitles 'a [Utah] contact lens retailer,' but not a non-Utah contact lens retailer, to manufacturer programs that are designed for some kinds of retailers and not others." (Alcon Reply at 10.)

However, the record before the court supports Defendants' claim that "the fact that retail sales outside of Utah could be higher because of the [UPPs] is entirely the result of Plaintiffs' pricing policies—not any action taken by Utah." (Costco Opp'n **[*19]** at 14.) Indeed, the purported burden that out-of-state retailers face as a result of the statute is simply that they may continue to be subject to UPPs and other policies implemented by contact lens manufacturers, whereas instate retailers will not. *Section 905.1* in no way requires or anticipates that out-of-state retailers will continue to be subject to UPPs. Instead, the statute merely protects Utah retailers and consumers from activity that the State of Utah believes violates principles of fair competition.

Antitrust law "is an area traditionally regulated by the States." *California v. ARC America Corp., 490 U.S. 93, 101, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)*. "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies." *Id. at 102*. As such, federal ***antitrust law*** sets a floor below which states cannot go, but states are free to legislate and regulate certain transactions more aggressively. See, e.g., *Exxon Corp. v. Gov. of Maryland, 437 U.S. 117, 129-32, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978)*. The statute at issue here is nothing more than a state antitrust statute, tailored to a specific industry, which the state has the power to enact. *Id. at 133-34*.

In Exxon, the Maryland legislature—in response to evidence that oil producers and refiners were favoring company-operated gasoline stations during the 1973 petroleum shortage—enacted a statute prohibiting **[*20]** petroleum producers and refiners from operating retail service stations within the State of Maryland and requiring that all temporary price reductions be extended uniformly to all service stations supplied within the state. *Id. at 117*. The plaintiffs in Exxon argued, similarly to Plaintiffs in the present case, that the Maryland statute discriminated against interstate commerce, unduly burdened interstate commerce, and imposed "controls on a commercial activity of such an essentially interstate character that it [was] not amenable to state regulation." *Id. at 125*. The United States Supreme Court rejected all three arguments, holding that the statute did not violate the *Commerce Clause*. *Id. at 125-29*. The Court noted that the *Commerce Clause* does not "protec[t] the particular structure or methods of operation in a retail market" nor does it invalidate a duly enacted state statute simply because the statute "causes some business to shift from one interstate supplier to another." *Id. at 127*. As in Exxon, the statute at issue here attempts to remedy a significant market issue—retail price fixing by contact lens manufacturers.

Based on the record before the court, *section 905.1* appears to be no more restrictive than the statute upheld in Exxon. In Exxon, the statute required **[*21]** producers to provide uniform discounts to all service stations. Here, the statute merely requires that manufacturers refrain from mandating price fixing within the state of Utah and from discriminating against Utah retailers for reasons related to price fixing. This Utah statute, like the statute in Exxon, appears to be an appropriately tailored antitrust statute within the legislative authority of the state. See *ARC America Corp., 490 U.S. at 101-02*; see also *Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 993-94 (9th Cir. 2000)* (holding that "California may apply its antitrust and unfair competition statutes consistent with the *Commerce Clause*" to a price fixing scheme in Wisconsin that affected prices in California).

Plaintiffs argue that the legislation at issue here is unique because "unlike traditional state antitrust, consumer protection, and public safety laws, . . . [the statute] forces out-of-state manufacturers and distributors who want to withdraw from commerce with a state resident...to continue engaging in interstate commerce with them." (Alcon Reply at 7.) Plaintiffs assert that Section 2 of the statute, which prohibits "discrimination" against retailers, essentially "instructs the Attorney General to penalize a manufacturer for deciding not to ship contact lenses to Utah . . . ." (Id.) At this early **[*22]** stage of the proceedings, a pre-enforcement request for preliminary injunction, Plaintiffs' constitutional concerns are premature and speculative.

First, a Utah statute that has been in effect since 2006 already expressly penalizes contact lens manufacturers that fail to make contact lenses available to retailers in a nondiscriminatory and commercially reasonable manner. *Utah Code Ann. § 58-16a-904*. Plaintiffs have presumably complied with this statute since 2006, and nothing in the record before this court indicates that the statute has been enforced in a way that impermissibly compels or effects interstate commerce.

Second, because *section 905.1* has not yet taken effect, the Utah Attorney General's Office has not had the opportunity to offer its interpretation of the statute in connection with an actual enforcement action. At oral argument, the Attorney General's representative expressed some uncertainty as to how and to what extent the law will be enforced. At this early stage, the court presumes the Utah Attorney General will enforce the statute in a manner that does not violate the *Commerce Clause*. See, e.g., *Nevares v. M.L.S., 2015 UT 34, 345 P.3d 719, 727 (Utah 2015)* (providing that duly enacted state statutes are presumed to be constitutional). At this stage, the court does not find that **[*23]** Plaintiffs have established that this statute is significantly different from other state antitrust statutes that have been upheld.

Burden on Interstate Commerce

The court is also unpersuaded that Plaintiffs are likely to succeed in demonstrating that the burden imposed on interstate commerce by the statute is clearly excessive in relation to the putative local benefits. Even if a state statute does not improperly discriminate or have impermissible extraterritorial effects, it will violate the *Commerce Clause* if it imposes a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970)*. This inquiry requires the court to consider "(1) the nature of the putative local benefits advanced by the Ordinance; (2) the burden the Ordinance imposes on interstate commerce; (3) whether the burden is "clearly excessive in relation to" the local benefits; and (4) whether the local interests can be promoted as well with a lesser impact on interstate commerce." *Blue Circle Cement, Inc. v. Bd. of Cnty Comm'rs, 27 F.3d 1499, 1512 (10th Cir. 1994)*.

The putative local benefit is that *section 905.1* "would return intrabrand competition to the Utah contact lens marketplace, allowing Utah contact lens retailers to provide lower prices to Utah consumers." (Costco Opp'n at 13.) As **[*24]** discussed above, this is exactly the type of benefit states are permitted to advance through state antitrust laws.

The purported burden on interstate commerce is that out-of-state manufacturers would have to "participate in interstate commerce, under circumstances which they otherwise would choose not to . . ." and that retailers in Utah, but not retailers in the other 49 States, would be exempt from certain manufacturer policies. (Alcon Reply at 13-14.) This purported burden appears to be no greater than the burden imposed by any other state ***antitrust law***. Indeed, as with apparent competitive advantages that may be gained by in-state businesses through other state antitrust laws, any competitive advantages obtained by Utah contact lens retailers through this statute will be negated if other states enact similar antitrust laws of their own. As noted above, such legislation is presently under consideration in at least 9 states. Consequently, Plaintiffs are not likely to demonstrate that the burden on interstate commerce imposed by the statute is "clearly excessive in relation to" the local benefits.

2. Irreparable Harm if the Injunction is Denied

Similarly, Plaintiffs have failed to convince **[*25]** the court that they will suffer irreparable harm if the injunction is denied. Establishing irreparable harm is not an "easy burden to fulfill." *Greater Yellowstone Coalition v. Flowers, 321 F.3d 1250, 1258 (10th Cir. 2003)*. "To constitute irreparable harm, an injury must be certain, great, actual and not theoretical." *Heideman v. South Salt Lake City, 348 F.3d 1182, 1189 (10th Cir. 2003)*.

Plaintiffs claim they will suffer two primary forms of irreparable harm absent an injunction—constitutional injury and economic injury. (Alcon Mem. in Supp. at 22.) Plaintiffs' claimed constitutional injury is the "[d]eprivation of the rights guaranteed under the *Commerce Clause*[.]" *ACLU v. Johnson, 194 F.3d 1149, 1163 (10th Cir. 1999)*. As discussed in detail above, these constitutional injuries are speculative at this stage and, as such, Plaintiffs have failed to establish injuries that are certain, actual and imminent, as required for a preliminary injunction. See *Heideman, 348 F.3d at 1189* ("[T]he party seeking injunctive relief must show that the injury complained of is of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm.").

Plaintiffs' claimed economic injuries include "financial loss that cannot be recovered because of the state's sovereign immunity from suits for damages" and the possibility that the Plaintiffs' inability to enforce UPPs will "suppress [Plaintiffs'] incentives and ability to invest **[*26]** in research and development." (Alcon Mem. in Supp. at 23.) These injuries, like Plaintiffs' claimed constitutional injuries, rely on Plaintiffs' speculation, both as to the monetary amounts of such injuries, and how *section 905.1* will be enforced. Such hypothetical injuries are insufficient to constitute irreparable harm. See *Goldammer v. Fay, 326 F.2d 268, 270 (10th Cir. 1964)* ("Injunction is a drastic remedy to be exercised with caution, and should be granted only is cases where the necessity therefore is clearly established."); *Voile Mfg. Corp. v. Dandurand, 551 F. Supp. 2d 1301, 1307 (D. Utah 2008)* (holding that a "probable loss in market share" was not the type of damage that amounts to irreparable harm). Accordingly, the court concludes that Plaintiffs have failed to meet their burden of establishing irreparable harm.

3. The Balance of Hardships & Public Interest

Finally, the balance of hardships and public interest factors also weigh against granting a preliminary injunction in this case. Utah's ability "to enact and enforce measures it deems to be in the public interest is [] an equity to be considered in the balance of hardships." *Heideman, 348 F.3d at 1191*. Entering an injunction in this case would prevent enforcement of a law that the Utah Legislature determined was necessary to protect consumers and promote free competition in the **[*27]** retail market for contact lenses. Indeed, according to Costco, the UPPs have forced Costco "to raise contact lens prices by as much as 35%, while undermining Costco Wholesale's business model, reducing product choice, foreclosing retail competition, and damaging its goodwill." (Costco Opp'n at 16.) In contrast, as the court has previously explained, any alleged harm to Plaintiffs is speculative.

Similarly, although Plaintiffs appeal to the public interest of upholding the Constitution as a basis for granting the preliminary injunction, as explained by the court more fully above, Plaintiffs have failed to persuade the court that they are likely to succeed on their claim that *section 905.1* is, in fact, unconstitutional.

Section 905.1 was enacted by the elected representatives of the people of Utah after a determination that it was in their best interest. See *Utah Gospel Mission v. Salt Lake City Corp., 316 F. Supp. 2d 1201, 1223 (D. Utah 2004)*, aff'd, *425 F.3d 1249 (10th Cir. 2005)* (denying motion for preliminary injunction and finding public interest would be impaired because it would "undermine the public process by nullifying the decision . . . [by] elected officials. The [democratic] process . . . was extensive, time consuming, very public and often wrenching and divisive. A compromise was reached through democratic means, **[*28]** and it would not be in the public interest to set this process aside."). After extensive public hearings and legislative debates, wherein Plaintiffs were provided a fair opportunity to present their positions, the people of Utah chose to enact *section 905.1* to eliminate price fixing in favor of free competition.

For these reasons, Plaintiffs have failed to satisfy the court that enjoining *section 905.1* would be in the best interests of the public.

CONCLUSION

Based on the foregoing, Plaintiffs' consolidated motions for preliminary injunction are DENIED. Plaintiffs have failed to satisfy the court that they have met the requirements for a preliminary injunction. Specifically and significantly, the court is not persuaded at this stage in the litigation that the Plaintiffs are likely to succeed on the merits.

Dated this 11th day of May, 2015.

/s/ Dee V. Benson

Dee V. Benson

United States District Court Judge

Am. Hotel & Lodging Ass'n v. City of Los Angeles

United States District Court for the Central District of California

May 13, 2015, Decided; May 13, 2015, Filed

Case No. CV 14-09603-AB (SSx)

Reporter

119 F. Supp. 3d 1177 *; 2015 U.S. Dist. LEXIS 86709 **; 165 Lab. Cas. (CCH) P61,591

AMERICAN HOTEL & LODGING ASSOCIATION et al., Plaintiff, v. CITY OF LOS ANGELES, Defendants.

Subsequent History: Motion denied by, As moot *Am. Hotel & Lodging Ass'n v. City of Los Angeles, 2015 U.S. Dist. LEXIS 106914 (C.D. Cal., Aug. 13, 2015)*

Stay granted by *Am. Hotel & Lodging Ass'n v. City of L.A., 2015 U.S. Dist. LEXIS 177943 (C.D. Cal., Nov. 5, 2015)*

Affirmed by *Am. Hotel & Lodging Ass'n v. City of Los Angeles, 2016 U.S. App. LEXIS 15447 (9th Cir. Cal., Aug. 23, 2016)*

Core Terms

Hotel, Ordinance, minimum wage, preemption, employees, per hour, collective bargaining agreement, preempted, collective bargaining, labor standards, parties, bargaining, non-union, preliminary injunction, negotiations, provisions, expiration, regulation, exemption, state law, tipped, Reply, service charge, declarations, benefits, onerous, wages, unilateral, terms, substantive requirements

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For Unite Here Local 11, Intervenor Defendant: Paul L More, Richard G McCracken, LEAD ATTORNEYS, Yuval M Miller, Davis Cowell and Bowe, San Francisco, CA USA.

For Chamber of Commerce of The United States of America, Coalition For A Democratic Workplace, Amicus: Michael J Lotito, LEAD ATTORNEY, William J Emanuel, Littler Mendelson PC, San Francisco, CA USA; H Christopher Bartolomucci, PRO HAC VICE, Bancroft PLLC, Washington, DC USA.

Judges: HONORABLE ANDRÉ BIROTTE JR., UNITED STATES DISTRICT JUDGE.

Opinion by: ANDRÉ BIROTTE JR.

Opinion

[*1179] ORDER DENYING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION; ORDER DENYING DEFENDANT'S MOTION TO STRIKE

Plaintiffs American Hotel & Lodging Association and Asian American Hotel Owners Association ("Hotel Associations" or "Hotels" **[**2]** or "Plaintiffs") have filed a motion for a preliminary injunction (Dkt. No. 23), seeking an order staying the effective date and enjoining the enforcement of a Los Angeles minimum wage ordinance on the ground that it is preempted by the *National Labor Relations Act*.

There has been no shortage of briefing on this motion. Defendant City of Los Angeles ("City") and Defendant-in-Intervention UNITE HERE Local 11 ("Local 11") (collectively "Defendants") filed opposition briefs, as well as a supplemental brief to notify the Court of a recently decided case from the Second Circuit on a similar issue. (Dkt. Nos. 56, 76, 82.) Plaintiffs filed reply briefs, including an objection and response to Defendants' supplemental brief. (Dkt. No. 71, 81, 84.) The United States Chamber of Commerce and the Coalition for a Democratic Workplace filed a brief as amici curiae in support of Plaintiff' preliminary injunction motion. (Dkt. No. 78.)

Separately, the City filed objections to the evidence submitted in support of Plaintiffs' pending motion (Dkt. No. 60), as well as a motion to strike the same evidence addressed in the objections. (Dkt. No. 62.) Plaintiffs filed a response to the objections (Dkt. No. 72) **[**3]** and a brief in opposition to the City's motion to strike. (Dkt. No. 68.) The City filed a reply brief in support of its motion to strike. (Dkt. No. 70.)

A lengthy hearing was held on April 6, 2015. Having considered the materials and argument submitted by the parties, and for the reasons indicated below, the Court hereby **DENIES** Plaintiffs' motion for a preliminary injunction. (Dkt. No. 23.)

I. BACKGROUND

At issue in this case is Los Angeles Ordinance No. 183241, Citywide Hotel Worker Minimum Wage Ordinance ("Wage Ordinance"), which the City passed in October 2014. (Dkt. No. 24, Azlin Decl., ¶ 2, Exhibit 1 ("WO").) The Wage Ordinance provides minimum wage and compensated time off protections for workers at large hotels (hotels with more than 150 rooms) in Los Angeles.

A. Prior Wage-Related Ordinances

The Wage Ordinance is not the first of its kind. In 1997, the City adopted a "living wage" ordinance, which mandates, among other things, that employers who employ airport workers and perform certain contract or subcontract work for the City pay their employees a minimum living wage (hereinafter referred to as the "Airport LWO") above and beyond that required by the then-state minimum wage. **[**4]** *See* L.A. Admin Code § 10.37 *et seq.; see also* Dkt. No. 57 City's Request for Judicial Notice ("City's RJN"), Exhibits 1-2.[1] **[*1180]** As of 2013, the Airport LWO required subject employers to pay their employees a minimum wage of $15.37 per hour if the

[1] The City seeks judicial notice of several Los Angeles ordinances and the corresponding administrative code sections that codify those ordinances. (Dkt. No. 57, City's RJN, Exhibits 1-6.) Under *Federal Rule of Evidence 201*, a court may take judicial notice of laws, regulations, and rules because they are matters of public records and therefore "not subject to reasonable dispute in that [they are] capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *See* *Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1025 n.2 (9th Cir. 2006)* (quoting *Fed. R. Evid. 201*). The Court grants the City's unopposed request with respect to RJN Exhibits 1-7.

employer offered no fringe benefits or $10.71 per hour if fringe benefits were valued at least $4.67 per hour. (Mohrfeld Decl. ¶ 16.)[2]

In 2006 and 2007, the City adopted two ordinances regulating large hotels in the "LAX Corridor," a stretch of Century Boulevard near the Los Angeles International Airport.[3] In 2006, the City enacted the Hotel Service Charge Reform Ordinance ("Service Charge Ordinance"), Ordinance No. 178084, which "require[d] LAX-area hotels to pass along service charges to those hotel service workers who actually rendered the services for which the charges are collected." (City's RJN, Exhibits 3-4.) The ordinance was passed following the City's determination that service workers had experienced decreased income as a result of hotel customers assuming that mandatory service charges are paid to the workers and therefore opting not to leave gratuities.

In 2007, the City passed the Airport Hospitality Zone Enhancement Ordinance ("AHZE Ordinance"), **[**6]** Ordinance No. 178432, which included a living-wage provision that established minimum wages for employees of covered hotels. (City's RJN, Exhibits 5-6.) As of 2013, the AHZE Ordinance living wage was $11.03 per hour if the employer provided fringe benefits valued at $1.25 per hour, or $12.28 per hour if the employer provided no fringe benefits.[4] (Mohrfeld Decl. ¶¶ 15-16.)

B. Events Leading up to the Passage of Wage Ordinance

On February 18, 2014, several Los Angeles City councilmembers made a motion to secure a study and provide for public input of the Citywide economic impacts of imposing a living wage of $15.37 per hour for hotel employees at hotels with more than 100 rooms. (Dkt. No. 58, Dickinson Decl., ¶ 5, Exhibit 2.)

The City commissioned Blue Sky Consulting Group to conduct the study, which was completed and delivered to the City in June 2014. (*Id. at ¶ 6*, Exhibit 3.) Blue Sky's executive summary explained that while an increased minimum wage would increase hotel workers' wages, only a fraction of those increased wages would be spent within city limits (thereby benefitting **[*1181]** the economy), and any benefits to the increased minimum wage would be offset by the detriments to the economy:

> [I]n response to the minimum wage increase, hotel profits would likely decline, and so too would the value of existing hotels; some hotels might be forced to sell or otherwise restructure their investments. Hotel owners would also seek ways to minimize the effects of a minimum wage increase, but most of the Los Angeles hotels subject to the **[**8]** new requirement would be limited in their ability to pass along any increased labor costs in the form of higher room rates. The result would therefore likely be reductions in staffing levels and reductions in certain purchases of goods and services in the local economy. Both of these effects would lead to reductions in

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[2] In 2012, an LAX contractor sued the City, alleging, among other things, that the Airport LWO was preempted by the federal *Railway Labor Act*, among other claims. The district court rejected the plaintiff's preemption theory and granted summary judgment in favor **[**5]** of the City. *See* *Calop Bus. Sys., Inc. v. City of Los Angeles, 984 F. Supp. 2d 981, 990 (C.D. Cal. 2013)* (Ninth Circuit appeal pending).

[3] These ordinances define terms like "Hotel," "Hotel Employer," "Hotel Worker," and "Service Charges," and the ordinances include exemptions for collective bargaining agreements. The definitions and collective bargaining exemptions are identical to those included in the Wage Ordinance at issue in this case and are reproduced below.

[4] In 2008, an airport hotel subject to the AHZE Ordinance filed a lawsuit, arguing among other things that the ordinance was preempted under the *National Labor Relations Act*. The district court granted the City's motion to dismiss, holding that the ordinance was not preempted because it "simply set[] the rate of the 'living wage' and then allow[ed] the hotels to enter into a collective bargaining agreement if they wish[ed to do so]. The [ordinance imposed] no restrictions on the terms of the collective bargaining agreement [but rather] allowed a collective bargaining agreement to set wages at a rate higher or lower than the wage set by the Ordinance." *Fortuna Enterprises, L.P. v. City of Los Angeles, 673 F. Supp. 2d 1000, 1005-06 (C.D. Cal. 2008)*. The *Fortuna* plaintiff initially appealed the district court's order, but the appeal was voluntarily dismissed pursuant to a stipulation by the parties. *See id.*, No. CV 08-4373 **[**7]** SVW (MANx) at docket entry 32.

> economic activity which would at least partially offset any gains in economic activity generated by increased spending by those hotel workers who received a raise under the policy.

(*Id.*) The City also received several reports and comment letters from members of the public and interested parties regarding the proposed minimum wage, many of which expressed strong opposition to the proposal. (*Id. at ¶ 7*, Exhibit 4.) These reports and letters were submitted to the City before Blue Sky completed its report, and Blue Sky considered them in its analysis. (*Id.*)

The City then asked three economist firms — PFK Consulting, Economic Roundtable, and Beacon Economics — to analyze the economic impact of the proposed hotel workers minimum wage. In September 2014, the City Economic Development Committee prepared a report, summarizing the firms' findings. (*Id. at ¶ 10*, Exhibit 7.) PFK Consulting **[**9]** concluded that while the minimum wage increase would positively impact hotel employees, there would be a negative impact on hotels that would have to compensate for the higher wages by cutting costs and reducing operations and a negative impact on hotel employees who might, as a result, be laid off or have their hours reduced. Beacon Economics concluded that the minimum wage ordinance would result in job losses and questioned whether the proposed wage ordinance was the appropriate method for improving wages. Economic Roundtable concluded that the minimum wage ordinance is a prudent method to raise wages for hotel workers, who are some of the lowest paid workers in Los Angeles. The City Economic Development Committee's report also summarized the public comments on the proposed minimum wage ordinance, which included concerns that the minimum wage ordinance would disproportionately affect smaller hotels, that food and beverage operators within hotels would be at a competitive disadvantage to similar operations outside of hotels, and that hotels and hotel employees would be negatively impacted by reduced operations, employee layoffs, and possible closure as a result of absorbing the higher **[**10]** wage costs. Despite these negative concerns, the Economic Development Committee recommended that the City adopt the Wage Ordinance (subject to an amendment that the ordinance only apply to hotels with 150 rooms or more), largely because the increased wage rate would positively affect thousands of hotel employees and their families. (*Id.*)

Having considered the input from the public and interested parties, as well as the various consulting and economist firms, the City Council adopted the Wage Ordinance and signed the final version into law in October 2014. (*Id. at ¶ 11*, Exhibit 8.)

C. Local 11's Current Role as the Only Union for Hotel Workers in Los Angeles

Currently, Local 11 is the only union representative for hotel workers in Los **[*1182]** Angeles, and Local 11 has a practice of organizing hotel workers only when the employer consents to card-check recognition and "neutrality" agreements. (*See, e.g.*, Dkt. No. 37, Wlodkowski Decl. ¶ 16; Dkt. No. 28, Gleason Decl. ¶¶ 26-27.) In its most basic form, a neutrality agreement involves an employer's agreement to remain neutral during the union campaign and election process, *i.e.*, neither encouraging nor discouraging employees to unionize, despite the **[**11]** employer's right under federal labor law to speak out for or against unionization. A card-check recognition agreement involves an employer's agreement to forego its right under the *National Labor Relations Act* to demand an NLRB-sponsored secret ballot election and instead voluntarily recognize the union so long as a majority of the bargaining unit employees sign union authorization cards. (*See generally* Dkt. No. 26, Eigen Decl. ¶¶ 38-46.)

Local 11 concededly lobbied for the passage of the Wage Ordinance. (Dkt. No. 76, Local 11 Opp. at 2-3; *see also* Dkt. No. 25, Mohrfeld Decl. ¶¶ 12-13.)

D. Substantive Terms of the Wage Ordinance

1. Stated purpose

The City's official stated purpose for passing the Wage Ordinance is to promote "an employment environment that protects government resources," and to promote "the health, safety and welfare of thousands of hotel workers by ensuring they receive decent compensation for the work they perform." (WO at 1-2.) Specifically, the Wage Ordinance provides:

> The City has made significant financial investments to create a climate that has allowed the hospitality industry to thrive in Los Angeles. . . . Because hotels receive benefits from City assets and investments **[**12]** and because the City and its tourist industry benefit from hotels with experienced and content workers with low turnover, it is fair and reasonable that hotels pay their employees a fair wage. . . .
> 43 percent of the people who work in hotels in Los Angeles earn wages that put them below the federal poverty line. Wages paid to hotel employees are economically restrictive and prevent many hospitality employees from exercising purchasing power at local businesses, which takes a toll on the local economy. . . . [T]he City has an interest in promoting an employment environment that protects government resources. In requiring the payment of a higher minimum wage [to hotel workers], this article benefits that interest.
> . . .
> Income equality is one of the most pressing economic, social and civil rights issues facing Los Angeles. By proceeding incrementally and applying a minimum wage to hotel workers at larger hotels . . . the City seeks to promote the health, safety and welfare of thousands of hotel workers by ensuring they receive decent compensation for the work they perform.
>
> A large hotel, one containing more than 150 rooms, is in a better position to absorb the cost of paying living wages to **[**13]** its employees and also to absorb costs without layoffs.

(*Id.*)

2. Relevant definitions

The Wage Ordinance contains the following definitions that are relevant to the Court's analysis:

> **"Hotel"** means a residential building that is designated or used for lodging and other related services for the public, and containing 150 or more guest rooms, or suites of rooms (adjoining rooms do not constitute a suite of rooms).
>
> **[*1183] "Hotel Employer"** means a Person who owns, controls and/or operates a Hotel in the City, or a Person who owns, controls and/or operates any contracted, leased, or sublet premises connected to or operated in conjunction with the Hotel's purpose, or a Person who provides services at the Hotel.
>
> **"Hotel Worker"** means any individual whose primary place of employment is at one or more Hotels and who is employed directly by the Hotel Employer, or by a Person who has contracted with the Hotel Employer to provide services at the Hotel. "Hotel Worker" does not include a managerial, supervisory, or confidential employee. . . .
>
> **"Service Charge"** means all separately-designated amounts, regardless of name or label, collected by a Hotel Employer from a customer for service by Hotel Workers, or described **[**14]** in such a way that customers might reasonably believe that the amounts are for the service including, but not limited to those charges designated on receipts under the term "service charge," "delivery charge" or "porterage charge."

(*Id.* at 3-4.)

3. Substantive terms

The substantive terms of the Wage Ordinance relevant to the instant motion are the minimum wage and service-charge pass-through provisions, as well as the exemption and waiver provisions for collective bargaining agreements.

Minimum Wage. The minimum wage provision requires Hotels to pay Hotel Workers a minimum wage of $15.37 per hour, to be adjusted annually, "not including gratuities, Service Charge distributions or bonuses," and not including any off-sets for employer fringe-benefit contributions. (*Id.* at 4.) The wage provision is set to go into effect on July 1, 2015 for Hotels with 300 rooms or more and on July 1, 2016 for Hotels with 150 rooms or more. (*Id.* at 6.)

Service-Charge Pass-Through. The service-charge provision requires Hotel Employers to pay Service Charges in their entirety to the "Hotel Worker(s) performing services for the customers from whom the Service Charges are collected." (*Id.*) Hotel Employers are further required to pay the **[**15]** Hotel Worker(s) "equitably and according to the services that are related to the description of the Service Charges given . . . to the customer." (*Id.*)

Enforcement Provision. The Wage Ordinance includes a private right of action for Hotel Workers alleging violations of the ordinance and allows recovery of treble damages, attorney's fees, and costs. (*Id.* at 7-8.)

Exemption for Collective Bargaining Agreements. The Wage Ordinance includes an exemption for Hotel Workers whose employment is covered by a collective bargaining agreement:

> All of the provisions of this article, or any part of this article, may be waived in a bona fide collective bargaining agreement, but only if the waiver is explicitly set forth in that agreement in clear and unambiguous terms. Unilateral implementation of terms and conditions of employment by either party to a collective bargaining relationship shall not constitute or be permitted as a waiver . . . .

(*Id.* at 8.)

One-Year Waiver for Certain Hotel Employers. The Wage Ordinance provides that it is "not intended to cause reduction in employment or work hours for Hotel Workers." (*Id.*) Accordingly, Hotel Employers can obtain one-year waivers from the Wage Ordinance with a showing that **[**16]** compliance would force the employer, "in order to avoid bankruptcy or a shutdown of the Hotel, to reduce its workforce by more than 20 percent or curtail its **[*1184]** Hotel Workers' total hours by more than 30 percent." (*Id.*)

4. Instant motion for a preliminary injunction

The Hotel Associations seek an order staying the effective date and enjoining the enforcement of the Wage Ordinance on the sole ground that it is preempted by the *National Labor Relations Act*. According to Plaintiffs, the ordinance interferes with collective bargaining, union organizing, and labor relations at all Los Angeles hotels subject to the ordinance by "improperly aid[ing]" Local 11 in its efforts to organize employees at non-union hotels, and disrupting the balance of economic power between Local 11 and unionized hotels by giving the union an economic weapon for which it would otherwise have to bargain. Thus, Plaintiffs argue, the Wage Ordinance is preempted because it improperly regulates a zone of activity that Congress intended to leave unregulated and subject to the free play of economic forces. (Dkt. No. 23, Mot. at 1.)

II. LEGAL STANDARD

"A preliminary injunction is an extraordinary and drastic remedy." *Pom Wonderful LLC v. Hubbard, 775 F.3d 1118, 1124 (9th Cir. 2014)* (quoting *Munaf v. Geren, 553 U.S. 674, 689, 128 S. Ct. 2207, 171 L. Ed. 2d 1 (2008))*. To obtain **[**17]** a preliminary injunction, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of hardships tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Defense Council, Inc., 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)*; *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 877 (9th Cir. 2009)*. The *Winter* factors are considered in conjunction with the Ninth Circuit's "sliding scale" approach, which provides that "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Vanguard Outdoor, LLC v. City of Los Angeles, 648 F.3d 737, 739 (9th Cir. 2011)*.

"In one version of the 'sliding scale,' a preliminary injunction could issue where the likelihood of success is such that serious questions going to the merits were raised and the balance of hardships tips sharply in [plaintiff's] favor." *Id. at 740* (internal quotation marks omitted; brackets in original) (noting that the "serious questions" test survives *Winter*). Therefore, "serious questions going to the merits and a hardship balance that tips sharply in the plaintiff's favor can support issuance of an injunction, so long as the plaintiff also shows a likelihood of irreparable injury and that the injunction is in the public interest." *Id.* (internal **[**18]** quotation marks omitted).

III. DISCUSSION

A. Objections and Motion to Strike Plaintiffs' Evidence

The City objected to and moved to strike nearly every aspect of every piece of evidence submitted by the Plaintiffs in support of the pending motion. (Dkt. Nos. 60, 62.) The objections generally concern standard evidentiary issues, such as hearsay, foundation, improper opinion, personal knowledge, speculation, and relevance. To cover their bases, Plaintiffs submitted lengthy responses, spanning hundreds of pages, to the City's objections and motion to strike. (Dkt. Nos. 68, 72.)

It is well established that trial courts can consider otherwise inadmissible evidence in deciding whether to issue a preliminary injunction. *See* *Univ. of Texas v. Camenisch, 451 U.S. 390, 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981)* ("[A] preliminary injunction is customarily **[*1185]** granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits"); *Flynt Distributing Co. v. Harvey, 734 F.2d 1389, 1394 (9th Cir. 1984)* ("The urgency of obtaining a preliminary injunction necessitates a prompt determination and makes it difficult to obtain affidavits from persons who would be competent to testify at trial. The trial court may give even inadmissible evidence some weight, when to do so serves the purpose of preventing irreparable **[**19]** harm before trial"). "Indeed, district courts have considerable discretion to consider otherwise inadmissible evidence when ruling on the merits of an application for a preliminary injunction." *Garcia v. Green Fleet Sys., LLC, 2014 U.S. Dist. LEXIS 168196, 2014 WL 5343814, *5 (C.D. Cal. Oct. 10, 2014)* (citing *Flynt, 734 F.2d at 1394*; *Republic of the Philippines v. Marcos, 862 F.2d 1355, 1363 (9th Cir. 1988)* (observing that the rules of evidence do not strictly apply to preliminary injunction proceedings)). While district courts may consider inadmissible evidence in the context of a preliminary injunction, this does not mean that evidentiary issues have no relevance to this proceeding. Such issues, however, properly go to weight rather than admissibility. *Id.*

The Court has reviewed each of the City's objections and Plaintiffs' responses. The Court finds the City's objections largely to be "boilerplate recitations of evidentiary principles or blanket objections without analysis." *Capitol Records, LLC v. BlueBeat, Inc., 765 F. Supp. 2d 1198, 1200 n.1 (C.D. Cal. 2010)*. Thus, it would be both "unnecessary and impractical" for the Court "to methodically scrutinize each objection and give a full analysis of each argument raised." *Id.* Accordingly, and in light of the relaxed evidentiary standard at this stage in the proceedings, the Court summarily holds that evidentiary objections inconsistent with this ruling and/or not discussed in the text of this order are **OVERRULED**. All **[**20]** other objections are **SUSTAINED**. The City's motion to strike (Dkt. No. 62) is **DENIED** as moot, as it is duplicative in substance to the City's objections and largely overlaps with the legal arguments made in the City's opposition brief.

The Court now turns to the substance of Plaintiffs' motion for a preliminary injunction.

B. Plaintiffs Have Not Shown a Likelihood of Success On the Merits

1. *Machinists* preemption

Two preemption doctrines carry out the federal labor policy that Congress created when it passed the *National Labor Relations Act ("NLRA")*. The first doctrine is known as *Garmon* preemption, *see* *San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959)*, which "is intended to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the integrated scheme of regulation established by the *NLRA*." *Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 613, 106 S. Ct. 1395, 89 L. Ed. 2d 616 (1986)* (quotations omitted); *Dillingham Const. N.A., Inc. v. County of Sonoma, 190 F.3d 1034, 1041 (9th Cir. 1999)* ("[*Garmon]* preempts state laws that attempt to regulate conduct [that] is either arguably protected or prohibited by the *NLRA*.").

The second doctrine, *Machinists* preemption, is at issue in this case. *See* *Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 140, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976)*. *Machinists* prohibits states from regulating conduct that Congress intended to be "controlled by the free play of economic forces." *Id.* ("[In enacting the *NLRA*], Congress **[**21]** struck a balance of protection, prohibition, and laissez-faire in respect to union **[*1186]** organization, collective bargaining, and labor disputes"); *Dillingham, 190 F.3d at 1038* ("Under the *Machinists* preemption doctrine, the *NLRA* preempts state laws and state causes of action that regulate activity Congress intended to leave unregulated."). "States are therefore prohibited from imposing additional restrictions on economic weapons of self-help, such as strikes or lockouts, unless such restrictions presumably were contemplated by Congress." *Golden State Transit Corp., 475 U.S. at 614-15* (citations omitted). "Whether self-help economic activities are employed by employer or union, the crucial inquiry regarding pre-emption is the same: whether 'the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes.'" *Id.* Thus, *Machinists* preemption "turns on the actual content of [the ordinance] and its real effect on federal rights." *Chamber of Commerce of the United States v. Brown ("Brown"), 554 U.S. 60, 69, 128 S. Ct. 2408, 171 L. Ed. 2d 264 (2008)* (quoting *Livadas v. Bradshaw, 512 U.S. 107, 119, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (1994))*.

2. Application of *Machinists* to the Wage Ordinance

Plaintiffs argue that — with one exception — the Wage Ordinance is preempted not because of any single provision but based on how various **[**22]** provisions of the ordinance interact with one another. In summary fashion, Plaintiffs argue the following provisions and their effects render the Wage Ordinance preempted.

- The $15.37 per hour minimum wage provision — which does not include gratuities, service charge distributions, bonuses, or off-sets for fringebenefit contributions — is so onerous that it is not the type of "minimum" labor standard contemplated by *Machinists* case law. (Mot. at 14; Reply to City's Opp. at 10.)
- The minimum wage provision's onerous dollar amount is augmented by its disregard of the hotel industry's distinction between tipped and nontipped employees, which creates exceedingly costly compensation schemes inconsistent with hotel economies and in effect requires hotels to increase compensation for their most highly compensated employees who already earn more than $15.37 per hour. (Mot. at 5; Reply to City's Opp. at 11.)
- The waiver provision empowers unions to waive the Wage Ordinance's economically "onerous" wage requirements, while affirmatively denying non-union employees that same option. (Mot. at 4-5; Reply to City's Opp. at 11.)

- The provision banning "unilateral implementation" of a collective bargaining **[**23]** agreement's terms disrupts the balance of economic power as contemplated under federal labor law.[5] (Mot. at 17-18; Reply to City's Opp. at 11.)

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[5] Plaintiffs assert that this provision — the ban on unilateral implementation — in and of itself renders the Wage Ordinance preempted under the *Machinists* doctrine.

- By virtue of the aforementioned provisions, the Wage Ordinance purportedly "exerts extraordinary economic pressure" on non-union hotels to accept union demands for card-check recognition and neutrality agreements. (Mot. at 7, 13; Reply to City's Opp. at 11.)

At the April 6, 2015 hearing, the Plaintiffs again emphasized that the Court should not conduct the *Machinists* preemption analysis by looking at the Wage **[*1187]** Ordinance provisions individually but instead should only consider how the various provisions, in the aggregate, interact with one another. While the Court agrees that the preemption analysis requires consideration of how the various provisions work together, the analysis ends (but does not begin) with this consideration. Rather, because the so-called "whole" of the Wage Ordinance is no greater than the sum of its "parts," the Court first considers each of the purported problematic **[**24]** provisions and then considers whether, in the aggregate, those provisions interact in a way that compels preemption.

3. $15.37 per hour minimum wage provision

The parties agree that minimum labor standards are not subject to *Machinists* preemption, so long as they are laws of general applicability (affecting union and nonunion employees alike), and they neither encourage nor discourage collective bargaining or self-organizing. (Mot. at 21; City Opp. at 10-12; Local 11 Opp. at 7.) The general principle that governments can pass minimum labor standards pursuant to their police power without running afoul of federal labor law was established in *Metropolitan Life Ins. Co. v. Massachusetts ("Metropolitan Life"), 471 U.S. 724, 105 S. Ct. 2380, 85 L. Ed. 2d 728 (1985)*, and affirmed in *Fort Halifax Packing Co. v. Coyne ("Fort Halifax"), 482 U.S. 1, 107 S. Ct. 2211, 96 L. Ed. 2d 1 (1987)*. The Ninth Circuit has since held that in extreme cases, "substantive requirements could be so restrictive as to virtually dictate the results of the [collective bargaining and self-organizing process]." *Chamber of Commerce of U.S. v. Bragdon ("Bragdon"), 64 F.3d 497, 501 (9th Cir. 1995)*.

The instant motion for a preliminary injunction begs the obvious question that the Ninth Circuit left open in *Bragdon*: where does the Court draw the line for "extreme" cases? When **[**25]** does a substantive minimum labor standard in this case, a minimum wage provision — become so onerous and restrictive that it dictates what otherwise would be the result of the free-play of economic forces?

To answer this question, the Court turns to the basic principle of feasible economic alternatives and — to put a finer point on the guidance of *Bragdon* — holds that a minimum wage standard is not preempted so long as (1) paying the minimum wage and (2) entering into a collective bargaining agreement are both economically feasible, such that the parties have a meaningful choice as between the two alternatives. Under these circumstances, the substantive dollar amount of a minimum wage provision is not so onerous and extreme so as to virtually dictate what would otherwise be the result of the free-play of economic forces. Said another way — and at the risk of mixing metaphors — a minimum labor standard that simply "alters the playing field" does not compel preemption; but when a minimum labor standard not only "alters the playing field" but also "forces the hand" of one or both parties, then *Machinists* preemption applies. As articulated below, the Plaintiffs have failed to meet their **[**26]** burden that the Wage Ordinance's $15.37 per hour minimum wage is economically unfeasible, such that it deprives Hotel Employers from having a meaningful choice as between paying the minimum wage and entering into a collective bargaining agreement, thereby forcing the hand of non-union hotels to unionize.

Because the facts of *Metropolitan Life* and its progeny are central to the analysis, the Court begins with a review of the pertinent case law and then addresses Plaintiffs' various arguments.

[*1188] a. *Metropolitan Life*

In *Metropolitan Life*, the Supreme Court considered whether federal labor law preempted a Massachusetts law that required specific minimum mental-health care benefits to be provided under general insurance policies and employee healthcare plans. *471 U.S. at 727*. The Massachusetts Attorney General brought an enforcement action against an insurance company. The insurance company argued as a defense that the state law was preempted because "welfare benefits are a mandatory subject of bargaining" under federal labor law, and the law at issue would affect the terms of subsequent collective bargaining agreements between employers and employees. Id. at 751-52. The Supreme Court rejected the defendant's argument **[**27]** and held that regulations "establishing minimum terms of employment" are not preempted under Machinists. Id. at 754. The Supreme Court explained:

> The evil Congress was addressing [in passing the NLRA] was entirely unrelated to local or federal regulation establishing minimum terms of employment. Neither inequality of bargaining power nor the resultant depressed wage rates were thought to result from the choice between having terms of employment set by public law or having them set by private agreement. No incompatibility exists, therefore, between [the NLRA] and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of the state legislation is not incompatible with these general goals of the NLRA.

Id. at 754-55. Thus, because the Massachusetts law affected union and non-union employees equally and neither encouraged nor discouraged collective bargaining and the right to self-organization, the Supreme Court held that the Massachusetts law survived *Machinists* preemption. Id. at 755.

b. *Fort Halifax*

Two years after deciding *Metropolitan Life*, the Supreme Court again considered the issue in Fort Halifax, 482 U.S. 1, 107 S. Ct. 2211, 96 L. Ed. 2d 1 (1987). *Fort Halifax* involved **[**28]** a Maine statute that required employers to provide a one-time severance payment to processing plant employees when a subject plant closed in the state. Id. at 4. Subject employers were exempt from the statute's severance requirements if an affected employee was covered by an "express contract providing for severance pay." Id. at 4 n.1. In defending an enforcement suit by former employees and state officials, the defendant processing plant argued that the severance statute was preempted on the grounds that the law "intrudes on the bargaining activities of the parties because the prospect of a statutory obligation undercuts an employer's ability to withstand a union's demand for severance pay." Id. at 20. The Supreme Court again rejected this preemption argument:

> This argument — that a State's establishment of minimum substantive labor standards undercuts collective bargaining — was considered and rejected in [*Metropolitan Life*]. . . . It is true that the Maine statute gives employees something for which they otherwise might have to bargain. That is true, however, with regard to *any* state law that substantively regulates employment conditions.

Id. at 20-21 (citations omitted) (emphasis added). The Supreme Court explained **[**29]** that employers and employees come to the bargaining table with state law rights that form a "backdrop" for their negotiations. Id. at 21. Absent a collective-bargaining **[*1189]** agreement, "state common law generally permits an employer to run the work-place as it wishes," and the "employer enjoys this authority *without* having to bargain for it." Id. at 21 (emphasis added). The parties are free to negotiate around the state law backdrop, but "if impasse is reached, [then] the employer may rely on pre-existing state law to justify its authority to make employment decisions. . . ." Id. "[T]he mere fact that a state statute pertains to matters over which the parties are free to bargain cannot support a claim of pre-emption, for there is nothing in the NLRA which expressly forecloses all state regulatory power with respect to those issues that may be the subject of collective bargaining." *Id.* (internal quotation marks, citations, and alterations omitted).

The *Fort Halifax* defendant sought, unsuccessfully, to distinguish the Maine severance statute from the Massachusetts mental-health care insurance statute in *Metropolitan Life*, arguing that the severance statute was not a "genuine minimum labor standard" because **[**30]** it only applied in the absence of an agreement covering severance pay. Id. at 22. The Supreme Court flatly rejected this argument:

> The fact that the parties are free to devise their own severance pay arrangements . . . *strengthens* the case that the statute works no intrusion on collective bargaining. Maine has sought to balance the desirability of a particular substantive labor standard against the right of self-determination regarding the terms and conditions

> of employment. If a statute that permits no collective bargaining on a subject escapes NLRA pre-emption, *see Metropolitan Life*, surely one that permits such bargaining cannot be pre-empted.

Id. (emphasis added). Thus, the Supreme Court held, the severance statute was not preempted but a "valid and unexceptional exercise of the State's police power." *Id.*

In this case, the Hotel Associations argue that the statutes at issue in *Metropolitan Life* (mental-health care benefits) and *Fort Halifax* (severance pay) were upheld not because they were minimum labor standards but rather because, as a result of their being *minimal* requirements, they did not actually interfere with collective bargaining. (Mot. at 20-24; Reply to City's Opp. at 11.) Here, **[**31]** in contrast (the Plaintiffs' argument goes), the wage provision is 70% higher than the current California minimum wage of $9 per hour, and therefore it is not the type of "minimum" standard contemplated by *Metropolitan Life* and *Fort Halifax*. (Mot. at 14.) To support their argument, the Hotel Associations direct the Court to *Bragdon, 64 F.3d 497 (9th Cir. 1995)*.

c. *Bragdon* and *Fortuna*

In *Bragdon*, the Ninth Circuit held that the *Machinists* doctrine preempted a Contra Costa County ordinance that required construction employers to pay "prevailing wages" on certain private industrial construction projects. *Id. at 498*. The prevailing wage determination was made "by reference to established collective-bargaining agreements within the locality in which the public work [was] to be performed." *Id.* In analyzing whether the prevailing wage ordinance was "incompatible with the goals of the NLRA," the Ninth Circuit noted that while "minimal substantive requirements" are not subject to *Machinists* preemption (citing *Metropolitan Life)*, more onerous substantive requirements could affect the collective bargaining process:

> Viewed in the *extreme*, the substantive requirements could be so restrictive as to virtually dictate the results of the contract. **[**32]** The objective of allowing the bargaining process to be controlled by **[*1190]** the free-play of economic forces can be frustrated by the imposition of substantive requirements. . . . The question then becomes the extent of the substantive requirements that the state may impose on the bargaining process.

Id. at 501. In this context, the Ninth Circuit held that the prevailing wage ordinance was preempted because it "does much more than the type of state regulation that has previously been held not preempted." *Id.* Unlike minimum wage statutes, the prevailing wage concept was "derived from the combined collective bargaining of third parties in a particular locality." *Id. at 502*. The prevailing wage was neither a fixed statutory or regulatory minimum nor "the result of the bargaining of those employers and employees actually involved in the selected construction projects." *Id.* In this regard, the prevailing wage left employers with a false choice: in either scenario, employers could only ever pay a union bargained-for wage, and they were deprived of the freedom to choose something different.

Defendants argue that the Wage Ordinance is *not* an extreme case and direct the Court to the 2008 district court decision in **[**33]** *Fortuna*, which considered the applicability of *Bragdon* to the City's AHZE Ordinance, a regulation nearly identical to the Wage Ordinance at issue here. *Fortuna, 673 F. Supp. 2d 1000 (C.D. Cal. 2008)*. As mentioned above (*see supra* note 4), the AHZE Ordinance established a minimum wage for Hotel Workers in the LAX Corridor. In analyzing *Bragdon*, the *Fortuna* district court noted that "[f]irst, and most importantly," the AHZE Ordinance was distinguishable from the one at issue in *Bragdon* because the AHZE Ordinance was not a prevailing wage statute; "that is to say, it is not tied to collective bargaining agreements entered into by third parties." *Id. at 1009*. The *Fortuna* district court went on to explain:

> In *Bragdon*, the prevailing wage rate was determined by averaging the rates in collective bargaining agreements in the specific locality. As a result, employers were completely deprived of the ability to pay anything other than the rate that the few major unions had established in that locality. The employer either had to enter into a collective bargaining agreement and pay the collective bargaining rate, or it could pay the prevailing wage, which was determined with reference to collective bargaining agreements established between third parties. **[**34]** Thus, the employers were faced with two options without a distinction, and the end result was to completely eviscerate the purpose of collective bargaining negotiations.

Id. The AHZE Ordinance, in contrast, "is a fixed number that is not tied in any way to collective bargaining agreements between third parties. As a result, an employer can choose to pay the living wage, or it can enter into a collective bargaining agreement." *Id. at 1010*. The critical distinction from *Bragdon* is that in *Fortuna*, "the parties had the opportunity to negotiate freely," and thus "the substantive requirements of the [AHZE] Ordinance are not so 'restrictive as to virtually dictate the results of the contract,' as was the case in *Bragdon*." *Id.*

The *Fortuna* district court, while distinguishing *Bragdon* in substance, accepted the premise that there are "legitimate concerns" that employees and unions will petition the local government for localized ordinances in order to target individual businesses, which, in extreme cases, could result in ordinances "with such onerous terms that business owners are virtually forced to enter into a collective bargaining agreement in order to pay lower wages." *Id.* (quoting *Bragdon, 64 F.3d at 504*). The *Fortuna* ***[**35]*** district court held that the AHZE Ordinance was not such an extreme case because the minimum wage **[*1191]** was only a few dollars per hour more than the then-state minimum wage, and it provided an economic hardship exemption for hotels facing reduction in their workforces, reduction in hours, bankruptcy, or shut down. Thus, "the apparent intent of the [AHZE] Ordinance is not to strong-arm hotels into entering into collective bargaining agreements, but rather to provide a living wage to the extent that the hotels can afford to do so." *Id.*

d. Applying *Metropolitan Life* and its progeny to the Wage Ordinance at issue in this case, the $15.37 per hour minimum wage does not compel *Machinists* preemption

The only difference between the text of the AHZE Ordinance,[6] which the *Fortuna* district court upheld as not preempted, and the Wage Ordinance at issue here is the dollar amount of the minimum wage. The AHZE Ordinance was approximately $2 per hour over the then-state minimum wage, while the Wage Ordinance here is just over $6 per hour over the current state minimum wage. At the April 6, 2015 hearing, the Court posed the question to Plaintiffs' counsel: what about the $15.37 per hour dollar amount makes **[**36]** the minimum wage provision an extreme case that compels *Machinists* preemption? Plaintiffs' only response was that there is "no single line" to be drawn to identify extreme cases, and that the absence of a "line" is immaterial because the Court must consider the minimum wage provision in the context of the Wage Ordinance's other provisions, *i.e.*, the failure to distinguish between tipped and non-tipped employees, service-charge pass through restrictions, the union-waiver provision, and the ban on unilateral implementation. Plaintiffs' response is wholly insufficient.

A key point of Plaintiffs' preemption argument is that the $15.37 per hour wage provision is not the type of "minimum" standard contemplated by *Metropolitan Life* and *Fort Halifax* because the wage is so high. This necessarily requires the Court to consider the substantive dollar amount of the minimum wage provision and whether that dollar amount presents Hotel Employers with an economically feasible alternative to union organizing in order to determine how high is too high for purposes of *NLRA* preemption. By directing the Court's attention away from this critical question, Plaintiffs attempt to **[**37]** obfuscate the issue. Notably, Plaintiffs cannot identify a single case where any court held that a minimum labor standard was so onerous that it rendered the statute preempted.[7] This makes sense. Establishing preemption in this context is hard to do, and the Supreme Court has cautioned that "preemption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State." *Fort Halifax, 482 U.S. at 21*. The Court ventures to guess that a minimum

[6] *See* City's RJN, Exhibits 5-6.

[7] In this regard, the distinction between cases involving substantive minimum labor standards, on the one hand, and cases involving statutes or regulations affecting labor relations, on the other hand, is both relevant and critical. *Compare, e.g., Brown, 554 U.S. 60, 128 S. Ct. 2408, 171 L. Ed. 2d 264 (2008)* (holding preempted two provisions of a California statute where the provisions precluded the use of state funds "to assist, promote, or deter union organizing"), *and Golden State Transit Corp., 475 U.S. at 611-12* (holding preempted the City of Los Angeles's decision to condition **[**38]** the renewal of a taxi cab franchise on the taxi cab company resolving a pending labor dispute with its union), *with Metropolitan Life, 471 U.S. 724, 105 S. Ct. 2380, 85 L. Ed. 2d 728* (holding not preempted a substantive minimum labor standard), *and Fort Halifax, 482 U.S. 1, 107 S. Ct. 2211, 96 L. Ed. 2d 1* (same).

wage standard would need to have a degree of outrageousness — an **[*1192]** amount that is completely arbitrary and has no rational basis with respect to its intended purpose — for it to be considered an extreme case that compels preemption.

For reasons similar to those articulated in the *Fortuna* decision, the Court finds that Plaintiffs have failed to satisfy their burden in establishing that the Wage Ordinance's $15.37 per hour minimum wage is so onerous that it is inconsistent with the legislative goals and purposes of the *NLRA* and therefore preempted. As with the AHZE Ordinance, the Wage Ordinance minimum wage provision is not tied in any way to third party agreements, and so a Hotel Employer can choose to pay the minimum wage, or it can enter into a collective bargaining agreement. Either way, the parties can "negotiate freely." *Fortuna, 673 F.Supp.2d at 1010*. That the Wage Ordinance changes the backdrop for the negotiations is not significant because that would be the case with respect to *any* change in the minimum wage dollar amount. *See* *Fort Halifax, 482 U.S. at 21*. Additionally, as with the AHZE Ordinance, the economic hardship exemption allows Hotel Employers to obtain relief from the Wage Ordinance if implementation of its terms would result in a 20% reduction of workforce or a **[**39]** 30% curtail in workers' hours, bankruptcy, or shut down. The hardship exemption, in essence, operates to give non-union Hotel Employers the necessary "out" before their compliance with $15.37 per hour minimum wage becomes so economically unfeasible as to compel preemption.

The Plaintiffs' own evidence disproves its preemption argument with respect to the Wage Ordinance's minimum wage provision. For example, in the declaration of Michael Wlodkowski — general manager for the Renaissance LAX, a non-union hotel in the LAX Corridor — Mr. Wlodkowski explains the economic impact of the hotel's prior compliance with the AHZE Ordinance beginning in 2007, as well as the anticipated economic impact of the hotel's compliance with the Wage Ordinance come July 1, 2015. (Dkt. No. 37, Wlodkowski Decl.) Because the Renaissance LAX does not have a collective bargaining relationship with any union, it was not and is not eligible for a waiver from the AHZE and Wage Ordinance's minimum wage provisions. Mr. Wlodkowski explains that the Renaissance LAX's estimated cost of compliance with the Wage Ordinance will be approximately $260,000 per year. (*Id. at ¶¶ 14, 19*.) This additional cost of compliance may **[**40]** put Renaissance LAX at a competitive disadvantage as compared to union hotels that are eligible for a waiver. (*Id. at ¶¶ 17-20*.) Critically, Mr. Wlodkowski's declaration suggests that Renaissance LAX will opt to absorb the economic cost of compliance rather than yield to Local 11 demands for card-check recognition and neutrality agreements. (*Id.*) Were Renaissance LAX to yield to Local 11's demands, the hotel would have a likely chance of unionizing (*see generally* Eigen Decl. ¶ 46), which in turn would make the hotel eligible for a Wage Ordinance waiver. Other declarations by representatives of nonunion Hotel Employers provide accounts that are similar to that of Renaissance LAX, *i.e.*, they concede that compliance with the Wage Ordinance's $15.37 per hour minimum wage, though undesirable, is economically feasible. (*See, e.g.*, Dkt. No. 29, Hannigan Decl. re Palomar Westwood; Dkt. No 30, Hsu Decl. re Hilton LAX Towers; Dkt. No. 32, Mora Decl. re LAX Courtyard Marriott; Dkt. No. 33, Roberts Decl. re Beverly Hills Crowne Plaza; Dkt. No. 34, Robey Decl. re Holiday Inn Torrance; Dkt. No. 35, Rowling Decl. re Omni Los Angeles; Dkt. No. 36, Stigter Decl. re Four Seasons; Dkt. No. 38, Zen Decl. **[**41]** re Holiday Inn Torrance.) Notably, none of the declarations provide that, as a result of the Wage Ordinance, any given non-union Hotel Employer will be forced to (*i.e.*, it **[*1193]** will have no other option but to) yield to Local 11's demands for card-check recognition and neutrality agreement.

Plaintiff's biggest concern with the $15.37 per hour minimum wage provision is that it is bad economic policy.[8] There are certainly grounds for this concern. More than one of the City's own economic consultants opined that the $15.37 per hour minimum wage would have detrimental effects on the economy. And, as stated above, the gravamen of the hotel-representative declarations is that implementation of the minimum wage will have damaging effects on the non-union hotels' ability to compete in the marketplace. It takes little effort to realize that this policy discussion is not unique to hotel workers at large hotels in Los Angeles. Nearly every day, the Los Angeles Times and other local and national news outlets are reporting on efforts to implement significant city- and county-wide wage increases for *all* workers, not just hotel workers.[9] On April 14, 2015, hundreds of home health care workers

[8] At the April 6, 2015 hearing, Plaintiffs' counsel conceded the Hotel Associations made (and lost) an economic-policy argument to the legislature.

marched through **[**42]** downtown Los Angeles, rallying for a $15 per hour minimum wage.[10] On April 15, 2015, there were wide reports of nearly 1,000 fast-food workers, Wal-Mart employees, and union members in Los Angeles that joined nationwide protests, also calling for a $15 per hour minimum wage.[11] April 15, 2015 also marked the first day of a fifteen-day hunger strike held outside the Los Angeles City Hall designed to pressure City officials into approving a city-wide $15 per hour minimum wage.[12] On May 1, 2015, protesters **[*1194]** marched through downtown Los Angeles as part of an annual May Day rally, a main theme of which was a $15 per hour minimum wage.[13] The point is this: it is not the role of the courts to interject into matters of legislative economic policy under the guise of *NLRA* preemption, and Plaintiffs have not met their burden that the Wage Ordinance's $15.37 per hour minimum wage provision is anything but a permissible exercise of the City's power to institute such economic policy.

e. Plaintiffs' attempt to couch their *Machinists* preemption argument as anything but a facial challenge to the Wage Ordinance fails

The Hotel Associations argue that this case is distinguishable from *Fortuna* because in *Fortuna* the plaintiff asserted only a *facial* challenge to the AHZE Ordinance and conceded that state minimum labor standards are not subject to preemption; whereas here the Plaintiffs have provided the Court with a detailed factual record and make no "ill-advised concession as to blanket immunity from *Machinists* preemption. . . ." (Reply to City's Opp. at 15 n.7.) The Court does not see the logic in this argument. As an initial matter, the Court does not read *Fortuna* to suggest that the plaintiff made any sort of concession that minimum labor standards have blanket immunity from *Machinists* preemption. More importantly, however, any attempt to distinguish *Fortuna* as a "facial" challenge is a red herring. The nomenclature of a facial challenge — versus an as-applied one — simply **[**45]** implicates the two ways a court may declare a statute unconstitutional, *i.e.*: (1) the court may declare a statute invalid on its face, such that a

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[9] *See, e.g.*, Emily Alpert Reyes, *Three studies of L.A. minimum wage boosts reach different **[**43]** conclusions*, L.A. Times, March 19, 2015, *http://www.latimes.com/local/cityhall/la-me-minimum-wage-studies-20150320-story.html* ; Abby Sewell, *L.A. County supervisors poised to begin weighing minimum wage hike*, L.A. Times, March 23, 2015, *http://www.latimes.com/local/countygovernment/la-me-minimum-wage-20150324-story.html* ; Christopher Thornberg, *Op-Ed: L.A.'s minimum wage plan doesn't make sense*, L.A. Times, March 24, 2015, *http://www.latimes.com/opinion/op-ed/la-oe-0325-thornberg-minimum-wage-20150325-story.html* ; Abbey Sewell, *L.A. County supervisors expected to call for a minimum wage study*, L.A. Times, March 31, 2015, *http://www.latimes.com/local/lanow/la-me-ln-county-minimum-wage-20150330-story.html#page=1* ; Emily Alpert Reyes, *L.A. restaurants push for tips to count toward minimum wage*, L.A. Times, April 19, 2015, *http://www.latimes.com/local/cityhall/la-me-tipped-workers-20150420-story.html#page=1* ; Abby Sewell, *Activists outnumber business owners at L.A. County minimum wage forums*, L.A. Times, April 28, 2015, *http://www.latimes.com/local/lanow/la-me-ln-minimum-wage-forum-20150423-story.html* ; The Times Editorial Board, *In hiking the minimum wage, don't leave tipped workers behind*, L.A. Times May 3, 2015, *http://www.latimes.com/opinion/editorials/la-ed-tipped-minimum-wage-20150503-story.html* ; Emily Alpert Reyes, *L.A. minimum wage up for discussion; business group says issue rushed*, L.A. Times, May 12, 2015, *http://www.latimes.com/local/lanow/la-me-ln-minimum-wage-agenda-20150512-story.html* .

[10] *See* John Schreiber, *In-home care workers march for $15 hourly wage in L.A. County*, MyNewsLA.com, April 14, 2015, *http://mynewsla.com/government/2015/04/14/in-home-care-workers-march-for-15-hourly-wage-in-l-a-county/* .

[11] *See* Samantha Masunaga, *Nearly 1,000 in L.A. join nationwide protests for $15 minimum wage*, L.A. Times, April 15, 2015, *http://www.latimes.com/business/la-fi-fast-food-protests-20150415-story.html* .

[12] *See* Javier Panzar, *Activists fasting outside L.A. City Hall tell council to hike minimum wage*, L.A. Times, April 21, 2015, *http://www.latimes.com/business/la-me-ln-minimum-wage-fast-20150421-story.html* ; **[**44]** Griselda Nevarez, *Los Angeles Latinas Fast to Raise Minimum Wage*, NBC News, April 29, 2015, *http://www.nbcnews.com/news/latino/women-going-without-meals-raise-minimum-wage-n350271* .

[13] *See* Veronica Rocha, *Thousands to march in May Day rally in downtown L.A.*, L.A. Times, May 1, 2015, *http://www.latimes.com/local/lanow/la-me-ln-may-day-20150501-story.html* .

state may not enforce it under any circumstance; or (2) the court may find the statute unconstitutional as applied to a particular set of circumstances, allowing the state to enforce the statute in other circumstances. *See generally*, Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, *46 Stan. L. Rev. 235, 236 (1994)*. Here, the Plaintiffs' seek an order enjoining the City from implementing and enforcing the Wage Ordinance under any circumstance, and therefore they indisputably assert a facial challenge against the Wage Ordinance.

That Plaintiffs submitted myriad declarations and other evidence in support of the instant motion (*see* Dkt. Nos. 24-38) does not change the analysis. To the extent these declarations are relevant to the analysis, they do not speak to the legal issue before the Court. For example, and as discussed above, each of the declarations provide detailed accounts of how implementation of the $15.37 per hour minimum wage will increase salary costs and may require the non-union Hotels to offset those costs — including by passing **[**46]** the costs on to customers through higher prices — in ways that make the non-union Hotels less competitive as compared to neighboring hotels that are either unionized (and therefore eligible for a waiver) or located outside the city limits (and therefore not subject to the Wage Ordinance). As a result, the declarants provide, any given non-union Hotel "could face economic pressure to strike a deal with the Union to obtain a waiver that will allow it to remain competitive in its market." (*See, e.g.*, Dkt No. 29, Hannigan Decl. ¶ 29.)[14] The problem with **[*1195]** these declarations is that similar statements could be made no matter what the dollar amount of the minimum wage, whether it is $2 per hour or $10 per hour over the current state minimum wage. Thus, the Plaintiffs have not satisfied their burden to show that the "difference in degree" as between the AHZE Ordinance minimum wage and the Wage Ordinance minimum wage amounts to a "difference in kind."

f. Local 11's role in lobbying [47] for the passage of the Wage Ordinance does not alter the analysis**

The Hotel Associations also attempt to capitalize on *Bragdon*'s warning that employees and unions may "seek to set minimum wage and benefit packages with political bodies," substituting "the free-play of political forces for the free-play of economic forces that was intended by the *NLRA*." *Bragdon, 64 F.3d at 504 (9th Cir. 1995)*. (*See* Reply to Local 11's Opp. at 8.) Plaintiffs make much of the fact that Local 11 lobbied the City Council in passing the Wage Ordinance, and that the Hotel Associations (and other third parties with aligned interests) were not given equal access during the legislative process. (*See, e.g.*, Mot. at 4.) To support their argument that Local 11's lobbying efforts are relevant to the preemption analysis, Plaintiffs direct the Court to the dissent in *Chamber of Commerce of U.S. v. Lockyer ("Lockyer"), 463 F.3d 1076, 1098 (9th Cir. 2006)* *rev'd sub nom.* *Chamber of Commerce of U.S. v. Brown, 554 U.S. 60, 128 S. Ct. 2408, 171 L. Ed. 2d 264 (2008)*. The Ninth Circuit's *Lockyer* dissent suggested that the entire assembly bill at issue (AB 1889) was preempted because it was "sponsored by the California Labor Federation, ALF-CIO, and supported by a phalanx of labor unions." *Id. at 1102* (Beezer, J. dissenting). Plaintiff's reliance on the *Lockyer* dissent is misplaced for at least three reasons. **[**48]** First (and most obviously), the *Lockyer* dissent is just that, a dissent, and therefore it is not now, and never has been, controlling authority on this Court. Second, as the Ninth Circuit's *Lockyer* majority pointed out, evidence of union sponsorship is an "irrelevant" consideration because it is "not up to [the courts] to impugn the California's legislature's motives." *Id. at 1097 n.21*; *see also* *Livadas, 512 U.S. at 120* (citing *Golden State Transit Corp., 475 U.S. at 613* (noting that the City's desire to remain "neutral" in labor dispute does not determine pre-emption)).[15] The *Lockyer* majority, thus, is consistent

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[14] The Court has quoted the declaration of Robert Hannigan, Director of Operations for Hotel Palomar Westwood, only as an example. The other declarations by representatives for non-union Hotels provide similar accounts.

[15] The Court recognizes that Plaintiffs cite *Golden State* for the opposite point, *i.e.*, that legislative motive is in fact relevant to the preemption analysis. (*See* Reply to City's Opp. at 19.) Plaintiffs' reliance on *Golden State* for this proposition is misplaced. At issue in *Golden State* was not the legislature's motive in passing an otherwise facially neutral ordinance (as is the case here) but rather the undisputed fact that the City explicitly conditioned the renewal of a taxi cab franchise agreement on the employer settling a labor dispute with its union. The Supreme Court held that the City's threat to withhold the franchise renewal absent a resolution of the labor dispute encroached on the employer's "essential weapon of economic strength — the ability to wait out the strike." *Golden State Transit Corp., 475 U.S. at 611-12*; *see also* *id. at 615* (explaining that both parties were permissibly using economic weapons as a legitimate part of their collective-bargaining process — *e.g.*, the union striking at a time the City

with Plaintiffs' own position that NLRA preemption is determined by an analysis of the "actual content of [the ordinance] and its real effects on federal rights," (Mot. at 10 (quoting Brown, 554 U.S. at 69)), as opposed to any interest- **[*1196]** group lobbying efforts and/or the legislature's apparent motive in passing the ordinance. Finally, though the Supreme Court reversed the Ninth Circuit *Lockyer* majority — in effect agreeing with the general conclusion of the Ninth Circuit *Lockyer* dissent that the two statutory provisions were preempted — the Supreme Court's reasoning for doing so had nothing to do with the union's lobbying efforts in passing AB 1889 (these efforts were not mentioned **[**49]** at all in the opinion). Plaintiff's attempt to use the *Lockyer* dissent as persuasive authority that Local 11's lobbying efforts are somehow relevant to the preemption analysis falls short.

Accordingly, because Plaintiffs have not satisfied their burden that the $15.37 per hour minimum wage is anything but a valid exercise of the City's police power, the substantive dollar amount of the minimum wage provision, on its face, does not support a finding of *Machinists* preemption.

4. Failure to distinguish between tipped and non-tipped employees

In conjunction with their arguments regarding the Wage Ordinance's $15.37 per hour minimum wage, Plaintiffs make much of the fact that the ordinance fails to distinguish between tipped and non-tipped employees and does not permit Hotel Employers to include gratuities or Service Charges to the minimum wage calculation. (Mot. at 5, 14 (citing Dkt. No. 29, Hannigan Decl. ¶¶ 16-22; Dkt No. 35, Rowling Decl. ¶¶ 21-22.) Plaintiffs state that typically in the hotel industry (and presumably in other service industries), tipped employees receive lower hourly wages because, as a result of their tips, they **[**51]** are often the highest paid employees at hotels. In order to maintain this pay structure once the Wage Ordinance goes into effect, Hotel Employers may have to raise non-tipped employees' hourly wages significantly higher than the $15.37 per hour minimum wage, which in turn will result in "exceedingly costly compensation schemes inconsistent with hotel economies." (Mot. at 14.)

The response to this argument is simple. The California Labor Code prohibits the state and municipalities from establishing minimum wages that distinguish between tipped and non-tipped workers. Cal. Labor Code § 351; *see also* Henning v. Industrial Welfare Commission, 46 Cal.3d 1262, 1279, 252 Cal. Rptr. 278, 762 P.2d 442 (1988) (holding that a two-tier minimum wage provision is invalid because it "purports to allow an employer to pay a tipped employee a wage lower than he would be obligated to pay if the employee did not receive tips"). Plaintiffs do not dispute that California law prohibits the City from making such a distinction in setting minimum wages. Thus, Plaintiffs' argument here is really a nuanced version of Plaintiffs' argument discussed above, *i.e.*, that the dollar amount of the $15.37 per hour minimum wage is so onerous that it is not the type of minimum labor standard contemplated by *Metropolitan Life* and *Fort Halifax* **[**52]** . For the reasons articulated above (the Court will not repeat them here), this argument is without merit.

5. Waiver provision

The Hotel Associations next argue that giving unions the "exclusive" power to grant waivers of the Wage Ordinance's terms disrupts the balance of power between labor and management because it gives unions an "economic weapon" that the union would not otherwise have. (Mot. at 14.) The Hotel Associations further argue that because the ordinance does not automatically exempt hotels with collective bargaining agreements but instead requires parties to renegotiate their existing agreements to include the waiver, the ordinance **[*1197]** amounts to government "meddling" in collective bargaining. (*Id.*)

Plaintiffs' arguments regarding the waiver provision fall short. Exemptions for collective bargaining agreements with respect to any minimum labor standard are par for the course, as they are nearly guaranteed to be present in any labor-related statute. Plaintiffs' counsel conceded as much at the April 6, 2015 hearing. The Supreme Court has

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was considering the franchise **[**50]** renewal, and the employer waiting out the strike in an attempt to obtain bargaining concessions — but that the bargaining process was "thwarted when the city in effect imposed a positive durational limit to the exercise of economic self-help").

made clear that the NLRA "cast[s] no doubt on the validity of these familiar and narrowly drawn opt-out provisions." Livadas, 512 U.S. at 132. It is simply "[not] plausible **[**53]** to suggest that Congress meant to pre-empt such opt-out laws as 'burdening' the statutory right of employees not to join unions by denying nonrepresented employees the 'benefit' of being able to 'contract out' of such standards. *Id.* at n.26; *see also* Babler Bros., Inc. v. Roberts, 995 F.2d 911, 915 (9th Cir. 1993) (applying the reasoning in *Fort Halifax* to find that a statute was not preempted where it exempted union employers from paying overtime wages). Further, the Ninth Circuit has rejected the argument that a collective bargaining agreement waiver is preempted simply because it may incentivize non-union employers to unionize. *See* Viceroy Gold Corp. v. Aubry, 75 F.3d 482 (9th Cir. 1996).

At issue in *Viceroy* was California Labor Code § 750 et seq., which set a maximum workday of eight hours for persons engaged in mining and smelting, unless the workers were covered by a valid collective bargaining agreement that "expressly provides for the wages, hours of work, and working conditions of the employees." Id. at 486. The employer, which operated a non-union facility, argued that the labor code was preempted because it put the facility "at a competitive disadvantage relative to union mines and that 'operational efficiency, safety and employee morale are all adversely impacted" by the interpretation and enforcement of the statute." Id. **[**54]** The district court found that the opt-out provision was preempted under Machinists because "[a]ny attempt to characterize the eight-hour shift limitation as a 'minimum-benefit' for mine workers is disingenuous in light of the overwhelming evidence that the prohibition is highly onerous to [non-union] employees and employers of the mining industry." Id. at 489. The Ninth Circuit reversed, holding that while the eight-hour work day requirement may be "burdensome," the statute "undoubtedly provides some minimum protection to non-union mine workers, while permitting a longer work day through the protections provided by the collective bargaining or the [union] election process. . . ." Id. at 489-90.

The Hotel Associations attempt to distinguish *Viceroy* on the grounds that California Labor Code § 750 does not require the waiver to be "clear and unambiguous" like the Wage Ordinance at issue here; and that the *Viceroy* opt-out provision was not exclusive to collective bargaining agreements, as it allowed employees to waive the labor code requirements if a two-thirds majority of the affected employees of a particular employer voted to adopt an alternative policy (subject to certain restrictions). (*See* Reply to City Opp. at 17 n.10; Reply to Local 11 Opp. at 7.) Plaintiffs' arguments are not persuasive. The Supreme Court has already held that collective bargaining agreement waivers need to be "clear and unmistakable" to be given effect. *See* Livadas, 512 U.S. at 125. And this makes perfect sense. The right to $15.37 per hour minimum wage belongs to the affected hotel workers. Thus, because California law requires that "the valid waiver of a right presupposes an actual and demonstrable knowledge of the very right being waived," **[*1198]** *Jones v. Brown, 13 Cal. App. 3d 513, 519, 89 Cal. Rptr. 651 (1970)*, the Wage Ordinance's requirement of a "clear and unambiguous" waiver is unremarkable. That non-union Hotel Workers cannot **[**55]** waive the provisions of the Wage Ordinance — as could the employees subject to California Labor Code § 750 in *Viceroy* — is likewise unremarkable: a minimum wage is categorically different than an hours-per-day maximum imposed for safety reasons, and the City has deemed that waiver of the rights by any Hotel Worker *not* covered by a collective bargaining agreement "shall be deemed contrary to public policy and shall be void and unenforceable." (WO at 8.) Again, this makes sense. Both California statute and case law recognize that the rights to minimum wage and overtime payments are not waivable. *See* Cal. Labor Code § 1194; Gentry v. Superior Court, 42 Cal.4th 443, 455, 64 Cal. Rptr. 3d 773, 165 P.3d 556 (2007). While "[a]nyone may waive the advantage of a law intended solely for his benefit . . . a law established for a public reason cannot be contravened by a private agreement." Sonic—Calabasas A, Inc. v. Moreno, 51 Cal. 4th 659, 679, 121 Cal. Rptr. 3d 58, 247 P.3d 130, 247 P.3d 130 (2011) (internal quotation marks omitted).

Plaintiffs' argument that the waiver provision gives unions an "economic weapon" that it would not otherwise have is equally unpersuasive. As Local 11 pointed out at the April 6, 2015 hearing, there is no evidence before the Court with respect to which party (the employer or the union) has the upper hand in bargaining power. California has enacted a vast array of regulations governing labor standards that form the "backdrop" **[**56]** of employee and employer state law labor rights. Some of these regulations ostensibly favor employers. For example, California law presumes all employees are at-will employees absent contract terms specifying otherwise. Guz v. Bechtel Nat. Inc., 24 Cal. 4th 317, 335, 100 Cal. Rptr. 2d 352, 8 P.3d 1089 (2000) (citing Cal. Labor Code § 2922) ("An atwill employment may be ended by either party 'at any time without cause,' for any or no reason, and subject to no procedure except the statutory requirement of notice."). Typically, collective bargaining agreements contract around California's at-will employment policy and contain for-cause termination clauses. Plaintiffs' argument with respect to the waiver provision is akin to a union arguing that California's at-will employment policy (or any other seemingly pro-employer regulation) is subject to *Machinists* preemption because it provides employers with an economic weapon for which it might otherwise have to bargain. The Court assumes no party to this litigation would suggest that to be the case. Thus — reminding Plaintiffs that "*any* state [or local] law that substantively regulates employment conditions" gives one party or the other something for which it otherwise might have to bargain, *Fort Halifax, 482 U.S. at 21* (emphasis added) — the Court finds that the Wage Ordinance's **[**57]** waiver provision and its effects are consistent with the *NLRA's* legislative goals and purposes and do not implicate *Machinists* preemption.

6. Ban on unilateral implementation

The Hotel Associations' waiver arguments are part and parcel of their arguments regarding the so-called ban on unilateral implementation. To review, the Wage Ordinance provides that "[u]nilateral implementation of terms and conditions of employment by either party to a collective bargaining relationship shall not constitute or be permitted as a waiver of all or any part of the provisions of this article." (WO at 8.) The Hotel Associations argue that this provision provides an independent basis for preemption because unilateral implementation is "an integral part of the bargaining process" in labor management relations, and requiring hotels to **[*1199]** implement statutory minimums during negotiations would interfere with collective bargaining as it typically occurs upon expiration of the CBA. (Mot. at 17.)

Plaintiffs rely on *Barnes v. Stone Container Corporation, 942 F.2d 689 (9th Cir. 1991)* to support their argument. (*See* Mot. at 19.) In *Barnes*, the collective bargaining agreement between Barnes' employer and his union had expired. After several months of unsuccessful negotiations, the parties reached an impasse. **[**58]** Following the expiration of the collective bargaining agreement but before the parties reached an impasse, the employer fired Barnes for harassment after he sprayed two replacement employees with water when they crossed the picket line. The union filed an unfair labor practice charge on Barnes' behalf, asserting that the stated reason for his discharge was pretextual and that the employer fired him for his union activity. The NLRB investigated and found no basis for the retaliation charge, and the union withdrew the complaint. Barnes then filed a state law action under the Montana wrongful discharge act ("WDA"), which provides that an employee discharge is "wrongful" if the termination is not for "good cause," except when the employee is covered by a collective bargaining agreement. The employer moved for summary judgment, arguing that Barnes' wrongful discharge lawsuit was preempted under *Machinists* because it "would impose a just cause term where one did not exist (*i.e.*, under the expired CBA), thus affecting the relations between employer and its represented employees after contract-termination and prior to impasse," a time period during which "the *NLRA* contemplates relations free **[**59]** of state interference." *Id. at 691*. The district court denied summary judgment, but the Ninth Circuit — relying on a Second Circuit case, *Derrico v. Sheehan Emergency Hosp., 844 F.2d 22 (2d Cir. 1988)* — reversed.

In *Derrico*, the plaintiff — who was also discharged after expiration of the collective bargaining agreement but before the union and employer had bargained to impasse — filed a state court action, alleging that he had been fired without just cause. His theory was that the expired bargaining agreement contained a just cause provision which, after contract expiration and prior to impasse, resulted in an implied contract between each union employee and the employer that there would be no discharge without cause. The Second Circuit affirmed the district court's dismissal of the plaintiff's case under *Machinists*, explaining that the theory of an implied contract resulting from an expired collective bargaining agreement created "substantial potential for friction" with the "delicate machinery of the *NLRA*," and permitting the plaintiff's lawsuit would "artificially limit" the parties' post-expiration options. *Id. at 28*. The Second Circuit explained:

> When bargaining alone does not produce consensus, the *NLRA* contemplates that both sides will resort to "economic **[**60]** weapons." Such resort is an integral part of the balance the *NLRA* strikes between labor and management. The possibility that a term of an expired CBA might become an "implied" contract under state law

> would tie the parties' hands in a manner inimical to this facet of the NLRA's collective bargaining process. Exposure to liability at state law for breach of contract under circumstances of this case would significantly alter the labor-management relationship that follows expiration of a CBA. [The plaintiff's] theory would [also] significantly affect the collective bargaining process that lies at the heart of the NLRA. Expiration of a CBA plainly works a significant change in the parties' relationship. Just as plainly, the prospect of that change and the mutual awareness of the tactics to which either side may thereafter resort provide the parties **[*1200]** with incentives to negotiate. To allow a CBA provision to linger on after the contract's expiration in the form of an implied contract would dilute these effects.

Id. at 29 (internal citations omitted).

Relying on the Second Circuit's reasoning in *Derrico*, the Ninth Circuit panel in *Barnes* found that the plaintiff's state law wrongful discharge lawsuit **[**61]** was preempted under *Machinists*:

> [T]he incidental effect of allowing Barnes to pursue his WDA action after contract expiration, but prior to a bargaining impasse, is precisely the sort of entanglement the Supreme Court sought to avoid in *Machinists*. Permitting WDA actions during this period would have the untoward effect of imposing a contract term on the parties and thus altering incentives to negotiate. . . . We believe [the *Derrico]* reasoning applies as well to a term imposed by a state statute as it does to a term implied via contract theory derived from case law.
>
> Unlike the unemployment compensation in *New York Telephone*[16] and the health benefits in *Metropolitan Life*, we view the imposition of a just cause term by the WDA on the parties negotiating a contract as meddling at the heart of the employer-employee relationship at a time when such interference is most harmful. Issues of hiring and firing are often central to CBA negotiations and the NLRA, as interpreted in *Machinists*, intended to allow the parties to resolve these matters without the unsettling effect of state regulation.

Id. at 693.

There are two unique aspects of *Barnes* that render its reasoning inapplicable to the facts in this case. First, the Ninth Circuit acknowledged that the Montana WDA is a substantive minimum labor standard different in kind than the minimum labor standards at issue in, for example, *Metropolitan Life* and *Fort Halifax*,[17] because "[i]ssues of hiring and firing are often central to CBA negotiations and the NLRA, as interpreted in *Machinists*, intended to allow the parties to resolve these matters without the unsettling effect of state regulation." *Id. at 693*. Second, and more importantly, *Barnes* makes clear that this preemption scenario is limited to a narrow set of circumstances, *i.e.*, the sensitive time period between post-expiration and pre-impasse negotiations. *Id.; see also National Broadcasting Co., Inc. v. Bradshaw ("NBC"), 70 F.3d 69, 73 (9th Cir. 1995)* (explaining that because a state statutory remedy was not invoked until after bargaining impasse was reached, "the type of interference with negotiations frowned upon in *Barnes* did not occur"). In this regard, *Barnes* involves the preemption of an individual lawsuit under a particular set of circumstances.[18] It has nothing to do with whether — post-expiration of a collective bargaining **[**63]** agreement — the NLRA prohibits employers from implementing statutory minimums during negotiations;[19] and it certainly does

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[16] *See New York Tel. Co. v. New York State Dep't of Labor, 440 U.S. 519, 540-546, 99 S. Ct. 1328, 59 L. Ed. 2d 553 (1979)* (holding that the NLRA does not preempt a state law providing unemployment benefits to striking workers). **[**62]**

[17] The Ninth Circuit acknowledged this distinction in the context of affirming the principles of *Metropolitan Life. See Barnes, 942 F.2d at 693* ("The policies underlying the NLRA, restoration of equality of bargaining power and encouragement of collective bargaining, are not affected by the kind of the minimum standards contained in the Massachusetts law [at issue in *Metropolitan Life*].").

[18] Notably, *Barnes* involved what would appropriately be referred to as an "as applied" challenge to the Montana WDA.

[19] The Ninth Circuit has since held that it is entirely permissible (and not preempted under the NLRA) for an employer to be liable for the difference between a higher statutory minimum wage rate and a lower negotiated rate during the interim period between

not support the Plaintiffs' **[*1201]** contention that the entire Wage Ordinance is preempted simply because, hypothetically, a hotel worker might, at some indefinite point in the future, bring a private enforcement action under the Wage Ordinance under the narrow circumstances at issue in *Barnes*.

Plaintiffs reliance on *Brown v. Pro Football, Inc. ("Pro Football"), 518 U.S. 231, 116 S. Ct. 2116, 135 L. Ed. 2d 521 (1996)* (*see* Mot. at 19-20), does not change the analysis. *Pro Football* involved the extent to which the non-statutory labor exemption to antitrust laws shielded the National Football League ("NFL") club owners' unilateral implementation of new salary caps ($1,000 per week) for developmental squad players after the league's collective bargaining agreement with the players union had expired and negotiations had reached an impasse. It was undisputed that the club owners' unilateral implementation — absent the labor exemption — would have constituted an unlawful restraint of trade. In holding that the exemption applied to the club owners' conduct at issue in the case — *i.e.*, their post-impasse imposition of a proposed employment term concerning a mandatory subject of bargaining — **[**65]** the Supreme Court explained that "[a]s a matter of logic, it would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves or with each other *any* of the competition-restricting agreements potentially necessary to make the process work or its results mutually acceptable." *Id. at 237* (emphasis in original); *see id. at 242* ("All this is to say that to permit antitrust liability here threatens to introduce instability and uncertainty into the collective-bargaining process, for ***antitrust law*** often forbids or discourages the kind of joint discussions and behavior that the collective-bargaining process invites or requires.").[20] While *Pro Football* had nothing to do with *Machinists* preemption, the players union argued that the exemption should not apply in this context because antitrust laws are akin to "general 'backdrop' statutes," such as the statutes involved in *Metropolitan Life* and *Fort Halifax*, which apply in the absence of an effective collective bargaining agreement. *Id. at 248*. The Supreme Court rejected this argument, explaining that the minimum labor standard statutes, like the ones at issue in *Metropolitan **[**66]** Life* and *Fort Halifax*, were categorically distinct from federal antitrust laws because they "neither encouraged nor discouraged the collective-bargaining process that are the subject of the federal labor laws," and they do not "come accompanied with antitrust's labor-related history." *Id.* (internal quotation marks and alterations omitted). It would be a different story had the *Pro Football* club owners unilaterally implemented a weekly salary cap less than any of the applicable state minimum wages.[21] Absent that, however, *Pro Football* **[*1202]** has no application to this case, and Plaintiffs have failed to establish that the Wage Ordinance's ban on unilateral implementation is inconsistent with the *NLRA's* legislative goals and purposes.

7. Pressure to engage in neutrality/card check agreements

The Hotel Associations finally argue that because (1) non-union Hotels must enter into collective bargaining agreements as a statutory predicate to receive a waiver, and (2) Local 11 is the only union for hotel workers in Los Angeles and organizes exclusively through card-check/neutrality agreements, then Hotel Employers are effectively required to acquiesce to Local 11's neutrality demand to be eligible for a waiver. Thus, the Plaintiffs argue, "the City has doubly rejiggered the economic calculus as to whether or not to acquiesce to the Union's demand for card-check recognition," which in turn compels *Machinists* preemption. (Mot. at 12-14; Reply to City's Opp. at 11.) This argument is not persuasive.

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effective collective bargaining agreements when the subsequent **[**64]** agreement is not retroactive to cover the gap period. *See NBC, 70 F.3d at 71-72* (holding that a state cannot "withhold its minimum benefit protections from employees solely on the ground that they were bound by a collective bargaining agreement," and union employees are allowed "the full protection of the minimum standard, absent any agreement for something different").

[20] *Pro Football* provides a detailed and comprehensive analysis of the many nuanced issues at the intersection of federal antitrust and labor laws, particularly with respect to multi-employer collective bargaining. For the most part, the analysis is not relevant to the issues in this case, and therefore the Court does not discuss it here.

[21] The Court surmises that when *Pro Football* was decided in 1996, $1,000 per week (roughly $25 per hour for a 40-hour work week) was well **[**67]** above each of the applicable then-state minimum wages.

As discussed in detail above, the Wage Ordinance's minimum wage and waiver provisions do not interfere with collective bargaining and labor relations, and they do not otherwise conflict with the NLRA's legislative goals and purposes. Nothing in the Wage Ordinance requires any Hotel Employer to unionize, enter into a cardcheck/ neutrality agreement,[22] or forego any rights to which **[**68]** it is otherwise entitled under federal labor law. The Wage Ordinance is completely silent on these issues. Simply because the Wage Ordinance may have "rejiggered" the economic calculus — again, this would be the case for any change in any substantive minimum labor standard — that does not compel preemption.

C. Absent a Showing of Success on the Merits, Plaintiffs Cannot Establish Irreparable Harm or That The Balance of Hardships Tip In Plaintiffs' Favor

In summary, the Plaintiffs have failed to show any likelihood of success on the merits. As stated at the beginning of this analysis, the whole of the Wage Ordinance is no greater than the sum of its parts. On its face, the Wage Ordinance is a minimum labor standard that neither encourages nor discourages collective bargaining. The minimum wage provision operates simply as part of the backdrop for collective bargaining negotiations — to the extent **[**69]** the parties opt to partake in such negotiations — and it is otherwise part of the minimum labor standard landscape that provides state law rights that the parties enjoy without having to bargain for them. Nothing about the waiver provision (including the ban on unilateral implementation) warrants preemption: the Supreme Court and Ninth Circuit have held that such opt-out provisions are valid and that union employees are entitled to the full protections of minimum standards absent a valid collective bargaining agreement for something different, including during any gap periods between such agreements.

Because Plaintiffs have not shown any likelihood of success on the merits, they cannot make the necessary showing of irreparable harm. Thus, under any version of the sliding scale approach, Plaintiffs have not satisfied their high burden for the **[*1203]** extraordinary and drastic remedy that is a preliminary injunction.

IV. CONCLUSION

Plaintiffs seek a preliminary injunction staying the effective date and enjoining enforcement of the City's Wage Ordinance, mandating a $15.37 per hour minimum wage for Hotel Workers at large Hotels in Los Angeles, which is scheduled to go into effect on July 1, 2015. **[**70]** Plaintiffs argue that the Wage Ordinance is preempted under the NLRA. A review of Plaintiffs' arguments and evidence, however, make clear that Plaintiffs' biggest concern with the Wage Ordinance is that it is bad economic policy. However, it is not the role of the Court to interject into matters of legislative economic policy under the guise of NLRA preemption. When Plaintiffs' arguments and evidence are considered against the backdrop of the NLRA preemption legal standard, Plaintiffs have not satisfied their high burden for the extraordinary and drastic remedy of preliminary injunctive relief.

Metropolitan Life and its progeny provide that, under *Machinists* preemption, minimum labor standards are presumptively valid, so long as they are laws of general applicability and neither encourage nor discourage collective bargaining or selforganizing. While the Ninth Circuit has recognized that in an extreme case, the substantive requirements of a minimum labor standard could be so restrictive as to virtually dictate the results of the collective bargaining and self-organizing process, this occurs only where one or both parties are deprived of a meaningful choice as between complying with the **[**71]** substantive requirements and entering into a collective bargaining agreement. Here, Plaintiffs have failed to meet their burden that the Wage Ordinance's $15.37 per hour minimum wage is so onerous that it is economically unfeasible and therefore forces the hand of non-union hotels to unionize. Plaintiffs' own evidence establishes that Hotel Employers have a meaningful choice as between paying the $15.37 per hour minimum wage and entering into collective bargaining agreements, and so the Wage

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[22] While, currently, Local 11 is the only union representing hotel workers in the Los Angeles area, there is nothing preventing another union — one that does not organize exclusively vis-à-vis card-check/neutrality agreement — from organizing hotel workers at any given hotel in the City in the future.

Ordinance's minimum wage provision does not compel preemption. Similarly, Plaintiffs have failed to meet their burden that the Wage Ordinance's waiver provision interferes with collective bargaining and labor relations or is otherwise inconsistent with the *NLRA's* legislative goals and purposes. Union opt-out provisions are also presumptively valid, and union employees are entitled to the full protections of minimum labor standards absent a collective bargaining agreement for something different, including during any gap periods between such agreements. Accordingly, the Hotel Associations have failed to show any likelihood of success on the merits of their *NLRA* preemption claim, and their motion **[**72]** for a preliminary injunction staying the effective date and enjoining enforcement of the Wage Ordinance is **DENIED**. (Dkt. No. 23.)

The City's motion to strike (Dkt. No. 62) is **DENIED** as moot, as it is duplicative in substance to the City's separately filed objections.

Dated: May 13, 2015

/s/ André Birotte Jr

HONORABLE ANDRÉ BIROTTE JR.

UNITED STATES DISTRICT COURT JUDGE

Dutra v. BFI Waste Mgmt. Sys. of N. Am.

United States District Court for the Northern District of California

May 13, 2015, Decided; May 13, 2015, Filed

Case No.14-cv-04623-NC

Reporter
2015 U.S. Dist. LEXIS 63631 *; 2015-1 Trade Cas. (CCH) P79,182

HAROLD DUTRA, Plaintiff, v. BFI WASTE MANAGEMENT SYSTEMS OF NORTH AMERICA, INC., Defendant.

Prior History: *Dutra v. BFI Waste Sys. of N. Am., Inc., 2013 U.S. Dist. LEXIS 85216 (N.D. Cal., June 14, 2013)*

Core Terms

Antitrust, sanctions, alleges, conspiracy, motion for sanctions, leave to amend, motion to dismiss, relevant market, good faith, settlement agreement, inherent power, fair dealing, discovery, parties, harass

Counsel: **[*1]** For Harold Dutra, Jr., Plaintiff: Russell Alan Robinson, LEAD ATTORNEY, Law Office of Russell A. Robinson, San Francisco, CA.

For BFI Waste Management Systems of North America, Inc., doing business as Allied Waste Services of San Mateo (BFI), now know as Republic Services, Inc., Defendant: Mark Gerard Kisicki, LEAD ATTORNEY, Christopher M. Ahearn, Ogletree Deakins Nash Smoak & Stewart, P.C., San Francisco, CA; Edward B. Schwartz, PRO HAC VICE, Steptoe & Johnson LLP, Washington, DC.

Judges: NATHANAEL M. COUSINS, United States Magistrate Judge.

Opinion by: NATHANAEL M. COUSINS

Opinion

ORDER GRANTING MOTION TO DISMISS WITHOUT LEAVE TO AMEND AND DENYING MOTIONS FOR SANCTIONS

Re: Dkt. Nos. 34, 44, 57

Before the Court are BFI's motion to dismiss the first amended complaint, BFI's motion for sanctions, and Dutra's cross-motion for sanctions. This is the second time Dutra has sued BFI over his dissatisfaction with a settlement agreement the parties entered into in 2009. Now, Dutra alleges that BFI has entered into an agreement with Recology to bar plaintiff from employment with Recology. The Court finds Dutra's antitrust allegations and breach of the covenant of good faith and fair dealing are meritless and GRANTS defendant's **[*2]** motion to dismiss without leave to amend. However, the Court does not find that sanctions are appropriate and DENIES both BFI's and Dutra's motions for sanctions.

I. BACKGROUND

Plaintiff Harold Dutra is a former employee of defendant, BFI (now Republic), a waste management service company. Dkt. No. 30 at ¶ 9. Dutra was a driver who collected waste in San Mateo County. *Id.* BFI terminated Dutra in 2007, and the parties engaged in arbitration, ultimately, ending in a settlement agreement in 2009. *Id.* at ¶¶ 11-14. The settlement agreement provided a $35,000 monetary payment for Dutra, and required Dutra to relinquish all employment rights with BFI including right to seek re-employment with BFI and its successors. *Id.* at ¶ 14.

In June 2012, Dutra sued BFI for a variety of claims, seeking to overturn the settlement agreement. *Id.* at ¶ 15. The district court dismissed Dutra's complaint in July 2013. *Id.* at ¶ 16.

After July 2013, Dutra applied for a job with Recology, another waste disposal company. *Id.* at ¶ 18. Dutra alleges that he was deemed qualified by Recology, and he believes that his application was rejected because of communications between Recology and BFI. *Id.* at ¶ 18.

II. DISCUSSION [*3]

Before the Court are two separate motions, which the Court will address in turn. First, defendant's motion to dismiss argues that this Court should dismiss the complaint without leave to amend because the complaint is meritless. Dkt. No. 34. Second, defendant moves for sanctions under *Rule 11*, *28 U.S.C. § 1927*, and the Court's inherent power, and asks the Court to award it attorney's fees. Dkt. No. 44. Plaintiff filed a cross-motion for sanctions, seeking recovery of attorney's fees in defending the motion for sanctions. Dkt. No. 57.

A. Motion To Dismiss

A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests the legal sufficiency of a complaint. *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)*. On a motion to dismiss, all allegations of material fact are taken as true and construed in the light most favorable to the non-movant. *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996)*. The Court, however, need not accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)*. Although a complaint need not allege detailed factual allegations, it must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A claim is facially plausible when it "allows the court to draw the reasonable inference **[*4]** that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

If a court grants a motion to dismiss, leave to amend should be granted unless the pleading could not possibly be cured by the allegation of other facts. *Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000)*. However, dismissal without leave to amend is proper if it is clear that the complaint could not be saved by amendment. *Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003)*.

Dutra sues for (1) a violation of the Sherman Antitrust Act *§ 1* alleging a conspiracy to restrict trade; (2) a violation of the Sherman Antitrust Act *§ 2*, alleging an unlawful monopoly; (3) the Cartwright Antitrust Act; and (4) breach of covenant of good faith and fair dealing.

1. Sherman Antitrust Act § 1

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." *15 U.S.C. § 1*. In antitrust claims, the Supreme Court has required a heightened pleading standard:

> In applying these general standards to a § 1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to

> infer an agreement does not impose a probability requirement at the pleading **[*5]** stage; it simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.... [A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice.

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556-57, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "This is because discovery in antitrust cases frequently causes substantial expenditures and gives the plaintiff the opportunity to extort large settlements even where he does not have much of a case." *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1046-47 (9th Cir. 2008)*.

To state a claim under *Section 1 of the Sherman Act*, claimants must plead not just ultimate facts (such as a conspiracy), but evidentiary facts which, if true, will prove: (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition. *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 (9th Cir. 2008)*; *Les Shockley Racing Inc. v. Nat'l Hot Rod Ass'n, 884 F.2d 504, 507 (9th Cir.1989)*; *see also* *Twombly, 550 U.S. at 553-56*. To satisfy the first prong, a plaintiff may not simply allege an agreement or conspiracy, but rather must provide information as to the "specific time, place, or person involved in the alleged conspiracies." *Twombly, 550 U.S. at 564*; *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1046-47 (9th Cir. 2008)*.

Here, Dutra alleges that sometime after the July 22, 2013 dismissal, he applied for a job with Recology. Dkt. No. 30 at **[*6]** ¶ 18. "[O]n information and belief, after communications between Recology and BFI (Republic), Plaintiff's application was rejected." *Id.* Dutra alleges that he learned in late 2013 and early 2014 "of the collusion between BFI (Republic) and Recology as that collusion or conspiracy relates to Plaintiff's re-employment." *Id.* at ¶ 21. These allegations do not include any factual information to give rise to plausible grounds that a conspiracy exists. The Court finds that such allegations are exactly the sort that the *Twombly* court rejected, and so too, this Court rejects the conspiracy claim as insufficiently pled.

On the restraint of trade, Dutra alleges "[b]y locking up certain markets, with fixed rates and single company locales, BFI (Republic) and Recology are able to harm persons seeking employment, consumers of their products, and others." *Id.* at ¶ 26. Dutra alleges that BFI and Recology control all of the San Francisco Bay Area's waste management services, and "have divided the Area into sections or regions within which there is no competition." *Id.* at ¶ 5. "BFI and Recology set wages, rates for collection, and dictate hiring and collection practices throughout the Bay Area." *Id.*

On a motion **[*7]** to dismiss, the Court may take judicial notice of matters of public record. *Harris v. County of Orange, 682 F.3d 1126, 1132 (9th Cir. 2012)*. BFI has provided public record information that Bay Area municipalities, such as San Mateo County and the City of San Francisco, grant exclusive licenses to both companies within particular boundaries. Dkt. No. 34 at 9. Thus, Dutra's restraint of trade claims are both unsupported legal conclusions and factually inaccurate statements. Dutra's Sherman Antitrust Act § 1 claim is dismissed.

2. Sherman Antitrust Act § 2

Section 2 of the Sherman Act requires allegations that the defendant (1) possesses monopoly power in a valid relevant market; and (2) willfully acquired, maintained, or used that power by anti-competitive or exclusionary means. *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. To satisfy the first prong, a plaintiff must allege that the defendant has market power within a legally cognizable relevant market. *Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1044 (9th Cir. 2008)*. "[T]he plaintiff must allege both that a 'relevant market' exists and that the defendant has power within that market." *Id.; see also Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001)*("Failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim"). A plaintiff must delineate a relevant market and show that the defendant plays enough of a role in that market to impair competition **[*8]** significantly. *Bhan v. NME Hospitals, Inc., 929 F.2d 1404,* *1413 (9th Cir. 1991)*. Additionally, antitrust laws are intended to protect only those activities that have anticompetitive effects on the market as a whole. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 23, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*; *Eichorn v. AT&T Corp., 248 F.3d 131, 148 (3d Cir. 2001)*, *as amended* (June 12, 2001).

Here, Dutra alleges that BFI possesses a monopoly on the "waste labor market," but also that BFI and Recology together control the market. Dkt. No. 30 at ¶¶ 5, 17. Additionally, Dutra alleges that the relevant market is "waste drivers and related industries in the Bay Area and throughout the State." *Id.* at ¶ 26. Finally, Dutra does not allege any specific injury to anyone but himself. Together, these legal conclusions do not support a claim of § 2 antitrust liability. Dutra has not alleged a cognizable relevant market or alleged BFI's role in the market with any specificity. Plaintiff has proffered no further facts in briefing or at the hearing that could provide even a plausible allegation of monopoly power or antitrust liability. Therefore, the Court dismisses the Sherman Antitrust Act § 2 claim.

3. Cartwright Antitrust Act

"The analysis under California's ***antitrust law*** mirrors the analysis under federal law because the Cartwright Act, *Cal. Bus. & Prof.Code § 16700 et seq.*, was modeled after the Sherman Act." *Cnty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001)*. Because plaintiff's Sherman **[*9]** Antitrust Act claims lack merit, so too does his Cartwright Antitrust Act claim. This claim is also dismissed.

4. Breach of the Implied Covenant of Good Faith and Fair Dealing

The covenant of good faith and fair dealing is implied in a contract and requires the party to uphold the contract's purposes and the parties' legitimate expectations. *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc., 2 Cal.4th 342, 373, 6 Cal. Rptr. 2d 467, 826 P.2d 710 (1992)*.

Dutra claims that BFI breached its duty of good faith by refusing to set aside part of the settlement agreement between the parties. Dkt. No. 30 at ¶ 35. This statement is at odds with the law of good faith and fair dealing, which requires parties to *uphold* contract terms, not to set them aside. Additionally, Dutra claims that BFI breached a duty by "interfer[ing] in Plaintiff's efforts to gain hire with another company." Dkt. No. 30 at ¶ 36. Again, such a claim is not properly within the scope of the law, as plaintiff does not claim that BFI was obligated to refrain from any actions in the parties' settlement agreement.

5. Conclusion

Although generally, leave to amend should be granted freely, plaintiff has not proffered any additional facts that could cure the deficiencies in the complaint. Instead, at hearing, plaintiff noted that a different cause of action, **[*10]** interference with prospective economic advantage, might be more appropriate. This was not presented in briefing, and the Court declines to rule on the permissibility of that claim because, brought alone, it is not a federal claim within the Court's jurisdiction. In addition, plaintiff has amended the complaint once with the benefit of defendant's pending motion to dismiss, so he was put on notice of defendant's arguments and had an opportunity to cure the complaint's deficiencies. Therefore, the Court believes amendment would be futile and dismisses without leave to amend. *See* *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1051-52 (9th Cir. 2008)*(finding amendment of the complaint futile when plaintiff proffered no additional facts or discovery that could be conducted to cure the complaint).

B. Sanctions

"Three primary sources of authority enable courts to sanction parties or their lawyers for improper conduct: (1) *Federal Rule of Civil Procedure 11*, which applies to signed writings filed with the court, (2) *28 U.S.C. § 1927*, which is aimed at penalizing conduct that unreasonably and vexatiously multiplies the proceedings, and (3) the court's inherent power." *Fink v. Gomez, 239 F.3d 989, 991 (9th Cir. 2001)*.

Federal Rule of Civil Procedure 11(b) provides in part that "[b]y presenting to the court a pleading, written motion, or other paper," an attorney certifies that "to the best of the person's **[*11]** knowledge, information, and belief, formed after an inquiry reasonable under the circumstances": "it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation"; and "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." *Fed. R. Civ. P. 11(b)*.

For *§ 1927* sanctions to apply, "if a filing is submitted recklessly, it must be frivolous, while if it is not frivolous, it must be intended to harass . . . . [R]eckless nonfrivolous filings, without more, may not be sanctioned." *B.K.B. v. Maui Police Dep't, 276 F.3d 1091, 1107 (9th Cir. 2002)* (quoting *In re Keegan Mgmt. Co., Sec. Lit., 78 F.3d 431, 436 (9th Cir. 1996))*.

Under its inherent powers, a court may impose sanctions in the form of attorneys' fees when the losing party has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." *Primus Auto. Fin. Servs., Inc. v. Batarse, 115 F.3d 644, 648 (9th Cir. 1997)* (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975))*. However, "because of their very potency, inherent powers must be exercised with restraint and discretion." *See* *B.K.B., 276 F.3d at 1108* (quoting *Chambers v. NASCO, Inc., 501 U.S. 32, 44, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991))*. "[A]n attorney's reckless misstatements of law and fact, when coupled with an improper purpose . . . are sanctionable under a court's inherent power." *Fink, 239 F.3d at 994*.

The Ninth Circuit instructs courts to be reluctant in imposing sanctions, **[*12]** "especially errors in papers filed before an opportunity for discovery." *Greenberg v. Sala, 822 F.2d 882, 887 (9th Cir. 1987)*. "The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading . . . was submitted." *Id.*

The Court denies BFI's request to impose sanctions because it finds that the requested relief is disproportionate to the sanctions requested and not in the interest of justice. BFI's motion is premised in large part on argument that the 2012 case was frivolous. This is irrelevant to the inquiry that this Court is permitted to entertain on the current case, except as it may demonstrate Dutra or his counsel's intent to harass. Here, the action is only at the pleading stage, and BFI only had to engage in one round of pleading. Additionally, the complaint is short, lacking in factual matter, and generally straightforward. Therefore, the Court does not agree that BFI was required to expend significant time and money to defend the action. In addition, BFI argues that Dutra required BFI to spend unnecessary time and money preparing for two motions to dismiss; however, the Court notes, and BFI acknowledges, that the original complaint **[*13]** and the first amended complaint were substantially similar and suffered from the same flaws. Thus, there was no need for defendant engage in an extensive effort to submit the second motion to dismiss. Finally, although the action is meritless, the Court does not find evidence of intention to harass.

The Court also denies plaintiff's motion for sanctions. "A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates *Rule 11(b)*." *Fed. R. Civ. P. 11(c)(2)*. Dutra moved for sanctions under *Rule 11* at the end of his opposition to BFI's sanctions, not on a separate motion. Dkt. No. 57 at 16-17. Dutra does not describe BFI's conduct that merits sanctions, except to suggest that BFI's motion for sanctions is meritless. *Id.* Thus, Dutra has not complied with the procedural requirements for bringing a motion for sanctions under *Rule 11*. Additionally, Dutra must demonstrate that BFI's motion was filed for an improper purpose, such as to harass, which he has not done. *Fed. R. Civ. P. 11(b)*. The Court disagrees with Dutra's arguments because his complaint did lack factual and legal merit, so BFI's motion was not improper. Therefore, Dutra's motion for sanctions is denied.

III. CONCLUSION

In conclusion, **[*14]** the Court dismisses the complaint without leave to amend and denies all motions for sanctions.

IT IS SO ORDERED.

Dated: May 13, 2015

/s/ Nathanael M. Cousins

NATHANAEL M. COUSINS

United States Magistrate Judge

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Giuliano v. Sandisk Corp.

United States District Court for the Northern District of California, Oakland Division

May 14, 2015, Decided; May 14, 2015, Filed

Case No: C 10-02787 SBA

Reporter

2015 U.S. Dist. LEXIS 193817 *; 2015 WL 10890654

ALFRED T. GIULIANO, Chapter 7 Trustee of the Ritz Estate; CPM ELECTRONICS INC.; E.S.E. ELECTRONICS, INC.; and MFLASH, INC., on Behalf of Themselves and All Others Similarly Situated, Plaintiffs, vs. SANDISK CORPORATION, Defendant.

Prior History: Ritz Camera & Image, LLC v. Sandisk corp., 2013 U.S. Dist. LEXIS 94243 (N.D. Cal., July 5, 2013)

Core Terms

flash, products, Patents, prices, antitrust, damages, memory, competitors', costs, predominate, royalties, chips, licensing, Plaintiffs', methodology, class certification, regression, appoint, market power, manufacture, class-wide, proposed class, class action, questions, contends, putative class member, absent class members, class representative, purchasers, reliable

Counsel: **[*1]** For Alfred T. Giuliano, Chapter 7 Trustee of the Ritz Estate, Cpm Electronics, Inc., on Behalf of Themselves and All Others Similarly Situated, E.S.E. Electronics, on Behalf of Themselves and All Others Similarly Situated, Mflash, Inc., Plaintiffs: Colleen Duffy-Smith, LEAD ATTORNEY, Morgan Tidalgo Sukhodrev & Azzolino LLP, San Jose, CA USA; Alexander Samuel Edelson, Kellogg Huber Hansen Todd Evans and Figel PLLC, Washington, DC USA; Jason Scott Hartley, Stueve Siegel Hanson, LLP, San Diego, CA USA; Joseph S. Hall, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C, Washington, DC USA; Melanie L. Bostwick, PRO HAC VICE, Kellogg Huber Hansen Todd Evans Figel. P.L.L.C., Washington, DC USA; Michael E. Joffre, Sterne, Kessler, Goldstein & Fox P.L.L.C., Washington, DC USA; Norman E. Siegel, PRO HAC VICE, Stueve Siegel Hanson LLP, Kansas City, MO USA; Robert Stephen Berry, Berry Law PLLC, Washington, DC USA; Ryan Dennis O'Dell, Stueve Siegel Hanson LLP, San Diego, CA USA; Steven F. Benz, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC USA; William J. Conynham PRO HAC VICE, Kellogg, Huber, Hansen, Todd, Evans & Figel, Washington Dc.

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For Eliyahou Harari, Defendant: Raoul Dion Kennedy, LEAD ATTORNEY, James Patrick Schaefer, Skadden Arps Slate Meagher & Flom LLP, Palo Alto, CA USA; David W. Hansen, Skadden Arps Slate Meagher & Flom LLP, San Francisco, CA USA.

For Fti Consulting, Inc., Interested Party: Nolan Edward Shanahan, LEAD ATTORNEY, PRO HAC VICE, Cole, Schotz, Meisel, Forman and Leonard, P.A., New York, NY USA.

For Sk Hynix America Inc., Miscellaneous: Jeffrey Michael Ratinoff, Hopkins & Carley, San Jose, CA USA.

Judges: SAUNDRA BROWN ARMSTRONG, United States District Judge.

Opinion by: SAUNDRA BROWN ARMSTRONG

Opinion

ORDER DENYING MOTION TO EXCLUDE AND GRANTING IN PART MOTION TO CERTIFY CLASS AND FOR APPOINTMENT OF CLASS COUNSEL

UNDER SEAL

Docket 240, 259

Plaintiffs[1] bring the instant putative class action against SanDisk Corporation ("SanDisk") **[*3]** alleging claims for relief under *§ 2* of the *Sherman Antitrust Act ("Sherman Act"), 15 U.S.C. § 2*. The parties are presently before the Court on Plaintiffs' motion to certify class and for appointment of class counsel under *Rule 23 of the Federal Rules of Civil Procedure*. SanDisk opposes the motion. Also before the Court is SanDisk's motion to exclude the report and testimony of Plaintiffs' expert, Ryan Sullivan, Ph.D. ("Dr. Sullivan"), under *Rule 702 of the Federal Rules of Evidence* and *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. Plaintiffs oppose the motion. Having read and considered the papers filed in connection with these matters and being fully informed, the Court hereby DENIES SanDisk's motion to exclude and GRANTS IN PART Plaintiffs' motion to certify class and for appointment of class counsel, for the reasons stated below. The Court, in its discretion, finds these matters suitable for resolution without oral argument. See *Fed.R.Civ.P. 78(b)*; N.D. Cal. Civ. *L.R. 7-1(b)*.

I. BACKGROUND

The parties are familiar with the facts of this case, which are summarized herein only to the extent they are pertinent to the motions pending before the Court.

SanDisk is a Delaware corporation headquartered in Milpitas, California. It designs, develops, and manufactures data storage solutions using flash memory, controller firmware, and software technologies. SanDisk **[*4]** owns numerous patents on aspects of NAND flash memory and related technology. SanDisk relies on its patents to manufacture and sell NAND flash memory products. Through its joint venture with Toshiba Corporation ("Toshiba"), SanDisk manufactures NAND flash memory chips that it either: (1) sells directly to manufacturers or retailers; or (2) combines with other components into final flash products that it sells to retailers who then sell the products to consumers. Plaintiffs are direct purchasers of final flash products from SanDisk, which include solid state drives ("SSD"), memory cards, wireless memory, USB storage, embedded storage (for devices such as mobile phones and tablets), and music and video players.

NAND flash memory is a form of non-volatile[2] erasable memory that can store large amounts of data. NAND flash memory comes in two forms: flash chips and final flash products. NAND flash chips are basic flash memory. They function by storing "bits" of data in "cells" contained on the chip. NAND flash chips come in the form of a wafer, die, or packaged die. NAND flash chips can be combined with additional components, software, or firmware to make final flash products that are eventually **[*5]** sold to consumers. NAND flash memory is incorporated into a variety of end-user products, including mobile phones, tablets, global positioning systems, portable and home gaming systems, and personal computers.

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[1] The named Plaintiffs in this action are Alfred T. Giuliano, Chapter 7 Trustee to the Ritz Estate ("Ritz"), CPM Electronics Inc. ("CPM"), E.S.E. Electronics, Inc. ("ESE"), and MFLASH, Inc. ("MFLASH") (collectively, "Plaintiffs").

[2] Flash memory is non-volatile, meaning that data is not lost when there is no power.

Worldwide sales of NAND flash chips increased from $200 million in 1997 to $18.1 billion in 2009 to $33.1 billion in 2013. Over the same period, the price per gigabit ("Gb") of NAND flash chips decreased from $952.60 in 1997 to $0.27 in 2009 to $0.08 in 2013. Due to rapidly declining prices and the adoption of NAND flash for more applications, total NAND flash output increased from 0.0002 billion Gb in 1997 to 67.7 billion Gb in 2009 to 412.9 billion Gb in 2013.

In the instant action, Plaintiffs bring claims against SanDisk for monopolization and attempted monopolization in violation of *§ 2* of the Sherman Act. Plaintiffs' antitrust claims are known as Walker Process claims because they are predicated on SanDisk's alleged use of fraudulently procured patents to obtain or attempt to obtain monopoly power. In *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*, the Supreme Court "established that antitrust liability under *section 2* of the Sherman Act may arise when a patent has been procured by knowing and willful fraud, the patentee has market **[*6]** power in the relevant market, and has used its fraudulently obtained patent to restrain competition." *C.R. Bard, Inc. v. M3 Systems, Inc., 157 F.3d 1340, 1367 (Fed. Cir. 1998)*.

As relevant to the motions before the Court, Plaintiffs allege that at least 75% of all NAND flash chips and final flash products imported into or sold in the United States are either: (a) manufactured and sold by SanDisk or its controlled and licensed joint venture with Toshiba; or (b) manufactured by other licensees of patents for NAND flash memory technology claimed to be owned by SanDisk. Plaintiffs assert that SanDisk has maintained a monopoly in the relevant market for final flash products,[3] or has attempted to monopolize this market, by fraudulently procuring two patents relating to flash memory technology,[4] and using those patents (collectively, "the Disputed Patents") to restrain competition by asserting their infringement. Specifically, Plaintiffs assert that SanDisk relied on its patents, including the Disputed Patents, to "force" other flash memory manufacturers to enter into license agreements in exchange for royalty fees, and to exclude any competitors that SanDisk had not granted a license. According to Plaintiffs' expert, Dr. Sullivan, by the end **[*7]** of the licensing negotiations, SanDisk was receiving royalties and profits on 88% to 100% of all final flash products sold worldwide. Plaintiffs allege that, by virtue of SanDisk's restraint on competition through the enforcement of the Disputed Patents, purchasers of final flash products from SanDisk paid supra-competitive, monopoly prices for such products.

Plaintiffs' theory of monopoly power is that SanDisk was able to charge supra-competitive prices and restrict output in the upstream final flash product market by raising its competitors' costs in the downstream NAND flash chip market through the enforcement of the Disputed Patents and the extraction of royalty payments from its competitors in that market. According to Plaintiffs, the increased costs from the royalties SanDisk charged to its competitors in the NAND flash chip market were passed through to manufacturers of final flash products who, in turn, passed through the increased costs to consumers of final flash products. Plaintiffs assert that SanDisk responded to the increased prices charged by its competitors in the final flash market by raising its prices for final flash products and "pocket[ing] the overcharge."[5] Plaintiffs **[*8]** maintain that SanDisk's market power in the upstream NAND flash chip market allowed it to exercise monopoly power in the downstream final flash product market because it controlled the cost of a necessary input in the downstream market, i.e., NAND flash chips.

Plaintiffs define the relevant product market for final flash products as "the market for final flash products, the manufacture, sale, or importation of which is subject to the reach of the U.S. patent laws." The market for final flash

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[3] While Plaintiffs allege that SanDisk has maintained a monopoly in the relevant market for NAND flash chips, or has attempted to monopolize this market, they only move to certify a class of direct purchasers of final flash products.

[4] The Disputed Patents are U.S. Patent No. 5,172,338 ("the '338 patent"), and U.S. Patent No. 5,991,517 ("the '517 patent"). The '338 patent was issued in 1992, while the '517 patent was issued in 1999. Both patents expired in 2009. Plaintiffs contend that SanDisk procured the Disputed Patents by intentionally making material misrepresentations to, and withholding prior art from, the Patent and Trademark Office ("PTO").

[5] According to Plaintiffs, "[b]ecause SanDisk and its licensees made up more than 88% of the market, SanDisk was able to raise its own prices. . . . Essentially, if all its licensees charged a higher price, SanDisk could too. But, because it did not have to pay a royalty itself, SanDisk could keep these supra-competitive profits."

products includes the following submarkets based on product categories: SSD, memory cards, wireless memory, USB storage, embedded storage, and music and video players. Similarly, Plaintiffs define the relevant product market for NAND flash chips as "the market for flash chips, the manufacture, sale, or importation of which is subject to the reach of the U.S. patent laws." Plaintiffs allege that purchasers of NAND flash chips and final flash products may buy such products only from SanDisk or its licensees, or must buy products that do not practice any SanDisk patent. Plaintiffs further allege that because purchasers of NAND flash chips and final flash products do not regard other types of memory **[*9]** as substitutes for NAND flash memory, they could not switch to other types of memory in response to a small but significant increase in the price of NAND flash memory in the relevant product markets. According to Plaintiffs, with its controlled and licensed Toshiba joint venture and its other controlled licensees of NAND patented technology, SanDisk had the power to control prices in, and restrict entry into, the relevant product markets during the class period, and maintained a monopoly in the relevant product markets during the class period for NAND flash chips and final flash products.

Plaintiffs define the relevant geographic market for the purchase of NAND flash chips and final flash products as worldwide. Plaintiffs refer to the "relevant markets" as: (1) the worldwide market for NAND flash chips, the manufacture, sale, or importation of which is subject to the reach of the United States patent laws; and (2) the worldwide market for final flash products, the manufacture, sale, or importation of which is subject to the reach of the United States patent laws. Plaintiffs allege that the relevant markets are characterized by high barriers to entry and expansion as a result of, among **[*10]** other things, SanDisk's claimed ownership of United States patents covering the technology necessary to manufacture NAND flash memory; SanDisk's unlawful assertion of the Disputed Patents to control entry and expansion within the relevant markets; and the extremely high costs necessary to enter the relevant markets. According to Plaintiffs, the construction of a flash memory fabrication facility can cost billions of dollars, and the plant may need to be retooled every five years.

Through this action, Plaintiffs seek to recover damages for the supra-competitive prices they and the absent class members allegedly paid for SanDisk's final flash products due to the anticompetitive royalty that SanDisk imposed using the Disputed Patents. Plaintiffs assert that "but for" the Disputed Patents, members of the proposed class would have paid less for final flash products purchased from SanDisk. According to Plaintiffs, SanDisk overcharged the putative class members at least $72 million on sales of final flash products.

Pursuant to *Rule 23*, Plaintiffs now move for certification of a "Final Flash Product Class" defined, in part, as: "All persons and entities residing in the United States who, on or after **[*11]** July 1997,[6] directly purchased from SanDisk, or from its controlled and licensed joint venture with Toshiba Corporation, final flash products."[7] In addition to seeking class certification, Plaintiffs also move for an order appointing class counsel. In support of their motion for class certification, Plaintiffs have submitted the expert report of Dr. Sullivan to show, among other things, that antitrust impact and damages can be proved through evidence common to the proposed class. SanDisk opposes Plaintiffs' motion for class certification, and has filed a motion to exclude the expert report and testimony of Dr. Sullivan under *Rule 702* and Daubert.

II. LEGAL STANDARDS

[6] The operative complaint defines the Final Flash Products Class, in part, as all "persons residing in the United States who, on or after *June 25, 2006*, directly purchased from SanDisk, or from its controlled and licensed joint venture with Toshiba Corporation, final flash products using technology claimed to be patented by SanDisk ('Final Flash Product Class')." (Emphasis added). Below, the Court will discuss whether it is proper for Plaintiffs to seek to certify a class that is broader than the class defined in the operative complaint.

[7] The proposed class definition further states: "Such products include, without limitation, those that SanDisk sold to retail firms, OEMs, and distributors. Purchases of final flash products that contain a microcontroller - a semiconductor that interfaces with electronic equipment and operates the flash memory - are included in the class. Purchases of flash memory combined with dynamic random access memory ('DRAM'), flash memory combined with static random access memory ('SRAM'), or flash memory combined with a microprocessor ('system on a chip') are excluded from the class."

A. Expert Testimony

When an expert report is challenged at the class certification stage, the evidentiary standard set forth in Daubert applies. *Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982 (9th Cir. 2011)*. Under Daubert, the trial court must act as a "gatekeeper" to exclude junk science that does not meet the requirements set forth in *Federal Rule of Evidence 702*. Id.

Rule 702 provides:

> [A] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help **[*12]** the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed.R.Evid. 702.

The trial court performs a "gatekeeping" function to ensure that the expert's proffered testimony is both reliable and relevant to the task at hand. *Daubert, 509 U.S. at 592-593*. In performing its gatekeeping function, the trial court is required to make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Id.; see also *Ellis, 657 F.3d at 982* ("Under Daubert, the trial court must act as a 'gatekeeper' to exclude junk science that does not meet *Federal Rule of Evidence 702*'s reliability standards by making a preliminary determination that the expert's testimony is reliable"). "Daubert does not require a court to admit or to exclude evidence based on its persuasiveness; rather it requires a court to admit or exclude evidence based on its scientific reliability and relevance. Thus, an expert's 'inference or assertion must **[*13]** be derived by the scientific method' to be admissible." *Ellis, 657 F.3d at 982*.

A trial court has broad latitude in determining whether an expert's testimony is reliable and in deciding how to determine the testimony's reliability. *Ellis, 657 F.3d at 982*; The reliability factors identified in Daubert - testing, peer review, error rates, and acceptability in the relevant scientific community - are not exhaustive; the Court's task is not to apply Daubert as "a definitive checklist or test," but to "make certain that an expert . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the field." See *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*. Evidence should be excluded as unreliable if it "suffer[s] from serious methodological flaws." *Obrey v. Johnson, 400 F.3d 691, 696 (9th Cir. 2005)*.

To be relevant, expert testimony must "assist the trier of fact." *Daubert, 509 U.S. at 591*. "'Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful.'" Id. Expert testimony must be sufficiently tied to the facts of the case such that it will aid in determining a fact in issue. Id. This consideration has been described as one of "fit." Id. "'Fit' is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, **[*14]** unrelated purposes." Id.

The inquiry envisioned by *Rule 702* is a flexible one. Its overarching subject is the scientific validity and thus the evidentiary relevance and reliability of the principles that underlie a proposed submission. *Daubert, 509 U.S. at 594-595*. The focus must be solely on principles and methodology, not on the conclusions that they generate." *Id. at 595*; see *Primiano v. Cook, 598 F.3d 558, 564 (9th Cir. 2010)* ("The test under Daubert is not the correctness of the expert's conclusions but the soundness of his methodology."). The proponent of expert testimony has the burden of establishing that the requirements for admissibility are met by a preponderance of the evidence. *Fed.R.Evid. 702*, Advisory Committee's Note to the 2000 Amendments. When the expert meets the threshold established by *Rule 702* as explained in Daubert, the expert may offer testimony and the jury decides how much weight to give that testimony. *Primiano, 598 F.3d at 565*. "Shaky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion." *Id. at 564*.

B. Class Certification

A class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki, 442 U.S. 682, 700-701, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979)*. To come within the exception, the party seeking to maintain a class action "must affirmatively" demonstrate compliance with *Rule 23*. *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S.Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011)*. *Rule 23* **[*15]** "does not set forth a mere pleading standard." Id. Rather, a party must "be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact," typicality of claims or defenses, and adequacy of representation, as required by *Rule 23(a)*. Id. The party must also satisfy through evidentiary proof at least one of the provisions of *Rule 23(b)*. *Comcast Corp. v. Behrend, 569 U.S. 27, 133 S.Ct. 1426, 1432, 185 L. Ed. 2d 515 (2013)*. As relevant here, *Rule 23(b)* permits certification if the Court finds that common questions of law or fact predominate, and that a class action is superior to other available methods of adjudication. *Fed.R.Civ.P. 23(b)(3)*.

The district court must conduct a "rigorous analysis" to determine whether the plaintiff has met his or her burden under *Rule 23*. *Mazza v. American Honda Motor Co., Inc., 666 F.3d 581, 588 (9th Cir. 2012)*. This "rigorous" analysis applies to both *Rule 23(a)* and *Rule 23(b)*, and may entail some overlap with the merits of the plaintiffs' underlying claims because "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's [claims]." *Comcast, 133 S.Ct. at 1432*; *Amgen Inc. v. Conn. Ret. Plans and Trust Funds, 568 U.S. 455, 133 S.Ct. 1184, 1194, 185 L. Ed. 2d 308 (2013)*. Nevertheless, "*Rule 23* grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen, 133 S.Ct. at 1194-1195*. "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the *Rule 23* prerequisites for class certification are satisfied." *Id. at 1195*. If a court concludes that the moving party has met its burden of proof, then the court has broad discretion to certify the class. *Zinser v. Accufix Research Institute, Inc., 253 F.3d 1180, 1186 (9th Cir. 2001)*.

III. DISCUSSION

A. Motion to Exclude

Before addressing Plaintiffs' motion to certify class and for appointment of class counsel, the Court will consider SanDisk's motion to exclude the expert report and testimony of Dr. Sullivan. Plaintiffs retained Dr. Sullivan to provide an economic and econometric analysis of **[*16]** whether the antitrust price injury (i.e., antitrust impact) alleged in the operative complaint is common to all members of the proposed class, and whether "common formulaic proof" of the existence of some price injury will be available at trial for all putative class members. Sullivan Rep. ¶ 11. Dr. Sullivan's report provides his opinions relating to the common antitrust injury caused by allegations that SanDisk has fraudulently procured and enforced the Disputed Patents against its competitors. Id. ¶ 12.

Dr. Sullivan's methodology in evaluating class-wide antitrust injury involved four steps. First, he evaluated "direct" evidence of SanDisk's market power in the markets for NAND flash chips and final flash products by analyzing SanDisk's licensing revenues obtained from competitors through SanDisk's enforcement of the Disputed Patents and SanDisk's licensing practices.[8] Sullivan Rep. ¶¶ 39-46, 60-87; Sullivan Decl. ¶ 13. Second, Dr. Sullivan evaluated the impact of the Disputed Patents on SanDisk's licensing revenue (i.e., royalty payments) by analyzing

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[8] According to Dr. Sullivan, he corroborated this direct evidence with economic evaluation of market definition, substitutability across products, and market concentration. See Sullivan Decl. ¶ 13.

the facts and circumstances of SanDisk's license agreements, the growth of SanDisk's patent portfolio over time, and changes in royalties **[*17]** that occurred when the Disputed Patents expired in 2009.[9] Sullivan Rep. ¶¶ 60-87; Sullivan Decl. ¶ 14. Third, he used SanDisk's sales data to create an econometric regression model[10] of SanDisk prices for final flash products, which he asserts explains more than 93% of the variation in SanDisk's pricing[11] and provides the effect of competitors' costs on SanDisk prices equal to 80.1%, i.e., a $1.00 increase in competitors' costs increases SanDisk final flash product prices by $0.801. Sullivan Rep. ¶¶ 92-101; Sullivan Decl. ¶ 15. Fourth, Dr. Sullivan combined the results from his licensing analysis with his econometric model to determine a specific overpayment for each final flash product sold by SanDisk, which is specific to each customer, product, and time period. Sullivan Rep. ¶¶ 113-123; Sullivan Decl. ¶ 16. According to Dr. Sullivan, his econometric model directly measures the effects of SanDisk's competitors' costs on SanDisk's pricing for final flash products. Sullivan Decl. ¶ 59. He asserts that his empirical analysis uses a reduced form approach to measure the total effect of competitor costs on SanDisk. Id. He then used the royalty payments to determine the increase in competitor **[*18]** costs and SanDisk's pricing for final flash products on a product-by-product basis for each SanDisk customer and time period. Id.

Dr. Sullivan concluded that each putative class member suffered some antitrust injury (i.e., overpaid for final flash products) because SanDisk's licensing program, which was driven in large part by the Disputed Patents, resulted in SanDisk raising its prices (i.e., charging supra-competitive prices) on final flash products in response to the increased prices charged by its competitors due to royalties on NAND flash chips. See Sullivan Rep. ¶¶ 21, 88, 95. According to Dr. Sullivan, his economic analysis shows that a common methodology can be applied to establish common antitrust price injury from SanDisk's alleged anti-competitive behavior. Id. ¶ 22. Dr. Sullivan claims that his econometric analysis of SanDisk's sales confirms the relationship between SanDisk's competitors' costs and the elevated prices SanDisk charged for its final flash products, and that an application of his licensing analysis in the "but-for" world allows for the formulaic calculation of common price impact and actual damages for purchasers of SanDisk's final flash products. Id. ¶ **[*19]** 88. In other words, Dr. Sullivan claims that his methodology demonstrates that antitrust impact and damages can be proven on a class-wide basis through common proof.

Pursuant to *Rule 702* and Daubert, SanDisk moves to exclude the expert report and testimony of Dr. Sullivan on the ground that Dr. Sullivan's opinions are unreliable and irrelevant for various reasons.[12] In support of its motion, SanDisk submitted an expert report prepared by Michael Keeley, Ph.D. ("Dr. Keeley"). Dr. Keeley purports to identify flaws in Dr. Sullivan's economic analysis and conclusions. Below, the Court will address SanDisk's arguments for excluding Dr. Sullivan's expert report and testimony.

1. Dr. Sullivan's Direct Evidence Opinion

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[9] Dr. Sullivan claims that such an analysis allows for a determination of the magnitude of royalties that would have occurred "but for" the Disputed Patents. Sullivan Decl. ¶ 14.

[10] "A regression analysis is a common statistical tool . . . designed to isolate the influence of one particular factor - e.g. sex - on a dependent variable - e.g. salary." *Equal Employment Opportunity Comm'n v. Gen. Tel. Co. of Northwest, Inc., 885 F.2d 575, 577 n. 3 (9th Cir. 1989)*.

[11] In other words, Dr. Sullivan claims that his econometric model provides explanatory factors that explain the vast majority of differences in final flash product prices across different products, purchasers, and time periods. Sullivan Rep. ¶ 114.

[12] SanDisk does not challenge Dr. Sullivan's qualifications as an expert. Having reviewed Dr. Sullivan's curriculum vitae, the Court finds that he is qualified to render expert opinions in the field of antitrust economics. It is undisputed that Dr. Sullivan earned his B.A., M.A., and Ph.D. in economics from the University of California, San Diego, and that Dr. Sullivan has published economic research in peer-reviewed academic journals as well as articles on calculating lost profits and reasonable royalty damages. Sullivan Decl. ¶ 7; see also Sullivan Rep. ¶ 7, Exh. A-1. It is also undisputed that Dr. Sullivan has provided professional economic consulting services since 1992, including economic analyses on issues such as monopolization, restraints of trade, lost profits, and reasonable royalty. Sullivan Decl. ¶¶ 1-3, 8; see also Sullivan Rep. ¶ 8, Exh. A-1.

Dr. Sullivan opines that SanDisk's patent enforcement and licensing practices are direct evidence of the existence and use of market power by SanDisk that is common to all putative class members. Sullivan Rep. ¶¶ 45-46. According to Dr. Sullivan, "SanDisk's ability to earn significant licensing revenue in the marketplace provides direct evidence of the market power of SanDisk by way of its patents." Id. ¶ 45. SanDisk contends that Dr. Sullivan's direct evidence opinion should **[*20]** be excluded because it is contrary to law as Dr. Sullivan failed to analyze whether SanDisk restricted market-wide output or imposed supra-competitive prices, and because Dr. Sullivan did not define or identify the relevant market in which he asserts there is direct evidence of SanDisk's market power. In addition, SanDisk contends that exclusion of Dr. Sullivan's direct evidence opinion is appropriate because Dr. Sullivan analyzed evidence relating to the wrong market, i.e., the market for NAND flash chips rather than the market for final flash products.

The Court rejects SanDisk's arguments. Contrary to SanDisk's contention, Dr. Sullivan specifically identified the relevant market in which he claims there is direct evidence of SanDisk's market power. Citing to the operative complaint, Dr. Sullivan identifies the relevant market as "the market for final flash products, the manufacture, sale, or importation of which is subject to the reach of U.S. patent laws."[13] Sullivan Rep. ¶ 47. Further, Dr. Sullivan specifically analyzed SanDisk's ability to raise prices to supra-competitive levels in the market for final flash products through its enforcement and licensing of its patents, i.e., SanDisk's **[*21]** exclusionary conduct.[14] See id. §§ 5-6. In doing so, Dr. Sullivan noted that a patent provides a patent holder the right to exclude, and that his "[p]reliminary calculations indicate that between 88% and 100% of worldwide sales of NAND flash memory were subject to SanDisk's pricing or royalty impact." See e.g., id. ¶¶ 45, 55-59, 68-87. Dr. Sullivan opines that: "Royalties paid by SanDisk's licensees are one cost that increases competitors' costs of production, increases competitors' prices, and thus increases the residual demand for SanDisk's products. As a result of greater residual demand for SanDisk's products, SanDisk was able to sell products at higher prices and greater quantities that it otherwise would have." Sullivan Rep. ¶ 90. According to Dr. Sullivan, his econometric model demonstrates that increased NAND flash chip costs from the payment of royalties resulted in higher SanDisk prices for final flash products from a combination of restricted market-wide output or supra-competitive prices.[15] Sullivan Decl. ¶ 19.

Finally, contrary to SanDisk's contention, Dr. Sullivan did not limit his analysis to evidence from the "wrong market," i.e., the NAND flash chip market. Nor **[*22]** does Dr. Sullivan's report "utterly fail[] to explain" how evidence relating to NAND flash chips is connected to his conclusions regarding final flash products. Dr. Sullivan's report explains that NAND flash chips are a fundamental and substantial component of final flash products. Sullivan Rep. ¶¶ 36-38. Further, Dr. Sullivan analyzed both the NAND flash chip market and the final flash product market. See id. §§ 4, 6. According to Dr. Sullivan, an analysis of both markets shows that SanDisk used the Disputed Patents to raise costs in the NAND flash chip market, which raised its competitors' costs and prices in the final flash product and allowed SanDisk to sell its final flash products at higher prices and in greater quantities than it otherwise would have. See id.

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[13] Dr. Sullivan's report also identifies the submarkets set forth in the operative complaint. Sullivan Rep. ¶ 47.

[14] Enforcement of a patent obtained by fraud constitutes an unlawful exclusionary act. See Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 705e (3d ed. 2008). Such enforcement is not limited to infringement actions, it can also include refusing to license or "licensing and thus increasing rivals' costs." Id.

[15] To determine the impact of SanDisk's competitors' costs on SanDisk's prices for final flash products, Dr. Sullivan utilized linear regression analysis to measure the statistical relationship between SanDisk's prices and the costs of its competitors, controlling for other factors. See Sullivan Rep. ¶¶ 96-97. Dr. Sullivan used the statistical relationships to determine the extent to which higher competitor costs from royalties earned by the Disputed Patents resulted in higher prices paid by consumers for final flash products sold by SanDisk. Id. ¶ 96. Dr. Sullivan asserts that "[s]uch a reduced form [econometric] approach to measuring the effects of costs on prices is supported by published economic literature," and that "[t]he regressions for determining the effect of competitor costs on SanDisk are based upon economic theory, statistical evaluation, and economic literature." Id. ¶¶ 96-97. Dr. Sullivan further asserts that a reduced form approach, which is an econometric technique that measures the overall impact of one variable on another without requiring separate structural modeling of intermediate variables or steps, is well-accepted and well supported in published economics literature for estimating the impact of costs on prices, and is economically appropriate here because separate structural estimation of restricted output and supra-competitive prices, individually, is not needed to determine the overall impact of royalties on SanDisk prices. Sullivan Decl. ¶ 20.

¶¶ 88, 90-91; Sullivan Decl. ¶¶ 25-27. To the extent SanDisk challenges the factual basis of Dr. Sullivan's direct evidence opinion, questions regarding the evidence relied upon by Dr. Sullivan go to the weight, not the admissibility, of his opinion. *Hangarter v. Provident Life and Acc. Ins. Co., 373 F.3d 998, 1017 n. 14 (9th Cir. 2004)*; see also *Manpower, Inc. v. Ins. Co. of Pennsylvania, 732 F.3d 796, 808-809 (7th Cir. 2013)* (an expert's reliance on faulty information is a matter to be explored on cross-examination; it does not go to admissibility).

2. Dr. Sullivan's Market Concentration [*23] Opinions

In evaluating whether SanDisk had sufficient market power to impose price increases in the marketplace, Dr. Sullivan considered market concentration. Sullivan Rep. ¶ 55. According to Dr. Sullivan, the most common approach to evaluating concentration in the market is known as the Herfindahl-Hirschman Index ("HHI").[16] Id. ¶ 57. Dr. Sullivan opines that SanDisk, through its own sales and that of its licensees, likely impacted a very high share of the relevant market. Id. ¶ 58. Specifically, Dr. Sullivan states that his "[p]reliminary calculations indicate that between 88% and 100% of worldwide sales of NAND flash memory were subject to SanDisk's pricing or royalty impact." Id. SanDisk contends that Dr. Sullivan's market concentration opinions should be excluded for three reasons: (1) Dr. Sullivan predicates his analysis on sales of NAND flash chips rather than final flash products; (2) Dr. Sullivan's opinions are contrary to law because SanDisk's market share of the final flash products market did not exceed 15.3% during the relevant period; and (3) Dr. Sullivan's analysis of the HHI is unhelpful to the trier of fact because such an analysis is irrelevant in a *§ 2* Sherman Act case. **[*24]**

The Court rejects SanDisk's arguments. First, as discussed above, Dr. Sullivan's economic analysis is not limited to sales of NAND flash chips. Dr. Sullivan specifically analyzed final flash product sales and the relationship between NAND flash chips costs and SanDisk's final flash product sales. See Sullivan Rep. ¶¶ 36-37 & §§ 4, 6. Second, SanDisk has not shown that Dr. Sullivan's market concentration opinions are contrary to law. While Courts generally require a 65% market share to establish a prima facie case of market power, *Image Technical Services, Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1206 (9th Cir. 1999)*, monopoly power in the context of a Walker Process claim can be shown by proof that the fraudulently acquired patent dominated a relevant antitrust market, and thus conveyed substantial power or, in an attempt case, had the potential to do so. See Areeda, et al., ***Antitrust Law*** ¶ 705f (patents may facilitate the creation of market power by excluding entry in refusal to license cases, or by raising rivals' costs in the case of actual licensing). Finally, SanDisk has not cited any authority demonstrating that the HHI, which is "[a] commonly used metric for determining market share," see *Saint Alphonsus Medical Center-Nampa Inc. v. St. Luke's Health System, Ltd., 778 F.3d 775, 786 (9th Cir. 2015)*; see also *F.T.C. v. PPG Industries, Inc., 798 F.2d 1500, 1503, 255 U.S. App. D.C. 69 (D.C. Cir. 1986)* ("Market power or the lack of it is often measured by the HHI."), **[*25]** is inapplicable to the facts of this case such that Dr. Sullivan's opinions regarding market concentration should be excluded as unhelpful to the trier of fact.

3. Dr. Sullivan's Opinions Regarding Impact and Damages

SanDisk contends that Dr. Sullivan's theory of impact and damages hinges on his determination that SanDisk would have collected $1.5 billion less in license fees and royalties in the "but-for" world. SanDisk asserts that an essential aspect of this determination is that, in 1997, SanDisk's licensees would not have been willing to enter into any cross-license agreement with SanDisk absent the '338 patent. SanDisk argues that Dr. Sullivan's opinion "regarding the intent and mental states of SanDisk's licensees underlying their decisions to enter into cross-licensees with SanDisk" is improper. According to SanDisk, Dr. Sullivan's impact and damages opinions should be excluded because Dr. Sullivan impermissibly opines on the intent of SanDisk's licensees in reaching his conclusion regarding the royalties attributable to the Disputed Patents. The Court disagrees.

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[16] It is undisputed that the HHI is a widely accepted method used by economists to measure market concentration. *ProMedica Health System, Inc. v. F.T.C., 749 F.3d 559, 568 (6th Cir. 2014)*. The HHI is calculated by summing the squares of the individual firms' market shares. Id. HHI data is used to classify markets into three types: unconcentrated markets, moderately concentrated markets, and highly concentrated markets. Id.

Contrary to SanDisk's contention, Dr. Sullivan does not impermissibly offer an opinion regarding the intent of any entity that **[*26]** entered into a licensing agreement with SanDisk. Instead, Dr. Sullivan offers his opinions as to how the Disputed Patents impacted the royalties obtained by SanDisk, including what the royalties would have been if SanDisk had not obtained the Disputed Patents. According to Dr. Sullivan, the Disputed Patents played a significant role in SanDisk's ability to earn licensing revenues from its NAND flash technology. Sullivan Rep. ¶ 68. Dr. Sullivan opines that SanDisk's license agreements were driven primarily by the successful enforcement of the '338 patent, and that SanDisk's licensing program would have been significantly impaired without the Disputed Patents. Id. ¶¶ 68-73. Dr. Sullivan concluded that "but-for" SanDisk's alleged fraudulent obtainment of the Disputed Patents, it is "plausible" that SanDisk would have received very little licensing revenues, if any, from its NAND flash technology licensing. Id. ¶ 68. In reaching his opinions regarding how the Disputed Patents impacted the royalties obtained by SanDisk, Dr. Sullivan analyzed SanDisk's licensing agreements, evidence relating to SanDisk's licensing program, SanDisk demand letters, litigation involving SanDisk's patents, the value of **[*27]** SanDisk's foreign patents compared to its U.S. patents, published literature, and the decline in royalties when the Disputed Patents expired. Id. ¶¶ 69-77. Dr. Sullivan asserts that public research confirms that economic value is commonly concentrated in a relatively small number of patents within a larger patent portfolio. Id. ¶ 75. SanDisk, for its part, failed to proffer any authority or analysis demonstrating that Dr. Sullivan's impact or damages opinions should be excluded on the ground that he impermissibly opines on the intent of SanDisk's licensees.[17]

4. Dr. Sullivan's Opinions Regarding Pass-Through and SanDisk's Competitive Response

SanDisk contends that Dr. Sullivan's testimony regarding "pass-through" is inadmissible because it is based on unsupported assumptions about how royalty costs purportedly attributable to the Disputed Patents were passed through the distribution chain and SanDisk's competitive response. Specifically, SanDisk argues that Dr. Sullivan impermissibly assumes the following based solely on economic theory: (1) SanDisk's NAND flash chip manufacturer licensees passed on 100% of the allegedly unlawful overcharge attributable to the Disputed Patents to flash **[*28]** product manufacturers; (2) flash product manufacturers, in turn, raised their prices on final flash products; and (3) SanDisk always raised its prices for final flash products in response to the increased prices charged by its competitors. According to SanDisk, Dr. Sullivan's impact and damages opinions should be excluded as unreliable because Dr. Sullivan failed to evaluate whether there is any "real-world" evidence to support his assumptions. In addition, SanDisk argues that Dr. Sullivan's impact and damages opinions should be excluded because his assumptions do not fit the facts of the case as they are inconsistent with "real-world" evidence regarding conditions in the flash memory industry.

The Court finds SanDisk's arguments unpersuasive. As an initial matter, SanDisk failed to show that Dr. Sullivan's opinions are predicated on the assumption of 100% pass-through or the assumption that SanDisk always raised its own prices for final flash products in response to the increased prices of its competitors. Indeed, a review of Dr. Sullivan's report reveals that he did not assume 100% pass-through; rather, he calculated the overall pass-through rate to be 80.1% using regression analysis. **[*29]** See Sullivan Rep. § 6. Further, Dr. Sullivan did not rely solely on "economic theory" in rendering his impact and damages opinions. As set forth above, Dr. Sullivan utilized linear regression analysis to measure the extent to which higher competitors' costs from royalties earned from the Disputed Patents resulted in higher prices paid by consumers for SanDisk's final flash products. See id. § 6.2.3. Dr. Sullivan's methodology, which is described in detail on pages 48-54 of his report, indicates that his analysis for determining the effect of competitors' costs on SanDisk prices for final flash products is based on economic theory, economic literature, and statistical evaluation. Id. In performing his regressions, Dr. Sullivan relied upon SanDisk's sales data and NAND flash chip sales data provided by Semico Research Corp. ("Semico"), a semiconductor marketing and consulting research company that provides, among other things, the marketplace price of purchasing NAND flash chips for use in final flash products.[18] Id. ¶¶ 79, 97. SanDisk has failed to show that Dr. Sullivan's

[17] To the extent SanDisk objects to portions of Dr. Sullivan's deposition testimony, the Court will not address those objections. Plaintiffs do not rely on Dr. Sullivan's deposition testimony to satisfy any of *Rule 23*'s requirements.

methodology suffers from serious flaws such that his impact and damages opinions should be excluded as unreliable. SanDisk's **[*30]** arguments regarding Dr. Sullivan's flawed assumptions go to the weight, not the admissibility, of his impact and damages opinions. See *Cotton v. City of Eureka, Cal., 2010 U.S. Dist. LEXIS 136270, 2010 WL 5154945, at *13 (N.D. Cal. 2010)* ("The matter of whether the assumptions underlying Dr. Bonnell's opinions are accurate is germane to the weight, as opposed to the admissibility, of his opinions.") (citing *Hangarter, 373 F.3d at 1017 n. 14*; *Bergen v. F/V St. Patrick, 816 F.2d 1345, 1352 n. 5 (9th Cir. 1987))*.

Finally, the Court rejects SanDisk's argument that Dr. Sullivan's impact and damages opinions should be excluded on the ground that his 100% pass-through assumptions do not fit the facts of this case because they are contrary to market realities. According to SanDisk, Dr. Sullivan's opinions are inconsistent with Dr. Keeley's empirical analysis, which illustrates that SanDisk frequently did not raise its NAND flash chip prices when its costs of NAND flash chip production increased and often did not raise prices for its final flash products in response to cost increases. SanDisk's objection goes to the weight, not the admissibility, of Dr. Sullivan's opinions. Disputes over the results reached and assumptions made with respect to competing methodologies are issues to be decided by the trier of fact. See *In re Online DVD Rental Antitrust Litigation, 2010 U.S. Dist. LEXIS 138558, 2010 WL 5396064, at *10 (N.D. Cal. 2010)*. At the class certification stage, the issue is not which expert is the **[*31]** most credible, or the most accurate modeler, but rather whether the plaintiffs have advanced a plausible methodology to demonstrate that antitrust injury can be proved on a class-wide basis. Id.

5. Dr. Sullivan's Linear Regression Analysis

SanDisk contends that Dr. Sullivan's linear regression analysis should be excluded as unreliable because it is incapable of analyzing the impact of competitors' NAND flash chip costs on SanDisk's prices for final flash products (i.e., the very relationship he purports to study). According to Dr. Keeley, the average NAND flash chip price that Dr. Sullivan derives from the Semico data has no impact on the results of his regression analysis because the results of Dr. Sullivan's econometric model are the same when the price derived from the Semico data is removed from the model and replaced with a value equal to one. In addition, SanDisk contends that Dr. Sullivan's regression analysis should be excluded because his econometric model cannot establish any relationship between royalties paid to SanDisk and the prices of SanDisk's final flash products as Dr. Sullivan's analysis neither includes any measure of SanDisk's royalties nor estimates a relationship **[*32]** between SanDisk's royalties and the price of SanDisk's final flash products.

The Court finds that SanDisk has failed to demonstrate that Dr. Sullivan's linear regression analysis should be exlcuded. SanDisk does not dispute that regression analysis is a reliable methodology that is well-accepted in the field of antitrust economics. See, e.g., *In re High-Tech Employee Antitrust Litigation, 2014 U.S. Dist. LEXIS 47181, 2014 WL 1351040, at *14 (N.D. Cal. 2014)* (nothing that courts have recognized that "regression analysis is generally a reliable method for determining damages in antitrust cases and is 'a mainstream tool in economic study'"). Instead, SanDisk argues that Dr. Sullivan's regression analysis is inadequate because of the data he used, i.e., the Semico data. However, such an objection goes to the weight, not the admissibility, of Dr. Sullivan's opinions. See *Hemmings v. Tidyman's Inc., 285 F.3d 1174, 1188 (9th Cir. 2002)* ("[I]n most cases, objections to the inadequacies of a study are more appropriately considered an objection going to the weight of the evidence rather than its admissibility."); see also *Obrey, 400 F.3d at 696* (same). As noted above, the question at this juncture is not whether Dr. Sullivan's regression analysis is correct or supported by reliable facts but rather whether his analysis is the product of a generally accepted method for demonstrating antitrust **[*33]** impact and damages through common evidence. *In re Online DVD Rental, 2010 U.S. Dist. LEXIS 138558, 2010 WL 5396064, at *10*; see *In re Aftermarket Automotive Lighting Products Antitrust Litigation, 276 F.R.D. 364, 373-374 (C.D. Cal. 2011)* ("the Court is not supposed to decide at the certification stage which expert analysis or model is better"). SanDisk's objection to the

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[18] The Semico data includes worldwide revenue, units, and average selling prices for NAND chips on a monthly basis. Sullivan Rep. ¶ 79. The Semico data also includes worldwide revenues, units, and average selling prices for USB drives, memory cards, solid state hard drives, MP3 players, and portable media players on a quarterly basis. Id.

data used by Dr. Sullivan raises an issue to be decided by the trier of fact. *In re Online DVD Rental, 2010 U.S. Dist. LEXIS 138558, 2010 WL 5396064, at *10*.[19]

Similarly, SanDisk's objection regarding Dr. Sullivan's failure to establish a relationship between royalties paid to SanDisk and the prices of SanDisk's final flash products is not a proper basis to exclude Dr. Sullivan's regression analysis. While Dr. Sullivan does not include royalties as a separate variable in his regression analysis, his econometric model evaluates the effects of competitors' costs on SanDisk's pricing for final flash products. Dr. Sullivan then used the royalty payments to establish a relationship between the royalties paid to SanDisk and the prices of SanDisk's final flash products on a product-by-product basis for each customer and time period, i.e., Dr. Sullivan used the royalty payments to determine the increase in competitors' costs and prices for San Disk's final flash products on a product-by-product basis for each customer and time period. See Sullivan Rep. ¶¶ 97-99; **[*34]** Sullivan Decl. ¶ 59.[20] To the extent SanDisk criticizes Dr. Sullivan for not including royalties as a separate variable in his regression analysis, this criticism does not justify exclusion. The selection of variables to include in a regression analysis is normally a question that goes to weight of the expert's analysis rather than its admissibility. *Rudebusch v. Hughes, 313 F.3d 506, 516 (9th Cir. 2002)* (citing *Bazemore v. Friday, 478 U.S. 385, 400, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986)* ("Normally, failure to include variables will affect the analysis' probativeness, not its admissibility."); *Maitland v. Univ. of Minnesota, 155 F.3d 1013, 1017 (8th Cir. 1998)* (if a regression analysis omits variables, it is for the finder of fact to consider the variables that have been left out of an analysis, and the reasons given for the omissions, and then to determine the weight to accord the study's results)); see *In re TFTLCD (Flat Panel) Antitrust Litigation, 267 F.R.D. 583, 604 (N.D. Cal. 2010)* (plaintiffs are not required to prove the merits of their case-in-chief at the class certification stage; they need not demonstrate that their multiple regression analysis captures all the proper variables and thus reaches the "right" answer). SanDisk has not shown that Dr. Sullivan's regression analysis suffers from serious methodological flaws such that it should be excluded.

Finally, to the extent Dr. Keeley used a "version" of Dr. Sullivan's model and determined **[*35]** that the royalties paid to SanDisk did not have any positive effect on the prices for SanDisk's final flash products when Dr. Sullivan's competitors' NAND flash chip cost variable is reduced by the amount of royalties that Dr. Sullivan asserts that SanDisk received, this is not a proper basis to exclude Dr. Sullivan's opinions. When experts reach different conclusions at the class certification stage, it is not for the Court to decide which expert's analysis is correct. See *In re Aftermarket Automotive Lighting Products, 276 F.R.D. at 373-374*; *Apple Inc. v. Motorola, Inc., 757 F.3d 1286, 1314 (Fed. Cir. 2014)* ("A judge must be cautious not to overstep its gatekeeping role and weigh facts, evaluate the

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[19] In its reply brief, SanDisk reiterates its argument that Dr. Sullivan's econometric model is incapable of determining any effect of the Semico data. SanDisk contends that the fatal flaw in Dr. Sullivan's "methodology" is "caused by a well-recognized error known as 'perfect collinearity.'" Contrary to SanDisk's contention, this "error" is not a sufficient basis to exclude Dr. Sullivan's regression analysis. Regressions have been admitted in the face of expert disagreement regarding whether collinearity posed a problem. See *In re High Fructose Corn Syrup Antitrust Lit., 295 F.3d 651, 660-661 (7th Cir. 2002)*; see also *In re High-Tech Employee, 2014 U.S. Dist. LEXIS 47181, 2014 WL 1351040, at *21 n. 51* (noting that the admission of such regressions "is not surprising given that the concept of collinearity is not a *methodology*, but a common phenomenon that results when using the methodology of regression analysis") (emphasis in original) (citing *Daubert, 509 U.S. at 595* ("The focus [of the admissibility inquiry], of course, must be solely on principles and methodology, not on the conclusions that they generate.")).

[20] Dr. Sullivan calculated his competitor NAND flash chip costs variable by multiplying the number of gigabytes per SanDisk product by the price per gigabyte derived from the market-wide data on NAND flash [chip] sales provided by Semico. Sullivan Rep. ¶ 97(d). Dr. Sullivan then calculated royalties per gigabyte in the worldwide NAND marketplace over time and connected them to the SanDisk sales data based on the time period and capacity of each SanDisk product. Id. ¶ 99. According to Dr. Sullivan, royalties calculated in this way for each SanDisk sale represent the actual royalties paid by competitors and the royalties that would have been paid by competitors but for SanDisk's alleged fraudulent obtainment of the patents-at-issue. Id. Dr. Sullivan opines that the coefficients from the regression model can be combined with the percentage decrease in competitor NAND flash chip costs resulting from lower royalties to calculate the overpayment associated with each sale in the SanDisk data. Id. Dr. Sullivan concludes that damages to any individual customer can be determined based on the sum total of this overpayment across all NAND flash products purchased from SanDisk. Id.

correctness of conclusions, impose its own preferred methodology, or judge credibility, including the credibility of one expert over another. These tasks are solely reserved for the fact finder.").

6. Dr. Sullivan's Damages Calculations

SanDisk contends that Dr. Sullivan's opinion as to damages outside the class period defined in the operative complaint (i.e., prior to June 25, 2006) should be excluded because it is irrelevant. In addition, SanDisk contends that Dr. Sullivan's opinion regarding prejudgment interest prior to the filing of the complaint should be excluded as contrary to law. The Court finds SanDisk's objections **[*36]** to be premature. Whether Plaintiffs are entitled to recover damages prior to June 25, 2006 or prejudgment interest prior to the filing of the complaint is irrelevant for purposes of determining whether class certification is appropriate. As such, the Court will not reach the merits of SanDisk's objections.

7. Conclusion

For the reasons stated above, the Court finds that SanDisk has failed to demonstrate that Dr. Sullivan's expert report or any of his opinions should be excluded as unreliable or irrelevant. Accordingly, because Plaintiffs have sustained their burden to show that the requirements for admissibility under *Rule 702* and Daubert have been met by a preponderance of the evidence, SanDisk's motion to exclude is DENIED.

B. Motion for Class Certification

Plaintiffs contend that class certification is appropriate because the requirements of *Rule 23(a)* are satisfied, and because this action meets the requirements of *Rule 23(b)(3)*, i.e., common questions of law or fact predominate and a class action is superior to other available methods of adjudication. SanDisk disagrees, arguing that class certification should be denied because Plaintiffs have failed to establish that common issues will predominate or that Plaintiffs **[*37]** are adequate and typical class representatives. Thus, SanDisk does not dispute that *Rule 23(a)*'s numerosity, ascertainability, and commonality requirements have been met. Below, the Court will address the requirements of *Rule 23* in turn.

1. *Rule 23(a)*

To satisfy *Rule 23(a)*, the party seeking class certification must show: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. *Fed.R.Civ.P. 23(a)*.

a. Numerosity and Ascertainability

Rule 23(a)(1) requires that the class must be "so numerous that joinder of all members is impracticable." *Fed.R.Civ.P. 23(a)(1)*. In addition, the class should be "ascertainable," *Mazur v. eBay Inc., 257 F.R.D. 563, 567 (N.D. Cal. 2009)*, meaning that the class definition must be "definite enough so that it is administratively feasible for the court to ascertain whether an individual is a member," *O'Connor v. Boeing N. Am., Inc., 184 F.R.D. 311, 319 (C.D. Cal. 1998)*. Here, SanDisk's records establish that there were 285 direct purchasers of final flash products during the class period defined in the operative complaint. Keeley Rep. ¶ 44. This is sufficient to satisfy the numerosity **[*38]** and ascertainability requirements. In general, courts find that the numerosity factor is satisfied when the class includes 40 or more members. See *Jordan v. Los Angeles County, 669 F.2d 1311, 1319 (9th Cir.)*, vacated on other grounds, *459 U.S. 810, 103 S. Ct. 35, 74 L. Ed. 2d 48 (1982)*; see also *Consolidated Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 482 (2d Cir. 1995)* ("numerosity is presumed at a level of 40 members").

b. Commonality

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." *Fed.R.Civ.P. 23(a)(2)*. "Commonality focuses on the relationship of common facts and legal issues among class members." *Hanlon v. Chrysler Corp., 150 F.3d 1011, 1021 (9th Cir. 1998)*. The commonality requirement of *Rule 23(a)(2)* is met where "the class member' claims 'depend upon a common contention' such that 'determination of its truth or falsity will resolve an issue that is central to the validity of each [claim] with one stroke.'" *Mazza, 666 F.3d at 588* (citation omitted). Thus, plaintiffs seeking to certify a class must "demonstrate 'the capacity of classwide proceedings to generate common answers' to common questions of law or fact that are 'apt to drive the resolution of the litigation.'" Id. "The commonality preconditions of *Rule 23(a)(2)* are less rigorous than the companion [predominance] requirements of *Rule 23(b)(3)*." *Hanlon, 150 F.3d at 1019*. "[C]ommonality only requires a single significant question of law or fact." *Mazza, 666 F.3d at 589*.

The Court finds that the commonality requirement has been satisfied. Common questions of law and fact **[*39]** are involved in determining whether SanDisk is liable for violating *§ 2* of the Sherman Act predicated on a Walker Process theory of liability. Common questions amenable to resolution on a class-wide basis exist as to whether SanDisk fraudulently procured the Disputed Patents, used those patents to facilitate the creation of market power by raising its competitors' costs through licensing agreements and royalty payments, and charged supra-competitive prices for its final flash products in response to its competitors raising their prices for such products due to the royalty payments. These questions are subject to generalized proof and are capable of class-wide resolution. SanDisk does not dispute that Plaintiffs have satisfied the commonality requirement. Instead, SanDisk argues that Plaintiffs have failed to demonstrate that common questions of law or fact predominate. This issue is discussed below.

c. Typicality and Adequacy

Rule 23(a)(3) requires the representative party to have claims that are "typical of the claims . . . of the class." *Fed.R.Civ.P. 23(a)(3)*. In order for a court to find typicality, "[a] class representative must be part of the class and possess the same interest and suffer the same injury as the class **[*40]** members." *Dukes, 131 S.Ct. at 2550*; see *Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1279 (11th Cir. 2000)* (typicality may not be established unless the named representative has individual standing to raise the legal claims of the class); *Turcios v. Carma Laboratories, Inc., 296 F.R.D. 638 (C.D. Cal. 2014)* (same). Typicality is satisfied "when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." Rodriguez v. Hayes, *591 F.3d 1105, 1124 (9th Cir. 2010)* (citations omitted). The typicality requirement is permissive and requires only that the representative's claims are "reasonably co-extensive with those of the absent class members; they need not be substantially identical." *Hanlon, 150 F.3d at 1020*.

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." *Fed.R.Civ.P. 23(a)(4)*. Resolution of two questions determines whether this requirement has been satisfied: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members; and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class? *Hanlon, 150 F.3d at 1020*. The adequacy requirement "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Products, Inc. v. Windsor, 521 U.S. 591, 625, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* (citations omitted). A district court must "ensure that the named plaintiffs have incentives **[*41]** that align with those of absent class members so as to assure that the absentees' interests will be fairly represented." *Prado—Steiman, 221 F.3d at 1279*. Proposed class representatives have a conflict of interest with the absent putative class members if they do not have standing to assert certain claims that may be available to the absent class members. See *Lierboe v. State Farm. Mut. Auto. Ins. Co., 350 F.3d 1018, 1022-1023 (9th Cir. 2003)* (finding that class representatives must have standing to bring all claims held by the putative class to which they belong and which they purport to represent).

SanDisk contends that ESE and MFLASH are not adequate class representatives because they did not purchase any SanDisk products during the class period defined in the operative complaint. In addition, SanDisk contends that Ritz and CPM are not typical or adequate class representatives because they lack standing. Specifically, SanDisk argues that Ritz and CPM do not have standing because they did not purchase products in the SSD, wireless memory, and embedded storage markets, and because they did not suffer injury in the market where competition was allegedly being restrained, i.e., the NAND flash chip market. Finally, SanDisk contends that Ritz and CPM's claims are not typical **[*42]** of the claims of the proposed class members because their purchases were substantially smaller and based on different terms than the high-volume retailers and distributors that account for the bulk of the putative class members' damages.

In response, Plaintiffs do not dispute that neither ESE nor MFLASH purchased final flash products during the class period defined in the operative complaint, i.e., on or after June 25, 2006. Instead, they argue that ESE and MFLASH purchased final flash products during the class period defined in the instant motion, i.e., on or after July 1997. The Court rejects Plaintiffs' attempt to dramatically expand the class period defined in the operative complaint by nearly nine years. Plaintiffs have not cited any authority demonstrating that it is proper for the Court to make such a major change to the class definition at this late stage of the litigation without an amendment of the operative complaint. Courts addressing this issue have refused to consider certifying a class beyond the definition provided in the operative complaint. See *Johnson v. Harley-Davidson Motor Co. Group, LLC, 285 F.R.D. 573, 577 n. 2 (E.D. Cal. 2012)* (court is bound by the class definition provided in the complaint); *Costelo v. Chertoff, 258 F.R.D. 600, 604 (C.D. Cal. 2009)* ("The Court is bound to class definitions provided in **[*43]** the complaint and, absent an amended complaint, will not consider certification beyond."); *Berlowitz v. Nob Hill Masonic Management, Inc., 1996 U.S. Dist. LEXIS 22599, 1996 WL 724776, at *2 (N.D. Cal. 1996)* (refusing to consider a broader class definition than that which was contained in the complaint; stating that the court was "bound by the class definition provided in the complaint" and that it would "not consider certification of the class beyond the definition provided in the complaint unless plaintiffs choose to amend it). Accordingly, because it is undisputed that neither ESE nor MFLASH purchased final flash products during the class period defined in the operative complaint, ESE and MFLASH do not have standing to assert claims on behalf of the proposed class. As such, the typicality and adequacy requirements are not satisfied as to these Plaintiffs. *Solis v. Regis Corp., 2006 U.S. Dist. LEXIS 77327, 2006 WL 2925682, at *8 (N.D. Cal. 2006)* ("Because Plaintiff is not a member of the putative . . . class, she is neither a typical nor an adequate representative of that class."); see *General Telephone Co. of Southwest v. Falcon Falcon, 457 U.S. 147, 156, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)* ("We have repeatedly held that a class representative must be part of the class")

As for SanDisk's contention that Ritz and CPM lack standing, the Court is unpersuaded by this argument. SanDisk's argument that Ritz and CPM lack standing because they did not suffer injury in the market where competition **[*44]** was allegedly being restrained (i.e., the NAND flash chip market) is without merit. Plaintiffs' theory of monopoly power is predicated on anti-competitive conduct that affected both the NAND flash chip market and the final flash product market. As discussed above, Plaintiffs contend that SanDisk raised its competitors' costs in the upstream market for final flash products by enforcing the Disputed Patents and extracting royalties from participants in the downstream NAND flash chip market. According to Plaintiffs, because NAND flash chips are critical components for all final flash products, SanDisk's enforcement of the Disputed Patents in the NAND flash chip market raised its competitors' costs in the market for final flash products because SanDisk's competitors paid more for flash chips. Plaintiffs further assert that, in response to the higher prices charged by its competitors in the final flash product market, SanDisk was able to raise its prices for final flash products, causing the proposed class members to pay an unlawful overcharge.

The Court also rejects SanDisk's argument that Ritz and CPM lack standing because they did not purchase SSD, wireless memory, or embedded storage. **[*45]** While it is undisputed that neither of these Plaintiffs purchased such products, Ritz and CPM's claims are reasonably co-extensive with those of the absent class members to satisfy the typicality requirement. Ritz and CPM's claims, like the putative class members' claims, arise from the same course of events and are based on the same Walker Process antitrust theory of liability. *Pecover v. Electronic Arts Inc., 2010 U.S. Dist. LEXIS 140632, 2010 WL 8742757, at *11 (N.D. Cal. 2010)* ("In antitrust cases, typicality usually 'will be established by plaintiffs and all class members alleging the same antitrust violations by defendants."); see *In re TFT-LCD, 267 F.R.D. at 593* ("The typicality requirement does not mandate that the products purchased, methods of purchase, or even damages of the named plaintiffs must be the same as those of the absent class members. . . . [T]he various products purchased and the different amount of damage sustained by individual plaintiffs do not negate a finding of typicality, provided the cause of those injuries arises from a common wrong."). Ritz and CPM possess the same interest and have suffered the same alleged injury as the absent class members, i.e., overpayment for final flash products. They will seek to prove that they were harmed by the same course of allegedly unlawful conduct in **[*46]** the same way as the putative class members. As such, their interests are fully consistent with those of the proposed class.[21]

Finally, SanDisk has failed to demonstrate that Ritz and CPM's claims are not typical of the claims of the absent class members because their purchases were substantially smaller and based on different terms than the high-volume retailers and distributors that account for the bulk of the putative class members' damages. SanDisk has not directed the Court to any evidence in the record showing that Ritz's or CPM's purchases were substantially smaller and based on different terms than the retailers and distributors that purportedly account for the bulk of the putative class' damages. But even if it had, SanDisk has failed to show that such disparities defeat typicality. Ritz and CPM possess the same interest and have suffered the same injury as the absent class members based on conduct which is not unique to them. To prove their claims, Ritz and CPM will have to show that the prices putative class members paid for SanDisk final flash products were artificially inflated by the anti-competitive conduct of SanDisk, i.e., the enforcement of the Disputed Patents. SanDisk **[*47]** has not cited any authority supporting the conclusion that the typicality requirement has not been met. The two district court cases SanDisk cited (but failed to analyze) are factually distinguishable, and do not support a finding that Ritz's or CPM's claims are not typical of the claims of the absent class members. Ritz and CPM's theory of liability is the same as the absent class members and there has been no showing that either of their individual circumstances are markedly different from the circumstances of the putative class members to defeat typicality.

In sum, the Court finds that Plaintiffs have satisfied the typicality requirement as to Ritz and CPM. This action is based on conduct which is not unique to them, and the putative class members have been injured by the same course of conduct. *Hanon, 976 F.2d at 508*. The Court also finds that Plaintiffs have satisfied the adequacy requirement. SanDisk failed to demonstrate that Ritz or CPM is an inadequate class representative because they lack standing. Further, there is no evidence demonstrating that Ritz, CPM, or their counsel has any conflicts of interest with other putative class members. Nor is there any evidence showing that Ritz's, CPM's, or **[*48]** their counsel's interest in this case is insufficient to ensure vigorous prosecution of this action on behalf of the proposed class. Ritz and CPM's counsel has extensive experience with class actions and complex litigation, Pls.' Mot. Exhs., H-K, and the record reflects that they have vigorously litigated this action in furtherance of the interests of the absent class members. SanDisk does not challenge the experience of Ritz and CPM's counsel or their capability of vigorously prosecuting this litigation.

d. Conclusion

The Court finds that Plaintiffs have demonstrated that the four requirements of *Rule 23(a)* have been met. Plaintiffs have shown that the proposed class is ascertainable and so numerous that joinder of all members is impracticable,

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[21] Without citation to authority or legal analysis, SanDisk asserts that Ritz and CPM are not adequate representatives of class members whose claims are barred by a prior settlement. The Court rejects SanDisk's unsupported argument. It is not the role of the Court to make the parties' arguments for them. See *Indep. Towers of Wash. v. Wash., 350 F.3d 925, 929 (9th Cir. 2003)*. That aside, SanDisk's argument fails on the merits. Even if some of the absent class members' claims are barred by a prior settlement, SanDisk has failed to show how such circumstances demonstrate that Ritz's or CPM's interests are antagonistic to any member of the proposed class or that either entity will be unable to prosecute this action vigorously on behalf of the proposed class.

there are questions of law and fact common to the class, the claims of the Ritz and CPM are typical of the claims of the putative class members, and that Ritz, CPM, and their counsel will fairly and adequately protect the interests of the class.

2. *Rule 23(b)(3)*

Under *Rule 23(b)(3)*, a plaintiff must demonstrate the superiority of maintaining a class action and show "that the questions of law or fact common to class members predominate over any questions affecting only individual **[*49]** members." *Fed.R.Civ.P. 23(b)(3)*. SanDisk does not contend that Plaintiffs have failed to demonstrate the superiority of maintaining a class action. Rather, SanDisk argues that Plaintiffs have not shown that common issues will predominate.

a. Predominance

Rule 23(b)(3) "permits certification only if 'the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members.'" *Comcast, 133 S.Ct. at 1430*. This requirement must be satisfied "through evidentiary proof." *Id. at 1431*. The predominance criterion is far more demanding than *Rule 23(a)*'s commonality requirement. *Amchem, 521 U.S. at 623-624*. The predominance analysis focuses on "the legal or factual questions that qualify each class member's case as a genuine controversy" in order to determine "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id. at 623*. "*Rule 23(b)(3)* requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen, 133 S.Ct. at 1191* (emphasis in original). "[T]he office of a *Rule 23(b)(3)* certification ruling is not to adjudicate the case; rather, it is to select the 'metho[d]' best suited to adjudication of the controversy 'fairly and efficiently.'" Id.

The test for predominance **[*50]** is met when there exists generalized evidence which proves or disproves an issue or element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class members' individual position. *In re Optical Disk Drive Antitrust Litigation, 303 F.R.D. 311, 318 (N.D. Cal. 2014)*. The Ninth Circuit has held that "'there is clear justification for handling the dispute on a representative rather than an individual basis' if 'common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication. . . .'" *Mazza, 666 F.3d at 589*. In the Ninth Circuit, "damage calculations alone cannot defeat certification." *Leyva v. Medline Indus. Inc., 716 F.3d 510, 513 (9th Cir. 2013)*; see also *Yokoyama v. Midland Nat. Life Ins. Co., Yokoyama v. Midland Nat. Life Ins. Co., 594 F.3d 1087, 1094 (9th Cir. 2010)*.

"Considering whether 'questions of law or fact common to class members predominate' begins . . . with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 131 S.Ct. 2179, 2181, 180 L. Ed. 2d 24 (2011)*. Under a Walker Process theory of antitrust liability, the plaintiff must show that the defendant procured the relevant patents by knowing and willful fraud on the PTO, and must prove all the elements otherwise necessary to establish a Sherman Act monopolization charge. *Ritz Camera & Image, LLC v. SanDisk Corp., 700 F.3d 503, 506 (Fed. Cir. 2012)*. These elements include: (1) an antitrust violation; (2) antitrust "impact" or injury resulting from the antitrust violation; and (3) damages sustained as a result **[*51]** of the antitrust violation. *In re Hydrogen Peroxide Antitrust Litigation, 552 F.3d 305, 311 (3d Cir. 2008)*.

i. Antitrust Violation

To establish an antitrust violation under *§ 2* of the Sherman Act, a plaintiff must show that: (1) the defendant possessed monopoly power in the relevant market; and (2) the defendant willfully acquired or maintained that power through "anti-competitive conduct," as opposed to gaining that power as a "consequence of a superior product, business acumen, or historical accident." *Image Tech. Serv., Inc. v. Eastman Kodak Co., 125 F.3d 1195,* 1202, 1208 (9th Cir. 1997) (willful acquisition or maintenance of monopoly power involves exclusionary conduct); see also Delano Farms Co. v. Cal. Table Grape Comm'n, 655 F.3d 1337, 1351 (Fed. Cir. 2011) ("To establish the antitrust portion of a Walker Process allegation, a plaintiff must show that the defendant held monopoly power in the relevant market and willfully acquired or maintained that power by anticompetitive means."). Monopoly power in the context of a Walker Process claim can be shown by proof that the fraudulently acquired patent dominated a relevant antitrust market, and thus conveyed substantial power or, in an attempt case, had the potential to do so. See Areeda, et al., ***Antitrust Law*** ¶ 705f (patents may facilitate the creation of monopoly power by excluding entry in refusal to license cases, or by raising rivals' costs in the case of actual licensing). **[*52]**

SanDisk contends that class certification should be denied because Plaintiffs cannot establish an antitrust violation with common proof.[22] Specifically, SanDisk argues that Plaintiffs offer no evidence - much less a class-wide methodology - for establishing market power. In addition, SanDisk argues that "[e]ven if Plaintiffs had demonstrated a class-wide means of establishing that SanDisk possessed market power, they would have had to demonstrate that the market power flows from the Disputed Patents." According to SanDisk, Plaintiffs failed to do so because Dr. Sullivan did not analyze the exclusionary scope of the Disputed Patents.

The Court finds that Plaintiffs have satisfied the predominance requirement with respect to the antitrust violation element of their monopolization claim. The question of whether there has been an antitrust violation is a common issue rather than an individual one. In no event will the individual circumstances of particular class members be relevant to the inquiry of whether such a violation has occurred. The adjudication of this issue will turn on common legal and factual issues. The claims of Plaintiffs and the absent class members arise out of the same course **[*53]** of events and are based on the same Walker Process theory of antitrust liability. Plaintiffs will rely on common evidence to establish an antitrust violation, i.e., to show that the Disputed Patents were fraudulently procured and used by SanDisk to acquire and maintain monopoly power in the final flash product market. SanDisk does not dispute that the issue of whether the Disputed Patents were fraudulently procured is a common question that can be resolved for all members of the class through generalized evidence. Further, contrary to SanDisk's contention, Plaintiffs have offered a plausible class-wide methodology to establish market power. To show market power through common evidence, Plaintiffs have offered the economic analysis of Dr. Sullivan. While SanDisk raises various objections to the adequacy of Dr. Sullivan's analysis regarding market power, these objections do not show that individual issues predominate. SanDisk's objections go to the merits of Dr. Sullivan's analysis. The relevant inquiry, however, is whether market power is capable of being proved at trial through common evidence. The Court finds that Plaintiffs have sufficiently made this showing. The issue of market **[*54]** power can be resolved for all members of the class in a single adjudication through generalized evidence.

ii. Antitrust Impact and Damages

Antitrust impact or antitrust injury is the damage that results from an antitrust violation. In re High-Tech Employee, 985 F.Supp.2d at 1192. "'It is the causal link between the antitrust violation and the damages sought by plaintiffs.'" Id. To satisfy the predominance requirement, Plaintiffs must show: (1) that the existence of individual injury arising from the SanDisk's alleged actions is "capable of proof at trial through evidence . . . common to the class rather than individual to its members[;]" and (2) that "the damages resulting from that injury [are] measurable 'on a class-wide basis' through the use of a 'common methodology.'" Comcast, 133 S.Ct. at 1430 (citation omitted). At the class certification stage, "any model supporting a plaintiff's damages case must be consistent with its liability case." Id. at 1433. Thus, a court can only certify a Rule 23(b)(3) class if there is evidence demonstrating the existence of a

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[22] SanDisk asserts that Plaintiffs' failure to demonstrate that they can establish the market power element of their antitrust claims on a class-wide basis with common proof is discussed in detail in their motion to exclude, which "SanDisk hereby incorporates by reference." The Court rejects SanDisk's attempt to incorporate arguments by reference that it made in its motion to exclude. Allowing litigants to engage in such conduct would provide an effective means of deliberately circumventing page limits on briefs set forth in the Civil Local Rules and this Court's Civil Standing Orders. This Court only considers arguments that are specifically and distinctively raised by the parties in their briefs. In any event, the Court has already considered and rejected the arguments SanDisk seeks to incorporate by reference.

class-wide method of awarding relief that is consistent with the Plaintiffs' theory of liability. *Astiana v. Ben & Jerry's Homemade, Inc., 2014 U.S. Dist. LEXIS 1640, 2014 WL 60097, at *12 (N.D. Cal. 2014)*.

The Court finds that Plaintiffs have satisfied the predominance requirement with respect to the antitrust impact and damages **[*55]** elements of their monopolization claim. Plaintiffs have shown that questions common to the proposed class predominate and that the proposed class is sufficiently cohesive to warrant certification. Plaintiffs have advanced a plausible methodology (i.e., Dr. Sullivan's economic analysis) to show that the existence of antitrust injury arising from SanDisk's alleged anticompetitive conduct is capable of proof at trial through evidence common to the proposed class, and that the damages resulting from the antitrust injury are measurable through the use of a common methodology. SanDisk has not offered any authority or analysis showing that the predominance requirement has not been met. SanDisk does not dispute that regression analysis is a standard way to show antitrust impact and damages. See *In re TFT-LCD, 267 F.R.D. at 605-606*; *In re Live Concert Antitrust Litigation, 247 F.R.D. 98, 145-146 (C.D. Cal. 2007)* (citing cases). Nor has SanDisk argued that Dr. Sullivan's econometric model supporting Plaintiffs' damages case is inconsistent with Plaintiffs' liability case. Instead, SanDisk argues that Dr. Sullivan's economic analysis is fundamentally and fatally flawed for various reasons identified by its expert, Dr. Keeley.[23] SanDisk's arguments in this regard are similar to the arguments SanDisk made in connection **[*56]** with its motion to exclude. To the extent these arguments are directed to the merits of Dr. Sullivan's economic analysis and conclusions, they are insufficient to support a finding that individual issues predominate. As noted above, the relevant question is whether Plaintiffs have advanced a plausible methodology to demonstrate that antitrust injury and damages can be proven on a class-wide basis through the use of a common methodology. *California v. Infineon Technologies AG, 2008 U.S. Dist. LEXIS 81251, 2008 WL 4155665, at *9 (N.D. Cal. 2008)*. In situations where a court is confronted with two opposing expert analyses or econometric models, the Court is not at liberty to decide at the certification stage which expert analysis or model is better. See *In re Aftermarket Automotive Lighting Products, 276 F.R.D. at 373-374* (the Court's inquiry at the class certification stage is limited to determining whether plaintiffs have made a sufficient showing that the evidence they intend to present concerning antitrust impact will be made using generalized proof common to the class and that these common issues will predominate); *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litigation, 256 F.R.D. 82, 100 (D. Conn. 2009)* ("[T]he issue at class certification is not which expert is the most credible, or the most accurate modeler, but rather have the plaintiffs demonstrated that there is a way to prove a class-wide measure of damages through generalized proof."); **[*57]** *Natchitoches Parish Hosp. Serv. Dist. v. Tyco Intern., Ltd., 247 F.R.D. 253, 270 (D. Mass. 2008)* ("To determine predominance, a court need not plunge into the weeds of an expert dispute about potential technical flaws in an expert methodology."). While SanDisk has raised numerous objections to Dr. Sullivan's economic analysis and conclusions, it has not shown that Dr. Sullivan's methodology is so flawed as to preclude class certification. SanDisk has not shown that Plaintiffs have failed to offer a plausible way to demonstrate antitrust impact and damages on a class-wide basis.

As for SanDisk's remaining arguments, the Court finds that they are insufficient to show that the predominance requirement has not been satisfied. SanDisk argues that individualized proof is required to determine whether a putative class member was impacted because the "bulk" of its final flash product sales were made pursuant to individually negotiated transactions. The Court rejects this argument. Courts have held that even if there is considerable individual variety in pricing because of individual price negotiations, plaintiffs may succeed in proving class-wide impact by showing that the minimum baseline for beginning negotiations, or the range of prices which

[23] For example, SanDisk argues that Dr. Sullivan's opinion as to the impact of the Disputed Patents is not grounded in economic reality because, among other things, his methodology for interpolating the Disputed Patents' royalty share between 1998 and 2008 is fundamentally flawed, and because he assumes, without empirical support, that the value of the Disputed Patents was common across licensees. In addition, SanDisk argues that Dr. Sullivan's pass-through opinion is "riddled" with flawed assumptions, and that Dr. Sullivan failed to perform empirical analysis that would support his assumption that SanDisk responded to supposed final flash product increases by its competitors by raising prices of its own products. SanDisk also argues that Dr. Sullivan's regression model provides no evidence that competitors' costs affect SanDisk's final flash product prices, and that Dr. Sullivan's model improperly assumes common impact and cannot be used to establish a relationship to estimate the impact of royalties attributable to the Disputed Patents on SanDisk's prices because royalty data is not used in the regression.

resulted from negotiation, was artificially **[*58]** raised by anti-competitive actions of the defendant. See, e.g., *In re Commercial Tissue Products Antitrust Litigation, 183 F.R.D. 589, 595 (N.D. Fla. 1998)*; *In re Industrial Diamonds Antitrust Litigation, 167 F.R.D. 374, 383 (S.D.N.Y. 1996)*; *In re NASDAQ Mkt.-Makers Antitrust Litigation, 169 F.R.D. 493, 523 (S.D.N.Y. 1996)*. Here, Plaintiffs' theory of antitrust liability is predicated on SanDisk's fraudulent procurement and use of the Disputed Patents to raise competitors' costs in the upstream final flash products market by extracting royalty payments from participants in the downstream flash chip market. Thus, under Plaintiffs' theory of liability, the baseline for price negotiations for SanDisk's final flash products was artificially inflated by the royalty payments. In other words, Plaintiffs claim that the prices which resulted from the SanDisk's price negotiations were artificially raised by SanDisk's anti-competitive conduct.

The Court also rejects SanDisk's argument that class certification should be denied on the ground that Dr. Sullivan's model is unreliable because he used aggregated and averaged data to establish antitrust impact. SanDisk contends that Dr. Sullivan's use of averages "masks" substantive variation in the proposed class. Courts have rejected similar arguments and held that averaged and aggregated data is not fatal to econometric models used to measure the extent of pass-through of component costs in the prices **[*59]** paid for enduse products. See *In re TFT-LCD, 267 F.R.D. at 605* ("a number of courts have held that averaged and aggregated data may be used to demonstrate pass-through"); see also *In re Static Random Access memory (SRAM) Antitrust Litigation, 264 F.R.D. 603, 614 (N.D. Cal. 2009)*; *In re Cathode Ray Tube (CRT) Antitrust Litigation, 2013 U.S. Dist. LEXIS 137946, 2013 WL 5391159, at *8 (N.D. Cal. 2013)*.

Finally, the Court rejects SanDisk's conclusory argument that antitrust impact cannot be established on a class-wide basis because SanDisk's alleged "anti-competitive conduct was directed to a component of the overall price of a product." SanDisk did not cite any controlling authority supporting its position. Further, SanDisk failed to provide any elaboration or analysis of the district court cases it cited. The Court finds SanDisk's undeveloped argument uncompelling. See *Indep. Towers of Wash., 350 F.3d at 929*. That aside, a review of the cases cited by SanDisk reveals that they are readily distinguishable from the facts of this case, and none of them holds, as SanDisk appears to suggest, that antitrust impact cannot be shown on a class-wide basis where the alleged anti-competitive conduct is directed at a component of a product.

b. Superiority

Rule 23(b)(3) requires that a class action be "superior to other methods for the fair and efficient adjudication of the controversy." *Hanlon, 150 F.3d at 1023*. Under *Rule 23(b)(3)*, the Court must consider four non-exclusive factors in evaluating whether **[*60]** a class action is a superior method of adjudicating Plaintiffs' claims: (1) the interest of each class member in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against the class; (3) the desirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action. *Zinser, 253 F.3d at 1190-1192*. Where individual class members' possible recoveries are so small that no other practical method of adjudication exists, superiority is often satisfied. See *Amchem, 521 U.S. at 617*.

The Court finds that the superiority requirement is satisfied. In an antitrust action, when common questions are found to predominate, "courts generally have ruled that the superiority prerequisite of *Rule 23(b)(3)* is satisfied." See *In re Cathode Ray Tube (CRT) Antitrust Litigation, 2013 U.S. Dist. LEXIS 137945, 2013 WL 5429718, at *23 (N.D. Cal. 2013)* (citing Wright, Miller & Kane, Federal Practice and Procedure: Civil Procedure § 1781, at 254-255 (3d ed. 2004)). Here, given the common legal and factual issues involved in this case, and given that it is undisputed that the possible recoveries for many of the putative class members are too small to justify the costs of litigating their claims **[*61]** individually, the Court finds that class treatment is superior to other methods for the fair and efficient adjudication of this case. See *In re Static Random Access (SRAM) Antitrust Litigation, 2008 U.S. Dist. LEXIS 107523, 2008 WL 4447592, at *10 (N.D. Cal. 2008)* ("In antitrust cases such as this, the damages of individual direct purchasers are likely to be too small to justify litigation, but a class action would offer those with small claims the opportunity for meaningful redress."). SanDisk does not contend that any of the relevant factors weigh in favor of a finding that a class action is not the superior method for adjudicating the claims alleged in the operative complaint.

c. Conclusion

The Court finds that Plaintiffs have demonstrated that the superiority and predominance requirements of *Rule 23(b)(3)* have been met. Plaintiffs have shown the superiority of maintaining a class action, and that questions of law and fact common to the proposed class predominate over any questions affecting only individual members. Accordingly, Plaintiffs' motion for class certification is GRANTED IN PART. The Court certifies the class defined in the operative complaint.

C. Appointment of Class Representatives

Plaintiffs seek an order appointing Ritz, CPM, ESE, and MFLASH as class representatives. As discussed above, ESE and MFLASH do **[*62]** not have standing to bring claims on behalf of the class defined in the operative complaint. As such, Plaintiffs request to appoint ESE and MFLASH as class representatives is DENIED. However, Plaintiffs request to appoint Ritz and CPM as class representatives is GRANTED. For the reasons set forth above, the Court finds that Ritz and CPM are adequate class representatives.

D. Appointment of Class Counsel

"[A] court that certifies a class must appoint class counsel." *Fed.R.Civ.P. 23(g)(1)*. In appointing class counsel, the court must consider: "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." *Fed.R.Civ.P. 23(g)(1)(A)*. A court may also "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." *Fed.R.Civ.P. 23(g)(1)(B)*.

Plaintiffs request the Court appoint Kellogg, Huber, Hansen, Todd, Evans & Figel P.L.L.C., Berry Law P.L.L.C., and Stueve, Siegel, Hanson LLP as class counsel. Plaintiffs also request the **[*63]** Court appoint Morgan, Duffy-Smith & Tidalgo LLP as liaison counsel. SanDisk does not challenge the adequacy of Plaintiffs' counsel or otherwise object to Plaintiffs' request for appointment of counsel. Having reviewed the evidence submitted by Plaintiffs in connection with their request for appointment of counsel, the Court finds that Plaintiffs' counsel possess sufficient experience, knowledge of the applicable law, and resources to represent the proposed class in this matter. See Pls.' Mot., Exhs. H-K. In addition, the record reflects that Plaintiffs' counsel has expended considerable resources investigating and litigating the claims alleged in this action. Finally, there is no evidence suggesting that Plaintiffs' counsel will not fairly or adequately represent the interests of the class. Accordingly, the Court appoints Kellogg, Huber, Hansen, Todd, Evans & Figel P.L.L.C., Berry Law P.L.L.C., and Stueve, Siegel, Hanson LLP as class counsel. In addition, the Court appoints Morgan, Duffy-Smith & Tidalgo LLP as liaison counsel.

IV. CONCLUSION

For the reasons stated above, IT IS HEREBY ORDERED THAT:

1. Plaintiffs' motion to certify class and for approval of class counsel is GRANTED IN PART. **[*64]** The Court certifies the following class: "All persons residing in the United States who, on or after June 25, 2006, directly purchased from SanDisk, or from its controlled and licensed joint venture with Toshiba Corporation, final flash products using technology claimed to be patented by SanDisk ("Final Flash Product Class"). Such products include, without limitation, those SanDisk sold to retail firms, original equipment manufacturers ("OEMs"), and distributors. Purchases of final flash products that contain a microcontroller, a semiconductor that interfaces with electronic

equipment and operates the flash memory, are included in the Final Flash Product Class. Purchases of flash memory combined with dynamic random access memory ("DRAM"), flash memory combined with static random access memory ("SRAM"), or flash memory combined with a microprocessor ("system on a chip") are excluded from the Class."

2. Ritz and CPM are appointed as class representatives.

3. Kellogg, Huber, Hansen, Todd, Evans & Figel P.L.L.C., Berry Law P.L.L.C., and Stueve, Siegel, Hanson LLP are appointed as class counsel. Morgan, Duffy-Smith & Tidalgo LLP is appointed as liaison counsel.

4. SanDisk's motion to exclude **[*65]** the expert report and testimony of Dr. Sullivan is DENIED.

5. Because this Order may contain information within the scope of the parties' protective order, this Order shall remain under seal pending further Order of the Court. By no later than May 29, 2015, the parties shall jointly advise the Court which facts, if any, they contend should be redacted from the public version of this ruling. To the extent any party seeks redaction of any portion of the Court's ruling, such party shall provide the Court with the legal authority for such request and a proposed redacted order for public disclosure.

6. This Order terminates Docket 240 and Docket 259.

IT IS SO ORDERED.

Dated: May 14, 2015

/s/ Saundra Brown Armstrong

SAUNDRA BROWN ARMSTRONG

United States District Judge

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Growers 1-7 v. Ocean Spray Cranberries, Inc.

United States District Court for the District of Massachusetts

May 14, 2015, Decided; May 14, 2015, Filed

CIVIL ACTION NO. 12-12016-RWZ

Reporter

2015 U.S. Dist. LEXIS 192538 *

GROWERS 1-7, et al. v. OCEAN SPRAY CRANBERRIES, INC., et al.

Prior History: Growers 1-7 v. Ocean Spray Cranberries, Inc., 2014 U.S. Dist. LEXIS 61654 (D. Mass., May 2, 2014)

Core Terms

cranberry, growers, plaintiffs', defendants', antitrust, monopolization, pricing, monopsonization, summary judgment, products, unfair, auction, fruit, summary judgment motion, Sherman Act, concentrate, predatory, consumer, raw, antitrust claim, anti trust law, competitors, termination, antitrust violation, contracts, monopsony, damages, harms, parties, sellers

Counsel: **[*1]** For John Doe Growers 1-7, on behalf of themselves and all others similarly situated as a class, John Doe B Pool Grower 1, on behalf of Themselves and all others similarly situated as a class, Plaintiffs: Daniel S. Lenz, James A. Olson, Paul S. Hassett, LEAD ATTORNEYS, PRO HAC VICE, Lawson & Cates, S.C., Madison, WI USA; Javier D. Spyker, LEAD ATTORNEY, PRO HAC VICE, Hernandez and Associates, Bandon, OR USA; Manuel C. Hernandez, LEAD ATTORNEY, PRO HAC VICE, Hernandez and Associates, LLC, Bandon, Or USA; Norman H. Jackman, LEAD ATTORNEY, Jackman & Roth LLP, Lincoln, NH USA; Shala McKenzie Kudlac, LEAD ATTORNEY, PRO HAC VICE, Carleton Law Offices, Bandon, Or USA; Frederick J Carleton, PRO HAC VICE, Carleton Law Offices, Brandon, OR USA.

For Barry K. Winters, doing business as, BKW Farms, Bkw Farms, Rick Jackson, Jackson Farms, Inc., James M. Schaer, Julie A. Schaer, Scott Vierck, Fred P. Bussman, Plaintiffs: Daniel S. Lenz, James A. Olson, Paul S. Hassett, LEAD ATTORNEYS, PRO HAC VICE, Lawson & Cates, S.C., Madison, WI USA; Javier D. Spyker, LEAD ATTORNEY, PRO HAC VICE, Hernandez and Associates, Bandon, OR USA; Norman H. Jackman, LEAD ATTORNEY, Jackman & Roth LLP, Lincoln, NH USA.

For John **[*2]** L. Meyer, John L. Meyer Cranberries, Inc, Christopher M. Bussman, Deanna M. Bussman, Paul D. Sogn, doing business as Wintersogn Farm LLC, Rachelle D. Sogn, doing business as Wintersogn Farm LLC, Wintersogn Farm, LLC, on behalf of Themselves and all others similarly situated as a class, Stacy Preston Winters, Michael A. Webb, Charles v. Goldsworthy, doing business as Thunderlake-Tomahawk Cranberries, Inc, Timothy R. Goldsworthy, doing business as Thunderlake-Tomahawk Cranberries, Inc, Plaintiffs: Daniel S. Lenz, Paul S. Hassett, LEAD ATTORNEYS, PRO HAC VICE, Lawson & Cates, S.C., Madison, WI USA; James A. Olson, LEAD ATTORNEY, PRO HAC VICE, Lawton & Cates, S.C., Madison, WI USA. Javier D. Spyker, LEAD ATTORNEY, PRO HAC VICE, Hernandez and Associates, Bandon, OR USA Norman H. Jackman, LEAD ATTORNEY, Jackman & Roth LLP, Lincoln, NH USA.

For Delmer C. Robison, Plaintiffs: Daniel S. Lenz, Paul S. Hassett, LEAD ATTORNEYS, PRO HAC VICE, Lawson & Cates, S.C., Madison, WI USA; Javier D. Spyker, LEAD ATTORNEY, PRO HAC VICE, Hernandez and Associates, Bandon , OR USA Norman H. Jackman, LEAD ATTORNEY, Jackman & Roth LLP, Lincoln , NH USA.

For H.E. Querry, Inc, on behalf of themselves and all others **[*3]** similarly situated as a class, Plaintiff: Daniel S. Lenz, Paul S. Hassett, LEAD ATTORNEYS, PRO HAC VICE, Lawson & Cates, S.C., Madison, WI USA; James A. Olson, LEAD ATTORNEY, PRO HAC VICE, Lawton & Cates, S.C., Madison, WI USA. Javier D. Spyker, LEAD ATTORNEY, PRO HAC VICE, Hernandez and Associates, Bandon, OR USA Norman H. Jackman, LEAD ATTORNEY, Jackman & Roth LLP, Lincoln, NH USA.

For Gretchen Weiner, Richard E. Haliburton, Randy Farr, Barry K Winters, Winter Crest Farm, Mckenzie Cranberries, Elk River Farms, Richard E. Haliburton Revocable Living Trust, Cannon, Inc., Robert Mckenzie III, High 5 Acres, Inc., High 5 Farm, Llc, Earl Lang, Merri Lang, Laurel Creek Acres, Llc, Nelson Family Farm, Llc, David Hughes, Virginia Hughes, William Stoddard, Linda Stoddard, Glen Flora Bogs, Oregon Cranberry Supply, Randall P. Manicke, Manicke Farms Enterprises, Alder Lake Cranberry Corp., Richard D. Indermuehle, Allen's Cranberry, Llc, Curt Allen, Theresa Allen-Hubka, Bires Cranberry, Llc, James Bires, William Bosshard, Brandy Creek Cranberry, Brian Pederson, Callaway Cranberry, David Callaway, Barbara Callaway, Fifield Cranberries, Llc, John Seramur, Hungry Run Cranberry, Llc, Kevin Griffin, **[*4]** Sue Griffin, Highlander Cranberries, Llc, David Brehm, Indian Hills Cranberries, Llc, Richard Okray, J&J Cranberries, Inc., John Sager, Plaintiffs: James A. Olson, Lawton & Cates, S.C., Madison, WI USA.

For Jerry's Berries, Gerald Fuerstenberg, K&S Cranberries, Kranco, Inc., Paul Konopacky, Lone Oak Cranberry, Michael Stump, Naden Cranberry Company, Inc., Scott Naden, Necedah Cranberry, Inc., Jeff Bentz, Peardot Bros. Cranberries, Bruce Peardot, Pergande Cranberry Marsh, Inc., Mark Pergande, R.E.D. Cranberry Marsh, Inc., Edward Allen, Lisa Kelley, Eugene Schwemmer, Sherry Berry, Llc, Richard Becker, Snider Marsh, Jeff Snider, Timberline Cranberries, Ltd., Albert Oates, Richard Teske, Karen Teske, Trout River Cranberry Co., Charles v. Goldsworthy, Brainfrank Nominee Trust, Edward Koplovsky, Plaintiffs: James A. Olson, Lawton & Cates, S.C., Madison, WI USA.

Timothy R. Goldworthy, Plaintiff, Pro se.

For Ocean Spray Cranberries, Inc., an agricultural cooperative, Defendant: Alfred C. Pfeiffer, Elyse M. Greenwald, Jessica N. Boluda, LEAD ATTORNEYS, Latham & Watkins LLP, San Francisco, CA USA; Lawrence E. Buterman, William J. Rinner, LEAD ATTORNEYS, PRO HAC VICE, Latham & Watkins, Washington, **[*5]** DC USA; Margaret M. Zwisler, LEAD ATTORNEY, Latham & Watkins LLP (DC), Washington, DC USA; Jennifer L. Giordano, Latham & Watkins, LLP, Washington, DC USA; Marguerite M. Sullivan, PRO HAC VICE, Latham & Watkins LLP, Washington, DC USA.

For Cliffstar Llc, other, Registered Agent Solutions, Inc., Cott Beverages, Llc, other, Registered Agent Solutions, Inc., Interested Partys: D. Alicia Hickok, LEAD ATTORNEY, PRO HAC VICE, Drinker Biddle & Reath LLP, Philadelphia, PA USA; John J. Powers, LEAD ATTORNEY, Drinker Biddle & Reath LLP, San Francisco, CA USA; David L. Ferrera, Katy O. Meszaros, Nutter, McClennen & Fish, LLP, Boston, MA USA; Norman H. Jackman, Jackman & Roth LLP, Lincoln, NH USA.

Judges: RYA W. ZOBEL, UNITED STATES DISTRICT JUDGE.

Opinion by: RYA W. ZOBEL

Opinion

MEMORANDUM OF DECISION

ZOBEL, J.

This is a putative antitrust class action brought by a group of cranberry growers. Their suit accuses the largest purchaser and processor of raw cranberries, defendant Ocean Spray Cranberries, Inc. ("Ocean Spray"), and its wholly-owned subsidiary, defendant Ocean Spray Brands, L.L.C. ("OSB"), of violating *Section 2* of the Sherman

Act, *15 U.S.C. § 2*, and the Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A, by engaging in predatory **[*6]** pricing and price fixing in the cranberry-products industry.

Last year, I allowed defendants' motion to dismiss nine of the thirteen counts in plaintiffs' complaint, including claims for violations of the Capper-Volstead Act, *7 U.S.C. § 291*, and *Section 1* of the Sherman Act; conspiracy to violate the Sherman Act; and certain derivative actions under Chapter 93A. Docket # 78. Now, the parties both seek summary judgment on the remaining claims. Ocean Spray moves for summary judgment on all remaining counts, basing its argument on plaintiffs' alleged lack of antitrust standing and the absence of disputed facts on plaintiffs' Chapter 93A claims. Docket # 115. Plaintiffs are less ambitious, seeking partial summary judgment on liability (but not damages) for their Sherman Act monopolization claim and its derivative Chapter 93A claim. Docket # 102. The parties have also filed several motions that are related to their summary judgment motions. See Docket ## 118, 139, 140.

I. Background

The claims in this case all relate to allegedly improper activities in the cranberry-products industry. There are three relevant levels in this industry: the growers, who sit at the origin of the cranberry product supply chain; the handlers, **[*7]** who convert raw cranberries received from the growers into both end-user products (e.g., cranberry juice and dried cranberries) and downstream ingredients (e.g., cranberry concentrate); and the consumers, who are either households (for the end-user products) or food and beverage companies (for the ingredient products).

Ocean Spray, as the largest handler, sits at the center of the industry. It holds itself out as a cooperative of more than 700 cranberry and grapefruit growers in the United States, Canada, and Chile.[1] Ocean Spray has contracts with its growers. Those contracts, broadly speaking, require the growers to deliver the fruit that they grow to Ocean Spray[2] and Ocean Spray, in turn, to process the fruit into a variety of different products, including shelf-stable beverages, commodity concentrate, puree and powders, and dried cranberries. Ocean Spray must then market and sell those products, returning a percentage of the proceeds to the growers.

According to the allegations in plaintiffs' Third Amended Complaint ("TAC," Docket # 44), historically, all Ocean Spray growers earned returns on their crop based on the returns from sales of Ocean Spray's branded products, **[*8]** like Craisins® and Ocean Spray brand juices. The amount the growers received was proportionate to the volume of fruit delivered to Ocean Spray, less administrative and sales expenses. In early 2006, Ocean Spray divided the cooperative into two classes of growers: the A Pool and the B Pool.[3] Since then, the A Pool growers have delivered their fruit to Ocean Spray for use in Ocean Spray's branded and value-added products, and Ocean Spray has paid them a return based upon its sales of those products. The B Pool growers, on the other hand, have delivered their fruit to Ocean Spray for use as non-value added, commodity products, such as cranberry concentrate and frozen whole and sliced cranberries, for sale primarily to the ingredient market.[4] Ocean Spray has paid the B Pool growers a return based upon its sales of those products. The two groups are at economic cross-

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[1] Plaintiffs dispute whether Ocean Spray is a true agricultural cooperative. Docket # 137 ¶ 1. I will refer to it as such because it holds itself out that way and because many other courts have called it a cooperative. See, e.g., ***Northland Cranberries, Inc. v. Ocean Spray Cranberries, Inc., 382 F. Supp. 2d 221, 223 (D. Mass. 2004)***; see also *Ocean Spray Cranberries, Inc. v. PepsiCo, Inc., 160 F.3d 58, 59 (1st Cir. 1998)*. But, because I do not need to make a finding about Ocean Spray's precise business form to decide these motions, I do not do so.

[2] The parties dispute whether Ocean Spray purchases or takes title to the fruit. The court does not find this distinction to be relevant to resolving the pending motions.

[3] Ocean Spray alleges that the B Pool consists of former independent growers, including former Ocean Spray growers. Cranberry growers joining Ocean Spray must join as B Pool growers. According to the operative complaint, Ocean Spray's Board of Directors is comprised of only A Pool growers.

[4] The parties dispute whether there is any mixing of A and B Pool fruit. That dispute is not material to the resolution of these motions.

purposes: A Pool growers want the price of cranberries to be low so they enjoy a higher profit margin, but B Pool growers want the price to be high so more money passes through to them.

Since July 2009, Ocean Spray has sold cranberry concentrate through an auction process in which Ocean Spray sets the opening prices. The revenue **[*9]** generated by the cranberry auction determines, in part, the payment that B Pool growers receive for their fruit. Plaintiffs allege that Ocean Spray deliberately manipulated the market price for cranberry concentrate by manipulating the cranberry auction (e.g., by driving the starting price of the auction lower with each auction).

Although Ocean Spray is the dominant handler in the industry, it does not have complete control of the cranberry market. There are some cranberry growers that are not Ocean Spray cooperative members—so-called "independent growers"—and there are independent handlers that can process these independent growers' fruit. Those independent handlers purchase (or take title to) raw fruit from growers at market-determined prices and then use the fruit as raw ingredients for the processing and manufacturing of the handlers' products that they sell to third parties. Ocean Spray competes with these independent handlers to sell finished cranberry products to customers, like food and beverage companies. According to plaintiffs, even though independent handlers do not participate in the cranberry auction, the auction plays a significant role in setting the price that the independent **[*10]** handlers can charge for their products.

II. Standard of Review

Summary judgment will be granted if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*. The court must view the record in the light most favorable to the nonmovant and draw all justifiable inferences in that party's favor. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. The moving party initially bears the burden of demonstrating the absence of a genuine issue of material fact. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. If the moving party has carried its burden, to defeat the motion, the nonmovant must then "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Id. at 587* (quoting *Fed. R. Civ. P. 56(e)* (emphasis omitted)). The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson, 477 U.S. at 247-48*. "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)*.

III. Defendants' Summary Judgment Motion (Docket # 115)

Defendants move for summary judgment on all remaining claims. They **[*11]** premise their arguments for the antitrust claims on plaintiffs' alleged lack of antitrust standing. They also contend that these deficiencies in the antitrust claims doom the derivative consumer protection claim, and that the consumer protection claim for retaliation is flawed as a matter of law. I will address these issues in turn.

First, however, I address defendants' recent motion to file a seven-page reply brief. That motion (Docket # 139) is denied. The court's order staying class certification proceedings (Docket # 138) instructed the parties that reply briefs for all pending motions were not necessary. Defendants offer no persuasive arguments for why the court was incorrect in reaching that conclusion. The parties are all reminded that replies may not be filed as of right in this court, and that any arguments they wish the court to consider should be raised in their primary briefs.

A. Antitrust Standing (Counts VIII and IX)

Two of the remaining four claims in this case, those about monopolization and monopsonization, arise under *Section 4* of the Clayton Act, *15 U.S.C. § 15(a)*. *Section 4*, which says that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust **[*12]** laws may sue . . . and shall recover threefold the damages by him sustained," establishes a private cause of action for damages under the federal antitrust laws. *Section 4* imposes certain threshold criteria upon plaintiffs bringing antitrust claims. First, a plaintiff must meet the statutory definition of "person" found in *15 U.S.C. § 12*. The plaintiff must also prove not only that it suffered injury in fact, but also that it suffered "antitrust injury." And the plaintiff finally must prove that its antitrust injury is not too remote from the alleged antitrust violation to allow for recovery. This last element, which focuses on "whether the plaintiff is a proper party to bring a private antitrust action," has also been called "antitrust standing." *Associated Gen. Contractors of Calif., Inc. v. Calif. State Council of Carpenters ("AGC"), 459 U.S. 519, 535 n.31, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. Defendants' motion contends that this is the missing element in plaintiffs' antitrust claims.[5]

The remoteness inquiry is a judicial exception to antitrust liability, premised on the "assum[ption] that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury **[*13]** to his business or property." *Blue Shield of Va. v. McCready, 457 U.S. 465, 477, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)*. Courts use a multi-factor inquiry to probe remoteness, focusing on "(1) the causal connection between the antitrust violation and the harm to the plaintiff, and whether the harm was intended; (2) the nature of the injury, including whether the plaintiff is a consumer or competitor in the relevant market; (3) the directness of the injury, and whether the damages are too speculative; (4) the potential for duplicative recovery, and whether the apportionment of damages would be too complex; and (5) the existence of more direct victims." 1 Am. Bar Ass'n, ***Antitrust Law*** Developments 824 (6th ed. 2007); see also *AGC, 459 U.S. at 537-44*; *Serpa Corp. v. McWane, Inc., 199 F.3d 6, 10 (1st Cir. 1999)* (same but breaking first factor into two separate inquiries). These factors are guides from the court's analysis, but "the infinite variety of claims that may arise [in an antitrust case] make it virtually impossible to announce a black-letter rule that will dictate the result [of the antitrust standing inquiry] in every case." *AGC, 459 U.S. at 536*. But, despite its complexities, the AGC multi-factor test makes one thing clear: a critical threshold question for resolving antitrust standing issues is defining, with particularity, what the alleged antitrust violations **[*14]** are and what the markets where these violations occur look like. I will begin there, then proceed to the multi-factor analysis for each violation.

1. The Alleged Antitrust Violations

Plaintiffs assert two separate antitrust claims, both alleging violations of *Section 2* of the Sherman Act. *Section 2* generally prohibits individual market players from engaging in monopolization in any of its forms. See, e.g., *Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*. One of plaintiffs' *Section 2* claims is styled as "monopolization" and the other as "monopsonization." Monopolization, in the traditional sense, describes the consolidation of a market into one seller. That seller then uses its power to produce at a sub-competitive level, causing fewer goods to be sold at a greater price. This sub-competitive production results in less consumer surplus and greater deadweight loss. Monopsonization is monopolization of a supply market—it is essentially the "mirror image" of traditional monopolization. See, e.g., *Todd v. Exxon Corp., 275 F.3d 191, 202 (2d Cir. 2001)*. Monopsonization describes consolidation of a market into one buyer. See U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines 32-33 (Aug. 19, 2010). That

[5] Defendants style their challenge as one to the antitrust injury element, but the case law they cite is about the remoteness element. This confusion comes, in part, from cases that blend the antitrust injury and antitrust standing inquiries. Compare *SAS of Puerto Rico, Inc. v. Puerto Rico Tel. Co., 48 F.3d 39, 43 (1st Cir. 1995)* (suggesting that antitrust injury and standing inquiries are the same), with *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 110 n.5, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)* ("A showing of antitrust injury is necessary, but not always sufficient, to establish standing under *§ 4*."). Here, I use "antitrust injury" in the narrow sense, i.e., whether an injury is "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful," *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*, and I use "antitrust standing" to refer to the remoteness inquiry.

buyer then uses its power to consume at a sub-competitive level, resulting in fewer goods sold **[*15]** at a lower price. Like a traditional monopoly, a monopsony results in less consumer surplus and greater welfare loss. Both monopolization in the traditional sense and monopsonization are violations of *Section 2*. See, e.g., *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 320, 127 S. Ct. 1069, 166 L. Ed. 2d 911 (2007)*.

Because Ocean Spray sits in the middle of the three-tiered cranberry-products industry, it may be the subject of either monopsonization or traditional monopolization claims. In the first market, the one for raw cranberries, growers are the sellers and handlers, like Ocean Spray, are buyers. This is the market in which Ocean Spray might behave as a monopsonist. In the second market, the one for cranberry products, handlers, like Ocean Spray, are sellers and cranberry product consumers are the buyers. This is the market in which Ocean Spray might behave as a traditional monopolist. Plaintiffs' "monopsonization" claim therefore must refer to the grower—handler market, and their "monopolization" claim must refer to the handler—consumer market.

As to the monopsonization claim, plaintiffs allege that Ocean Spray has a 70-80% share of the grower—handler market. TAC ¶ 67. Although plaintiffs' explanation of the alleged exclusionary conduct in this market is somewhat muddled, it seems **[*16]** to turn on Ocean Spray's decision to form the B Pool. See, e.g., id. at 2 ("Defendants accomplished their illegal scheme, in part, by creating a second-class membership within the cooperative, the 'B Pool,' . . . ."). The B Pool guaranteed growers an outlet for their fruit but did not guarantee them a particular price. If market conditions in the downstream handler—consumer market were to cause independent handlers to decrease their demand for fruit (e.g., because of predatory pricing by Ocean Spray in that market, which forms the basis of plaintiffs' other claim), independent growers would be "force[d] . . . to either join the B Pool or to exit the cranberry market altogether." Id. ¶ 49. By getting more independent growers to join the B Pool, Ocean Spray would enhance its monopsony power. This, plaintiffs allege, is a violation of *Section 2*.

As to the traditional monopolization claim, the complaint also alleges that Ocean Spray is a monopolist in the handler—consumer market. Id. ¶¶ 119-23. Plaintiffs allege that Ocean Spray engaged in predatory pricing in that market by artificially depressing the auction price for cranberry concentrate. That predatory pricing, which plaintiffs allege was below Ocean **[*17]** Spray's costs in contravention of *Section 2*, drove down prices paid to independent handlers.

These are two separate antitrust violations. Because plaintiffs must have antitrust standing to seek recovery for each of them, I will examine them in turn.

2. Antitrust Standing for the Monopsonization Claim (Count IX)

There is a clear causal connection between the lower market price of raw cranberries and the antitrust violation alleged in plaintiffs' monopsonization claim. That violation, price fixing at a sub-competitive level in the market for cranberries, directly affected the price at which the growers could sell their cranberries to handlers. This, in turn, affected the revenue that the plaintiffs could generate and encouraged them to consolidate their sales to only Ocean Spray. Plaintiffs have alleged, and at this point defendants do not contest, that the defendants' conduct was meant to cause the harm that followed. Id. ¶¶ 125, 127. Because the A Pool, representing Ocean Spray's leadership, is at economic cross-purposes with the B Pool, see Docket # 78 at 2-3, plaintiffs' claim that the alleged harm was intentional is reasonable on its face.

The nature of the harms from the antitrust violation **[*18]** is the type of harm that the antitrust laws are intended to remedy. One of the alleged harms is market consolidation—by its very nature, a competition-reducing effect that prevents the market from allocating resources to their most valued uses. According to plaintiffs (and yet unchallenged by defendants), the alleged price fixing caused reductions in the price for cranberries across the market. Smaller independent handlers, allegedly unable to sustain their operations at these prices, reduced their demand for cranberries. This made joining Ocean Spray's B Pool a more attractive option for many independent growers, increasing defendants' monopsony power in the cranberry market. In fact, plaintiffs have offered evidence that "[a]t the conclusion of 2009 (the first year of the [alleged] price-fixing), Ocean Spray added 80 new grower-members to the Cooperative" and lost none. TAC ¶ 54, Ex. 14. The plaintiffs are the direct sellers of cranberries to

Ocean Spray and other handlers.[6] Although they are not customers or competitors of Ocean Spray, as sellers in a monopsonistic market, they walk in the same shoes as customers in a traditional monopolistic market.[7] See, e.g., Roger D. Blair & Jeffrey **[*19]** L. Harrison, Antitrust Policy and Monopsony, *76 Cornell L. Rev. 297, 337 (1991)*.

Plaintiffs' harms in this case are not speculative. Plaintiffs seek damages to undo the price fixing that Ocean Spray allegedly introduced into the cranberry market to drive independent growers into its B Pool. These damages may be measured, for example, based on past market prices or related yardsticks. For members of the B Pool, no entity is better situated to pursue this antitrust claim. The B Pool members were direct sellers to Ocean Spray at the price that Ocean Spray allegedly set; no intermediaries were involved. Independent growers, though one step removed from Ocean Spray, are also well situated to pursue this antitrust claim. They sold their product to independent handlers, allegedly receiving a lower price because Ocean Spray had fixed prices in its large segment of the market. In theory, either the independent growers or the independent handlers could bring a claim against Ocean Spray for its allegedly anticompetitive tactics. Yet, reality suggests otherwise. There are no allegations that independent handlers suffered harm from Ocean Spray's conduct in the grower—handler market.[8] Indeed, it is plausible that **[*20]** they did not, because they were able to piggyback on Ocean Spray's attempted monopsonization to pay less for their cranberries. Although the independent growers are one step removed from the anticompetitive conduct, this is not a case like *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, where the plaintiffs' harm is derivative of harm to a better situated plaintiff. Here, the independent growers are at least as well situated as the independent handlers to bring an antitrust claim, and they may even be the only plaintiffs that can sustain one. To the extent that there is any overlap in damages claims, apportionment of damages between the independent handlers and independent growers would not be difficult because past dealings between the independent growers and independent handlers provide benchmarks.

Having considered all of the *AGC* factors, I find that the plaintiffs have antitrust standing to pursue their monopsonization claim—i.e., that defendants' formation of the B Pool, coupled with their alleged price fixing in the grower—handler market, enhanced their monopsony power and decreased competition in that market. I also note that allowing the grower plaintiffs to pursue this claim is consistent with scholarly commentary on antitrust **[*21]** standing in the monopsony context. See, e.g., IIA Phillip E. Areeda et al., ***Antitrust Law*** ¶¶ 350a & 350b (4th ed. 2014) ("[Where] Defendants are the plaintiff's customers and . . . create an illegal monopsony . . . plaintiff has standing."); Roger D. Blair & Jeffrey L. Harrison, Antitrust Policy and Monopsony, *76 Cornell L. Rev. 297, 336-37 (1991)*. Defendants' motion for summary judgment for lack of antitrust standing on Count IX is denied.

3. Antitrust Standing for the Monopolization Claim (Count VIII)

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[6] Defendants' argument that one B Pool plaintiff, Stacy Preston Winters, lacks standing because the scheme was designed for her benefit is unpersuasive. The harm that Winters complains of in the monopsony claim is consolidation of the grower—handler market, leading to reduced competition among handlers. This would lead to more allocative inefficiency for all growers not in the A Pool, whether B Pool members or independent. That Winters may have benefited from the other alleged antitrust violation, predatory pricing in the handler—consumer market, does not undermine Winters' monopsony claim.

[7] Defendants contend that they are entitled to summary judgment because plaintiffs are neither consumers nor competitors of Ocean Spray in the relevant markets. They cite a string of First Circuit authority limiting antitrust standing to such groups in traditional monopolization cases. See, e.g., *Serpa, 199 F.3d at 10*; *SAS, 48 F.3d at 44*. But defendants' rote recitation of that case law ignores the nature of plaintiffs' claim—it is one for monopsonization, not monopolization. In this context, the proper focus is on sellers, not customers. See *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 235, 68 S. Ct. 996, 92 L. Ed. 1328 (1948)* ("It is clear that the agreement is the sort of combination condemned by the [Sherman] Act, even though the price-fixing was by purchasers, and the persons specially injured under the treble damages claim are sellers, not customers or competitors.") (footnotes omitted); cf. *Weyerhaeuser, 549 U.S. at 321* (noting "close theoretical connection between monopoly and monopsony" and adopting "mirror image" analytical approach).

[8] There are, of course, allegations that independent handlers were harmed by Ocean Spray's alleged predatory pricing behavior in the handler—consumer market, but that is not relevant to this inquiry.

As with plaintiffs' monopsonization claim, there is a clear causal link between the alleged violation in the handler—consumer market (i.e., predatory pricing) and the harm to plaintiffs (i.e., less competition in the handler market and lower cranberry prices). Predatory pricing "occurs when a firm sets its prices temporarily below its costs, with the hope that the low price will drive a competitor out of business." *Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 483 (1st Cir. 1988)*. If Ocean Spray priced its refined cranberry products, and cranberry concentrate in particular, below its costs, this would cause the quantity of Ocean Spray product demanded to increase to the detriment of the independent handlers. The independent handlers would then either be forced to lower their prices to **[*22]** compete with Ocean Spray, thereby placing limits on what they could pay independent growers for their raw cranberries, or reduce their output. If they chose the latter course, they would necessarily require a lower volume of raw cranberries, thus shrinking the buyer market for independent growers. Plaintiffs allege, and at this point defendants do not dispute, that this was the intended effect of defendants' conduct. And, because this injury results in less competition in both the grower—handler and handler—consumer markets, it is the type of injury that the antitrust laws were intended to remedy.

Yet, despite successfully satisfying these two factors of the AGC test, the remainder of the analysis weighs against permitting plaintiffs to pursue a claim for this violation. Plaintiffs' injuries are indirect—they are harmed because the independent handlers are harmed. Plaintiffs are neither competitors nor customers of Ocean Spray in the handler—consumer market.[9] Under First Circuit law, this creates a presumption that they are not proper antitrust plaintiffs. See, e.g., *Serpa, 199 F.3d at 10* ("Competitors and consumers in the market where trade is allegedly restrained are presumptively the proper plaintiffs **[*23]** to allege antitrust injury."); *SAS, 48 F.3d at 44*. Plaintiffs' damage for Ocean Spray's behavior in the handler—consumer market also present difficult apportionment problems. Plaintiffs would need to show, with respect to each independent handler, just how much the handler's demand for raw cranberries decreased as a result of defendants' conduct and how much more the handler would have paid for raw cranberries but for Ocean Spray's predatory pricing. This would require a detailed analysis of the internal cost structures of each of the independent handlers. And, since the independent handlers undeniably would have a claim against Ocean Spray for the alleged predatory pricing, the potential for duplicative recovery from faulty apportionment is high. The independent handlers, the direct victims of defendants' alleged predatory pricing scheme, are better situated to pursue damages claims for that conduct.

As suppliers to Ocean Spray's competitors in the handler—consumer market, plaintiffs's claims are entirely derivative of claims that the competitors themselves could bring. As defendants rightly point out, "[t]he First Circuit has made it clear that suppliers are not preferred plaintiffs." *In re Compact Disc Minimum Advertised Price Antitrust Litig., 456 F. Supp. 2d 131, 146 (D. Me. 2006)*. **[*24]** Again, scholarly commentary supports this approach. IIA Phillip E. Areeda et al., ***Antitrust Law*** ¶¶ 350a & 350d (4th ed. 2014) ("[Where] [a]n immediate victim of illegal conduct by the defendant(s) is the plaintiff's customer, who then buys fewer inputs from the plaintiff[,] . . . [t]he plaintiff generally lacks standing unless the plaintiff competes with the defendant."). Having considered the AGC factors here, I conclude that plaintiffs do not have antitrust standing to pursue their monopolization claim—i.e., that defendants' predatory pricing caused anticompetitive harms in the handler—consumer market. The defendants' motion for summary judgment is therefore allowed on Count VIII of the Third Amended Complaint.[10]

B. Chapter 93A Claim (Count IV)

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[9] To the extent plaintiffs contend that they are competitors with Ocean Spray because the Ocean Spray cooperative is the same thing as the Ocean Spray growers, the court disagrees. Agricultural cooperatives are generally distinct corporate entities from the growers that have a stake in them. See, e.g., *Kuntz v. Lamar Corp., 385 F.3d 1177, 1183 (9th Cir. 2004)*. Here, that is particularly true because defendants are distinct corporate entities, i.e., a Delaware corporation and a Delaware limited liability company. Plaintiffs have not offered sufficient evidence to allow a reasonable jury to conclude that the cooperative is an alter ego of its members or that any other corporate veil-piercing doctrines apply here.

[10] Having concluded that no plaintiffs have antitrust standing to bring their monopolization claim, I do not separately consider whether the one B Pool plaintiff, Stacy Preston Winters, is barred from bringing this claim as an intended beneficiary of the anticompetitive conduct.

Defendants next contend that plaintiffs[11] lack standing to bring their claims under Massachusetts General Laws chapter 93A ("93A"). Violations of the federal antitrust laws, including *Section 2* of the Sherman Act, are cognizable under 93A. *F. Ciardi v. Hoffmann-LaRoche Ltd., 436 Mass. 53, 762 N.E.2d 303, 307-08 (Mass. 2002)*. Chapter 93A is in some ways broader than the federal antitrust laws though, so a plaintiff may be able to bring a 93A claim even if it is unable to bring a statutory antitrust claim. *Id. at 312*. *Section 11* of 93A, which applies to business-to-business **[*25]** transactions like the ones here, requires a plaintiff to show that the alleged unfair practice (1) is within at least the penumbra of some common-law, statutory or other established concept of unfairness; (2) is immoral, unethical, oppressive, or unscrupulous; and (3) causes substantial injury to consumers, competitors, or other businesspeople. *Mass. Eye & Ear Infirmary v. QLT Phototherapeutics, Inc., 552 F.3d 47, 69 (1st Cir. 2009)* (quotation and citation omitted).

As an initial matter, although plaintiffs pleaded their 93A claim broadly, alleging "price-fixing, attempting to monopolize and monopsonize, monopolization and monopsonization of trade in commerce," TAC ¶ 109, defendants contend that the court should construe the claim to be based on three acts: (1) violation of *Section 2* of the Sherman Act; (2) violation of the 1957 Final Judgment; and (3) violation of Ocean Spray's contractual obligations to plaintiffs. I am not convinced that plaintiffs have so limited their claim. They have alleged numerous facts to support claims for unfair trade practices leading to the monopolization and monopsonization of the cranberry fruit and concentrate markets. Defendants cannot evade those allegations simply by adopting their own narrow construction of the complaint. Yet, even assuming **[*26]** that plaintiffs' 93A claims are based on these three narrow grounds, defendants' summary judgment motion fails.

The survival of one of plaintiffs' Sherman Act claims necessarily means that summary judgment is inappropriate on the 93A claim that is premised upon that Sherman Act claim. See, e.g., *RSA Media, Inc. v. Media Grp., Inc., 260 F.3d 10, 16 (1st Cir. 2003)*. Because I have concluded that plaintiffs have standing to bring a monopsonization claim under the Sherman Act based on defendants' alleged conduct in the grower—handler market, they may also bring a 93A claim based on that conduct. Of course, because I have concluded that plaintiffs do not have standing to bring a monopolization claim under the Sherman Act based on defendants' alleged conduct in the handler—consumer market, plaintiffs may not bring a 93A claim that is premised only upon that alleged violation of the antitrust laws. But even under defendants' narrow reading of plaintiffs' complaint, plaintiffs do not do that—they rest their 93A claim for conduct in the handler—consumer market on additional grounds.

One of those other grounds is that defendants' conduct allegedly contravened the competitive standards set out in the 58-year-old consent decree.[12] In 1957, this court entered a final **[*27]** judgment in an antitrust lawsuit filed by the United States against five defendants, including the National Cranberry Association (which is Ocean Spray's corporate predecessor) and two of its grower-members. See Final Judgment, *United States v. Nat'l Cranberry Ass'n, C.A. No. 55-418-3, 1957 U.S. Dist. LEXIS 4199 (D. Mass. Oct. 28, 1957)* (TAC Ex. 3) (the "1957 Final Judgment"). The relevant fairness standard, according to plaintiffs, is found in Section VI(A) of that document:

> Defendants ADM, United, Markpeace and Urann are jointly and severally enjoined and restrained from: (A) Purchasing cranberries from others and reselling or otherwise disposing of them to artificially raise, depress or stabilize market price levels of fresh or processed cranberries.

1957 Final Judgment at 5. Although Ocean Spray's predecessor was not bound by this provision, it indisputably had notice of the consent decree. A consent decree involving Ocean Spray's predecessor and prohibiting the "class of conduct" of which plaintiffs complain—"[p]urchasing cranberries from others and reselling . . . them to artificially . . . depress . . . market price levels of fresh or processed cranberries"—may undoubtedly form the basis for a claim under **[*28]** *section 11* of 93A. See *In re TJX Cos. Retail Sec. Breach Litig., 564 F.3d 489, 497 (1st Cir. 2009)* (relying on "a substantial body of FTC complaints and consent decrees focus[ing] on a class of conduct" to find that conduct unfair within the meaning of 93A).

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[11] This count is brought only on behalf of independent growers, not members of the B Pool.

[12] Plaintiffs do not brief this point in their opposition, but they do advance this theory in their own motion for summary judgment, and defendants addressed it in their motion.

Another ground on which plaintiffs base their 93A claim is that defendants engaged in unfair trade practices by breaching contracts with independent handlers to which the independent growers are third-party beneficiaries. The record at this stage shows that genuine issues of material fact remain about whether the independent growers are in fact third-party beneficiaries to these contracts. For that reason alone, summary judgment is inappropriate. But, even if the independent growers are not third-party beneficiaries of those agreements, they still may have a claim under 93A because defendants' alleged breach of their contracts with independent handlers may result in competitive harms to plaintiffs within the meaning of 93A. In other words, plaintiffs need not necessarily be third-party beneficiaries of the contracts to sustain a claim under 93A for their breach. See, e.g., *Cooper v. Charter Commc'ns Entm'ts I, LLC, 760 F.3d 103, 112 (1st Cir. 2014)*. Defendants do not address such a claim at all in their briefs and therefore have not shown that they are entitled to summary judgment.

C. Retaliation [*29] Claim (Count XIII)

Plaintiffs Barry K. Winters and Paul D. Sogn individually entered into a three-year cranberry marketing agreement with Ocean Spray. TAC ¶¶ 147-48. In a separate count, they claim that after the complaint was filed, Ocean Spray sent them a letter terminating the agreements because they are named plaintiffs in this action. Id. ¶ 150. The termination letters state:

> This Notice of Termination is based on the fact that you and BKW Farms are named plaintiffs in a lawsuit recently filed against Ocean Spray in the United States District Court for the District of Massachusetts (C.A. No. 1:12-CV-12016-RWZ). Because you have elected to participate in this action against Ocean Spray, we are no longer interested in doing business with you or with BKW Farms.

Id. Exs. 22 & 23. These plaintiffs claim that defendants terminated their contracts to intimidate and coerce them, frustrate the pending litigation, and discourage other "B Pool" members from joining the suit.

I declined to dismiss this count last year, concluding that plaintiffs had stated a 93A claim within the "penumbra" of the established standard of unfairness for breach of contract. Docket # 78 at 16-17. Now, on summary **[*30]** judgment, defendants offer facts to support their framing of the events as "declining to renew" the contracts, in a non-breaching manner, rather than "terminating" them. Regardless of which framing is correct, plaintiffs' claim still survives. Non-breaching termination of an at-will contract or non-renewal of a contract may, under some circumstances, constitute a 93A violation. See, e.g., 52 Mass. Practice § 9.1; cf. *Zapatha v. Dairy Mart, Inc., 381 Mass. 284, 408 N.E.2d 1370, 1374-78 (Mass. 1980)*. A finding that the termination or non-renewal is lawful under the contract does not end the 93A inquiry. The critical question is whether the circumstances surrounding the termination or non-renewal demonstrate unfair trade practices as determined by the three-part test described above. See *Mass. Eye & Ear Infirmary, 552 F.3d at 69*. For example, unfair trade practices in this context may include breaches of the implied covenant of good faith and fair dealing, *Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451, 583 N.E.2d 806, 820 (Mass. 1991)*, motives contrary to public policy, *Buster v. George W. Moore, Inc., 438 Mass. 635, 783 N.E.2d 399, 412 (Mass. 2003)* (finding 93A violation where lawful foreclosure auction was retribution for the refusal of a witness to testify), or stringing along that causes detrimental reliance, *Lambert v. Fleet Nat'l Bank, 449 Mass. 119, 865 N.E.2d 1091, 1098 (Mass. 2007)*. Because defendants' motion is premised upon the legality of the termination or non-renewal being dispositive, and it does not address plaintiffs' broader **[*31]** unfairness allegation, which I have already once found sufficient to support their 93A claim, Docket # 78 at 16-17, it is denied.

IV. Plaintiffs' Summary Judgment Motion (Docket # 102)

Plaintiffs move for summary judgment on liability for their monopolization and 93A claims (Counts IV and XIII). Their motion is denied with respect to the monopolization claim (Count XIII) because I have concluded that they lack standing to pursue it. I therefore address only their 93A claim on the merits.

A. Chapter 93A Claim (Count IV)

Plaintiffs contend that summary judgment should enter in their favor on liability for their 93A claim because (1) defendants' conduct runs afoul of the concept of fairness established by the 1957 Final Judgment and the best efforts rule of contract law; (2) the conduct was oppressive to growers; and (3) it caused injury to growers, as competitors of Ocean Spray. From the showing in plaintiffs' motion and defendants' opposition, however, a reasonable jury may conclude that defendants' conduct did not violate an established concept of fairness or that it did not cause plaintiffs' harms.

Whether particular conduct constitutes an unfair practice under Chapter 93A is a question **[*32]** of fact. *James L. Miniter Ins. Agency v. Ohio Indem. Co., 112 F.3d 1240, 1251 (1st Cir. 1997)*. Conduct that is unfair in one market may not be fair in another. *Baker v. Goldman Sachs & Co., 771 F.3d 37, 50 (1st Cir. 2014)*. Plaintiffs' allegations of unfairness are reasonable on their face and supported by facts in the record. Defendants, however, also offer credible evidence, in the form of an expert declaration from an economist, that purports to show that the type of auction that Ocean Spray uses is common in commodities markets. See Docket # 117. A genuine dispute of fact exists, therefore, about whether the Ocean Spray cranberry concentrate auction is unfair.

Similarly, "causation [is] a necessary element of a successful 93A claim." *RSA Media, 260 F.3d at 16*. Plaintiffs must also demonstrate the absence of genuine fact disputes about causation to be entitled to summary judgment. Although plaintiffs have credibly alleged and produced documents to show that the price of cranberry concentrate would have been higher if Ocean Spray had conducted the concentrate auction differently, Ocean Spray's economics expert has offered evidence to the contrary. Because the conflicting causation evidence offered by each party tells a plausible story, summary judgment is inappropriate. Plaintiffs' motion is denied.

B. Defendants' Motion to Defer Under *Rule 56(d)* and to Strike [*33] New Evidence and Argument in Plaintiffs' Reply (Docket ## 118 and 140)

Defendants move the court under *Rule 56(d)* to defer considering plaintiffs' summary judgment motion until more discovery is complete. They also move to strike allegedly new evidence and argument in plaintiffs' reply brief, including a new theory of liability, an expert declaration, and several fact declarations. Having now considered the merits of plaintiffs' summary judgment motion and found them wanting even with the allegedly improper evidence, both of these related motions (Docket ## 118 and 140) are DENIED AS MOOT.

V. Stays

Throughout this litigation, the court has allowed numerous requests for stays. Although those requests may have been supported by good cause at the time, they no longer are. All stays that are in place are hereby vacated.

Of particular note is the court's recent stay of plaintiffs' motion for class certification (Docket # 138). Because this summary judgment order has affected the issues remaining in the case, the class certification motion (Docket # 130) is DENIED AS MOOT. Within two weeks of this order, plaintiffs shall either re-file that motion or, if appropriate, file a revised version that accounts **[*34]** for the court's rulings on the summary judgment motions.[13] Defendants shall file their opposition within two weeks of plaintiffs' motion, and plaintiffs may file a three-page reply within one week of defendants' opposition. The court expects to schedule a hearing on the motion promptly. The court will

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[13] The court is concerned that the class certification motion, as last filed, is not in final form. For example, it includes a significant amount of yellow highlighting, and is written, in part, in the first person. See Docket # 129 at 13-15. Given the inherently complex nature of this antitrust case, the court expects the parties to make efforts to ensure that their arguments are complete and efficiently presented.

schedule a status conference by separate order. To help get this now three-year-old case moving, all counsel of record shall participate in that status conference.[14]

VI. Conclusion

For reasons explained above, defendants' motion for summary judgment (Docket # 115) is ALLOWED IN PART with respect to Count VIII and DENIED IN PART with respect to Counts IV, IX, and XIII. Plaintiffs' motion for partial summary judgment (Docket # 102) is DENIED, and defendants' motions to defer consideration (Docket # 118) and to strike parts of plaintiffs' reply (Docket # 140) are DENIED AS MOOT. All stays currently in place are HEREBY VACATED. Class certification briefing shall proceed as outlined above.

May 14, 2015

DATE

/s/ Rya W. Zobel

DATE RYA W. ZOBEL

UNITED STATES DISTRICT JUDGE

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[14] Likewise, all counsel who intend to appear in this case are instructed to check the docket and ensure that they have entered a notice of appearance or motion for pro hac vice admission.

![LexisNexis]

CollegenNET, Inc. v. Common Application, Inc.

United States District Court for the District of Oregon

May 15, 2015, Decided; May 15, 2015, Filed

No. 3:14-cv-00771-HZ

Reporter
104 F. Supp. 3d 1137 *; 2015 U.S. Dist. LEXIS 63979 **; 2015-1 Trade Cas. (CCH) P79,162

COLLEGENET, INC., a Delaware Corporation, Plaintiff, v. THE COMMON APPLICATION, INC., a Virginia corporation, Defendant.

Subsequent History: Reversed by, Remanded by *CollegeNET, Inc. v. The Common Application, Inc., 2017 U.S. App. LEXIS 20840 (9th Cir. Or., Oct. 23, 2017)*

Core Terms

antitrust, alleges, Online, anticompetitive, processing service, processing, consumers, Output, monopolize, prices, Sherman Act, competitors, motion to dismiss, rule of reason, conspiracy, foreclosed, effects, markets, membership, customers, quotation, bottle, restraint of trade, anti trust law, innovation, documents, contends, programs, matches, harms

LexisNexis® Headnotes

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

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

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

A motion to dismiss under *Fed. R. Civ. P. 12(b)(6)* tests the sufficiency of the claims. All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. However, the court need not accept conclusory allegations as truthful. Rather, to state a plausible claim for relief, the complaint must contain sufficient allegations of underlying facts to support its legal conclusions.

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

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

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

A motion to dismiss under *Fed. R. Civ. P. 12(b)(6)* will be granted if a plaintiff alleges the "grounds" of his entitlement to relief with nothing more than labels and conclusions, and a formulaic recitation of the elements of a cause of action. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

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

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

HN3[] **Motions to Dismiss, Failure to State Claim**

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face, meaning when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Additionally, only a complaint that states a plausible claim for relief survives a motion to dismiss. A complaint must contain well-pleaded facts which permit the court to infer more than the mere possibility of misconduct.

Antitrust & Trade Law > Sherman Act > Scope

HN4[] **Antitrust & Trade Law, Sherman Act**

Section 1 of the Sherman Act prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. *15 U.S.C.S. § 1*. Congress designed the Sherman Act as a consumer welfare prescription. Consumer welfare is maximized when economic resources are allocated to their best use and when consumers are assured competitive price and quality. A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of ***antitrust law***. Congress sought to ensure that competitors not cut deals aimed at stifling competition and at permitting higher prices to be charged to consumers than would be expected in a competitive environment, or permitting lower prices to be paid to those from whom competitors bought materials than a fair market rate.

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

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

Agreements of competitors, whether express or implicit, whether by formal agreement or otherwise, in restraint of trade are outlawed. However, the U.S. Supreme Court has repeatedly recognized that by the language of the Sherman Act, Congress intended to outlaw only unreasonable restraints. Most antitrust claims are analyzed under a "rule of reason," according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors. The rule of reason is the presumptive or default standard, and it requires the antitrust plaintiff to demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive. The rule of reason weighs legitimate justifications for a restraint against any anticompetitive effects. The court reviews all the facts, including the precise harms alleged to the competitive markets, and the legitimate justification provided for the challenged practice, and determines whether the anticompetitive aspects of the challenged practice outweigh its procompetitive effects.

Antitrust & Trade Law > Sherman Act > Claims

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

HN6[] **Sherman Act, Claims**

In order to state a *§ 1* of the Sherman Act claim under the rule of reason, plaintiffs must plead facts which, if true, will prove (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition; and (4) that they were harmed by the defendant's anti-competitive contract, combination, or conspiracy, and that this harm flowed from an anti-competitive aspect of the practice under scrutiny. This fourth element is generally referred to as "antitrust injury" or "antitrust standing."

Antitrust & Trade Law > Sherman Act > Claims

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

HN7[] **Sherman Act, Claims**

Section 2 of the Sherman Act provides: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other persons, to monopolize any part of the trade or commerce shall be deemed guilty of a felony. *15 U.S.C.S. § 2*. In order to state a claim for monopolization under *§ 2* of the Sherman Act, a plaintiff must prove: (1) possession of monopoly power in the relevant market; (2) willful acquisition or maintenance of that power; and (3) causal antitrust injury. The following elements are required to establish an attempt to monopolize claim: (1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct to accomplish the monopolization; (3) dangerous probability of success; and (4) causal antitrust injury. To prove a conspiracy to monopolize in violation of *§ 2* of the Sherman Act, a plaintiff must show four elements: (1) the existence of a combination or conspiracy to monopolize; (2) an overt act in furtherance of the conspiracy; (3) the specific intent to monopolize; and (4) causal antitrust injury.

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

HN8[] **Per Se Rule & Rule of Reason, Sherman Act**

While the rule of reason is the default standard to analyze allegedly anticompetitive conduct, some types of restraints have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful per se. Such restraints are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. Per se treatment is proper only once experience with a particular kind of restraint enables the court to predict with confidence that the rule of reason will condemn it. A departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than upon formalistic line drawing. To justify per se condemnation, a challenged practice must have manifestly anticompetitive effects and lack any redeeming virtue. The U.S. Supreme Court has expressed reluctance to adopt per se rules where the economic impact of certain practices is not immediately obvious.

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

HN9[] **Per Se Rule & Rule of Reason, Sherman Act**

Per se and rule-of-reason analyses are two methods of determining whether a restraint is "unreasonable"; in other words, whether its anticompetitive effects outweigh its procompetitive effects. While the per se rule determines whether or not the Sherman Act was violated, antitrust injury must be shown even for per se claims.

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

Civil Procedure > Pleading & Practice > Motion Practice

HN10[] Motions to Dismiss, Failure to State Claim

The doctrine of incorporation by reference allows a district court to consider documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the plaintiff's pleading. Because these documents have essentially been adopted as part of the complaint, the court may consider them without converting a motion to dismiss into a motion for summary judgment.

Antitrust & Trade Law > Sherman Act > Claims

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

HN11[] Sherman Act, Claims

Antitrust injury is an element of all antitrust suits. Accordingly, the lack of antitrust injury serves as an independent basis for dismissal.

Antitrust & Trade Law > Sherman Act > Claims

HN12[] Sherman Act, Claims

To assert a claim under *§ 1* and *§ 2* of the Sherman Act, a plaintiff must have suffered an "antitrust injury," meaning an injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendant's acts unlawful. Plaintiff must prove that its loss flows from an anticompetitive aspect or effect of the defendant's behavior, since it is inimical to the antitrust laws to award damages for losses stemming from acts that do not hurt competition.

Antitrust & Trade Law > Sherman Act > Claims

HN13[] Sherman Act, Claims

Because Congress designed the Sherman Act to protect consumers or purchasers of goods in a market, the focus of the antitrust injury analysis is the direct result of anticompetitive conduct on consumers. Hence the often repeated phrase—antitrust laws were enacted for the protection of competition, not competitors. A plaintiff must demonstrate injury to competition in the market as a whole, not merely injury to itself as a competitor.

Antitrust & Trade Law > Sherman Act > Claims

HN14[] Sherman Act, Claims

Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give rise to antitrust injury.

Antitrust & Trade Law > Sherman Act > Claims

HN15[] **Sherman Act, Claims**

Certainly, decreased innovation and choice can be relevant to a court's finding of antitrust injury. However, an allegation of diminished quality alone is not sufficient to establish injury.

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

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

HN16[] **Motions to Dismiss, Failure to State Claim**

An insistence on specificity of facts is warranted before permitting a case to proceed into costly and protracted discovery in an antitrust case because of the potential great expense of discovery.

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

HN17[] **Amendment of Pleadings, Leave of Court**

If the court dismisses a complaint, it must decide whether to grant leave to amend. *28 U.S.C.S. § 1653*. The Ninth Circuit has repeatedly held that dismissal without leave to amend is improper, even if no request to amend the pleading was made, unless it is clear that the defective pleading cannot possibly be cured by the allegation of additional facts.

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Judges: MARCO A. HERNÁNDEZ, United States District Judge.

Opinion by: MARCO A. HERNÁNDEZ

Opinion

[*1140] OPINION & ORDER

HERNÁNDEZ, District Judge:

Plaintiff CollegeNET, Inc. brings this antitrust action against Defendant The Common Application, Inc., contending that Defendant violated the Sherman Act, *15 U.S.C. §§ 1*, *2*. Plaintiff alleges collusion among competitor colleges[1]

[1] Plaintiff defines "college" for the purpose of this action as "a regionally accredited, not-for-profit educational institution in the United States that offers four-year (baccalaureate), full-time programs." Am. Compl. ¶ 17.

and conspiracy with their joint-venture entity, Defendant, to monopolize and restrain trade and foreclose rival providers in the admissions and online college application processing markets. Plaintiff brings the following claims in its First Amended Complaint[2] : (1) Horizontal Restraint of Trade in the Admissions Markets; (2) Horizontal Restraint of Trade in the Online College Application **[**2]** Processing Market; (3) Exclusive Dealing; (4) Tying; (5) Monopolization; (6) Attempted Monopolization; and (7) Conspiracy to Monopolize.

Defendant moves to dismiss Plaintiff's Amended Complaint. Because Plaintiff fails to adequately allege antitrust injury, a required element for each of Plaintiff's claims, the Court grants Defendant's motion.

BACKGROUND

Plaintiff is a Portland, Oregon-based company that provides "web-based on-demand technologies to institutions of higher education and non-profits." Am. Compl. ¶ 35. Plaintiff offers a "suite of web-based administrative services, including customized online application forms and processing services and contact management services." Id. at ¶ 6.

Defendant is an association of 549 non-profit member colleges and universities. Id. at ¶ 7. According to Plaintiff, **[**3]** Defendant is not a single entity, but rather a "consortium of competitors." Id. at ¶ 84. Defendant was formed in 1975 to assist students by simplifying the college admissions process by providing one "common" student application form (the "Common Application") for students to submit basic background information in a standardized way as they applied to member colleges. Id. at ¶¶ 13, 38. Defendant provided a common, standardized (paper) application **[*1141]** form for use at each of the member institutions. Id. at ¶ 38. Applicants could fill out this Common Application once, photocopy it, and submit it to any member institution. Id. Membership was limited to "selective" colleges. Id. at ¶ 42.

Over time, Defendant has grown to be a "dominant online college application processing provider," as colleges join the association in order to access Defendant's "national pipeline of applicants" and use Defendant as their common application developer and processor. Id. at ¶¶ 14, 23, 48. Today, membership is open to almost any college. Id. at ¶ 83. As Defendant's membership ranks grow, so do the number of student applicants using that service and, therefore, the number of applications members receive. Colleges **[**4]** compete to attract applicants not only to secure "high-value students" but also because an increase in the number of applications increases the application fees a college generates and lowers its admission rate, thereby raising its selectivity rating and college ranking. Id. at ¶ 31. Defendant has a three-tiered membership structure. Id. at ¶ 74. All members must (1) use

Defendant's Common Application for all form and payment processing—including Institutional Supplements—for Common Applicants; (2) accept all Common Applicant evaluation forms (including final transcripts) online, for schools that choose to send them online; and (3) accept the Common Application fee waiver. Id. at ¶ 75. In addition, "Exclusive I" members must also use the Common Application as their only admission application for full-time, undergraduate, degree-seeking applicants, and "Exclusive II" members must further (1) establish uniform fees for all applicants; (2) use the Common Application as their only transfer application; and (3) use Slideroom.com for their Arts Supplement (if they offer one). Id. at ¶¶ 76, 77. According to Plaintiff, the "penalties"[3] for choosing to be a Non-Exclusive versus Exclusive II member **[**5]** are "extreme." Id. at ¶ 78.

Plaintiff alleges that Defendant's agreements with its members have reduced "Net Output," which Plaintiff defines as the net value derived from Online College Application Processing services by both Colleges and applicants:

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[2] On November 3, 2014, the Court dismissed Plaintiff's 103-page Complaint under *Rule 8*. Plaintiff submitted the present 55-page Amended Complaint [75] on November 24, 2014.

[3] There is a $2 difference per application between Exclusive and Non-Exclusive members. Am. Compl. ¶ 78. Plaintiff characterizes this as a "penalty" on Non-Exclusive members. Id. Defendant characterizes it as a "modest, two-tiered incentive discount" for Exclusive members. Def.'s Mot. 24.

> Net Output increases as the quality, functionality, features, ease of use, and level of innovativeness of Online College Application Processing services improve. Net Output also increases as those services better enable Colleges to discover and matriculate students who are good matches for their College, applicants to discover and matriculate at Colleges that are good matches for them, and Colleges to predict yield (how many accepted applicants will matriculate). Net Output decreases as the amount of resources (e.g. money and time) expended by Colleges and applicants in connection with using Online College Application Processing services in the college admissions **[**6]** process increases.

Id. at ¶ 21. Plaintiff alleges that Defendant has reduced Net Output by imposing the following membership restrictions and restraints (thereinafter, "Challenged Restraints"): tying and bundling/forced purchase requirements, exclusivity restrictions, an "equal treatment" requirement, and uniformity requirements. Id. at ¶ 15. According to Plaintiff, Defendant's Challenged **[*1142]** Restraints have led to a significant growth in Defendant's membership and revenue, yet none of them are necessary to achieve any legitimate or procompetitive goal. Id. at ¶ 16.

Plaintiff hosted Common Application Institutional Supplements[4] and supported Common Application member colleges in a variety of ways prior to Defendant's adoption and enforcement of the "Challenged Restraints." Id. Plaintiff alleges that it has been injured because it has been prevented or significantly limited in its ability to offer customized application processing services to colleges and applicants. Id. at ¶ 160. Plaintiff alleges that it has lost over 200 college customers to Defendant in the last 10-15 years due to Defendant's "anticompetitive and exclusionary conduct." Id. at ¶ 37.

As to the tying and bundling/forced purchase requirements, Plaintiff alleges that Defendant has tied access to the applicant pipeline generated by its Standard College Application Data service to members' use of Common Application's Online College Application Processing services. Id. at ¶ 153. Plaintiff contends that Defendant's tying arrangement harms competition in the relevant markets by limiting college choice, limiting the scope of services and price competition available to student applicants, and foreclosing rival providers from capturing colleges' and applicants' business. Id. at ¶ 153.

Plaintiff alleges that Defendant's exclusivity provisions have further disadvantaged and foreclosed rival providers by making it prohibitively expensive for members to use and offer to applicants those rivals' services. Id. at ¶ 154. The exclusivity provisions charge a lower per-application fee for members who agree to use the Common Application exclusively. Id. at ¶ 47.

Defendant's "equal treatment" requirement requires members to encourage the use of the Common Application by ensuring that the fee for **[**8]** Common Applicants is no more than for other accepted applications, providing an equally prominent link to the Common Application Online whenever the college posts a link to another online application, and offering any special benefits to students regardless of what kind of application they choose.[5] Id. at ¶ 46. Plaintiff alleges that Defendant's "equal treatment" requirement is "tantamount to an agreement among members to suppress demand for Online College Application Processing services" and also operates as a group boycott agreement among members, pursuant to which they agree not to promote rival providers' applications. Id. at ¶ 152.

Finally, Plaintiff alleges that Defendant's uniformity requirements have forced colleges to limit the content and standardize the look and feel of their **[**9]** applications and to limit applicants' ability to upload documents, customize their applications to different colleges, and otherwise showcase themselves. Id. at ¶ 155. This has resulted in reduced competition, depressed Net Output, and has foreclosed competitors. Id.

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[4] "Institutional Supplements" are member-specific **[**7]** supplements which many members require in addition to the Common Application. Am. Compl. ¶ 15.

[5] While Plaintiff's Amended Complaint says that members are required to "not explicitly offer special benefits," Am. Compl. ¶ 46 (emphasis added), this must have been a typographical error on Plaintiff's part because Defendant's 2013 Membership Profile Form for Non-Exclusive members states that members are required "to explicitly offer special benefits." Def.'s Request for Judicial Notice, Ex. 2 at 4, [82].

[*1143] Plaintiff identifies four relevant markets in which to analyze its claims: (1) Online College Application Processing Market; (2) College Market for Standard College Application Data Services; (3) Student Application Market; and (4) College Admissions Market (markets (3) and (4) collectively, the "Admissions Markets"). Id. at ¶ 90. Alternatively, Plaintiff argues that the Admissions Markets may be limited to "Elite Colleges,"—top ranked colleges. Id. at ¶¶ 132, 141.

The Online College Application Processing Market is the market for online application and evaluation forms and processing services offered to colleges and applicants. Id. ¶ 20. Online College Application Processing providers develop a college's online application and evaluation forms, host those forms online, process applicants' form submissions, process applicants' transcripts, and/or process applicants' application fee payments. Id. Plaintiff estimates that **[**10]** Defendant's share of this market is "at least 60%." Id. at ¶ 115. Plaintiff further estimates that Defendant's share of each of this market's submarkets—those for (1) online application forms and processing, (2) online evaluation forms and processing, (3) transcript processing, and (4) payment processing—is at least 60%, "except perhaps in transcript processing market." Id. at ¶¶ 20, 115. Therefore, according to Plaintiff, Defendant has market and monopoly power in these submarkets. Id. at ¶ 116.

The Standard College Application Data Service market is the market for a generic, text-based data entry form for applicants to input their background information as required by more than one college. Id. at ¶ 118. The market includes full application form development and processing. Id. According to Plaintiff, Defendant's share of this market is in excess of 90%. Id. at ¶ 122.

The Student Application market encompasses the market for student applications to full-time, four-year degree programs at colleges. Id. at ¶ 32. This market does not include the market for student applications to non-U.S. colleges, graduate student programs, two-year and/or part-time degree programs, unaccredited institutions, **[**11]** or for-profit institutions. Id. at ¶ 127. According to Plaintiff, Defendant has market power because its members will process at least 40-45% of college applications in the 2014-2015 year. Id. at ¶ 129. Alternatively, Plaintiff states that the Student Application Market may be limited to the Elite Student Application Market—the market for student applicants for admission to Elite Colleges. Id. at ¶ 132. Plaintiff alleges that Defendant will process approximately 70% of Elite Colleges' freshman admissions applications in the 2014-2015 year. Id. at ¶ 141.

The College Admissions market is the market for students to enroll in full-time, four-year degree programs at colleges. Id. at ¶ 138. As with the Student Application market, Plaintiff excludes from the College Admissions market the market for student applications to non-U.S. colleges, graduate student programs, two-year and/or part-time degree programs, unaccredited institutions, or for-profit institutions. Id. at ¶ 139. Additionally, Plaintiff alleges Defendant's market share and market power are the same as in the Student Application Market, and that the market can similarly be limited to Elite Colleges. Id. at ¶¶ 140-41.

STANDARDS

[**12] I. Motion to Dismiss

HN1[] A motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)* tests the sufficiency of the claims. *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)*. "All **[*1144]** allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." *Am. Family Ass'n, Inc. v. City & Cnty. of S.F., 277 F.3d 1114, 1120 (9th Cir. 2002)*. However, the court need not accept conclusory allegations as truthful. See *Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003)* ("[W]e are not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint, and we do not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations") (internal quotation marks, citation, and alterations omitted). Rather, to state a plausible claim for relief, the complaint "must contain sufficient allegations of underlying facts" to support its legal conclusions. *Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011)*.

HN2[] A motion to dismiss under *Rule 12(b)(6)* will be granted if a plaintiff alleges the "grounds" of his "entitlement to relief" with nothing "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action[.]" *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)[.]" Id. (citations and footnote **[**13]** omitted).

HN3[] To survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face[,]" meaning "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (internal quotation marks omitted). Additionally, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id. at 679*. A complaint must contain "well-pleaded facts" which "permit the court to infer more than the mere possibility of misconduct[.]" *Id. at 679*.

II. Antitrust Analysis

HN4[] *Section 1* of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." *15 U.S.C. § 1*. "Congress designed the Sherman Act as a consumer welfare prescription." *Reiter v. Sonotone Corp., 442 U.S. 330, 343, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979)* (internal quotation marks omitted). "Consumer welfare is maximized when economic resources are allocated to their best use" and when "consumers are assured competitive price and quality." *Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995)*. "A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with **[**14]** this fundamental goal of ***antitrust law***." *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 107, 104, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*. Congress sought to ensure that competitors not cut deals aimed at stifling competition and at permitting higher prices to be charged to consumers than would be expected in a competitive environment, or permitting lower prices to be paid to those from whom competitors bought materials than a fair market rate. *California ex rel. Harris v. Safeway, Inc., 651 F.3d 1118, 1132-34 (9th Cir. 2011)*.

HN5[] Agreements of competitors, whether express or implicit, whether by formal agreement or otherwise, in restraint **[*1145]** of trade are outlawed. However, the Supreme Court has repeatedly recognized that by the language of the Sherman Act, "'Congress intended to outlaw only *unreasonable* restraints.'" *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)* (quoting *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997))*. "[M]ost antitrust claims are analyzed under a 'rule of reason,' according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors[.]" *State Oil, 522 U.S. at 10*. The rule of reason is the presumptive or default standard, and it requires the antitrust plaintiff to "demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive." *Dagher, 547 U.S. at 5*. "The rule of reason weighs legitimate justifications for a restraint against any anticompetitive effects." **[**15]** *Paladin Associates, Inc. v. Montana Power Co., 328 F.3d 1145, 1156 (9th Cir. 2003)*. The court reviews all the facts, including the precise harms alleged to the competitive markets, and the legitimate justification provided for the challenged practice, and determines whether the anticompetitive aspects of the challenged practice outweigh its procompetitive effects. Id.

HN6[] In order to state a Section 1 claim under the rule of reason, plaintiffs must plead facts which, if true, will prove "(1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition;" and (4) that they were harmed by the defendant's anti-competitive contract, combination, or conspiracy, and that this harm flowed from an "anti-competitive aspect of the practice under scrutiny." *Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1197 (9th Cir. 2012)* (citations omitted); see also *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*. This fourth element is generally referred to as "antitrust injury" or "antitrust standing." Id.

HN7[] Section 2 of the Sherman Act provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other persons, to monopolize any part of the trade or commerce ... shall be deemed **[**16]** guilty of a felony...." 15 U.S.C. § 2. "In order to state a claim for monopolization under Section 2 of the Sherman Act, a plaintiff must prove: (1) possession of monopoly power in the relevant market; (2) willful acquisition or maintenance of that power; and (3) causal antitrust injury." SmileCare Dental Grp. v. Delta Dental Plan of California, Inc., 88 F.3d 780, 783 (9th Cir. 1996) (citation omitted). The following elements are required to establish an attempt to monopolize claim: "(1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct to accomplish the monopolization; (3) dangerous probability of success; and (4) causal antitrust injury." Id. To prove a conspiracy to monopolize in violation of Section 2, a plaintiff must show four elements: (1) the existence of a combination or conspiracy to monopolize; (2) an overt act in furtherance of the conspiracy; (3) the specific intent to monopolize; and (4) causal antitrust injury. Paladin, 328 F.3d at 1158.

HN8[] While the rule of reason is the default standard to analyze allegedly anticompetitive conduct, "[s]ome types of restraints . . . have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se*." **[*1146]** State Oil, 522 U.S. at 10. Such restraints "'are conclusively presumed to be unreasonable **[**17]** and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.'" Nw. Wholesale Stationers, 472 U.S. at 289 (quoting N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)). *Per se* treatment is proper only "[o]nce experience with a particular kind of restraint enables the [c]ourt to predict with confidence that the rule of reason will condemn it." Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 344, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982). "[A] 'departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than ... upon formalistic line drawing.'" Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007) (second alteration in original) (quoting Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58-59, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)). To justify *per se* condemnation, a challenged practice must have "manifestly anticompetitive" effects and lack "any redeeming virtue." Id. at 886 (internal quotation marks omitted). The Supreme Court has "'expressed reluctance to adopt *per se* rules where the economic impact of certain practices is not immediately obvious.'" Dagher, 547 U.S. at 5 (quotation marks and ellipses omitted) (quoting State Oil, 522 U.S. at 10).

In sum,HN9[] *per se* and rule-of-reason analyses are two methods of determining whether a restraint is "unreasonable"; in other words, whether its anticompetitive effects outweigh its procompetitive effects. Atl. Richfield Co., 495 U.S. at 341-42 n.12 (1990) ("Both *per se* rules and the Rule of Reason are employed 'to form a judgment about the competitive significance of the restraint.' [W]hether the **[**18]** ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same-whether or not the challenged restraint enhances competition.") (internal quotations and citations omitted). While the *per se* rule determines whether or not the Sherman Act was violated, antitrust injury must be shown even for *per se* claims. Id. at 341 ("The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior. The need for this showing is at least as great under the *per se* rule as under the rule of reason.") (emphasis in original).

DISCUSSION

I. Incorporation by Reference

HN10[] The doctrine of incorporation by reference allows "a district court to consider documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the plaintiff's pleading." In re Silicon Graphics, Inc. Sec. Litig. (SGI), 183 F.3d 970, 986 (9th Cir. 1999) (internal quotation omitted). Because these documents have essentially been adopted as part of the complaint, the Court may consider them without converting the motion to dismiss into a motion for summary judgment. United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003) ("Even if a document is not attached to a complaint, **[**19]** it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim.").

Defendant asks the Court to incorporate by reference: (1) a letter to Defendant's board members and (2) a copy of Defendant's **[*1147]** 2013 Membership Profile Form for Non-Exclusive Members. Plaintiff does not oppose Defendant's request. Because both documents are referred to in the Amended Complaint and form part of the basis of Plaintiff's claims, the Court incorporates them by reference.

II. Antitrust Injury

HN11[] Antitrust injury "is an element of all antitrust suits." *Rebel Oil, 51 F.3d at 1433*. Accordingly, the lack of antitrust injury serves as an independent basis for dismissal. *LiveUniverse, Inc. v. MySpace, Inc., 304 F. App'x 554, 557 (9th Cir. 2008)*. The Court grants Defendant's motion to dismiss in its entirety because Plaintiff fails to adequately plead an antitrust injury.[6]

HN12[] To assert a claim under *§ 1* and *§ 2* of the Sherman Act, a plaintiff must have suffered an "antitrust injury," meaning an injury "of the type the antitrust laws were intended to prevent and that **[**20]** flows from that which makes the defendant's acts unlawful." *Brunswick Corp v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. Plaintiff "must prove that [its] loss flows from an anticompetitive aspect or effect of the defendant's behavior, since it is inimical to the antitrust laws to award damages for losses stemming from acts that do not hurt competition." *Rebel Oil Co., 51 F.3d at 1433 (9th Cir. 1995)* (citing *Atlantic Richfield Co., 495 U.S. at 334*); see also, *Metro Indus., Inc. v. Sammi Corp., 82 F.3d 839, 847 (9th Cir. 1996)* ("a plaintiff must allege 'antitrust injury,' that is, that the agreement at issue actually caused injury to competition within a market, beyond its impact on the plaintiff.").

HN13[] Because Congress designed the Sherman Act to protect consumers or purchasers of goods in a market, *Reiter v. Sonotone Corp., 442 U.S. 330, 343, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979)*, the focus of the antitrust injury analysis is the direct result of anticompetitive conduct on consumers. *Brunswick Corp. v. Riegel Textile Corp., 752 F.2d 261, 266 (7th Cir. 1984)*. Hence the often repeated phrase—antitrust laws were enacted for "the protection of competition, not competitors." *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*; see also *Gorlick Distribution Centers, LLC v. Car Sound Exhaust Sys., Inc., 723 F.3d 1019, 1024-25 (9th Cir. 2013)*. A plaintiff must demonstrate injury to competition in the market as a whole, not merely injury to itself as a competitor. *Gorlick, 723 F.3d at 1024-25*; see also *Brantley, 675 F.3d at 1200*.

As discussed in the Background section of this Opinion & Order, Plaintiff alleges that Defendant engages in unlawful conduct in the form of four Challenged Restraints. Plaintiff alleges that it has lost over 200 college customers to Defendant **[**21]** in the last 10-15 years. Id. at ¶ 37. According to Plaintiff, these losses "were directly caused by [Defendant's] anticompetitive and exclusionary conduct." Id. Plaintiff contends that Defendant has foreclosed a substantial amount of competition, is likely to further foreclose a substantial amount of competition, and has excluded Plaintiff from competing in the Online College Application Processing Market and submarkets. Id. at ¶¶ 180-81. Plaintiff claims that Defendant has artificially suppressed Plaintiff's output and profits and foreclosed possible customers from retaining Plaintiff. Id. at ¶ 176. Furthermore, Plaintiff claims that is has been injured by **[*1148]** being foreclosed from competing with Defendant to provide Online College Application Processing services and from earning the profits it would have earned but for Defendant's unlawful conduct. Id at ¶¶ 186, 198, 205, 211, 218.

Plaintiff tries to translate its individual harm into harm to competition by alleging that Defendant's Challenged Restraints injure both colleges and applicants. However, the Amended Complaint lacks sufficient factual allegations of harm to either group of consumers.

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[6] Because the lack of antitrust injury disposes of the entire case, the Court declines to reach the parties' additional arguments regarding the merits of specific claims.

Defendant's Challenged Restraints have led **[**22]** to an increase in applicants applying to colleges. See Am. Compl. ¶ 50 ("For example, between 2010 and 2011, the percentage of students applying to at least three Colleges rose from 77% to 79% (more than 10% more than in 2000) and the percentage of students applying to at least seven colleges rose from 25% to 29% (both of which are more than double the percentage of such students a decade earlier."). Nevertheless, Plaintiff contends that this increase in output of applications harms applicants and colleges when quality, and not just quantity, is accounted for.

Plaintiff uses the concept of "Net Output" as a framework for understanding the injury to consumers. Plaintiff contends that antitrust laws allow for "output" to encompass factors beyond quantity, such as quality, efficiency, and innovation. Taking those factors into account, Plaintiff contends that "Net Output" from Online College Application Processing services accounts for the costs of submitting, processing, and reviewing applications. Am. Compl. ¶ 32. While colleges are receiving more and more applications, the online application processing services are allegedly of an inferior quality because there is a lack of competition, **[**23]** resulting in a more expensive and time-consuming process for applicants and colleges. Id. ¶¶ 68-72, 137, 149-56, 159, 166-67. Plaintiff argues that Defendant's Challenged Restraints have decreased "Net Output," as seen by the anticompetitive effects of the Challenged Restraints—specifically, worse college matching, reduced choice, lower-quality, less innovative college application processing services, and higher effective prices to students. According to Plaintiff, "customization and information exchange in the college application process result in greater-quality matches with less application churn." Pl.'s Opp. 16. Colleges and applicants would save time and money by submitting and processing less meaningless applications, which would improve services and result in better matches. Id.

Plaintiff's concept of Net Output fails, however, because it is based on the assumption that colleges and applicants do not want to participate in an increased "application churn." Plaintiff's position rests upon the conclusion that colleges and applicants are harmed by a system that increases the number of applications to colleges, regardless of an applicant's likelihood of acceptance to any particular **[**24]** college. However, Plaintiff's opinion about what is best for applicants and colleges cannot suffice to establish antitrust injury. The Court finds it equally probable that the "application churn" is precisely what colleges and applicants desire—a system that facilitates increased applications in an efficient way. Even Plaintiff concedes that colleges want an increase in applications because they "secure a boost in members' applications, application fees, and rankings." Am. Compl. ¶157(c). "This in turn allows the College to attract even more (and higher-value) applicants, greater alumni donations, and better professors, increases the College's creditworthiness, and lowers its borrowing costs." Id. ¶ 31.

Contrary to Plaintiff's assertions, the product at issue here is unlike dating websites **[*1149]** that advertise to help people find their *one* match or services in the real estate market that help a buyer find *one* house. The product here aims to do precisely what Plaintiff alleges is occurring—increasing the ease and efficiency by which applicants can apply to many colleges and by which colleges can receive many applications.

Furthermore, Plaintiff alleges that Defendant's Challenged Restraints **[**25]** have suppressed prices for online college applications processing services "below competitive levels." Am. Compl. ¶ 172. According to Plaintiff, the Challenged Restraints "enable members to spend below-competitive levels on Online College Application Processing services without losing applicants" and Defendant's "equal treatment" requirement has "lower[ed] prevailing prices for" Online College Application Processing services. Id. at ¶¶ 157(a), 151. Notably, Plaintiff does not allege that Defendant has set prices below-cost. An allegation of prices merely "below competitive levels," (as opposed to predatory pricing), does not form the basis of an antitrust claim. See *Atl. Richfield, 495 U.S. at 340* (***HN14***[] "Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give rise to antitrust injury.").

Plaintiff does not offer, and this Court does not find, support for the proposition that an injury solely based on less innovation and choice is sufficient to state a claim for antitrust injury. ***HN15***[] Certainly, decreased innovation and choice can be relevant to a court's finding of antitrust injury. However, an allegation of diminished **[**26]** quality alone is not sufficient to establish injury in any of the cases cited by Plaintiff. See, e.g., *Rebel Oil, 51 F.3d at 1433* (an act is deemed anticompetitive under the Sherman Act only when it harms *both* allocative efficiency *and* raises the prices of goods above competitive levels or diminishes their quality) (emphasis added). The Court declines to make new law here and open the door for antitrust claims to be brought by any plaintiff who claims to have a higher quality product that consumers *should* be choosing.

Both parties cite *Sewell Plastics, Inc. v. Coca-Cola Co., 720 F. Supp. 1196 (W.D.N.C. 1989)* aff'd and remanded, *912 F.2d 463 (4th Cir. 1990)*, in support of their arguments. In Sewell, a plastic bottle manufacturer (Sewell) brought an action against soft drink bottlers and Southeastern Container, a plastic bottle manufacturing cooperative formed by the defendant bottlers, alleging violations of federal ***antitrust law*** (among other allegations). Id. Prior to the defendant bottlers forming their manufacturing cooperative, they had purchased over 90% of their bottles from Sewell. *Id. at 1199*. After forming their own bottling manufacturing facility, defendant bottlers bought only about 17% of their bottle requirements from Sewell. Id. The court found that the "economic consequences in the relevant market of the **[**27]** bottle-making defendants were dramatic." Id. Prices for plastic bottles dropped, production of plastic bottles increased, production processes became more efficient, the number of competitors in the market remained the same but market concentration decreased, and—most importantly—"although some competit*ors* may be making less profit, there has been no adverse effect on competit*ion*." Id. (emphasis in original). Because antitrust laws were enacted to protect competition, not competitors, the court granted the defendants summary judgment because the plaintiff could not establish an antitrust injury. Id.

[*1150] Plaintiff argues that Sewell is distinguishable because the court found that there were no anticompetitive effects—price to consumers had decreased, consumer choice had increased, and innovation had increased. *Id. at 1196, 1211, 1213, 1218-1219, 1222*. Because Plaintiff alleges anticompetitive effects here, Plaintiff argues that its Complaint survives the motion to dismiss. However, in evaluating a motion to dismiss, the court looks not just at Plaintiff's allegations, but at the factual support underlying those allegations. As discussed above, Plaintiff fails to allege any facts to support a claim that Defendant's Challenged Restraints **[**28]** have had an anticompetitive effect that has injured consumers. As the Supreme Court has emphasized, ***HN16***[] an insistence on specificity of facts is warranted before permitting a case to proceed into costly and protracted discovery in an antitrust case because of the potential great expense of discovery. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*; see also *Somers v. Apple, Inc., 729 F.3d 953, 966 (9th Cir. 2013)*. Because the Court fails to find facts to support an allegation of antitrust injury, Plaintiff's Amended Complaint is dismissed.

III. Leave to Amend

HN17[] If the court dismisses a complaint, it must decide whether to grant leave to amend. See *28 U.S.C. § 1653*. The Ninth Circuit has repeatedly held that dismissal without leave to amend is improper, even if no request to amend the pleading was made, unless it is clear that the defective pleading cannot possibly be cured by the allegation of additional facts. *Snell v. Cleveland, Inc., 316 F.3d 822, 828 n. 6 (9th Cir. 2002)* (citing *Lee v. City of Los Angeles, 250 F.3d 668, 692 (9th Cir. 2001))*; *Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir. 2000)*. Accordingly, the Court grants Plaintiff leave to amend.

CONCLUSION

Defendant's Motion to Dismiss [80] and Amended Request Seeking Judicial Consideration of Documents Incorporated by Reference [82] are GRANTED. Plaintiff is granted leave to amend the First Amended Complaint to allege facts sufficient to demonstrate an antitrust injury. If Plaintiff chooses to amend its complaint, it must do **[**29]** so within 14 days of the date below.

IT IS SO ORDERED.

Dated this 15 day of May, 2015.

/s/ Marco A. Hernández

MARCO A. HERNÁNDEZ

United States District Judge

[United States ex rel. Blaum v. Triad Isotopes, Inc.](#)

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

May 15, 2015, Decided; May 15, 2015, Filed

Case No.: 11-cv-8098

Reporter

104 F. Supp. 3d 901 *; 2015 U.S. Dist. LEXIS 63795 **; 2015-1 Trade Cas. (CCH) P79,171

UNITED STATES OF AMERICA, STATE OF ILLINOIS, and COOK COUNTY ex rel. MATTHEW BLAUM, Relator, and HOT SHOTS NM, LLC, Plaintiff, v. TRIAD ISOTOPES, INC.; COVIDIEN, INC.; TODD GIBA; DONALD TREPASHKO, M.D.; and SAMI DISTRIBUTORS, INC. Defendants.

Core Terms

bid, radiopharmaceutical, antitrust, Defendants', allegations, contracts, inducement, conspiracy, fraudulent, anti trust law, false claim, anticompetitive, bidder, bid-rigging, misrepresentations, invoices, win, amended complaint, funding, drugs, bidding process, relevant market, dose, conspirators, expectancy, reimbursed, patient, lowest, motion to dismiss, antitrust claim

LexisNexis® Headnotes

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

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

In reviewing the sufficiency of a complaint, a district court must accept all well-plead facts as true and draw all permissible inferences in favor of the plaintiff. The Federal Rules of Civil Procedure require only that a complaint provide the defendant with fair notice of what the claim is and the grounds upon which it rests. The Supreme Court has described this notice-pleading standard as requiring a complaint to contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. While factual allegations must be accepted as true, legal conclusions may not be considered.

Antitrust & Trade Law > Procedural Matters

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

HN2[] **Antitrust & Trade Law, Procedural Matters**

The pleading standard under *Fed. R. Civ. P. 8(a)*, as applied in the antitrust context, does not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. A plaintiff must plead facts that "raise a reasonable expectation that discovery will reveal evidence of illegal agreement. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely. The fact that the allegations undergirding a claim could be true is no longer enough to save a complaint from being dismissed; the complaint must establish a nonnegligible probability that the claim is valid; but the probability need not be as great as such terms as preponderance of the evidence connote.

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

Governments > Federal Government > Claims By & Against

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

HN3[] **Heightened Pleading Requirements, Fraud Claims**

In addition to meeting the *Fed. R. Civ. P. 8(a)* requirements, fraud-based claims brought under the False Claims Act, *31 U.S.C.S. § 3729 et seq.*--an anti-fraud statute--are subject to the heightened pleading standard of *Fed. R. Civ. P. 9(b)*. *Rule 9(b)* says that in alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally. *Fed. R. Civ. P. 9(b)*. While the precise level of particularity required under *Rule 9(b)* depends upon the facts of the case, the pleading ordinarily requires describing the who, what, when, where, and how of the fraud.

Governments > State & Territorial Governments > Claims By & Against

HN4[] **State & Territorial Governments, Claims By & Against**

The Illinois Whistleblower Reward and Protection Act, *740 ILCS 175/1 et seq.*, is identical to the federal false-claims statute except with respect to which governmental entity served as the target for the fraud (i.e., federal or state). Courts generally apply the same pleading standard for both federal and state False Claims Act, *31 U.S.C.S. § 3729 et seq.*, claims.

Governments > Federal Government > Claims By & Against

Governments > State & Territorial Governments > Claims By & Against

HN5[] **Federal Government, Claims By & Against**

The False Claims Act, *31 U.S.C.S. § 3729 et seq.*, and the Illinois Whistleblower Reward and Protection Act, *740 ILCS 175/1 et seq.*, impose liability on any person who: (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim; (C) conspires to commit a violation of subparagraph (A) or (B). *31 U.S.C.S. § 3729(a)(1)(A)-(C)*; *740 ILCS 175/3(a)(1)(A)-(C)*.

Governments > Federal Government > Claims By & Against

HN6[] **Federal Government, Claims By & Against**

Each and every claim submitted under a contract, loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct constitutes a false claim.

Governments > Federal Government > Claims By & Against

HN7[] **Federal Government, Claims By & Against**

Where a relator argues that a defendant's false claims were predicated on a fraudulently induced contract, in order to survive a motion to dismiss, the relator need only provide a plausible basis for believing that the defendant entered into a government contract with the intent not to perform or with the knowledge that it could not preform as promised. Simple breach of contract is not fraud, but making a promise while planning not to keep it is fraud. If a false statement is integral to a causal chain leading to payment, it is irrelevant how the federal bureaucracy has apportioned the statements among layers of paperwork. This approach comports with the Supreme Court's instruction that the False Claims Act, *31 U.S.C.S. § 3729 et seq.*, be construed broadly so as to reach all types of fraud, without qualification, that might result in financial loss to the Government; the Court has consistently refused to accept a rigid, restrictive reading of the Act.

Governments > Federal Government > Claims By & Against

HN8[] **Federal Government, Claims By & Against**

Making a false promise in order to obtains something of value is fraud, and can be the basis of a claim under the False Claims Act, *31 U.S.C.S. § 3729 et seq.*, and emphasizing the need for a relator to show that the defendant knew that the promise was false when making it.

Governments > Federal Government > Claims By & Against

HN9[] **Federal Government, Claims By & Against**

A material statement (in the context of a False Claims Act, *31 U.S.C.S. § 3729 et seq.*, claim) is one that has the potential to influence the government's decision to pay or approve a false claim. But under a fraudulent-inducement theory, relator must show not only that defendants' misrepresentations had the potential to induce government action, but actually did induce (or cause) the government to act, thus invoking the legal principles of causation, reliance, and inducement. In essence, the essential element of inducement or reliance is one of causation. At the pleading stage, relator's allegations of materiality and inducement need only be plausible.

Governments > Federal Government > Claims By & Against

HN10[] **Federal Government, Claims By & Against**

To plead False Claims Act, *31 U.S.C.S. § 3729 et seq.*, and Illinois Whistleblower Reward and Protection Act, *740 ILCS 175/1 et seq.*, claims, relator must show that defendants presented fraudulent claims to the government in order to obtain governmental funding; both federal and state.

Public Health & Welfare Law > ... > Medicaid > Providers > Payments & Reimbursements

HN11[] **Providers, Payments & Reimbursements**

Under Medicaid, the state pays health care providers for services rendered to Medicaid recipients, and it is reimbursed for a significant portion of those funds by the federal government after demonstrating compliance with a number of federal regulations.

Governments > Federal Government > Claims By & Against

HN12[] Federal Government, Claims By & Against

The definition of the word "claim" as defined by the False Claims Act, *31 U.S.C.S. § 3729 et seq.*, includes, in part: any request or demand for money presented to an officer, employee, or agent of the United States; or is made to a contractor, grantee, or other recipient, if the money is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government provides or has provided any portion of the money requested or demanded; or will reimburse such contractor, grantee, or other recipient for any portion of the money requested or demanded. *31 U.S.C.S. § 3729(b)(2)(A)*. The pre-2009 version of the statute is somewhat narrower, but the relevant language is still the same.

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

HN13[] Heightened Pleading Requirements, Fraud Claims

The particularity requirement of *Fed. R. Civ. P. 9(b)* must be relaxed where the plaintiff lacks access to all facts necessary to detail his claim.

Governments > Federal Government > Claims By & Against

HN14[] Federal Government, Claims By & Against

In the Seventh Circuit, a relator does not need to have actually witnessed the specific request for payment or to have had access to paperwork submitted to the government. It is not essential for a relator to produce the invoices (and accompanying representations) at the outset of the suit.

Governments > Federal Government > Claims By & Against

HN15[] Federal Government, Claims By & Against

The False Claims Act (FCA), *31 U.S.C.S. § 3729 et seq.*, confers liability on those who conspire to commit a violation of the FCA. *31 U.S.C.S. § 3729(C)*. *31 U.S.C.S. § 3729(a)(3) (pre-2009)* confers liability on those who conspire to defraud the Government by getting a false or fraudulent claim allowed or paid.

Governments > Federal Government > Claims By & Against

HN16[] Federal Government, Claims By & Against

Unique to a conspiracy claim, the relator must establish that the conspirators agreed that the false record or statement would have a material effect on the Government's decision to pay the false or fraudulent claim.

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

HN17[] Heightened Pleading Requirements, Fraud Claims

Claims premised on a course of fraudulent conduct are subject to *Rule 9(b)*'s particularity requirement.

Governments > Federal Government > Claims By & Against

HN18[] Federal Government, Claims By & Against

The U.S. Court of Appeals for the Seventh Circuit has recognized bid-rigging as a basis for a False Claims Act, *31 U.S.C.S. § 3729 et seq.*, violation.

Governments > Federal Government > Claims By & Against

HN19[] Federal Government, Claims By & Against

Courts in the Northern District of Illinois have recognized false inducement as a basis for alleging a False Claims Act, *31 U.S.C.S. § 3729 et seq.*, violation.

Antitrust & Trade Law > Sherman Act > Claims

HN20[] Sherman Act, Claims

The Sherman Act exists to protect consumers from injury that results from anticompetitive behavior. The successful pleading of a claim under *§ 1* of the Sherman Act requires proof of three elements: (1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in the relevant market; and (3) an accompanying injury.

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

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

HN21[] Per Se Rule & Rule of Reason, Sherman Act

Where the alleged anticompetitive conduct does not amount to a per se violation of the Sherman Act, defendants' conduct is assessed under the Rule of Reason analysis, under which the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. The test of legality under the Rule is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. The Rule requires not only that the plaintiff allege and prove anticompetitive effects, but additionally, as with all antitrust claims, that the injury complained of be of a type that the antitrust laws were designed to guard against, and further that the antitrust violation be the direct cause of plaintiff's injury. Plaintiff must show that defendants' conduct had an anticompetitive effect in a relevant market, and that the defendants have market power in that market. Plaintiff must allege, not only an injury to himself, but an injury to the market as well. Finally, a plaintiff must also establish "antitrust standing" to raise an antitrust claim (i.e., whether a party injured by an antitrust violation may recover under the antitrust laws), which is an inquiry separate and apart from whether a plaintiff has Article III standing.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

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

HN22[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Vertical price restraints are to be judged by the rule of reason.

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

Evidence > Burdens of Proof > Allocation

HN23[] **Per Se Rule & Rule of Reason, Sherman Act**

The first requirement in every suit based on the Rule of Reason is market power, without which the practice cannot cause those injuries (lower output and the associated welfare losses) that matter under the federal antitrust laws. Because the antitrust laws do not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce, plaintiffs must allege that the anticompetitive conduct at issue actually impacted competition in a relevant market; a loss by the plaintiff of a single contract with a single purchaser is simply not equivalent to a deleterious effect on the market. Otherwise the mere fact that one party bid successfully against another party for a contract would be equivalent to an anticompetitive effect and would raise the specter of an antitrust action being used as a remedy for any tortious conduct during the course of the competition. A plaintiff must also show that the defendant has market power in the relevant market, which means that it can raise prices above a competitive level without losing its business.

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

Evidence > Burdens of Proof > Allocation

HN24[] **Per Se Rule & Rule of Reason, Sherman Act**

Under the Rule of Reason, the plaintiff bears the burden to define the relevant market and to establish the defendants' market power. If the plaintiff meets this burden, the defendant can show that the restraint in question actually has a procompetitive effect on balance, while the plaintiff can dispute this claim or show that the restraint in question is not reasonably necessary to achieve the procompetitive objective.

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

HN25[] **Per Se Rule & Rule of Reason, Sherman Act**

A loss by the plaintiff of a single contract with a single purchaser is simply not equivalent to a deleterious effect on the market. It is the function of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, to compensate the unfortunate only when their demise is accompanied by a generalized injury to the market.

Antitrust & Trade Law > Sherman Act > Claims

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

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

HN26[] **Sherman Act, Claims**

The concept of "antitrust injury" has both a ubiquitous and amorphous presence in antitrust jurisprudence, and can be found (1) as a prima facie element of Sherman Act claims, (2) as a factor under the Rule of Reason analysis, and (3) as a factor in the determining whether a plaintiff has "antitrust standing. But regardless of its contextual surroundings, the "antitrust injury" inquiry always remains relatively the same: Plaintiffs must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations would be likely to cause. A plaintiff must demonstrate that her claimed injuries are of the type the antitrust laws were intended to prevent and reflect the anticompetitive effect of either the violation or of anticompetitive acts made possible by the violation.

Antitrust & Trade Law > Clayton Act > Claims

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

HN27[] **Clayton Act, Claims**

Although the standing provision in § 4 of the Clayton Act is broad—permitting civil suits by any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws, *15 U.S.C.S. § 15*—the Supreme Court has endorsed several limiting principles such that not every person, however tangentially injured by an antitrust violator, has standing to sue.

Antitrust & Trade Law > Clayton Act > Claims

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

HN28[] **Clayton Act, Claims**

The Supreme Court has incorporated traditional common-law tort principles into the evolving antitrust-standing inquiry, thereby adding a proximate cause element into § 4 of the Clayton Act, *15 U.S.C.S. § 15*, actions such that a plaintiff does not have standing to sue under § 4 if its injuries were indirect and speculative. The result is a six-factor test for examining the link between a plaintiff's harm and a defendant's wrongdoing that has become the predominant test for assessing antitrust standing, focusing on: (1) the causal connection between the violation and the harm; (2) the presence of improper motive; (3) the type of injury and whether it was one Congress sought to redress; (4) the directness of the injury; (5) the speculative nature of the damages; and (6) the risk of duplicate recovery or complex damage apportionment.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN29[] **Private Actions, State Regulation**

Illinois courts have adopted a common-law harmonization provision, meaning that they interpret their antitrust laws in harmony with federal-court decisions interpreting federal ***antitrust law***. Federal precedent is both relevant and helpful in determining the adequacy of antitrust allegations. While federal precedent is not binding on Illinois courts, the relevant statutes are very similar.

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

HN30[] Intentional Interference, Elements

Under Illinois law, the elements of a claim for tortious interference with prospective business relations are (1) plaintiff's reasonable expectancy of entering into a valid business relationship; (2) defendant's knowledge of that expectancy; (3) defendant's intentional and unjustifiable interference that induced or caused a breach or termination of the expectancy; and (4) damage to plaintiff resulting from defendant's conduct.

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

HN31[] Intentional Interference, Elements

The fact that the plaintiff was asked to bid implies that the contract was up for competitive bidding and thus it cannot be said that the plaintiff had an expectancy of future business relations. Twombly does require that the plaintiff set forth facts that make it plausible that she had a reasonable expectancy.

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Judges: Robert M. Dow, Jr., United States District Judge.

Opinion by: Robert M. Dow, Jr.

Opinion

[*908] MEMORANDUM OPINION AND ORDER

Before the Court are Defendants' motions to dismiss [94, 96, 99, 102, **[**2]** 103] Relator's and Plaintiff's amended complaint [88]. Defendants' motions are denied as to Counts I-IV and granted as to Counts V—VII. Counts V—VII of the amended complaint are dismissed without prejudice. Relator and Plaintiff should inform the court within 14 days as to whether they intend to file a second amended complaint repleading Counts V—VII, at which time the Court will set a status hearing to discuss scheduling moving forward.

I. Background[1]

On November 11, 2011, Relator Matthew Blaum brought this *qui tam* action on behalf of the United States and the State of Illinois, alleging violations of the False Claims Act, *31 U.S.C. § 3729 et seq.* ("FCA"),[2] and the Illinois Whistleblower Reward and Protection Act, *740 ILCS 175/1 et seq.* ("IWRPA"). In addition, Plaintiff Hot Shots NM, LLC alleged that Defendants violated state and federal antitrust laws, and tortiously interfered with its prospective business opportunities. The federal government declined to intervene [15] on October 28, 2013, prompting the court to unseal the complaint [16]. In April 2014, Defendants filed individual **[**3]** motions to dismiss the complaint, which were mooted three months later when Relator Blaum and Plaintiff Hot Shots filed an amended complaint [88]. Now before the Court are Defendants' motions to dismiss the amended complaint.

Originally there were seven named Defendants in this case. On January 12, 2015, Relator and Plaintiff filed a Rule 41 stipulation of voluntary dismissal with prejudice of individual Defendants Faisal Sami and Sarah Faisal (keeping as a Defendant Sami Distributors, Inc.), and the Court subsequently entered an order dismissing only those two defendants [126].[3] Each of remaining five Defendants filed an individual motion to dismiss the amended **[*909]** complaint: Dr. Trepashko [95], Covidien [97], Triad Isotopes [100], Mr. Giba (adopting Covidien and Triad Isotopes' arguments) [102], and Sami Distributors [104]. Relator and Plaintiff filed **[**4]** a single response brief [110], and each Defendant filed an independent reply [115, 117, 119, 120, 121].

A. Cook County Health and Hospital System and Radiopharmaceuticals

Relator alleges that from at least 2008 through 2011, Defendants defrauded Cook County, Illinois and the Cook County Health and Hospitals System ("CCHHS") by making false statements and false claims regarding the sale of radiopharmaceutical drugs. CCHHS, formerly known as the Cook County Bureau of Health Services, oversees a comprehensive and integrated healthcare system covering Chicago and suburban Cook County, composed of hospitals, ambulatory and community health network clinics, a public health department, **[**5]** a correctional healthcare facility, and an outpatient infectious disease center. Specific facilities within the healthcare conglomerate include John H. Stroger Jr. Hospital, Provident Hospital, Oak Forest Hospital, Cook County Department of Public Health, Cermak Health Services, the Ruth Rothstein CORE Center, and 16 ambulatory and Community Health Network clinics.

CCHHS's annual revenues exceed $900 million. The majority of that revenue comes from patient services, and approximately 39 percent of CCHHS's patient revenue comes from the federal Medicare and Medicaid programs. Because CCHHS serves all patients, it has a substantial shortfall each year between its expenses and the revenue generated by patient care, and that shortfall is made up with funding from Cook County. In 2011, for example, Cook County provided CCHHS with approximately $368 million in funding. CCHHS spends approximately $2 million per year on radiopharmaceutical drugs.

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[1] The Court accepts as true the facts alleged in Relator's and Plaintiff's amended complaint and makes all reasonable inferences in their favor. See *McReynolds v. Merrill Lynch & Co., 694 F.3d 873, 879 (7th Cir. 2012)*.

[2] The FCA was amended in 2009, and various sections of the FCA became effective at different times. See, *e.g., United States ex rel. Frawley v. McMahon, 2015 U.S. Dist. LEXIS 423, 2015 WL 115763, at *8 (N.D. Ill. Jan. 5, 2015)*. Here, the allegedly fraudulent conduct relating to the 2008 and 2010 CCHHS contracts took place both before and after the FCA amendments went into effect, meaning that most likely both the pre- and post-amendment statutes are relevant here.

[3] Sami Distributors argues in its reply brief that Relator's claims against it are barred by *res judicata* based on Relator's voluntary dismissal of individual Defendants Faisal Sami and Sarah Faisal. [See 121, at 1-4.] But *res judicata* has no application here. The preclusive effect of the voluntary dismissal with prejudice means that Relator is barred from raising similar claims against Faisal Sami and Sarah Faisal in a separate lawsuit; it does not release Sami Distributors from the claims currently pending against it.

Radiopharmaceutical drugs, which fall within the nuclear pharmacy industry, are used to treat certain medical conditions (such as cancer) and to perform radiological testing (such as CT scans and MRIs). The purchase, storage, and sale of these drugs **[**6]** are highly regulated by several federal and state industries, and distributors must hold a license to provide radiopharmaceuticals.

B. 2008 and 2010 Contracts

Defendant Dr. Trepashko is a nuclear radiologist for CCHHS. As head of the Nuclear Medicine department at CCHHS, he has substantial control over the awarding of CCHHS's annual contract for nuclear medicine. Dr. Trepashko had a close relationship with Defendant Mr. Giba, a sales representative for global healthcare-products provider Covidien, Inc. (which also is a Defendant here). Relator alleges that in 2008—when Relator himself was a Sales Specialist at Covidien—Dr. Trepashko provided Mr. Giba with insider information about how to ensure that Covidien obtained CCHHS's 2008 radiopharmaceutical contract. Specifically, Dr. Trepashko formulated a plan that would have Sami Distributors—a Minority- or Woman-Owned Business Entity ("M/WBE") with no experience or qualifications in providing radiopharmaceutical drugs—submit a bid on its own behalf, when in fact the plan was to have Covidien fulfill the terms of the contract. In **[*910]** that scenario, Sami was slated to be a "pass-through" entity that would handle some paperwork (*e.g.*, billing CCHHS), **[**7]** but would provide no commercially useful functions regarding the purchase, storage, or sale of radiopharmaceuticals. All parties benefitted from this arrangement: Sami won (on paper) the contract, earning it a cut of the proceeds; Covidien won (in reality) the contract, earning it the bulk of the proceeds; CCHHS was a step closer to complying with Cook County's aspirational goal that 35 percent of all contracts for professional and consulting services be with M/WBEs; and Dr. Trepashko was in the good graces of Covidien and Sami, who rewarded him with expensive dinners and lucrative speaking engagements.

According to the amended complaint, Dr. Trepashko passed the torch to Mr. Giba to carry out the scheme. Just prior to the 2008 bid submissions, Mr. Giba met with Faisel Sami of Sami Distributors at Mr. Sami's home to secure his participation in the plan. After reaching an agreement, Mr. Giba went to a nearby restaurant, where—utilizing insider information provided to him by Dr. Trepashko—he prepared the bid form that Sami would ultimately submit to CCHHS. The bid form itself listed a number of radiopharmaceutical drugs and the quantities of those drugs that CCHHS anticipated using in **[**8]** the upcoming year. Bidders were required to provide a per-dose price for each drug and, if awarded the contract, a bidder would be required to honor its contract price regardless of the quantities actually ordered by CCHHS during the contract term. Mr. Giba's tactic, informed by Dr. Trepashko, was to lower Sami's bid price for one specific drug, which had the effect of making Sami the overall lowest bidder in the lot. Sami approved and submitted this bid on August 11, 2008, and CCHHS awarded Sami the 2008 radiopharmaceutical contract on December 5, 2008.

In addition to this price-fixing scheme, Sami made a number of misrepresentations calculated to ensure that it would win the contract, including (1) that it would maintain an inventory allowing same-day delivery (or one-hour delivery in emergency situations), (2) that it would meet certain transportation and delivery requirements relating to radiopharmaceuticals as dictated by Illinois law, (3) that it would pick-up expended radioactive syringes, (4) that it would maintain a current license from the State of Illinois, Department of Nuclear Safety, Radioactive Material License pursuant to the Illinois Radiation Protection Act and Regulations **[**9]** for Radiation Protection, allowing it to receive, acquire, own, possess, and transfer radioactive materials, (5) that it would not subcontract the CCHHS radiopharmaceutical contract, and (6) that it would spend $625,000.00 of the contract funds with other M/WBE contractors (specifically, MedRx Distributors, Inc. and Beverly A. Simpson, Inc.). Relator alleges that Sami never intended to perform any of these functions; instead, it was the conspirators' plan all along to have Covidien execute all radiopharmaceutical services directly with CCHHS, with Sami acting only as a pass-through entity. Nonetheless, after obtaining the contract, Sami proceeded to submit hundreds of invoices to CCHHS for the sale of radiopharmaceuticals as if it were performing under the contract, even though the bulk of those proceeds were funneled to Covidien.

On December 17, 2009, Sami submitted a bid to retain the CCHHS radiopharmaceutical contract. The bidding process did not change, and the conspirators put forth a nearly identical bid. Two months later, CCHHS again awarded Sami the radiopharmaceutical contract. One key difference is that in the 2010 bid, Sami represented that its earnings under the contract **[**10]** **[*911]** would satisfy the county's M/WBE ordinance (which requires the entity to perform a "commercially useful function"). Because Sami maintained its passive role as a pass-through entity, it didn't perform any commercially useful functions, and thus knowingly misrepresented itself in order to induce CCHHS into awarded it the contract.

C. 2011 Contract

Several changes occurred between the bidding periods for CCHHS's 2010 and 2011 radiopharmaceutical contracts. First, Triad Isotopes—a nationwide radiopharmaceutical company based in Orlando, Florida—acquired Covidien's radiopharmaceutical business (in a deal that they announced in December 2009 and finalized in June 2010), prompting Mr. Giba to transition over as a Triad Isotopes employee. Second, in 2010, Relator left Covidien and joined a competing radiopharmaceutical provider called Hot Shots as their Director of Business Development. Third, CCHHS enlisted Pricewaterhouse Coopers to revamp the bidding process for their radiopharmaceutical process. Specifically, while CCHHS still used a similar RFP that listed certain radiopharmaceutical drugs and expected usage quantities, the bidding itself would be accomplished through an online auction **[**11]** system run by Electronic Auction Services, Inc., meant to ensure same-time, blind bidding wherein the lowest bidder would be awarded the contract.

Because of the change in the bidding process for the CCHHS radiopharmaceutical contract, Defendants were forced to rejigger their scheme to ensure that Dr. Trepashko's chosen provider, Mr. Giba (now with Triad Isotopes) would win the contract. Due to the added scrutiny over the bidding process (and at Triad Istopes' insistence), Sami was dropped as the middle-man in the scheme. Instead, Triad Isotopes submitted a bid on its own. But because the new bidding process meant that Triad Isotopes would be bidding without any insider knowledge as to where its competitors' bids would be, the conspirators had to devise a new way of ensuring victory. Their solution was to alter the bid form itself by raising the expected usage quantities of infrequently used (but expensive) drugs. For example, Triad Isotopes bid $20 per dose for the drug Tc99 (WBC), and Hot Shots and Cardinal Health bid $1,120.00 and $1,763.98 per dose, respectively. The quantity listed in the bid was 75 doses, when CCHHS's actual usage in prior years had been approximately 2-3 doses **[**12]** annually. Similarly, Triad Isotopes bid $100 per dose for the drug Sm-153 Quadramet 90 mCi, and Hot Shots and Cardinal Health bid $5,250 and $7,301 per dose for that same drug. And again, the quantity requested, 35, far exceeded CCHHS's historical usage.

This bidding tactic dramatically lowered Triad Isotopes bottom line pricing, which allowed it to raise its prices on commonly-used drugs. For example, for Tc99m Sestamibi, of which CCHHS purchases approximately 2000 doses per year, Triad Isotopes bid $68/dose while Hot Shots bid $40/dose. Similarly, CCHHS purchases approximately 2000 doses of TL-201 4 mCi annually, and Triad Isotopes' and Hot Shots' respective bid prices were $80/dose and $60/dose.

Triad Isotopes had the overall lowest bid (and thus won the contract), and Hot Shots had the second lowest bid. Relator alleges that absent Defendants' fraudulent alteration of the bid form, Hot Shots would have won the contract, and would have saved CCHHS over $300,000. Reflecting on his role in the multi-year conspiracy, Dr. Trepashko said to Relator that he didn't care what happened to the money or how much **[*912]** the drugs cost; it was CCHHS's money, not his.

II. Legal Standard

HN1[] In reviewing the **[**13]** sufficiency of a complaint, a district court must accept all well-plead facts as true and draw all permissible inferences in favor of the plaintiff. *Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 334 (7th Cir. 2012)*. The Federal Rules of Civil Procedure require only that a complaint provide the defendant with "fair notice of what the * * * claim is and the grounds upon which it rests." *Erickson v. Pardus, 551 U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)* (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. The Supreme Court has described this notice-pleading standard as requiring a complaint to "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 570*). While factual allegations must be accepted as true, legal conclusions may not be considered. *Id.*

HN2[] The pleading standard under *Federal Rule of Civil Procedure 8(a)*, as applied in the antitrust context, "do[es] not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A plaintiff must plead facts that "raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id. at 556* ("And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" (citation omitted)); *In re Text Messaging Antitrust Litig., 630 F.3d 622, 629 (7th Cir. 2010)* ("The fact **[**14]** that the allegations undergirding a claim could be true is no longer enough to save a complaint from being dismissed; the complaint must establish a nonnegligible probability that the claim is valid; but the probability need not be as great as such terms as 'preponderance of the evidence' connote.").

HN3[] In addition to meeting the *Rule 8(a)* requirements, fraud-based claims brought under the False Claims Act—an anti-fraud statute—are subject to the heightened pleading standard of *Rule 9(b)*. *United States ex rel. Gross v. Aids Research Alliance-Chicago, 415 F.3d 601, 604 (7th Cir. 2005)*. *Rule 9(b)* says that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Fed. R. Civ. P. 9(b)*. "While the precise level of particularity required under *Rule 9(b)* depends upon the facts of the case, the pleading 'ordinarily requires describing the who, what, when, where, and how of the fraud.'" *Camasta v. Jos. A. Bank Clothiers, Inc., 761 F.3d 732, 737 (7th Cir. 2014)* (quoting *AnchorBank, FSB v. Hofer, 649 F.3d 610, 615 (7th Cir. 2011))*.

III. Analysis

A. False Claims Act Claims

Relator alleges that Defendants' conduct surrounding (a) the 2008 and 2010 CCHHS radiopharmaceutical contracts and (b) the 2011 CCHHS radiopharmaceutical contract violated both the federal False Claims Act ("FCA") and ***HN4***[] the Illinois Whistleblower Reward and Protection **[**15]** Act ("IWRPA"), which is identical to the federal false-claims statute except with respect to which governmental entity served as the target for the fraud (*i.e.*, federal or state). Because courts generally apply the same **[*913]** pleading standard for both federal and state FCA claims, see, *e.g.*, *United States ex rel. Upton v. Family Health Network, Inc., 900 F. Supp. 2d 821, 828 (N.D. Ill. 2012)*; *United States ex rel. Goldberg v. Rush Univ. Med. Ctr., 929 F. Supp. 2d 807, 816 (N.D. Ill. 2013)*, the Court will assess Relator's federal and state claims simultaneously.

HN5[] The False Claims Act and IWRPA impose liability on any person who:

> (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
> (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
> (C) conspires to commit a violation of subparagraph (A) [or] (B) * * *.

31 U.S.C. § 3729(a)(1)(A)-(C); *740 Ill. Comp. Stat. 175/3(a)(1)(A)-(C)*; see also *United States ex rel. Yannacopoulos v. Gen. Dynamics, 652 F.3d 818, 822 (7th Cir. 2011)*; *United States ex rel. Crews v. NCS Healthcare of Ill., Inc., 460 F.3d 853, 856 (7th Cir. 2006)*.

Relator's theory for liability under the FCA and IWRPA is that Defendants' fraudulently induced CCHHS to enter into the 2008, 2010, and 2011 radiopharmaceutical contracts by making contractual promises without intending to perform them, and thus, while the individual claims for payment on those contracts were not themselves false, they were predicated on the fraudulently-induced underlying contracts, thus bringing them within the sphere of prohibited **[**16]** claims under the FCA statutes (*i.e.*, a fraudulent-inducement theory of liability). Each of the five

Defendants seeks dismissal of these claims on multiple grounds, many of which overlap. For simplicity, the Court will address Defendants' arguments relating to the 2008 and 2010 contracts first, followed by Defendants' arguments related to the 2011 contract.

1. The 2008 and 2010 Contracts

a. False Statement

The most prevalent objection to Relator's FCA claims regarding the 2008 and 2010 CCHHS contracts is that Relator failed to identify any claim for payment that was actually *false*. In other words, Defendants focus on the actual invoices that Sami sent to CCHHS seeking payment for the radiopharmaceuticals that were provided (by Covidien, as it turned out) under the 2008 and 2010 contracts, and argue that Relator did not (and cannot) allege that any of those individual invoices was false. Relator counters by arguing that this approach is too myopic and ignores the fact that Sami bid on these contracts to provide radiopharmaceuticals knowing that it was in no way fit to do so; instead, Sami served as a paradigmatic middle-man. Although Covidien supplied the radiopharmaceuticals directly to **[**17]** CCHHS, Covidien and CCHHS (with help from Defendants Giba and Trepashko) filtered the paperwork through Sami so that CCHHS could reap the benefits of contracting with a minority-owned business. The question, then, is whether Sami's misrepresentations in obtaining the 2008 and 2010 contracts pollute its subsequent invoices so as to transform those invoices into false claims under the FCA. See, *e.g.*, *United States ex rel. Marcus v. Hess, 317 U.S. 537, 543-44, 63 S. Ct. 379, 87 L. Ed. 443 (1943)* ("This fraud did not spend itself with the execution of the contract. Its taint entered into every swollen [invoice] which was the basic cause for payment of every dollar paid by the [government] * * *. The initial fraudulent action and every step thereafter taken, pressed ever to the ultimate goal—payment of government money to persons who had caused it **[*914]** to be defrauded."); S. Rep. No. 99-345, at 9 (1986), reprinted in 1986 U.S.C.C.A.N. at 5226, 5274 ("**HN6**[] [E]ach and every claim submitted under a contract, loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct * * * constitutes a false claim.").

HN7[] Where a relator argues that a defendant's false claims were predicated on a fraudulently induced contract, in order to survive **[**18]** a motion to dismiss, the relator need only "provide[] a plausible basis for believing that the defendant entered into a government contract with the intent not to perform or with the knowledge that it could not preform as promised." *United States ex rel. Wildhirt v. AARS Forever, Inc., 2011 U.S. Dist. LEXIS 127735, 2011 WL 5373985, at *1 (N.D. Ill. Nov. 4, 2011)* (citing *United States ex rel. Lusby v. Rolls-Royce Corp., 570 F.3d 849, 853-54 (7th Cir. 2009)* ("Simple breach of contract is not fraud, but making a promise while planning not to keep it *is* fraud.")); see also *United States ex rel. Main v. Oakland City Univ., 426 F.3d 914, 916 (7th Cir. 2005)* ("If a false statement is integral to a causal chain leading to payment, it is irrelevant how the federal bureaucracy has apportioned the statements among layers of paperwork."); *United States ex rel. Schwedt v. Planning Research Corp., 59 F.3d 196, 199, 313 U.S. App. D.C. 200 (D.C. Cir. 1995)* (suggesting that an FCA claim based on misrepresentations regarding the defendant's ability to perform the terms of the contract would be actionable). This approach comports with the Supreme Court's instruction that the False Claims Act be construed broadly so as "to reach all types of fraud, without qualification, that might result in financial loss to the Government[;][4] * * * the Court has consistently refused to accept a rigid, restrictive reading" of the act. *United States v. Neifert-White Co., 390 U.S. 228, 232 (1968)*; *Cook Cnty., Ill. v. United States ex rel. Chandler, 538 U.S. 119, 129, 123 S. Ct. 1239, 155 L. Ed. 2d 247 (2003)* (discussing the legislative history of the FCA and its focus on protecting the federal fisc).

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[4] Exactly how, or if, Defendants' fraudulent **[**19]** inducement resulted in a financial loss to the government is unclear from Relator's complaint. But "whether harm to the public fisc is an essential element of a *qui tam* action" is unclear, as the Supreme Court failed to address that issue after granting certiorari on that very question. See *Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939, 945, 117 S. Ct. 1871, 138 L. Ed. 2d 135 (1997)*. Regardless, Defendants did not raise this issue, and so the Court need not resolve it here.

Here, Relator alleges that Sami falsely represented to CCHHS that it would store and provide radiopharmaceuticals in accordance with the terms of the contract—knowing that Covidien would actually be the one performing Sami's contractual obligations—thereby fraudulently inducing CCHHS into contracting with Sami. Relator claims that Sami was simply a "pass-through" entity that did not perform any "commercially useful functions" but nonetheless received a cut of the contract funds for its middle-man function. Relator does not allege that any of Sami's actual invoices to CCHHS were fraudulent, but that those invoices were tainted by the underlying fraudulent inducement. This is sufficient to state an FCA claim under a fraudulent-inducement theory.[5] **[*915]** See, *e.g.*, *United States ex rel. Longhi v. Lithium Power Techs., Inc., 575 F.3d 458, 468 (5th Cir. 2009)* ("Under a fraudulent inducement theory, although **[**20]** the Defendants' subsequent claims for payment made under the contract were not literally false, [because] they derived from the original fraudulent misrepresentation [in the grant proposals], they, too, became actionable false claims." (alterations in original)).

Expanding on his fraudulent-inducement theory of liability, Relator describes several additional misrepresentations that Sami (with the help of Defendants) made to the government knowing at the time that their statements were false: (1) that Sami promised in the 2008 contract to spend $625,000.00 of the contract with M/WBEs despite having no intention to do so, (2) that Sami promised in the 2010 contract that its earnings under the contract would satisfy the county's M/WBE ordinance (which requires the entity to perform a "commercially useful function"),[6] and (3) that Sami obtained both the 2008 and 2010 the contracts through bid-rigging, which is a form of fraudulent inducement.[7] These allegations also serve as potential grounds for FCA liability under Relator's fraudulent-inducement theory. See, *e.g.*, *United States ex rel. Grenadyor v. Ukrainian Vill. Pharmacy, Inc., 772 F.3d 1102, (7th Cir. 2014)* (noting that "***HN8***[] [m]aking a false promise in order to obtains something of value is fraud, and **[**22]** can be the basis of a claim under the False Claims Act," and emphasizing the need for a relator to show that the defendant knew that the promise was false when making it (internal citation omitted)).

b. Materiality, Reliance, Causation, and Inducement

Defendants volley a number of additional attacks on Relator's false-claims allegations, intertwining arguments **[**23]** that invoke the somewhat-related issues of materiality, reliance, causation, and inducement. Starting with materiality, ***HN9***[] a material **[*916]** statement (in the context of an FCA claim) is one that has the

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[5] Defendants pose somewhat of a straw man argument when they argue in response that "a mere breach of contract does not give rise to liability under the False Claims Act." *United States ex rel. Yannacopoulos v. Gen. Dynamics, 652 F.3d 818, 824 (7th Cir. 2011)* ("If the breaching party falsely claims to be in compliance with the contract to obtain payment, however, there may be an actionable false claim."). This principle exists outside of the fraud-in-the-inducement cases, and instead applies where a party misrepresents to the government that it is in compliance with a statute, regulation, or contract in order to induce a government benefit. These so-called "false certification" cases turn on the extent of the breach and whether the certification of compliance was a prerequisite to government payment, such that "minor technical regulatory violations do not make a claim 'false' for purposes of the FCA." *United States ex rel. Gross v. AIDS Research Alliance-Chicago, 415 F.3d 601, 604 (7th Cir. 2005)*. But a mere breach of contract (or noncompliance with a regulation or statute) is different in kind from a fraudulently **[**21]** induced contract, where at the outset a contracting party has no intention of complying with its contractual obligations. Additionally, Relator confirmed that he "is not pursuing a theory [of liability] based on false certifications, whether such certifications are express or implied." [110, at 10 n.5.]

[6] Cook County's M/WBE ordinance allows an M/WBE to function as a broker, which is essentially the role that Relator claims Sami filled. But using an M/WBE as a broker only entitles the user to a credit equal to 10 percent of the value of the goods that the M/WBE brokers, not the 100 percent that Sami allegedly represented. See Cook County Code § 34-281.

[7] See *Harrison, 176 F.3d at 787-88* (noting that, based on the language in the Supreme Court case of *Marcus v. Hess*, "courts have found False Claims Act violations in [various] bid-rigging situations"); *United States v. CFW Const. Co., Inc., 649 F. Supp. 616, 618 (D.S.C. 1986)* ("The conspiracy to rig bids on two federal funded * * * treatment projects falls within the proscription of [*31 U.S.C. § 3729(b)(1)(C)*]. In addition, the claims for payment submitted to the United States under the rigged contract that resulted from the conspiracy are false claims subjecting them to liability under [*31 U.S.C. § 3729(b)(1)(A)*]." (internal citations omitted)).

potential to influence the government's decision to pay or approve a false claim. See *Yannacopoulos, 652 F.3d at 828*. But under a fraudulent-inducement theory, Relator must show not only that Defendants' misrepresentations had *the potential* to induce government action, but actually *did* induce (or cause) the government to act, thus invoking the legal principles of causation, reliance, and inducement.[8] See, *e.g., Marcus, 317 U.S. at 543-44*; *United States ex rel. Thomas v. Siemens AG, 991 F. Supp. 2d 540, 569-71 (E.D. Pa. 2014)* ("In essence, the essential element of inducement or reliance is one of causation."). At the pleading stage, Relator's allegations of materiality and inducement need only be plausible. *Lusby, 570 F.3d at 854*.

Defendants argue that dismissal of Relator's **[**24]** FCA claims is appropriate because Relator failed to plead that CCHHS actually relied on any false statement in awarding the 2008 and 2010 contracts to Sami (or, put another way, that Defendants' statements did not induce—or cause—CCHHS to contract with Sami). Essentially Defendants' argument is that Dr. Trepashko knew about Sami's pass-through role and the other alleged misrepresentations and, acting on behalf of CCHHS, he contracted with Sami anyway. But Defendants fail to appreciate a major factual component of Relator's complaint: that CCHHS's decisionmaker (Dr. Trepashko) was part of the vertical bid-rigging conspiracy. Accordingly, it is no surprise that Dr. Trepashko approved of the middle-man set-up despite "kn[owing] full well how the arrangement would work in practice" because, according to Relator, he orchestrated it. [See 120, at 9.]

Regardless, the Court's focus at this stage is on Relator's allegations, and Relator clearly alleges that Defendants' false statements were material, were intended to induce CCHHS into contracting with Sami, and actually induced CCHHS into contracting with Sami. [Am. Compl., 88, ¶¶ 43, 49.] In addition to these high-level allegations, Relator sets forth in **[**25]** detail each material misrepresentation, and explains how each misrepresentation was a calculated effort on the part of the conspiracy to ensure that CCHHS would select Sami as the recipient of the radiopharmaceutical contracts. Relator's allegations are plausible because if these misrepresentations were not necessary to induce CCHHS into selecting Sami, why would Dr. Trepashko, the purported decisionmaker, have pushed for their inclusion?

In a related argument, Defendant Covidien claims that Relator failed to plead "that any statement or claim by Covidien *caused* CCHHS to make a payment it would not have otherwise made," arguing that this precludes Relator from meeting its burden to show that "if [Defendants'] statement or claim had not been 'false,' the government would not have issued payment." [97, at 18.] Relator did not respond directly to this argument, nor did Covidien reraise it in their reply brief. This argument was likely mooted by Relator's focus on his fraudulent-inducement theory of liability, wherein Relator alleges that CCHHS wouldn't have made *any* payments to Defendants had it not been **[*917]** fraudulently induced into entering the Sami contracts in the first place, meaning **[**26]** that Defendants' statements made to induce the contracts did in fact cause CCHHS to make payments it would not have otherwise made. Whether Covidien abandoned this argument or not, it is not an appropriate ground for dismissal.

c. Governmental Funding

HN10[] To plead FCA and IWRPA claims, Relator must show that Defendants presented fraudulent claims *to the government* in order to obtain governmental funding; here, both federal and state. Relator alleged the following:

> CCHHS['s] annual revenues exceed $900 million. The majority of that revenue comes from payments for services, including payments from the [federal] Medicare and Medicaid programs. Approximately 39 percent of CCHHS's patient revenue comes from Medicare and Medicaid. Because CCHHS serves all patients, it has a substantial shortfall each year between its expenses and the revenue generated by patient care. This shortfall

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[8] Even though materiality and reliance/inducement are separate inquiries, because the latter is essentially a more demanding version of the former, and because Defendants' arguments related to both issues are based on the same set of facts, the Court will address these arguments simultaneously. See, *e.g., United States ex rel. Thomas v. Siemens AG, 991 F. Supp. 2d 540, 569-71 (E.D. Pa. 2014)* (discussing the difference between the materiality and reliance/inducement standards).

> is made up by the County directly. In 2011, for example, the County provided CCHHS approximately $368 million to make up for its shortfall.

[Am. Compl., 88, ¶ 22.] Relator also cites to specific invoices, including dates and amounts, that Sami submitted to the government for payment based on services rendered under the **[**27]** fraudulently-induced contracts. [*Id.*, ¶¶ 44, 50.]

To be clear, Relator does not allege that Sami submitted claims directly to the federal government.[9] Instead, Relator argues that Sami presented its fraudulent claims to an officer or employee of the government (*i.e.*, CCHHS),[10] and that at least some portion of CCHHS's payments to Sami were *reimbursed* by federal Medicare and Medicaid programs (or, regarding Relator's IWRPA claim, by funding from Cook County). "***HN11***[] Under Medicaid, the state pays health care providers for services rendered to Medicaid recipients, and it is reimbursed for a significant portion of those funds by the federal government after demonstrating compliance with a number of federal regulations." *United States ex rel. Tyson v. Amerigroup Ill., Inc., 2005 U.S. Dist. LEXIS 24032, 2005 WL 2667207, at *2 (N.D. Ill. Oct. 17, 2005)* (denying a motion to dismiss on presentment grounds where relator alleged that defendants submitted fraudulent claims to the Illinois Department of Public Aid, which was reimbursed by federal Medicare and Medicaid programs); *United States ex rel. West v. Ortho-McNeil Pharm., Inc., 2007 U.S. Dist. LEXIS 52666, 2007 WL 2091185, at *2 (N.D. Ill. July 20, 2007)* ("[C]laims submitted to state Medicaid agencies are considered claims presented to the federal government and may give rise to liability under the FCA.").

Relator relies on ***HN12***[] the definition of the word "claim" as defined by the FCA to support his "reimbursement" theory, which includes, in part:

> any request or demand * * * for money * * * presented to an officer, employee, or agent of the United States; or is made to a contractor, grantee, or other recipient, if the money * * * is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United **[*918]** States Government provides or has provided any portion of the money * * * requested or demanded; *or will reimburse such contractor, grantee, or other recipient for any portion of the money * * * requested or demanded*.

31 U.S.C. § 3729(b)(2)(A) (emphasis added). The pre-2009 version of the statute is somewhat narrower, but the relevant language is still the same:

> any request or demand * * * for money * * * which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money * * * demanded, *or if* ***[**29]*** *the Government will reimburse such contractor, grantee, or other recipient for any portion of the money * * * which is requested or demanded*.

31 U.S.C. § 3729(c) (pre-2009 version) (emphasis added).[11]

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[9] Defendants do not object to Relator's allegations that Sami submitted claims to the Illinois government.

[10] A private **[**28]** entity that "serve[s] a public function" in the administration of the Medicare program is "an 'officer or employee' of the United States." *Bodimetric Health Servs., Inc. v. Aetna Life & Cas., 903 F.2d 480, 487-88 (7th Cir. 1990)*. As applied here, CCHHS is thus an officer, employee, or agent of the United States for FCA purposes.

[11] As mentioned above, the allegedly fraudulent activity here is likely governed by both the current FCA statute (amended in 2009), and the pre-amendment statute. In briefing their respective motions to dismiss, the parties failed to commit to a particular version of the statute, citing cases that apply both versions and implying that there are no relevant differences here (at least at this stage). One distinction worth noting, however, is Congress's amending of the definition of "claim," which was meant to "clarify and correct erroneous interpretations of the law that were decided in *Allison Engine Co. v. United States ex rel. Sanders, 553 U.S. 662, 128 S.Ct. 2123, 170 L. Ed. 2d 1030 (2008)*, and *United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488, 363 U.S. App. D.C. 180 (D.C. Cir. 2004)*." S. Rep. No. 111-10, at 10-11 (2009), reprinted in 2009 U.S.C.C.A.N. 430, 438. The goal of the amendment was to bring within the proscription of the FCA those who submit false claims to non-governmental entities that are funded by or reimbursed by the federal government. See, *e.g., id.* at 11 (clarifying that the amended FCA

Defendants argue that Relator failed to adequately plead that the money CCHHS used to pay for radiopharmaceuticals actually came from (or was reimbursed by) the government. The Court disagrees. Regarding federal funding, Relator alleges that a "majority" of CCHHS's $900 million annual revenue (*i.e.*, more than $450 million) comes from payments for patient care, and that 39 percent of patient revenue comes from Medicare and Medicaid. That means at least $175 million (or 19.5 percent) of CCHHS's annual revenue is paid by (or reimbursed by) federal funding. While Relator does not say specifically what portion (if any) of CCHHS's approximately $2 million annual budget on radiopharmaceuticals is reimbursed by Medicare and Medicaid, Relator provides enough information about CCHHS's relationship to the federal government to **[**31]** allow an inference that at least some of CCHHS's radiopharmaceutical expenditures were reimbursed by federal funding. See *Corley v. Rosewood Care Ctr., Inc., 142 F.3d 1041, 1051 (7th Cir. 1998)* ("***HN13***[] [T]he particularity requirement of *Rule 9(b)* must be relaxed where the plaintiff lacks access to all facts necessary to detail his claim.").[12] Furthermore, Relator is not required at this stage to provide individual patient information to show which radiopharmaceutical prescriptions were covered **[*919]** by Medicare or Medicaid. See *Goldberg v. Rush Univ. Med. Ctr., 929 F. Supp. 2d 807, 817 (N.D. Ill. 2013)* ("Whether claims were actually submitted to Medicare is information that is inaccessible to Relators."); see also *United States ex rel. Geschrey v. Generations Healthcare, LLC, 922 F. Supp. 2d 695, 705 (N.D. Ill. 2012)* ("***HN14***[] In this circuit, a relator does not need to have actually witnessed the 'specific request for payment' or to have had access to paperwork submitted to the government." (citing *Lusby, 570 F.3d at 854* (explaining that it is not "essential for a relator to produce the invoices (and accompanying representations) at the outset of the suit"))). Accordingly, Relator has met his burden.

d. *Rule 9(b)*

Defendants also seek dismissal of Relator's FCA and IWRPA claims based on a purported failure to state those claims **[**32]** with the requisite particularity required under *Rule 9(b)*. The familiar paradigm for assessing the sufficiency of a pleading is to determine whether the relator spelled out the "who, what, when, where, and how of the fraud.'" *Camasta, 761 F.3d at 737*. Relator's amended complaint accomplishes this feat in spades. The "who" in Relator's story are the conspiring Defendants, who engaged in a vertical bid-rigging scheme to win CCHHS contracts for radiopharmaceuticals (that's the "what"). When, where, and how? At various times and locations preceding the 2008 CCHHS contract bid the co-conspirators met (*e.g.*, at Faisel Sami's home, and at a nearby restaurant [Am. Compl. 88, ¶¶ 29-30]), at which time CCHHS insider Dr. Trepashko (a) told Covidien that it wanted to use Sami as a pass-through (knowing that Sami was not qualified to carry out the terms of the contract) and instructed Covidien's representative, Mr. Giba, to work with Sami, (b) provided Mr. Giba with insider bidding information, and (c) doctored Sami's bid to ensure that Sami would win the contract, which it did. [Am. Compl. 88, ¶¶ 25-31.] Relator alleges that Defendants duplicated their hoax by submitting a similarly fraudulent bid to retain the CCHHS contract **[**33]** in December of 2009.[13] [Am. Compl. 88, ¶ 46.] Relator's allegations exceed the particularity requirements of *Rule 9(b)*.

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reaches "all false claims submitted to State administered Medicaid programs"). Importantly, though, even pre-amendment, **[**30]** courts regularly interpreted the FCA to apply to false claims made to Medicare and Medicaid providers. See, *e.g.*, *United States ex rel. Tyson v. Amerigroup Ill., Inc., 2005 U.S. Dist. LEXIS 24032, 2005 WL 2667207, at *2 (N.D. Ill. Oct. 17, 2005)* ("Indeed, several courts have highlighted the substantial role played by the federal government in its funding and enforcement of Medicare and Medicaid programs, and have found frauds upon such programs to fall squarely within the protections of the FCA.").

[12] Defendants' presentment argument can be construed as either a Rule 8 or a *Rule 9(b)* issue. The Court addresses both arguments here, and thus will not revisit this issue in the *Rule 9(b)* section.

[13] Defendants argue that Relator should be required to plead the who, what, where, when, and why regarding the fraud leading up to the 2010 contract, as Relator did in connection with the 2008 contract. But this misconstrues Relator's allegations. Relator claims that Defendants' fraudulent scheme arose prior to the 2008 contract, and Defendants merely duplicated (or continued) that scheme in obtaining the 2010 contract. Relator distinguishes these contracts with the 2011 contract, where CCHHS implemented a new bidding system, thus requiring Defendants to devise and implement a new fraudulent scheme to win that contract (and thus requiring Relator to set forth with particularity the details of that new scheme).

Defendants also argue—responding to Relator's allegations that Covidien rewarded Dr. Trepashko's role in the conspiracy by wining and dining him and providing him with lucrative speaking engagements [see Am. Compl. 88, ¶ 32]—that Relator failed to allege with sufficient particularity any violation of the federal Anti-Kickback Statute. [See 97, at 21.] This argument was effectively **[**34]** mooted by Relator's endorsement of his fraudulent-inducement theory of liability. Either way, the Court agrees that Relator has failed to state with particularity that Dr. Trepashko violated any anti-kickback statutes, but the Court interprets Relator's allegations regarding kickbacks [see Am. Compl. 88, ¶ 32] as rhetorical information to explain why Dr. Trepashko elected to devise and participate in this scheme.

[*920] e. Co-Conspirator Liability

While it's clear that Relator has stated a claim against Sami under his fraud-in-the-inducement theory, the next question is whether Relator's theory extends to Covidien, Mr. Giba, and Dr. Trepashko. Relator advances two arguments to bring these remaining Defendants into the fold: (1) that they are directly liable for causing the submission of the false claims and statements, and (2) that they are liable as co-conspirators under *31 U.S.C. § 3729(a)(1)(C)* and *740 ILCS 175/3(a)(1)(C)*.[14]

As to the former theory, Relator contends that FCA liability extends to those persons or entities that knowingly assisted in the submission of a false claim to the government. See, *e.g., Marcus, 317 U.S. at 544-45* ("These [FCA] provisions, considered together, indicate a purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud * * *."); *United States ex rel. McCready v. Columbia/HCA Healthcare Corp., 251 F. Supp. 2d 114, 116 (D.D.C. 2003)* ("The False Claims **[**36]** Act extends beyond the person making a false claim to one who engages in a fraudulent course of conduct that induces payment by the government."); *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah, 472 F.3d 702, 715 (10th Cir. 2006)* (finding direct FCA liability for those who took critical actions in furtherance of the fraud); *United States ex rel. Tran v. Computer Sciences Corp., 2014 U.S. Dist. LEXIS 90757, 2014 WL 2989948, at *14-15 (D.D.C. July 3, 2014)* (citing cases); *United States ex rel. Smith v. Yale Univ., 415 F. Supp. 2d 58, 90 (D. Conn. 2006)* (holding that a relator must allege "knowing assistance" or "cooperation" to survive a motion to dismiss); *United States ex rel. Schmidt v. Zimmer, Inc., 386 F.3d 235, 243 (3d Cir. 2004)* (applying the "knowingly assisted" standard as articulated in *Marcus*).

Because the "false claims" here are actually predicated on the underlying fraudulent inducement of the contracts, the Court looks to whether Relator alleged that each Defendant played a role in the causal chain leading up to the actual inducement, which they all did. Specifically, Dr. Trepashko was the driving force behind the scheme, providing insider information to Covidien and Sami about the bidding process (and allegedly received kickbacks in return); Covidien and Mr. Giba worked with Dr. Trepashko and Sami to prepare the fraudulent bids; and Sami submitted the bids (and the invoices derived from those bids). This is more than a simple conspiracy, as each Defendant played a specific role in forwarding the allegedly fraudulent bids, and their actions **[**37]** were substantial factors in causing Sami's submission of the false bid and the subsequent false claims.

As to the latter theory, Defendants argue that Relator "fails to plead **[*921]** any facts whatsoever supporting an actionable conspiracy." [97, at 23.] This is a bold (and inaccurate) bit of hyperbole. ***HN15***[] The FCA confers

[14] There is a question as to whether Relator's claims related to the 2008 and 2010 CCHHS contracts apply to Defendant Triad Isotopes. In his Amended Complaint, Relator alleges in Counts I and II that *all* Defendants violated the FCA and the IWRPA with regards to the 2008 and 2010 CCHHS contracts. However, **[**35]** Relator also alleges that CCHHS awarded the later of the two contracts (*i.e.*, the 2010 contract) to Sami on February 19, 2010, which was four months before Defendant Triad Isotopes completed its acquisition of Covidien's radiopharmacy business. [Am. Compl., 88, ¶¶ 17, 48.] Relator does not allege that Triad Isotopes participated in any of the allegedly fraudulent bidding practices related to these contracts, or that Triad Isotopes assumed any preexisting liabilities of Covidien. In responding to Triad Isotopes' motion to dismiss, Relator agreed to dismiss Triad Isotopes from Counts I and II, but requested that the dismissal be without prejudice in the event that discovery reveals a basis for liability. The Court agrees and dismisses Defendant Triad Isotopes from Counts I and II without prejudice.

liability on those who "conspire to commit a violation" of the FCA. *31 U.S.C. § 3729(C)*; see also *31 U.S.C. § 3729(a)(3) (pre-2009)* (conferring liability on those who "conspire[] to defraud the Government by getting a false or fraudulent claim allowed or paid"). Arguably this is a lower threshold that the direct-liability showing just discussed, pursuant to which Relator had to plead that each Defendant "knowingly assisted" in the furtherance of the fraudulent scheme. But***HN16***[] unique to a conspiracy claim, Relator must establish that the conspirators "agreed that the false record or statement would have a material effect on the Government's decision to pay the false or fraudulent claim." *Allison Engine Co., Inc. v. United States ex rel. Sanders, 553 U.S. 662, 673, 128 S. Ct. 2123, 170 L. Ed. 2d 1030 (2008)*. The Court has covered this point already, noting that the thrust of the scheme was to construct a collection of knowing misrepresentations with the sole purpose of procuring the CCHHS radiopharmaceutical contracts. Relator alleged that each misrepresentation **[**38]** was material, and this allegation makes sense, for why else would the parties include the misrepresentations in the bid but-for their impact on winning the bid? Whether any of these allegations is true remains to be seen, but Relator has more than adequately pled a conspiracy among these Defendants.

These allegations are also sufficiently particular so as to satisfy the requirements of *Rule 9(b)*. See *Borsellino v. Goldman Sachs Grp., Inc., 477 F.3d 502, 507 (7th Cir. 2007)* (noting that ***HN17***[] claims premised on a course of fraudulent conduct are subject to *Rule 9(b)*'s particularity requirement). Unlike the relator in *Goldberg v. Rush University Medical Center*, Relator here provided more than conclusory allegations of conspiracy, going beyond just the "who" and the "what" by referencing actual instances where the alleged co-conspirators met to devise their scheme (*e.g.*, at Faisel Sami's home, and at a nearby restaurant [Am. Compl. 88, ¶¶ 29-30]). *Goldberg, 929 F. Supp. 2d at 825*. Perhaps most importantly, Relator alleges in detail the "how" of the story, describing the various misrepresentations that the conspirators ginned up to put Sami in the pole position for securing the contracts. Cognizant of the "great harm to the reputation of a business" that a fraud lawsuit can bring, see *Borsellino v. Goldman Sachs Grp., Inc., 477 F.3d 502, 507 (7th Cir. 2007)* (citation omitted), the Court **[**39]** nonetheless finds that Relator has engaged in sufficient pre-complaint investigation so as to present a particularized and plausible complaint adequate to allow Relator to proceed beyond the motion-to-dismiss stage.

2. The 2011 Contract

The Court addresses Relator's FCA and IWRPA claims regarding the 2011 CCHHS contract (*i.e.*, Counts III and IV in the amended complaint) separately based on several factual distinctions that distinguish the 2011 contract from the 2008 and 2010 contracts. First, because Triad Isotopes had acquired Covidien's radiopharmaceutical business by that time, Relator dropped Covidien from Counts III and IV and replaced it with Triad Isotopes. In addition, CCHHS implemented a new electronic bidding process for the 2011 contract, requiring Defendants to tweak their tactics in order to continue their conspiracy (including dropping Sami as part of the conspiracy), and consequently Relator dropped Sami from Counts III and IV. More specifically, Relator alleges that Dr. Trepashko and Mr. Giba (a Triad Isotopes employee post-acquisition) rigged **[*922]** the bid form for the 2011 contract so that it included high quantities of expensive drugs that CCHHS was unlikely to use. To complete **[**40]** the ruse, Triad Isotopes submitted impossibly low bids for these expensive drugs (while submitting artificially high prices on the more common drugs), giving Triad Isotopes the lowest overall bid and thus allowing it to win the contract. Relator alleges that absent this fraudulent scheme, Hot Shots would have been the low bidder and thus would have won the 2011 CCHHS contract and saved CCHHS at least $300,000.

While the facts surrounding the 2011 contract differ from the 2008 and 2010 schemes, the legal principles governing the associated FCA and IWRPA claims are the same. Relator again pursues liability under a fraudulent-inducement theory, arguing that because the 2011 contract was fraudulently induced (through the presentation of artificially low numbers pursuant to the vertical bid-rigging scheme between Dr. Trepashko, Mr. Giba, and Triad Isotopes), all subsequent invoices submitted from Triad Isotopes to CCHHS were tainted with that fraud and therefore qualify as false statements made to the government for payment. Relator's presentment argument is also the same, in that CCHHS continued to receive federal funding from Medicare and Medicaid and state funding from Cook County. As **[**41]** such, any duplicate arguments that Triad Isotopes makes regarding these issues fail for the same reasons that Defendants' arguments failed relating to the 2008 and 2010 contracts.

Triad Isotopes does advance two unique theories for dismissal of Counts III and IV, neither of which is persuasive. First, Triad Isotopes argues that Relator failed to provide examples of any allegedly false claims. [100, at 14.] But (a) based on a fraudulent-inducement theory, *all* invoices submitted pursuant to the underlying fraudulent contract are false claims, and (b) Relator need not provide this information anyway. See *Lusby, 570 F.3d at 854* (explaining that it is not "essential for a relator to produce the invoices (and accompanying representations) at the outset of the suit"). Second, Triad Isotopes argues that Relator failed to allege an actionable bid-rigging scheme that could give rise to liability under the FCA or IWRPA. But whether Defendants' conduct surrounding the 2011 contract is more accurately described as a government agency exercising its discretion or a conspiracy to defraud the government is a fact issue that is off-limits at this stage in the litigation. Relator *alleged* a plausible bid-rigging scheme (with **[**42]** particularity), and that is all that is required to defeat a motion to dismiss. See, *e.g., United States ex rel. McGee v. IBM Corp., 81 F. Supp. 3d 643, 2015 U.S. Dist. LEXIS 22972, 2015 WL 877458, at *12 (N.D. Ill. Feb. 26, 2015)* ("***HN18***[] [T]he Seventh Circuit has recognized bid-rigging as a basis for an FCA violation." (citing *United States v. Azzarelli Const. Co., 647 F.2d 757 (7th Cir. 1981)))*; *2015 U.S. Dist. LEXIS 22972, 2015 WL 877458 at *11* ("***HN19***[] Courts in this district have recognized false inducement as a basis for alleging an FCA violation." (citing *United States ex rel. Danielides v. Northrop Grumman Sys. Corp., 2014 U.S. Dist. LEXIS 150855, 2014 WL 5420271, at *5 (N.D. Ill. Oct. 23, 2014)))*.

Finally, Dr. Trepashko argues that (a) Relator failed to plead that Dr. Trepashko had any personal involvement in the submission of false claims to the government such that he should not be held directly liable for any FCA violations, and (b) Relator failed to plead that Dr. Trepashko played a role in any conspiracy to defraud the government.[15] [95, at 13-16.] Dr. Trepashko's arguments fail for **[*923]** the same reasons that Defendants' similar arguments failed regarding the 2008 and 2010 contracts. In short, as to the former argument, Relator alleged that Dr. Trepashko knowingly assisted his co-Defendants in inducing CCHHS into contracting with Triad Isotopes (*i.e.*, knowingly assisting Triad Isotopes in furthering the fraud via his doctoring of the bid form), and that is sufficient to state a claim under *31 U.S.C. § 3729(a)(1)(A)* or *(B)*. To the latter argument, Relator provided a detailed account of the conspiracy surrounding the **[**43]** 2011 CCHHS contract, stating who was involved and exactly how they devised to rig the bidding process, including names of individuals who can allegedly corroborate these allegations, and the material misrepresentations that they concocted to ensure that Triad Isotopes won the contract. [See Am. Compl., 88, ¶¶ 60-64.] Relator sufficiently stated a claim of conspiracy amongst Triad Isotopes, Mr. Giba, and Dr. Trepashko regarding the 2011 CCHHS contract.

B. Antitrust Claims

HN20[] The Sherman Act exists to protect consumers from injury that results from anticompetitive behavior. See *Banks v. NCAA, 977 F.2d 1081, 1087 (7th Cir. 1992)*. The successful pleading of a claim under *§ 1* of the Sherman Act "requires proof of three elements: (1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in the relevant market; and (3) an accompanying injury." *Denny's Marina, Inc. v. Renfro Prods., Inc., 8 F.3d 1217, 1220 (7th Cir. 1993)*.

Regarding the second element,***HN21***[] where, as here, the alleged anticompetitive conduct does not amount to a *per se* violation of the Sherman Act, courts assess the defendants' conduct under the Rule of Reason analysis,[16] under which "the factfinder weighs all of the circumstances of a case in deciding whether **[**44]** a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Leegin, 551 U.S. at 885*; see also *FTC v. In. Fed'n of Dentists, 476 U.S. 447, 458, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)* ("'[The] test of legality [under the Rule of Reason] is whether the restraint imposed is such as merely regulates and perhaps

[15] Triad Isotopes and Mr. Giba do not object to Relator's conspiracy allegations.

[16] Defendants allege that the vertical bid-rigging allegation here should be analyzed under the Rule of Reason, which Plaintiff Hot Shots does not dispute. The Court agrees with Defendants. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 881, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)* ("***HN22***[] [V]ertical price restraints are to be judged by the rule of reason.").

thereby promotes competition or whether it is such as may suppress or even destroy competition.'" (quoting *Chi. Bd. of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918))*). The Rule of Reason "requires not only that the plaintiff allege and prove anticompetitive effects, but additionally, as with all antitrust claims, that the injury complained of be of a type that the antitrust laws were designed to guard against, and further that the antitrust violation be the direct cause of plaintiff's injury." *Havoco of Am., Ltd. v. Shell Oil Co., 626 F.2d 549, 556 (7th Cir. 1980)* (citations omitted). More specifically, a plaintiff must show that the defendants' conduct had an anticompetitive effect in a relevant market, and that the defendants have market power in that market. *Menasha Corp. v. News Am. Mktg. In-Store, Inc., 354 F.3d 661, 663 (7th Cir. 2004)*; see also *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107 (7th Cir. 1984)* ("[T]he plaintiff must allege, not only an injury to himself, but an injury to the market as well."). Finally, a plaintiff must also establish "antitrust **[*924]** standing" to raise an antitrust claim (*i.e.*, whether a party injured by an antitrust violation may recover under the antitrust laws), which is an inquiry **[**45]** separate and apart from whether a plaintiff has Article III standing. See *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* ("*ACG*").

In Counts V and VI of the amended complaint, Plaintiff Hot Shots alleges that Defendants Triad Isotopes, Mr. Giba, and Dr. Trepashko conspired to rig the bidding process for the 2011 CCHHS radiopharmaceutical contract to ensure that CCHHS awarded the contract to Triad Isotopes (and thus not to Hot Shots, who was the second-lowest bidder for the contract), in violation of state and federal antitrust laws. Defendants moved to dismiss Hot Shots' claims, arguing that (1) Hot Shots failed to allege harm in a relevant market as required under the Rule of Reason, (2) Hot Shots failed to plead an antitrust injury to support antitrust standing, (3) vertical bid-rigging conspiracies are *per se* invalid where the plaintiff was not the low bidder, and (4) Hot Shots lacks antitrust standing. The Court reviews each argument in turn.

1. Injury in a Relevant Market and [**46] Triad Isotopes' Market Power

HN23[] "The first requirement in every suit based on the Rule of Reason is market power, without which the practice cannot cause those injuries (lower output and the associated welfare losses) that matter under the federal antitrust laws." *Menasha, 354 F.3d at 663*.[17] Because the antitrust laws do "not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce," *Hunt v. Crumboch, 325 U.S. 821, 826, 65 S. Ct. 1545, 89 L. Ed. 1954 (1945)*, plaintiffs must allege that the anticompetitive conduct at issue actually impacted competition in a relevant market; "a loss by the plaintiff of a single contract with a single purchaser is simply not equivalent to a deleterious effect on the market." *Havoco, 626 F.2d at 558*. "Otherwise the mere fact that one party bid successfully against another party for a contract would be equivalent to an anticompetitive effect and would raise the specter of an antitrust action being used as a remedy for any tortious conduct during the course of the competition." *Id.* A plaintiff must also show that the defendant has market power in the relevant market, which means that "it can raise prices above a competitive level without losing its business." See *42nd Parallel North v. E Street Denim Co., 286 F.3d 401, 404 (7th Cir. 2002)*.***HN24***[] The plaintiff bears the burden to define the relevant market and **[**47]** to establish the defendants' market power. *Spectrum Sports v. McQuillan, 506 U.S. 447, 455, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*. If the plaintiff meets this burden, "the defendant can show that the restraint in question actually has a procompetitive effect on balance, while the plaintiff can dispute this claim or show that the restraint in question is not reasonably necessary to achieve the procompetitive objective." *Agnew, 683 F.3d at 335-36*.

The relevant market here, according to Hot Shots, is the Chicago-area marketplace for radiopharmaceuticals. Regarding **[*925]** the market impact of Defendants' allegedly anticompetitive behavior, Hot Shots argues that the lucrative 2011 CCHHS contract—covering $1.6 million in sales of radiopharmaceuticals—provided windfall profits to

[17] A relevant market is comprised of those "commodities reasonably interchangeable by consumers for the same purposes." *United States v. E.I. Du Pont de Nemours & Co., 351 U.S. 377, 395, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. "In making this determination, the trier must decide whether the product is unique or has close substitutes, as to which there are substantial cross-elasticities of demand." *Fishman v. Estate of Wirtz, 807 F.2d 520, 531 (7th Cir. 1986)*.

a single provider in the Chicago-area market (Triad Isotopes) whilst simultaneously locking out other market participants (Hot Shots and Cardinal Health), thereby dampening the competitiveness of the radiopharmaceutical market throughout Chicagoland. **[**48]** [See Am. Compl. 88, ¶ 95 ("Pursuant to their unlawful conspiracy, Defendants have reduced competition among providers of radiopharmaceutical services in the Chicago-area market by preventing legitimate low-cost bidders such as Plaintiff from competing equally for the CCHHS radiopharmaceutical contract and thereby depriving them of the opportunity to win the contract.").]

The Court is not persuaded. Simply put, Hot Shots cannot escape the Seventh Circuit's holding that "***HN25***[] a loss by the plaintiff of a single contract with a single purchaser is simply not equivalent to a deleterious effect on the market." *Havoco, 626 F.2d at 558*; see also *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1109 (7th Cir. 1984)* (noting that "it is the function of *§ 1* to compensate the unfortunate only when their demise is accompanied by a generalized injury to the market"). While Defendants' actions clearly had an anticompetitive effect, that effect extended only to a single (albeit substantial) contract. Hot Shots fails to explain how Defendants' actions with regards to the 2011 CCHHS contract impacted any other participants or any other contracts in the Chicagoland radiopharmaceutical market. Even under the generous *Rule 8(a)* notice-pleading standard, Hot Shots' complaint cannot be construed to allege a deleterious **[**49]** impact on the market. Instead, Hot Shots clearly states that Defendants' anticompetitive conduct affected only one contract: "Defendants have reduced competition in the Chicago-area market by preventing legitimate low-cost bidders such as Plaintiff from competing equally *for the CCHHS radiopharmaceutical contract."* [Am. Compl. 88, ¶ 95 (emphasis added).] The Seventh Circuit affirmed the dismissal of an antitrust claim under similar circumstances in *Havoco*, noting that while the complaint "detail[ed] a scenario of unsavory and reprehensible business practices," the plaintiff nonetheless failed to state a claim for relief under the Sherman Act. *Havoco, 626 F.2d at 559*. Such is the case here. While the bid-rigging allegations here are distasteful, Plaintiff fails to plead enough facts to plausibly explain how Defendants' conduct impacted the relevant market, thus putting Hot Shots' claim beyond the bounds of the Sherman Act.[18]

2. Antitrust Injury

HN26[] The concept of "antitrust injury" has both a ubiquitous and amorphous presence in antitrust jurisprudence, and can be found (1) as a *prima facie* element of Sherman Act claims, (2) as a factor under the Rule of Reason analysis, and (3) as a factor in the determining whether a plaintiff has "antitrust standing." See, *e.g., Denny's Marina, 8 F.3d at 1220* (listing **[*926]** "antitrust injury" as a necessary element of a Sherman Act claim); *Atl. Richfield Co. v. USA Petro. Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* (noting that a showing of "antitrust standing" is required in both *per se* and Rule of Reason cases); *Havoco, 626 F.2d at 556* (same in the Rule of Reason context); *AGC, 459 U.S. at 538* (listing antitrust injury as one of several nondispositive factors for assessing "antitrust standing"). But regardless of its contextual surroundings, the "antitrust injury" inquiry always remains relatively the same:

> [Plaintiffs] must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove antitrust injury, which is to **[**51]** say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations * * * would be likely to cause.

Brunswick Corp., 429 U.S. at 489 (quoting *Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 125, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969))*; see also *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391,*

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[18] Hot Shots does not explicitly plead that Triad Isotopes has market power in the Chicago-area radiopharmaceutical market, but Hot Shots does allege that Triad Isotopes obtained the 2011 CCHHS contract despite not having the lowest "actual" bid, implying that Triad Isotopes can "raise prices above a **[**50]** competitive level without losing its business." See *42nd Parallel North, 286 F.3d at 404*. Because Hot Shots failed to establish that Defendants' conduct impacted a relevant market, the Court need not decide whether Plaintiff met its burden to show that Triad Isotopes had market power in the relevant market.

395 (7th Cir. 1993); Kochert v. Greater Lafayette Health Servs., Inc., 463 F.3d 710, 716 (7th Cir. 2006) ("[A plaintiff] must demonstrate that her 'claimed injuries are 'of the type the antitrust laws were intended to prevent' and 'reflect the anticompetitive effect of either the violation or of anticompetitive acts made possible by the violation.''" (quoting Tri-Gen Inc. v. Int'l Union of Operating Eng'rs, Local 150, 433 F.3d 1024, 1031 (7th Cir. 2006))).

The Achilles' heel for most vertical bid-rigging conspiracies with regards to antitrust injury is the fact that the conspiracy actually *increases* competition such that plaintiffs' injuries are not of the type that the antitrust laws were meant to prevent. Such was the case in *James Cape & Sons*, where the defendants in a bid-rigging scheme had insider knowledge of their competitors' bids, allowing them to lower their bids to ensure victory, such that "their bid-rigging activities actually *increased*, rather than restricted, competition, albeit in **[**52]** an illegal manner." James Cape & Sons v. PCC Const., 453 F.3d 396, 399 (7th Cir. 2006). But Hot Shots doesn't have this problem. Instead, Hot Shots alleges that the conspirators rigged the RFP in such a way that Triad Isotopes was actually the highest bidder, even though on paper it appeared to be the lowest. Thus, the bid-rigging activities here genuinely did decrease competition (and increase prices to the consumer—here, CCHHS), meaning that Hot Shots' injury is related to CCHHS's injury, and those injuries are precisely the sort of injuries that the antitrust laws were meant to prevent. See, *e.g.,* Stamatakis Indus., Inc. v. King, 965 F.2d 469, 471 (7th Cir. 1992) (noting that to establish antitrust injury a plaintiff must show "that its loss comes from acts that reduce output *or raise prices to consumers*" (emphasis added)).

Somewhat relatedly, Defendants argue that Hot Shots failed to plead antitrust injury because its purported injury—*i.e.*, lost profits from its failure to secure the 2011 CCHHS contract—is not the type of injury that the antitrust laws were intended to prevent. See, *e.g.,* Brunswick, 429 U.S. at 488 ("The antitrust laws * * * were enacted for 'the protection of competition not competitors.'" (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))); Atl. Richfield Co., 495 U.S. at 342 ("The purpose of the **[*927]** antitrust injury requirement is * * * [to] ensure that the harm claimed by the plaintiff corresponds **[**53]** to the rationale for finding a violation of the antitrust laws in the first place * * *."); Ehredt Underground, Inc. v. Commonwealth Edison Co., 90 F.3d 238, 240 (7th Cir. 1996) ("Over and over, we stress that antitrust is designed to protect consumers from producers, not to protect producers from each other or to ensure that one firm gets more of the business."). To be sure, this argument is cut from the same cloth as Defendants' argument regarding Hot Shots' failure to allege an anticompetitive effect in a relevant market. But the Court is careful not to conflate these two inquiries. The real problem with Hot Shots' allegation is its lack of an anticompetitive impact *on a relevant market*, not its anticompetitive nature in general. The Court cannot overlook the fact that Defendants' alleged behavior did have an anticompetitive impact on at least one consumer. And were Hot Shots able to remedy its pleading deficiency as to the market impact of Defendants' anticompetitive conduct, its complaint would not fail due to a lack of antitrust injury.[19]

3. Vertical Bid-Rigging Conspiracies

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[19] Also unpersuasive is Defendant Trepashko's argument that Hot Shots failed to plead the causation component of antitrust injury. See Greater Rockford Energy, 998 F.2d at 395 (noting that "[a]ntitrust injury involves a causation requirement"). Defendant's argument hinges on a literal **[**54]** interpretation of Hot Shots' allegation that it "had the lowest overall bid among the *legitimate* bidders," [Am. Compl., 88, at ¶ 69 (emphasis added)], and Defendant claims ignorance as to what Hot Shots means to imply with this "arbitrary, qualifying language." [95, at 10.] But read in context of the complaint as a whole, the clear inference is that Triad Isotopes is the "illegitimate" bidder, meaning that but-for Defendants' rigging of the RFP, Hot Shots would have been the lowest bidder, and thus would have won the 2011 contract. Defendant Triad Isotopes also argues that "Hot Shots does not allege any *facts* to show that its lost profits resulted from the alleged reduction in competition." [100, at 23-24.] This is not true. Hot Shots alleges that (1) Dr. Trepashko and Mr. Giba worked together to change the expected quantities for various drugs in the RFP to ensure that Triad Isotopes would have the lowest bid among all bidders (which included Hot Shots), and (2) if the drug usage amounts in the RFP reflected actual usage instead of the deliberately skewed usage, Hot Shots' bid—which was the second-lowest overall—would have been approximately $300,000 less than Triad Isotopes' bid. **[**55]** [Am. Compl., 88, at ¶¶ 64-69.] Hot Shots adequately pled causation.

Defendants argue that bid-rigging conspiracies are not actionable under the Sherman Act where the contract at issue is awarded to the lowest bidder. [See, *e.g.*, 100, at 20 (citing *Expert Masonry, Inc. v. Boone Cnty., Ky., 440 F.3d 336, 343-48 (6th Cir. 2006)*.] The Court disagrees with Defendants that there is a categorical ban on such cases. The legal principle motivating the court in *Expert Masonry*—the only case that Defendants cite in support of their argument—is that buyers are free to buy from whomever they choose, and courts are not fit to second-guess such business judgments. *Expert Masonry* realizes that "salesmen battle and strive to curry favor and close the deal," and "whether the parties exercise wise business judgment in any given transaction is not a concern of the antitrust laws." *Id. at 347*. And "[t]o allow any auction, bidding, or other competitive sales process to be challenged whenever one potential supplier is distraught because it did not win the sale would be to outlaw competition and salesmanship, for companies and their staffs could not reasonably be expected to compete to win sales, projects, and new clients if, in so doing, they risk treble damages **[**56]** and even imprisonment when even one rival is disappointed with the results." *Id. at 348-49*.

First of all, the decision in *Expert Masonry* is better understood as one involving **[*928]** a plaintiff's failure to identify anticompetitive behavior, and should not be read as a categorical ban on vertical bid-rigging schemes. Regardless, while there are hints of the *Expert Masonry* fact pattern present here (*i.e.*, a distraught seller in a single transaction), the two cases are really quite different. The issue here has nothing to do with CCHHS's freedom to contract with the seller of its choice; of course CCHHS has that freedom, and it would be beyond the Court's bailiwick to question CCHHS's business judgments in that regard. But here, the terms of the 2011 CCHHS radiopharmaceutical RFP eliminated much of CCHHS's discretion by stating that the low bidder would receive the contract. And Hot Shots alleges that (after accounting for the fraudulent usage numbers included in the RFP) *it*, and not Triad Isotopes, was the low bidder. This is anticompetitive behavior, for absent the conspiracy, competition increases. To be sure, the principles articulated in *Expert Masonry* are sounds ones, they just don't translate into **[**57]** the bright-line rule that Defendants' assert here. To put a categorical ban on Defendants' behavior would be contrary to the core mission of the antitrust laws, and for that reason, this argument fails.[20]

4. Antitrust Standing and Antitrust Injury

HN27[] Although the standing provision in *§ 4* of the Clayton Act is broad—permitting civil suits by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws," *15 U.S.C. § 15*—the Supreme Court has endorsed several limiting principles such that not every person, however tangentially injured by an antitrust violator, has standing **[**58]** to sue. See *Blue Shield of Va. v. McCready, 457 U.S. 465, 472-75, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)*; *Hawaii v. Standard Oil Co., 405 U.S. 251, 263 n.3, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972)* (observing that the lower federal courts were "virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation").

In *AGC*,***HN28***[] the Supreme Court incorporated traditional common-law tort principles into the evolving antitrust-standing inquiry, thereby adding "a proximate cause element into *§ 4* actions [such] that a plaintiff does not have standing to sue under *§ 4* if its injuries were indirect and speculative." *Greater Rockford Energy & Tech. Corp. v. Shell Oil co., 998 F.2d 391, 395 (7th Cir. 1993)*. The result was a six-factor test for examining the link between a plaintiff's harm and a defendant's wrongdoing that has become the predominant test for assessing antitrust standing, focusing on: (1) the causal connection between the violation and the harm; (2) the presence of improper motive; (3) the type of injury and whether it was one Congress sought to redress; (4) the directness of the injury; (5)

[20] In a swing-for-the-fences moment, Defendant Trepashko also argues, more fundamentally, that Hot Shots failed to plead direct allegations of a conspiracy. [See 95, at 3-4.] But in addition to its express allegations of conspiracy [Am. Compl. 88, ¶¶ 55, 70], Hot Shots pled a wealth of facts describing the agreement between Triad Isotopes, Mr. Giba, and Dr. Trepashko regarding the 2011 CCHHS contract [*Id.* ¶¶ 9, 60-65], which are consistent with Plaintiffs other allegations regarding the nefarious relationship between these Defendants. [*Id.* ¶¶ 18-19, 25-33.] Hot Shots sufficiently pled a conspiracy.

the speculative nature of the damages; and (6) the risk of duplicate recovery or complex damage apportionment. *Loeb Indus., Inc. v. Sumitomo Corp., 306 F.3d 469, 484 (7th Cir. 2002)* (citing *AGC, 459 U.S. at 537-45*).

[*929] a. Antitrust Injury

Defendants argue that Hot Shots lacks antitrust standing **[**59]** because it failed to state a cognizable "antitrust injury," *i.e.*, a type of injury that Congress sought to redress. Defendants' arguments here do not differ from their other arguments regarding antitrust injury, which the Court has already addressed. The Court need not repeat its analysis here.

b. Causation

Defendant Trepashko argues separately that Hot Shots did not plead that the alleged anticompetitive conduct at issue here (*i.e.*, bid rigging) was the "but for" cause of Hot Shots' injury, based on the "tenuous" assumption that Hot Shots would have won the 2011 bidding process but-for the alleged anticompetitive behavior. [See 95, at 12.] While Hot Shots' allegation may be tenuous, it is still sufficient. Indeed, Hot Shots expressly alleged but-for causation: "If the drug usage amounts in the RFP reflected actual usage instead of the deliberately skewed usage, Hot Shots' bid * * * which [was] the lowest overall bid among the legitimate bidders * * * would have been approximately $300,000 less than Triad's Bid," and thus Defendants' conspiracy "prevent[ed] Hot Shots * * * from winning the CCHHS contract." [Am. Compl., 88, at ¶¶ 69-70.] Hot Shots sufficiently pled causation.

c. Directness

Finally, Defendant **[**60]** Trepashko also argues that Hot Shots fails under the directness inquiry because it failed to plead that the alleged bid-rigging has in fact resulted in increased prices to radiopharmaceutical consumers. [See 95, at 12.] This is a misapplication of the directness inquiry, which is meant to assess the plaintiff's proximity to the harm in comparison to other (actual or potential) plaintiffs, as often contemplated in the direct-purchaser versus indirect-purchaser context. Defendant's argument is really just another way of saying that Hot Shots failed to allege an anticompetitive impact on a relevant market, which the Court has addressed with belt and suspenders at this point.

5. Application to Illinois State *Antitrust Law*

The Court's antitrust analysis thus far has been solely with regard to Hot Shots' federal antitrust claim (Count V), not Hot Shots' state antitrust claim under Illinois statute *740 ILCS 10/3* (Count VI). The question is whether the Court's analysis under federal law applies to the state-law claim at issue. The parties did not address this issue in their briefs.

HN29[] Illinois courts have adopted a common-law harmonization provision, meaning that they interpret their antitrust laws in harmony with **[**61]** federal-court decisions interpreting federal ***antitrust law***. See, *e.g., People v. Crawford Distrib. Co., 53 Ill. 2d 332, 291 N.E.2d 648, 652-53 (Ill. 1972)* (noting that federal antitrust precedent is a "useful guide to our court"); *People ex rel. Scott v. College Hills Corp., 91 Ill. 2d 138, 435 N.E.2d 463, 467, 61 Ill. Dec. 766 (Ill. 1982)* ("Federal precedent is both relevant and helpful in determining the adequacy of antitrust allegations."). While federal precedent is not binding on Illinois courts, the relevant statutes are very similar, and the Court has not identified any case law indicating that the Illinois Supreme Court would differ in any way from the analysis set forth herein.[21] See, *e.g.,* **[*930]** *Popp v. Cash Station, Inc., 244 Ill. App. 3d 87, 613 N.E.2d 1150,*

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[21] In interpreting state statutes, the Court looks to decisions from the state's highest court for guidance. See *Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)*; *Jean v. Dugan, 20 F.3d 255, 260 (7th Cir. 1994)*. "In the

1158, 184 Ill. Dec. 558 (Ill. App. Ct. 1992) (citing federal ***antitrust law*** in defining "antitrust injury"); Intercontinental Parts, Inc. v. Caterpillar, Inc., 260 Ill. App. 3d 1085, 631 N.E.2d 1258, 1268, 197 Ill. Dec. 799 (Ill. Ct. App. 1994) (citing federal law in assessing the market-power requirement); see also Holzrichter v. Yorath, 2013 IL App (1st) 110287, 987 N.E.2d 1, 27-29, 369 Ill. Dec. 659 (Ill. Ct. App. 2013).

The only potential hiccup in this inquiry relates to the Court's antitrust-standing analysis under the *AGC* six-factor test. The problem is that *AGC* was derivative of an earlier **[**62]** antitrust-standing opinion (Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)) that multiple state legislatures—including the Illinois legislature—repealed (in what have come to be known as *Illinois Brick* repealer statutes). See 740 ILCS 10/7. The question, then, is whether Illinois' *Illinois Brick* repealer statute (which repealed one antitrust-standing opinion) would motivate Illinois courts to decline to follow *AGC* (a subsequent antitrust-standing opinion). While the Illinois Supreme Court has yet to decide the issue, the Illinois Appellate Court has cited *AGC* approvingly, see County of Cook v. Philip Morris, Inc., 353 Ill. App. 3d 55, 817 N.E.2d 1039, 1045, 288 Ill. Dec. 389 (Ill. App. Ct. 2004), and the Seventh Circuit has stated affirmatively that federal antitrust standing rules apply under the Illinois Antitrust Act. O'Regan v. Arbitration Forums, Inc., 121 F.3d 1060, 1066 (7th Cir. 1997). Thus, the Court sees no reason why the Illinois Supreme Court would not follow *AGC*. However, because the Court rejected Defendants' antitrust-standing arguments, the issue is simply academic at this point.

Because the Court finds that the Illinois Supreme Court would interpret its antitrust statute consistent with this Court's interpretation of federal ***antitrust law***, Hot Shots' state-law antitrust claim fails for the same reasons that its federal antitrust claim fails. Thus, the Court must dismiss both Count V and Count VI of Plaintiffs' amended **[**63]** complaint.

C. Tortious Interference with Prospective Business Claim

In addition to its state and federal antitrust claims, Hot Shots also makes a tortious interference claim against the Trepashko-Giba-Triad Isotopes group of defendants regarding their role in the 2011 CCHHS radiopharmaceutical bid process. Specifically, Hot Shots argues that, through their purposeful manipulation of the RFP, Defendants intentionally interfered to prevent Hot Shots' legitimate expectancy of entering into a contractual relationship with CCHHS from ripening. [Am. Compl. 88, ¶¶ 107-111.]

HN30[] Under Illinois law, the elements of a claim for tortious interference with prospective business relations are "(1) plaintiff's reasonable expectancy of entering into a valid business relationship; (2) defendant's knowledge of that expectancy; (3) defendant's intentional and unjustifiable interference that induced or caused a breach or termination of the expectancy; and (4) damage to plaintiff resulting from defendant's conduct." F:A J Kikson v. Underwriters Labs., Inc., 492 F.3d 794, 800 (7th Cir. 2007) (citing Voyles v. Sandia Mortg. Corp., 196 Ill. 2d 288, 751 N.E.2d 1126, 1133-34, 256 Ill. Dec. 289 (Ill. 2001)); Botvinick v. Rush Univ. Med. Center, 574 F.3d 414, 417 (7th Cir. 2009).

[*931] Hot Shots stumbles out of the gate. Because this was a blind bid (*i.e.*, where all bidders submitted anonymous bids), all competitors theoretically had an equal expectancy of winning the **[**64]** contract. Hot Shots alleges that it was a "highly qualified bidder," but that allegation alone is insufficient to allow the Court to infer that Hot Shots expected to win the contract. And Hot Shots' allegation that it ultimately had the lowest "legitimate" bid is also unavailing, as this is an *ex post* observation that says nothing of Hot Shots' pre-bid expectations. Because this was a blind bidding process where the contract would go to the lowest bidder, Hot Shots has a tough row to hoe to establish an *ex ante* expectancy of winning—perhaps if Hot Shots had a long history of underbidding its competitors (which presupposes that Hot Shots knew who its competitors were pre-bid), or if Hot Shots had been the only bidder. Clearly Hot Shots had a reasonable expectancy of entering into *a fair bidding process*, but this is not the same as a reasonable expectancy of entering into *a business relationship*. And while Hot Shots was surely hopeful

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absence of guiding decisions by the state's highest court, [federal courts] consult and follow the decisions of intermediate [state] appellate courts unless there is a convincing reason to predict [that] the state's highest court would disagree." ADT Sec. Servs., Inc. v. Lisle-Woodridge Fire Prot. Dist., 672 F.3d 492, 498 (7th Cir. 2012).

of winning the contract, it must show "more than a mere hope" to establish a tortious interference, and Hot Shots failed to plead any basis for its expectation of success. See, *e.g.,* *Quadro Enters., Inc. v. Avery Dennison Corp., 2000 U.S. Dist. LEXIS 11568, 2000 WL 1029176, at *10 (N.D. Ill. July 26, 2000)* ("***HN31***[] The fact that [plaintiff] was asked to bid implies that the contract **[**65]** was up for competitive bidding and thus it cannot be said that [plaintiff] had an expectancy of future business relations."). Even at the pleading stage, Hot Shots threadbare allegations are insufficient to state a claim, thus requiring dismissal. See *Del Monte Fresh Produce, N.A., Inc. v. Kinnavy, 2010 U.S. Dist. LEXIS 28687, 2010 WL 1172565, at *6 (N.D. Ill. Mar. 22, 2010)* ("*Twombly* does require that [plaintiff] set forth facts that make it plausible that she had a reasonable expectancy * * *."); *Huon v. Breaking Media, LLC, 75 F. Supp. 3d 747, 2014 U.S. Dist. LEXIS 168265, 2014 WL 6845866, at *16 (N.D. Ill. Dec. 4, 2014)* (same); *Myers v. Phillips Chevrolet, Inc., 2004 U.S. Dist. LEXIS 21635, 2004 WL 2403126, at *3-4 (N.D. Ill. Oct. 26, 2004)* (same); *Emery v. Ne. Ill. Reg'l Commuter R.R. Corp., 2003 U.S. Dist. LEXIS 16403, 2003 WL 22176077, at *10 (N.D. Ill. Sept. 18, 2003)* (same).

IV. Conclusion

For the foregoing reasons, Defendants' motions to dismiss [94, 96, 99, 102, 103] are denied as to Counts I-IV and granted as to Counts V—VII. Counts V—VII of the amended complaint are dismissed without prejudice. Relator and Plaintiff should inform the court within 14 days as to whether they intend to file a second amended complaint repleading Counts V—VII, at which time the Court will set a status hearing to discuss scheduling moving forward.

Dated: May 15, 2015

/s/ Robert M. Dow

Robert M. Dow, Jr.

United States District Judge

Gil Ramirez Grp., L.L.C. v. Houston Indep. Sch. Dist.

United States Court of Appeals for the Fifth Circuit

May 18, 2015, Filed

No. 13-20753

Reporter
786 F.3d 400 *; 2015 U.S. App. LEXIS 8171 **

THE GIL RAMIREZ GROUP, L.L.C.; GIL RAMIREZ, JR., Plaintiffs - Appellants v. HOUSTON INDEPENDENT SCHOOL DISTRICT; LAWRENCE MARSHALL; EVA JACKSON; RHJ-JOC, INCORPORATED; FORT BEND MECHANICAL, LIMITED; MARSHALL & ASSOCIATES; JOYCE MOSS CLAY; JM CLAY AND ASSOCIATES; FBM MANAGEMENT, L.L.C.; DAVID L. MEDFORD, Defendants - Appellees

Prior History: [1]** Appeals from the United States District Court for the Southern District of Texas.

Gil Ramirez Group, LLC v. Houston Indep. Sch. Dist., 2013 U.S. Dist. LEXIS 164100 (S.D. Tex., Nov. 18, 2013)

Disposition: AFFIRMED IN PART, REVERSED and REMANDED IN PART.

Core Terms

vendor, district court, summary judgment, contracts, tortious interference, immunity, treble damages, business relationship, state law claim, contractor, estoppel, municipal, election, bid, selection committee, punitive damages, recommended, corruption, violations, renewal, governmental unit, procurement, employees, promise, promissory estoppel, civil conspiracy, school district, consultant, projects, punitive

LexisNexis® Headnotes

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

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

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

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

A court of appeals reviews motions under *Fed. R. Civ. P. 12(b)(6)* and *(c)* de novo.

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

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

HN2[] Motions to Dismiss, Failure to State Claim

To survive a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss, a plaintiff must plead enough facts to state a claim to relief that is plausible on its face.

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

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

HN3[] Standards of Review, De Novo Review

A court of appeals reviews a district court's grant of summary judgment de novo, applying the same standards as the district court.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN4[] Summary Judgment, Entitlement as Matter of Law

Summary judgment is proper when no issue of material fact exists and the moving party is entitled to judgment as a matter of law. The standard of review is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the non-moving party based upon the record evidence before the court.

Civil Procedure > Appeals > Standards of Review > General Overview

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

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

HN5[] Appeals, Standards of Review

For *Fed. R. Civ. P. 12* and summary judgment alike, a court of appeals views the facts and inferences in the light most favorable to the non-movant.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

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

HN6[] Racketeer Influenced & Corrupt Organizations, Claims

18 U.S.C.S. § 1962(c) and *(d)* of the Racketeer Influenced and Corrupt Organizations Act (RICO) prohibit, respectively, participation in a racketeering enterprise or conspiring to do the same. U.S. Court of Appeals for the Fifth Circuit precedent requires a RICO plaintiff to show a conclusive financial loss and not harm to mere expectancy or intangible interests.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

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

HN7[] **Racketeer Influenced & Corrupt Organizations, Claims**

The Racketeer Influenced and Corrupt Organizations Act's (RICO's) civil provision creates a cause of action for any person injured in his business or property by reason of a violation of any of the statute's prohibited activities. *18 U.S.C.S. § 1964*. The plaintiff's injury must be "conclusive" and cannot be "speculative." Injury to mere expectancy interests or to an intangible property interest is not sufficient to confer RICO standing.

Civil Procedure > ... > Justiciability > Standing > General Overview

Governments > Legislation > Statutory Remedies & Rights

HN8[] **Justiciability, Standing**

Although whether a legislative enactment authorizes a plaintiff to sue is sometimes referred to as "statutory standing," courts should avoid using that term. "Statutory standing" is a misleading label since the absence of a valid cause of action does not implicate subject-matter jurisdiction.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN9[] **Racketeer Influenced & Corrupt Organizations, Claims**

A Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. § 1961 et seq.*, plaintiff need not demonstrate legal entitlement.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

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

Although the vagueness of terms like "expectancy" may have created some confusion, the context of the U.S. Court of Appeals for the Fifth Circuit's Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. § 1961 et seq.*, cases makes clear that the test for injury is a factual one. Damage to a plaintiff's subjective expectations cannot form the basis of a RICO claim.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN11[] **Racketeer Influenced & Corrupt Organizations, Claims**

Loss of a legal entitlement is sufficient but not invariably necessary to sustain a Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. § 1961 et seq.*, claim. A plaintiff need not show that the other party would have been obliged to confer a benefit, only that the other party would have conferred the benefit.

Civil Procedure > Appeals > Standards of Review > General Overview

HN12[] **Appeals, Standards of Review**

Although a court of appeals may decide a case on any ground that was presented to the trial court, it is not required to do so.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

HN13[] **Racketeer Influenced & Corrupt Organizations, Claims**

Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. § 1961 et seq.*, claims require showing that the unlawful behavior proximately caused the plaintiff's injuries.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Education Law > Civil Liability > General Overview

Civil Procedure > Remedies > Damages > Punitive Damages

Education Law > Immunities From Liability > School District Immunity

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

HN14[] **Racketeer Influenced & Corrupt Organizations, Claims**

School districts are not proper Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. § 1961 et seq.*, defendants for two reasons. First, RICO requires demonstrating an underlying criminal act, which entails a mens rea requirement that a governmental entity cannot form. Second, municipal entities enjoy common law immunity from punitive damages, and, whatever else it is, RICO's treble-damages provision is at least partially punitive.

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

Civil Procedure > Remedies > Damages > Punitive Damages

Governments > Local Governments > Claims By & Against

HN15[] **Racketeer Influenced & Corrupt Organizations, Remedies**

To overcome municipal immunity from punitive damages, Congress must clearly express its intention. No such clear intent to overcome governmental immunity appears in the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. § 1961 et seq.*, provision for treble damages.

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

Governments > Local Governments > Claims By & Against

HN16[] **Racketeer Influenced & Corrupt Organizations, Remedies**

The U.S. Supreme Court's characterization of Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. § 1961 et seq.*, treble damages as "remedial" in PacifiCare Health Sys., Inc. v. Book cannot substitute for an express congressional abrogation of municipal immunity from treble damages, which, whatever the characterization, exceed actual provable damages. Nothing in PacifiCare contravenes the Court's earlier holdings that treble-damages provisions serve both compensatory and punitive functions. There is convincing authority that Congress authorized civil RICO's powerful treble damages provision to serve a punitive purpose. PacifiCare has no bearing on the liability of governmental entity defendants for treble damages under RICO.

Governments > Courts > Authority to Adjudicate

Governments > Legislation > General Overview

HN17[] **Courts, Authority to Adjudicate**

A court lacks power to revise federal statutes.

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

HN18[] **Racketeer Influenced & Corrupt Organizations, Remedies**

The civil Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. § 1961 et seq.*, requires that a successful plaintiff be awarded treble damages.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN19[] **Contract Interpretation, Good Faith & Fair Dealing**

Texas law rejects an implied duty of good faith except in the context of special relationships.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

HN20[] **Consideration, Promissory Estoppel**

Promissory estoppel may be asserted by a plaintiff as an affirmative ground for relief. To succeed on a promissory estoppel cause of action, a plaintiff must show: (1) a promise, (2) foreseeability of reliance thereon by the promisor, and (3) substantial reliance by the promisee to his detriment. This cause of action, however, presumes no contract exists. If a valid contract between the parties covers the alleged promise, the plaintiff cannot recover for the promise under promissory estoppel.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

HN21[] **Consideration, Promissory Estoppel**

It is the existence of a contract that makes promissory estoppel inappropriate, not the viability of any contract claim.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Estoppel

Contracts Law > Defenses > Affirmative Defenses > Estoppel

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

HN22[] **Affirmative Defenses, Estoppel**

Quasi estoppel is not a freestanding cause of action but a procedural device or affirmative defense. Unlike equitable estoppel, quasi estoppel requires no showing of a false representation or detrimental reliance but describes certain legal bars, such as ratification, election, acquiescence or acceptance of benefits. This concept was developed to prevent a party from retaining a benefit by asserting a position to the disadvantage of another and then asserting a right which is inconsistent with that previous position.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Estoppel

HN23[] **Affirmative Defenses, Estoppel**

Quasi-estoppel requires (1) a previous action and (2) a subsequent inconsistent action which is thereby sought to be estopped.

Torts > ... > Liability > State Tort Claims Acts > Construction & Interpretation

Torts > ... > Liability > State Tort Claims Acts > General Overview

Torts > ... > Liability > State Tort Claims Acts > Employees

HN24[] **State Tort Claims Acts, Construction & Interpretation**

The Texas Tort Claims Act (TTCA) waives the state's immunity from suit in certain circumstances. The TTCA also covers all tort theories that may be alleged against a governmental entity whether or not it waives that immunity. Further, if a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit. *Tex. Civ. Prac. & Rem. Code Ann. § 101.106(e)*. The state supreme court has interpreted this language to mean that if a plaintiff brings virtually any state common law tort claim against both a governmental unit and its employees, *§ 101.106(e)* will allow the employee defendants to be dismissed if the governmental unit so moves.

Torts > ... > Liability > State Tort Claims Acts > Employees

HN25[] **State Tort Claims Acts, Employees**

The Texas Tort Claims Act (TTCA) defines an employee as a person, including an officer or agent, who is in the paid service of a governmental unit by competent authority but excludes a person who performs tasks the details of which the governmental unit does not have the legal right to control. *Tex. Civ. Prac. & Rem. Code Ann. § 101.001(2)*.

Education Law > Administration & Operation > Elementary & Secondary School Boards > General Overview

Education Law > Immunities From Liability > Statutory Immunity

HN26[] Administration & Operation, Elementary & Secondary School Boards

Provisions of the Texas Education Code define a school board trustee as an employee, *Tex. Educ. Code Ann. § 22.051*, and grant immunity to "employees" for any act that is incident to or within the scope of the duties of the employee's position and that involves the exercise of judgment or discretion. *Tex. Educ. Code Ann. § 22.0511(a)*.The same Education Code provision limits personal liability for any act that is incident to or within the scope of the duties of the employee's position of employment and that involves the exercise of judgment or discretion on the part of the employee. *Tex. Educ. Code Ann. § 22.0511*.

Education Law > Administration & Operation > Elementary & Secondary School Boards > General Overview

HN27[] Administration & Operation, Elementary & Secondary School Boards

The Texas Education Code defines a "professional employee of a school district" to include a member of the board of trustees of an independent school district. *Tex. Educ. Code Ann. § 22.051(a)(5)*.

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

HN28[] Intentional Interference, Elements

The Texas Supreme Court has defined the elements of tortious interference with prospective business relations. The common law cause requires that (1) there was a reasonable probability that the plaintiff would have entered into a business relationship with a third party; (2) the defendant either acted with a conscious desire to prevent the relationship from occurring or knew the interference was certain or substantially certain to occur as a result of the conduct; (3) the defendant's conduct was independently tortious or unlawful; (4) the interference proximately caused the plaintiff injury; and (5) the plaintiff suffered actual damage or loss as a result.

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN29[] Equal Protection, Nature & Scope of Protection

The *Equal Protection Clause* forbids state actors from treating similarly situated individuals differently for a discriminatory purpose and without a rational basis. "Discriminatory purpose" implies more than intent as volition or intent as awareness of consequences. An equal protection claim requires showing that the decisionmaker selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects.

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN30[] Equal Protection, Nature & Scope of Protection

An equal protection claim depends on either identifying a class or showing that the aggrieved party is a "class of one." However, the class-of-one rationale does not apply to forms of state action which by their nature involve discretionary decision-making based on a vast array of subjective, individualized assessments. The discretionary-decision-making principle applies most clearly in the employment context, for employment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify. The government has wider constitutional latitude when it is acting as employer than as sovereign.

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Judges: Before REAVLEY, JONES, and ELROD, Circuit Judges.

Opinion by: EDITH H. JONES

Opinion

[*404] EDITH H. JONES, Circuit Judge:

This case, involving multiple causes of action based on allegations of bribery to procure construction contracts, was filed against Houston Independent School District ("HISD" or "the District"), former trustee Lawrence Marshall and his consulting company, alleged coconspirator Joyce Moss Clay and her consulting company, and two of the plaintiff's competitors (RHJ-JOC and Fort Bend Mechanical), and their respective owners. The district court ably resolved most of these kaleidoscopic claims against Plaintiff-Appellants Gil Ramirez, Jr. and the Gil Ramirez Group, L.L.C. (collectively "GRG"), but we conclude GRG has met its summary judgment burden with respect to its RICO claims (against all defendants except HISD) and has sufficiently supported those elements of its claims for tortious interference with business relations that the district court ruled on. For those claims, we reverse and remand for further proceedings. This decision requires resolving two novel issues in this circuit—whether HISD is a proper **[**3]** RICO defendant (it is not), and whether Appellee Marshall, a former elected HISD trustee, may invoke state sovereign immunity principles against the state law claims (he cannot).

BACKGROUND[1]

Defendant Houston Independent School District is one of the largest school districts in the nation, serving over 200,000 students. A nine-member Board of Trustees governs the district; the administrative staff is led by the Superintendent. The District procures some construction and facilities services through a job-order contract ("JOC") program. Under this program, the District periodically solicits requests for proposals ("RFPs"), following which a committee of HISD administrators (the "selection committee") evaluates vendors' bids against predetermined criteria and selects as many qualifying vendors as current needs require. The single most important factor in the

[1] For purposes of reviewing the pretrial orders on appeal, the evidence is recited in the light most favorable to Appellants.

selection process is the vendor's pricing coefficient—a percentile that reflects the difference between the standard price set in a pricing manual and the price a contractor agrees to charge. Pricing coefficients **[**4]** are assigned for several categories of work and are combined to determine the vendor's weighted average. The selection committee forwards its recommendations to the Board of Trustees, which then votes on whether to offer JOC contracts to the suggested vendors.

HISD outsourced the assignment and management of JOC projects to several independent project managers, each of which covered specific facilities. The District would inform the relevant project manager of its need and the project manager would solicit cost estimates from the JOC vendors, evaluate the estimates, assign the jobs, and manage their progress.

Ramirez alleges that he and his company GRG were punished for refusing to participate in the corruption of municipal authorities. Defendant Lawrence Marshall, for many years an administrator at HISD until he was elected Trustee in 1997, masterminded questionable business arrangements in which he served as a paid **[*405]** consultant for several organizations that did business with the District. When the District explicitly prohibited that conduct, those companies hired Marshall's business associate Joyce Moss Clay (together with her company, "Clay"), whose company began paying Marshall a **[**5]** share of its consulting fees.

Ramirez and Marshall crossed paths during an RFP initiated in May 2008 (the "2008 RFP") to expand the HISD's contractor capacity and increase vendor diversity. GRG bid in this RFP along with ten other companies, including Defendants Fort Bend Mechanical ("FBM") and RHJ-JOC ("RHJ") (collectively, with their owners, the "vendor defendants"). The vendor defendants both hired Clay as a consultant, in RHJ's case "to provide moral support." RHJ paid Clay over $2,000 per month for several years, but neither RHJ nor Clay could explain what work Clay actually performed. FBM's owner Pete Medford avers that he wanted to make donations to specific schools and hired Clay to help him negotiate the rules and regulations governing those donations. Clay's explanation for forwarding Marshall 65% of her consulting fees is that he was her "mentor."

Once the initial bids were in, an employee in HISD's procurement department (who also served on the selection committee) advised several companies to reallocate their pricing coefficients. No bidding vendor was permitted to change its overall coefficient; such a change would have given that vendor an unfair advantage.[2] On its first **[**6]** cut, the selection committee recommended approving the two companies with the lowest overall price: RHJ and Kellogg Brown & Root Services, Inc. ("KBR"). GRG ranked ninth and the selection committee summarily eliminated it along with several other companies. Senior HISD administrators reviewed the proposal and, based on an internal policy, disqualified RHJ because of a then-pending lawsuit between the vendor and another school district.

Left with only one proposed vendor, HISD Superintendent Dr. Abelardo Saavedra and Chief Business Operations Officer Richard Lindsay unilaterally added four vendors to the list that went before the Board of Trustees: FBM for its HVAC expertise, and the other three, including GRG, to increase JOC "diversity." The Board approved this slate of five vendors, only one of which (KBR) had the approval of the selection committee. It is noteworthy that the selection committee passed over GRG, and HISD administrators added the company solely for diversity reasons.[3] Shortly after learning that it was not among HISD's selected **[**7]** JOC group, RHJ fired Clay.

GRG and the other contractors executed one-year contracts, renewable at HISD's sole discretion, thus constituting the 2009 JOC program. When the District began assigning projects the following summer, GRG received more project funds than any other vendor. GRG maintains that it was a JOC vendor *par excellence*, completing jobs properly, ahead of schedule, and under budget. Appellees dispute this. The District reports that it "experienced a

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[2] GRG alleges that even this communication was improper; the District maintains that reapportioning coefficients could not improve a vendor's score.

[3] Lindsay testified that the District's goals in the 2008 RFP were, among others, "to diversify the available skillsets of JOC vendors" and "to increase the number of minority-owned businesses within the JOC program." Lindsay recommended adding FBM for the former kind of diversity and the other three companies for the latter.

number of performance issues with GRG **[*406]** . . . including false starts on construction projects, failure to obtain proper bonding and insurance, and failure to timely submit documents required under" the JOC program.

Marshall became president of the Board of Trustees in January 2009. The next month, Superintendent Saavedra announced his resignation, effective at the end of August of that year. In August, Saavedra **[**8]** recommended that the Board reconsider RHJ because its lawsuit with the other school district was over. The Board agreed and added RHJ to the approved JOC list. Saavedra testified that he was "very hesitant" to recommend RHJ for approval and that Marshall was putting "tremendous pressure" on other senior administrators.[4] He also testified that he had lost Marshall's support by disqualifying RHJ earlier in the process.

According to GRG, **[**9]** the trouble began after August 2009. Once RHJ was in the mix, GRG saw a sharp decline in the volume of JOC work it received, though it continued to receive assignments until its contract expired. Ramirez testified that Ricardo Aguirre, a janitorial services consultant and mutual associate of Marshall and Ramirez's father, visited Ramirez's office. Aguirre told Ramirez that GRG would need to hire Clay as Marshall's "bag lady" in order to protect its JOC business.[5] GRG suggests that Ramirez's expression of disapproval to Aguirre was the triggering event for the decrease in GRG's JOC assignments.

In the February before the election, FBM paid for Marshall to attend the Super Bowl in Tampa, Florida. Medford admitted on tape that he had given Marshall approximately $150,000 since 2008. When Marshall faced a reelection contest in autumn 2009, the owners of RHJ and FBM donated to Marshall's campaign, in amounts totaling over $50,000. GRG did not contribute to Marshall's reelection campaign or otherwise support him, but there is no indication that Marshall or anyone **[**10]** else asked GRG or Ramirez to do so.

Also in August 2009, a District internal auditor noticed the non-recommended vendors on the Board of Trustees meeting agenda. He investigated the 2008 procurement process, concluding that HISD administrators failed to follow proper procedure and that the final JOC configuration did not provide the best value for the District. His report recommended voiding the contracts for noncompliance with state law. GRG attacks this report as a "smokescreen to enable Marshall and allied board members to steer more of the JOC work to his favored contractors." GRG asserts that an independent agency gave HISD's auditors low marks in a general review, and that the audit did not result in changes to future RFPs.[6]

[*407] In January 2010, based on the auditor's report, the District's Inspector General brought the 2008 noncompliance to the Board's attention and intimated that the conduct might be criminal. Presumably because the initial contract terms for the 2008 JOC vendors were at an end, the business administrator recommended rebidding **[**11]** the entire JOC program. Just a few days before the meeting at which the Board was scheduled to vote on renewal of the JOC contracts, the new Superintendent Terry Grier removed the matter from the agenda. Superintendent Grier later called for Lindsay's resignation when Lindsay was unable to explain his conduct in the 2008 RFP. Because the Board did not renew any contracts, most of the 2008 JOC contracts expired by February 2010; RHJ's contract remained in force until October 1, 2010, since it started much later than the others. All vendors had to bid in the 2010 RFP if they wanted to continue to be part of the JOC program.

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[4] GRG also argues that there is evidence suggesting that RHJ was supposed to supplant GRG. The only evidence to which it directs us is the former procurement manager's obscure reference to "substitut[ing] a supplier," but the context suggests he is referring to the improprieties with the 2008 vendor recommendations, not RHJ's later addition. GRG also identifies an email from an internal auditor referring to GRG's JOC proposal and admonishing "the replacement JOC contractor to do their own scope and proposal." The evidence also shows, however, that the program manager that handled GRG's contract testified that he never heard anyone refer to RHJ as a replacement contractor. The agenda item by which the Board approved the addition says it is "to supplement" the JOC program.

[5] When asked whether he was involved in bribery schemes involving Marshall, Aguirre invoked his *Fifth Amendment* right against self-incrimination.

[6] GRG identifies no specific defects within the report, the purpose of which was to urge conformity to established procedures, not to change them.

The 2010 RFP selection process evaluated vendors' bids according to a pre-established set of criteria that, as in the 2008 RFP, was mostly a function of price. This time, the selection committee recommended KBR, RHJ, FBM, and Jamail & Smith, the last of which had been a JOC participant since before the 2008 expansion RFP. RHJ rehired Clay two days after its selection. The committee did not recommend GRG, which ranked tenth out of thirteen bidders because as in the previous RFP, its work was not competitively priced. The Board approved the selection committee's slate **[**12]** of vendors. GRG alleges, not without dispute by the Appellees, that the ranking system and selection process were pretextual.

Ramirez and GRG sued in December 2010, alleging that their refusal to bribe Marshall harmed their business, both in the reduction in assignments under the 2008 JOC and in GRG's nonselection under the 2010 RFP. GRG brought an array of federal and state law claims against the various defendants. Against HISD, plaintiffs alleged 1) violations of the Racketeer Influenced Corrupt Organizations Act ("RICO"), *18 U.S.C. § 1961 et seq.*; 2) infringement of their *First* and *Fourteenth Amendment* rights (through *42 U.S.C. § 1983*); and 3) state law claims for breach of contract, estoppel, and civil conspiracy. Against Marshall and Clay (and their respective consulting companies), GRG alleged the same RICO violations, in addition to tortious interference with prospective contract, tortious interference with existing contract, and civil conspiracy (but not the estoppel or breach of contract claims). The vendor defendants were also named in the RICO and tortious interference claims. Extensive discovery was conducted.

The District, Marshall, and Clay moved for summary judgment on all claims. The District also moved to dismiss the RICO and state **[**13]** law tort claims under *Fed. Rules of Civ. Pro. 12(b)(6)* and *12(c)*. The district court granted these motions in its Memorandum and Order of November 18, 2013. The district court first dismissed the state law claims against Marshall as barred by the election of remedies provision of the Texas Tort Claims Act, *Tex. Civ. Prac. & Rem. Code § 101.106*. It then held that GRG was not a proper RICO plaintiff; that GRG could not make out any constitutional violations, even if it could overcome various immunity obstacles; and that HISD and Clay were entitled to summary judgment or dismissal on the state law claims. The district court dismissed the civil conspiracy charges because it had resolved the underlying tort **[*408]** claims, leaving no illegal conduct for a conspiracy. After additional briefing, the district court granted summary judgment for the vendor defendants. Final judgment was entered on December 13, 2013. GRG timely appealed.

STANDARDS OF REVIEW

The district court dismissed the state law claims against Marshall under *Fed. R. Civ. Pro. 12(b)(6)* and *12(c)*. ***HN1***[] We review both types of motion de novo. *Jebaco, Inc. v. Harrah's Operating Co., Inc., 587 F.3d 314, 318 (5th Cir. 2009)*. ***HN2***[] "To survive a *Rule 12(b)(6)* motion to dismiss, the plaintiff must plead enough facts 'to state a claim to relief that is plausible on its face.'" *Bustos v. Martini Club Inc., 599 F.3d 458, 461 (5th Cir. 2010)* (quoting *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009))*.

The district court disposed of the other claims on summary **[**14]** judgment. ***HN3***[] "This court reviews the district court's grant of summary judgment de novo, applying the same standards as the district court." *Depree v. Saunders, 588 F.3d 282, 286 (5th Cir. 2009)*. ***HN4***[] "Summary judgment is proper when no issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Cronn v. Buffington, 150 F.3d 538, 541 (5th Cir. 1998)*. "The standard of review is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the non-moving party based upon the record evidence before the court." *James ex rel. James v. Sadler, 909 F.2d 834, 837 (5th Cir. 1990)* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986))*.

HN5[] For *Rule 12* and summary judgment alike, we view the facts and inferences in the light most favorable to the non-movant. *Cronn, 150 F.3d at 541*; *Jebaco, 587 F.3d at 318*.

DISCUSSION

In this appeal, Appellants challenge the district court's adverse judgment on all but one of their claims.[7] We address each cause of action in turn.

I. Racketeer Influenced and Corrupt Organizations Act

GRG sued all defendants under **HN6**[] §§ 1962(c) and (d) of RICO, which prohibit, respectively, participation in a racketeering enterprise or conspiring to do the same. In the district court, HISD objected that it was not a proper RICO defendant because as a municipal **[**15]** corporation it cannot form the *mens rea* of any of RICO's predicate offenses and is not susceptible to RICO's treble damages, which the District characterizes as "punitive." Several other arguments were raised by HISD and other defendants, but the court found instead that GRG failed to assert or prove a cognizable RICO claim. We disagree in part. Our precedent requires a RICO plaintiff to show a "conclusive financial loss" and not harm to "mere expectancy" or "intangible" interests. *Price v. Pinnacle Brands, Inc., 138 F.3d 602, 607 (5th Cir. 1998)* (per curiam). GRG has created a genuine issue of material fact on this issue. Appellants may not, however, sue HISD for RICO violations, because the District is immune from treble damages.

A. Ramirez and GRG as Plaintiffs

1. The Standard

HN7[] RICO's civil provision creates a cause of action for "any person injured in his business **[*409]** or property by reason of a violation" of any of the statute's prohibited activities. *18 U.S.C. § 1964*. At issue here is the injury requirement. The plaintiff's injury must be "conclusive" and cannot be "speculative." *In re Taxable Mun. Bond Sec. Litig., 51 F3d 518, 523 (5th Cir. 1995)*. "Injury to mere expectancy interests or to an 'intangible property interest' is not sufficient to confer RICO standing." *Pinnacle Brands, 138 F.3d at 607* (quoting *In re Taxable Mun. Bond Sec. Litig., 51 F.3d at 523*).[8] The district court held that GRG's alleged injuries **[**16]** were uncertain and intangible because JOC job assignments and contract renewal were at the sole discretion of HISD. "Thus," the district court concluded, "any injury can only be the loss of an expectation interest and therefore speculative[.]"

Appellants contend that they were not required to demonstrate legal entitlement to JOC assignments or job orders, but only the *fact* of loss. That is, although HISD *could* stop assigning GRG jobs and end the business relationships, it *would* not have done so but for the alleged corruption. The district court appears to have interpreted GRG as showing only that HISD *might* have continued favoring GRG.

GRG is correct that **HN9**[] a RICO plaintiff need not demonstrate legal entitlement, a point the Supreme Court made clear in *Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 (2008)*. The plaintiffs in Bridge were "regular participants **[**17]** in Cook County's tax sales[,]" in which bids often ended in a tie. *Id. at 643, 128 S. Ct. at 2135*. The county would then allocate the auctioned property on a rotational basis. *Id. at 642, 128 S. Ct. at 2135*. In order to make this process fair, each bidder was permitted only one simultaneous bid. *Id. at 643, 128 S. Ct. at 2135*. The plaintiffs alleged that a competing corporate bidder had arranged for false-flag bidders to channel additional allocations. *Id.* The *Bridge* plaintiffs had no legal entitlement to the subject matter of the auction. Nevertheless, the Supreme Court held that "[a]s a result of petitioners' fraud, respondents lost valuable

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[7] GRG has not briefed and has therefore waived its claim for tortious interference with an existing contract.

[8] Following *Pinnacle Brands, 138 F.3d at 606*, the district court referred to this as "RICO Act standing." **HN8**[] Although whether a legislative enactment authorizes a plaintiff to sue is sometimes referred to as "statutory standing," courts should avoid using that term. *See* *Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1387-88, 188 L. Ed. 2d 392 & n.4 (2014)* ("statutory standing" is a misleading label "since 'the absence of a valid . . . cause of action does not implicate subject-matter jurisdiction'") (quoting *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 642-43, 122 S. Ct. 1753, 1758, 152 L. Ed. 2d 871 (2002))*.

liens they otherwise would have been awarded." *Id. at 649, 128 S. Ct. at 2139*. Because the *fact* of loss was certain, the plaintiffs could state a RICO claim.

HN10[] Although the vagueness of terms like "expectancy" may have created some confusion, the context of our cases makes clear that the test is a factual one. In *Pinnacle Brands,* for instance, plaintiffs complained that the random inclusion of valuable "chase" cards in packs of baseball cards constituted "illegal gambling." *138 F.3d at 605*. This court held that the plaintiffs could not show injury under RICO because they suffered no harm to a property interest; the card packs they bought were exactly what they bargained for. *Id. at 607*. ***[**18]*** *Pinnacle Brands* thus stands for the unremarkable proposition that a RICO plaintiff must demonstrate harm. The court's rejection of "mere expectancy interests" appears to have been directed at the notion that the plaintiff was injured by not having any luck in drawing a chase card. *See id.* That is, damage to **[*410]** a plaintiff's subjective expectations cannot form the basis of a RICO claim.

Likewise, in *In re Taxable Municipal Bond Securities Litigation,* the plaintiff (for himself and others similarly situated) claimed that corruption in a state-authorized municipal bond program injured certain farmers and ranchers who might have applied for loans under that program. *51 F.3d at 521-22*. The loans under the program were loans of last resort, unavailable to those who could obtain other credit. *Id. at 522*. At least some of the farmers and ranchers had pursued and secured other loans with higher interest rates, which disqualified them for loans under the bond program. *Id.* The court held that the farmers and ranchers "have suffered no injury from not receiving what they were ineligible to receive." *Id. at 522*. The court further held that the plaintiff had not demonstrated detrimental reliance, and that a lost opportunity to obtain **[**19]** a loan was too speculative. *Id. at 522-523*. Importantly, the plaintiff "ha[d] not alleged lost profits" or "that [the farmers and ranchers] ha[d] ever lost money as a result of the RICO scheme." *Id. at 523*. GRG alleges both. *Accord* *Tel-Instrument Elecs. Corp. v. Teledyne Indus., Inc., No. 90-1549, 1991 U.S. App. LEXIS 12209, 1991 WL 87194 (4th Cir. May 28, 1991)*.[9]

The rule that emerges from these cases is that ***HN11***[] loss of a legal entitlement is sufficient but not invariably necessary to sustain a RICO claim. A plaintiff need not show that the other party *would have been obliged* to confer a benefit, only that the other party *would have conferred* the benefit. That HISD retained discretion to award fewer contracts, or no contracts at all, does not prohibit GRG from demonstrating that but for corruption, it would have continued to receive awards.

2. The Evidence

The standard now clarified, it remains to determine whether GRG has marshaled competent summary judgment **[**20]** evidence that its business was injured. The proof covers two periods of time, differentiated by GRG's status as a JOC contractor in 2009 and its subsequent failure to be chosen in the 2010 RFP process.

The district court acknowledged that evidence of factual loss might be sufficient, but found that GRG had not met this burden with respect to the contract renewal. GRG points to evidence that several Board members and a high-level administrator led Ramirez to believe that GRG's contract was on the verge of renewal. As the district court noted, "[t]hese assurances [] were made before it was revealed to the HISD Board's audit committee that the same highlevel administrator had bypassed the JOC contract procurement process unilaterally to award GRG with a contract in the first place." GRG challenges that audit of the 2008 RFP as improperly motivated, but does not undermine the fact that the initial RFP was tainted nor does it allege that re-bidding the program was the wrong course of action. GRG also faults the District's decision to select only four JOC vendors. Even viewed in the light most favorable to GRG, however, none of this evidence shows that GRG would have been chosen in the 2010 RFP **[**21]** but for corruption. Indeed, GRG's tenth-place ranking was so low that even if HISD had selected seven

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[9] Marshall cites this case for the proposition that "the denial of a government contract that plaintiff expected to receive, but for a competitor's alleged bribery of public officials, did not give rise to a cognizable RICO injury." What he fails to mention in his brief is that our sister court explicitly found that the plaintiff "would not have been awarded the [government] contract regardless." *1991 U.S. App. LEXIS 12209, [WL] at *2*.

[*411] vendors and eliminated the vendor defendants, GRG still would not have been selected.[10] In short, GRG has not adduced sufficient evidence to overcome summary judgment as to its nonselection in the 2010 RFP.

The sudden decline in JOC assignments in 2009, however, is another matter. The District assigned GRG more work than any other contractor in the initial honeymoon period of the 2009 JOC program, and GRG won 42 of the 64 projects it "bid on" in 2009. The confluence of events in August 2009—Superintendent Saavedra's testimony that his resignation was driven by his dispute with Marshall, RHJ's latter-day and questionable addition to the JOC program, the drop-off in assignments to GRG—would **[**22]** allow a jury to infer that undue influence on and by Marshall harmed GRG's business.

Appellees offer plausible explanations why GRG's assignments dropped off, but none of these positively displaces the possible inference of corrupt influence. For example, vendors not alleged to have bribed Marshall continued to receive work after RHJ entered the picture. But GRG has produced evidence suggesting that Marshall's preferred vendor RHJ was displacing GRG after Ramirez spurned Marshall. Further, Appellees' expert noted that if GRG had continued to receive work at the same rate as it did the first two months, it would have been awarded over 100% of all JOC expenditures. But the drop off in total JOC volume may itself have been part of the alleged scheme. These are matters for the factfinder. We hold only that the evidence creates a fact issue as to the cause of the loss of GRG's JOC assignments.

Appellees urge many other grounds for affirming summary judgment on the RICO claims. ***HN12***[] "Although this court may decide a case on any ground that was presented to the trial court, we are not required to do so." *Breaux v. Dilsaver, 254 F.3d 533, 538 (5th Cir. 2001)*. Because the issues require consideration of a voluminous record, "we decline to decide these **[**23]** complex issues as they are better addressed by the district court in the first instance." *Lone Star Nat'l Bank, N.A. v. Heartland Payment Sys., Inc., 729 F.3d 421, 427 (5th Cir. 2013)*.[11]

B. HISD as a Defendant

HISD contends that ***HN14***[] school districts are not proper RICO defendants for **[*412]** two reasons. First, RICO requires demonstrating an underlying **[**24]** criminal act, which entails a *mens rea* requirement that a governmental entity cannot form. *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397, 404 (9th Cir. 1991)*; *see also* *Pedrina v. Chun, 97 F.3d 1296, 1300 (9th Cir. 1996)* (reaffirming *Lancaster*).[12] Second, municipal

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[10] After oral argument, Appellants called to our attention an internal audit HISD released on March 10, 2015. While it may be true that "this report contradicts HISD's position in this case that their re-bid of JOC contracts cleaned up the demonstrated favoritism shown in 2008," GRG still does not challenge the facts that the 2010 re-bid was an appropriate response, or that GRG would not have been selected.

[11] By noting two particular issues that will be pertinent on remand, we do not presume to eliminate others raised by the Appellees. First, ***HN13***[] RICO claims require showing that the unlawful behavior proximately caused the plaintiff's injuries. *Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268, 112 S. Ct. 1311, 1317, 117 L. Ed. 2d 532 (1992)*. A threat to a finding of proximate cause here may lie in HISD's use of third-party project managers to administer its JOC assignments. The factfinder will have to determine whether GRG's injury "flows" from the RICO violations. ***Khurana v. Innovative Health Care Sys., Inc., 130 F.3d 143, 150 (5th Cir. 1997)***, *abrogated on other grounds by* *Beck v. Prupis, 529 U.S. 494, 120 S. Ct. 1608, 146 L. Ed. 2d 561 (2000)*. Second, the permissible scope and extent of damages is also a matter for the district court to determine on remand. GRG's expert estimates the company lost 18 jobs—JOC assignments GRG would have received but for Marshall's improper influence—totaling $177,307. Based on the same data, a defense expert calculated the range of damages between $16,776.76 and $145,032.96. The defendants also challenge the reliability and thus admissibility of GRG's expert report.

[12] Several district courts in this circuit have also recognized "strong authority that governmental entities, such as counties or government agencies, cannot be proper RICO defendants." *Dale v. Mo. Governor Jay Nixon's Office, No. CIV.A. C-11-114, 2011 U.S. Dist. LEXIS 50304, 2011 WL 1810321, at *3 (S.D. Tex. May 10, 2011)*; *see also* *Nationwide Pub. Ins. Adjusters Inc. v. Edcouch-Elsa I.S.D., 913 F. Supp. 2d 305, 308 (S.D. Tex. 2012)*; *Dammon v. Folse, 846 F. Supp. 36, 38 (E.D. La. 1994)*; *La. Power & Light Co. v. United Gas Pipe Line Co., 642 F. Supp. 781, 806 (E.D. La. 1986)*.

entities enjoy common law immunity from punitive damages, and, whatever else it is, RICO's treble-damages provision is at least partially punitive. Genty v. Resolution Trust Corp., 937 F.2d 899, 908 (3d Cir. 1991). These reasons have proven persuasive to other courts.[13] We agree with these holdings.

A particularly good reason for rejecting governmental RICO liability stems from judicial reluctance to impose punitive damages on the public fisc. The Supreme Court has held that a municipality's liability for § 1983 damages does not thereby subject it to punitive damages, from which government entities were historically immune. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 263, 101 S. Ct. 2748, 2758, 69 L. Ed. 2d 616 (1981). *City of Newport* emphasized that because a public entity itself "can have no malice independent of the malice of its officials," 453 U.S. at 267, 101 S. Ct. at 2760, punishment by punitive damages would be inequitably assessed against the public. Moreover, "the deterrence rationale of § 1983 does not justify making punitive damages available against municipalities." Id. at 268, 101 S. Ct. at 2760.[14]

City of Newport held that, ***HN15***[] to overcome municipal immunity from punitive damages, Congress must clearly express its intention. Id. at 263, 101 S. Ct. at 2749. No such clear intent to overcome governmental immunity appears in the RICO provision for treble damages.

GRG, however, fastens hope on the Supreme Court's ambiguity about treble damages, "which have a compensatory **[*413]** side, serving remedial purposes in addition to punitive objectives." Cook Cnty., Ill. v. U.S. ex rel. Chandler, 538 U.S. 119, 130, 123 S. Ct. 1239, 1246, 155 L. Ed. 2d 247 (2003). The Supreme Court locates "different statutory treble-damages provisions on different points along the spectrum between purely compensatory and strictly punitive awards." PacifiCare Health Sys., Inc. v. Book, 538 U.S. 401, 405, 123 S. Ct. 1531, 1535, 155 L. Ed. 2d 578 (2003). Treble damages provisions designedly go well beyond the amount of actual harm, but the Supreme Court has "repeatedly acknowledged that the treble-damages provision contained in RICO itself is remedial in nature." PacifiCare, 538 U.S. at 406, 123 S. Ct. at 1535.

The Court's ambivalence about punitive damages complicates analysis here, but we believe PacifiCare cannot salvage a claim against HISD. First, ***HN16***[] the Supreme Court's characterization of **[**27]** RICO treble damages as "remedial" in *PacifiCare* cannot substitute for an express Congressional abrogation of municipal immunity from treble damages, which, whatever the characterization, exceed actual provable damages. To hold otherwise would mock *City of Newport.* Second, nothing in *PacifiCare* contravenes the Court's earlier holdings that treble-damages provisions serve both compensatory and punitive functions. *See* Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220, 240, 107 S. Ct. 2332, 2345, 96 L. Ed. 2d 185 (1987); *accord* Genty, 937 F. 2d at 910 ("there is convincing authority that Congress authorized civil RICO's powerful treble damages provision to serve a punitive purpose").[15] Third, the narrow question posed in *PacifiCare* was whether an arbitration agreement's ban on

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[13] Either of these theories—the inability to form a *mens rea* or immunity from punitive damages—might suffice to remove HISD from RICO's ambit in this case. There are also sound policy reasons for this conclusion:

> [T]he . . . theories for refusing to hold a municipal entity liable under RICO are not mutually exclusive—indeed, it can be said that they are two sides of the same concept. In an abstract but doctrinal sense, a corporation in and of itself cannot form *mens rea.* Similarly, a corporation, that is, the institutional construct itself, cannot be deterred; deterrence **[**25]** can only be achieved by targeting the behavior of the people who determine corporate conduct. Thus, if punitive damages would not operate to encourage innocent and essentially powerless taxpayers to prevent RICO's condemned activity by municipal officials, short of the election process, it would seem inappropriate to hold the municipal corporation liable.

Dammon, 846 F. Supp. at 38.

[14] When the Supreme Court held that municipal entities were liable under federal ***antitrust law***, it "understandably [left] open the question whether municipalities may be liable for treble damages[.]" **[**26]** Cmty. Commc'ns Co. v. City of Boulder, Colo., 455 U.S. 40, 65, 102 S. Ct. 835, 848, 70 L. Ed. 2d 810 (1982) (Rehnquist, J., dissenting). Before there was occasion for the high court to resolve that question, Congress exempted governmental units from all monetary damages. Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750 (1984), *codified at* 15 U.S.C. §§ 34-36

punitive damages included RICO treble damages. The Court refused to interpret the private parties' agreement, holding that threshold duty for an arbitrator. *PacifiCare* has no bearing on the liability of governmental entity defendants for treble damages under RICO.

For these reasons, we conclude that GRG cannot proceed against HISD under RICO's mandatory **[**28]** treble damage provision. Because Congress wrote no single-damage alternative, and ***HN17***[] we lack power to revise federal statutes, Appellants fail to state a cognizable RICO claim against HISD. *See Cullen v. Margiotta, 811 F.2d 698, 713 (2d Cir. 1987)* (***HN18***[] "civil RICO requires that a successful plaintiff be awarded treble damages").

II. State Law Claims

A. Breach of Contract and Estoppel Theories

GRG appeals the district court's summary judgment rejecting its state law claims against HISD for breach of contract and estoppel. GRG's breach of contract argument relies on ***HN19***[] an implied duty of good faith, which, as the district court noted, Texas law rejects except in the context of special relationships. *See Hall v. Resolution Trust Corp., 958 F.2d 75, 79 (5th Cir. 1992)*; *see also City of Midland v. O'Bryant, 18 S.W.3d 209, 215 (Tex. 2000)*. The case that GRG cites to the contrary is inapposite, as the court relied expressly on the Texas Uniform Commercial Code, which imposes a duty of good faith in contracts for sales of goods, a condition plainly not met here. *See Mailing & **[*414]** Shipping Sys., Inc., v. Neopost USA, Inc., 937 F. Supp. 2d 879 (W.D. Tex. 2013)*. Indeed, *Neopost* admonished that there is no general duty of good faith in contracts in Texas. *Id. at 889*.

GRG also argues that "HISD breached its promise to GRG to permit GRG to *seek* JOC projects[.]" However, it cites neither a contractual provision nor other evidence of a promise. Consequently, GRG identifies no obligation **[**29]** that HISD failed to perform.[16]

GRG's promissory estoppel and quasi estoppel claims fare no better. The district court held that the promissory estoppel claim failed because the JOC contract covered the subjects of dispute, and that the quasi estoppel claim failed because GRG did not create a genuine, material fact issue on the elements of that claim. Both of these holdings are correct.

HN20[] Promissory estoppel "may be asserted by a plaintiff as an affirmative ground for relief." *Fertic v. Spencer, 247 S.W.3d 242, 250 (Tex. App. 2007)*. To succeed on a promissory estoppel cause of action, a plaintiff must show: "(1) a promise, (2) foreseeability of reliance thereon by the promisor, and (3) substantial reliance by the promisee to his detriment." *English v. Fischer, 660 S.W.2d 521, 524 (Tex. 1983)*. This cause of action, however, "presumes no contract exists[.]" *Subaru of Am., Inc. v. David McDavid Nissan, Inc., 84 S.W.3d 212, 226 (Tex. 2002)*. "If . . . a valid contract between the parties covers the alleged promise, the plaintiff cannot recover for the promise under promissory estoppel." *Fertic, 247 S.W.3d at 250*. GRG's JOC contract here covered both the terms for the assignment of JOC work and the parties' rights in renewal. By its terms, the contract **[**30]** did not oblige HISD to

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[15] Albeit in non-precedential opinions, the Third Circuit has continued to apply *Genty* since *PacifiCare* was decided. *Tengood v. City of Philadelphia, 529 F. App'x 204, 209 n.4 (3d Cir. 2013)* (unpublished) (rejecting argument that *PacifiCare* abrogated *Genty*); *Heinemeyer v. Twp. of Scotch Plains, 198 F. App'x 254, 256 (3d Cir. 2006)*; *Kadonsky v. New Jersey, 188 F. App'x 81, 85 (3d Cir. 2006)*. *See also Cranberry Promenade, Inc. v. Cranberry Twp., No. CIV. A. 09-1242, 2010 U.S. Dist. LEXIS 15077, 2010 WL 653915, at *4 (W.D. Pa. Feb. 22, 2010)*.

[16] HISD urges several grounds to reject the contract claim other than those on which the district court relied. We need not and do not address these arguments.

assign JOC work, and the contract was renewable for successive years at HISD's sole discretion. Promissory estoppel is utterly displaced.[17]

HN22[] Quasi estoppel, on the other hand, is not a freestanding cause of action but a procedural device or affirmative defense. *See* Deutsche Bank Nat'l Trust Co. v. Stockdick Land Co., 367 S.W.3d 308, 311 (Tex. App. 2012). "Unlike equitable estoppel, quasi estoppel requires no showing of a false representation or detrimental reliance" but describes "certain legal bars, such as ratification, election, acquiescence or acceptance of benefits." Steubner Realty 19, Ltd. v. Cravens Rd. 88, Ltd., 817 S.W.2d 160, 164 (Tex. App. 1991) (citing 31 C.J.S. *Estoppel* § 107 (1964)). "This concept was developed to prevent a party from retaining a benefit by asserting a position to the disadvantage of another and then asserting a right which is inconsistent with that previous position." Stimpson v. Plano Indep. Sch. Dist., 743 S.W.2d 944, 946 (Tex. App. 1987, writ denied).

GRG cannot prevail on **[**31]** quasi-estoppel either. **HN23**[] Quasi-estoppel "requires (1) a previous action and (2) a subsequent inconsistent action which is thereby sought to be estopped." Mulvey v. Mobil Producing Tex. & N.M Inc., 147 S.W.3d 594, 607 (Tex. App. 2004). GRG argues that HISD should be "estopped to deny GRG's rights **[*415]** consistent with the parties' contractual relationships" and it accurately recites the elements of quasi-estoppel. GRG does not, however, identify HISD's prior inconsistent action or the alleged benefit that it received at GRG's expense. Its reply brief refers to "the promise relevant to the quasi-estoppel claim," but, as just discussed, quasi-estoppel needs no promise. The district court found that "HISD did not take inconsistent positions[;] it merely acted according to the JOC contract." Even if GRG's expectations were defeated by a bribery scheme, HISD's contract is not inconsistent with its actions regarding GRG.[18]

B. Tortious Interference with Prospective Business Relations

GRG brought tortious interference with prospective business relations claims against Marshall, Clay, and the vendor defendants and appeals the district court's rejection of those claims. We hold, contrary to the district court, that Marshall is not entitled to dismissal on state law grounds, nor is summary judgment appropriate for these defendants.

1. Election of Remedies for Claims Against Marshall

Marshall contends that he is immune from GRG's state law claims for tor tortious interference and conspiracy for two reasons. First, he argues that (a) the Texas Tort Claims Act ("TTCA") requires an election of remedies where a plaintiff has sued both a governmental entity and its employee **[**33]** and (b) that he is an "employee" of HISD

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[17] GRG argues that the district court dismissed its estoppel claims "on the basis that GRG had a contract with HISD. But if the Court holds that no contract claim is stated, it should necessarily reinstate GRG's estoppel and quasi-estoppel claims." However, **HN21**[] it is the existence of a *contract* that makes estoppel inappropriate, not the viability of any contract *claim.* Further, GRG pressed only quasi-estoppel in its reply brief.

[18] In affirming these conclusions, we, like the district court, reserve judgment on whether public entities like HISD can be held liable at all under theories of estoppel. Texas law generally immunizes municipalities from estoppel for governmental (as opposed to proprietary) functions, but the decisions seem to be split over whether a school district ever exercises **[**32]** proprietary functions. *Compare* S.W. ex rel. A.W. v. Arlington Indep. Sch. Dist., 435 S.W.3d 414, 421 & n.10 (Tex. App. 2014), *with* Galveston Indep. Sch. Dist. v. Clear Lake Rehab. Hosp., L.L.C., 324 S.W.3d 802, 809 (Tex. App. 2010). And while Texas courts have contemplated exceptions in certain extreme cases, *see* Bowman v. Lumberton Indep. Sch. Dist., 801 S.W.2d 883, 888 (Tex. 1990); City of Hutchins v. Prasifka, 450 S.W.2d 829, 835-36 (Tex. 1970), we decline to explore the scope of these exceptions except to note that the cases address estoppel to deny agency, normally in the employment context. *See, e.g.,* Hudspeth v. Chapel Hill I.S.D., No. 03-06-00243-CV, 2007 Tex. App. LEXIS 4506, 2007 WL 1647818, at *4 (Tex. App. June 8, 2007); La Villa Indep. Sch. Dist. v. Gomez Garza Design, Inc., 79 S.W.3d 217, 221 (Tex. App. 2002) (finding agency authority by estoppel); Bowman, 801 S.W.2d at 888. It is unhelpful to talk about "estoppel" *simpliciter* when the different types of estoppel implicate different analyses.

under a statutory definition, *Tex. Educ. Code § 22.051(a)(5)*, and therefore falls within the protection of the election of remedies provision of the TTCA. Second, Marshall argues that he is separately entitled to professional immunity under the *Texas Education Code § 22.0511*. The district court granted summary judgment in Marshall's favor on the first basis. We disagree with that conclusion and also find Marshall ineligible for the professional immunity provision.

HN24[] The TTCA waives the state's immunity from suit in certain circumstances. Importantly for present purposes, the TTCA also covers all tort theories that may be alleged against a governmental entity whether or not it waives that immunity. *Mission Consol. Indep. Sch. Dist. v. Garcia, 253 S.W.3d 653, 658 (Tex. 2008)*. Further, "[i]f a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit." *Tex. Civ. Prac. & Rem. Code § 101.106(e)*. The **[*416]** state supreme court interpreted this language to mean that "if a plaintiff brings virtually any state common law tort claim against both a governmental unit and its employees, *§ 101.106(e)* will allow the employee defendants to be dismissed if the governmental unit so moves." *Bustos v. Martini Club, Inc., 599 F.3d 458, 463* (citing *Garcia, 253 S.W.3d at 658*). In *Bustos*, this court held that **[**34]** where state law claims against the municipality based on negligent hiring and supervision were joined with claims against police officer defendants for excessive force, the claims against the city were "rooted in the same alleged common law violations." *Id. at 464*. Accordingly, the court was bound to grant the city's motion to dismiss the officers pursuant to *§ 101.106(e)*.

In this case, the district court assumed that Marshall was an HISD employee and, based on TTCA *§ 101.106(e)* and *Bustos*, granted HISD's motion to dismiss both state law conspiracy claims filed against HISD and Marshall and the tortious interference claims brought against Marshall alone. The court concluded that the tortious interference claims were "rooted in the same alleged common law violations" as the global conspiracy claims. Why HISD would have wanted to shield Marshall from GRG's suit in this fashion, given the seriousness of the allegations and the state of proof, is unclear. Nevertheless, in this posture it becomes critical to determine whether Marshall was an "employee" of HISD who could be statutorily shielded. Because we conclude that he was not, there is no need to reach the question whether *Bustos* compels the dismissal of claims brought **[**35]** against Marshall but not HISD.

HN25[] The TTCA defines an employee as "a person, including an officer or agent, who is in the paid service of a governmental unit by competent authority" but excludes "a person who performs tasks the details of which the governmental unit does not have the legal right to control." *Tex. Civ. Prac. & Rem. Code § 101.001(2)*. Marshall, an elected school board trustee, was neither in HISD's paid service nor did the District have any right to control him. He is not an employee under the TTCA.

To overcome this deficiency, Marshall asserts that he was an "employee" pursuant to the recent decision of the Texas Supreme Court in *Franka v. Velasquez, 332 S.W.3d 367 (Tex. 2011)*. One defendant in *Franka* was a medical resident who did not fit TTCA's definition of employee, because she "was not both paid by and subject to the legal control of the same governmental unit[.]" *Franka, 332 S.W.3d at 373*. The court deemed her an employee under the TTCA, however, pursuant to a provision of the Texas Health and Safety Code, which designated medical residents as employees "for purposes of determining liability[.]" *Id. at 374*. Marshall analogizes his position to that of the medical resident in *Franka*. ***HN26***[] Provisions of the Texas Education Code define a school board trustee as an employee, *Tex. Educ. Code § 22.051*,[19] and grant immunity **[**36]** to "employees" for "any act that is incident to or within the scope of the duties of the employee's position . . . and that involves the exercise of judgment or discretion[.]" *Tex. Educ. Code § 22.0511(a)*. On the basis of this analogy, Marshall urges us to rely on the Education Code's definition of employee.

But even if some "employees" under these Education Code provisions might fall **[*417]** within the scope of *Franka,* Marshall does not. The same Education Code provision limits personal liability "for any act *that is incident to or within the scope of the duties* of the employee's position of employment and that involves the exercise of judgment or discretion on the part of the employee[.]" *Tex. Educ. Code § 22.0511* (emphasis added). Marshall is not alleged

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[19] ***HN27***[] The statute defines a "professional employee of a school district" to include "a member of the board of trustees of an independent school district[.]" *Tex. Educ. Code § 22.051(a)(5)*.

to have been acting "within the scope" of his duties. To the contrary, bribery and peddling influence are not within the scope of a trustee's duty. He was allegedly defiling his position and wholly outside the legitimate scope of a trustee's duties if he accepted bribes in exchange for advancing the interests of certain contractors. Marshall's **[**37]** rationalization that getting involved with contracting and procurement decisions is "minimally" within the scope of his duties, particularly when he served as HISD Board President in 2009, cannot stand against GRG's detailed evidence of the pay-to-play scheme. Marshall is not entitled to immunity under the TTCA or the Education Code.

2. Tortious Interference with Prospective Business Relations

Next to consider is whether summary judgment was appropriate on GRG's claim for tortious interference with prospective business relations against Marshall, the vendor defendants and Clay. GRG contends that there was a reasonable probability that it would have entered into additional contracts with HISD and that Marshall, Clay, and the vendor defendants "intentionally interfered with the relationship."

HN28[] The Texas Supreme Court has recently defined the elements of tortious interference with prospective business relations. The common law cause requires that

> (1) there was a reasonable probability that the plaintiff would have entered into a business relationship with a third party; (2) the defendant either acted with a conscious desire to prevent the relationship from occurring or knew the interference **[**38]** was certain or substantially certain to occur as a result of the conduct; (3) the defendant's conduct was independently tortious or unlawful; (4) the interference proximately caused the plaintiff injury; and (5) the plaintiff suffered actual damage or loss as a result.

Coinmach Corp. v. Aspenwood Apartment Corp., 417 S.W.3d 909, 923 (Tex. 2013). The second element in this list—the requisite mental state—was the deciding factor for the district court, which found that any bribery on the part of competing vendors did not have as its object the interference with GRG's status as a JOC contractor. The district court relied on *Bradford v. Vento*, in which the Texas Supreme Court adopted the explanation of the Second Restatement of Torts that when a defendant "had no desire to effectuate the interference by his action but knew that it would be a mere incidental result of conduct he was engaging in for another purpose, the interference may be found to be not improper." *48 S.W.3d 749, 757* (quoting *RESTATEMENT (SECOND) OF TORTS § 766B cmt. d* (1979)).

Bradford is distinguishable on its facts. The plaintiff in *Bradford* claimed he had bought a particular store from its previous owner. The defendant mall administrator had allegedly interfered with the plaintiff's sales by stating, in response to a police inquiry, that the previous owner **[**39]** still owned the store. *Bradford, 48 S.W.3d at 754-55*. The Texas Supreme Court found that "the interference was at most only an incidental result of Bradford's legitimate conduct." *Id. at 758*. *Bradford* dealt with statements made in good faith, whereas these defendants' actions hardly occurred in good faith.

[*418] GRG bolsters its argument by citing *Strickland v. Joeris*, an unpublished Texas court of appeals case. *No. 04-11-00626-CV, 2012 Tex. App. LEXIS 9841, 2012 WL 6013423 (Tex. App. Nov. 30, 2012)* (mem. op.) (unpublished). The plaintiff in *Strickland* contended he was fired because of a dispute he had with one of the firm's largest clients over a transaction unrelated to the firm's business. Shortly after the dispute, the client called the firm and complained about the employee. The plaintiff introduced evidence that the client "made it clear" that the plaintiff's dispute "could possibly jeopardize all current and future work." *2012 Tex. App. LEXIS 9841, [WL] at *4*. The court held that this was sufficient to create a triable fact issue as to whether the client intended to jeopardize the employee's future with the firm. *Id.* GRG contends that the evidence here likewise supports the inference that its competitors "instructed Marshall to get rid of GRG[.]"

In *Strickland,* the defendant actually made statements to a party in the business relationship about **[**40]** the plaintiff, and circumstantial evidence strongly supported an inference that the statement was designed to harm the plaintiff.[20] In contrast, there is in this case no direct evidence of communications between any vendor defendant and any HISD official on the subject of GRG. The nature of the alleged bribery scheme, however, was to fix the contracting process in favor of the vendor defendants. Where only a limited number of JOC contractors would be selected, all of the participants in the scheme "knew the interference was substantially certain to occur as a result of the conduct." *See* *Coinmach Corp., 417 S.W.3d at 923*. This reasoning would apply to GRG's claim as regards the decrease in projects under the 2009 contract and the non-renewal of GRG's JOC contract in the 2010 RFP process.[21] That this one element of the claim survives summary judgment does not, of course, resolve questions concerning the other elements on which the court did not rule.

III. Civil Conspiracy Claims

Our partial reinstatement of the RICO claim and the claim for interference with prospective business relations requires reinstatement of the civil conspiracy claim against the defendants targeted thereby (except HISD) pending further developments on remand.

IV. Constitutional Claims

GRG and Ramirez brought equal protection, *First Amendment*, and due process claims under the Civil Rights Act, *42 U.S.C. § 1983* against HISD and Marshall. The *First Amendment* claim fails for essentially the reasons stated by the district court: Appellants did not "speak" or intend to convey a particular message, and no one would have "reasonably apprehended" that they so intended, when they refused to pay bribes to Marshall. *See* *Cabrol v. Town of Youngsville, 106 F.3d 101, 108 (5th Cir. 1997)*. The due process claim fares no better. GRG identifies no constitutionally protected liberty or property interest. *See* *Bd. of Regents of State* **[*419]** *Colls. v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)*.

GRG's equal protection claim also lacks support.[22] ***HN29***[] The *Equal Protection Clause* forbids state **[**42]** actors from treating similarly situated individuals differently *for a discriminatory purpose* and without a rational basis. GRG argues that the zero-sum nature of the JOC program meant that Marshall and HISD knew that favoring bribers would harm those who refused to bribe, and that a plaintiff must only "show that the decisionmakers were aware" of potential harm to disfavored individuals. "'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences." *Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279, 99 S. Ct. 2282, 2296, 60 L. Ed. 2d 870 (1979)*. The district court concluded that GRG failed to demonstrate that Marshall or HISD discriminated against GRG "because of" and not "in spite of" its refusal to pay bribes. *See id.* (equal protection claim requires showing that "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects"). Nothing in the record suggests that Marshall or any of his collaborators acted to harm non-bribers. *See* *SECSYS, LLC v. Vigil, 666 F.3d 678, 687 (10th Cir. 2012)* (rejecting equal protection claim arising out of pay-off scheme involving state contracts when harm was "at most a foreseen (but unintended) side effect"). That Marshall may have perverted HISD's procurement **[**43]** processes to cause HISD to discriminate *in favor of* RHJ and FBM is not sufficient to show that GRG was discriminated *against. See* *Club Italia Soccer & Sports Org., Inc. v. Charter Twp. of Shelby, Mich., 470 F.3d 286,*

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[20] *See also* *Lee v. Levi Strauss & Co., 897 S.W.2d 501 (Tex. App. 1995)*, in which a letter from the defendant led the plaintiff's employer to believe he had to fire the plaintiff. *Id. at 504-05*.

[21] Appellees strenuously contend that GRG's claim also fails for lack of evidence that it would have become a JOC contractor following the 2010 RFP. This contention **[**41]** was not addressed by the district court, and we do not address it either. Assessing the "likelihood" of "prospective business relations" under Texas law suggests different considerations than the RICO inquiry we discussed earlier herein, which is whether HISD "would have" entered into a 2010 JOC arrangement with GRG.

[22] At the outset, we reject HISD's unpalatable argument that there was no disparate treatment since all vendors were given an opportunity to bribe a trustee.

299 (6th Cir. 2006) (rejecting equal protection claim when one vendor "was treated beneficially, but no party was discriminated against").

Further, ***HN30***[] an equal protection claim depends on either identifying a class, *Washington v. Davis, 426 U.S. 229, 240, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976)*, or showing that the aggrieved party is a "class of one," *Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S. Ct. 1073, 1074, 145 L. Ed. 2d 1060 (2000)*. Ramirez does not claim that he was discriminated against on the basis of his membership in any particular class and therefore must rely on the class of one theory. However, the class-of-one rationale does not apply to "forms of state action . . . which by their nature involve discretionary decision-making based on a vast array of subjective, individualized assessments." *Engquist v. Oregon Dep't of Agr., 553 U.S. 591, 603, 128 S. Ct. 2146, 2154, 170 L. Ed. 2d 975 (2008)*. *Engquist* held that the discretionary-decision-making "principle applies most clearly in the employment context, for employment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify." *Id. at 604, 128 S. Ct. at 2154*; *see also* *Harris v. Quinn, 134 S. Ct. 2618, 2653, 189 L. Ed. 2d 620 (2014)* ("the government **[**44]** has wider constitutional latitude when it is acting as employer than as sovereign"). HISD calls our attention to the "obvious parallels between government employees and government contractors." *Engquist* is not dispositive of GRG's class of one theory but cuts against it. In any event, even if GRG's dealings with HISD fall within a class of one for equal protection purposes, **[*420]** the absence of discriminatory intent dooms its claim.

For the foregoing reasons, GRG cannot sustain its constitutional claims.[23]

CONCLUSION

The district court commendably dealt with novel claims in this troubling case with a long and complex record. Based on the foregoing discussion, we AFFIRM the judgment dismissing HISD from liability for RICO and federal constitutional violations and state law claims. We AFFIRM the judgment dismissing Marshall from liability for constitutional violations. We REVERSE and REMAND, for further proceedings consistent herewith, the summary judgment dismissing the RICO claims against the (non-HISD) Appellees insofar as they allege injury covering the remainder of the 2009 JOC contract period. **[**45]** We REVERSE and REMAND for further proceedings consistent herewith the summary judgment dismissing the claim against the (non-HISD) Appellees for tortious interference with prospective business relations and the civil conspiracy claims.

AFFIRMED IN PART, REVERSED and REMANDED IN PART.

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[23] We do not reach HISD's assertion that these *§ 1983* claims do not justify imposing municipal liability.

[Trendsettah USA, Inc. v. Swisher Int'l Inc.](#)

United States District Court for the Central District of California

May 19, 2015, Decided; May 19, 2015, Filed

SACV14-01664 JVS (DFMx)

Reporter
2015 U.S. Dist. LEXIS 186835 *

Trendsettah USA, Inc., et al. v. Swisher International Inc.

Prior History: *Trendsettah United States v. Swisher Int'l, 2015 U.S. Dist. LEXIS 186869 (C.D. Cal., Feb. 3, 2015)*

Core Terms

Pleadings, trade libel, choice-of-law, allegations, prospective economic relations, argues, negligent interference, anti trust law, antitrust, cigarillos, entitled to judgment, special damage, products, monopolization, wholesalers, Reply

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

Attorneys Present for Defendants: Not Present.

Judges: James V. Selna.

Opinion by: James V. Selna

Opinion

CIVIL MINUTES - GENERAL

Proceedings: (IN CHAMBERS) **Order Granting in Part and Denying in Part Defendant's Motion for Judgment on the Pleadings**

Defendant Swisher International, Inc. ("Swisher") moves the Court to enter judgment on the pleadings on the first, second, fifth, eight, and ninth claims against it as alleged by Plaintiffs Trendsettah USA, Inc. and Trend Settah, Inc. (collectively, "Trendsettah"). (Docket No. 33.) Trendsettah opposes. (Docket No. 34.) Swisher has replied. (Docket No. 35.)

As set forth below, the Court GRANTS IN PART and DENIES IN PART Swisher's motion.

I. BACKGROUND

Swisher is a manufacturer of cigars and "cigarillos," a type of cigar. (Compl. ¶ 11.) Effective January 20, 2011, Trendsettah entered into a supply agreement (the "Private Label Agreement") with Swisher whereby Swisher would produce a private-label brand of cigarillos to be sold by Trendsettah under the "Splitarillos" brand. (Id. ¶ 20.) The Private Label Agreement ("PLA") contains a choice-of-law clause that indicates that "this Agreement shall be governed by the laws of the State of **[*2]** Florida." (Opp'n Mot. J. Pleadings 14; see also Laquidara Decl., Ex A, Docket No. 16-1.)

Although Splitarillos sold well, in 2012, Swisher allegedly began refusing to fulfill Trendsettah's orders for Splitarillos. (Compl. ¶ 23-24.) At the same time, Swisher allegedly falsely told Trendsettah's wholesale customers that Trendsettah was going out of business and would no longer make Splitarillos. (Id. ¶¶ 36-37.) Swisher employees also allegedly removed Splitarillo products and marketing materials from wholesalers and individual retailers during site visits. (Id. ¶¶38-39.) As a result, Trendsettah claims that sales of Splitarillos sharply dropped. (Id. ¶ 41.)

On October 14, 2014, Trendsettah filed a Complaint with this Court, asserting the following claims against Swisher: (1) violation of the Sherman Act, *15 U.S.C. § 2*; (2) violation of Florida ***Antitrust Law***, *Fl. Stat. § 542.19*; (3) breach of contract; (4) breach of the implied covenant of good faith and fair dealing; (5) trade libel; (6) tortuous interference with contract; (7) intentional interference with prospective economic relations; (8) negligent interference with prospective economic relations; and (9) violation of California's Unfair Competition Law ("UCL"), **[*3]** *Cal. Bus. & Prof. Code § 17200 et seq.* (Docket No. 1.)

II. LEGAL STANDARD

Under *Federal Rule of Civil Procedure 12(c)*, "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." A motion for judgment on the pleadings should be granted only if "taking all the allegations in the pleading as true, the moving party is entitled to judgment as a matter of law." *McSherry v. City of Long Beach, 423 F.3d 1015, 1021 (9th Cir. 2005)*. A *Rule 12(c)* motion asserting a failure to state a claim is governed by the same standard as a *Rule 12(b)(6)* motion to dismiss. *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1054 n.4 (9th Cir. 2011)*; *Chavez v. United States, 683 F.3d 1102, 1108 (9th Cir. 2012)*.

In resolving a *12(b)(6)* motion, the Court must follow a two-pronged approach. First, the Court must accept all well-pleaded factual allegations as true, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. Nor must the Court "accept as true a legal conclusion couched as a factual allegation." Id. (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). Second, assuming the veracity of well-pleaded factual allegations, the Court must "determine whether they plausibly give rise to an entitlement to relief." *Id. at 679*. This determination is context-specific, requiring the Court to draw on its experience and common sense, but there is no plausibility "where the well-pleaded facts do not permit the **[*4]** court to infer more than the mere possibility of misconduct." Id.

III. DISCUSSION

A. Antitrust Claims

Swisher argues that it is entitled to judgment on the pleadings because Trendsettah has failed to allege an "antitrust injury" sufficient to state a claim for illegal monopolization or attempted monopolization in violation of *§2* of the Sherman Act and Florida ***Antitrust Law*** (*Fl. Stat. § 542.19*). (Mot. J. Pleadings 5-11.) The Court analyzes the claims in tandem because "[f]ederal and Florida antitrust laws are analyzed under the same rules and case law." *All Care Nursing Serv., Inc. v. High Tech Staffing Servs., Inc., 135 F.3d 740, 745 n.11 (11th Cir. 1998)*.

In order to state a monopolization claim under *§ 2* of the Sherman Antitrust Act, a plaintiff must allege facts sufficient to demonstrate "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." See *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. In order to state an attempted monopolization claim under *§ 2*, a plaintiff must allege facts sufficient to demonstrate "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly **[*5]** power." *Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 893 (9th Cir. 2007)*. "Anticompetitive conduct is behavior that tends to impair the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way." Id. (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n. 32, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*).

A private plaintiff seeking redress for violation of federal ***antitrust law*** must sufficiently allege "causal antitrust injury" under *§ 4* of the Clayton Act. See *Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995)*. "Antitrust injury" is not merely an injury caused by violation of ***antitrust law***, but rather is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Glen Holly Entm't, Inc. v. Tektronix, Inc., 352 F.3d 367, 371 (9th Cir. 2003)* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*). In other words, a plaintiff must allege facts sufficient to show an injury to competition, not just injury to competitors. *Glen Holly, 352 F.3d at 372* (citing *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 107, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*).

Swisher argues that Trendsettah has not adequately alleged an antitrust injury but rather has merely alleged injury to itself as Swisher's competitor. (See Mot. J. Pleadings 5-11.) Specifically, Swisher argues that Trendsettah has failed to allege that Swisher's conduct "resulted in higher prices or decreased output for the consuming public." (Mot. J. Pleadings. 9, citing *Streamcast Networks, Inc. v. Skype Techs., S.A., 547 F. Supp. 2d 1086, 1096-98 (C.D. Cal. 2007)*.)

However, Trendsettah's Complaint alleges that Swisher's conduct caused harm to competition **[*6]** by (1) maintaining a supracompetitive price for cigarillos (Compl. ¶¶ 50-52) and (2) decreasing output available to consumers (id. ¶ 29, 41, 51, 52). Trendsettah supports its allegation that the cigarillo market price is supracompetitive by alleging that the cigarillo market has "high profitability margins" and "major barriers to entry." (Id. ¶¶ 12-13.) Trendsettah also alleges that because the PLA was exclusive, Swisher was unilaterally able to constrain output of Splitarillos cigarillos to consumers despite their capacity to meet demand. (Id. ¶¶ 22, 26-30.) These allegations describe a plausible injury to competition, not merely an injury to Trendsettah alone.

Swisher argues that Trendsettah's "injury to competition" allegations should not be entitled to the assumption of truth in light of Trendsettah's acknowledgment that it lost business to non-party competitors as a result of Swisher's actions. (Mot. J. Pleadings 8-9; Compl. ¶¶ 29, 66, 77, 83.) The Court disagrees. At this stage, the Court must draw all inferences in favor of Trendsettah, the nonmoving party. Accordingly, the Court finds that Trendsettah has pled facts that, if true, state a claim for a cognizable antitrust injury. **[*7]**

Accordingly, Swisher is not entitled to judgment in its favor on Trendsettah's antitrust claims.[1]

B. Trade Libel, Negligent Interference, and UCL Claims

Swisher argues that the Court should grant judgment in its favor on Trendsettah's trade libel, negligent interference with prospective economic relations, and California UCL claims. (Mot. J. Pleadings 11.) As a threshold issue, Swisher argues that Florida law governs these claims because the parties' PLA contains a Florida choice-of-law clause. (Id.) Trendsettah disagrees. (Opp'n Mot. J. Pleadings 12-14.) Thus, the Court must first determine whether California or Florida law applies to each of the aforementioned claims.

"In a federal question action where the federal court is exercising supplemental jurisdiction over state claims, the federal court applies the choice-of-law rules of the forum state[.]" *Paracor Finance, Inc. v. Gen. Elec. Capital Corp., 96 F.3d 1151, 1164 (9th Cir. 1996)*. Here, as in *Paracor*, the forum state is California. Id. Trendsettah does not dispute that the choice-of-law clause is enforceable but does dispute whether the clause requires the Court to apply

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[1] Swisher does not raise any other aspect of the antitrust claims, and the Court expresses no opinion beyond the issue of antitrust injury.

Florida law to its trade libel, negligent interference with prospective economic relations, and UCL claims. (Opp'n Mot. J. Pleadings 13-14, 16.) **[*8]**

Under California law, "[a] valid choice-of-law clause, which provides that a specified body of law 'governs' the 'agreement' between the parties, encompasses all causes of action arising from or related to that agreement, regardless of how they are characterized, including tortious breaches of duties emanating from the agreement or the legal relationships it creates." *Nedlloyd Lines B.V. v. Superior Court, 3 Cal. 4th 459, 470, 11 Cal. Rptr. 2d 330, 834 P.2d 1148 (1992)*). Here, the Florida choice-of-law clause is phrased similarly to the clause in *Nedlloyd*, providing that the PLA "shall be governed by the laws of the State of Florida." (Opp'n Mot. J. Pleadings 14; see also Laquidara Decl., Ex A, Docket No. 16-1.)

The Court will consider the applicability of the choice-of-law clause to each claim in turn.

1. Trade libel

Swisher and Trendsettah dispute whether Trendsettah's trade libel claim falls within the scope of the PLA's choice-of-law clause. (Mot. J. Pleadings 11-12; Opp'n Mot. J. Pleadings 13-14.)

The Court finds that Florida law applies to Trendsettah's trade libel claim. In holding that a contractual choice-of-law provision governs "all causes of action arising from or related to that agreement, regardless of how they are characterized," the California Supreme Court in Nedlloyd further **[*9]** explained:

> When a rational businessperson enters into an agreement establishing a transaction or relationship and provides that disputes arising from the agreement shall be governed by the law of an identified jurisdiction, the logical conclusion is that he or she intended the law to apply to all disputes arising out of the transaction or relationship. We seriously doubt that any rational businessperson, attempting to provide by contract for an efficient and business-like resolution of possible future disputes, would intend that the laws of multiple jurisdictions would apply to a single controversy having its origin in a single, contract-based relationship.

Nedlloyd, 3 Cal. 4th at 469-70 (emphasis added). Upon examination of the facts alleged in the Complaint, it is evident that the trade libel claim is a cause of action related to the parties' contract-based relationship even though it is not predicated on the PLA itself. The present dispute is based on a single controversy regarding Swisher's alleged failure to perform under the PLA in order to stifle competition. Trendsettah's trade libel claim specifically alleges that Swisher made false statements about the quality and future availability of products that it **[*10]** was contractually obligated to produce on Trendsettah's behalf, implicating questions of the PLA's interpretation and the parties' contractual relationship. See *Olinick v. BMG Entm't, 138 Cal. App. 4th 1286, 1299-1300, 42 Cal. Rptr. 3d 268 (2006)* (choice-of-law clause controlled Fair Employment and Housing Act ("FEHA") and tortious wrongful discharge case because interpretation of employment contract was central issue, although clams were not predicated on contract's existence). Like the California Supreme Court in *Nedlloyd*, here the Court seriously doubts that Trendsettah and Swisher intended to apply the laws of multiple jurisdictions to what is a single controversy arising from their PLA relationship.

Having concluded that Florida law applies to Trendsettah's trade libel claim, the Court must now consider whether Swisher is entitled to judgment on the pleadings.

Swisher argues that Trendsettah has failed to allege facts sufficient to state a trade libel claim under Florida law. (Mot. J. Pleadings 12-14.) To state a Florida trade libel (or "injurious falsehood") claim, a plaintiff must allege "(1) a falsehood (2) has been published, or communicated to a third person, (3) when the defendant-publisher knows or reasonably should now that it will likely result in inducing **[*11]** others not to deal with the plaintiff; (4) in fact, the falsehood does play a material and substantial part in inducing others not to deal with the plaintiff; and (5) special damages are proximately caused as a result of the published falsehood." *National Numismatic Certification, LLC v. eBay, Inc., No. 6:08-cv-42-Orl-19GJK, 2008 U.S. Dist. LEXIS 109793, 2008 WL 2704404, at *19-*20 (M.D. Fla. July 8, 2008)* (quoting *Border Collie Rescue, Inc. v. Ryan, 418 F. Supp. 2d 1330, 1348 (M.D. Fla. 2006)*).

The parties dispute what level of specificity is required to state a trade libel claim. (Mot. J. Pleadings 12-14; Opp'n Mot. 14-16.) A federal court follows federal procedural rules, including their pleading requirements, even when considering the sufficiency of an allegation of violation of state substantive law. See *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1102* (noting that "[t]he Federal Rules of Civil Procedure apply irrespective of the source of subject matter jurisdiction, and irrespective of whether the substantive law at issue is state or federal," citing *Hanna v. Plumer, 380 U.S. 460, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965)*); see also *Caster v. Hennessey, 781 F.2d 1569, 1570 (11th Cir. 1986)*. In fact, the 11th Circuit has specifically noted that Florida's strict pleading requirements for defamation claims[2] exceed the requirements of *Fed. R. Civ. P. 8(a)(2)*, which simply requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Id.; see also *Caruso v. Galencare, Inc., No. 8:14-cv-539-T-33AEP, 2014 U.S. Dist. LEXIS 62468, 2014 WL 1796684, at *4-*5 (M.D. Fla. May 6, 2014)* **[*12]** . This distinction was not lost on the court in Caruso, which correctly identified that it is the pleading standard of *Rule 8*, not Florida's heightened pleading requirements, that guide a federal court's analysis of claims. See *2014 WL 1796684, at *4-*5*.

Swisher maintains that a trade libel claim is generally subject to more "stringent standards" than those applied under *Rule 8* in Caruso (see Reply 18) and that a plaintiff "must allege certain facts such as the identity of the speaker, a description of the statement, and provide a time frame within which the publication occurred." See *Fowler v. Taco Viva, Inc., 646 F. Supp. 152, 157-58 (S.D. Fla. 1986)*. However, Swisher cites no authority that holds that this is what *Rule 8* requires for a trade libel claim. Rather, "*Rule 8* does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*).

Swisher correctly notes, however, that a plaintiff must plead its allegations of special damages pursuant to *Federal Rule of Civil Procedure 9(g)*, which provides that "[i]f an item of special damage is claimed, it must be specifically stated." See *eBay, 2008 WL 2704404, at *19-*20* ("Florida law requires a plaintiff claiming trade libel to prove special damages by establishing a 'pecuniary loss that has been realized or liquidated, as in the case of **[*13]** specific lost sales . . . *Rule 9(g)* unequivocally states '[i]f an item of special damage is claimed, it must be specifically stated.").

Here, Trendsettah alleges that during the second quarter of 2012, Swisher representatives falsely told wholesalers and distributors of Splitarillo products that Splitarillo products were low quality, that Trendsettah would no longer receive Splitarillo products, and that Trendsettah was going out of business. (Compl. ¶¶ 36-37, 71-73.) Trendsettah alleges that Swisher knew the statements were false or acted with reckless disregard as to their truth. (Id. ¶ 74.) Trendsettah further alleges that Swisher knew or should have recognized that wholesalers and distributors might rely on these statements to cause Trendsettah financial loss, and that their reliance did, in fact, cause Trendsettah financial loss because the wholesalers and distributors reduced or ceased orders of Splitarillo products. (Id. ¶¶ 75-76.) As a result, Trendsettah argues that it has lost "millions of dollars in lost profits from reduced or lost orders and has experience a diminution of its value because its economic growth dramatically slowed once its customers permanently turned to other cigarillo **[*14]** alternatives that copied the Splitarillo product." (Id. ¶ 77.)

The Court concludes that Trendsettah has adequately stated a Florida trade libel claim under the liberal pleading standard of *Rule 8* and has specifically identified its proximately-caused special damages pursuant to *Rule 9(g)*. In its Reply, Swisher argues for judgment in its favor based on *Rule 9(g)* for the first time. While Swisher's argument may be viable, raising new legal arguments in a reply is improper. *U.S. ex rel. Giles v. Sardie, 191 F. Supp. 2d 1117, 1127 (C.D. Cal. 2000)* ("It is improper for a moving party to introduce new facts or different legal arguments in the reply brief than those presented in the moving papers.") (citing *Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 894-95, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)*). Accordingly, the Court declines to grant judgment in Swisher's favor on Trendsettah's trade libel claim.

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[2] Swisher argues that the pleading standard for Florida defamation claims is the same as that for trade libel claims because the claims have the same elements. (See Mot. J. Pleadings 12-14.)

2. Negligent interference with prospective economic relations

Swisher moves for judgment in its favor on Trendsettah's negligent interference with prospective economic relations claim because Florida law governs the parties' agreement and Florida law does not recognize such a claim. (Mot. J. Pleadings 22-23, citing *Fla. Power & Light Co. v. Fleitas, 488 So. 2d 148, 151 (Fla. 3d DCA 1986)*). Trendsettah disputes that Florida law applies to the claim, but does not dispute that Florida does not recognize a negligent interference with prospective economic **[*15]** relations claim. (Opp'n Mot. J. Pleadings 16.)

The Court agrees that Florida law governs this claim. Here, Trendsettah alleges that Swisher negligently interfered with its prospective economic relations with third parties by failing to "act with reasonable care" when conducting itself in the manner described by the Complaint. (See Compl. ¶¶ 93-97, incorporating all previous paragraphs.) This claim clearly implicates matters of the PLA's interpretation and emanates, at least in part, from Swisher's obligations under it. See *Olinick, 138 Cal. App. 4th at 1299-1300*.

Therefore, given that Florida law applies to this claim and does not recognize it, Swisher is entitled to judgment in its favor on Trendsettah's negligent interference with prospective economic relations claim. See Householder Group LLLP v. Fuss, No. C 07-573 SI, 2007 WL 1650933, at *7 (N.D. Cal. June 4, 2007) (dismissing negligent interference with prospective economic relations claim when chosen state law did not recognize such a claim).

3. California UCL

Swisher argues that Trendsettah cannot state a California UCL claim because Florida law applies to this dispute.

Again, Trendsettah does not dispute that the choice-of-law clause is enforceable. (Opp'n Mot. J. Pleadings **[*16]** 16-17.) Instead, it argues that the UCL claim falls outside its scope because it is predicated in part on a violation of federal ***antitrust law***. (Id.)

Swisher cites authority indicating that courts applying California choice-of-law rules dismiss California UCL claims when an enforceable choice-of-law clause selects the law of a different state. *Abat v. Chase Bank USA, N.A., 738 F. Supp. 2d 1093, 1096 (C.D. Cal. 2010)*; *It's Just Lunch Int'l LLC v. Island Park Enter. Group, Inc., No. EDCV 08-367-VAP, 2008 U.S. Dist. LEXIS 89194, 2008 WL 4683637, at *6 (C.D. Cal. Oct. 21, 2008)*; *Century 21 Real Estate LLC v. All Prof'l Realty, Inc., 889 F. Supp. 2d 1198, 1217 n.15 (E.D. Cal. 2012)*. Trendsettah cites no authority in support of its argument that a UCL claim based in part on violation of federal ***antitrust law*** is outside the scope of the choice-of-law clause.

The Court concludes, as above, that Trendsettah's UCL claim falls within the scope of the choice-of-law clause and that Florida law applies. Here, although Trendsettah's claim is not necessarily predicated upon the PLA, it is indisputable that substantial questions relating to the PLA's interpretation and enforcement will be central to the resolution of the claims on which Trendsettah's UCL claim is based. See *Olinick, 138 Cal. App. 4th at 1299-1300 (2006)*.

Accordingly, the selection of Florida law bars Trendsettah's UCL claim as a matter of law. Swisher is entitled to judgment in its favor on Trendsettah's UCL claim.

IV. CONCLUSION

As set **[*17]** forth above, the Court GRANTS IN PART Swisher's motion for judgment on the pleadings in its favor with respect to Trendsettah's intentional interference with prospective economic relations and UCL claims. Swisher's motion is otherwise DENIED IN PART.

IT IS SO ORDERED.

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Waggoner v. Denbury Onshore, L.L.C.

United States Court of Appeals for the Fifth Circuit

May 20, 2015, Filed

No. 14-60310

Reporter
612 Fed. Appx. 734 *; 2015 U.S. App. LEXIS 8355 **; 2015-1 Trade Cas. (CCH) P79,169; 2015 WL 2393960

JAMES A. WAGGONER; J.W.W. OIL AND GAS EXPLORATION, INCORPORATED, Plaintiffs-Appellants v. DENBURY ONSHORE, L.L.C.; DENBURY GULF COAST PIPELINES, L.L.C.; DENBURY RESOURCES, INCORPORATED, Defendants-Appellees

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

Prior History: **[**1]** Appeal from the United States District Court for the Southern District of Mississippi. USDC No. 3:12-CV-257.

Core Terms

antitrust, oil, district court, amend, summary judgment, leave to amend, royalty, grounds, decrease, civil conspiracy, working interest, royalty payment, conspiracy, fields, Dome

LexisNexis® Headnotes

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

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

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN1[] **Entitlement as Matter of Law, Appropriateness**

The court of appeals reviews de novo a district court's grant of summary judgment, viewing all facts and evidence in the light most favorable to the non-moving party. It applies the same standard as the district court in the first instance.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN2[] **Summary Judgment, Entitlement as Matter of Law**

Summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*. A genuine dispute of material fact exists when the evidence is such that a reasonable jury could return a verdict for the nonmoving party.

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

HN3[] **Private Actions, Standing**

A plaintiff has standing to pursue an antitrust suit only if he or she shows: (1) injury-in-fact, an injury to the plaintiff proximately caused by the defendants' conduct, (2) antitrust injury, and (3) proper plaintiff status, which assures that other parties are not better situated to bring suit. Injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be the type of loss that the claimed violations would be likely to cause.

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

HN4[] **Private Actions, Standing**

This antitrust injury requirement of antitrust standing is sometimes confused with injury to competition, which is often a component of substantive liability. In the standing context, injury should be viewed from the perspective of the plaintiff's position in the marketplace, not from the merits-related perspective of the impact of a defendant's conduct on overall competition.

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

HN5[] **Standing, Clayton Act**

Typically, parties with antitrust injury are either competitors, purchasers, or consumers in the relevant market. But standing is not necessarily limited to this group. Section 4 of the Clayton Act does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers.

Energy & Utilities Law > Royalties > General Overview

HN6[] **Energy & Utilities Law, Royalties**

A royalty-interest owner's alleged injury of decreased royalty payments due to a conspiracy among oil companies is not antitrust injury.

Torts > ... > Concerted Action > Civil Conspiracy > Elements

HN7[] **Civil Conspiracy, Elements**

Under Mississippi law, the elements of civil conspiracy are (1) two or more persons or corporations, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful overt acts, and (5) damages as the proximate result. Mississippi follows the rule of almost all jurisdictions in uniformly requiring that civil conspiracy claims be predicated upon an underlying tort that would be independently actionable.

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN8[] Actual Fraud, Elements

A Mississippi fraud claim has nine elements: (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his or her intent that it should be acted on by the hearer and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) his or her reliance on its truth, (8) his or her right to rely thereon, and (9) his or her consequent and proximate injury.

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

HN9[] Amendment of Pleadings, Leave of Court

A party who neglects to ask the district court for leave to amend cannot expect to receive such a dispensation from the court of appeals. A bare request in an opposition to a motion to dismiss, without any indication of the particular grounds on which the amendment is sought, does not constitute a motion within the contemplation of *Fed. R. Civ. P. 15(a)*.

Counsel: For James A. Waggoner, J.W.W. Oil And Gas Exploration, Incorporated, Plaintiffs - Appellants: Dunbar Dowdy Watt, Charles Wayne Dowdy, Esq., Dowdy, Cockerham & Watt, Magnolia, MS.

For Denbury Onshore, L.L.C., Denbury Gulf Coast Pipelines, L.L.C., Denbury Resources, Incorporated, Defendants - Appellees: William Fredric Blair, Esq., Eric Lee Patterson, Esq., Blair & Bondurant, P.A., Brandon, MS; Mark Raymond Beebe, Esq., Adams & Reese, L.L.P., New Orleans, LA.

Judges: Before DENNIS, PRADO, and HIGGINSON, Circuit Judges.

Opinion

[*735] PER CURIAM:*

James Waggoner owns a working interest in a carbon-dioxide well in Mississippi entitling him to a percentage of the proceeds from Denbury Resources, Incorporated's sales of the carbon dioxide. Waggoner sued Denbury and its subsidiaries for antitrust violations and civil conspiracy alleging that Denbury sells the carbon dioxide to its subsidiaries at low prices to decrease the royalties it has **[**2]** to pay. The district court granted summary judgment to Denbury because Waggoner 1) lacked "antitrust injury" for standing purposes and 2) failed to allege the elements of fraud, the underlying tort for his conspiracy claim. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case concerns royalty interests owned by Plaintiffs—Appellants James Waggoner and his family-owned company, J.W.W. Oil and Gas Exploration, Incorporated (collectively "Waggoner"). In 1984, J.W.W. acquired an oil,

* Pursuant to ***5TH CIR. R. 47.5***, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in ***5TH CIR. R. 47.5.4***.

gas, and mineral lease in Rankin County, Mississippi. Rankin County is the location of a carbon-dioxide (CO_2) formation known as the Jackson Dome.

After Shell Western E&P, Incorporated successfully petitioned the Mississippi State Oil and Gas Board to pool the interests in a large tract of land including J.W.W.'s leases, J.W.W. entered into a Farmin Agreement with Shell. Under the agreement, J.W.W. placed its 77 acres into the pooled unit and received a 6.25% overriding royalty interest (ORRI) in the well until payout. At payout, J.W.W. retained the option to convert the ORRI into a 40% working interest.[1] The parties also executed an Operating Agreement that provided that the price for CO_2 would be the "volume **[**3]** weighted average price." When the well paid out, J.W.W. exercised its option to convert the ORRI into a working interest. As a working-interest owner, J.W.W. was entitled to take either its proportionate share of the CO_2 or its proportionate share of the volume-weighted average price of CO_2 that Shell received in the area. J.W.W. chose the latter and later sold this interest to Waggoner.

Shell sold the field unit to Airgas Carbonic Enterprises. Shell also sold several of its enhanced oil recovery (EOR) fields to J.P. Oil. EOR is a process that uses CO_2 to enhance oil output from older oil fields. Airgas and J.P. Oil entered into a purchase agreement under which Airgas would sell CO_2 to J.P. Oil at an agreed-upon price for use at the EOR fields. They also agreed that the treatment and transport costs would be borne by the owner of the field unit. In 1999, J.P. Oil **[*736]** sold its fields to Defendant-Appellee Denbury Resources, Incorporated. Denbury continued to purchase CO_2 from Airgas under the purchase agreement. In 2001, Airgas sold the field unit to Denbury. According to Waggoner, this acquisition made Denbury the owner of "the **[**4]** entire carbon dioxide supply in Mississippi."

In 2012, Waggoner sued Defendants-Appellees Denbury Onshore, LLC, Denbury Gulf Coast Pipelines, LLC, and Denbury Resources, Incorporated (collectively "Denbury"), for, *inter alia*, antitrust violations under *Mississippi Code Annotated §§ 75-21-1*, *75-21-3(b)*, and *75-21-3(e)* and civil conspiracy. Waggoner alleges that "Denbury Onshore pays the royalty and working interest owners in the Jackson Dome based upon the price Denbury Onshore receives from the Denbury subsidiary for the CO_2. Denbury then pipes the CO_2 to oilfields . . . to be used by Denbury in tertiary oil recovery operations." Waggoner alleges that "Denbury Onshore 'sells' the CO_2 to its subsidiary . . . at an artificially low price . . . and pays its royalty owners based on that artificially low price."

Denbury filed a Motion to Dismiss and for Summary Judgment. The district court granted summary judgment to Denbury on the antitrust claims for lack of antitrust standing and on the civil-conspiracy claim for failure adequately to plead the underlying tort of fraud.

II. DISCUSSION

The district court had diversity jurisdiction under *28 U.S.C. § 1332(a)*. We have jurisdiction to review the district court's final judgment pursuant to *28 U.S.C. § 1291*.

HN1[] This Court reviews de novo **[**5]** a district court's grant of summary judgment, viewing "all facts and evidence in the light most favorable to the non-moving party." *Juino v. Livingston Parish Fire Dist. No. 5, 717 F.3d 431, 433 (5th Cir. 2013)*. It applies the same standard as the district court in the first instance. *Turner v. Baylor Richardson Med. Ctr., 476 F.3d 337, 343 (5th Cir. 2007)*.

HN2[] Summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. A genuine dispute of material fact exists when the "evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Royal v. CCC & R Tres Arboles, L.L.C., 736 F.3d 396, 400 (5th Cir. 2013)* (quoting *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986))*.

[1] Working interests are cost-bearing interests, unlike ORRIs.

A. Antitrust

HN3[] A plaintiff has standing to pursue an antitrust suit only if he shows: "1) injury-in-fact, an injury to the plaintiff proximately caused by the defendants' conduct; 2) antitrust injury; and 3) proper plaintiff status, which assures that other parties are not better situated to bring suit." *Doctor's Hosp. of Jefferson, Inc. v. Se. Med. Alliance, Inc., 123 F.3d 301, 305 (5th Cir. 1997)*.[2]

> **[*737]** injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause." **[**6]**

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977) (alteration in original) (quoting *Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 125, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1975))*.[4]

The principal issue in this case is the second requirement, antitrust injury,[3] which is

HN5[] Typically, parties with antitrust injury are either competitors, purchasers, or consumers in the relevant market. *See, e.g.*, John J. Miles, 1 *Health Care and **Antitrust Law*** § 9:7 & n.30 (2014) (collecting cases). But standing is not necessarily limited to this group. *See Blue Shield of Va. v. McCready, 457 U.S. 465, 472, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)* ("As we have recognized, '[§ 4 of the Clayton Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers . . . .'" (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 236, 68 S. Ct. 996, 92 L. Ed. 1328 (1948)* (alteration in original)); *cf. Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 112, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)* (extending the antitrust injury requirements of Clayton Act § 4 claims for damages to § 16 claims for injunctive relief).

In *Jebaco, Inc. v. Harrah's Operating Co., 587 F.3d 314 (5th Cir. 2009)*, this Court addressed an assertion of antitrust standing similar to Waggoner's—decreased fees from the downstream **[**8]** anticompetitive conduct of the payor. Harrah's, which owned two gaming licenses, leased two berths for its riverboat casinos. *Id. at 316*. Pursuant to a settlement agreement, the plaintiff was entitled to a portion of that rent in per-patron fees. *Id.* Harrah's proceeded to sell the casinos, gaming licenses, and interests in the berths to another company, Pinnacle. *Id.* Pinnacle applied to the state regulatory agency to use the two gaming licenses at berths in which the plaintiff had no interest, which would have deprived the plaintiff of all per-patron fees. *Id. at 317*.

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[2] Although the antitrust claim in this case was brought under Mississippi law, the parties agree that Mississippi antitrust claims are "analytically identical" to federal antitrust claims; therefore, Plaintiffs lack standing to maintain their Mississippi antitrust claim if they lack standing under federal ***antitrust law***. Thus, we analyze their claim under federal law.

[4] Both the district court and Waggoner's brief quote the following from *Bell v. Dow Chemical Co.*: "In making the determination, courts may assess several factors: 1) the nature of plaintiff's alleged injury; 2) the directness of the **[**7]** injury; 3) the speculative measure of the harm; 4) the risk of duplicative recovery; and 5) the complexity in apportioning damages." *847 F.2d 1179, 1183 (5th Cir. 1988)*. While these factors are indeed appropriate in the *overall* standing inquiry, the antitrust-injury standing requirement is analogous to the first *Dow* factor: the nature of the plaintiff's injury. This is evident from *Dow's* citation to *Brunswick* for the proposition that, "[r]egarding the first factor, plaintiff's injury must be the type that the antitrust laws were intended to prevent," *id.*

[3] ***HN4***[] This antitrust injury requirement of antitrust standing is sometimes confused with "injury to competition[,] . . . which is often a component of substantive liability." *Doctor's Hosp., 123 F.3d at 305*. In the standing context, injury "should be viewed from the perspective of the plaintiff's position in the marketplace, not from the merits-related perspective of the impact of a defendant's conduct on overall competition." *Id.* In this opinion, "antitrust injury" refers only to the antitrust standing requirement.

The plaintiff sued Harrah's and Pinnacle, alleging, *inter alia*, antitrust violations for dividing the Louisiana casino market. *Id. at 318*. The plaintiff argued that the loss of fees constituted antitrust injury. *Id.* In determining whether this constituted antitrust injury, we analogized to landlord-tenant and supplier-customer law. *Id. at 320*. Noting that these relationships **[*738]** "when terminated or modified by a byproduct of 'downstream' anticompetitive conduct, have rarely been held to inflict antitrust injury," we held that the loss of per-patron fees did not amount to antitrust injury and affirmed the dismissal on antitrust standing grounds. *Id. at 320-21, 323*.

Additionally, **[**9]** we have explicitly held that ***HN6***[] a royalty-interest owner's alleged injury of decreased royalty payments due to a conspiracy among oil companies is not antitrust injury. In *Bailey v. Shell Western E&P, Inc.*, the holder of an ORRI in CO_2 in the McElmo Dome in Colorado brought an antitrust suit against Shell. *609 F.3d 710, 715-16, 727 (5th Cir. 2010)*. The interest holder's alleged antitrust injury was the decrease in royalty payments resulting from an alleged conspiracy between Shell and other unit operators. *Bailey v. Shell W. E & P, Inc., 555 F. Supp. 2d 767, 769, 776 (S.D. Tex. 2008)*.[5] We reasoned that "if Shell were to raise the price of gas [on which the royalty payments were based] Bailey would benefit because his royalty payments would increase." *609 F.3d at 727*. Because the royalty holder "suffered no antitrust injury," we affirmed summary judgment. *Id. at 729*.

Waggoner's attempt to distinguish *Bailey* is unavailing.[6] First Waggoner notes that that the oil companies in *Bailey* owned only 87% of the CO_2 in the McElmo dome, *555 F. Supp. 2d at 769*, but Denbury allegedly owns 100% of the CO_2 in Mississippi. Additionally, Waggoner asserts that in *Bailey* Shell was **[**10]** selling the gas to third parties. The case does not support this assertion, and even if this were true, it would not render *Bailey* inapplicable. Neither the district court's nor our reasoning in *Bailey* depends on Shell's share of the market or on the identity of the CO_2 purchasers.

Jebaco and *Bailey* decide this issue. As with the decrease in per-patron fees in *Jebaco*, Waggoner's decrease in royalties is the result of downstream conduct by the payor, in a market in which Waggoner is not a participant. *See 587 F.3d at 320*. More importantly, Waggoner's alleged antitrust injury is exactly the same as that **[*739]** alleged in *Bailey*—decreased royalty payments on CO_2 as a result of a conspiracy between oil companies (here, between Denbury and its affiliates). This Court unequivocally held that this is not antitrust injury. **[**12]** *609 F.3d at 727*. Because Waggoner has failed to raise a fact issue as to antitrust standing, we affirm the district court's grant of summary judgment for Denbury on the antitrust claims.

B. Civil Conspiracy

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[5] We cite the district court opinion for these facts and not for its reasoning because our opinion deals with numerous issues and therefore provides a limited discussion of the antitrust claim. *See Bailey, 609 F.3d at 727*.

[6] Waggoner attempts to analogize this case to *McCready*. In that case, a beneficiary of an insurance policy purchased by her employer alleged that the insurance company's practice of denying coverage for treatment by psychologists while covering treatment by psychiatrists was part of a conspiracy to restrain competition in the market. *457 U.S. at 467*. The defendants argued that the plaintiff lacked antitrust standing because her injury did not "reflect the 'anticompetitive' effect of the alleged" conspiracy, stressing that she did not claim that psychiatry costs were higher because of the alleged conspiracy. *Id. at 481-82*. The Court disagreed, finding she had standing because she was forced into the "Hobson's choice" of being treated by a psychiatrist and forfeiting reimbursement or forgoing treatment by the practitioner of her choice. *Id. at 483*. The Court held her injury "was inextricably intertwined with the injury the conspirators sought **[**11]** to inflict on psychologists and the psychotherapy market." *Id. at 484*.

The most salient distinction between *McCready* and the instant case is that Waggoner is not a consumer, directly or indirectly, in the CO_2 market. Moreover, the alleged antitrust behavior in that case was the pressure on subscribers to choose treatment from psychiatrists rather than psychologists to limit competition against psychiatrists. *Id.* Here Waggoner's alleged injury stems from the monopolist's power to "control price or exclude competition." The Defendant's sale of CO_2 for *low* prices is hardly the type of harm that "Congress sought to redress in providing a private remedy for" antitrust violations, *id. at 483*.

In addition to the antitrust claims, Waggoner alleged Denbury engaged in a conspiracy

> to create a fraudulent scheme, by which Denbury has been underpaying CO_2 royalty owners in the Jackson Dome, including the Plaintiffs, and as part of their fraudulent scheme, the Defendants have been over-charging working interest owners for CO_2 used in the tertiary recovery oil fields operated by Denbury in Southwest Mississippi and Louisiana.

HN7[] Under Mississippi law, the elements of civil conspiracy are "(1) two or more persons or corporations; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result." *Gallagher Bassett Servs., Inc. v. Jeffcoat, 887 So. 2d 777, 786 (Miss. 2004)*. "Mississippi follows the rule of almost all jurisdictions in uniformly requiring that civil conspiracy claims be predicated upon an underlying tort that would be independently actionable." *Ward v. Life Investors Ins. Co. of Am., 383 F. Supp. 2d 882, 890 (S.D. Miss. 2005)* (citing *Wells v. Shelter Gen. Ins. Co., 217 F. Supp. 2d 744, 755 (S.D. Miss. 2002))*.[7]

Waggoner alleges the underlying tort of fraud. ***HN8***[] A Mississippi fraud claim has nine elements: "(1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted on by the hearer and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) his reliance on its truth, (8) his right to rely thereon, and (9) his consequent and proximate injury." *Martin v. Winfield, 455 So. 2d 762, 764 (Miss. 1984)*.

This Court, in an unpublished decision, affirmed a judgment as a matter of law on a Mississippi civil-conspiracy claim based on a fraud claim when the plaintiff failed to present any evidence of a false statement. *Aiken v. Rimkus Consulting Grp., Inc., 333 F. App'x 806, 811-12 (5th Cir. 2009)* (per curiam).[8] So too here: Waggoner's complaint contains no allegation of a false statement, much less any of the other elements of fraud.[9] Additionally, Waggoner points to no summary-judgment evidence that suggests Denbury made a fraudulent statement.

Waggoner does not contend that it properly pleaded the elements of fraud. Rather, it argues that instead of granting summary judgment, the court should have **[*740]** granted Waggoner leave to amend the complaint. Waggoner did not file a motion for leave to amend; it simply stated at the end of its response to Denbury's motion: "If the Court finds that the Plaintiffs have failed to plead particular elements of a claim (or that they have alleged facts without enough specificity), then the Plaintiffs would request the opportunity to amend their complaint." The district court never expressly addressed this request.

HN9[] "A party who neglects to ask the district court for leave to amend cannot expect to receive such a dispensation from the court of appeals." *United States ex rel Willard v. Humana Health Plan of Tex. Inc., 336 F.3d 375, 387 (5th Cir. 2003)*. A "bare request in an opposition to a motion to dismiss—without any indication of the particular grounds on which the amendment is sought—does not constitute **[**15]** a motion within the contemplation of *Rule 15(a)*." *Id.* (citations and internal quotation marks omitted).

In *Willard*, this court affirmed dismissal with prejudice in part on the grounds that the plaintiff's purported request for leave to amend did not satisfy the requirements of *Rule 15*. *Id.* The plaintiff, in his response to a motion to dismiss

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[7] The Mississippi Supreme Court has not spoken on whether a civil-conspiracy claim can stand where no underlying **[**13]** tort is alleged. *See* *Wells, 217 F. Supp. 2d at 755* (surveying other states' laws).

[8] In *Aiken*, it was unclear what tort the conspiracy claim was based on, but the Court assumed it was fraud. *333 F. App'x at 812*.

[9] The complaint states:

> Defendants herein, have conspired to create a fraudulent scheme, by which Denbury **[**14]** has been underpaying CO_2 royalty owners in the Jackson Dome, including the Plaintiffs, and as part of their fraudulent scheme, the Defendants have been over-charging working interest owners for CO_2 used in the tertiary recovery oil fields operated by Denbury in Southwest Mississippi and Louisiana.

stated: "In any event, the only relief possibly available to it at this stage of the case is that relator replead. A court should not dismiss a plaintiff's complaint under Rule 9(b) unless the plaintiff has already been given the opportunity to amend." *Id.* The district court dismissed the complaint, stating the plaintiff "has not requested leave to amend." Id. at 386. Willard never filed a motion to reconsider "as part of which he could have moved to amend his complaint." Id. at 387. This Court affirmed for three reasons, one of which was that the statement did in the response did "not expressly request that [the plaintiff] be given leave to amend and does not provide any indication of the grounds on which such an amendment should be permitted." *Id.*

On the other hand, this Court has found sufficient under Rule 15 a statement in a response to a motion to dismiss that sought leave to "fix any **[**16]** infirmity" based on "information obtained during depositions of two former . . . [employees of the defendant] taken in a California state court proceeding." Cent. Laborers' Pension v. Integrated Elec. Servs. Inc., 497 F.3d 546, 555-56 (5th Cir. 2007). In *Central Labrorers' Pension*, the district court "did not explicitly address this request but implicitly rejected it by entering a judgment of dismissal with prejudice." *Id.* While "discoruag[ing] litigants from moving to amend in haphazard fashion," we construed the statement as a "proper motion to amend" because it "was not devoid of any indication of the grounds for amendment." Id. at 556.

We hold that the district court did not abuse its discretion in implicitly denying Waggoner's request for leave to amend. *See* Central Laborers' Pension, 497 F.3d at 555 ("The district court . . . implicitly rejected [the request to amend] by entering a judgment of dismissal with prejudice."). Ordinarily, "outright refusal to grant the leave without any justifying reason appearing for the denial is . . . [an] abuse of discretion and inconsistent with the spirit of the Federal Rules." Foman v. Davis, 371 U.S. 178, 181-82, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). But here, unlike the request in Central Laborers' Pension, Waggoner's request for leave to amend was tacked on to the end of its response to Denbury's motion to dismiss and gave no indication of the grounds for amendment. **[**17]** This "bare request in an opposition to a motion to dismiss—without any indication of the particular grounds on which the amendment is sought—does not constitute a motion within the contemplation **[*741]** of Rule 15(a)," Willard, 336 F.3d at 387 (citations and internal quotation marks omitted). And, as in *Willard*, Waggoner did not file a motion to reconsider in which it could have requested leave to amend, attached a proposed amended complaint, or otherwise explained how it could allege a false statement. Waggoner compounds this error on appeal by neglecting to explain to this Court how it could or would allege a false statement were leave to amend granted. *See id*. ("[T]here is no indication in [the plaintiff's] briefs to this court that he will be able to allege the necessary 'who, what, when, where, and how' of the alleged fraud."). Thus, it appears leave to amend would be futile.

III. CONCLUSION

For the foregoing reasons, we AFFIRM.

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In re Mem'l Hermann Hosp. Sys.

Supreme Court of Texas

February 25, 2015, Argued; May 22, 2015, Opinion Delivered

NO. 14-0171

Reporter
464 S.W.3d 686 *; 2015 Tex. LEXIS 464 **; 58 Tex. Sup. J. 975; 40 I.E.R. Cas. (BNA) 323; 2015-1 Trade Cas. (CCH) P79,188

IN RE MEMORIAL HERMANN HOSPITAL SYSTEM; MEMORIAL HERMANN PHYSICIAN NETWORK; MICHAEL MACRIS, M.D.; MICHAEL MACRIS, M.D., P.A.; AND KEITH ALEXANDER, RELATORS

Prior History: *In re Mem'l Hermann Hosp. Sys., 2014 Tex. App. LEXIS 2424, 2014 WL 866069 (Tex. App. Houston 1st Dist., Mar. 4, 2014)*

Core Terms

anticompetitive, documents, peer review committee, confidential, records, trial court, proceedings, patients, allegations, medical committee, antitrust, referral, surgeon, heart surgery, discovery, entity, healthcare, mortality rate, monopolize, privileges, provisions, communications, cause of action, anti trust law, pleadings, probable, robotic, preliminary findings, relevant market, robotic-assisted

LexisNexis® Headnotes

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

Evidence > Types of Evidence > Documentary Evidence > Affidavits

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

Civil Procedure > ... > Discovery > Misconduct During Discovery > Motions to Compel

Evidence > Inferences & Presumptions > Inferences

HN1[ ] **Discovery, Privileged Communications**

Mandamus is proper when the trial court erroneously orders the disclosure of privileged information because the trial court's error cannot be corrected on appeal. Pleading and producing evidence establishing the existence of a privilege is the burden of the party seeking to avoid discovery. The party asserting the privilege must establish by testimony or affidavit a prima facie case for the privilege. The party need produce only the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true, and tender the documents to the trial court, at which point, the trial court must conduct an in camera inspection of the documents before deciding to compel production.

Civil Procedure > Discovery & Disclosure > Discovery

Evidence > ... > Preliminary Questions > Admissibility of Evidence > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

HN2[] **Discovery & Disclosure, Discovery**

A reviewing court may not substitute its judgment for that of the trial court regarding the resolution of fact issues or matters committed to the trial court's discretion. The scope of discovery and the admission of evidence is principally within the discretion of the trial court. The relator must establish that the trial court failed to reach the only reasonable conclusion on such matters. A less deferential standard applies to the trial court's determination of the legal principles governing the discovery.

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN3[] **Peer Review, Peer Review Statutes**

A medical peer review committee includes a committee of a health care entity including a hospital licensed under Tex. Health & Safety Code Ann. ch. 241 or 577, or the medical staff of a health care entity that: (1) operates under written bylaws approved by either the policy-making or governing board of the health care entity; and (2) is authorized to evaluate the quality of medical and health care services or the competence of physicians. *Tex. Occ. Code Ann. §§ 151.002(a)(8)*, *151.002(a)(5)*.

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN4[] **Peer Review, Peer Review Statutes**

All proceedings and records of a medical peer review committee are confidential, and all records of, determinations of, and communications to a committee are privileged and are not discoverable, with certain exceptions. *Tex. Occ. Code Ann. § 160.007(a)* The provision of confidentiality extends to the committee's initial and subsequent credentialing decisions, as well as to documents generated by a committee or prepared by or at the direction of the committee for committee purposes. The minutes and recommendations of the committee as well as the committee's inquiries about a physician to outside sources and responses thereto are also protected. However, simply passing a document through a peer review committee does not make it privileged. The privilege does not prevent a party from discovering from a nonprivileged source material that has been presented to the committee.

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN5[] **Peer Review, Peer Review Statutes**

See *Tex. Occ. Code Ann. § 160.007(a)*.

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

Healthcare Law > Business Administration & Organization > Facility & Personnel Licensing > Revocation & Suspension

HN6[] **Business Administration & Organization, Hospital Privileges**

Tex. Occ. Code Ann. § 160.007's provisions expressly delineate and limit the circumstances under which the records of and communications to a peer review committee may or must be accessed. The committee may disclose its records and proceedings, and communications made by the committee to other medical peer review committees, appropriate governmental agencies, national accreditation bodies, the Texas Medical Board, and another state's board of registration or licensing of physicians. Tex. Occ. Code Ann. § 160.007(c). The committee may disclose to a physician under its review confidential information relevant to the matter without waiving confidentiality. Tex. Occ. Code Ann. § 160.007(d). The committee must provide the physician with a written copy of its recommendation and final decision for certain actions, including those that could result in censure, suspension, restriction, limitation, revocation, or denial of membership or privileges in a health care entity. Tex. Occ. Code Ann. § 160.007(d).

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

HN7[] **Discovery, Privileged Communications**

Certain parties are entitled to use the confidential information from a peer review committee in their defense or in rebuttal to such a defense. Tex. Occ. Code Ann. § 160.007(f). Otherwise, the records and determinations of a medical peer review committee, as well as communications to the committee, are not subject to subpoena or discovery and are not admissible as evidence in any civil judicial or administrative proceeding without waiver of the privilege of confidentiality executed in writing by the committee. Tex. Occ. Code Ann. § 160.007(e).

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN8[] **Regulated Practices, Trade Practices & Unfair Competition**

Under certain circumstances, the information from a peer review committee may not be confidential, in which case it would not be subject to a privilege. For example, the records made or maintained in the regular course of business by a hospital or medical organization are not covered by Tex. Occ. Code Ann. § 160.007 and therefore are not confidential under § 160.007. Tex. Health & Safety Code Ann. § 161.032(f). In addition, Tex. Occ. Code Ann. § 160.007(b) provides a limited exception to confidentiality for proceedings, records, or communications that are relevant to an anticompetitive action.

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN9[] **Business Administration & Organization, Covenants not to Compete**

See Tex. Occ. Code Ann. § 160.007(b).

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

HN10[] **Business Administration & Organization, Peer Review**

The peer review privilege protects the products of the peer review process: reports, records -- including those produced for the committee's review as part of the investigative review process, and deliberations.

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

HN11[] **Business Administration & Organization, Peer Review**

With one exception set forth in Tex. Occ. Code Ann. § 151.002(a)(8)(B), the medical peer review committee privilege affords confidential status to the records of, proceedings of, and communications to a medical peer review committee regardless of whether the individual record, proceeding, or communication relates to a peer review action. Tex. Occ. Code Ann. § 151.002(a)(7).

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

Governments > Legislation > Interpretation

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

HN12[] **Standards of Review, De Novo Review**

Statutory construction is a question of law that is reviewed de novo. The appellate court's objective is to determine and give effect to the legislature's intent, and the truest manifestation of what lawmakers intended is what they enacted. Proper construction requires reading the statute as a whole rather than interpreting provisions in isolation. Courts should not give an undefined statutory term a meaning out of harmony or inconsistent with other provisions, although it might be susceptible of such a construction if standing alone. The court presumes that the legislature chooses a statute's language with care, and the court will not ignore the statute's use of a term that carries a particular meaning.

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

HN13[] **Discovery, Privileged Communications**

Privileges are not favored in the law and are strictly construed.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Civil Rights Law > General Overview

HN14[] **Regulated Practices, Trade Practices & Unfair Competition**

For purposes of the anticompetitive action exception to the medical peer review committee privilege, the legislature intended the term "anticompetitive" in *Tex. Occ. Code Ann. § 160.007* to denote an overall substantially adverse effect on competition, rather than the existence of some negative effects. However, the term "anticompetitive action" is not synonymous with "antitrust action." Although the term anticompetitive describes the type of conduct or circumstances generally targeted by antitrust laws, the term itself is broader because the law of antitrust does not encompass all conduct that could substantially lessen competition in a particular market. For example, certain conduct—regardless of its overall impact on competition—is immune from ***antitrust law*** under the state action doctrine, the exemption for political activity, or the exemptions, both implicit and explicit, for labor unions. The terms anticompetitive and antitrust are therefore not inherently coextensive, and the court cannot ignore the legislature's use of the broader term, particularly in juxtaposition to *§ 160.007(b)*'s specificity regarding its application to civil rights proceedings.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Evidence > Relevance > Relevant Evidence

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN15[] **Regulated Practices, Trade Practices & Unfair Competition**

A litigant may not successfully rely on *Tex. Occ. Code Ann. § 160.007(b)* simply by adding a gratuitous allegation that the conduct at issue is anticompetitive. *Section 160.007(b)* requires a preliminary finding that a proceeding or record of a medical peer review committee or a communication made to the committee is relevant to an anticompetitive action, and provides that the proceeding, record, or communication is not confidential to the extent it is considered relevant. Relevance cannot be determined in isolation of the elements of an asserted cause of action.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

Civil Rights Law > Protection of Rights > Section 1983 Actions > General Overview

Governments > Legislation > Interpretation

HN16[] **Regulated Practices, Trade Practices & Unfair Competition**

The court has equated the term "action" with "suit," which is a demand of one's rights in court. For purposes of the anticompetitive action exception to the medical peer review committee privilege under *Tex. Occ. Code Ann. § 160.007(b)*, had the legislature intended the focus to be on the defendant's conduct apart from any asserted cause of action, it would have been more natural to say "an anticompetitive act" or "anticompetitive conduct." But the legislature chose the term "action," which is a well-established legal term of art synonymous with lawsuit. This meaning also better fits the parallelism of the phrases "anticompetitive action" and "a civil rights proceeding" in *Tex. Occ. Code Ann. § 160.007(b)*.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Evidence > Relevance > Relevant Evidence

Governments > Legislation > Interpretation

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN17[] Regulated Practices, Trade Practices & Unfair Competition

For purposes of the anticompetitive action exception to the medical peer review committee privilege under *Tex. Occ. Code Ann. § 160.007(b)*, the reference to relevance confirms that the legislature intended the term action to refer to a "civil or criminal judicial proceeding." *Tex. R. Evid. 401* provides that evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence, and if that fact is of consequence in determining the action. A purely voluntary showing that the defendant's conduct is anticompetitive cannot constitute a fact of consequence in a lawsuit—the limited waiver of confidentiality for proceedings, records, and communications "relevant to an anticompetitive action" under *Tex. Occ. Code Ann. § 160.007(b)* can only apply if the plaintiff asserts a cause of action that requires proof of anticompetitive conduct or effects.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

Governments > Legislation > Interpretation

HN18[] Regulated Practices, Trade Practices & Unfair Competition

The exception to the medical peer review committee privilege for anticompetitive actions under *Tex. Occ. Code Ann. § 160.007(b)* applies when the plaintiff asserts a cause of action that requires proof that the conduct at issue has a tendency to reduce or eliminate competition that is not offset by countervailing procompetitive justifications.

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

Civil Procedure > Discovery & Disclosure > Discovery > Relevance of Discoverable Information

HN19[] Discovery, Privileged Communications

Determinations of potential relevancy or privilege typically do not require a litigant to produce evidence on the merits of his claim—as opposed to the merits of the privilege. It is counter to the notion that affording parties full discovery promotes the fair resolution of disputes by the judiciary, to condition access to documents that could substantiate a plaintiff's claim on the plaintiff's ability to substantiate his claim without the documents' aid.

Civil Procedure > Sanctions > Baseless Filings > Bad Faith Motions

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

Civil Procedure > Discovery & Disclosure > Discovery > Protective Orders

Civil Procedure > Discovery & Disclosure > Discovery > Undue Burdens in Discovery

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

HN20[] Baseless Filings, Bad Faith Motions

By permitting defendants to recover costs incurred from defending against frivolous or bad faith pleadings, *Tex. Occ. Code Ann. § 160.008(c)* discourages the addition of groundless allegations of injury to competition for purposes of the exception to the medical peer review committee privilege. Second, nothing in *Tex. Occ. Code Ann. § 160.007* prevents defendants from seeking, as they do in all civil cases, to limit discovery on the grounds that the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive. *Tex. R. Civ. P. 192.4(a)*. Defendants may also assert that the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. *Tex. R. Civ. P. 192.4(b)*. Defendants may also seek protective orders to protect themselves from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights. *Tex. R. Civ. P. 192.6(b)*.

Civil Procedure > Sanctions > Baseless Filings > Bad Faith Motions

Civil Procedure > Sanctions > Baseless Filings > Frivolous Lawsuits

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN21[] **Baseless Filings, Bad Faith Motions**

See *Tex. Occ. Code Ann. § 160.008(c)*.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

Civil Procedure > Discovery & Disclosure > Discovery > Relevance of Discoverable Information

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN22[] **Regulated Practices, Trade Practices & Unfair Competition**

For purposes of the exception to the medical peer review committee privilege for anticompetitive actions, because *Tex. Occ. Code Ann. § 160.007(b)* provides that information is not confidential to the extent it is considered relevant, the exception's scope is still narrower than the otherwise applicable scope of discovery, which permits discovery of information that appears reasonably calculated to lead to the discovery of admissible evidence. *Tex. R. Civ. P. 192.3(a)*. Defendants may further limit the scope of discovery through the judicious use of special exceptions, which are the appropriate vehicle by which an adverse party may force clarification of vague pleadings, thereby narrowing the range of facts that will be of consequence in the action.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Civil Procedure > Pleading & Practice > Pleadings > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

Governments > Courts > Judges

HN23[] Regulated Practices, Trade Practices & Unfair Competition

For purposes of the exception to the medical peer review committee privilege for anticompetitive actions, judges are to determine a *Tex. Occ. Code Ann. § 160.007(b)* "preliminary finding" on the basis of the plaintiff's pleadings.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

Governments > Legislation > Interpretation

Governments > Courts > Judicial Precedent

HN24[] Trade Practices & Unfair Competition, State Regulation

The Supreme Court of Texas construes Texas Free Enterprise and Antitrust Act of 1983, *Tex. Bus. & Com. Code Ann. § 15.01 et seq.*, in harmony with federal antitrust caselaw to promote competition for consumers' benefit. *Tex. Bus. & Com. Code Ann. § 15.04*. Because Texas caselaw is limited, the court relies heavily on the jurisprudence of the federal courts.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

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

HN25[] Regulated Practices, Monopolies & Monopolization

The Texas Free Enterprise and Antitrust Act of 1983 (TFEAA), *Tex. Bus. & Com. Code Ann. § 15.01 et seq.*, declares that every contract, combination, or conspiracy in restraint of trade or commerce is unlawful, and that it is unlawful for any person to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce. *Tex. Bus. & Com. Code Ann. § 15.05(a)-(b)*. However, the TFEAA does not operate as a qui tam provision, but rather limits the ability to bring suit under the TFEAA to persons whose business or property has been injured by reason of any conduct declared unlawful in *Tex. Bus. & Com. Code Ann. § 15.05(a)*, *(b)*, or *(c)*. *Tex. Bus. & Com. Code Ann. § 15.21(a)(1)*. Thus, courts have held that standing to pursue an antitrust suit exists only if a plaintiff shows (1) injury-in-fact, an injury to the plaintiff proximately caused by the defendant's conduct; (2) antitrust injury; and (3) proper plaintiff status, which assures that other parties are not better situated to bring suit.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN26[] Regulated Practices, Monopolies & Monopolization

On its own, the elimination of a single competitor does not constitute proof of an anticompetitive effect for every market and context. Claims of improper restraint of trade require a plaintiff to plead a reduction of competition in the market in general and not mere injury to their own positions as competitors in the market. However, the United States Supreme Court has forbidden as a matter of law, a defense based upon a claim that only one small firm, not competition itself, had suffered injury, because monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > Trials > General Overview

HN27[] **Regulated Practices, Trade Practices & Unfair Competition**

In order to successfully allege injury to competition, a claimant may not merely recite the bare legal conclusion that competition has been restrained unreasonably. At a minimum, the claimant must sketch the outline of the antitrust violation with allegations of supporting factual detail. Whether the practice constitutes an improper restraint of trade will depend upon whether the plaintiff's allegations suggest a market in which the removal of a single competitor from the pool of competing sellers would adversely and unreasonably affect overall competitive conditions. Under the rule of reason, courts consider a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect. As such, the adequacy of a plaintiff's contentions regarding the effect on competition is typically resolved after discovery, either on summary judgment or after trial.

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

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

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

HN28[] **Actual Monopolization, Claims**

A successful claim of monopoly requires proof of (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. The term "relevant market" encompasses notions of geography as well as product use, quality, and description. The geographic market extends to the area of effective competition where buyers can turn for alternate sources of supply.

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

HN29[] **Attempts to Monopolize, Elements**

Demonstrating attempted monopolization requires proof (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

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

Antitrust & Trade Law > Regulated Practices > Market Definition

HN30[] **Regulated Practices, Monopolies & Monopolization**

Under either a claim for monopoly or attempted monopolization, it is necessary to consider the relevant market and the defendant's ability to lessen or destroy competition in that market. However, the disposition of the question of a dangerous probability of achieving monopoly power is typically one that is not resolved at the pleading stage unless it is clear on the face of the complaint that the dangerous probability standard cannot be met as a matter of law. Defining the relevant market is a factual inquiry ordinarily reserved for the jury.

Governments > Legislation > Enactment

Governments > Legislation > Interpretation

HN31[] Legislation, Enactment

To the extent possible, the court will construe different provisions in a way that harmonizes rather than conflicts. *Tex. Gov't Code Ann. §§ 311.025*, *311.026(a)*. When the provisions are irreconcilable, the general rule is that the terms of the later-enacted statute should control. *Tex. Gov't Code Ann. § 311.025(a)*. However, conflicts between general and specific provisions favor the specific, and when the literal terms of the two provisions cannot both be true, the terms of the specific provision ordinarily will prevail. *Tex. Gov't Code Ann. § 311.026(b)*. The court will construe the general provision as controlling only when the manifest intent is that the general provision will prevail and the general provision is also the later-enacted statute. *Tex. Gov't Code Ann. § 311.026(b)*.

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

HN32[] Business Administration & Organization, Peer Review

Tex. Health & Safety Code Ann. § 161.032 broadly defines a "medical committee" to include any committee, including a joint committee of certain types of entities, including a hospital or a medical organization. Medical committees may be appointed ad hoc to conduct a specific investigation, or established under the bylaws or rules of the organization or institution.

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN33[] Discovery, Subpoenas

The records and proceedings of a medical committee are governed by *Tex. Health & Safety Code Ann. § 161.032*. With the exception of records maintained in the regular course of business by a hospital or medical organization, medical committees and their members may use the committee's records and proceedings only in the exercise of proper committee functions. Subject to the same exception, the records and proceedings of a medical committee are confidential and are not subject to court subpoena. *Tex. Health & Safety Code Ann. § 161.032(a)*.

Governments > Legislation > Interpretation

Healthcare Law > Business Administration & Organization > Peer Review > Organizations

HN34[] Legislation, Interpretation

Tex. Health & Safety Code Ann. § 161.032 suggests that medical committees are at least potentially distinct from medical peer review committees. However, the definitions of the two committees contain significant overlap. Provided that the other statutory requirements are met, the definition of a medical peer review committee includes committees of a health care entity, the governing board of a health care entity, or the medical staff of a health care entity. But any entity that provides or pays for medical care or health services, and follows a formal peer review process to further quality medical care or health care will be considered a health care entity.

Healthcare Law > Business Administration & Organization > Peer Review > Organizations

HN35[] **Peer Review, Organizations**

Although the committees of some health care entities may not be medical committees, every committee of every entity listed in the definition of a medical committee that follows a formal peer review process to further quality medical care or health care under *Tex. Occ. Code Ann. § 151.002(a)(5)(B)(ii)* will be considered a medical peer review committee—unless the committee does not operate under written bylaws approved by the policy-making board or the governing board of the health care entity. By extension, no medical committee that satisfies these two additional provisions necessary to be deemed a medical peer review committee can credibly claim that its records and proceedings are not governed by *Tex. Occ. Code Ann. § 160.007*.

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

HN36[] **Discovery, Subpoenas**

See *Tex. Health & Safety Code Ann. § 161.032(a)*.

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

HN37[] **Discovery, Privileged Communications**

For purposes of discovery, a record or proceeding is either confidential or not; it cannot be both.

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN38[] **Peer Review, Peer Review Statutes**

The records and proceedings of a dual medical committee and medical peer review committee do not enjoy any greater confidentiality under *Tex. Health & Safety Code § 161.032(a)* than they do under *Tex. Occ. Code Ann. § 160.007(b)*.

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Judges: JUSTICE WILLETT delivered the opinion of the Court.

Opinion by: Don R. Willett

Opinion

[*695] ON PETITION FOR WRIT OF MANDAMUS

A decade ago, we observed: "While the medical privileges are important in promoting free discussion in the evaluation of health care professionals and health services, the right to evidence is also important, and therefore privileges must be strictly construed."[1] In this original proceeding—involving a heart surgeon who claims his former hospital retaliated against him for joining a competing hospital—we must determine **[**2]** whether either the medical committee privilege or the medical peer review committee privilege protects certain documents from disclosure. The trial court concluded the documents sought were discoverable, and the court of appeals denied relief, prompting the parties resisting production to seek mandamus relief here. We hold that some of the documents are protected, and we conditionally grant mandamus relief as to them. But we are unconvinced that the remainder of the documents are confidential under either privilege.

BACKGROUND

Plaintiffs Miguel A. Gomez, III, M.D. and Miguel A. Gomez, M.D., P.A. (collectively, "Dr. Gomez") filed suit against defendants Memorial Hermann Hospital System,[2] Memorial Hermann Physician Network, Michael P. Macris, M.D., Michael P. Macris, M.D., P.A.,[3] and Keith Alexander[4] (collectively, "defendants" or "Memorial Hermann") on September 17, 2012. Dr. Gomez's original petition asserted causes of action for business disparagement, defamation, tortious interference with prospective business relations, and improper restraint of trade under the Texas Free Enterprise and Antitrust Act of 1983 ("TFEAA").

Dr. Gomez is a cardiothoracic surgeon who practiced at Memorial Hermann Memorial City Medical Center ("Memorial City")[5] from 1998 until 2012 when he resigned his privileges with Memorial City.[6] During his years of practice at Memorial City, Dr. Gomez built a reputation in the "West Houston and Katy community" for "quality patient care, technical excellence, and outstanding professionalism in heart and general surgery."

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[1] *In re Living Ctrs. of Tex., Inc., 175 S.W.3d 253, 258 (Tex. 2005)*.

[2] Memorial Hermann Hospital System is a business entity organized under **[**3]** the laws of the State of Texas that controls and manages a number of hospitals, out-patient facilities, and other health care service centers throughout the Houston Metropolitan area, including Memorial Hermann Memorial City Medical Center.

[3] Michael P. Macris, M.D., P.A. is a professional association organized under the laws of Texas, and Michael P. Macris, M.D. is its principal officer.

[4] Mr. Alexander is the Chief Executive Officer of Memorial Hermann Memorial City Medical Center.

[5] Memorial City is one of Memorial Hermann Hospital System's medical campuses.

[6] The facts described in this section are drawn from allegations in Dr. Gomez's live petition and attached exhibits. They are presented in the light most favorable to the trial court's finding.

Dr. Gomez's "skills and specialized **[**4]** abilities" for patients who require heart and general surgeries range from "'basic' open heart surgery to advanced robotic-assisted surgical procedures." Robotic heart surgery "eliminates the need to mechanically crack open a patient's chest." Robotic heart surgery always involves significantly less recovery time than its non-robotic surgical analogue, and depending on the particular **[*696]** procedure, can spare the patient up to six days of recovery time in the hospital. Robotic heart surgery therefore has the potential to save an individual patient $50,000 or more in medical expenses.

In the Houston medical community, Dr. Gomez "pioneer[ed] implementation of 'off-pump' surgery and robotic-assisted heart surgeries." Memorial City heavily promoted robotic heart surgery as well as Dr. Gomez himself—the only heart surgeon at Memorial City who was capable of performing robotic heart surgeries. The hospital invested in a million dollar "DA VINCI" machine, and spent significant advertising dollars promoting the robotic-assisted surgical procedures.

Referrals from other physicians are extremely important to surgeons and specialists. The primary means for a physician "to build his practice is . . . actually going **[**5]** out on his own to doctor's offices, meeting the doctors, [and] developing relationships" in order to get referrals from physicians. The success of a surgeon's practice depends on his ability to attract referrals, and cardiologists are a cardiovascular surgeon's primary referral source. In turn, the surgeon's decision to perform his surgeries at one hospital over another directly impacts the profitability of the hospitals.

In 2009, another hospital—Methodist West Houston Hospital—was in the process of opening, which caused a change in the atmosphere at Memorial City. There was a growing fear at Memorial City that staff would leave to go to Methodist West. Around this time, the then-CEO of Memorial City and the Chief of Staff[7] met with at least one of Memorial City's physicians, Dr. Jo Pollack, in order to express disapproval of Dr. Pollack's pattern of referring her patients to non-affiliated facilities and physicians. According to Dr. Pollack's affidavit, she was told she would be "committing political suicide" and her practice "could be in jeopardy" if she did not refer her patients to the Memorial City affiliated medical oncologists, radiation oncologists and imaging. Memorial City **[**6]** also began holding "Town Hall" meetings in order to "gain information about who wanted to leave and to attempt to persuade people to stay at Memorial City."

Of the heart surgeons who practiced at Memorial City, Dr. Gomez was the first to agree to practice at Methodist West. Dr. Gomez asserts that, because of his complaints about staffing and equipment dysfunctions as well as Memorial City's priorities regarding patient care, Memorial City knew he would perform his surgeries at Methodist West in the future. Consequently, despite having invested heavily in promoting robotic-assisted heart surgery, Memorial City would no longer be the sole Houston hospital offering robotic-assisted heart surgeries. Memorial City faced sharing, or worse, losing that distinction to Methodist West.

When the defendants learned that Dr. Gomez was willing to associate himself with Methodist West, the defendants began conducting a "whisper campaign" against Dr. Gomez. According to Dr. Gomez, the purpose of the campaign was "to cast doubt **[**7]** on robotic heart surgery procedures," throughout the entire city of Houston and "evaporate" the "robotic heart surgery market." If the campaign was successful, it would inoculate Memorial City from the advantage Methodist West would otherwise gain from the ability to offer the superior procedure.

[*697] Rumors began spreading across the Memorial City campus that Dr. Gomez was "having problems" with his mortality rate, and the marketing director at Memorial City did an "about-face" regarding Dr. Gomez. Portia Willis, who was then employed in Memorial City's marketing department, had scheduled speaking engagements and other promotional engagements for Dr. Gomez on behalf of Memorial City. But amidst the rumors, Ms. Willis was told not to push forward with any type of marketing or promotion of Dr. Gomez indefinitely. Although the reasons for the marketing hiatus were not explained, Ms. Willis had the impression that the move was related to the rumors that Dr. Gomez was "a crappy surgeon." By this point, rumors had become "rampant" that Dr. Gomez "wasn't the surgeon

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[7] At the time of the meeting, Dave Jones was the CEO of Memorial City and Dr. Joel Abramowitz was the Chief of Staff. Shortly after the meeting took place, Mr. Alexander became CEO.

that [the Hospital workers] thought he was," and the hospital's employees began to wonder how much longer Dr. Gomez's practice could **[**8]** endure.

At a "Cardiovascular and Thoracic CPC" meeting on November 1, 2011, Dr. Macris displayed "false data and statements regarding Dr. Gomez's practice and mortality rates of his patients to an entire room filled with Dr. Gomez's professional colleagues, intending that it be thereafter widely disseminated." The presentation "create[d] the appearance that patients were more likely to die in Dr. Gomez's care." Dr. Macris had "manipulated" the presented data, eschewing generally accepted methodologies for proper peer review comparison as well as basic scientific principles. Although the "true" peer review committee at Memorial Hermann[8] intervened and ultimately determined Dr. Macris's comparative data could not be relied upon for any legitimate purpose, the defendants continued to disseminate the manipulated data within the medical community. This spread the false impression of Dr. Gomez's practice. After Dr. Gomez's abilities were assessed in the cardiology section meeting, his "referral patterns were ruined," and he lost his status as one of the most sought-after surgeons.

At a January 2012 meeting, Mr. Alexander publicly ridiculed Dr. Gomez's skills as a heart surgeon. Mr. Alexander let the physicians, nurses, and administrators in the room "know that he had targeted Dr. Gomez because of his affiliation with Methodist West." Mr. Alexander "made clear . . . he would not tolerate physicians taking business to Methodist West." Destroying Dr. Gomez's reputation "served as a preemptive warning" to other physicians considering an affiliation with Methodist West.

Dr. Gomez brought suit on the claims described above and moved to compel the production of certain documents. Memorial Hermann asserted the documents were protected from discovery under the medical committee privilege and the medical peer review committee privilege. Following an in camera inspection, the trial court ordered Memorial Hermann to produce certain documents. After the court of appeals denied Memorial Hermann's petition for writ of mandamus,[9] Memorial Hermann sought mandamus relief in this Court.

DISCUSSION

I. Standard of review

HN1[] "Mandamus is proper when the trial court erroneously orders the disclo **[*698]** sure of privileged information because the trial court's error cannot be **[**10]** corrected on appeal."[10] Pleading and producing evidence establishing the existence of a privilege is the burden of the party seeking to avoid discovery.[11] The party asserting the privilege must establish by testimony or affidavit a prima facie case for the privilege.[12] The party need produce "only the 'minimum quantum of evidence necessary to support a rational inference that the allegation of

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[8] Dr. Gomez disputes whether the committee to which Dr. Macris presented the data falls within the definition of a medical **[**9]** peer review committee.

[9] *In re Mem'l Hermann Hosp. Sys., 2014 Tex. App. LEXIS 2424, 2014 WL 866069 (Tex. App.—Houston [1st Dist.] March 4, 2014, orig. proceeding)*.

[10] *In re E.I. DuPont de Nemours & Co., 136 S.W.3d 218, 222 (Tex. 2004)*.

[11] *State v. Lowry, 802 S.W.2d 669, 671 (Tex. 1991)*; *Jordan v. Court of Appeals for Fourth Supreme Judicial Dist., 701 S.W.2d 644, 648-49 (Tex. 1985)*.

[12] *In re Living Ctrs. of Tex., Inc., 175 S.W.3d at 261*; *Lowry, 802 S.W.2d at 671*.

fact is true,'" and tender the documents to the trial court, at which point, "the trial court must conduct an in camera inspection of [the] documents before deciding to compel production."[13]

HN2[] A reviewing court may not substitute its judgment for that of the trial court regarding "the resolution of fact issues or matters committed to the trial court's discretion."[14] "The scope of discovery and the admission of evidence is principally within the discretion of the trial court."[15] The relator must establish that the trial court failed to reach the only reasonable conclusion on such matters.[16] A less deferential standard applies to the trial court's determination of the legal principles governing the discovery, however.[17]

II. The trial court did not abuse its discretion in holding that the "anticompetitive action" exception to the medical peer review committee privilege applied.

A. Under certain circumstances, the medical peer review committee privilege limits the accessibility of the records of, proceedings of, and communications to a medical peer review committee.

HN3[] A medical peer review committee includes "a committee of a health care entity [including a hospital licensed under Chapter 241 or 577 of the Health and Safety Code] . . . or the medical staff of a health care entity" that (1) "operates under written bylaws" approved by either the policy-making or governing board of the health care entity, and (2) "is authorized to evaluate the quality of medical and health care services or the competence of physicians." **[**12]** [18]

HN4[] "All proceedings and records of a medical peer review committee are confidential, and all records of, determinations **[*699]** of, and communications to a committee are privileged and are not discoverable, with certain exceptions. . . ."[19] The provision of confidentiality extends to the committee's initial and subsequent credentialing decisions,[20] as well as to documents "generated" by a committee or "prepared by or at the direction of the committee for committee purposes."[21] The minutes and recommendations of the committee as well as the committee's inquiries about a physician to outside sources and responses thereto are also protected.[22] However,

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[13] *In re E.I. DuPont de Nemours & Co., 136 S.W.3d at 222* (quoting *Tex. Tech. Univ. Health Scis. Ctr. v. Apodaca, 876 S.W.2d 402, 407 (Tex. App.—El Paso 1994, writ denied))*.

[14] *Walker v. Packer, 827 S.W.2d 833, 839-40 (Tex. 1992)*.

[15] *Flores v. Fourth Court of Appeals, 777 S.W.2d 38, 41 (Tex. 1989)*.

[16] *Id.*

[17] *Walker, 827 S.W.2d at 840* ("In determining whether the trial court abused its discretion in the present **[**11]** case, we treat the trial court's erroneous denial of the requested discovery on the sole basis of *Russell* as a legal conclusion to be reviewed with limited deference to the trial court."); *see also* *Marathon Oil Co. v. Moye, 893 S.W.2d 585, 589 (Tex. App.—Dallas 1994, orig. proceeding)* ("When a trial court's interpretation of discovery law is at issue, we treat the trial court's order as a legal conclusion. We review the legal conclusion with limited deference to the trial court.").

[18] *Tex. Occ. Code § 151.002(a)(8)*; *see also id.* *§ 151.002(a)(5)* (defining "Health care entity").

[19] *In re Univ. of Tex. Health Ctr. at Tyler, 33 S.W.3d 822, 825 (Tex. 2000)*; *see also* ***HN5***[] *Tex. Occ. Code § 160.007(a)* ("Except as otherwise provided by this subtitle, each proceeding or record of a medical peer review committee is confidential, and any communication made to a medical peer review committee is privileged.").

[20] *Mem'l Hosp.—The Woodlands v. McCown, 927 S.W.2d 1, 3-5 (Tex. 1996)*.

[21] *Id. at 10*; *see also* *In re Living Ctrs. of Tex., Inc., 175 S.W.3d at 257*.

"simply passing a document through a peer review committee does not make it privileged."[23] The privilege does not prevent a party from discovering from a nonprivileged source material that has been presented to the committee.[24]

HN6[] Texas Occupations Code section 160.007's provisions **[**13]** "expressly delineate and limit the circumstances under which the records of and communications to a peer review committee may [or must] be accessed."[25] The committee may disclose its records and proceedings, and communications made by the committee to other medical peer review committees, appropriate governmental agencies, national accreditation bodies, the Texas Medical Board, and another state's board of registration or licensing of physicians.[26] The committee may disclose to a physician under its review confidential information relevant to the matter without waiving confidentiality.[27] The committee must provide the physician with a written copy of its recommendation and final decision for certain actions, including those that could result in "censure, suspension, restriction, limitation, revocation, or denial of membership or privileges in a health care entity."[28]HN7[] Certain parties are entitled to use the confidential information in their defense or in rebuttal to such a defense.[29] Otherwise, the records and determinations of a medical peer review committee, as well as communications to the committee, are "not subject to subpoena or discovery and [are] not admissible as evidence in any civil **[**14]** judicial or administrative proceeding without waiver of the privilege of confidentiality executed in writing by the committee."[30]

However, HN8[] under certain circumstances, the information may not be confidential, in which case it would not be subject to a privilege. For example, the "records made or maintained in the regular course of business by a hospital . . . [or] medical organization" are not covered by section 160.007 and therefore are not confidential **[*700]** under that section.[31] In addition, section 160.007(b) provides a limited exception to confidentiality for proceedings, records, or communications that are relevant to an anticompetitive action. HN9[] The anticompetitive action exception provides in full:

> If a judge makes a preliminary finding that a proceeding or record of a medical peer review committee or a communication made to the committee is relevant to an anticompetitive action, or to a civil rights proceeding brought under 42 U.S.C. Section 1983, the proceeding, record, or communication is not confidential to the extent it is considered relevant.[32]

The parties dispute the applicability of this exception.

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[22] *In re Living Ctrs. of Tex., Inc., 175 S.W.3d at 257*.

[23] *Id.*

[24] *Id. at 260*; *McCown, 927 S.W.2d at 10*.

[25] *Irving Healthcare Sys. v. Brooks, 927 S.W.2d 12, 16 (Tex. 1996)*.

[26] *Tex. Occ. Code § 160.007(c)*; *see also id. § 151.002(a)(1)*("'Board' means the Texas Medical Board.").

[27] *Id. § 160.007(d)*.

[28] *Id.*

[29] *See id. § 160.007(f)*.

[30] *Id. § 160.007(e)*.

[31] *Tex. Health & Safety Code § 161.032(f)*. However, the fact that **[**15]** a committee reviewed such records is protected. *See In re Living Ctrs. of Tex., 175 S.W.3d at 257* ("HN10[] The peer review privilege protects the products of the peer review process: reports, records (including those produced for the committee's review as part of the investigative review process), and deliberations."); *Brooks, 927 S.W.2d at 18*.

[32] *Tex. Occ. Code § 160.007(b)*.

B. The committees at issue are medical peer review committees.

As an initial matter, Dr. Gomez disputes that Memorial Hermann proved the relevant committees are medical peer review committees. The trial court found "that the anticompetitive exception to the medical peer review committee privilege applies," which inherently implies a finding that the relevant committees were medical peer review committees. Dr. Gomez argues that Memorial Hermann failed to establish that the investigations were performed for the purpose of quality assessment, or that the committee was established by bylaws.

HN11[] With one exception,[33] the medical peer review committee privilege affords confidential status to the records of, proceedings of, and communications to a medical peer review committee regardless of whether the individual record, proceeding, or communication relates to a peer review action.[34] Memorial Hermann submitted the committees' **[**16]** bylaws as well as affidavits stating that the committees engaged in peer review. Although Dr. Gomez points us to evidence to the contrary, the trial court had sufficient evidence before it to make a reasonable finding that the committees are medical peer review committees. We will not disturb that finding.

C. An "anticompetitive action" is one that requires proof of a net negative impact on competition within a defined market.

The trial court found that the documents at issue "are relevant to an anticompetitive action." Before we can resolve the parties' dispute regarding the correctness of this finding, we must first determine the meaning of the statutory phrase "relevant to an anticompetitive action."[35]

HN12[] Statutory construction is a question of law we review de novo.[36] Our objective is to determine and give effect to the Legislature's intent,[37] and "the truest manifestation of what lawmakers intended **[*701]** is what they enacted."[38] Proper construction requires reading the statute as a whole rather than interpreting provisions in isolation.[39] "[C]ourts should not give an undefined statutory term **[**17]** a meaning out of harmony or inconsistent with other provisions, although it might be susceptible of such a construction if standing alone."[40] "We presume that the Legislature chooses a statute's language with care," and we will not ignore the statute's use of a term that carries a "particular meaning."[41] ***HN13***[] "Privileges are not favored in the law and are strictly construed."[42]

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[33] *See id.* *§ 151.002(a)(8)(B)*.

[34] *Compare id.* *§ 151.002(a)(7)* (defining medical peer review) *with id.* *§ 151.002(a)(8)* (defining medical peer review committee).

[35] *Tex. Occ. Code § 160.007(b)*.

[36] *Tex. Dep't of Transp. v. Needham, 82 S.W.3d 314, 318 (Tex. 2002)*.

[37] *Liberty Mut. Ins. Co. v. Garrison Contractors, Inc., 966 S.W.2d 482, 484 (Tex. 1998)*.

[38] *Combs v. Roark Amusement & Vending, L.P., 422 S.W.3d 632, 635 (Tex. 2013)*.

[39] *Tex. Dep't of Transp. v. City of Sunset Valley, 146 S.W.3d 637, 642 (Tex. 2004)*.

[40] *Needham, 82 S.W.3d at 318*.

[41] *TGS-NOPEC Geophysical Co. v. Combs, 340 S.W.3d 432, 439 (Tex. 2011)*.

[42] *Jordan, 701 S.W.2d at 647*.

Neither section 160.007 nor any other peer review committee privilege that incorporates the phrase "anticompetitive action" defines the term.[43] Black's Law Dictionary defines "anticompetitive" as "[h]aving a tendency to reduce or eliminate competition" in contrast to the term procompetitive.[44] Procompetitive is in turn defined as "[i]ncreasing, encouraging, or preserving competition."[45] Competition itself is defined as "[t]he struggle for commercial advantage; the effort or action of two or more commercial interests to obtain the same business from third parties."[46] The dictionary also notes that the term anticompetitive "describes the type of conduct or circumstances generally targeted by antitrust laws,"[47] although the statement is "not purely definitional."[48]

This framework accurately maps out the meaning afforded the term "anticompetitive" in court decisions in the antitrust context. As noted by the Supreme Court of the United States, to restrain competition is the "very essence" of every agreement and regulation of trade.[49] Therefore, regarding restraints of trade, "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[50] As **[*702]** such, an "abbreviated or 'quick-look' analysis" is appropriate only when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[51] The goal of judicial scrutiny of restraints on trade is to "distinguish[] between restraints with anticompetitive effect that are **[**19]** harmful to the consumer and restraints stimulating competition that are in the consumer's best interest."[52]

Judicial scrutiny in other areas of ***antitrust law*** confirms that the antitrust laws were designed as a "consumer welfare prescription" that requires consideration of both anticompetitive and procompetitive effects.[53] Thus, proof that a firm's dominant position is the "consequence of a superior product, business acumen, or historic accident"—

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[43] *See, e.g.*, Tex. Occ. Code §§ 261.051 (dental peer review committee); 202.454(b) (podiatric peer review committee); **[**18]** 564.103(b) (pharmacy peer review committee).

[44] BLACK'S LAW DICTIONARY 113 (10th ed. 2014).

[45] *Id.* at 1400.

[46] *Id.* at 344.

[47] *Id.* at 113.

[48] *See id.* at xxxii (noting that "[b]ullets are used to separate definitional information (before the bullet) from information that is not purely definitional (after the bullet), such as encyclopedic information or usage notes").

[49] Bd. of Trade of City of Chi. v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918).

[50] *Id.; see also* State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997) ("Although the Sherman Act, by its terms, prohibits every agreement 'in restraint of trade,' this Court has long recognized that Congress intended to outlaw only unreasonable restraints."); F.T.C. v. Ind. Fed'n of Dentists, 476 U.S. 447, 459, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986) ("Absent some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services . . .—such an agreement limiting consumer choice by impeding the 'ordinary give and take of the market place' cannot be sustained under the Rule of Reason."); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 342, 17 S. Ct. 540, 41 L. Ed. 1007 (1897) ("The necessary effect of the agreement is to restrain trade or commerce, no matter what the intent was on the part of those who signed it.").

[51] California Dental Ass'n v. FTC, 526 U.S. 756, 770, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999).

[52] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007).

[53] Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Ok., 468 U.S. 85, 107, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984) (internal quotation marks omitted). *See also* Tex. Bus. & Comm. Code § 15.04 ("The purpose of this Act is to maintain and promote economic competition in trade and commerce occurring wholly or partly within the State of Texas and to provide the benefits of that competition to consumers in the state.").

circumstances that either benefit the consumer or are outside the firm's control—will **[**20]** defeat a claim of monopoly.[54] Claims of attempted monopolization require the further showing that the defendant "pose[s] a danger of monopolization," because judging unilateral conduct absent actual potential to achieve a monopoly would "risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur."[55] Similarly, in scrutinizing a proposed merger, the "economic efficiencies produced by the merger must be weighed against anticompetitive consequences in the final determination whether the *net effect* on competition is substantially adverse."[56] Ultimately, the "use of the word 'competition' [is] a shorthand for the invocation of the benefits of a competitive market,"[57] and ***antitrust law*** acknowledges that "it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects."[58]

We have no trouble holding that ***HN14***[] the Legislature intended the term "anticompetitive" in *section 160.007* to denote an overall substantially adverse effect on competition, rather than the existence of some negative effects. However, we reject Memorial Hermann's characterization of the term "anticompetitive action" as synonymous with "antitrust action." Although we agree that the term anticompetitive "describes the type of conduct or circumstances **[*703]** *generally* targeted by antitrust laws,"[59] the term itself is broader because the law of antitrust does not encompass *all* conduct that could substantially lessen competition in a particular market. For example, certain conduct—regardless of its overall impact on competition—is immune from ***antitrust law*** under the state action doctrine,[60] the exemption for political activity,[61] or the exemptions, both implicit and explicit, for labor unions.[62] The terms anticompetitive and antitrust are therefore not inherently coextensive, and we cannot ignore the Legislature's

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[54] *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*.

[55] *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-68, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*; *Swift & Co. v. United States, 196 U.S. 375, 402, 25 S. Ct. 276, 49 L. Ed. 518 (1905)* ("Not every act that may be done with intent to produce an **[**21]** unlawful result is unlawful, or constitutes an attempt. It is a question of proximity and degree.").

[56] *F.T.C. v. Procter & Gamble Co., 386 U.S. 568, 597, 87 S. Ct. 1224, 18 L. Ed. 2d 303 (1967)* (emphasis added).

[57] *Id.*

[58] *Copperweld Corp., 467 U.S. at 767-68*.

[59] BLACK'S LAW DICTIONARY 113 (10th ed. 2014) (emphasis added).

[60] *See, e.g., Cmty. Commc'ns Co. v. City of Boulder, Colo., 455 U.S. 40, 48, 102 S. Ct. 835, 70 L. Ed. 2d 810 (1982)* (holding that federal ***antitrust law*** does not "prohibit[] a State, in the exercise of its sovereign powers, from imposing certain anticompetitive restraints"); *E. R. R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)* ("[W]here a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out."); *Parker v. Brown, 317 U.S. 341, 351, 63 S. Ct. 307, 87 L. Ed. 315 (1943)* ("The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state."). *See also Tex. Bus. & Comm. Code § 15.05(g)* ("Nothing in this section shall be construed to prohibit activities that are exempt from the operation of the federal antitrust laws . . . except that an exemption otherwise available under the McCarran-Ferguson Act . . . does not serve to exempt activities under this Act.").

[61] *Noerr Motor Freight, Inc., 365 U.S. at 136* ("[T]he Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly."); *see also Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609, 611, 30 L. Ed. 2d 642 (1972)* (extending *Noerr* to "the approach of citizens . . **[**23]** . to administrative agencies . . . and to courts").

[62] *Brown v. Pro Football, Inc., 518 U.S. 231, 237, 116 S. Ct. 2116, 135 L. Ed. 2d 521 (1996)* ("[T]he implicit exemption recognizes that, to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions."); *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 621-22, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975)* (holding that certain federal statutes "declare that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws").

use of the broader term, particularly in juxtaposition to *section 160.007(b)*'s specificity regarding its application **[**22]** to civil rights proceedings.[63]

However, this does not mean that***HN15***[] a litigant may successfully rely on *subsection (b)* simply by adding a gratuitous allegation that the conduct at issue is anticompetitive. *Section 160.007(b)* requires a "preliminary finding that a proceeding or record of a medical peer review committee or a communication made to the committee *is relevant to an anticompetitive action*" and provides that "the proceeding, record, or communication is not confidential *to the extent it is considered relevant*."[64] Relevance cannot be determined in isolation of the elements of an **[**24]** asserted cause of action.

Dr. Gomez's contrary construction treats the terms action and conduct as synonymous,[65] but as we have previously noted, **[*704]** ***HN16***[] this Court has "equated 'action' with 'suit."[66] Although we have not previously discussed the meaning of the word action in this particular context, we have held that generally the term is "synonymous with 'suit,' which is a demand of one's rights in court."[67] Had the Legislature intended the focus to be on the defendant's conduct apart from any asserted cause of action, it would have been more natural to say "an anticompetitive act" or "anticompetitive conduct." But the Legislature chose the term "action," which is a well-established legal term of art synonymous with lawsuit.[68] This meaning also better fits the parallelism of the phrases "anticompetitive action"[69] and "a civil rights proceeding"[70] in *subsection (b)*.

At any rate, ***HN17***[] the exception's reference to relevance confirms that the Legislature intended the term action to refer to a "civil or criminal judicial proceeding."[71] Our rules of evidence provide that evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and if that "fact is *of consequence* in determining the action."[72] A purely voluntary showing that the defendant's conduct is anticompetitive cannot constitute a fact of consequence in a lawsuit—the limited waiver of confidentiality for proceedings, records, and communications "relevant to an anticompetitive action"[73] can only apply if the plaintiff asserts a cause of action that requires proof of anticompetitive conduct or effects.[74]

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[63] *See Tex. Occ. Code § 160.007(b)* (limiting the exception's application to "civil rights proceeding[s] brought under *42 U.S.C. Section 1983*").

[64] *Id.* (emphases added).

[65] *See* BLACK'S LAW DICTIONARY 35 (10th ed. 2014) (listing "[t]he process of doing something; conduct or behavior" as one definition of action).

[66] *Thomas v. Oldham, 895 S.W.2d 352, 356 (Tex. 1995)*.

[67] *Id.*

[68] *See id. See also* BLACK'S LAW DICTIONARY 35 (10th ed. 2014) ("'The terms 'action' and suit' are nearly if not quite synonymous. But lawyers usually speak of proceedings in courts of **[**25]** law as 'actions,' and those in courts of equity as 'suits.'" (quoting Edwin E. Bryant, *The Law of Pleading Under the Codes of Civil Procedure* 3 (2d ed. 1899))).

[69] *Tex. Occ. Code § 160.007(b)*.

[70] *Id.*

[71] BLACK'S LAW DICTIONARY 28 (7th ed. 1999), *quoted in Jaster v. Comet II Constr., Inc., 438 S.W.3d 556, 564 (Tex. 2014)* (plurality op.).

[72] *Tex. R. Evid. 401* (emphasis added).

[73] *Tex. Occ. Code § 160.007(b)*.

In light of the rarity of claims that require proof of a net anticompetitive effect, as a practical matter, our interpretation will not greatly expand the scope of an "anticompetitive action" beyond valid antitrust claims. However, our caselaw has already identified at least one cause of action that potentially falls within the interstice between anticompetitive and antitrust—tortious interference with prospective business relations.[75] As we have **[*705]** previously held, recovery for tortious interference with a prospective business relation requires a plaintiff to "prove that the defendant's conduct was independently tortious or wrongful" as an element of the cause of action.[76] Thus, even without asserting a cause of action under the TFEAA,[77] a plaintiff who asserts that a defendant's conduct is independently wrongful because it violates the laws of antitrust[78] would, as part of proving the violation, be required to show a negative effect on competition.

Such a plaintiff would still need to plead a valid antitrust *violation*, however, he would not need to plead a valid antitrust *claim*.[79] The TFEAA grants a private right of action to bring suit, but only to persons "whose business or property has been injured by reason of any conduct declared unlawful" in the Act.[80] This requires a plaintiff to prove "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[81] Furthermore, permissible recovery is limited to "actual **[**29]** damages

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[74] As already illustrated in our brief review of the meaning of "anticompetitive," there is no practical difference between the terms anticompetitive conduct and anticompetitive **[**26]** effects as used in the caselaw, because we do not deem conduct anticompetitive unless it has a net anticompetitive effect.

[75] Memorial Hermann argues that our decision in *Irving Healthcare Sys. v. Brooks, 927 S.W.2d 12 (Tex. 1996)*, forecloses argument that *section 160.007(b)*'s anticompetitive action exception encompasses routine **[**27]** business torts, including interference with prospective business relations. In *Brooks*, we noted that "the statute provides that if a court makes a preliminary finding that a medical peer review committee's proceedings, records, or communications are relevant to an anticompetitive action . . . they are not confidential," but that "a similar provision for a libel action in which the plaintiff claims malice" was "[n]oticeably absent from the statute." *927 S.W.2d at 16*. We also held that the statute did not "explicitly exclude from its confidentiality provisions any of [the plaintiff's] other causes of action." *Id.*

The plaintiff in *Brooks* sued for libel, slander, "intentional infliction of mental anguish," and interference with business relations. *Id. at 14-15*. The plaintiff alleged that the defendant had "intentionally and maliciously supplied false information, thereby damaging or destroying [the plaintiff's] ability to gain admittance to the medical staffs of the hospitals to which he applied." *Id.* Thus, *Brooks* did not require us to review the applicability of *subsection (b)*, because the trial court never made the required preliminary finding of relevance to an anticompetitive action. Furthermore, although the plaintiff's **[**28]** "other causes of action," included an allegation that the defendant tortiously interfered with prospective business relations, the plaintiff did not allege that the conduct was independently wrongful because the provision of false information had a negative effect on competition and constituted an antitrust violation. Our decision today is therefore consistent with our holding in *Brooks*.

[76] *Wal-Mart Stores, Inc. v. Sturges, 52 S.W.3d 711, 726 (Tex. 2006)*.

[77] *Tex. Bus. & Comm. Code § 15.01 et seq.*

[78] *See* *Sturges, 52 S.W.3d at 726* ("[A] plaintiff could recover for tortious interference by showing an illegal boycott, although a plaintiff could not recover against a defendant whose persuasion of others not to deal with the plaintiff was lawful.").

[79] *See generally* Phillip Areeda, *Antitrust Violations Without Damages Recoveries*, 89 HARV. L. REV. 1127 (1976) (discussing "three superficially paradoxical possibilities," each of which hypothesizes circumstances under which a plaintiff might be able to prove an antitrust violation, but not be able to recover damages under the antitrust laws).

[80] *Tex. Bus. & Comm. Code § 15.21(a)(1)*.

[81] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*; *see also* *Austin v. Blue Cross & Blue Shield of Ala., 903 F.2d 1385, 1389-90 (11th Cir. 1990)* ("'The antitrust injury concept . . . requires the private antitrust plaintiff to show that his own injury coincides with the public detriment tending to result from the alleged violation. This requirement increases the likelihood that public and private enforcement of the antitrust laws will further the same goal of increased competition.'" (quoting P. Areeda and H. Hovenkamp, ***Antitrust Law***, 335.1, at 261 (Supp. 1987)).

sustained" as a result of the unlawful conduct.[82] The damages must "reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation"[83] —in other words, "the type of loss that the claimed violations of the antitrust laws would be likely to cause."[84]

[*706] In contrast, tortious interference with business relations "provides a remedy for injurious **[**30]** conduct that other tort actions might not reach . . . but only for conduct that is already recognized to be wrongful under the common law or by statute."[85] Thus, in *Wal-Mart Stores, Inc. v. Sturges*, we provided the example of "a defendant who threatened a customer with bodily harm if he did business with the plaintiff."[86] We stated that such a defendant would be liable because the defendant's "conduct toward the customer—assault—was independently tortious," even though the plaintiff would not be able to sue the defendant for the assault itself.[87]

In sum, we hold that ***HN18***[] the exception to the medical peer review committee privilege for anticompetitive actions applies when the plaintiff asserts a cause of action that requires proof that the conduct at issue has "a tendency to reduce or eliminate competition"[88] that is not offset by countervailing procompetitive justifications.[89]

D. Subsection [31] (b) requires a plaintiff to plead, not present evidence of, an anticompetitive action**.

We also reject Memorial Hermann's contention that *section 160.007(b)* conditions its exception to confidentiality on the plaintiff's satisfaction of an evidentiary burden. The Legislature knows how to provide this type of gatekeeping function,[90] and *subsection (b)* is devoid of any language indicating intent to do so. The statute does not reference expert reports,[91] affidavits,[92] or categories of evidence to be considered.[93] Significantly, other than requiring a

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[82] *Tex. Bus. & Comm. Code § 15.21(a)(1)*.

[83] *Brunswick Corp., 429 U.S. at 489*.

[84] *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 125, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*.

[85] *Sturges, 52 S.W.3d at 713*.

[86] *Id.*

[87] *Id. Compare Brunswick Corp., 429 U.S. at 488* (rejecting the lower court holding that "once a merger is found to violate *[section 7 of the Clayton Act]*, all dislocations caused by the merger are actionable, regardless of whether those dislocations have anything to do with the reason the merger was condemned").

[88] BLACK'S LAW DICTIONARY 113 (10th ed. 2014).

[89] *Cf. Ind. Fed'n of Dentists, 476 U.S. at 459*.

[90] *Cf. Bioderm Skin Care, LLC v. Stock, 426 S.W.3d 753, 756 (Tex. 2014)* (holding the Texas Medical Liability Act "requires **[**32]** claimants asserting health care liability claims to substantiate their claims with an expert report"); *Crosstex Energy Srvs., L.P. v. Pro Plus, Inc., 430 S.W.3d 384, 387 (Tex. 2014)* (holding that the certificate of merit statute requires plaintiffs to "file an affidavit . . . [that] substantiate[s] the plaintiff's claim on each theory of recovery").

[91] *Compare Tex. Civ. Prac. & Rem. Code §§ 74.351(a)* ("In a health care liability claim, a claimant shall . . . serve on that [defendant] or the [defendant's] attorney one or more expert reports. . . ."); *128.053(a)* ("In a suit against a sport shooting range . . . a claimant shall . . . serve on each party or the party's attorney one or more expert reports. . . ."); *see also Tex. Health & Safety Code § 841.101(b)* ("In preparation for a judicial review conducted under *Section 841.102*, the case manager shall provide a report of the biennial examination to the judge.").

[92] *Compare Tex. Civ. Prac. & Rem. Code §§ 14.004(a)* ("An inmate who files an affidavit or unsworn declaration of inability to pay costs shall file a separate affidavit or declaration. . . ."); *150.002(a)* ("In any action or arbitration proceeding for damages arising out of the provision of professional services by a licensed or registered professional, the plaintiff shall be required to file

"preliminary finding" that the **[*707]** material be "relevant to an anticompetitive action,"[94] *subsection (b)* contains no indication of a threshold quantum of proof.[95] ***HN19***[] Determinations of potential relevancy or privilege typically do not require a litigant to produce evidence on the merits of his claim—as opposed to the merits of the privilege.[96] Furthermore, it is counter to the notion that "[a]ffording parties full discovery promotes the fair resolution of disputes by the judiciary,"[97] to condition access to documents that could substantiate a plaintiff's claim on the plaintiff's ability to substantiate his claim without the documents' aid.

Although Memorial Hermann's concern that plaintiffs may circumvent the privilege through artful pleading is a compelling one, defendants are not left without protection. First, ***HN20***[] by permitting defendants to recover costs incurred from defending against frivolous or bad faith pleadings, *section 160.008(c)* discourages the addition of groundless allegations of injury to competition.[98] Second, nothing in *section 160.007* prevents defendants from seeking, as they do in all civil cases, to limit discovery on the grounds that "the discovery sought is unreasonably cumulative or duplicative, or is **[**35]** obtain[able] from some other source that is more convenient, less burdensome, or less expensive."[99] Defendants may also assert that "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case . . . the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."[100] Defendants may also seek protective orders to protect themselves "from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, **[*708]** or property rights."[101]

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with the complaint an affidavit of a **[**33]** third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor. . . .").

[93] *Compare id. § 27.006(a)* ("[T]he court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.").

[94] *Tex. Occ. Code § 160.007(b)*. *Compare* *Md. Am. Gen. Ins. Co. v. Blackmon, 639 S.W.2d 455, 457 (Tex. 1982)* ("We will assume for purposes of this opinion that the information ordered to be disclosed is relevant.").

[95] *Compare* *Tex. Civ. Prac. & Rem. Code § 27.005(c)* ("The court may not dismiss a legal action under this standard if the party bringing the legal action establishes by *clear and specific* evidence a prima facie case for each essential element of the claim in question." (emphasis added)); *Tex. Health & Safety Code § 841.102(c)* ("The judge shall set a hearing if the judge determines at the biennial review that . . . *probable cause* exists to believe that the person's behavioral abnormality has changed to the extent that the person is no longer likely to engage in a predatory act of sexual violence." (emphasis added)).

[96] *Cf.* *Tex. R. Civ. P. 193.4(a)* ("The party making the objection or asserting the privilege must present any evidence necessary *to support the objection or privilege*." (emphasis added)); ***[**34]*** *see also* ***Lunsford v. Morris, 746 S.W.2d 471, 473 (Tex. 1988)*** ("Absent a privilege or specifically enumerated exemption, our rules permit discovery of any 'relevant' matter; thus, there is no evidentiary threshold a litigant must cross before seeking discovery.").

[97] *See* *Lowry, 802 S.W.2d at 673* ("[A]ll of the information sought to be discovered was gathered by the State during the investigation that led to the filing of this antitrust enforcement action. The State has refused to provide materials requested by the insurers that could lead to evidence supporting their defense. It is difficult for the insurers to make a more particularized showing of need for these documents, the contents of which are unknown to them.").

[98] *See* ***HN21***[] *Tex. Occ. Code § 160.008(c)* ("A defendant subject to this section may file a counterclaim in a pending action or may prove a cause of action in a subsequent action to recover defense costs, including court costs, attorney's fees, and damages incurred as a result of the civil action, if the plaintiff's original action is determined to be frivolous or brought in bad faith.").

[99] ***Tex. R. Civ. P. 192.4(a)***.

[100] ***Tex. R. Civ. P. 192.4(b)***.

[101] ***Tex. R. Civ. P. 192.6(b)***.

Finally, ***HN22***[] because the statute provides that information "is not confidential *to the extent it is considered relevant*,"[102] the exception's scope is still narrower than the otherwise applicable scope of discovery, which permits **[**36]** discovery of information that "appears reasonably calculated *to lead* to the discovery of admissible evidence."[103] Defendants may further limit the scope of discovery through the judicious use of special exceptions, which are "the appropriate vehicle . . . by which an adverse party may force clarification of vague pleadings,"[104] thereby narrowing the range of facts that will be of consequence in the action.[105]

As such, we hold that ***HN23***[] judges are to determine a *subsection (b)* "preliminary finding" on the basis of the plaintiff's pleadings. We now turn to the application of *subsection (b)* to Dr. Gomez's pleadings.

E. Dr. Gomez pleaded an anticompetitive action.

Dr. Gomez alleged that the defendants intentionally interfered with his "longstanding and continuous relationships with referring physicians in the West Houston and Katy medical community" and that the defendants' acts constituted a "concerted **[**37]** effort . . . to restrain competition in and monopolize surgical procedures." Dr. Gomez also asserted that the defendants' acts "constitute illegal monopolization, attempted monopolization, and/or conspiracy to monopolize under applicable Texas law."

Memorial Hermann does not dispute that Dr. Gomez alleged that Memorial Hermann violated the TFEAA, but rather, argues Dr. Gomez failed to plead a valid antitrust claim. Memorial Hermann challenges the sufficiency of Dr. Gomez's allegations, taken as true, to establish (1) a legally cognizable injury to competition, and (2) an adverse effect on competition in the relevant market. The crux of Memorial Hermann's argument is its contention that caselaw overwhelmingly establishes that a claim for an injury to a single physician at a single hospital is insufficient. We disagree with Memorial Hermann's characterization of Dr. Gomez's allegations as well as its characterization of the law.

HN24[] We "construe the TFEAA in harmony with federal antitrust caselaw to promote competition for consumers' benefit."[106] "Because our own caselaw is limited, we rely heavily on the jurisprudence of the federal courts."[107]

[*709] ***HN25***[] The TFEAA declares that "[e]very contract, combination, or conspiracy in restraint of trade or commerce is unlawful," and that "it is unlawful for any person to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce."[108] As discussed above, however, the TFEAA does not operate as a

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[102] *Tex. Occ. Code § 160.007(b)* (emphasis added).

[103] ***Tex. R. Civ. P. 192.3(a)*** (emphasis added).

[104] *Fort Bend Cnty. v. Wilson, 825 S.W.2d 251, 253 (Tex. App.—Houston [14th Dist.] 1992, no writ)*.

[105] *See Roark v. Allen, 633 S.W.2d 804, 810 (Tex. 1982)* ("A petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim. The purpose of this rule is to give the opposing party information sufficient to enable him to prepare a defense.").

[106] *Coca-Cola Co. v. Harmar Bottling Co., 218 S.W.3d 671, 688-89 (Tex. 2006)*; *see also Tex. Bus. & Comm. Code § 15.04*.

[107] *Coca-Cola Co., 218 S.W.3d at 688-89*. *Accord Caller-Times Pub. Co. v. Triad Commc'ns, Inc., 826 S.W.2d 576, 580 (Tex. 1992)* ("Because **[**38]** *section 15.05(b)* of the Texas Antitrust Act is comparable to *section 2 of the Sherman Antitrust Act*, we look to federal law interpreting *section 2 of the Sherman Act* for guidance in interpreting *section 15.05(b)* of the Texas Antitrust Act."); *DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 687 (Tex. 1990)* ("*Section 15.05* is comparable to, and indeed taken from, *section 1 of the Sherman Antitrust Act*, *15 U.S.C. § 1 (1988)*. Accordingly, we look to federal judicial interpretations of *section 1 of the Sherman Act* in applying *section 15.05(a)* of our state ***antitrust law***.").

[108] *Tex. Bus. & Comm. Code § 15.05(a)—(b)*.

qui tam provision,[109] but rather limits the ability to bring suit under the TFEAA to persons "whose business or property has been injured by reason of any conduct declared unlawful in Subsection (a), (b), or (c) of Section 15.05 of [the] Act."[110] Thus, courts have held that standing to pursue an antitrust suit exists only if a plaintiff shows (1) injury-in-fact, an injury to the plaintiff proximately caused by the defendant's conduct; (2) antitrust injury; and (3) proper plaintiff status, which assures **[**39]** that other parties are not better situated to bring suit.[111]

HN26[] On its own, the elimination of a single competitor does not constitute proof of an anticompetitive effect for every market and context.[112] Claims of improper restraint of trade require a plaintiff to "plead . . . a reduction of competition in the market in general and not mere injury to their own positions as competitors in the market."[113] However, it is also well established that the United States Supreme Court has "forb[idden] as a matter of law, a defense based upon a claim that only one small firm, not competition **[**40]** itself, had suffered injury,"[114] because "[m]onopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups."[115]

HN27[] "In order to successfully allege injury to competition, a . . . claimant may not merely recite the bare legal conclusion **[*710]** that competition has been restrained unreasonably."[116] At a minimum, the claimant must "sketch the outline of the antitrust violation with allegations of supporting factual detail."[117] Whether the practice constitutes an **[**41]** improper restraint of trade will depend upon whether the plaintiff's allegations "suggest[] a market in which the removal of [a single competitor] from the pool of competing sellers would adversely and unreasonably affect overall competitive conditions."[118] Under the rule of reason,[119] courts consider "a variety of

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[109] *Cf.* BLACK'S LAW DICTIONARY 1443 (10th ed. 2014) (defining *qui tam* action as "[a]n action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive"). *See, e.g.*, Tex. Hum. Res. Code § 36.110.

[110] Tex. Bus. & Comm. Code § 15.21(a)(1).

[111] Doctor's Hosp. of Jefferson, Inc. v. Se. Med. Alliance, Inc., 123 F.3d 301, 305 (5th Cir. 1997); *but see* Levine v. Cent. Fla. Med. Affiliates, Inc., 72 F.3d 1538, 1548 (11th Cir. 1996) ("'When a court concludes that no violation has occurred, it has no occasion to consider standing . . . An increasing number of courts, unfortunately, deny standing when they really mean that no violation has occurred.'" (quoting P. Areeda & H. Hovenkamp, ***Antitrust Law*** ¶ 360f, at 202-03 (rev. ed. 1995))).

[112] Austin v. McNamara, 979 F.2d 728, 739 (9th Cir. 1992) (emphasis removed); *see also* Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n, 884 F.2d 504, 508 (9th Cir. 1989) ("[R]emoval of one or more competing sellers from any market necessarily has an effect on competitive conditions within that market. But removal of one or a few competitors need not equate with injury to competition.").

[113] Les Shockley Racing, Inc., 884 F.2d at 508.

[114] NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 134-35, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998) (discussing Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)); *see also* Klor's, Inc., 359 U.S. at 213 (holding that a group boycott was "not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy").

[115] Klor's Inc., 359 U.S. at 213. *Cf.* U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 597 (1st Cir. 1993) ("Ultimately the issue turns upon antitrust policy, where a permanent tension prevails between the 'no sparrow shall fall' concept of antitrust . . . and the ascendant view that antitrust protects 'competition, not competitors.'").

[116] Les Shockley Racing, Inc., 884 F.2d at 508.

[117] *Id.*

[118] Id. at 509. *Compare* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 7, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984) (affirming dismissal of the claim where the defendant was only one hospital of several in a large metropolitan area) *with* Full Draw Prods. v. Easton Sports, Inc., 182 F.3d 745, 754 (10th Cir. 1999) (holding that the loss of one or two competitors alleged

factors, including 'specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect.'"[120] As such, "the adequacy of a physician's contentions regarding the effect on competition is typically resolved after discovery, either on summary judgment or after trial."[121]

HN28[] A successful claim of monopoly requires proof of "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[122] "The term 'relevant market' encompasses notions of geography as well as product use, quality, and description. The geographic market extends to the 'area of effective competition' . . . where buyers can turn for alternate sources of supply."[123] HN29[] Demonstrating attempted monopolization requires proof "(1) **[**43]** that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power."[124]

HN30[] Under either claim, it is "necessary to consider the relevant market and **[*711]** the defendant's ability to lessen or destroy competition in that market."[125] However, the disposition of the question of "a dangerous probability of achieving monopoly power" is "typically one that is not resolved at the pleading stage unless it is clear on the face of the complaint that the 'dangerous probability' standard cannot be met as a matter of law."[126]

Here, Dr. Gomez is not complaining that the defendants have prevented him from obtaining privileges at any of the hospitals in the area, but rather that the defendants have prevented him from obtaining referrals.[127] According to Dr. Gomez's petition, the number one source of referrals for a cardiovascular surgeon is a cardiologist, and his ability to compete—regardless of whether he has staff privileges with one hospital or another—is contingent upon his reputation with those cardiologists. **[**44]** [128] The alleged injury to Dr. Gomez's reputation is therefore not

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an injury to competition where "[t]he allegation describes the anticompetitive effect of the boycott to be the loss of competition through the elimination of AMMO's sole archery trade show competitor and the resultant loss in exhibition space output") *and* Oltz v. St. Peter's Comm. Hosp., 861 F.2d 1440, 1446-47 (9th Cir. 1988) (exclusion of a single nurse anesthetist from a single hospital constituted an unreasonable **[**42]** restraint of trade where that hospital "enjoyed the overwhelming majority of the market for general surgery" and "there was no evidence that patients could effectively turn outside [the hospital] for alternate sources of anesthesia services").

[119] We note that "[o]nce experience with a particular kind of restraint enables [courts] to predict with confidence that the rule of reason will condemn it, [courts will] appl[y] a conclusive presumption that the restraint is unreasonable." Arizona v. Maricopa Cnty. Med. Soc., 457 U.S. 332, 344, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982). Dr. Gomez has not alleged that the conduct at issue falls within a category of behavior deemed unreasonable *per se*, however.

[120] Ginzburg v. Mem'l Healthcare Sys., Inc., 993 F. Supp. 998, 1009 (S.D. Tex. 1997) (quoting State Oil Co., 522 U.S. at 10).

[121] Brader v. Allegheny Gen. Hosp., 64 F.3d 869, 876 (3d Cir. 1995).

[122] Grinnell Corp., 384 U.S. at 570-71.

[123] Oltz, 861 F.2d at 1446.

[124] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993).

[125] *Id.*

[126] Brader, 64 F.3d at 876; *see also* Oltz, 861 F.2d at 1446 ("Defining the relevant market is a factual inquiry ordinarily reserved for the jury.").

[127] *See* Brader, 64 F.3d at 877 ("[T]he type of injury alleged by Brader (the loss of income due to an inability to practice in the relevant market area) is directly related to the illegal activity in which the defendant allegedly engaged: a conspiracy to exclude Brader from the relevant market.").

confined to a single hospital,[129] particularly if Dr. Gomez is able to show that Memorial Hermann has the capacity to impact a substantial number of the market's cardiologists' willingness to refer patients to him.[130]

Dr. Gomez also alleges that by disseminating false information about his mortality rate, Memorial Hermann cast doubt on robotic heart surgery procedures throughout Houston, inoculating itself from competition from a medical service that Memorial Hermann could no longer offer. The deposition excerpts attached to and quoted in Dr. Gomez's petition suggest that "referral patterns changed" and that Dr. Gomez used to be the "Number One" physician, but that following the conduct at issue, another physician, a Dr. Gibson, received more referrals.[131] Dr. Gomez also suggests in his briefing that Dr. Macris may have improperly benefitted from an increase in patients due to Dr. Gomez's decrease in patients.

Dr. Gomez alleges **[**46]** that as a result of the loss of trust in robotic heart surgery, patients **[*712]** would incur $50,000 or more in medical expenses due to longer hospital stays.[132] Dr. Gomez also disputes the existence of any procompetitive justifications for presenting manipulated mortality data.[133] As Dr. Gomez has not yet had an opportunity to obtain full discovery, we are not in a position to predict whether he will ultimately be able to sustain his burden of proof on these issues, however, his petition sufficiently alleges an injury to competition under the TFEAA.[134]

As for Memorial Hermann's arguments regarding Dr. Gomez's identification of a relevant market in which the alleged injury to competition occurred, we hold that Dr. Gomez's petition sufficiently pleads viable markets. It may

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[128] *See, e.g., Fuentes v. S. Hills Cardiology, 946 F.2d 196, 202 (3d Cir. 1991)* ("Fuentes alleges that the defendants acted in concert to deny Fuentes, a provider of cardiological services, access to the Pittsburgh cardiological market. Consequently, Fuentes asserts, that by eliminating him as a competitor, the boycott successfully reduced competition for the defendants' cardiological services."). *Compare BCB Anesthesia Care, Ltd. v. Passavant Mem'l Area Hosp. Ass'n, 36 F.3d 664, 668 (7th Cir. 1994)* ("The plaintiffs can practice at Passavant or elsewhere—they are not disabled from practicing wherever they choose.").

[129] *Cf. Bolt v. Halifax Hosp. Med. Ctr., 891 F.2d 810, 820 (11th Cir. 1990)* ("[A]s the defendants' own arguments suggest, a negative decision at one hospital could affect the decision at another hospital; therefore . . . a negative decision by one hospital could be tantamount **[**45]** to excluding a doctor from the profession as a whole." (internal quotation marks omitted)), *overruled in part on other grounds by City of Columbia v. Omni Outdoor Adver., 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)*.

[130] *Compare Coca-Cola Co., 218 S.W.3d at 688* (reversing a jury verdict where "there is only evidence of harm in relatively isolated instances and no evidence of substantial foreclosure or anti-competitive effect in any relevant market").

[131] *Compare id.* ("There must be evidence of demonstrable economic effect, not just an inference of *possible* effect." (internal quotation marks omitted)).

[132] *Cf. Leegin Creative Leather Prods., Inc., 551 U.S. at 886* (holding that the goal of judicial scrutiny is to "distinguish[] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest").

[133] We note that there may be procompetitive justifications for allowing the presentation of even misleading data, such as allowing for freer and more informed discussions—particularly in light of procedures available to physicians to challenge the peer review process. For example, ensuring that the data cannot be challenged might delay the hospital's ability to respond to concerns raised by the data. It may be that such increased **[**47]** responsiveness is of greater value than the interim damage to a physician's reputation.

As we have already discussed, the inclusion and wording of the anticompetitive exception to the medical peer review committee privilege does not condition the exception on a pre-determination that the behavior at issue is indeed anticompetitive. It requires only that the action seeks to establish that the behavior is anticompetitive. This case presents itself to us at the discovery phase rather than summary judgment. The procompetitive value of allowing for the presentation of false data is a factual determination—one likely requiring the aid of expert reports—and it is not a determination that we can make as a matter of law.

[134] *See Brader, 64 F.3d at 876*.

be unlikely that the relevant market for a valid injury to competition can be limited to the market for robotic-assisted heart surgery. For example, if Memorial Hermann does not have a heart surgeon capable of performing those surgeries, then Memorial **[**48]** Hermann could not have hoped to capture the patients who would otherwise have gone to Dr. Gomez.[135] On the other hand, if those patients are willing to substitute traditional heart surgery procedures, then a cross-elasticity of demand between the two types of procedures must exist, in which case review of the competitive impact cannot be limited to robotic-assisted heart procedures.[136]

However, although the trial court noted that Dr. Gomez alleged that Memorial Hermann's actions "impacted the referral market for heart surgeons specializing in robotic-assisted heart surgeries in Houston," the trial court did not **[**49]** base its conclusion that the anticompetitive exception applied on a finding of a particular market. **[*713]** Dr. Gomez's petition alleges multiple service markets, including the market for surgical procedures, the heart surgery market, and the referral market. Precisely because Dr. Gomez alleged so many different potential markets for his claims—as Memorial Hermann itself complains[137]—the flaw at this stage can only be with the state of evidence regarding the relevant market and not with Dr. Gomez's pleadings. The same criticism applies to Memorial Hermann's complaints about Dr. Gomez having alternatively pleaded different geographies for the relevant market for services.

Finally, Dr. Gomez's allegations suggest that Memorial Hermann targeted not only his own ability to compete for surgeries, but also Methodist **[**50]** West's competitive position. Dr. Gomez claims the destruction of his reputation served to deter Memorial Hermann's other physicians from practicing at Methodist West or from referring patients to physicians who are not affiliated with Memorial Hermann.[138] Dr. Gomez's allegations, taken as true, suggest that Memorial Hermann may have attempted to (1) intimidate a number of physicians from making referrals to specialists at Methodist West, thus cutting off Methodist West's patient base, and (2) intimidate other doctors—Methodist West's "supply" for its services—from practicing at Methodist West.[139] Even if Dr. Gomez himself would not have standing to bring a suit under the TFEAA based on antitrust injury to Methodist West,[140] Dr. Gomez could

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[135] *Cf.* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 598, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* ("[A]s presumably rational businesses, petitioners had every incentive *not* to engage in the conduct with which they are charged, for its likely effect would be to generate losses for petitioners with no corresponding gains."). *But see* *Boczar v. Manatee Hosps. & Health Sys., Inc., 993 F.2d 1514, 1518 (11th Cir. 1993)* ("The jury could believe that the hospital would benefit economically by securing its pre-existing ob/gyn staff and revenues. . . .").

[136] *See* *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 393, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)* ("Determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another.").

[137] We note that Memorial Hermann filed special exceptions regarding Dr. Gomez's allegations of the relevant market. Memorial Hermann has not requested relief regarding the trial court's denial of those special exceptions, however, and we do not consider whether pleading these markets in the alternative provides Memorial Hermann with "information sufficient to enable [it] to prepare a defense." *See* *Roark, 633 S.W.2d at 810*.

[138] *See* *Boczar, 993 F.2d at 1517* ("When Dr. Boczar joined its staff, Manatee Hospital had suffered defections by members of its ob/gyn staff and feared still more ob/gyn departures to a competing hospital.").

[139] *Cf.* *Brown Shoe Co. v. United States, 370 U.S. 294, 323-24, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)* ("The primary vice of a vertical merger *or other arrangement* tying a consumer to a supplier is that, by foreclosing the competitors of either party from a **[**51]** segment of the market otherwise open to them, the arrangement may act as a 'clog on competition.'" (emphasis added)); *Klors, Inc., 359 U.S. at 209* ("The concerted refusal to deal with Klor's has seriously handicapped its ability to compete and has already caused it a great loss of profits, goodwill, reputation and prestige.").

[140] *See* *Doctor's Hosp. of Jefferson, Inc., 123 F.3d at 305* (holding that standing to bring suit for antitrust requires "proper plaintiff status, which assures that other parties are not better situated to bring suit").

rely on the violation to show that the interference with his prospective business relations was independently wrongful.[141]

We hold that Dr. Gomez's petition presents multiple viable anticompetitive actions.

F. The trial court did not abuse its discretion in making a preliminary finding that the documents in question are relevant to the anticompetitive actions pleaded by Dr. Gomez.

The trial court ordered Memorial Hermann to produce a number of documents. We review the trial court's preliminary finding of relevance to each set of documents in the sealed record for an abuse of discretion.[142]

Memorial Hermann argues that the various categories of documents are not relevant **[*714]** to Dr. Gomez's alleged anticompetitive action because (1) a number of the documents predate November 2011, which Dr. Gomez **[**52]** identified in his deposition as the relevant time period for the case; (2) Dr. Gomez's action involves the purportedly improper publication of false material through different peer review committees, but he has not alleged that the documents themselves were publicly disseminated; (3) certain documents do not discuss individual or aggregated physician mortality rates, instead focusing on physician volume; (4) certain documents do not refer to Dr. Gomez; and (5) with regard to one particular slide, the slide is not relevant to any actionable antitrust conduct under Texas law. We conclude that the majority of the documents in the sealed record are relevant to essential elements of the anticompetitive causes of actions that Dr. Gomez has asserted.

Before discussing the relevance of otherwise protected documents, however, we note that some of the documents included in the sealed record do not qualify for protection under the medical peer review committee privilege. Any affidavits prepared for and submitted to the trial court are neither records nor proceedings of the committees at issue nor communications to that committee. They therefore receive no protection under either the medical peer **[**53]** review committee privilege or the medical committee privilege. The committee bylaws attached as exhibits to the affidavits also do not qualify as a record of, proceeding of, or communication to the committee, and are therefore not protected.[143] However, the remaining documents in the sealed record are records or proceedings of the committees, or communications to the committee.

Dr. Gomez alleges that Memorial Hermann manipulated and disseminated data on his mortality rates in order to harm his ability to compete for surgical procedures as well as to intimidate other doctors from defecting to Methodist West. As such, the withheld documents are relevant if they would tend to make more or less probable Dr. Gomez's allegations that Memorial Hermann disseminated manipulated data on Dr. Gomez's mortality rates, that the dissemination caused Dr. Gomez's referral rates to decline, or that other doctors were fearful that they could also be targeted **[**54]** in such a fashion. These fact issues are at the core of Dr. Gomez's claims that Memorial Hermann violated the TFEAA and tortiously interfered with his prospective business relations.

A number of the documents at issue are relevant because they either contain data on mortality rates of cardiovascular surgeons, discuss obtaining or direct others to obtain mortality rates of cardiovascular surgeons, establish plans to review mortality data, or reference appropriate parameters for calculating mortality data. Even if Memorial Hermann never published some of the documents that contain data on mortality rates, the data could still be relevant to the veracity of any data that Memorial Hermann did publish, particularly if discrepancies appeared between the different reports of the data. Similarly, evidence establishing that Memorial Hermann did not follow

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[141] *See* Sturges, 52 S.W.3d at 713.

[142] All page references in this section are to the sealed record.

[143] *See* Brownwood Reg'l Hosp. v. Eleventh Court of Appeals, 927 S.W.2d 24, 27 (Tex. 1996) (holding "the bylaws, rules, and regulations of [the hospital's] medical staff or Board of Trustees . . . are not records, reports, or proceedings of a hospital or medical peer review committee, nor do they reveal communications to such a committee").

what it knew to be the appropriate parameters for calculating mortality data could support an inference that Memorial Hermann intended to cast doubt on Dr. Gomez's ability as a surgeon.

[*715] The documents discussing physician volume are relevant. Memorial Hermann's argument that these documents lack any discussion of Dr. Gomez's mortality rates does **[**55]** not negate the documents' potential relevance to Dr. Gomez's allegations that he suffered a loss of referrals. The documents could also tend to prove or disprove a corresponding increase in referrals to Memorial Hermann's other physicians, which could support Dr. Gomez's allegations that Memorial Hermann violated the TFEAA. Furthermore, although the data on physician volume predates the time period in which Dr. Gomez alleges his referral rate declined, such data could still provide a baseline for measuring the effect of the alleged conduct. Documents relating to referral patterns, either of particular physicians or Memorial Hermann itself, are also relevant for the same reasons.

We note that the data on mortality and physician volume are associated with assigned numbers rather than the names of particular physicians in a number of the documents. However, although Memorial Hermann would be free to present evidence suggesting that the code effectively concealed the physicians' identities, the existing overlap between some of the coded and un-coded documents is sufficient to support a preliminary finding that the presentations' audiences as well as a judicial fact finder would be able **[**56]** to understand which physicians' rates and volumes appear in the documents.

Other documents are relevant because they discuss Memorial Hermann's plans to differentiate itself from other hospitals' cardiovascular surgery departments. This focus could make more or less probable the likelihood that Dr. Gomez's unique services were of sufficient importance to provide the impetus for the alleged improper conduct.

Another category of relevant documents consists of maps that identify the locations of doctors or hospitals in the surrounding geographic area, and maps demarcating the geographic areas from which Memorial Hermann draws its patients. Because they provide a basis for determining the feasibility of alternatives for patients in the area, these documents—in conjunction with expert testimony—could make a particular geographic market for Dr. Gomez's claims under the TFEAA more or less probable.

On the other hand, Exhibit B to E. Leticia Mireles' affidavit, which consists of an email to a number of persons, is not relevant to Dr. Gomez's allegations. The body of the email does not include any information that would make any of Dr. Gomez's allegations more or less probable. Although the email **[**57]** includes an attachment, nothing before us suggests that a record of the sending of this particular attachment to a number of persons would make Dr. Gomez's allegations more or less probable, because the attachment itself does not contain any data about Dr. Gomez or a relevant competitive market. This email, appearing on pages 365-68 of the sealed record, is therefore not relevant to an anticompetitive action, and retains its protection under the medical peer review committee privilege.

In addition, the documents appearing on pages 119, 122-23, 129-30, 135, 138, 140, 142, 145, 154-55, 160-61, 166-67, 174-75, 180-81, 188-89, 195-98, and 243 of the sealed record also retain their protection under the medical peer review committee privilege. These documents do not discuss any data on mortality rates, physician volume, or referral pattern. Nor do they discuss plans to disseminate such data, any staffing concerns of the hospital, or the competitive positions of the hospital or Dr. Gomez. These documents lack any apparent **[*716]** relevance to Dr. Gomez's claims, and we hold the trial court therefore abused its discretion in compelling Memorial Hermann to produce them.

However, the trial court did not **[**58]** abuse its discretion in making a preliminary finding that the other materials in the record are relvant to an anticompetitive action. We therefore turn to whether these documents enjoy any residual protection under the medical committee privilege.

III. When both are applicable, the anticompetitive exception to the medical peer review committee privilege limits the provision of confidentiality under the medical committee privilege.

This question is contingent on the extent to which overlapping provisions of two different statutes can concurrently operate.[144] *HN31*[] To the extent possible, we will construe the different provisions in a way that harmonizes rather than conflicts.[145] When the provisions are irreconcilable, the general rule is that the terms of the later-enacted statute should control.[146] However, conflicts between general and specific provisions favor the specific, and when the literal terms of the two provisions cannot both be true, the terms of the specific provision ordinarily will prevail.[147] We will construe the general provision as controlling only when the manifest intent is that the general provision will prevail and the general provision is also the later-enacted statute.[148]

HN32[] *Section 161.031 of the Health and Safety Code* broadly defines a "medical committee" to include "any committee, including a joint committee" of certain types of entities, including "a hospital" or "a medical organization."[149] Medical committees may be "appointed ad hoc to conduct a specific investigation or established . . . under the bylaws or rules of the organization or institution."[150]

HN33[] The records and proceedings of a medical committee are governed by *section 161.032 of the Health and Safety Code*. With the exception of "records maintained in the regular course of business by a hospital . . . [or] medical organization,"[151] medical committees and their members may use the committee's records and proceedings "only in the exercise of proper committee functions."[152] Subject to the same exception,[153] the "records and proceedings of a medical committee are confidential and are not subject to court subpoena."[154]

[*717] *HN34*[] *Section 161.032 of the Health and Safety Code* suggests that medical committees are at least potentially distinct from medical peer review committees.[155] However, the definitions of the two committees contain

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144 *See City of Waco v. Lopez, 259 S.W.3d 147, 153 (Tex. 2008)*.

145 *Tex. Gov't Code §§ 311.025*, *311.026(a)* **[**59]** ; *Tex. Indus. Energy Consumers v. CenterPoint Energy Hous. Elec., LLC, 324 S.W.3d 95, 107 (Tex. 2010)*.

146 *Tex. Gov't Code § 311.025(a)*; *Jackson v. State Office of Admin. Hearings, 351 S.W.3d 290, 297 (Tex. 2011)*.

147 *Tex. Gov't Code § 311.026(b)*; *TracFone Wireless, Inc. v. Comm'n on State Emergency Commc'ns, 397 S.W.3d 173, 181 (Tex. 2013)*.

148 *Tex. Gov't Code § 311.026(b)*; *Lopez, 259 S.W.3d at 153*.

149 *Tex. Health & Safety Code § 161.031(a)*. The other categories of entities include university medical schools and health science centers, health maintenance organizations licensed under *Chapter 843 of the Insurance Code*, extended care facilities, hospital districts, and hospital authorities. *Id.* *§ 161.031(a)(3)-(7)*.

150 *Id.* *§ 161.031(b)*.

151 *Id.* *§ 161.032(f)*.

152 *Id.* *§ 161.032(d)*.

153 *Id.* *§ 161.032(f)* **[**60]** .

154 *Id.* *§ 161.032(a)*.

155 *See id.* *§ 161.032(b)(1)* (proving that "a proceeding of a medical peer review committee . . . *or* medical committee" may be held in a closed meeting (emphasis added)); *id.* *§ 161.032(b)(2)* (providing for closed meetings of the governing board of certain hospitals or health maintenance organizations if at the meeting, "the governing body receives records, information, or reports provided by a medical committee [*or*] medical peer review committee"); *id.* *§ 161.032(c)* (providing that the "[r]ecords, information, or reports of a medical committee [*or*] medical peer review committee" as well as "records, information **[**61]** or

significant overlap. Provided that the other statutory requirements are met,[156] the definition of a medical peer review committee includes committees "of a health care entity, the governing board of a health care entity, or the medical staff of a health care entity."[157] But any "entity . . . that provides or pays for medical care or health services" and "follows a formal peer review process to further quality medical care or health care" will be considered a health care entity.[158]

As such, ***HN35***[] although the committees of some health care entities may not be medical committees,[159] every committee of every entity listed in the definition of a medical committee that "follows a formal peer review process to further quality medical care or health care"[160] will be considered a medical peer review committee—unless the committee does not "operate[] under written bylaws approved by the policy-making board or the governing board of the health care entity."[161] By extension, no medical committee that satisfies these two additional provisions necessary to be deemed a medical peer review committee can credibly **[**62]** claim that its records and proceedings are not governed by *section 160.007 of the Occupations Code*.[162]

[*718] Here, because Memorial Hermann stipulated that the relevant committees are medical peer review committees, the documents at issue cannot be considered confidential under *section 161.032(a) of the Health and Safety Code* without ignoring *section 160.007 of the Occupations Code*. Memorial Hermann's argument that a document should enjoy the combined protection of all applicable privileges relies on our previous references to *section 161.032 of the Health and Safety Code* and *section 160.007 of the Occupations Code* as "the medical committee privilege" and "the medical peer review committee privilege," respectively.[163] However, the statutes

reports provided by a medical committee [*or*] medical peer review committee . . . to the governing board of a public hospital, hospital district, or hospital authority" are exempt from the disclosure provisions of Chapter 552 of the Government Code).

[156] In order to be considered a medical peer review committee, the committee must (1) "operate[] under written bylaws approved by the policy-making board or the governing board of the health care entity" and (2) be "authorized to evaluate the quality of medical and health care services or the competence of physicians." *Tex. Occ. Code § 151.002(a)(8)*.

[157] *Id.*

[158] *Id. § 151.002(a)(5)*.

[159] By way of example, "a health care collaborative certified under Chapter 848, Insurance Code" is specifically designated as a health care entity, *Tex. Occ. Code § 151.002(a)(5)(E)*, but such entities would not fall neatly within any of the entity categories listed in the definition of a medical committee. *Compare id. with Tex. Health & Safety Code § 161.031(a)(1)-(7)*. *But see Brooks, 927 S.W.2d at 20* ("[T]he statutory definition of "medical committee" is broad . . . That definition encompasses a medical peer review committee. . . .").

[160] *Tex. Occ. Code § 151.002(a)(5)(B)(ii)*.

[161] *Id. § 151.002(a)(8)*. In other words, any medical committee that both "operates under written bylaws" approved by either its policy-making or governing board, and follows a formal peer review process will also be considered a medical peer review committee. *Id.*

[162] There is only one potential exception to this rule, and that exception applies to the records and proceedings of governing bodies of "public hospital[s] owned or operated by a governmental entity, . . . hospital authorit[ies] created under Chapter 262 or 264, Health and Safety Code, . . . [or] hospital district[s] created under Article IX, Texas Constitution." *Tex. Occ. Code § 151.002(a)(8)(B)*. These governing bodies are considered to be medical peer review committees only in relation to their **[**63]** evaluation of the quality of the medical and health care services they provide or a physician's competence—and only "to the extent that the evaluation . . . involves discussions or records that specifically or necessarily identify an individual patient or physician." *Id. § 151.002(a)(8)(B)(i)—(ii)*. Thus, none of the governing bodies' records or proceedings that does not "specifically or necessarily identify an individual patient or physician," *id. § 151.002(a)(8)(B)(ii)*, would be subject to *section 160.007 of the Occupations Code*, although they would still enjoy the protections of *section 161.032 of the Health and Safety Code*.

[163] *See, e.g., In re Living Ctrs. of Tex., Inc., 175 S.W.3d at 256*.

themselves confer confidentiality on records and proceedings—not the committee itself.[164] Because the records and proceedings here are subject to both sections, both sections' provisions regarding confidentiality apply. That the records **[**64]** and proceedings of some medical peer review committees may not be considered records and proceedings of a medical committee—or the reverse—has no bearing on the question before us, because such documents would never be subject to both sections.

Because the documents are subject to both sections, any reconcilable provisions will apply in concert.[165] For example, a medical committee that is also a medical peer review committee could not use its records or proceedings in the exercise of improper committee functions simply because *section 160.007* does not explicitly forbid it.[166] By the same token, a dual medical committee and medical peer review committee could not rely on the provision of confidentiality in *section 161.032(a)* to shirk its duty under *section 160.007(d)* to provide a physician with a written copy of its recommendation to suspend **[**65]** the physician's privileges.[167]

However, ***HN37***[] a record or proceeding is either confidential or not; it cannot be both. As we have already discussed at length, the majority of the documents that Dr. Gomez seeks are relevant to an anticompetitive action. Because Memorial Hermann has stipulated that those documents are the records and proceedings of a medical peer review committee, *section 160.007(b)* provides that those documents are "not confidential to the extent [they are] considered relevant."[168] It is impossible to reconcile that provision with a provision stating that the same documents "are confidential and are not subject to court **[*719]** subpoena."[169] *Section 160.007* is both the later enacted statute as well as the more specific regarding when records and proceedings are confidential.[170] We therefore hold that ***HN38***[] the records and proceedings of a dual medical committee and medical peer review committee do not enjoy any greater confidentiality under *section 161.032(a)* than they do under *section 160.007(b)*.

CONCLUSION

We hold that the trial court abused its discretion in ordering Memorial Hermann to produce pages 119, 122-23, 129-30, 135, 138, 140, 142, 145, 154-55, **[**66]** 160-61, 166-67, 174-75, 180-81, 188-89, 195-98, 243, and 365-68 of the sealed record. We conditionally grant Memorial Hermann's writ of mandamus, directing the trial court to modify its discovery order insofar as the order compelled production of those documents. We are confident the trial court will comply, and the writ will issue only if it does not. In all other respects, Memorial Hermann's petition for writ of mandamus is denied.

Don R. Willett

Justice

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[164] *See* ***HN36***[] *Tex. Health & Safety Code § 161.032(a)* ("*The records and proceedings* of a medical committee are confidential and are not subject to court subpoena." (emphasis added)); *Tex. Occ. Code § 160.007(a)* ("Except as otherwise provided by this subtitle, *each proceeding or record* of a medical peer review committee is confidential, and any communication made to a medical peer review committee is privileged." (emphasis added)).

[165] *See* *Lopez, 259 S.W.3d at 153*.

[166] *See* *Tex. Health & Safety Code § 161.032(d)*.

[167] *See* *Tex. Occ. Code § 160.007(d)*.

[168] *Id.* *§ 160.007(b)*.

[169] *Tex. Health & Safety Code § 161.032(a)*.

[170] *See* *Tex. Gov't Code §§ 311.025(a)*; *311.026(b)*.

OPINION DELIVERED: May 22, 2015

Mian v. General Manager, Baltimore-Washington Manheim Auction

United States District Court for the District of Maryland

May 22, 2015, Decided; May 22, 2015, Filed

Civil Action No. TDC-14-2534

Reporter

2015 U.S. Dist. LEXIS 67054 *; 2015 WL 3369366

MOHAMMAD A. MIAN, Plaintiff, v. GENERAL MANAGER, BALTIMORE-WASHINGTON MANHEIM AUCTION, Defendant.

Subsequent History: Affirmed by *Mian v. Gen. Manager, Baltimore-Washington Manheim Auction, 2016 U.S. App. LEXIS 6688 (4th Cir. Md., Apr. 13, 2016)*

Core Terms

purchaser, commodity, alleges, motion to dismiss, dealers, motion to strike, consumer, unfair, resale, deceptive, practices, wholesale, discriminatory, bought, auction, retail, terms, dismissal with prejudice, cause of action, misleading, pleadings, stockyard, deceived, supplier

Counsel: **[*1]** Mohammad A. Mian, Plaintiff, Pro se, Silver Spring, MD.

For Baltimore-Washington Manheim Auction, Defendant: Gerin Brendan Ballard, LEAD ATTORNEY, Sutherland Asbill and Brennan LLP, Washington, DC; Jason S McCarter, PRO HAC VICE, Sutherland Asbill and Brennan LLP, Atlanta, GA.

Judges: THEODORE D. CHUANG, United States District Judge.

Opinion by: THEODORE D. CHUANG

Opinion

MEMORANDUM OPINION

This matter is before the Court on a Motion to Dismiss, ECF No. 9, tiled by Defendant Manheim Remarketing. Inc. d/b/a/ Manheim Baltimore-Washington ("Manheim").[1] The issue before the Court is whether the Complaint filed by Plaintiff Mohammad A. Mian ("Mian") sufficiently states a cause of action upon which relief may be granted. The Court has reviewed the Complaint and briefs and has determined that no hearing is warranted. *See* Local Rule 105.6 (D. Md. 2014). For the following reasons, the Motion is GRANTED.

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[1] The Complaint names "General Manager, Baltimore-Washington Manheim Auction" as the defendant. Manheim Baltimore-Washington is owned by Manheim Remarketing, Inc., which reserves its rights with respect to deficiencies both in the pleadings and in service of process, but has filed the present Motion to Dismiss and consented to a ruling on the **[*2]** merits of the sufficiency of the Complaint as pleaded.

BACKGROUND

The instant *pro se* civil action was filed on August 11, 2014 by Mian, the former owner and operator of Mid-Atlantic Automotive Supply Company ("Mid-Atlantic"), a wholesale used car dealership in Silver Spring, Maryland. While Mian was the owner of Mid-Atlantic, he sold his cars at Manheim's weekly car auction in Baltimore. Mian alleges that for "[y]ears before," Manheim ran its auctions on a "first come first serve system," meaning that as soon as a car entered Manheim's main gates, it was entered into the computer system and placed automatically in the row and run number generated by the computer, but that at some point, Manheim began to assign the row and run numbers manually. Compl. ¶ 5, ECF No. 1. Mian alleges that this new system was unfair and discriminatory, because, as was common knowledge to the dealers, those cars with the earliest assignments tended to sell quickly and for competitive prices, while those cars with later assignments did not. Mian alleges that he filed complaints with Manheim's General Manager on August 8, 2012 and January 18, 2013, but that he eventually lost his business in February 2013.

Mian also **[*3]** alleges that, in response to his complaints. Manheim explained that "placement of cars in the auction lanes on quantity basis was their privilege," and that they had put his cars at the end of the auction because of his relatively small inventory. *Id.* ¶ 11. Mian alleges that these practices are in violation of federal and state laws against unfair or deceptive trade practices. Specifically, the Complaint states: The applicable law here is *7 U.S. Code Section 213* which provides Prevention of unfair, discriminatory, or deceptive practice.'" *Id.* ¶ 13. It also references the Maryland Consumer Protection Act ("MCPA"), *Md. Code Ann., Com. Law §§ 13-301-501* (West 2014), and the Maryland Antitrust Act ("MAA"), *Md. Code Ann., Com. Law §§ 11-201-213*.

On October 2, 2014, Manheim filed its Motion to Dismiss Pursuant to *Rules 12(b)(6)* and *12(b)(5)*. In response, on October 22, 2014, Mian filed a "Motion to Strike Defendant's Motion with his Memorandum of Law" (hereinafter "Opp. Mot. Dismiss"), in which he both requested that the Court strike Manheim's Motion to Dismiss and made substantive arguments refuting Manheim's contention that the Complaint failed to state a claim. The Court treats Mian's filing as both a Motion to Strike and a Memorandum in Opposition to the Motion to Dismiss. Both **[*4]** the Motion to Dismiss and the Motion to Strike have been fully briefed and are ripe for adjudication.

DISCUSSION

I. Plaintiff's Motion to Strike

The Court first addresses Mian's Motion to Strike the Motion to Dismiss. Under *Federal Rule of Civil Procedure 12(f)*, the court "may strike from a pleading any redundant, immaterial, impertinent, or scandalous matter." *Fed. R. Civ. P. 12(f)*. In this case, the Motion to Dismiss is neither a pleading, *see* *Thomas v, Bet Sound-Stage Rest./Brett Co, Inc., 61 F. Supp. 2d. 448, 458 (D. Md. 1999)* ("As motions to dismiss are not pleadings. Plaintiff's motions to strike are inappropriate."), nor is it redundant, immaterial, impertinent, or scandalous in its content. Mian argues that the Court should strike the Motion because Manheim did not answer the Complaint, as required by *Federal Rule of Civil Procedure 8(b)(1)(B)*, and "instead, adopted an irregular way in the answer to mislead the Court with redundant and impertinent material." Opp. Mot. Dismiss at 2. Mian is correct that Manheim's Motion to Dismiss is not an answer under Rule 8(b)(1)(B), However, under *Federal Rule of Civil Procedure 12(b)*, a defendant is permitted, before filing its answer, to assert various defenses by motion, including a motion to dismiss for failure to state a claim upon which relief can be granted, *Fed. R. Civ. P. 12(b)(6)*. Manheim's Motion to Dismiss is properly filed, and its content is not redundant, immaterial, impertinent, **[*5]** or scandalous. *See* *Schultz v. Braga, 290 F. Supp. 2d 637, 654-55 (D. Md. 2003)* (explaining that motions to strike "should be denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties") (citation and internal quotation marks omitted)). Thus, Mian's Motion to Strike is denied.

II. Defendant's Motion to Dismiss

In its Motion to Dismiss, Manheim argues that the Complaint should be dismissed under both *Federal Rule of Civil Procedure 12(b)(6)* for failure to state a claim and under *Rule 12(b)(5)* for insufficient service of process. Although Mian does not number his causes of action, the Complaint invokes three statutes: *7 U.S.C. § 213*, the MCPA, and the MAA. The Court addresses each in turn and concludes that Mian does not state a cause of action under any of the three. Because the Court dismisses the Complaint with prejudice for failure to state a claim, the Court does not reach the question whether service was insufficient in this case.

A. Legal Standard

In order to defeat a *Federal Rule of Civil Procedure 12(b)(6)* motion, a complaint must allege enough facts to state a plausible claim for relief. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868)*; *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A claim is plausible when "the plaintiff pleads *factual content* that allows the Court to draw the reasonable inference that the defendant is liable for **[*6]** the misconduct alleged." *Iqbal, 556 U.S. at 678* (emphasis added). In assessing whether this standard has been met, the Court must examine the complaint as a whole, consider the factual allegations in the complaint as true. and construe the factual allegations in the light most favorable to the plaintiff. *Albright v. Oliver, 510 U.S. 266, 268, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994)*: *Lambeth v. Bd. of Comm'rs of Davidson Cnty., 407 F.3d 266, 268 (4th Cir. 2005)*. However, legal conclusions or conclusory statements do not suffice and are not entitled to the assumption of truth. *Iqbal, 556 U.S. at 678*. Notably, "a document filed *pro se* is to be liberally construed, and a *pro se* complaint, however manfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)* (citations omitted).

B. *7 U.S.C. § 213*

In the Complaint. Mian pleads that 'Vile applicable law here is *7 U.S. Code Section 213* which provides 'Prevention of unfair, discriminatory, or deceptive practice." Compl. ¶ 13. However. *7 U.S.C. § 213* is a subsection of the Packers and Stockyards Act of 1921. *7 U.S.C. §§ 181-231 (2012)*. and applies only to persons engaged in the business of conducting or operating a livestock stockyard. The text of *§ 213* states:

> It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection **[*7]** with determining whether persons should be authorized to operate at the stockyards, or with the receiving., marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling of livestock.

7 U.S.C. § 213. The definition a stockyard under the statute is any place, establishment, or facility" that is "conducted, operated, or managed" as a "public market for livestock producers, feeders, market agencies. and buyers, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce." *Id.* *§ 202*. Because, as the Complaint alleges, Manheim is engaged in the sale of cars, not livestock, any claim under *7 U.S.C. § 213* is dismissed with prejudice.

C. The Maryland Consumer Protection Act

Mian also alleges that Manheim violated the MCPA. Specifically, the Complaint cites § 13-301(1) of the MCPA, a provision of the statute that defines "unfair or deceptive trade practices." However, any attempt by Mian to state a cause of action under the MCPA is unsuccessful for several reasons.

First, the MCPA specifically prohibits those practices that deceive or mislead "consumers." **[*8]** The MCPA defines a consumer as an actual or prospective purchaser, lessee, or recipient of consumer goods, consumer services, consumer realty, or consumer credit." *Md. Code Ann., Com. Law § 13-101(d)(1)*. It further defines "consumer" goods, services, realty, and credit, as those that "are primarily for personal, household, family, or agricultural purposes." *Id. § 13-101(d)(1)*. In this case, the Complaint alleges that Mian was a "wholesale used car dealer" doing business with Manheim to sell his cars through Manheim's auction services. Compl. at 1-2. Thus, Mian does not, and cannot allege that the services were for personal, household, family or agricultural purposes. Because Mian is not a "consumer' under the MCPA. his claim will be dismissed with prejudice.

Furthermore, even if Mian were a "consumer" under the statute, his claim would be dismissed because he fails sufficiently to state a claim. In order to state a claim under the MCPA, a plaintiff must adequately plead that (1) the defendant engaged in an unfair or deceptive practice or misrepresentation, (2) the plaintiff relied upon the representation, and (3) doing so caused the plaintiff actual injury. *Currie v. Wells Fargo Bank, 950 F. Supp. 2d 788, 796 (D. Md. 2013)* (citation omitted). The MCPA defines an "unfair or deceptive trade practice" **[*9]** as a "false, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers." *Md. Code Ann., Com. Law § 13-301(1)*. Because an MCPA claim involves fraud, it is subject to the heightened pleading standards of *Federal Rule of Civil Procedure 9(b)*. *Spaulding v. Wells Fargo Bank. N.A., 714 F.3d 769, 781 (4th Cir. 2013)*. Under *Rule 9(b)*, a plaintiff must plead with particularity the circumstances of the fraud, including "the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 783-84 (4th Cir. 1999)* (citations omitted).

In this case, Mian takes issue with Manheim's practice of assigning earlier lane placements on its lot to those sellers with higher-volume inventories, but he does not allege that Manheim ever made any false representations regarding its practices, or that Manheim otherwise misled or deceived Mian in any way. Instead, Mian believes that Manheim's assignment practice was unfair to those smaller dealers with fewer units, like himself, and that it should therefore fall within the ambit of the MCPA's prohibition against unfair or deceptive trade practices. As explained above, however, to state an MCPA claim, a plaintiff **[*10]** must allege there was a false or misleading representation or some kind. which had the effect of *deceiving* the plaintiff. Mian's allegations establish that, while he disagreed with Manheim's policies as a matter of principle, he was never deceived by any representations Manheim made, and that, to the contrary, he was fully aware of their practices. Such allegations are insufficient to state a claim under the MCPA. Mian's claim is therefore dismissed.

D. The Maryland Antitrust Act

Finally. Mian alleges that Manheim's practices violate the MAA. The Complaint does not cite to a specific provision or the MAA, but in his Opposition, Mian argues that Manheim was in violation of *Md. Code Ann.. Com. Law §§ 11-204(a)(3)*. 11-204(a)(4). and 11-204(a)(5). Mian fails to state a claim under any of these provisions.

Subsections 11-204(a)(3) and 11-204(a)(4) do not apply in this case because they deal with prohibited price discrimination. Subsection 11-204(a)(3) would prohibit Manheim from directly or indirectly discriminating in price among its dealers, if the effects of the discrimination may substantially lessen competition, tend to create a monopoly, or injure, destroy, or prevent competition. *Md. Code Ann., Com. Law § 11-204(a)(3)(i)—(iii)*. Subsection 11-204(a)(4) **[*11]** would prohibit Manheim from making payments or any other compensation to a dealer, unless the payment "is available on proportionally equal terms to all other 'dealers] competing in the distribution of the service or commodity." *Id. § 11-204(a)(4)*. Here, Mian does not allege anywhere in the Complaint that Manheim charged him a discriminatory price, or that Manheim made any payments to dealers on an unequal basis. Because there are no factual allegations in the Complaint from which it can be inferred that Manheim was engaged in price discrimination, any claim under *§ 11-204(a)(3)* or *§ 11-204(a)(4)* is dismissed.

As for *§ 11-204(a)(5)*, that subsection provides that a person may not:

> Discriminate in favor of one purchaser against another purchaser of a commodity bought for resale by contracting to furnish, furnishing, or contributing to the furnishing of any service or facility connected with the processing, handling, sale, or offering for sale of the commodity on terms not accorded to all purchasers on proportionally equal terms.

Id. § 11-204(a)(5).

Mian cannot allege a plausible claim under this provision because it bars discrimination relating to the provision of services or facilities in favor of one purchaser against another purchaser of a commodity bought **[*12]** for resale." *Id.*, "Commodity" is defined as "goods, wares, merchandise, machinery, supplies, or any other articles in trade or commerce." *Id.* § 11-201(c). This provision is designed to address the situation where a wholesaler or retailer purchases goods from a supplier to then be resold to wholesale or retail customers, but is subjected to discrimination by the supplier in the provision of advertising, promotional. or merchandising services or facilities. See *Hinkleman v. Shell Oil Co., 962 F.2d 372. 380 (4th Cir. 1992)*; *Ludwig v. Am. Greetings Corp., 264 F.2d 286, 288-89 (6th Cir. 1959)* (finding, a violation of *§ 2(e)* of the Robinson-Patman Act. a parallel provision of federal ***antitrust law***, where a greeting card payment "is available on proportionally equal terms to all other [dealers] competing in the distribution of the service or commodity." *Id.* *§ 11-204(a)(4)*. Here, Mian does not allege anywhere in the Complaint that Manheim charged him a discriminatory price, or that Manheim made any payments to dealers on an unequal basis. Because there are no factual allegations in the Complaint from which it can be inferred that Manheim was engaged in price discrimination, any claim under *§ 11-204(a)(3)* or *§ 11-204(a)(4)* is dismissed.

As for *§ 11-204(a)(5)*, that subsection provides that a person may not:

> Discriminate in favor of one purchaser against another purchaser of a commodity bought **[*13]** for resale . . . by contracting to furnish, furnishing, or contributing to the furnishing of any service or facility connected with the processing, handling, sale, or offering for sale of the commodity on terms not accorded to all purchasers on proportionally equal terms.

Id. *§ 11-204(a)(5)*.

Mian cannot allege a plausible claim under this provision because it bars discrimination relating to the provision of services or facilities "in favor of one purchaser against another purchaser of a commodity bought for resale." *Id.* "Commodity" is defined as "goods, wares, merchandise, machinery, supplies, or any other articles in trade or commerce." *Id.* § 11-201(c). This provision is designed to address the situation where a wholesaler or retailer purchases goods from a supplier to then be resold to wholesale or retail customers, but is subjected to discrimination by the supplier in the provision of advertising, promotional, or merchandising services or facilities. *See* *Hinkleman v. Shell Oil Co., 962 F.2d 372, 380 (4th Cir. 1992)*; *Ludwig v. Am. Greetings Corp., 264 F.2d 286, 288-89 (6th Cir. 1959)* (finding a violation of *§ 2(e)* of the Robinson-Patman Act, a parallel provision of federal ***antitrust law***, where a greeting card supplier unfairly provided free greeting card displays to certain retailers as an improper inducement to disadvantage a wholesaler). **[*14]** [2]

Although a used car would qualify as a "commodity," Mid-Atlantic and the other dealers doing business with Manheim were not purchasing cars from Manheim for resale, nor was Manheim purchasing cars from the dealers. Rather, as Mian alleges, Manheim is engaged in the business of providing a service to car dealers such as Mid-Atlantic, in that it "provides auction services to wholesale and retail dealers registered with them . . . charging commission on sold cars and no-sale charges on unsold cars." Compl. ¶ 3. Significantly, although the language of *§ 11-204(a)(3)* prohibits price discrimination "among purchasers of commodities or services," and *§ 11-204(a)(4)* prohibits discriminatory payments made in connection with the sale of "any service or commodity," the language of *§ 11-204(a)(5)* prohibits discrimination against a purchaser of a "commodity bought for resale" only, and notably

[2] In analyzing state claims under *§ 11-204(a)(5)*, the United States Court of Appeals for the Fourth Circuit has looked to cases construing § 2(e) of the Robinson-Patman Act, codified as *15 U.S.C. § 13(e)*, because the statutory language in the two provisions is nearly identical. *See* *Hinkleman, 962 F.2d at 379*.

does not cover purchasers of services. *Md. Code Ann., Com. Law § 11-204(a)(3)-(5)*. Because neither Mian nor Mid-Atlantic was a "purchaser of a commodity." **[*15]** much less a "purchaser of a commodity bought for resale," in the context of their interactions with Manheim, there can be no cause of action under *§ 11-204(a)(5)*. *See Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 546-47 (9th Cir. 1983)* (dismissing a claim under *§ 2(e)* of the Robinson-Patman Act because the plaintiff's allegation that it had been subject to discrimination in relation to photofinishing equipment it had purchased for use in its operations, rather than for resale to customers, failed sufficiently to assert that it was a "purchaser of a commodity bought for resale" as required to state a claim). Because Mian has not and cannot state a plausible claim under *§ 11-204(a)(5)* or any of the other cited provisions of the MAA, his MAA claim is dismissed with prejudice,

CONCLUSION

For the foregoing reasons, the Motion to Strike the Motion to Dismiss is DENIED, and the Motion to Dismiss is GRANTED. The Complaint shall be dismissed with prejudice. A separate Order follows.

Date: May 22, 2015

/s/ Theodore D. Chuang

THEODORE D. CHUANG

United States District Judge

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is hereby ORDERED that:

1. The Motion to Strike the Motion to Dismiss, ECF No. 13, filed by Plaintiff Mohammad A. Mian is DENIED;

2. The Motion to Dismiss, ECF No. **[*16]** 9, filed by Defendant Manheim Remarketing, Inc., d/b/a Manheim Baltimore-Washington, is GRANTED; and
3. The Complaint is DISMISSED with prejudice.

Date: May 22, 2015

/s/ THEODORE D. CHUANG

United States District Judge

End of Document

New York v. Actavis PLC

United States Court of Appeals for the Second Circuit

April 13, 2015, Argued; May 22, 2015,[1] Decided

No. 14-4624

Reporter

787 F.3d 638 *; 2015 U.S. App. LEXIS 8809 **; 2015-1 Trade Cas. (CCH) P79,178

PEOPLE OF THE STATE OF NEW YORK, by and through ERIC T. SCHNEIDERMAN, Attorney General of the State of New York, Plaintiff-Appellee, v. ACTAVIS PLC, FOREST LABORATORIES, LLC, Defendants-Appellants.

Subsequent History: US Supreme Court certiorari dismissed by *Allergan PLC v. New York, 136 S. Ct. 581, 193 L. Ed. 2d 421, 2015 U.S. LEXIS 7671 (U.S., 2015)*

Prior History: **[**1]** Appeal from the United States District Court for the Southern District of New York. No. 14 Civ. 7473 Robert W. Sweet, Judge.

The State of New York brought this antitrust action against Defendant-Appellant Actavis plc and its wholly-owned subsidiary Forest Laboratories, LLC (collectively, "Defendants"). New York alleges that as Namenda IR, Defendants' twice-daily drug designed to treat moderate-to-severe Alzheimer's disease, neared the end of its patent exclusivity period in July 2015, Defendants introduced a new once-daily version called Namenda XR. The patents on XR ensure exclusivity, and thus prohibit generic versions of XR from entering the market, until 2029. Faced with the prospect of competition from generic IR, Defendants decided to withdraw virtually all Namenda IR from the market in order to force Alzheimer's patients who depend on Namenda IR to switch to XR before generic IR becomes available. Because generic competition depends heavily on state drug substitution laws that allow pharmacists to substitute generic IR for Namenda IR—but not for XR, New York alleges that Defendants' forced-switch scheme would likely impede generic competition for IR. Moreover, the substantial transaction **[**2]** costs of switching from once-daily XR back to twice-daily IR therapy would likely further ensure that Defendants would maintain their effective monopoly in the relevant drug market beyond the time granted by their IR patents.

The United States District Court for the Southern District of New York (Robert W. Sweet, Judge) issued a preliminary injunction barring Defendants from restricting access to Namenda IR prior to generic IR entry. We conclude that the district court did not abuse its discretion by granting New York's motion for a preliminary injunction because New York has demonstrated a substantial likelihood of success on the merits of its claim under the Sherman Act, *15 U.S.C. § 2*, and has made a strong showing of irreparable harm to competition and consumers in the absence of a preliminary injunction. Accordingly, we affirm the district court's order issuing a preliminary injunction.

New York v. Actavis PLC, 2015 U.S. App. LEXIS 8569 (2d Cir., May 22, 2015)
New York v. Actavis, PLC, 2014 U.S. Dist. LEXIS 149327 (S.D.N.Y., Oct. 21, 2014)
New York v. Actavis, PLC, 2014 U.S. Dist. LEXIS 172918 (S.D.N.Y., Dec. 11, 2014)

Core Terms

[1] This opinion was filed under seal on May 22, 2015, and the parties were permitted to request redactions of confidential information. This published version of the opinion indicates the redactions allowed by the court.

generic, patients, switch, Defendants', patent, substitution, district court, antitrust, injunction, anticompetitive, brand, withdrawing, manufacturer, preliminary injunction, consumers, monopolization, pharmacists, drugs, merits, memantine, monopoly, Sherman Act, procompetitive, therapeutically, therapy, irreparable harm, anti trust law, impede, pharmaceutical, innovation

LexisNexis® Headnotes

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

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

In compliance with the Federal Food, Drug, and Cosmetic Act, *21 U.S.C.S. § 301 et seq.*, when a pharmaceutical manufacturer seeks to bring a new drug to market, it must submit a New Drug Application (NDA) for approval by the U.S. Food and Drug Administration. *21 U.S.C.S. § 355*. An NDA must contain scientific evidence that demonstrates the drug is safe and effective, which inevitably requires a long, comprehensive, and costly testing process. NDA-approved drugs are generally referred to as brand-name or brand drugs. An approved brand drug enjoys a period of patent exclusivity in the market at the end of which one or more generic drugs, exhibiting the same characteristics as the brand drug, may enter the market at a lower price to compete with the brand drug.

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

HN2[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

The Drug Price Competition and Patent Term Restoration Act, Pub. L. No. 98-417, 98 Stat. 1585, promotes competition from generic substitute drugs. It permits a manufacturer that seeks to market a generic version of an approved New Drug Application (NDA) drug to file what is known as an Abbreviated New Drug Application (ANDA). *21 U.S.C.S. § 355(j)*. An ANDA allows a generic manufacturer to rely on the studies submitted in connection with the already-approved brand drug's NDA to show that the generic is safe and effective, provided that the ANDA certifies that the generic drug has the same active ingredients as and is biologically equivalent or bioequivalent to the already-approved drug. *§ 355(j)(2)(A)(iv)*. A generic drug is bioequivalent to a brand drug if the rate and extent of absorption of the active ingredient is the same as that of the brand drug. *§ 355(j)(8)(B)(i)*. In other words, two drugs are bioequivalent if they deliver the same amount of the same active ingredient content into a patient's blood stream over the same amount of time.

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

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

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

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

An appellate court reviews a district court's grant of a preliminary injunction for abuse of discretion. A district court has abused its discretion if it based its ruling on an error of law or a clearly erroneous assessment of the evidence, or if its decision cannot be located within the range of permissible decisions. The appellate court reviews legal conclusions, such as the appropriate standard for relief, de novo.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN4[] **Remedies, Injunctions**

Section 16 of the Clayton Act entitles a party to obtain injunctive relief against threatened loss or damage by a violation of the antitrust laws. A party seeking a preliminary injunction must ordinarily establish: (1) irreparable harm; (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party; and (3) that a preliminary injunction is in the public interest. A court holds the movant to a heightened standard where: (i) an injunction is mandatory; or (ii) the injunction will provide the movant with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits. When either condition is met, the movant must show a clear or substantial likelihood of success on the merits, and make a strong showing of irreparable harm, in addition to showing that the preliminary injunction is in the public interest.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

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

HN5[] **Attempts to Monopolize, Elements**

Section 2 of the Sherman Act makes it an offense to monopolize, or attempt to monopolize, any part of the trade or commerce among the several states. *15 U.S.C.S. § 2*. To establish monopolization in violation of *§ 2*, a plaintiff must prove not only that the defendant possessed monopoly power in the relevant market, but that it willfully acquired or maintained that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct. In order to show attempted monopolization, the plaintiff must prove: (1) that the defendant has engaged in predatory or anticompetitive conduct; (2) with a specific intent to monopolize; and (3) a dangerous probability of achieving monopoly power. Attempted monopolization, unlike monopolization, requires a finding of specific intent.

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

HN6[] **Actual Monopolization, Claims**

Once a plaintiff establishes that a monopolist's conduct is anticompetitive or exclusionary, the monopolist may proffer non-pretextual pro-competitive justifications for its conduct. The plaintiff may then either rebut those justifications or demonstrate that the anticompetitive harm outweighs the pro-competitive benefit.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN7[] **Actual Monopolization, Anticompetitive & Predatory Practices**

As a general rule, courts are properly very skeptical about claims that competition has been harmed by a dominant firm's product design changes. Product innovation generally benefits consumers and inflicts harm on competitors, so courts look for evidence of exclusionary or anticompetitive effects in order to distinguish between conduct that defeats a competitor because of efficiency and consumer satisfaction and conduct that impedes competition through means other than competition on the merits. Product redesign is anticompetitive when it coerces consumers and impedes competition.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN8[] **Actual Monopolization, Anticompetitive & Predatory Practices**

When a monopolist combines product withdrawal with some other conduct, the overall effect of which is to coerce consumers rather than persuade them on the merits, and to impede competition, its actions are anticompetitive under the Sherman Act.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

Patent Law > General Overview

HN9[] **Misuse of Rights, Patent Misuse Defense**

A patent does not confer upon the patent holder an absolute and unfettered right to use its intellectual property as it wishes, and intellectual property rights do not confer a privilege to violate the antitrust laws.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

HN10[] **Remedies, Injunctions**

Irreparable harm is injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages. To obtain injunctive relief under § 16 of the Clayton Act, that injury must be an injury of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.

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ANISHA S. DASGUPTA, (Barbara D. Underwood, Andrew Kent, Eric J. Stock, Elinor R. Hoffmann, on the brief), for Eric T. Schneiderman, Attorney General of the State of New York, New York, N.Y., for Plaintiff-Appellee.

Judges: Before: WALKER, RAGGI, and DRONEY, Circuit Judges.

Opinion by: JOHN M. WALKER, JR.

Opinion

[*642] JOHN M. WALKER, JR., *Circuit Judge*:

The State of New York brought this antitrust action against Defendant-Appellant Actavis plc and its wholly-owned subsidiary Forest Laboratories, LLC (collectively, "Defendants"). New York alleges that as Namenda IR, Defendants' twice-daily drug designed to treat moderate-to-severe Alzheimer's disease, neared the end of its patent exclusivity period in July 2015, Defendants introduced a new once-daily version called Namenda XR. The patents on XR ensure exclusivity, and thus prohibit generic versions of XR from entering the market, until 2029. Faced with the prospect of competition from generic IR, Defendants decided to withdraw virtually all Namenda IR from the market in order to force Alzheimer's patients who depend on Namenda IR to switch to XR before generic IR becomes available. Because **[**4]** generic competition depends heavily **[*643]** on state drug substitution laws that allow pharmacists to substitute generic IR for Namenda IR—but not for XR, New York alleges that Defendants' forced-switch scheme would likely impede generic competition for IR. Moreover, the substantial transaction costs of switching from once-daily XR back to twice-daily IR therapy would likely further ensure that Defendants would maintain their effective monopoly in the relevant drug market beyond the time granted by their IR patents.

The United States District Court for the Southern District of New York (Robert W. Sweet, *Judge*) issued a preliminary injunction barring Defendants from restricting access to Namenda IR prior to generic IR entry. We conclude that the district court did not abuse its discretion by granting New York's motion for a preliminary injunction because New York has demonstrated a substantial likelihood of success on the merits of its claim under the Sherman Act, *15 U.S.C. § 2*, and has made a strong showing of irreparable harm to competition and consumers in the absence of a preliminary injunction. Accordingly, we affirm the district court's order issuing a preliminary injunction.

BACKGROUND

This case raises **[**5]** a novel question of ***antitrust law***: under what circumstances does conduct by a monopolist to perpetuate patent exclusivity through successive products, commonly known as "product hopping,"[2] violate the Sherman Act, *15 U.S.C. §§ 1* and *2*. This question is an issue of first impression in the circuit courts. Determining whether Defendants' actions are unlawfully anticompetitive requires some understanding of the idiosyncratic market characteristics of the complex and highly-regulated pharmaceutical industry, as well as some peculiar characteristics of treatment for Alzheimer's disease. We begin by describing several key features of the pharmaceutical industry.

I. FDA Requirements, the Hatch-Waxman Act, and State Drug Substitution Laws

HN1[] In compliance with the Federal Food, Drug, and Cosmetic Act, *21 U.S.C. §§ 301-399f*, when a pharmaceutical manufacturer seeks to bring a new drug to market, it must submit a New Drug Application ("NDA") for approval by the U.S. Food and **[**6]** Drug Administration ("FDA"). *21 U.S.C. § 355*. An NDA must contain scientific evidence that demonstrates the drug is safe and effective, which inevitably requires "a long, comprehensive, and costly testing process." *F.T.C. v. Actavis, Inc., 133 S. Ct. 2223, 2228, 186 L. Ed. 2d 343 (2013)*. NDA-approved drugs are generally referred to as brand-name or brand drugs. An approved brand drug

[2] The term "product hopping" was coined by Herbert Hovenkamp. *See* Alan Devlin, *Exclusionary Strategies in the Hatch-Waxman Context*, *2007 Mich. St. L. Rev. 631, 658 (2007)* (citing Herbert Hovenkamp et al., *IP and Antitrust: An Analysis of Antitrust Principals Applied to Intellectual Property Law* (2002)).

enjoys a period of patent exclusivity in the market at the end of which one or more generic drugs,[3] exhibiting the same characteristics as the brand drug, may enter the market at a lower price to compete with the brand drug.

In 1984, Congress amended the Federal Food, Drug, and Cosmetic Act by enacting the Drug Price Competition and Patent Term Restoration Act (the "Hatch-Waxman Act" or "Hatch-Waxman"), Pub. L. **[*644]** No. 98-417, 98 Stat. 1585. Hatch-Waxman was designed to serve the dual purposes of both encouraging generic drug competition in order to lower drug prices and incentivizing brand drug manufacturers to innovate through patent extensions. To incentivize **[**7]** innovation, Hatch-Waxman grants brand manufacturers opportunities to extend their exclusivity period beyond the standard 20-year patent term: it allows a brand manufacturer to seek a patent extension of up to five years to compensate for time that lapsed during the FDA regulatory process, *35 U.S.C. § 156*, and an additional six-month period of "pediatric exclusivity" if the manufacturer conducts certain pediatric studies, *21 U.S.C. § 355a*. Defendants applied for, and received, both extensions for Namenda IR.

HN2[] Hatch-Waxman also promotes competition from generic substitute drugs. It permits a manufacturer that seeks to market a generic version of an NDA-approved drug to file what is known as an Abbreviated New Drug Application ("ANDA"). *See* *21 U.S.C. § 355(j)*; *see also* *In re Adderall XR Antitrust Litig., 754 F.3d 128, 130 (2d Cir. 2014)*. An ANDA allows a generic manufacturer to rely on the studies submitted in connection with the already-approved brand drug's NDA to show that the generic is safe and effective, provided that the ANDA certifies that the generic drug has the same active ingredients as and is "biologically equivalent" or "bioequivalent" to the already-approved drug.[4] *21 U.S.C. § 355(j)(2)(A)(iv)*; *see also* *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S, 132 S. Ct. 1670, 1676, 182 L. Ed. 2d 678 (2012)* (citing *21 U.S.C. §§ 355(j)(2)(A)(ii)*, *(iv)*).

A generic drug is bioequivalent to a brand drug if "the rate and extent of absorption" of the active ingredient is the same as that of the brand drug. *21 U.S.C. § 355(j)(8)(B)(i)*. In other words, two drugs are bioequivalent if they deliver the same amount of the same active ingredient content into a patient's blood stream over the same amount of time. By enabling generic manufacturers to "piggy-back" on a brand drug's scientific studies, Hatch-Waxman "speeds the introduction of low-cost generic drugs to market, thereby furthering drug competition." *Actavis, 133 S. Ct. at 2228* (internal quotation marks, alteration, and citation omitted); *see also* H.R. Rep. No. 98-857, pt. 2, at 9 (1984) (stating the Hatch-Waxman Act's "policy objective" was to "get[] safe and effective generic substitutes on the market as quickly as possible after the expiration of the patent").

By the time Congress enacted the Hatch-Waxman Act, many states had enacted drug substitution laws to further encourage generic competition.[5] Today, all 50 states and the District of Columbia have drug substitution laws.[6] Although **[*645]** the specific terms of these laws vary by state, drug substitution laws either permit or require pharmacists **[**9]** to dispense a therapeutically equivalent, lower-cost generic drug in place of a brand drug absent express direction from the prescribing physician that the prescription must be dispensed as written.[7] For example,

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[3] Generic drugs "are copies of brand-name drugs and are the same as those brand name drugs in dosage form, safety, strength, route of administration, quality, performance characteristics and intended use." FDA, *Understanding Generic Drugs*, *http://1.usa.gov/1SjEIso* (last visited Apr. 14, 2015).

[4] An ANDA also requires a manufacturer to demonstrate other measures of equivalence between the brand **[**8]** and generic drugs, which are not relevant here. *21 U.S.C. § 355(j)(2)(A)*.

[5] *See* Alison Mason & Robert L. Steiner, Fed. Trade Comm'n, *Generic Substitution and Prescription Drug Prices: Economic Effects of State Drug Product Selection Laws* 1 (1985), *available at* *http://1.usa.gov/1IS44Ju* ("FTC, *Generic Substitution*").

[6] Michael A. Carrier, *A Real-World Analysis of Pharmaceutical Settlements: The Missing Dimension of Product Hopping*, *62 Fla. L. Rev. 1009, 1017 (2010)* ("Carrier, *A Real-World Analysis*"); *see also* Jessie Cheng, Note, *An Antitrust Analysis of Product Hopping in the Pharmaceutical Industry*, *108 Colum. L. Rev. 1471, 1479-80 (2008)* ("Cheng, *Product Hopping*").

[7] The FTC, like the district court, has found that only a "modest[]" difference in the frequency of substitution rates exists between states with mandatory substitution laws and states with permissive substitution laws. *See* FTC, *Generic Substitution*, at 99.

New York's drug substitution law requires a pharmacist to "substitute a less expensive drug product containing the same active ingredients, dosage form and strength as the drug product prescribed" provided certain conditions are met. *N.Y. Educ. Law § 6816-a(1)*.

All state drug substitution **[**10]** laws prohibit pharmacists from substituting generic drugs that are not therapeutically equivalent to the brand drug, but state laws do not all define therapeutic equivalence in the same way.[8] Thirty states, including New York and the District of Columbia, adopt the FDA's definition of therapeutically equivalent and only allow generic substitution if the FDA designates the generic as "AB-rated" in a publication commonly referred to as the "Orange Book."[9] *N.Y. Education Law § 6816-a(1)*; *N.Y. Public Health Law § 206(1)(o)*. To receive an AB-rating, a generic must not only be bioequivalent but pharmaceutically equivalent to the brand drug, meaning it has the same active ingredient, dosage form, strength, and route of administration as the brand drug. U.S. Dep't of Health & Human Servs., FDA, *Approved Drug Products with Therapeutic Equivalence Evaluations* vii-x (35th ed. 2015), *available at* *http://1.usa.gov/1PzbMxF* (the "Orange Book"). The AB-rating requirement is designed to provide guidance regarding which drugs are therapeutically equivalent, but, as has been observed, it also provides an opportunity for brand manufacturers to "game" the system.[10] S.A. 28.

Hatch-Waxman and state substitution laws were enacted, in part, because the pharmaceutical market is not a well-functioning market. In a well-functioning market, a consumer selects and pays for a product after evaluating the price and quality of the product. In the prescription **[*646]** drug market, however, the party who selects the drug (the doctor) does not fully bear its costs, which creates a price disconnect. Moreover, a patient can only obtain a prescription drug if the doctor writes a prescription for that particular drug. The doctor selects the drug, but the patient, or in most cases a third-party payor such as a public or private health insurer, pays for the drug. As a result, the doctor may not know or even care about the price and generally has no incentive to take the price into account. *See* American Antitrust Institute *Amicus* Brief in Support of Appellee ("AAI Br.") at 6; *see also* Intellectual Property and Antitrust Professors *Amicus* Brief in Support of Appellee ("IP and Antitrust Prof. Br.") at 12. As the Federal Trade **[**13]** Commission has explained:

> The basic problem is that the forces of competition do not work well in a market where the consumer who pays does not choose, and the physician who chooses does not pay. Patients have little influence in determining which products they will buy and what prices they must pay for prescription.

Fed. Trade Comm'n Bureau of Consumer Prot., *Drug Product Selection* 2-3 (1979), *available at* *http://bit.ly/1JqKd4G*. ("FTC, Drug Product Selection"). State substitution laws are designed to correct for this price

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[8] *See* Jesse C. Vivian, *Generic-Substitution Laws*, U.S. Pharmacist (June 19, 2008), *http://www.uspharmacist.com/content/s/44/c/9787;* *see also* FTC, *Generic Substitution*, at 3 (Vivian, *Generic-Substitution* ***[**11]*** *Laws*).

[9] Some states explicitly require generic drugs to have an AB-rating, some states adopt the requirements of an AB-rating without using the term, some states develop formularies that list permissible or impermissible drug substitutes, and some states give discretion to individual pharmacists as long as the drugs are pharmaceutically equivalent. *See* Vivian, *Generic-Substitution Laws* tbl.2.

[10] *See, e.g.*, Stacey L. Dogan & Mark A. Lemley, ***Antitrust Law*** *and Regulatory Gaming*, *87 Tex. L. Rev. 685, 709 (2009)* (explaining that the regulatory framework that governs the pharmaceutical industry "presents a perfect storm for regulatory gaming"); Cheng, *Product Hopping, at 1494* ("Product hopping itself amounts to little more than a thinly disguised scheme to game the pharmaceutical industry's regulatory system."); Intellectual Property and Antitrust Professors *Amicus* Brief in Support of Appellee ("IP and Antitrust Prof. Br.") at 3 (explaining that product hopping "presents a paradigmatic case of a regulatory game. . . . [It] exploits the product-approval process precisely because of its exclusionary effects and converts it into a tool for suppressing competition" (alterations in original)); American Antitrust Institute *Amicus* Brief in Support of Appellee **[**12]** ("AAI Br.") at 6, 10-11 (explaining that branded manufacturers can game the system by changing the form of the brand product before generics enter the market).

disconnect by shifting drug selection, between brand drugs and their corresponding generics from doctors, to pharmacists and patients, who have greater financial incentives to make price comparisons.[11] *See* AAI Br. at 8-9.

II. The Relevant Market

The **[**14]** relevant market, undisputed on appeal, is the memantine-drug market in the United States. Defendants manufacture Namenda, a memantine hydrochloride-based[12] ("memantine") drug designed to treat moderate-to-severe Alzheimer's disease. Namenda is currently available in two formulations: a twice-daily immediate-release drug, Namenda IR, and a once-daily extended-release drug, Namenda XR. When Forest introduced Namenda IR tablets **[*647]** in January 2004, Namenda IR was the first medication approved for individuals suffering from moderate-to-severe Alzheimer's disease.[13] Namenda IR became one of Forest's best-selling drugs—generating approximately $1.5 billion in annual sales in 2012 and 2013. The FDA approved Namenda XR in June 2010, and Forest began marketing XR in 2013. The two drugs are the only memantine therapies in their class—N-Methyl D-Aspartate ("NMDA") receptor antagonists—currently on the market.[14]

Namenda IR and Namenda XR have the same active ingredient and the same therapeutic effect. The relevant medical difference between the two is that IR, which is released immediately into the bloodstream, is taken twice a day while XR, which is released gradually, is taken once a day.[15] All other Alzheimer's disease treatments are administered once a day.

The non-medical difference between IR and XR relates to their patent protection. Defendants' patents on Namenda IR prohibit any manufacturer from marketing a generic version of IR until July 11, 2015 (Namenda IR's "exclusivity period").[16] The exclusivity period for Namenda XR does not expire until 2029. A brand drug's exclusivity period is

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[11] Perhaps counter-intuitively, pharmacists have an incentive to dispense lower-cost generic drugs because pharmacies typically realize higher profit margins on generic drugs due to health plan incentives. *See* Antitrust Economists *Amicus* Brief in Support of Appellants ("Antitrust Economists Br.") at 12; *see also* Carrier, *A Real-World Analysis, at 1017* ("[State drug product selection] laws carve out a role for pharmacists, who are much more sensitive to prices than doctors.").

[12] Memantine is an N-Methyl D-Aspartate ("NMDA") receptor antagonist that affects the glutamate pathway in the brain. As expert Dr. Alan Jacobs, a neurologist in private practice, explained at the preliminary injunction hearing:

> Neurons in the brain communicate by signaling each other. Some of these **[**15]** signals are transmitted through an influx of calcium into a molecule on the surface of neurons called the NMDA receptor. This influx of calcium is triggered when glutamate, an excitatory neurotransmitter, docks at the NMDA receptor, causing the calcium influx. When patients enter the moderate stage of Alzheimer's disease, there can be overexcitation of the NMDA receptor by glutamate.

S.A. 16. Memantine-based drugs, like Namenda, partially block the brain's NMDA receptor in order to prevent "overexcitation" of that receptor, "which can cause toxicity to neurons in the brain." S.A. 17.

In contrast, the three other FDA-approved drugs on the market to treat Alzheimer's disease—Aricept, Exelon, and Razadyne—are all acetylcholinesterase inhibitors ("CIs"). CIs reduce the breakdown of acetylcholine, a chemical messenger that transmits information between nerve cells, in the brain. Rather than work on the glutamate pathway, like Namenda, CIs work on the acetylcholine pathway. CIs are generally prescribed to patients experiencing the early stage of Alzheimer's disease, and are prescribed in conjunction with—but not independently of—Namenda during the moderate-to-severe stages of Alzheimer's disease. **[**16]**

[13] Defendants also introduced a twice-daily liquid version of Namenda IR in 2005.

[14] Because CIs perform different functions, Aricept, Exelon, and Razadyne are not substitutes for Namenda.

[15] Additionally, Namenda IR and Namenda XR have different dosage forms. J.A. 673 n.57. Namenda IR is marketed in tablet form, whereas Namenda XR is marketed in capsule form. *Id.; see also Dosing for Patients Currently Taking NAMENDA*, *http://www.namendaxrhcp.com/patients-currently-taking-namenda.aspx* (last visited Apr. 16, 2014).

significant because when that period ends and generic versions enter **[**17]** the market, the brand drug often loses more than 80 to 90% of the market within six months. This period following the end of patent exclusivity has been referred to in this litigation and throughout the industry as the "patent cliff."

III. Defendants' Introduction of Namenda XR and Withdrawal of Namenda IR

Namenda IR and Namenda XR currently occupy the entire memantine-drug market. However, five generic versions of IR have tentative FDA approval to enter the market on July 11, 2015, and seven others may enter the market as early as October 2015. Because Namenda XR has a different strength and daily dosage regimen—Namenda IR involves two immediate-release tablets of 10mg each and Namenda XR involves one 28mg extended-release capsule[17]—the generic IR versions that are poised to enter the market will be therapeutically equivalent under FDA regulations to Namenda IR, but not to Namenda XR. Therefore, **[**18]** pharmacists are prohibited from substituting generic IR for Namenda XR under most, if not all, state drug substitution laws.

When Defendants brought Namenda XR to market in July 2013 (approximately three years after it was approved), they **[*648]** adopted so-called "product extension" strategies to convert patients from Namenda IR to Namenda XR and, thus, to avoid the patent cliff. Initially, Defendants sold both Namenda IR and XR but stopped actively marketing IR. During that time, they spent substantial sums of money[18] promoting XR to doctors, caregivers, patients, and pharmacists. They also sold XR at a discounted rate, making it considerably less expensive[19] than Namenda IR tablets, and issued rebates to health plans to ensure that patients did not have to pay higher co-payments for XR than for IR. The parties have referred to Defendants' efforts to transition patients to XR while IR was still on the market as the "soft switch," and we will adopt that term.

In early 2014, Defendants decided on a more direct approach. They were **[**19]** concerned that they would be unable to convert a significant percentage of Alzheimer's patients dependent upon memantine therapy from IR to XR prior to the entry of generic IR. Defendants' internal projections estimated that only 30% of Namenda IR users would voluntarily switch prior to July 2015. On February 14, 2014, Defendants publicly announced that they would discontinue Namenda IR on August 15, 2014, notified the FDA of their plans to discontinue Namenda IR, and published letters on their websites urging caregivers and healthcare providers to "discuss switching to Namenda XR" with their patients. S.A. 51-52. Defendants also sought to convert Namenda IR's largest customer base, Medicare patients, to XR by sending a letter to the Centers for Medicare & Medicaid Services requesting that the agency remove IR from the formulary list, so that Medicare health plans would not cover it. Their planned discontinuance was delayed by a disruption in XR production, and in June 2014, Defendants announced that Namenda IR would be available until the fall of that year.

But before Defendants withdrew IR entirely, intervening events again prompted them to modify their plans. In September 2014, New **[**20]** York State filed a complaint alleging that Defendants' planned withdrawal of Namenda IR violated the antitrust laws. Defendants subsequently entered into an agreement with Foundation Care, a mail-order-only pharmacy, to provide for limited access to Namenda IR if medically required. Under the terms of the agreement, Foundation Care is authorized to dispense Namenda IR tablets only after receiving a form from a doctor stating that it is "medically necessary" for the patient to take Namenda IR. Defendants estimated internally that less than 3% of current Namenda IR users would be able to obtain IR through Foundation Care. S.A. 67.

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[16] Defendants' patents on Namenda IR prohibit generic entry until October 2015. But in 2009 and 2010, in order to resolve patent litigation, Forest entered into licensing agreements permitting ten generic competitors to enter the market three months before Namenda IR's official exclusivity period ends.

[17] *See Dosing for Patients Currently Taking NAMENDA*, Namenda XR, *http://www.namendaxrhcp.com/patients-currently-taking-namenda.aspx* (last visited Apr. 16, 2014).

[18] The original numbers have been redacted.

[19] The original numbers have been redacted.

Although the agreement with Foundation Care makes IR available to a limited number of patients, Defendants' actions effectively withdrew Namenda IR from the market. The parties have referred to Defendants' efforts to withdraw Namenda IR from the market as the "hard switch" or "forced switch," terms we also adopt. The hard switch began on February 14, 2014 with the announcement of Defendants' intention to withdraw Namenda IR and was suspended in September 2014 when Defendants agreed to a "standstill" during the litigation proceedings described below. Because **[**21]** a manufacturer does not simply withdraw a drug at once, absent pressing safety concerns, announcing the imminent discontinuation of a drug is tantamount to withdrawal.

[*649] IV. Procedural History

In September 2014, New York State filed a complaint in the District Court for the Southern District of New York (Robert W. Sweet, *Judge)* alleging that Defendants were violating the Sherman Antitrust Act, *15 U.S.C. §§ 1* and *2*, as well as New York's Donnelly Act, *N.Y. Gen. Bus. Law § 340 et seq.*, and seeking a permanent injunction and damages. New York also sought a preliminary injunction barring Defendants from restricting access to Namenda IR during the course of the litigation.

New York's theory of antitrust liability, in substance, is as follows. As Namenda IR neared the end of its exclusivity period, Defendants introduced Namenda XR and, before generic IR was available, withdrew Namenda IR in order to force patients to switch from IR to XR (for which generic IR will not be substitutable under most states' laws). In doing so, Defendants intended to thwart generic entry into and competition in the memantine-drug market in order to maintain their monopoly in that market.

The district court held a five-day hearing on the preliminary-injunction **[**22]** motion, during which it received testimony from 24 witnesses and reviewed over 1,400 exhibits. After considering that evidence, the district court made several key findings. (1) Withdrawing Namenda IR from the market prior to generic entry forces Alzheimer's patients dependent on memantine therapy to switch to Namenda XR because it is the only available alternative; (2) The generic versions of IR poised to enter the market in July and October of 2015 will not be AB-rated to XR because they have different strengths and dosages; (3) Pharmacists will not be permitted to substitute generic IR for Namenda XR under New York and many other states' substitution laws because generic IR is not therapeutically equivalent to Namenda XR; (4) If Defendants forced Alzheimer's patients to switch to Namenda XR prior to generic entry, those patients would be very unlikely to switch back to twice-daily IR therapy even after less-expensive generic IR becomes available, due to the high transaction costs associated with Alzheimer's patients first switching from one formulation of a drug to a new formulation and then back to the original formulation ("reverse commuting"); (5) Preventing generic IR from competing **[**23]** under state drug substitution laws would likely thwart generic entry into and competition in the memantine-drug market; and (6) In withdrawing Namenda IR from the market, Defendants' explicit purpose was to impede generic competition and to avoid the patent cliff—which occurs at the end of a drug's exclusivity period when generics gain market share through state substitution laws.

Based on those findings, the district court granted New York's request for a preliminary injunction. The district court concluded that New York raised serious questions regarding the merits of its claims under *Sections 1* and *2* of the Sherman Act and the Donnelly Act, demonstrated the potential for irreparable harm, and concluded that the balance of the equities favored an injunction. The injunction states:

> 1. During the Injunction Term . . . the Defendants shall continue to make Namenda IR (immediate-release) tablets available on the same terms and conditions applicable since July 21, 2013 . . .
>
> 2. Defendants shall inform healthcare providers, pharmacists, patients, caregivers, and health plans of this injunction . . . and the continued availability of Namenda IR . . .
>
> **[*650]** 3. The Defendants shall not impose a "medical necessity" **[**24]** requirement or form for the filling of prescriptions of Namenda IR during the Injunction Term.

S.A. 137-38. The injunction is effective from the date of issuance, December 15, 2014, until "thirty days after July 11, 2015 (the date when generic memantine will first be available) (the 'Injunction Term')." S.A. 138. Defendants timely appealed the grant of the preliminary injunction, and we granted expedited review.

DISCUSSION

HN3[] We review a district court's grant of a preliminary injunction for abuse of discretion. *Faiveley Transp. Malmo AB v. Wabtec Corp., 559 F.3d 110, 116 (2d Cir. 2009)*. A district court has abused its discretion if it based its ruling on an error of law or a clearly erroneous assessment of the evidence, or if its "decision . . . cannot be located within the range of permissible decisions." *Id.* (internal quotation marks omitted). We review legal conclusions, such as the appropriate standard for relief, *de novo. See Somoza v. N.Y.C. Dep't of Educ., 538 F.3d 106, 112 (2d Cir. 2008)*.

On appeal, Defendants argue that (1) the district court applied the wrong legal standard for a preliminary injunction; (2) product hopping is not anticompetitive or exclusionary under *§ 2* of the Sherman Act; (3) Defendants' patent rights foreclose antitrust liability; (4) the agreement with Foundation Care does not violate *§ 1* of the Sherman **[**25]** Act; (5) New York failed to show irreparable harm; and (6) the injunction is vague and overbroad.

I. The Applicable Preliminary Injunction Standard

Defendants argue that the district court erred by applying the ordinary standard for a preliminary injunction, rather than a heightened standard, because the injunction provides New York with "substantially all the relief sought." Defendants' Brief ("Defs. Br.") at 25. We agree that a heightened standard applies.

HN4[] Section 16 of the Clayton Act entitles a party to obtain injunctive relief "against threatened loss or damage by a violation of the antitrust laws." *California v. Am. Stores Co., 495 U.S. 271, 280, 110 S. Ct. 1853, 109 L. Ed. 2d 240 (1990)* (quoting *15 U.S.C. § 26*). A party seeking a preliminary injunction must ordinarily establish (1) "irreparable harm"; (2) "either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party"; and (3) "that a preliminary injunction is in the public interest." *Oneida Nation of New York v. Cuomo, 645 F.3d 154, 164 (2d Cir. 2011)* (internal quotation marks omitted).

We have held the movant to a heightened standard where: (i) an injunction is "mandatory," or (ii) the injunction "will provide the movant with substantially **[**26]** all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits." *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc., 60 F.3d 27, 33-34 (2d Cir. 1995)*. When either condition is met, the movant must show a "clear" or "substantial" likelihood of success on the merits, *Beal v. Stern, 184 F.3d 117, 123 (2d Cir. 1999)*, and make a "strong showing" of irreparable harm, *Doe v. N.Y. Univ., 666 F.2d 761, 773 (2d Cir. 1981)*, in addition to showing that the preliminary injunction is in the public interest.

The injunction issued by the district court in this case remains in place until 30 days after generics enter the market, and therefore "grant[s] plaintiffs substantially all the relief they ultimately sought, in effect, as if the injunction had **[*651]** been permanent." *Eng v. Smith, 849 F.2d 80, 82 (2d Cir. 1988)*. The district court found that Defendants' plan is contingent on switching patients to Namenda XR before generic IR enters the market. S.A. 20. The injunction, however, bars Defendants from withdrawing IR, and thus forcing a switch, "until thirty days after July 11, 2015 (the date when generic memantine will first be available)." S.A. 138. Because the injunction prevents Defendants' hard switch from succeeding, the injunction "render[s] a trial on the merits largely or partly meaningless." *Tom Doherty Assocs., 60 F.3d at 35*.[20] Accordingly, the heightened standard applies.

That conclusion, however, is of little import in this case because New York has satisfied the heightened standard. The district court did not abuse its discretion in granting a preliminary injunction because New York has demonstrated a substantial likelihood of success on the merits of its monopolization and attempted monopolization

[20] Although New York also seeks a permanent injunction, **[**27]** disgorgement, civil penalties, and damages, the preliminary injunction is the gravamen of the complaint.

claims under *§ 2* of the Sherman Act, *see* *Beal, 184 F.3d at 123*, and has made a strong showing that Defendants' conduct would cause irreparable harm to competition in the memantine-drug market and to consumers, *Doe, 666 F.2d at 773*. The district court's factual findings, which were based, for the most part, on Defendants' own internal documents, cannot be said to be clearly erroneous, and its injunction prohibiting Defendants from withdrawing Namenda IR prior to generic entry was not an abuse of discretion as being outside the range of permissible decisions.

II. Monopolization and Attempted Monopolization Under *§ 2* of the Sherman Act

HN5[] *Section 2* of the Sherman Act makes it an offense to "monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States." *15 U.S.C. § 2*; *see also* *Geneva Pharms. Tech. Corp. v. Barr Labs., Inc., 386 F.3d 485, 495 (2d Cir. 2004)*. To establish **[**28]** monopolization in violation of *§ 2*, a plaintiff must prove not only that the defendant possessed monopoly power in the relevant market, but that it willfully acquired or maintained that power "as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))*. "To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct." Id.* In order to show attempted monopolization, the plaintiff must prove: "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*. Attempted monopolization, unlike monopolization, requires a finding of specific intent. *See, e.g., Delaware & Hudson Ry. Co. v. Consol. Rail Corp., 902 F.2d 174, 180 (2d Cir. 1990)*.

Defendants' patents on Namenda IR indisputably grant them a legal monopoly in the U.S. memantine-drug market until July 11, 2015.[21] The parties do not dispute the district court's factual findings that the **[*652]** relevant market is the memantine-drug market in the United States and that Namenda IR and XR represent 100% of that market. S.A. 108-10. Consequently, **[**29]** the parties do not dispute that Defendants possess monopoly power. *See* *Geneva Pharms., 386 F.3d at 500* (monopoly power can be "proven directly through evidence of control over prices or the exclusion of competition," or "inferred from a firm's large percentage share of the relevant market").

Given that Defendants' monopoly power has been established, this case turns on whether Defendants willfully sought to maintain or attempted to maintain that monopoly in violation of *§ 2*. In *United States v. Microsoft Corp., 253 F.3d 34, 58-60, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (en banc), the D.C. Circuit, sitting en banc, established a helpful framework for determining when a product change violates *§ 2* based on the rule-of-reason test articulated by the Supreme Court in *Standard Oil Co. v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911)*, and generally applied to antitrust claims. *See also* *Paycom Billing Servs., Inc. v. Mastercard Int'l, Inc., 467 F.3d 283, 289-90 (2d Cir. 2006)* (explaining that courts analyze most antitrust claims under the rule of reason).[22] Under the *Microsoft* framework, ***HN6***[] once a plaintiff establishes that a monopolist's conduct is anticompetitive or exclusionary, the monopolist may proffer "nonpretextual" procompetitive justifications for its conduct. *253 F.3d at 58-59*. The plaintiff may then either rebut those justifications or demonstrate that **[**30]** the anticompetitive harm outweighs the procompetitive benefit. *Id.*

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[21] *See* *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 816, 65 S. Ct. 993, 89 L. Ed. 1381, 1945 Dec. Comm'r Pat. 582 (1945)* ("[A] patent is an exception to the general rule against monopolies and to the right to access to a free and open market.").

[22] *See also* *Mid-Texas Commc'ns Sys., Inc. v. Am. Tel. & Tel. Co., 615 F.2d 1372, 1389 n.13 (5th Cir. 1980)* ("It is clear, however, that the analysis under *section 2* is similar to that under *section 1* regardless whether the rule of reason label is applied per se." (citing *Byars v. Bluff City News Co., 609 F.2d 843, 860 (6th Cir. 1979))*); *Cal. Computer Prods., Inc. v. Int'l Bus. Machs. Corp., 613 F.2d 727, 737 (9th Cir. 1979)* ("[U]nder *§ 2* attempt as with *§ 1* monopolization individual conduct is measured against the same 'reasonableness' standard governing concerted and contractual activity under *§ 1*.").

a. Anticompetitive and Exclusionary Conduct

HN7[] "As a general rule, courts are properly very skeptical about claims that competition has been harmed by a dominant firm's product design changes." *Microsoft, 253 F.3d at 65*; *see also* *Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 544-45 (9th Cir. 1983)*. Product innovation generally benefits consumers and inflicts harm on competitors, so courts look for evidence of "exclusionary or anticompetitive effects" in order to "distinguish 'between conduct that defeats a competitor because of efficiency and consumer satisfaction'" and conduct that impedes competition through means other than competition on the merits. *Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 188-89 (2d Cir. 1992)* (quoting *U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1359 (2d Cir. 1988))*.

Well-established case law makes clear that product redesign is anticompetitive when it coerces consumers and impedes competition.[23] The leading case in **[*653]** our circuit for *§ 2* liability based on product redesign is *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979)*. In that case, Kodak simultaneously **[**31]** introduced its new Kodacolor II film and new Kodak 110 camera, which was designed so that it could only be used with the Kodacolor II film (the "110 system"). *Id. at 277-78*. Kodak, which possessed a lawful monopoly in film but not in cameras, heavily advertised Kodacolor II film as "a remarkable new film," and for 18 months, Kodak made Kodacolor II film only for the 110 camera. *Id. at 278*. Berkey Photo, Inc. ("Berkey"), a smaller camera manufacturer, alleged that Kodak unlawfully used its monopoly in film to increase camera sales and monopolize the camera market. *Id.* We rejected that claim and held that the introduction of the 110 system and advertising of the Kodacolor II film did not violate the Sherman Act because "[Kodak's] success was not based on any form of coercion." *Id. at 287*. But, of significance to the case before us, we cautioned that "the situation might be completely different if, upon the introduction of the 110 system, Kodak had ceased producing film in the 126 size, thereby compelling camera purchasers to buy a Kodak 110 camera." *Id. at 287 n.39*.[24]

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[23] Our emphasis on consumer coercion in evaluating a monopolist's product redesign is in accord with several of our sister circuits. *See* *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 994 (9th Cir. 2010)* ("A monopolist's discontinuation **[**32]** of [an old product] may violate *§ 2* if it effectively forces customers to adopt its new [product]."); *Microsoft, 253 F.3d at 65* (explaining that Microsoft's redesign of its operating system was anticompetitive because the redesign impeded competition "not by making Microsoft's own browser more attractive to consumers but, rather, by discouraging [manufacturers] from distributing rival products"); *cf.* *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc., 63 F.3d 1540, 1550 (10th Cir. 1995)* (noting that illegal tie-ins under *Section 1* may "qualify as anticompetitive conduct for *Section 2* purposes"). Similarly, the other district courts that have considered product hopping cases also examined consumer coercion. And those district courts that have ruled in favor of plaintiffs alleging antitrust violations stemming from product hopping have found consumer coercion. *See* *In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig., No. 13-MD-2445, 64 F. Supp. 3d 665, 2014 U.S. Dist. LEXIS 167204, 2014 WL 6792663, at *12 (E.D. Pa. Dec. 3, 2014)* (plaintiffs alleged exclusionary conduct under *§ 2* where the brand manufacturer coerced patients into switching from the tablet form of a drug—for which their patent was set to expire—to a new film version of the drug by raising allegedly false safety concerns about the tablet and announcing that it would soon be withdrawn from the market); *Abbott Labs. v. Teva Pharms. USA, Inc., 432 F. Supp. 2d 408, 430 (D. Del. 2006)* (plaintiffs alleged antitrust violations **[**33]** where the defendants introduced new drug formulations and withdrew the prior versions whose exclusivity period would soon expire). In contrast, in cases in which there is no evidence of coercion, district courts have rejected such claims. *See* *Mylan Pharms. Inc. v. Warner Chilcott PLC et al., No. Civ. 12-3824, 2015 U.S. Dist. LEXIS 50026, 2015 WL 1736957, at *13 (E.D. Pa. Apr. 16, 2015)* (noting that because generics had already entered the market at the time of defendants' product reformulation, "doctors remained free to prescribe generic Doryx; pharmacists remained free to substitute generics when medically appropriate; and patients remained free to ask their doctors and pharmacists for generic versions of the drug"); *Walgreen Co. v. AstraZeneca Pharm. L.P., 534 F. Supp. 2d 146, 151 (D.D.C. 2008)* (dismissing a case alleging attempted market monopolization because unlike in *Abbott Labs*, "there is no allegation that AstraZeneca eliminated any consumer choices. Rather, AstraZeneca . . . introduced a new drug to compete with already-established drugs—both its own and others'—and with the generic substitutes for at least one of the established drugs").

[24] We also noted that restricting Kodacolor II to the 110 format for 18 months may have been anticompetitive conduct, but we did not decide the question because there was no proof of injury to Berkey. *Berkey Photo, 603 F.2d at 290*.

In this case, Defendants argue that withdrawing a product is **[**34]** not anticompetitive or exclusionary conduct, especially when the new product is superior to the old product.[25] Certainly, neither product **[*654]** withdrawal nor product improvement alone is anticompetitive. But under *Berkey Photo*, ***HN8***[] when a monopolist *combines* product withdrawal with some other conduct, the overall effect of which is to coerce consumers rather than persuade them on the merits, *id. at 287*, and to impede competition, *id. at 274-75*, its actions are anticompetitive under the Sherman Act.[26] *Cf. Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)* (noting that when an antitrust conspiracy involves multiple acts, "[t]he character and effect of [the] conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole" (internal quotation marks omitted)). Here, Defendants' hard switch—the combination of introducing Namenda XR into the market and effectively withdrawing Namenda IR—forced Alzheimer's patients who depend on memantine therapy to switch to XR (to which generic IR is not therapeutically equivalent) and would likely impede generic competition by precluding generic substitution through state drug substitution laws.

i. Consumer Coercion

Defendants' hard switch crosses the line from persuasion to coercion and is anticompetitive. As long as Defendants sought to persuade patients and their doctors to switch from Namenda IR **[**36]** to Namenda XR while both were on the market (the soft switch) and with generic IR drugs on the horizon, patients and doctors could evaluate the products and their generics on the merits in furtherance of competitive objectives.

By effectively withdrawing Namenda IR prior to generic entry, Defendants forced patients to switch from Namenda IR to XR—the only other memantine drug on the market.[27] S.A. 49; Tr. 183:22-184:17 (Stitt) ("So the unique thing [about the Namenda IR hard switch] I think is that there's really no place for prescribers to, to go with a drug to treat that condition."). In fact, the district court found that Defendants devised the hard switch because they projected that only 30% of memantine-therapy patients would voluntarily switch to Namenda XR prior to generic entry. S.A. 56-57. Defendants' hard switch was expected to transition 80 to 100% of Namenda IR patients to XR prior to generic entry, S.A. 81, and thereby impede generic competition.

Defendants **[**37]** argue that courts should not distinguish between hard and soft switches. But this argument ignores one of *Berkey Photo*'s basic tenets: the market **[*655]** can determine whether one product is superior to another only "so long as the free choice of consumers is preserved." *603 F.2d at 287*. Had Defendants allowed Namenda IR to remain available until generic entry, doctors and Alzheimer's patients could have decided whether the benefits of switching to once-daily Namenda XR would outweigh the benefits of adhering to twice-daily therapy using less-expensive generic IR (or perhaps lower-priced Namenda IR). By removing Namenda IR from the market prior to generic IR entry, Defendants sought to deprive consumers of that choice. In this way, Defendants could avoid competing against lower-cost generics based on the merits of their redesigned drug by forcing Alzheimer's

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[25] Whether XR is superior to IR is not significant in this case. When there is coercion, "the technological **[**35]** desirability of the product change . . . bear[s] on the question of monopolistic intent," *id. at 287 n.39*, rather than the permissibility of the defendant's conduct. Here, there is no genuine dispute that Defendants intended to avoid the patent cliff. *See, e.g.*, J.A. 132, 155.

[26] Several other courts have held that product redesign violates *§ 2* when combined with other conduct and the combined effect is anticompetitive or exclusionary. *See Allied Orthopedic, 592 F.3d at 1000* (explaining that *§ 2* is violated when "some conduct of the monopolist associated with its introduction of a new and improved product design constitutes an anticompetitive abuse or leverage of monopoly power, or a predatory or exclusionary means of attempting to monopolize the relevant market" (internal quotation marks omitted)); *In re Suboxone, 2014 U.S. Dist. LEXIS 167204, 2014 WL 6792663, at *10* ("The key question is whether the defendant combined the introduction of a new product with some other wrongful conduct, such that the comprehensive effect is likely to stymie competition, prevent consumer choice and reduce the market's ambit.").

[27] As previously noted, the other available Alzheimer's drugs, all CIs, are not substitutes for Namenda because they perform different medical functions and are not designed to treat moderate-to-severe Alzheimer's disease.

patients to take XR,[28] with the knowledge that transaction costs would make the reverse commute by patients from XR to generic IR highly unlikely.

ii. Impedes Competition

As the district court concluded, Defendants' hard switch would likely have anticompetitive and exclusionary effects **[**38]** on competition in the memantine market, creating a "dangerous probability" that Defendants would maintain their monopoly power after generics enter the market. *Spectrum Sports, 506 U.S. at 456*. Based on careful consideration of the unique characteristics of the pharmaceutical market, the district court found that "[p]rice competition at the pharmacy, facilitated by state substitution laws, is the principal means by which generics are able to compete in the United States." S.A. 26.

We agree with the district court's analysis. Forcing patients to switch to XR would prevent generic substitution because generic versions of IR are not AB-rated to Namenda XR. And if, as Defendants' own internal predictions estimate, the hard switch successfully converted 80 to 100% of IR patients to XR prior to generic entry, there would be "few to no prescriptions" left for which generics would be eligible to compete. S.A. 82. Because Defendants' forced switch "through something other than competition on the merits[] has the effect of significantly reducing usage of rivals' products and hence protecting its own . . . monopoly, it is anticompetitive." *Microsoft, 253 F.3d at 65*.

Defendants and their *amici* argue that generics can successfully compete by persuading third-party **[**39]** payors and prescription-benefit managers to promote generic IR through the use of formularies, tiered-drug structures, step programs, and prior-authorization requirements.[29] But, as the district court determined, competition through state drug substitution laws is the only cost-efficient means of competing **[*656]** available to generic manufacturers.[30] S.A. 78. For there to be an antitrust violation, generics need not be barred "from all means of distribution" if they are "bar[red] . . . from the cost-efficient ones." *Microsoft, 253 F.3d at 64*; *see also* *United States v. Dentsply Int'l, Inc., 399 F.3d 181, 191 (3d Cir. 2005)* ("The test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit."). Moreover, as the district court found, additional expenditures by generics on marketing would be impractical and ineffective because a generic manufacturer promoting a product would have no way to ensure that a pharmacist would substitute its product, rather than one made by one of its generic competitors.

Although in theory, Alzheimer's patients would be free to switch back to IR therapy after generic entry, the district court found that, in practice, such a reverse commute would be a highly unlikely occurrence. As one of Defendants'

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[28] Alternatively, patients could discontinue memantine-therapy entirely.

[29] Formularies, tiered-drug structures, step programs, and prior-authorization requirements are all tools that third-party payors may use to incentivize patients to take less-expensive drugs. A formulary is a list of approved drugs **[**40]** that a health plan will pay for, either in whole or in part. S.A. 19. A tiered-drug structure divides the drugs listed on a plan's formulary into categories or "tiers." S.A. 20. Typically, health plans use a three-tiered system, which reserves tier 1 for generic drugs, tier 2 for preferred branded drugs, and tier 3 for non-preferred branded drugs. The portion of the cost of the drug that the patient is responsible for paying, known as the "co-payment" or "co-pay," increases with each tier. A step program requires a patient to first try a preferred, and usually less expensive, drug. Only if that treatment is unsuccessful will the health plan pay for the patient's drug of choice. S.A. 20. A prior authorization policy requires a patient to obtain the third-party payor's approval for payment prior to taking a particular drug. Antitrust Economists Br. at 14.

[30] The district court found that the regulatory context makes it impractical and uneconomical for generic manufacturers to market their products to doctors or pharmacists because, among other reasons, marketing costs severely impact generic manufacturers' ability to offer the lower prices upon which they compete. S.A. 78. Two other district **[**41]** courts confronted with product hopping cases concluded that plaintiffs plausibly alleged that the unique characteristics of the pharmaceutical industry "make generic substitution the cost-efficient means of competing for companies selling generic pharmaceuticals." *In re Suboxone, 2014 U.S. Dist. LEXIS 167204, 2014 WL 6792663, at *12*; *see also* *Abbott Labs., 432 F. Supp. 2d at 423* (same).

own executives explained during a January 21, 2014 earnings call: "if we do the hard switch and we convert patients and caregivers to once-a-day therapy versus twice a day, it's very difficult for the generics then to reverse-commute back." S.A. 51. This is because there are high transaction costs associated with reverse commuting. Any patient who wants to switch back to twice-daily IR therapy must first obtain a new prescription from a doctor. But, as the district court found, the nature of Alzheimer's disease makes moderate-to-severe Alzheimer's patients especially vulnerable to changes in routine, and makes doctors and caregivers very reluctant to change a patient's medication **[**42]** if the current treatment is effective. As a result, if Defendants forced patients to switch from twice-daily Namenda IR to once-daily XR, those patients would be very unlikely to switch back to twice-daily generic IR even if generic IR is more cost-effective.[31] Moreover, third-party payors are reluctant to require patients to switch from a drug they are currently taking to a new drug, so health plans would be unlikely to require patients to switch to less-expensive generic IR.

Defendants and their *amici* argue that the district court's focus on AB-ratings **[**43]** is misplaced because up to 20 states do not impose an AB-rating requirement and thus "*may* let pharmacists unilaterally substitute generic IR for Namenda XR." **[*657]** Defs. Br. at 13 (emphasis added). Defendants' argument, however, exaggerates the variance in state substitution laws. Many states that do not explicitly require generic drugs to have the same AB-rating effectively require the same degree of therapeutic equivalence. For example, Defendants cite *Iowa Code § 155A.32* as an example of a state law that "do[es] not rely on the Orange Book." Defs. Br. at 13. *Section 155A.32(1)* permits pharmacists to substitute a generic drug if it has the same "demonstrated bioavailability" as the brand drug, *Iowa Code Ann. § 155A.32(1)*, but *Section 155A.3(9)* clarifies that a generic is only considered to have the same "demonstrated bioavailability" if it has the same "rate and extent of absorption of a drug or drug ingredient from a specified dosage form," *Iowa Code Ann. § 155A.3(9)*. Because the dosage and absorption rates of generic IR differ from that of XR, the drugs are not bioequivalent under Iowa law. Moreover, because generic IR is manufactured in tablet form and Namenda XR is marketed in capsule form, they do not have the same dosage form.[32] As a result, as in New York and the 29 other states that require **[**44]** an AB-rating, Iowa pharmacists will not be permitted to substitute generic IR for XR.[33]

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[31] The Department of Health and Human Services ("HHS") reached this same conclusion, explaining:

> The unique nature of this patient population—Alzheimer's patients with moderate-to-severe dementia—makes it likely that a switch from the twice-daily Namenda IR to the once-daily Namenda XR would be a permanent one for practical purposes, as providers, patients, and families would be reluctant to switch back to twice-a-day therapy even if they believed that it represented a better value.

HHS, Office of the Assistant Sec'y for Planning and Evaluation, *Some Observations Related to the Generic Drug Market* 5 (2015), *available at* http://aspe.hhs.gov/sp/reports/2015/GenericMarket/ib_GenericMarket.pdf (HHS, *Some Observations*).

[32] Generic IR is manufactured in 5 and 10 mg tablet dosage formulations whereas Namenda XR is marketed in 7, 14, 21, and 28 mg capsule dosage formulations. J.A. 673 n.57. As Dr. Ernest R. Berndt, Ph.D. explains in his declaration, "tablets and capsules are not the same 'dosage form.'" *Id.*

[33] Defendants argue that up to 20 states may allow pharmacists to substitute generic IR for Namenda XR; however, throughout their briefs, Defendants and their experts point to 21 different states. Of the states identified by Defendants and their experts, 16 require the same dose and/or dosage form and thus will not allow generic IR to be substituted for Namenda XR. *See Ala. Code § 34-23-8*; *Alaska Stat. Ann. §§ 08.80.295(a)*, *08.80.480(11)*; *Ark. Code Ann. §§ 17-92-503(a)(1)*, *17-92-101(6)*, *(11)*; *Cal. Bus. & Prof. Code §§ 4073(a)*, *4052.5(a)*, *(f)*; Colo. Rev. Stat. Ann. §§ 12-42.5-122(1)(a), *as amended by* 2015 Colo. Legis. Serv. Ch. 77 (S.B. 15-071), 12-42.5-102(40); *Conn. Gen. Stat. Ann. § 20-619(b)*; *Fla. Stat. Ann. §§ 465.025(2)*, *(1)(b)*; *Ga. Code Ann. § 26-4-81(a)*; *Mo Ann. Stat. § 338.056(1)*; *Mont. Code Ann. § 37-7-505(1)*; *Neb. Rev. Stat. §§ 71-5403(1)*, *71-5402(1)*, *(5)*, *(6)*, *as amended by* 2015 Nebraska Laws L.B. 37; *N.C. Gen. Stat. Ann. §§ 90-85.28(a)*, *90-85.27(1)*; *Or. Rev. Stat. Ann. § 689.515(2)(a)*; *R.I. Gen. Laws Ann. §§ 21-31-16.1(a)*, *5-19.1-2(k)*; *S.C. Code Ann. § 39-24-30*. *Mich. Comp. Laws Ann. § 333.17755(1)* allows for substitution of "generically equivalent" drugs, which courts in Michigan have interpreted to require "chemical equivalence," meaning that the drugs "contain the same active ingredients and are identical in strength, dosage form and route of administration." *Pennwalt Corp. v. Zenith Labs., Inc., 472 F. Supp. 413, 417 (E.D. Mich. 1979)*. Oklahoma **[**45]** prohibits substitution "without authority of the prescriber or purchaser," so we cannot determine whether generic IR will be substituted for Namenda XR under Oklahoma law. *See Okla. Stat. Ann. tit. 59, § 353.13(D)*. Of the states that allow pharmacists

Defendants argue that their conduct was not anticompetitive because preventing "free riding" is a legitimate business purpose. But what Defendants call "free riding"—generic substitution by pharmacists following the end of Namenda IR's exclusivity period—is authorized by law; is the explicit goal of state substitution laws; and furthers the goals of the Hatch-Waxman Act by promoting drug competition, *Actavis, 133 S. Ct. at 2228*, and by preventing the "practical extension of [brand drug **[*658]** manufacturers'] monopoly . . . beyond the expiration of the[ir] patent[s]," H.R. Rep. No. 98-857, pt. 2, at 4 (1984).

Defendants also argue that ***antitrust law*** is not a vehicle for enforcing the "spirit" of drug laws. Defs. Br. at 46. But the Supreme Court **[**46]** has made clear that "[a]ntitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue." *Trinko, 540 U.S. at 411*. Leading antitrust authorities have encouraged courts to acknowledge market defects, such as a price disconnect and the exclusivity of patents, in their antitrust analysis.[34] And in other Hatch-Waxman contexts, this court has recognized that efforts to manipulate aspects of the Hatch-Waxman incentive structure to exclude competition could state an antitrust claim. *See, e.g., Arkansas Carpenters Health & Welfare Fund v. Bayer AG, 604 F.3d 98, 106 (2d Cir. 2010)* ("[A] plaintiff can have antitrust claims" where a pharmaceutical manufacturer "manipulate[s] the [Hatch-Waxman-conferred] 180-day exclusivity period in a manner that bars subsequent challenges to the patent or precludes the generic manufacturer from marketing non-infringing products unrelated to the patent."), *abrogated on other grounds by Actavis, 133 S. Ct. at 2231*. Therefore, we conclude that the district court appropriately considered the unique market characteristics of the pharmaceutical industry in concluding that ***antitrust law*** "requires [Defendants] to allow generic competitors a fair opportunity to compete using state substitution laws." S.A. 95-96.

b. Procompetitive Justifications

All of Defendants' procompetitive justifications for withdrawing IR are pretextual. The record is replete with evidence showing that Defendants were, in the words of Defendants' own CEO, "trying to . . . put up barriers or obstacles" to generic competition. J.A. 132; *see also* S.A. 49 ("We need to transition volume to XR to protect our Namenda revenue from generic penetration in 2015 when we lose IR patent exclusivity."); J.A. 155 ("[W]hat we're trying to do is make **[**48]** a cliff disappear and rather have a long—a prolonged decline. And we believe that by potentially doing a forced switch, we will hold on to a large share of our base users."); S.A. 49 ("Our mission is to convert to Namenda XR and lift the franchise . . . . We need to convert as much IR business to Namenda XR as quickly as possible."). Based largely on Defendants' own documents, New York has rebutted Defendants' procompetitive justifications.

c. Procompetitive Benefits v. Anticompetitive Harms

Because we have determined that Defendants' procompetitive justifications are pretextual, we need not weigh them against the anticompetitive harms. But in any event, New York has shown that whatever procompetitive benefits exist are outweighed by the anticompetitive harms. **[*659]** Defendants argue that their conduct is procompetitive because "[l]aunching a new product . . . advances competition by adding a better product to the market and by

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to substitute generic drugs without consulting the prescribing physician, four states *may*—but will not necessarily—allow substitution of generic IR for Namenda XR. *See* ***Minn. Stat. Ann. § 151.21 Subd. 3***; *Minn. R. 9505.0340* Subp.3(H); *N.D. Cent. Code Ann. §§ 19-02.1-14.1(3)*, *(1)(g)*; *Vt. Stat. Ann. tit. 18, § 4605(a)*, *4601(4)*; *Wash. Rev. Code Ann. § 69.41.120*; *69.41.110(4)*. Those four states account for less than 6% of the U.S. population. J.A. 673.

[34] *See* IIIB Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law****: An Analysis* ***[**47]*** *of Antitrust Principles and Their Application* ¶ 776c, at 297 (3d ed. 2008); Herbert Hovenkamp et al., *IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law* § 15.3, at 25 (2012); C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, *81 N.Y.U. L. Rev. 1553, 1557 (2006)* ("A particular regulatory regime sets the boundaries of feasible anticompetitive conduct."); Jonathan Jacobson, et al., *Predatory Innovation: An Analysis of Allied Orthopedic v. Tyco in the Context of Section 2 Jurisprudence*, *23 Loy. Consumer L. Rev. 1, 8 (2010)* ("There are two scenarios where an exclusionary redesign may be especially harmful: (a) in the context of networked markets . . . and (b) in pharmaceutical markets . . . .").

paving the way for further innovation." Defs. Br. at 51. While *introducing* Namenda XR may be procompetitive, that argument provides no procompetitive justification for *withdrawing* Namenda IR.

Defendants argue that withdrawing IR was procompetitive because it would maximize their **[**49]** return on their investment in XR. But in deciding to take IR off the market, Defendants were willing to give up profits they would have made selling IR—Forest's best-selling drug. This "willingness to forsake short-term profits to achieve an anticompetitive end" is indicative of anticompetitive behavior. *In re Adderall, 754 F.3d at 135* (internal quotation marks omitted). Moreover, Defendants fail to explain why the potential [TEXT REDACTED BY THE COURT] in additional XR sales that they stood to earn—which is less than the approximately $1.5 billion in annual sales they have made from Namenda IR in recent years—makes economic sense in the absence of the benefit derived from eliminating generic competition. *See* *id. at 133* (stating that anticompetitive effects could be shown where defendants' conduct "makes sense only because it eliminates competition"). As a result, we agree with the district court that:

> Defendants' short-term loss of [TEXT REDACTED BY THE COURT] in IR sales, translating to [TEXT REDACTED BY THE COURT] in income, is most rationally construed as an investment in moving the memantine market in [their] favor [through impeding generic competition], yielding [D]efendants [TEXT REDACTED BY THE COURT] in income over the course **[**50]** of the next [TEXT REDACTED BY THE COURT] years.

S.A. 74.

Finally, Defendants have presented no evidence to support their argument that antitrust scrutiny of the pharmaceutical industry will meaningfully deter innovation. To the contrary, as the American Antitrust Institute *amici* argue, immunizing product hopping from antitrust scrutiny may deter significant innovation by encouraging manufacturers to focus on switching the market to trivial or minor product reformulations rather than investing in the research and development necessary to develop riskier, but medically significant innovations.

In sum, we conclude that the combination of withdrawing a successful drug from the market and introducing a reformulated version of that drug, which has the dual effect of forcing patients to switch to the new version and impeding generic competition, without a legitimate business justification, violates *§ 2* of the Sherman Act.

III. Patent Rights as a Defense to Liability

Defendants argue that their patent rights under Namenda IR and Namenda XR shield them from antitrust liability. To be sure, there is tension between the antitrust laws' objective of enhancing competition by preventing unlawful monopolies **[**51]** and patent laws' objective of incentivizing innovation by granting legal patent monopolies. *See In re Adderall, 754 F.3d at 133*; *see also* *SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1205 (2d Cir. 1981)*.

But in its recent landmark antitrust case, *F.T.C. v. Actavis, Inc.*, the Supreme Court made clear that "patent and antitrust policies are both relevant in determining the scope of the patent monopoly—and consequently ***antitrust law*** immunity—that is conferred by a patent." *133 S. Ct. at 2231* (internal quotation marks omitted); *see also* *United States v. Gypsum Co., 333 U.S. 364, 390-91, 68 S. Ct. 525, 92 L. Ed. 746 (1948)* (indicating that courts must "balance the privileges of [the patent holder] **[*660]** and its licensees under the patent grants with the prohibitions of the Sherman Act against combinations and attempts to monopolize").

The Court's decision in *Actavis* reaffirmed the conclusions of circuit courts that ***HN9***[] a patent does not confer upon the patent holder an "absolute and unfettered right to use its intellectual property as it wishes," *Microsoft, 253 F.3d at 63*, and "[i]ntellectual property rights do not confer a privilege to violate the antitrust laws," *In re Indep. Serv. Orgs. Antitrust Litig., 203 F.3d 1322, 1325 (Fed. Cir. 2000)*. *See also* *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 998 (9th Cir. 2010)* ("[C]hanges in product design are not immune from antitrust scrutiny and in certain cases may constitute an unlawful means of maintaining a monopoly under *Section 2*.").

Defendants argue that their conduct does not violate ***antitrust law*** because they have merely "exercised rights **[**52]** afforded by the Patent Act." Defs. Br. at 34. But patent law gives Defendants a temporary monopoly on individual drugs—not a right to use their patents as part of a scheme to interfere with competition "beyond the limits of the patent monopoly." *United States v. Line Material Co., 333 U.S. 287, 308, 68 S. Ct. 550, 92 L. Ed. 701 (1948)*. Defendants have essentially tried to use their patent rights on Namenda XR to extend the exclusivity period for all of their memantine-therapy drugs. As explained above, it is the *combination* of Defendants' withdrawal of IR and introduction of XR in the context of generic substitution laws that places their conduct beyond the scope of their patent rights for IR or XR individually.

IV. The Sherman Act § 1 and the Donnelly Act

In light of New York's substantial likelihood of success on the merits of its monopolization and attempted monopolization claims, we need not address the merits of its Sherman Act *§ 1* or Donnelly Act claims, which are based on the agreement between Defendants and Foundation Care. We do note, however, that an agreement related to a party's violation of *§ 2* does not trigger liability under *§ 1* unless the agreement *itself* unreasonably restrains trade, *Geneva Pharms., 386 F.3d at 506*, and there is mutual anticompetitive intent, *see id. at 507* ("[L]ack of intent by one party . . **[**53]** . precludes a conspiracy to monopolize."). Conduct that satisfies the unreasonable restraint prong under *§ 2* does not necessarily violate *§ 1* absent evidence that the agreement furthers the anticompetitive conduct. *Id. at 506*.

V. Irreparable Harm

New York has made a "strong" showing that competition and consumers will suffer irreparable harm in the absence of the injunction. *Doe, 666 F.2d at 773*. ***HN10***[] Irreparable harm is "injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages." *Forest City Daly Hous., Inc. v. Town of N. Hempstead, 175 F.3d 144, 153 (2d Cir. 1999)* (internal quotation marks omitted). To obtain injunctive relief under § 16 of the Clayton Act, that injury must be an injury "of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful." *Consol. Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 257* (internal quotation marks omitted), *amended by 890 F.2d 569 (2d Cir. 1989)*.

As the district court concluded, "[p]ermanent damage to competition in the memantine market can . . . result from Defendants' planned hard switch **[*661]** strategy."[35] S.A. 131. If generics cannot compete with Defendants' drugs via state substitution laws, they "cannot compete effectively for sales of a branded drug in the same class, such as Namenda XR, even if the price of the generics is much lower than **[**54]** the brand." S.A. 80-81; *see also* IP and Antitrust Prof. Br. at 13-14 (explaining that absent substitution at the pharmacy, "the market for generics will collapse"). Moreover, generics cannot simply move into the market for generic XR. To become substitutable for Namenda XR, generic manufacturers must develop new once-daily Namenda tablets, begin the ANDA-approval process all over again, and await the end of XR's patent exclusivity period in 2029. Because Defendants' conduct does not simply harm a competitor or two, but threatens to "reduce competition in the [memantine-drug] market[,] . . . [it] is precisely the type that the antitrust laws were designed to protect against." *Consol. Gold, 871 F.2d at 257-58*.

The district court also found that, in addition to harming consumer choice, Defendants' hard switch would cause economic harm to consumers. Based on Defendants' own data, the district court found **[**55]** that consumers would pay almost $300 million more and third-party payors would pay almost $1.4 billion more for memantine therapy if Defendants were permitted to switch patients to Namenda XR before generic IR entry. And HHS reports that Defendants' withdrawal of Namenda IR prior to generic entry would cost Medicare and its beneficiaries a

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[35] *See also LePage's Inc. v. 3M, 324 F.3d 141, 159 (3d Cir. 2003)* ("When a monopolist's actions are designed to prevent one or more new or potential competitors from gaining a foothold in the market by exclusionary, i.e. predatory, conduct, its success in that goal is not only injurious to the potential competitor but also to competition in general.").

minimum of $6 billion over the next ten years.[36] "Threaten[ed] economic harm to . . . consumers . . . is plainly sufficient to authorize injunctive relief." Am. Stores Co., 495 U.S. at 283.[37]

Defendants argue that the district court erred in finding *irreparable* harm because any increase in costs to consumers and third-party payors is "compensable and readily quantifiable." Defs. Br. at 26. But compensating the approximately 500,000 Alzheimer's patients who take Namenda IR tablets, and an unknown number of public and private third-party payors, for an ongoing harm would impose "the **[**56]** task of disentangling overlapping damages claims [which] is not lightly to be imposed upon potential antitrust litigants, or upon the judicial system." Blue Shield of Va. v. McCready, 457 U.S. 465, 475 n.11, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982); *see also* Salinger v. Colting, 607 F.3d 68, 81 (2d Cir. 2010) ("Harm might be irremediable, or irreparable, for many reasons, including that a loss is difficult to replace . . . .").[38] **[*662]** In addition, many of the victims of Defendants' hard switch, such as patients and health plans, may be prevented from direct recovery for their antitrust losses because of the "indirect purchaser" rule, which bars those who do not directly purchase a product from recovering antitrust damages, thus further supporting New York's claim of irreparable injury. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 745-46, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977).

Additionally, we agree with the district court, and the parties do not dispute, that the preliminary injunction serves the public's interest in a competitive market for memantine drugs. *See* United States v. Siemens Corp., 621 F.2d 499, 506 (2d Cir. 1980) (finding that the government represents the public's interest in a competitive marketplace in seeking to enjoin a merger under § 7 of the Clayton Act); *see also* Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 424 (2d Cir. 2004) ("[G]overnment action taken in furtherance of a regulatory or statutory scheme . . . is presumed to be in the public interest").

VI. The Preliminary Injunction

Defendants argue that the injunction provision requiring them to make Namenda IR tablets available on the same terms and conditions applicable since July 21, 2013 is vague because the terms and conditions have shifted over the past 17 months. We disagree. The injunction plainly prohibits Defendants from charging more for Namenda IR

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[36] HHS, *Some Observations*, at 7.

[37] Given that we conclude that the district court did not abuse its discretion in granting a preliminary injunction based on the harm to competition and economic harm to consumers, we need not consider whether the district court's findings related to medical harm to patients provided a basis for injunctive relief.

[38] Defendants also argue that the district court erred in discounting the harm that they will suffer as a result of the injunction. We need not consider the balance of the hardships given that New York has demonstrated a substantial likelihood of success on the merits. In any event, we agree with the district court that the balance of the hardships tips decidedly in New York's favor.

Defendants argue that they will be injured if they cannot convert patients to Namenda XR prior to July 2015, but that argument begets the question of whether their conduct **[**57]** is lawful. Certainly, courts do not consider the harm a party suffers from being prevented from violating the law.

Defendants also argue that they "had stopped making IR batches and ha[d] been implementing plans to limit distribution for months." Defs. Br. at 25. Ordering Defendants to manufacture IR, Defendants argue, impedes production of XR and delays the development of Namzaric, an even newer Alzheimer's drug, because the FDA has only certified one plant to produce IR, XR, and Namzaric. This argument is belied by the record. At the preliminary injunction hearing, one of Defendants' executives testified that the plant could manufacture IR while manufacturing XR. J.A. 533. Defendants also informed the district court that there was no cap on the amount of IR that would be supplied through Foundation Care and that the supply could be "adjusted as necessary based on demand." J.A. 904. Another of Defendants' experts testified that the "biggest problem [Defendants] have with [manufacturing both IR and XR] is the labor force," but "the equipment is completely different equipment." J.A. 202. Defendants' expert clarified that they need skilled labor but, at most, he explained that there might **[**58]** be some delay caused by training employees to use the new XR equipment where employees who had manufactured IR would be able to transition more quickly. J.A. 203.

than it did during the specified timeframe and from restricting access to IR. If Defendants need additional clarification, they can seek it in the district court.

Defendants also argue that the injunction is overbroad **[**59]** because there is no antitrust violation in the 20 states in which drug substitution laws *might* allow pharmacists to substitute generic IR for Namenda XR. Defendants did not raise this argument before the district court, and therefore have forfeited it. *See, e.g., Zalaski v. City of Hartford, 723 F.3d 382, 395 (2d Cir. 2013)* ("[P]laintiffs failed to raise the argument in the district court, thereby forfeiting it on appeal."). In any event, that argument is not persuasive because, as explained above, it exaggerates the extent to which state substitution laws differ. Defendants have not brought to our attention a single state in which drug substitution laws will definitively allow pharmacists to submit generic IR for Namenda XR, and have thus failed to identify any state for which there is no antitrust violation.

[*663] CONCLUSION

For the reasons stated above, we AFFIRM the District Court's order granting New York's motion for a preliminary injunction.

In re Capacitors Antitrust Litig.

United States District Court for the Northern District of California

May 26, 2015, Decided; May 26, 2015, Filed

Master File No. 14-cv-03264-JD

Reporter

106 F. Supp. 3d 1051 *; 2015 U.S. Dist. LEXIS 68615 **; 2015-2 Trade Cas. (CCH) P79,230

IN RE CAPACITORS ANTITRUST LITIGATION.

Subsequent History: Motion denied by *In re Capacitors Antitrust Litig., 2015 U.S. Dist. LEXIS 76557, 2015 WL 3638551 (N.D. Cal., June 11, 2015)*

Motion granted by, Motion denied by, Dismissed by, in part *In re Capacitors Antitrust Litig., 154 F. Supp. 3d 918, 2015 U.S. Dist. LEXIS 173404, Trade Reg. Rep. (CCH) P 79443 (N.D. Cal., Dec. 30, 2015)*

Later proceeding at *In re Capacitors Antitrust Litig., 2016 U.S. Dist. LEXIS 136224 (N.D. Cal., Sept. 30, 2016)*

Related proceeding at, Motion denied by *In re Capacitors Antitrust Litig. No. II, 223 F. Supp. 3d 1340, 2016 U.S. Dist. LEXIS 172578 (J.P.M.L., Dec. 7, 2016)*

Motion to strike granted by, Motion denied by, Without prejudice *In re Capacitors Antitrust Litig., 2017 U.S. Dist. LEXIS 32463, 2017 WL 897340 (N.D. Cal., Mar. 7, 2017)*

Related proceeding at, Transferred by *AASI Beneficiaries' Trust v. AVX Corp., 2017 U.S. Dist. LEXIS 92359 (S.D. Fla., June 14, 2017)*

Costs and fees proceeding at, Motion granted by *In re Capacitors Antitrust Litig., 2017 U.S. Dist. LEXIS 99616 (N.D. Cal., June 27, 2017)*

Later proceeding at *In re Capacitors Antitrust Litig., 2017 U.S. Dist. LEXIS 236648 (N.D. Cal., Oct. 30, 2017)*

Related proceeding at *United States v. Elna Co., 2018 U.S. Dist. LEXIS 10851 (N.D. Cal., Jan. 17, 2018)*

Settled by, Class certification granted by *In re Capacitors Antitrust Litig. This Document Relates to: All Direct Purchaser Actions, 2018 U.S. Dist. LEXIS 245910, 2018 WL 11414283 (N.D. Cal., Mar. 2, 2018)*

Motion granted by *In re Capacitors Antitrust Litig., 2018 U.S. Dist. LEXIS 169760 (N.D. Cal., June 28, 2018)*

Costs and fees proceeding at, Motion granted by *In re Capacitors Antitrust Litig., 2018 U.S. Dist. LEXIS 169764 (N.D. Cal., Sept. 21, 2018)*

Class certification granted by, Motion denied by *In re Capacitors Antitrust Litig. (No. III), 2018 U.S. Dist. LEXIS 195310, 2018 WL 5980139 (N.D. Cal., Nov. 14, 2018)*

Later proceeding at *In re Capacitors Antitrust Litig., 2019 U.S. Dist. LEXIS 242178 (N.D. Cal., Feb. 28, 2019)*

Magistrate's recommendation at *In re Capacitors Antitrust Litig., 2019 U.S. Dist. LEXIS 232309, 2019 WL 13166174 (N.D. Cal., July 30, 2019)*

Motion granted by, Costs and fees proceeding at *In re Capacitors Antitrust Litig., 2019 U.S. Dist. LEXIS 239218, 2019 WL 12872867 (N.D. Cal., Dec. 16, 2019)*

Judgment entered by, Claim dismissed by, Settled by *In re Capacitors Antitrust Litig. This Document Relates To: All Direct Purchaser Actions, 2020 U.S. Dist. LEXIS 32265 (N.D. Cal., Feb. 21, 2020)*

Motion granted by, Settled by, in part *In re Capacitors Antitrust Litig., 2020 U.S. Dist. LEXIS 32277 (N.D. Cal., Feb. 21, 2020)*

Settled by *In re Capacitors Antitrust Litig., 2020 U.S. Dist. LEXIS 32278 (N.D. Cal., Feb. 21, 2020)*

Motion granted by, Motion denied by, Without prejudice, Motion granted by, in part *In re Capacitors Antitrust Litig., 2020 U.S. Dist. LEXIS 32282, 2020 WL 870927 (N.D. Cal., Feb. 21, 2020)*

Motion denied by *In re Capacitors Antitrust Litig., 2020 U.S. Dist. LEXIS 33984, 2020 WL 912700 (N.D. Cal., Feb. 25, 2020)*

Dismissed by, Judgment entered by *In re Capacitors Antitrust Litig., 2020 U.S. Dist. LEXIS 263117 (N.D. Cal., July 17, 2020)*

Claim dismissed by, Judgment entered by *In re Capacitors Antitrust Litig., 2020 U.S. Dist. LEXIS 263116 (N.D. Cal., July 17, 2020)*

Costs and fees proceeding at, Magistrate's recommendation at *In re Capacitors Antitrust Litig., 2020 U.S. Dist. LEXIS 210938, 2020 WL 6813220 (N.D. Cal., Sept. 14, 2020)*

Settled by *In re Capacitors Antitrust Litig., 2020 U.S. Dist. LEXIS 209540 (N.D. Cal., Nov. 7, 2020)*

Costs and fees proceeding at, Motion granted by *In re Capacitors Antitrust Litig., 2020 U.S. Dist. LEXIS 209514, 2020 WL 6544472 (N.D. Cal., Nov. 7, 2020)*

Request denied by *In re Capacitors Antitrust Litig., 2021 U.S. Dist. LEXIS 223291, 2021 WL 5407452 (N.D. Cal., Nov. 18, 2021)*

Core Terms

capacitors, allegations, meetings, conspiracy, film, defendants', purchaser, subsidiaries, motion to dismiss, antitrust, consolidated, indirect, cartel, leave to amend, electrolytic, tantalum, participated, joined, prices, plaintiffs', aluminum, alleged conspiracy, Consumer, attended, Electronics, products, class period, complaints, Electric, motions

LexisNexis® Headnotes

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

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

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

HN1[] Motions to Dismiss, Failure to State Claim

To comply with the pleading requirements of *Fed. R. Civ. P. 8(a)(2)* and survive a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss, a plaintiff must allege enough facts to state a claim to relief that is plausible on its face. A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. In evaluating a motion to dismiss, the court must assume that the plaintiff's allegations are true and must draw all reasonable inferences in his or her favor. However, the court need not accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. If the court dismisses a complaint, it should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.

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

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

HN2[] Motions to Dismiss, Failure to State Claim

While a complaint attacked by a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

Antitrust & Trade Law > Sherman Act > Claims

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

HN3[] Sherman Act, Claims

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

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

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

HN4[] Motions to Dismiss, Failure to State Claim

The task of the district court is not to sustain or dismiss a complaint based on whether the court feels it is a winner or has curb appeal. The court's task is to determine whether the facts alleged in the complaint rise above mere speculation, even if the court has doubts about them, and whether they plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.

Antitrust & Trade Law > Sherman Act > Claims

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

HN5[] **Sherman Act, Claims**

There simply is no requirement that an antitrust plaintiff draw the boundaries of the alleged conspiracy (or conspiracies) in a complaint with the precision of a diamond cutter. And mere size or breadth alone is not a reason to peremptorily jettison a conspiracy allegation.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

HN6[] **Tolling of Statute of Limitations, Fraudulent Concealment**

To toll the statute of limitations under a fraudulent concealment theory, a plaintiff must plead facts showing that defendants affirmatively misled it, and that plaintiff had neither actual nor constructive knowledge of the facts giving rise to its claim despite its diligence in trying to uncover those facts. Conclusory statements are not enough, and plaintiffs must instead plead with particularity the circumstances of the concealment and the facts supporting their due diligence. It is generally inappropriate to resolve the fact-intensive allegations of fraudulent concealment at the motion to dismiss stage, particularly when the proof relating to the extent of the fraudulent concealment is alleged to be largely in the hands of the alleged conspirators.

Antitrust & Trade Law > Sherman Act > Claims

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

HN7[] **Sherman Act, Claims**

While detailed "defendant by defendant" allegations are not necessary, an antitrust complaint must allege that each individual defendant joined the conspiracy and played some role in it because, at the heart of an antitrust conspiracy is an agreement and a conscious decision by each defendant to join it.

Mergers & Acquisitions Law > Liabilities & Rights of Successors

HN8[] **Mergers & Acquisitions Law, Liabilities & Rights of Successors**

A purchaser of a company does not assume the seller's liabilities unless: (1) there is an express or implied agreement of assumption; (2) the transaction amounts to a merger or consolidation of the corporations; (3) the purchasing corporation is a mere continuation of the seller; or (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts.

Antitrust & Trade Law > Sherman Act > Claims

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

HN9[] **Sherman Act, Claims**

An antitrust complaint must allege that each individual defendant joined the conspiracy and played some role in it.

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Existence > Distinct & Separate Legal Entity

HN10[] **Existence, Distinct & Separate Legal Entity**

A parent corporation is not liable for the acts of its subsidiaries.

Antitrust & Trade Law > Procedural Matters

Governments > Legislation > Interpretation

HN11[] **Antitrust & Trade Law, Procedural Matters**

The California Supreme Court has been careful to emphasize that the state's antitrust laws are not mere clones of federal law subject to federal court opinions. Interpretations of federal ***antitrust law*** are at most instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was modeled not on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the 20th century.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Choice of Law

Civil Procedure > Special Proceedings > Class Actions

HN12[] **Federal & State Interrelationships, Choice of Law**

The law of any particular state may not be applied to a nationwide class unless (1) the chosen state's law does not conflict with the law of another jurisdiction that has an interest in the case, and (2) the chosen state has a significant contact or significant aggregation of contacts to claims asserted by each member of the plaintiff class such that the choice of that state's law is not arbitrary or unfair.

Civil Procedure > Pleading & Practice > Pleadings

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN13[] **Pleading & Practice, Pleadings**

Unjust enrichment is a remedy and is properly pled in the Prayer for Relief.

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For EPCOS Inc., EPCOS AG, Defendants: Michelle Park Chiu, LEAD ATTORNEY, Morgan Lewis & Bockius LLP, San Francisco, CA.

For Vishay Polytech Co., Ltd., HolyStone International, Holy Stone Enterprise Co., Ltd., Defendants: Jeffrey Alan LeVee, LEAD ATTORNEY, Rachel Hadass Zernik, Jones Day, Los Angeles, CA

For FPCAP Electronics (Suzhou) Co., Ltd., Defendant: Daniel William Fox, K&L Gates LLP, San Francisco, CA; Scott M Mendel, Chicago, IL.

For Fujitsu Components America, Inc., Fujitsu Ltd., Fujitsu Semiconductor America, Inc., Defendants: Paul T. Friedman, LEAD ATTORNEY, Morrison & Foerster LLP, San Francisco, CA; Jeffrey A Jaeckel, Morrison and Foerster LLP, Washington, DC; Michael P. Kniffen, Morrison Foerster LLP, San Francisco, CA.

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For Schuten Electronics, Inc., Interested Party: Brent W Johnson, Kit A. Pierson, Cohen Milstein Sellers and Toll **[**14]** PLLC, Washington, DC; Matthew W Ruan, Cohen Milstein Sellers & Toll, New York, NY.

For UNITED STATES OF AMERICA, Intervenor: Jacklin Chou Lem, LEAD ATTORNEY, Howard J. Parker, United States Department of Justice, Antitrust Division, San Francisco, CA.

Judges: James Donato, United States District Judge.

Opinion by: James Donato

Opinion

[*1058] ORDER ON MOTIONS TO DISMISS

Re: Dkt. Nos. 474, 475, 479, 480

Direct and indirect purchasers in these consolidated antitrust class actions allege price-fixing conspiracies in the capacitor market. The direct purchaser plaintiffs ("DPPs") allege that defendant manufacturers in Japan, Taiwan, Germany and the United States have participated in a single overarching conspiracy since 2003 to artificially raise prices and suppress price competition for aluminum, tantalum and film capacitors. In a separate complaint, the indirect purchaser plaintiffs ("IPPs") allege two conspiracies running over different times for the same products. The defendants are largely the same in the DPP and IPP cases, and include overseas parent companies and United States subsidiaries. Defendants move to dismiss the DPP complaint mainly for failing to state a plausible price-fixing claim. They concede the plausibility **[**15]** of the antitrust claim in the IPP complaint, but challenge it on standing and state law grounds.

The Court denies the motions for the most part. The DPP complaint provides enough factual allegations to state a price-fixing claim. The IPP complaint also survives defendants' primary challenges. In both cases, the Court grants defendants' request to dismiss certain entities who were sued because they belong to an alleged family of conspirators rather than on the basis of specific allegations against them individually. DPPs and IPPs will have an opportunity to amend.

BACKGROUND

The technology at issue here is straightforward. As alleged in both complaints, capacitors are one of the most basic functional units in electronic circuits. While they can vary considerably in specific application, capacitors generally operate to store energy on a short-term basis, like a temporary battery, and smooth out the flow of energy to avoid surges and deficits. Capacitors are classified as "passive" components, which means they do not generate power but store and condition it. At heart, a capacitor consists of two electrical plates, one positively and one negatively charged, that are sandwiched together with **[**16]** a non-conductive insulator called a dielectric between them. They are used universally in circuits. As the result, virtually every electronic device we use, from toasters to cellphones, has capacitors in it.

Capacitors can be electrolytic or electrostatic. As the IPPs allege, electrolytic capacitors are "asymmetrical, polarized constructions," while electrostatic capacitors are "symmetrical, non-polarized constructions." Dkt. No. 400 ¶¶ 128, 129. Capacitors made with a dielectric of aluminum or tantalum are electrolytic capacitors. Those made with a plastic film or ceramic dielectric are electrostatic capacitors.

The DPPs and IPPs bring their antitrust claims in the context of the global market for these ubiquitous components. Unsurprisingly, there is a high degree of overlap between the consolidated complaints, although the IPP complaint does a deeper dive into some areas. *See* Dkt. Nos. 400, 401. Both complaints allege that the defendant capacitor manufacturers, many of whom are based in Japan, engaged in a multi-year price-fixing conspiracy for electrolytic and film capacitors. Both complaints trumpet multiple government antitrust investigations underway in the United States and overseas **[**17]** into possible anticompetitive practices in the capacitor industry. In the United States, the Department of Justice is leading the charge from its San Francisco office. *See* Dkt. No. 401 ¶¶ 274-93; Dkt. No. 400 ¶¶ 13-18. And both complaints highlight **[*1059]** that one of the defendants, Panasonic Corporation, has applied for leniency under the DOJ's Corporate Leniency Program pursuant to the Antitrust Criminal Penalty Enhancement and Reform Act ("ACPERA"). Dkt. No. 400 ¶¶ 15-16; Dkt. No. 401 ¶¶ 278-79.

But the complaints also have some substantial differences. The four named direct purchaser plaintiffs -- Chip-Tech, Ltd., a New York corporation; Dependable Component Supply Corporation, a Florida corporation; eIQ Energy, Inc., a California corporation; and Walker Component Group, Inc., a Colorado corporation, Dkt. No. 401 ¶¶ 25-28 -- allege a single, overarching conspiracy "in aluminum, tantalum and film capacitors" with a class period of January 1, 2003 to the present. *Id.* ¶¶ 1, 111. Each DPP states that it "directly purchased capacitors from one or more defendants during the class period." *Id.* Defining the proposed class to comprise "[a]ll persons in the United States that purchased capacitors . . **[**18]** . directly from any of the defendants" during the class period, *id.* ¶ 111, the DPPs assert a single claim for restraint of trade in violation of Section 1 of the Sherman Act, *15 U.S.C. § 1*. For this claim, the DPPs seek, among other things, treble damages under Section 4 of the Clayton Act, *15 U.S.C. § 15*, and an injunction. *Id.* at 67-68 (Demand for Judgment).

The indirect purchaser plaintiffs, on the other hand, allege two "massive and separate conspiracies" to fix the prices of "electrolytic and film capacitors, respectively." Dkt. No. 400 ¶ 1. The IPPs assert that the "electrolytic class period" has a start date of January 1, 2003, and the "film class period" one of January 1, 2007. *Id.* ¶¶ 2-3. The named IPPs include "First-Level Indirect Purchaser Plaintiffs" -- five named plaintiffs who allege that they purchased capacitors as stand-alone products from one or more distributors, who in turn purchased the capacitors as stand-alone products from defendants. *Id.* ¶¶ 29-34.[1]

The consolidated IPP complaint also included "Consumer Indirect Purchaser Plaintiffs" -- thirty-one plaintiffs hailing from twenty-two states who purchased such varied products as laptops, televisions, tablets, cell phones, printers, game consoles, MP3 players, power tools, dishwashers and auto parts, all of which allegedly contained price-fixed capacitors manufactured by one or more defendants during the respective class periods. *Id.* ¶¶ 35-65. This putative consumer group was the only group to allege claims on the basis of finished goods that included capacitors. In response to the Court's discussion with the interim lead counsel for the putative indirect purchaser plaintiff class at the hearing on the motions to dismiss, counsel filed a Notice of Voluntary Dismissal that dismissed without prejudice all thirty-one of the Consumer Indirect Purchaser Plaintiffs and their claims from the IPPs' first consolidated complaint. Dkt. No. 594. Those plaintiffs and claims are no longer a part of this case and unless otherwise noted, all references to the "indirect purchaser **[**20]** plaintiffs" are references to the "First-Level Indirect Purchaser Plaintiffs" only. In the event the IPPs amend their complaint in response to this order, they are directed to remove the consumer group parties and allegations from the next version.

[*1060] The IPPs allege different dates and types of conduct by the defendants. Some defendants are alleged to have participated only in the electrolytic capacitor cartel, some in only the film capacitor cartel, and some in both. Dkt. No. 400 ¶ 10. The lengthy cast of the IPP defendants largely matches the DPPs' cast, with some variations.

Alleging that each and every capacitor purchased by the IPPs is "traceable to an entity owned and/or controlled by a defendant because it bears the defendant's markings (*e.g.*, name, logo, series)," *id.* ¶ 4, the IPPs assert claims under: (i) the Sherman Act, *15 U.S.C. § 1*; (ii) the California Cartwright Act, *Cal. Bus. & Prof. Code § 16720*; and (iii) the California Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200* ("UCL"). *Id.* ¶¶ 349-379. For the Sherman Act claim, the IPPs seek an injunction only; they seek treble damages under the Cartwright Act and "restitution and/or disgorgement" for the UCL claim. *Id.* ¶¶ 359, 367, 379. The complaint seeks nationwide application of California's **[**21]** Cartwright Act and UCL. *Id.* ¶¶ 368, 379.[2]

Before the Court are four separate motions to dismiss the DPP and IPP complaints. The "joint" motions assert arguments in which all moving defendants join. Dkt. Nos. 474, 479. The "consolidated" motions are compilations of various defendants' individual arguments, *i.e.*, arguments that are specific to why the allegations against that moving **[**22]** defendant should be dismissed. Dkt. Nos. 475, 480.

DISCUSSION

Well-established standards govern these motions. ***HN1***[] To comply with the pleading requirements of *Federal Rule of Civil Procedure 8(a)(2)* and survive a *Rule 12(b)(6)* motion to dismiss, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662,*

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[1] One of the named First-Level Indirect Purchaser Plaintiffs is Alfred H. Siegel, the Liquidating Trustee of the Circuit City Stores, Inc. Liquidating Trust. Dkt. No. 400 ¶ 33. Circuit City Stores, Inc. is alleged to have "indirectly purchased capacitors as stand-alone products **[**19]** and as components of products containing electrolytic and/or film capacitors from one or more of the Defendants." *Id.* ¶ 34.

[2] The complaint also asserts claims for violations of (iv) state antitrust and restraint of trade laws ("in the event that the Court does not apply California law on a nationwide basis"); and (v) state consumer protection and unfair competition laws (again "in the event that the Court does not apply California law on a nationwide basis"). Dkt. No. 400 ¶¶ 380-412. Because the First-Level Indirect Purchaser Plaintiffs are two California residents, two California companies and the trustee of a trust that was established in connection with the bankruptcy of a Virginia corporation, and because no Virginia state law claim is included in the fourth or fifth claims for relief, the Court deems all state claims other than those under California law to have been voluntarily dismissed by the indirect purchaser plaintiffs.

678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing *Twombly at 556*). In evaluating a motion to dismiss, the Court must assume that the plaintiff's allegations are true and must draw all reasonable inferences in his or her favor. *Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987)*. However, the Court need not "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)*. If the Court dismisses a complaint, it "should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000)* (internal quotation marks and citation omitted).

[*1061] I. DIRECT PURCHASER PLAINTIFFS' COMPLAINT

A. *Twombly* Plausibility

The defendants' main attack on the DPP complaint is that it falls short of plausibility **[**23]** under *Twombly*. Specifically, defendants seize upon the one vs. two conspiracy theories in the DPP and the IPP complaints. Defendants concede that they "as a general matter do not challenge the sufficiency of the IPP Complaint's allegations of two separate conspiracies" for electrolytic and film capacitors. Dkt. No. 479 at 2. They attack the DPPs because they do not follow the same approach, and argue that the DPPs' "central allegation of a single overarching conspiracy involving both electrolytic and film capacitors is implausible on its face." *Id.* at 6.

The DPPs defend their complaint with heavy reliance on the fact that the Panasonic/SANYO entities have "admitted to the conduct and provided information about it." Dkt. No. 519 at 1. They say they make highly detailed allegations of conspiracy on the basis of that information, and that these "direct allegations of a conspiracy must be taken as true and establish, without any need for inference, the key facts of the conspiracy." *Id.*

In essence, defendants argue that the DPPs' single conspiracy is just too big to plead, and DPPs contend that where there's smoke, there's fire. The Court finds that both sides exaggerate their positions but that **[**24]** overall the DPP complaint has sufficient grounding in fact to go forward. Panasonic's "admission" does not have the dispositive weight ascribed to it by the direct purchaser plaintiffs. But more importantly for purposes of this motion, defendants limn far too bleak a picture -- and one that does not fairly reflect the DPPs' complaint -- when they argue that the DPPs' allegations are too "conclusory" and "bare-bones" to satisfy *Twombly*, or that size alone can doom conspiracy allegations. Dkt. No. 479 at 11.

The specific pleading standards stated by the Supreme Court in *Twombly* drive these findings. ***HN2***[] "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *550 U.S. at 555* (internal citations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id. at 555-56* (same).

The Court has the added benefit that *Twombly* was itself a Sherman Act § 1 antitrust **[**25]** case. In that context, the same as here, the Supreme Court held that ***HN3***[] a conspiracy claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Id. at 556*. "Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.*

These standards were not met in *Twombly* because the complaint left "no doubt that plaintiffs rest[ed] their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement" among defendants. *Id. at 564*. That omission is not true of the DPP complaint. The DPP complaint makes these substantive agreement allegations:

• "Defendants agreed to concertedly fix, raise, maintain and/or stabilize the **[*1062]** prices for aluminum, tantalum and film capacitors." Dkt. No. 401 ¶ 183. Defendants shared and exchanged with each other "confidential and competitively sensitive information pertaining to their product pricing" either through correspondence or during in-person meetings. *Id.* Pricing agreements were reached both in "regular, organized meetings" **[**26]** as well as through "ad hoc meetings and correspondence." *Id.* ¶ 185. Defendants also "agreed to quote similar or identical production lead times to purchasers on a concerted basis," as well as "to restrain their output." *Id.* ¶¶ 188-89.

• At least by the beginning of 2003, the defendant cartel members had "formally organized meetings among themselves to serve as a forum for the discussion and exchange of competitively sensitive information." *Id.* ¶ 194. These meetings were known variously as "ATC," "MK" or "JFC" meetings, and they were "generally organized by the types of capacitors to be discussed"; ATC and MK for aluminum and tantalum capacitors, and JFC meetings for film capacitors. *Id.* ¶ 196.

• Defendants generally held "monthly one-day meetings that were usually attended by manager-level employees," as well as "two-day meetings" twice a year that were "generally attended by defendants' more senior officials." *Id.* ¶¶ 201-02. For specific defendant groups such as the film capacitor manufacturers, meetings were held less frequently, *i.e.*, every one to three months. *Id.* ¶ 203.

• "Based on the recommendations and agreements reached at these different cartel meetings, the defendant attendees **[**27]** intended to and did agree to price capacitors collusively, stand united against price reduction demands, and set production and delivery dates to collusively control supply in the aluminum and tantalum capacitors markets." *Id.* ¶ 204.

• The complaint also describes, by way of example, organized "cartel meetings" that took place in ten different time periods, as well as a number of informal meetings among defendants that took place during the class period. *Id.* ¶¶ 208-18. Included are allegations of the identities of the defendants companies whose representatives attended each meeting, and defendant attendees are alleged, among other things, to have discussed "their plans to increase film capacitor prices" at a "cartel meeting" in the 4th quarter of 2007, discussed "implementing film capacitor price increases" at a meeting in the 4th quarter of 2008, and "agreed among themselves to resist price decreases and stabilize their film capacitor prices" at a meeting in the 1st quarter of 2009. *Id.* ¶ 208(a), (d), (e).

• Finally, the complaint alleges -- with specific price data -- that defendants' "concerted and collusive actions . . . artificially inflated the prices of capacitors," and "defendants' **[**28]** conspiracy permitted the defendant manufacturers of aluminum, tantalum and film capacitors to slow, negate and even reverse the market-driven decline in price for their products, and to fix prices at supra-competitive levels." *Id.* ¶ 219-23.

These allegations are enough to avoid dismissal. As an initial matter, they add up to much more than the superficial generalities about the "absence of any meaningful competition" and "parallel course of conduct" that sank the complaint in *Twombly.* **[*1063]** *550 U.S. at 564-65*. Defendants strongly deny the allegations and attack them as impossible or wrong but that objection clearly is irrelevant to this motion to dismiss. Whether the DPPs will carry their burden of proof on the price-fixing claim is a decidedly different issue from whether they have alleged enough facts under *Rule 8* to stay in court. Like others before them, defendants ask this Court to treat *Twombly* as a license to resolve a *Rule 12(b)(6)* challenge on an impressionistic assessment of a complaint's merits. But ***HN4***[] the task of the district court is not to sustain or dismiss a complaint based on whether the Court feels it is a winner or has curb appeal. The Court's task is to determine whether the facts alleged in the complaint rise above **[**29]** mere speculation, even if the Court has doubts about them, *Twombly, 550 U.S. at 555-56*, and whether they "plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011)*; *see also* *Twombly, 550 U.S. at 556* (standard simply calls for "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."). The DPP complaint passes this test.

In using the IPP complaint against the DPPs', defendants also overstate the differences between the pleadings. Despite the allegation of two separate conspiracies, the IPPs acknowledge that some defendants (Hitachi, NCC, Rubycon and Panasonic) participated in both, and that "discovery may reveal that there was one overarching conspiracy due to the overlapping defendants and customers." Dkt. No. 400 at 5 & 1 n.2. The DPPs similarly acknowledge that "[w]hile there was substantial overlap between and among defendants who participated in discussions, communications and agreements concerning electrolytic (aluminum and tantalum) capacitors, on the one hand, and film capacitors, on the other, much still needs to be discovered." Dkt. No. 401 ¶ 181. The DPPs have nevertheless **[**30]** taken the step of alleging one overarching conspiracy, but, like the IPPs, the DPPs identify "Nippon Chemi-Con, Rubycon, Hitachi AIC and Panasonic/SANYO" as having played a "key role" because "each of these defendant companies manufactured both electrolytic capacitors (*i.e.*, aluminum and/or tantalum) and film capacitors and are dominant manufacturers of these capacitors." *Id.* ¶ 199.

Not only are the factual allegations between the two complaints not as dissimilar as defendants contend,***HN5***[] there simply is no requirement that an antitrust plaintiff draw the boundaries of the alleged conspiracy (or conspiracies) in a complaint with the precision of a diamond cutter. *See* In re Lithium Ion Batteries Antitrust Litigation ("Batteries I"), No. 13-MD-2420 YGR, 2014 U.S. Dist. LEXIS 7516, 2014 WL 309192, at *2 (N.D. Cal. Jan. 21, 2014) ("The question in this case is not whether any conspiracy existed, only how far it reached. That question is ultimately one of fact, and cannot be resolved in the present procedural posture, where the Court tests only the sufficiency of the pleadings."). And mere size or breadth alone is not a reason to peremptorily jettison a conspiracy allegation. Defendants cite In re Optical Disk Drive Antitrust Litigation, No. 3:10-md-2143 RS, 2011 U.S. Dist. LEXIS 101763, 2011 WL 3894376 (N.D. Cal. Aug. 3, 2011), for the purported rule **[**31]** that "a single overarching conspiracy" is inherently implausible. Dkt. No. 479 at 7. But the case does not stand for that proposition at all. There, the court was reacting to an allegation of conspiracy that stretched from stand-alone disk drives to products that incorporated the drives into other devices. 2011 U.S. Dist. LEXIS 101763, 2011 WL 3894376, at *6. None of **[*1064]** the device makers were named as defendants and they participated in a broad range of markets and marketing channels that the named drive conspirators would somehow need to have controlled. *Id.* For that reason, the court expressed plausibility concerns. But that reason does not, of course, exist in this case, which involves only stand-alone capacitors. So long as an alleged conspiracy is supported by enough facts to make it plausible, as it is here, it is of no matter whether it involves three conspirators or a score or more.

Significantly, defendants do not attack the plausibility of the IPPs' complaint, which alleges a film capacitor conspiracy beginning in 2007 and an electrolytic capacitor conspiracy beginning in 2003. While defendants seek to make much of the fact that the DPP complaint puts the starting date of the film capacitor conspiracy at 2003 (because it alleges **[**32]** a single conspiracy from 2003 for all the named products), defendants did not explain in their papers or at the hearing how, if at all, this difference would have any impact on the scope or cost of discovery. *Cf.* Twombly, 550 U.S. at 559 ("it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive"). The DPPs' allegations "give a defendant seeking to respond to [the] allegations of [] conspiracy an idea of where to begin," and defendants cannot with a straight face claim otherwise. Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 (9th Cir. 2008).

The Court finds that the DPP complaint has met the bar set by Twombly after considering, as it must, the DPPs' complaint as a whole. The Court makes clear, however, that the government investigations alleged by plaintiffs carry no weight in that holistic analysis. Dkt. No. 401 ¶¶ 275-76, 280-83 (describing investigations by the U.S. DOJ Antitrust Division, the People's Republic of China's National Development and Reform Commission, and Fair Trade Commissions of Japan, South Korea, Taiwan and the European Commission's competition authority). "It is unknown whether the[se] investigation[s] will result in indictments or nothing at all." **[**33]** In re Graphics Processing Units Antitrust Litigation ("GPU"), 527 F. Supp. 2d 1011, 1024 (N.D. Cal. 2007). Moreover, at least some, and possibly all, of these investigations are being conducted in secret, and consequently, "the scope of the investigation is pure speculation. It may be broader or narrower than the allegations at issue." *Id.*

Panasonic's leniency application through ACPERA is in the same boat. Dkt. No. 401 ¶¶ 277-79. While substantively different from a mere investigation, the ACPERA application also entails a lack of transparency that vitiates its utility in a pleading. The parties agreed at the hearing that there is no pertinent case law on this issue, and that this case presents a rather unusual factual circumstance in that the ACPERA application (and corresponding assistance to the private plaintiffs) came early in the timeline. DPPs ask the Court to treat Panasonic's application as the equivalent of a guilty plea that admits all facts. They assert that Panasonic must "admit to price fixing" by statute and DOJ policy in order to receive leniency under ACPERA. *Id.* ¶ 279. Panasonic did not dispute this, and further acknowledged that it must sufficiently cooperate with both plaintiff groups in order to avoid both **[**34]** treble damages and joint and several liability pursuant to ACPERA. But as Panasonic pointed out, and plaintiffs agreed, the ACPERA process is not transparent. There is in fact no guilty plea or similar formal acknowledgement of wrongdoing that plaintiffs, and more critically **[*1065]** the Court, can see and evaluate. While it is tempting to ascribe a higher value to the application than to an investigation, its contents are unknown and the same concerns about the lack of transparency in investigative proceedings applies here. It is not possible for the Court to delimit the actual scope of Panasonic's alleged admissions and how they map on to the DPP civil complaint. Consequently, Panasonic's ACPERA application is a non-factor in the Court's analysis. The Court understands that Panasonic has proffered facts about its scope of conduct and documents to both groups of plaintiffs, but otherwise the Court finds that it is not particularly different from the other defendants for present purposes. Panasonic's application certainly is not the be-all and end-all confession that DPPs' motion to dismiss opposition suggests.

B. Statute of Limitations

Defendants also seek dismissal of the DPPs' claim at least **[**35]** "to the extent it accrued before July 18, 2010," pursuant to the Clayton Act's four-year statute of limitations. Dkt. No. 479 at 20 (citing *15 U.S.C. § 15b*). Defendants argue that the DPPs' allegation that the statute was tolled by defendants' fraudulent concealment is insufficient because the DPPs have alleged "no specific facts that would satisfy *Rule 9(b)* to support their conclusory allegations," such as the dates, time or locations of any "secret discussions" or when, how, where and why any "coded language" was used. *Id.* at 21.

HN6[] To toll the statute of limitations under a fraudulent concealment theory, a plaintiff "must plead facts showing that [defendants] affirmatively misled it, and that [plaintiff] had neither actual nor constructive knowledge of the facts giving rise to its claim despite its diligence in trying to uncover those facts." *Conmar Corp. v. Mitsui & Co. (U.S.A.), 858 F.2d 499, 502 (9th Cir. 1988)*. Conclusory statements are not enough, and plaintiffs must instead "plead with particularity the circumstances of the concealment and the facts supporting [their] due diligence." *Id.* "[I]t is generally inappropriate to resolve the fact-intensive allegations of fraudulent concealment at the motion to dismiss stage, particularly when the proof relating to the extent of the fraudulent **[**36]** concealment is alleged to be largely in the hands of the alleged conspirators." *In re Cathode Ray Tube (CRT) Antitrust Litigation, 738 F. Supp. 2d 1011, 1024 (N.D. Cal. 2010)*.

The Court finds that the DPPs have made specific allegations of fraudulent concealment. They allege that defendants generally "agreed not to discuss publicly the nature of the scheme" and "did not take or distribute official minutes or record" the meetings alleged. Dkt. No. 401 ¶¶ 295-96. And plaintiffs quote from a 2006 e-mail from a SANYO employee, stating: "[E]xchanging information is useful . . . . However, it maybe [*sic*] become a double-edged sword at times. To the extent possible, try to exchange verbally so that no evidence is left behind. Especially pricing figures and important presentation materials." *Id.* ¶297. Plaintiffs also allege a SANYO employee's comments in an e-mail requesting "utmost care in handling" reports attached to the e-mail because the "gathering[s] should not be disclosed to the public." *Id.* ¶ 299. Other e-mails among SANYO employees and NEC-TOKIN employees are alleged to have included the instruction, "Once you read this email, please delete it." *Id.* ¶ 300.

These allegations are sufficiently particularized to support the allegation of fraudulent concealment at this stage. The Court denies defendants' **[**37]** request to dismiss plaintiffs' claim to the extent it accrued before July 18, 2010.

[*1066] C. SUFFICIENCY OF ALLEGATIONS FOR EACH DEFENDANT'S MEMBERSHIP AND ROLE

Defendants' third and final "joint" argument is that the direct purchaser plaintiffs have not sufficiently alleged each defendant's membership and role in the alleged conspiracy. Dkt. No. 479 at 16. Defendants make this argument in two ways.

Defendants argue that the DPPs "ignore corporate separateness and fail to sufficiently allege the involvement of the U.S. subsidiaries." *Id.* at 17. Defendants say the DPP complaint "does not contain a single, solitary allegation linking the majority of the defendant U.S. subsidiaries to the alleged conspiracy." *Id.* The Court agrees with the general principle that, ***HN7***[] while detailed "'defendant by defendant' allegations" are not necessary, an antitrust complaint "must allege that each individual defendant joined the conspiracy and played some role in it because, at the heart of an antitrust conspiracy is an agreement and a conscious decision by each defendant to join it." *In re TFT-LCD (Flat Panel) Antitrust Litigation, 586 F. Supp. 2d 1109, 1117 (N.D. Cal. 2008)*. But this case involves twenty-two different defendant groups, Dkt. No. 491 ¶¶ 7-107, and defendants have done little to identify who is **[**38]** in the "majority" they reference. The Court declines the invitation to do the heavy lifting on its own time and resources to figure out which defendants fall into the "majority" and which do not. The Court resolves the separate motions to dismiss brought by individual defendants and defendant groups below, but it denies defendants' joint motion to dismiss the "majority" of the defendant U.S. subsidiaries for lack of specificity.

Defendants also argue that "[e]qually fatal to the DPPs' complaint is its failure to identify the role each defendant played in the alleged conspiracy." Dkt. No. 479 at 19. This argument, too, is made on behalf of all moving defendants with no further specification. *Id.* at 19-20. But not only is there no particularity requirement akin to *Rule 9(b)* to explain each defendant's own, unique role, defendants have identified no basis for dismissing all defendants for this alleged failure. The Court denies this request as well.

D. Individual Defendants' Motions

The Court turns to the twelve separate motions brought by individual defendants and defendant groups. Dkt. No. 480. The Court grants these motions in part and denies them in part.

a. AVX Corporation

The Court grants AVX Corporation's motion **[**39]** to dismiss with leave to amend. AVX Corporation is not alleged to have participated in or even been informed of the "cartel's regular meetings," Dkt. No. 401 ¶ 198, nor is it alleged to have participated in any cartel "sub-groups" or in any specific cartel meetings. The only substantive allegation against AVX is that it "worked to coordinate pricing strategy" with other defendants, *id.* ¶¶ 215-16, but these allegations fall short of alleging "an agreement and a conscious decision" by AVX to join it. *TFT-LCD, 586 F. Supp. 2d at 1117*.

Also insufficient are the allegations about AVX's February 2013 acquisition of "Nichicon's tantalum capacitor production facilities in Japan and China." Dkt. No. 401 ¶ 64. Plaintiffs assert that the acquired facility is a "mere continuation of" the unit as it was organized and operated by Nichicon, and that AVX is consequently the "successor in interest" to all assets and liabilities, including those arising from the unit's alleged violations of § 1 of the Sherman Act. *Id.* ¶ 65. However,***HN8***[] "[a] purchaser of a company does not **[*1067]** assume the seller's liabilities unless: (1) there is an express or implied agreement of assumption; (2) the transaction amounts to a merger or consolidation of the corporations; **[**40]** (3) the purchasing corporation is a mere continuation of the seller; or (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts." *GPU, 527 F. Supp. 2d at 1031* (citing *Ray v. Alad Corp., 19 Cal. 3d 22, 28, 136 Cal. Rptr. 574, 560 P.2d 3 (1977))*. Here, plaintiffs have made nothing but the conclusory allegation of "mere continuation." That is not enough. *See, e.g., No Cost Conf., Inc. v. Windstream Commc'ns., Inc., 940 F. Supp. 2d 1285, 1299 (S.D. Cal. 2013)* (finding that even though liberal requirements of *Rule 8(a)(2)* apply to successor-in-interest allegations, conclusory allegation that defendant assumed all rights and responsibilities as result of merger was insufficient, because plaintiff "must plead the existence of a contract [and] its terms which establish the obligation [in] issue") (internal quotation marks omitted).

b. EPCOS AG, EPCOS Inc., TDK-EPC Corporation and TDK U.S.A. Corporation

The Court denies the motion to dismiss by EPCOS AG, but grants the motions of EPCOS Inc., TDK-EPC Corporation and TDK U.S.A. Corporation with leave to amend.

Plaintiffs filed a chart identifying the specific paragraphs in their consolidated complaint for each defendant. *See* Dkt. No. 520-2. For EPCOS AG, the chart shows that the only substantive allegations are paragraphs 213 and 214 of the consolidated complaint. Paragraph 213, however, alleges **[**41]** that during the class period, "SANYO and EPCOS met at a trade show to discuss their tantalum capacitors, conducted an exchange of competitively sensitive information, [and] *agreed to make such exchanges in the future so that they could cooperate on future pricing*." Dkt. No. 401 ¶ 213 (emphasis added). This allegation is enough to meet the *Twombly* pleading standard, and EPCOS AG's motion is denied. *See* *In re Citric Acid Litig., 191 F.3d 1090, 1103 (9th Cir. 1999)* (Supreme Court held in *U.S. v. Container Corp. of America, 393 U.S. 333, 89 S. Ct. 510, 21 L. Ed. 2d 526 (1969)* that "the reciprocal exchange of price information pursuant to an agreement by the defendants was concerted action sufficient to establish a price-fixing conspiracy.").

As plaintiffs' chart shows, paragraph 213 is not identified as applying to EPCOS AG's subsidiary companies, *i.e.*, EPCOS Inc., TDK-EPC Corporation and TDK U.S.A. Corporation. *See* Dkt. No. 520-2. The allegations that do relate to those companies are too paltry to go forward and those companies are dismissed with leave to amend.

c. Fujitsu Components America, Inc.

The Fujitsu family of defendants includes three entities, but only Fujitsu Components America, Inc. ("FCA") has filed a separate motion to dismiss. FCA argues that the DPP complaint fails to allege that it joined the conspiracy and played a **[**42]** role in it. The Court agrees. Plaintiffs' chart acknowledges that paragraphs 54 and 123 of the consolidated complaint are the only ones that mention FCA. Paragraph 54 generally alleges that FCA "sold and distributed to United States purchasers aluminum and/or tantalum and/or film capacitors manufactured by business units . . . of its corporate parent, Fujitsu." Dkt. No. 401 ¶ 54. Paragraph 123 alleges in a vague and conclusory manner that FCA is one of the defendants that "assisted its respective corporate parent defendants with the sale and/or delivery to United States purchasers of the parents' **[*1068]** respective aluminum, tantalum and film capacitors to United States purchasers." *Id.* ¶ 123.

Plaintiffs argue that they are not required to "plead the precise role in the conspiracy of each individual company in each corporate family," and try to rely on their general allegations against the "larger Fujitsu corporate family." Dkt. No. 519 at 38-39. That is not a sound approach. ***HN9***[] An antitrust complaint "must allege that each individual defendant joined the conspiracy and played some role in it." *TFT-LCD, 586 F. Supp. 2d at 1117*. The cases that found adequate pleading against subsidiaries contained much more than is present here. **[**43]** *See* *CRT, 738 F. Supp. 2d at 1019* (noting allegations that "employees engaged in conspiratorial meetings on behalf of members of their corporate families, that participants did not always know the corporate affiliation of their counterparts and did not distinguish between the entities within a corporate family," and finding as a result that "the entire corporate family was represented in meetings and discussions . . . and was a party to the agreements reached in them."); *see also* *In re Lithium Ion Batteries Antitrust Litig. ("Batteries II"), No. 13-MD-2420 YGR, 2014 U.S. Dist. LEXIS 141358, 2014 WL 4955377, at *34 (N.D. Cal. Oct. 2, 2014)* (plausible to infer "that generic references to NEC in documents generated by defendants themselves implicate both NEC Corp. and NEC Tokin"). FCA is dismissed from the direct purchaser plaintiffs' complaint with leave to amend.

d. Holy Stone Enterprise Co., Ltd. and HolyStone International

Defendants Holy Stone Enterprise Co., Ltd. and HolyStone International (who refer to themselves collectively as "Holy Stone") move for dismissal "for failure to offer facts plausibly suggesting that Holy Stone joined and participated in the alleged 'global' conspiracy." Dkt. No. 480 at 19. But while Holy Stone argues that the DPPs' complaint offers "only a single, conclusory allegation **[**44]** regarding Holy Stone" in paragraph 208(j), the complaint mentions Holy Stone in at least one other substantive paragraph. In paragraph 198, the complaint alleges that "meeting rosters during the period from 2003 to 2008 indicate that officers, managers and/or employees of the following defendant companies participated in or were informed of the cartel's regular meetings: . . . Holy Stone . . . ." Dkt. No. 401 ¶ 198. The complaint further alleges that "[b]ased on the recommendations and agreements reached at these different cartel meetings, the defendant attendees intended to and did agree to price capacitors collusively, stand united against price reduction demands, and set production and delivery dates to collusively control supply in the aluminum and tantalum capacitors markets." *Id.* ¶ 204. In addition to these allegations, the consolidated complaint alleges that "[r]epresentatives of NEC TOKIN, Nippon Chemi-Con, Rubycon, Matsuo, ELNA, ROHM and Holy Stone attended cartel meetings held in the 2nd Quarter of 2010." *Id.* ¶ 208(j).

The Court finds that the allegations against Holy Stone are sufficient under *Twombly*, and denies Holy Stone's motion to dismiss.

e. KEMET Corporation and KEMET Electronics Corporation [45]**

Like Holy Stone, KEMET Corporation is named in paragraph 198 of the consolidated complaint and in at least one of the subparagraphs of paragraph 208. Dkt. No. 401 ¶¶ 198, 208(c). In addition, KEMET Corporation is specifically alleged to have "joined the conspiracy at least by 2008 and perhaps by 2005, if not earlier." *Id.* ¶ 217. Although KEMET Corporation argues that "[i]t does not make sense that KEMET, an American company, was invited **[*1069]** to attend or attended" meetings which were presumably "conducted in Japanese," this argument misunderstands the standards that apply at this stage of the proceedings. KEMET Corporation's motion to dismiss is denied.

Its subsidiary, KEMET Electronics Corporation ("KEC"), is a different story. The four paragraphs that plaintiffs identify as relating to KEC -- paragraphs 38 through 41 of the consolidated complaint -- establish only that KEC acquired a controlling majority voting interest in NEC TOKIN and as a result, "KEC has, since early 2012, sold and distributed NEC TOKIN's aluminum and/or tantalum capacitors, directly or through its business units, subsidiaries, agents or affiliates, to United States purchasers." Dkt. No. 401 ¶¶ 38-41. These allegations **[**46]** do nothing to establish that KEC itself joined the conspiracy. KEC is dismissed with leave to amend.

f. Nichicon Corporation and Nichicon (America) Corporation

The allegations against Nichicon Corporation are sufficient and its motion to dismiss is denied. Among other things, Nichicon Corporation is alleged to have participated in the "cartel's regular meetings"; the defendant attendees are alleged to have "intended to and did agree to price capacitors collusively [and] stand united against price reduction demands"; and representatives from "Nichicon" are alleged to have attended at least four separate "cartel meetings." Dkt. No. 401 ¶¶ 198, 204, 208 (f)-(i). These are enough.

Nichicon (America) Corporation ("Nichicon America"), however, is dismissed with leave to amend. Plaintiffs' chart shows that paragraphs 58 and 123 of the consolidated complaint are the only ones that relate to Nichicon America. Dkt. No. 250-2 at 2. As discussed, these allegations are insufficient.

g. Okaya Electric Industries Co., Ltd. and Okaya Elec tric America Inc.

Okaya Electric America Inc. ("Okaya America") is similarly situated to Nichicon America. *See* Dkt. No. 520-2 at 2 (identifying only paragraphs 93 and **[**47]** 123 of the consolidated complaint as relating to Okaya America). The Court grants its motion to dismiss with leave to amend.

Okaya Electric Industries Co., Ltd., on the other hand, impermissibly re-argues a point already raised in defendants' joint motion. *See* Dkt. No. 480 at 31 (attacking plausibility of one overarching conspiracy encompassing both film capacitors and electrolytic capacitors). It is denied for the same reasons the Court has denied defendants' joint motion.

h. ROHM Co., Ltd. and ROHM Semiconductor U.S.A., LLC

ROHM Semiconductor U.S.A. LLC is in the same boat as defendants Okaya America and Nichicon America. *See* Dkt. No. 520-2 at 2 (identifying only paragraphs 85 and 123 of the consolidated complaint as relating to ROHM Semiconductor U.S.A.). It is dismissed with leave to amend for the same reasons.

Its parent company, ROHM Co., Ltd., presents a closer call. While the allegations against it are thin, and the Court finds that reference to its membership in trade associations (Dkt. No. 401 ¶¶ 268-69) adds nothing to the analysis here, the Court concludes plaintiffs have alleged enough to get past the *Twombly* pleadings bar. ROHM is alleged to be included in "[m]eeting rosters during **[**48]** the period from 2003 to 2008" for "cartel meetings," and its representatives are alleged to have attended at least one meeting in the 2nd quarter of 2010. *Id.* ¶¶ 198, 208(j).

[*1070] i. Shinyei Kaisha, Shinyei Capacitor Co., Ltd. and Shinyei Corporation of America, Inc.

Defendants Shinyei Capacitor Co., Ltd. and Shinyei Corporation of America are identified as having only one and two allegations, respectively, in the consolidated complaint that relate to them. Dkt. No. 520-2 at 2-3 (identifying paragraph 99 for Shinyei Capacitor Co., Ltd. and paragraphs 100 and 123 for Shinyei Corporation of America). These paragraphs have no substance -- certainly none that shows these defendants as having joined the conspiracy -- and these defendants are dismissed with leave to amend.

Shinyei Kaisha is similarly situated as ROHM Co., Ltd. and Holy Stone, discussed above, except that it is alleged to have participated in at last four meetings (which, it should be noted, are described by way of example and not as constituting an exhaustive list of all cartel meetings). *See* Dkt. No. 401 at ¶ 208(b), (c), (d), (e). Its motion to dismiss is denied.

j. Soshin Electric Co., Ltd. and Soshin Electronics of America, Inc. [49]**

The allegations against Soshin Electronics of America, Inc. (*see* Dkt. No. 520-2 at 3, identifying only paragraphs 105 and 123) are insufficient to show that it joined the conspiracy. The Court grants Soshin Electronics of America, Inc.'s motion to dismiss with leave to amend.

Soshin Electric Co., Ltd.'s motion otherwise repeats arguments made in the defendants' joint motion, which the Court declined. While the Court has some concern that Soshin is not alleged to have participated in a single, specific meeting (Dkt. No. 520-2 at 3, identifying only paragraphs 104, 198, 208 and 268), the list of specific meetings is intended to be a sampling only. The Court consequently concludes that plaintiffs have pled enough to proceed as against Soshin Electric Co., Ltd. and denies its motion to dismiss.

k. United Chemi-Con, Inc.

United Chemi-Con, Inc. ("UCC"), a U.S. subsidiary of Nippon Chemi-Con Corporation, is the only defendant in its corporate family to seek dismissal. Dkt. No. 401 ¶ 45. As with the other U.S. subsidiaries dismissed above, plaintiffs' chart shows that only paragraphs 45 and 123 relate to UCC. Dkt. No. 520-2 at 3. That is not enough, and UCC is dismissed with leave to amend.

I. [50] Vishay Intertechnology, Inc.**

Plaintiffs' chart identifies six paragraphs of the consolidated complaint that relate to Vishay Intertechnology, Inc. ("Vishay"). Dkt. No. 520-2 at 3. Two of these can be dispensed with easily. Paragraph 269 alleges membership in a trade association, and paragraph 307 alleges that "in 2010 and 2011, defendants Vishay and Panasonic each made a number of public statements to industry and technology media attributing supply limitations and pricing adjustments for their tantalum electrolytic capacitors to raw materials supply issues." Dkt. No. 401 ¶¶ 269, 307. Neither of these allegations advances the ball in the slightest towards alleging Vishay's participation in the alleged conspiracy.

The other four paragraphs, 76, 79, 80 and 82, all relate to Vishay's acquisition of Holy Stone Polytech -- Hitachi AIC's tantalum and niobium capacitors division, which was acquired by Holy Stone -- on or about June 11, 2014. Dkt. No. 401 ¶¶ 76, 80. The division was renamed "Vishay Polytech Co., Ltd." and Vishay Polytech is alleged to be a successor in interest to Holy Stone Polytech's liabilities, including those alleged under § 1 of the Sherman Act. *Id.* ¶ 81. Vishay itself, however, **[**51]** is not alleged to be such a successor in interest. Although Vishay Polytech is itself **[*1071]** named as a defendant, it does not seek dismissal.

For Vishay, it is alleged to have "effectively purchased a participant in the unlawful cartel alleged herein and [to have] thereby joined and participated in defendants' conspiracy through Vishay Polytech's acts taken in furtherance of the conspiracy." Dkt. No. 401 ¶82. But***HN10***[] a parent corporation "is not liable for the acts of its subsidiaries." *In re Cal. Title Ins. Antitrust Litig., No. C 08-01341 JSW, 2009 U.S. Dist. LEXIS 43323, 2009 WL 1458025, at *7 (N.D. Cal. May 21, 2009)* (quoting *United States v. Bestfoods, 524 U.S. 51, 61, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1988))*. Plaintiffs have identified no reason why this "general principle of corporate law deeply ingrained in our economic and legal systems" is inapplicable here. Defendant Vishay Intertechnology, Inc. is dismissed with leave to amend.

II. INDIRECT PURCHASER PLAINTIFFS' COMPLAINT

Also pending before the Court are "joint" and "consolidated" motions to dismiss the indirect purchaser plaintiffs' complaint. Dkt. Nos. 474, 475. Those motions are easier to resolve because defendants do not contest the plausibility of the indirect purchaser plaintiffs' allegations, and because plaintiffs voluntarily dismissed the indirect consumer purchaser plaintiffs after the hearing. **[**52]** Dkt. No. 594.

A. Article III Standing

Defendants make two standing arguments under Article III of the United States Constitution. They argue that the indirect purchaser plaintiffs lack standing because they have "failed to allege the necessary pass through of injury down the complicated distribution and product chains applicable to the different IPPs," and because they "fail to allege facts sufficient to show that their claimed injury is traceable to *any* defendant." Dkt. No. 474 at 5-6.

If the multi-level consumer IPPs were still in the case, defendants' arguments might have some punch. But the consumers have been voluntarily dismissed, and so the thrust of these arguments has been substantially blunted. To the extent they are applicable at all to the remaining "first-level" IPPs, they are unpersuasive. These IPPs allege that "[e]lectrolytic and film capacitors are discrete and identifiable component parts that pass through the chain of distribution in substantially the same form from defendants to consumers when purchased as part of electronic products." Dkt. No. 400 ¶ 151. Moreover, "[a] capacitor is traceable to an entity owned and/or controlled by a defendant because it bears the defendant's markings (*e.g.*, name, logo, series)." *Id.* The first-level **[**53]** indirect purchaser plaintiffs further allege that they "purchased electrolytic and/or film capacitors as stand-alone products from one or more distributors that purchased such capacitors as stand-alone products from one or more defendants during the respective class periods," *id.* ¶ 29, and paid supracompetitive prices for them, *id.* ¶¶ 286-87. These allegations are sufficient to establish injury in fact fairly attributable to the defendants for standing purposes. *See* *TFT-LCD, 586 F. Supp. 2d. at 1122-23* (sustaining IPP claims on similar allegations). Defendants' reliance on *Easter v. American West Financial, 381 F.3d 948 (9th Cir. 2004)*, in no way undercuts this conclusion. That case involved a summary judgment motion under Washington state laws on usury in bank loan agreements where the "borrowers presented no evidence that their alleged injuries were the result of a conspiracy or concerted scheme between the trust defendants." *Id. at 962*. It has no application here.

[*1072] Defendants also argue under Article III that the complaint "lacks representative plaintiffs for the Consumer IPPs' Michigan claim and the First-Level IPPs' claims for all states other than California, and the Consumer IPPs have also failed to allege facts that they purchased products affected by either of the claimed conspiracies." **[**54]** Dkt. No. 474 at 5. Obviously, these arguments are mostly mooted by the voluntary dismissal of the Consumer IPPs. The four remaining first-level IPPs hail from only two states, California and Virginia, and the IPPs' complaint does not assert any claim under Virginia state law. Consequently, the Court finds that the only live question is whether California law can be applied nationwide, which the Court resolves shortly.[3]

B. *AGC*

Defendants spent substantial effort attacking standing under the prudential considerations in *Associated General Contractors of California v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* ("*AGC*"). They argued that "[a]ccording to the legislatures or courts of eighteen of the nineteen states at issue here, *AGC* or analogous principles apply to determine standing under their respective antitrust laws," and the claims brought under those states' laws should therefore be dismissed. Dkt. No. 551 at 5. But now that the Consumer IPPs are no longer a part of the case and no Virginia state law claim has been asserted, the only state whose laws can be invoked is California. **[**55]**

The application of *AGC* to California state antitrust claims has recently become murky, and that murkiness persuades the Court *AGC* should not be applied. As an initial matter, *AGC* is a creature of federal law and sets out standards for federal antitrust standing. *See* *AGC, 459 U.S. at 521* ("question presented is whether the complaint sufficiently alleges that the unions have been 'injured in [their] business or property by reason of anything forbidden in the ***antitrust law***' and may therefore recover treble damages under § 4 of the Clayton Act"). Defendants include California in their list of states where the legislature or highest court has "indicated that federal ***antitrust law*** should be followed in determining standing." Dkt. No. 474 at 10. This is a mighty overstatement of California law. Defendants fail to cite any California statute showing that the California legislature has made that indication. Defendants' characterization of a decision by the California Supreme Court is equally shaky. Defendants cite *Clayworth v. Pfizer, Inc., 49 Cal. 4th 758, 111 Cal. Rptr. 3d 666, 233 P.3d 1066 (2010)*, for the proposition that the California Supreme Court applies and follows *AGC*. But that case did not involve a question of standing under the California antitrust laws, and the court's reference to *AGC* ***[**56]*** was at most a passing one made in discussing an intermediate appellate court's opinion. *Id. at 774*. *Clayworth* is not at all a definitive decision holding that *AGC* applies to California antitrust claims.

To the contrary, since *Clayworth*,***HN11***[] the California Supreme Court has been careful to emphasize that the state's antitrust laws are not mere clones of federal law subject to federal court opinions. "Interpretations of federal ***antitrust law*** are at most instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was modeled not on federal antitrust statutes but instead on statutes **[*1073]** enacted by California's sister states around the turn of the 20th century." *Aryeh v. Canon Bus. Solutions, Inc., 55 Cal. 4th 1185, 1195, 151 Cal. Rptr. 3d 827, 292 P.3d 871 (2013)*. The California Supreme Court just reiterated that teaching in a very recent

[3] For these same reasons, the Court finds as inapplicable defendants' state-specific arguments (which do not relate to either California or Virginia), and denies those arguments on that basis. Dkt. No. 474 at 27-31.

decision on reverse payment settlement agreements. *See* In re Cipro Cases I & II, No. S198616, 61 Cal. 4th 116, 187 Cal. Rptr. 3d 632, 348 P.3d 845, 2015 Cal. LEXIS 2486, 2015 WL 2125291, at *10 (Cal. May 7, 2015).

The Ninth Circuit has recognized this development in California law. Samsung Electronics Co. v. Panasonic Corp., 747 F.3d 1199, 1205 (9th Cir. 2014) (finding that it is "no longer the law in California" that "the interpretation of California's antitrust statute [is] coextensive with the Sherman Act."). Defendants do not cite any persuasive authority calling this fact into question. The Ninth Circuit case cited by defendants, **[**57]** Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 987 (9th Cir. 2000), pre-dates both *Aryeh* and *Samsung* by more than a decade, and the Court disregards it for that reason. The Court also disregards defendants' cite to a California Court of Appeals case, Vinci v. Waste Management, Inc., 36 Cal. App. 4th 1811, 1814, 43 Cal. Rptr. 2d 337 (Ct. App. 1995), because it was issued neither by California's legislature or highest court. *See* GPU, 540 F. Supp. 2d at 1097 (finding it proper to apply *AGC* to those states where the supreme court had "explicitly endorsed using the test," but finding the law "less clear cut" in California where the "Cartwright Act contains a harmonization provision, and some California appellate courts have used the *AGC* test as well").

Consequently, the Court joins the other courts in this district that have concluded that the federal standing test under *AGC* has not been clearly applied by the California Supreme Court to claims brought under California's Cartwright Act. *See, e.g.,* TFT-LCD, 586 F. Supp. 2d at 1123 ("inappropriate to broadly apply the *AGC* test" to states like California); Batteries II, 2014 U.S. Dist. LEXIS 141358, 2014 WL 4955377, at *10-11 (stating after detailed analysis that "the Court cannot conclude on the authorities now before it that California applies *AGC* in the manner urged by defendants"). Defendants' arguments under *AGC* are therefore denied.

C. Nationwide Claims Under California Law

The IPPs' complaint does allege claims under California **[**58]** law, specifically the Cartwright Act and the UCL, and seeks to assert these claims on behalf of a nationwide class. Dkt. No. 400 ¶¶ 360-379. Defendants argue that a national application of California law would be unconstitutional and impermissible under Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821-22, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985). Dkt. No. 474 at 22-23. As was the case in *GPU*, the Court finds that defendants "in effect move to strike all references to a nationwide class in these claims because extraterritorial application of California's ***antitrust law*** would violate due process." 527 F. Supp. 2d at 1027. Under *Shutts*,***HN12***[] the law of any particular state may not be applied to a nationwide class unless (1) the chosen state's law does not conflict with the law of another jurisdiction that has an interest in the case, and (2) the chosen state has a significant contact or significant aggregation of contacts to claims asserted by each member of the plaintiff class such that the choice of that state's law is not arbitrary or unfair. *Id.* (citing Shutts, 472 U.S. at 821-22).

Here, as in *GPU*, the Court finds that the potential conflict with the laws of other states (which surely would have an interest in this case if the Court were to certify a nationwide class) "looms large." ***[*1074]*** 527 F. Supp. 2d at 1027. This is because "some states allow their citizens **[**59]** to sue for antitrust injuries as indirect purchasers (like California) and some do not." *Id.* Furthermore, "[e]ach state had the ability to repeal *Illinois Brick* as to its local law. Some chose yes. Some chose no." *Id.* As in GPU, here, too, plaintiffs have not shown that California has a greater interest in applying its law than any other state, and consequently, any Cartwright Act class that may ultimately be certified would, at most, have to be limited to states with laws like California's.

On the significant contacts question as well, the IPPs' complaint alleges hardly any contacts at all with the state of California. Most of the defendants are headquartered abroad, and the meetings and conduct at issue are also mostly alleged to have taken place outside of the United States.

Although plaintiffs argue that it would be "premature for this Court to rule on the application of California law to a nationwide class," Dkt. No. 516 at 27, the Court finds "merit in disposing of this issue at an early stage of the litigation, particularly where the issue of whether the different state's laws conflict will not change significantly as this action progresses." GPU, 527 F. Supp. 2d at 1028. Defendants' motion is granted in this **[**60]** regard, and all references to a nationwide class in indirect purchasers' claims under California's Cartwright Act and Unfair Competition Law are stricken.

D. Unjust Enrichment

Both sides agree, correctly, in the Court's view, that unjust enrichment is a remedy, and not an independent claim. Dkt. No. 474 at 31-32; 516 at 37-38 (***HN13***[] "unjust enrichment is a remedy and is properly pled in the Prayer for Relief"). The Court has previously held that unjust enrichment is not a claim. *See, e.g., Callaghan v. BMW of N. Am., LLC, No. 13-CV-04794-JD, 2014 U.S. Dist. LEXIS 164290, 2014 WL 6629254, at *4 (N.D. Cal. Nov. 21, 2014)* (finding that "to the extent plaintiffs are seeking to rely on California law, the claim must be dismissed for the separate and additional reason that unjust enrichment is not an independent cause of action"). To the extent the complaint can be read to allege a stand-alone claim for unjust enrichment, that claim is dismissed with prejudice.

E. Statute of Limitations

Defendants argue that the IPPs' complaint, too, is "barred by the applicable statutes of limitations for any injuries that took place outside the limitation periods," and that plaintiffs' "allegations regarding fraudulent concealment are insufficient under *Rule 9(b)*." Dkt. No. 474 at 32. But as was the case **[**61]** with the DPPs' complaint, the IPPs' complaint, too, includes specific allegations that are enough to satisfy the pleading standards for fraudulent concealment. *See, e.g.*, Dkt. No. 400 ¶¶ 170 ("In a Spring 2009 e-mail from a SANYO employee to other SANYO employees, he began with: 'Once you read this email, plead delete it.'"; sender also used "Company N" as code name to refer to NEC TOKIN); 172 (again using code name and asking recipient to "please discard this e-mail"). The Court denies defendants' motion on this issue.

F. Individual Defendants' Arguments

For the IPPs' complaint, there are five separate motions to dismiss in addition to the joint motion. Dkt. No. 475.

a. U.S. Subsidiaries

The IPPs' complaint names fewer defendants overall, and fewer U.S. subsidiaries, than its DPP counterpart. For example, the IPPs have not named the KEMET or Fujitsu groups of companies **[*1075]** at all, and in the case of Taitsu, Shinyei and Soshin, have not named the U.S. subsidiary. In the first separately-filed motion, five U.S. subsidiaries which were named in the IPPs' complaint jointly seek dismissal for the same reason. The five subsidiaries are ELNA America Inc., Hitachi Chemical Co. America, Ltd., NEC **[**62]** TOKIN America, Inc., Nichicon (America) Corp., and Rubycon America, Inc. Dkt. No. 475 at 1. Their joint argument for dismissal is that the IPPs have "fail[ed] to make any non-conclusory factual allegations whatsoever about the involvement of any of them in either" the film conspiracy or the electrolytic conspiracy. *Id.* The subsidiaries assert that "[t]here is not a single factual allegation in the complaint that any particular U.S. subsidiary engaged in any collusive conduct." *Id.*

Plaintiffs respond that their allegations are sufficient, and point in particular to paragraphs 152 to 187, and paragraph 368 of their complaint. Dkt. No. 517 at 5. Paragraphs 152 to 186, however, generically refer to defendant corporate groups on a family basis, without distinguishing between parent and subsidiary. *See, e.g.*, Dkt. No. 400 ¶ 158 ("The Elna, NCC, Nichicon, Panasonic, Rubycon defendants generally attended these other pre-ATC meetings.").

Neither paragraph 187 nor 368 helps supply the missing link. Paragraph 187 alleges that "defendants' Japanese parent companies" generally "attended the conspiratorial meetings," but defendants' U.S. subsidiaries "also engaged in some bilateral discussions that included exchanges **[**63]** of sensitive information." Paragraph 368 alleges merely that "four of the eight U.S.-based defendants (Hitachi Chemical Co. America, Ltd., SANYO

Electronic Device (U.S.A.) Corp., Elna America Inc., NEC TOKIN America Inc.), are headquartered in California, conspiratorial acts occurred in California, and the conspirators targeted their price-fixing activities at large purchasers . . . in California, such as Apple Inc., Intel Corp., and Hewlett Packard Co."

These paragraphs contain no allegation that these five U.S. subsidiaries joined the conspiracy and played some role in it. As was the case with many of the U.S. subsidiaries who were named by the DPPs' complaint, there is a large gap between the IPPs' allegations and the allegations in those cases where the allegations against subsidiaries were found to be sufficient. *See* *CRT, 738 F. Supp. 2d at 1019* (noting allegations that "employees engaged in conspiratorial meetings on behalf of members of their corporate families, that participants did not always know the corporate affiliation of their counterparts and did not distinguish between the entities within a corporate family," and finding as a result that "the entire corporate family was represented in meetings **[**64]** and discussions . . . and was a party to the agreements reached in them."); *see also* *Batteries II, 2014 U.S. Dist. LEXIS 141358, 2014 WL 4955377, at *34* (plausible to infer "that generic references to NEC in documents generated by defendants themselves implicate both NEC Corp. and NEC Tokin").

The U.S. subsidiaries who have moved for dismissal are dismissed with leave to amend.

b. Nichicon Corporation

Nichicon Corporation, the Japanese parent company of Nichicon (America) Corporation (who is one of the five moving U.S. subsidiaries discussed directly above), moves separately for dismissal. Dkt. No. 475 at 6-8. Nichicon Corporation argues that the IPPs' allegations are insufficient either to establish "that Nichicon Japan entered into an agreement with any other defendant" or that Nichicon Japan bears liability as a successor based on its **[*1076]** acquisition of a capacitor business from Fujitsu Media Devices (Suzhou) Ltd. *Id.*

Nichicon argues that it is alleged to have participated in "only" five types of meetings: "ECC meetings; KCC/Hananoki meetings; 'other' meetings 'similar to industry gatherings or trade association meetings;' ATC meetings; and Shimotsuki Kai meetings." *Id.* at 6. But this is just about every type of meeting identified by the IPPs, whose complaint **[**65]** defendants have not challenged on *Twombly* grounds. The Court finds that most importantly, Nichicon is alleged to have participated in ATC meetings, which are alleged to have been "conspiratorial in nature." Dkt. No. 400 ¶ 158. Nichicon is specifically alleged to have been listed as a member of these meetings in a "Summer 2003 ATC Meeting Roster," and the ATC meetings are at the core of the IPPs' complaint for the electrolytic conspiracy, as these meetings are alleged to have served as the "regular conspiratorial meetings." *Id.* ¶¶ 10, 159.

These allegations alone are enough to defeat Nichicon's motion, but the Court further notes that Nichicon is not alleged simply to have taken on successor liability as a result of its acquisition from FMD. Rather, the IPPs' complaint alleges that "[t]he Nichicon defendants joined [Marketing Study Group] meetings in 2008 when it acquired FMD." *Id.* ¶ 167. These meetings are alleged to have been "conspiratorial [in] nature" and to have consisted of high-level employees attending to "agree upon prices." *Id.* ¶¶ 160, 166.

Nichicon's motion is denied.

c. Shinyei Technology Co., Ltd. and Shinyei Capacitor Co., Ltd.

Shinyei Technology Co., Ltd. and Shinyei Capacitor **[**66]** Co., Ltd. separately seek dismissal. Dkt. No. 475 at 10-11. The Court denies the request.

Both are Japanese corporations. Shinyei Technology Co., Ltd. is alleged to have established Shinyei Capacitor Co., Ltd. on February 3, 2011, to take over Shinyei Technology Co., Ltd.'s capacitor business. Dkt. No. 400 ¶¶ 103-05. The Court will therefore refer to both defendants collectively as "Shinyei," as defendants themselves do. Dkt. No. 475 at 10.

Shinyei is alleged only to have participated in the film capacitor conspiracy. The Japan Film Capacitor (JFC) meetings are alleged to have been the foundational, "regular conspiratorial meetings" for that conspiracy. Dkt. No. 400 ¶ 10. The Shinyei defendants are alleged to have "generally attended the JFC meetings," at which "[m]embers often shared price intentions that resulted in price agreements." *Id.* ¶ 181. Shinyei is even alleged to have been included in a fall 2008 chart created by Panasonic which stated that each listed defendant "discussed negotiating for price increases," and at the bottom of which "Panasonic wrote, 'We decided to accept the film price hike effective on April 1.'" *Id.* ¶ 183.

Based on these allegations, the Court finds that Shinyei **[**67]** Technology Co., Ltd. and Shinyei Capacitor Co., Ltd. do "belong in this case," Dkt. No. 475 at 10, and their motion to dismiss is denied.

d. Soshin Japan

Defendant Soshin Electric Co., Ltd. ("Soshin Japan") separately moves for dismissal on the ground that the complaint "does not give fair notice of the claims made against Soshin Japan" and because the complaint "fails to adequately allege that Soshin Japan entered into the allegedly conspiracy." Dkt. No. 475 at 13.

The first argument rests on the premise that the IPPs have insufficiently alleged "what [Soshin] did, to whom, where and when." *Id.* The Court finds that this level of detail is not required, and in any event, it is inconsistent with defendants' joint position that the IPPs' complaint generally passes the *Twombly* pleading standard, a **[*1077]** view the Court agrees with. The argument is rejected.

The second argument, too, is denied. Like Shinyei discussed above, Soshin Japan, too, is alleged to have been a participant of the foundational JFC meetings at which price agreements were entered into. Dkt. No. 400 ¶ 181. This is enough for now. Soshin Japan's motion is denied.

e. United Chemi-Con, Inc.

The final separate motion was brought by **[**68]** United Chemi-Con, Inc. ("UCC"). Dkt. No. 475 at 16-17. UCC is the U.S. subsidiary of Nippon Chemi-Con. Dkt. No. 400 ¶ 72.

UCC is generally situated similarly to the other U.S. subsidiaries which are discussed above, but the one way in which it is different — and, the Court suspects, the reason it is moving separately — is that there is one substantive paragraph in the complaint that addresses UCC directly. That paragraph is paragraph 186 and it figures largely in both UCC's motion and plaintiffs' response to it. Dkt. Nos. 475 at 16-17; 517 at 15-16.

The question, then, is whether that paragraph alone is enough to compel a different conclusion as to UCC than the other U.S. subsidiaries. The Court concludes the answer is no. Paragraph 186 alleges that "[t]here were bilateral meetings and discussions involving film capacitor cartel members during the Film Class Period, including those: (1) involving the NEC TOKIN, Panasonic, Rubycon, and United Chemi-Con, Inc. defendants from 2002 to 2013 regarding film capacitors sold to Dell Inc. . . . ." Dkt. No. 400 ¶ 186. The alleged participation in "meetings and discussions" about "film capacitors sold to Dell" does not establish that UCC joined the conspiracy. **[**69]** The Court dismisses UCC with leave to amend.

CONCLUSION

Defendants' motions are denied in part and granted in part.

For the DPPs' complaint, the following defendants are dismissed for the reasons stated above, with leave to amend: AVX Corporation; EPCOS Inc.; TDK-EPC Corporation; TDK U.S.A. Corporation; Fujitsu Components America, Inc.; KEMET Electronics Corporation; Nichicon (America) Corporation; Okaya Electric America Inc.; ROHM Semiconductor U.S.A. LLC; Shinyei Capacitor Co., Ltd.; Shinyei Corporation of America; Soshin Electronics of America, Inc.; United Chemi-Con, Inc.; and Vishay Intertechnology, Inc. Defendants' motions to dismiss the DPPs' complaint are denied in all other respects.

For the IPPs' complaint, the Court strikes all references to a nationwide class in indirect purchasers' claims under California's Cartwright Act and Unfair Competition Law. In addition, the following defendants are dismissed with leave to amend: ELNA America Inc.; Hitachi Chemical Co.; NEC TOKIN America, Inc.; Nichicon (America) Corp.; Rubycon America, Inc.; and United Chemi-Con, Inc. Defendants' motions to dismiss the IPPs' complaint are denied in all other respects.

The DPPs and IPPs are each directed **[**70]** to file either an amended complaint that conforms to this order or a notice of intent not to amend by June 16, 2015.

IT IS SO ORDERED.

Dated: May 26, 2015

/s/ James Donato

James Donato

United States District Judge

In re Mushroom Direct Purchaser Antitrust Litig.

United States District Court for the Eastern District of Pennsylvania

May 26, 2015, Decided

Master File NO. 06-0620

Reporter

2015 U.S. Dist. LEXIS 143331 *; 2015 WL 6322383

IN RE MUSHROOM DIRECT PURCHASER ANTITRUST LITIGATION. THIS DOCUMENT RELATES TO: All Actions

Subsequent History: Reconsideration denied by *In re Mushroom Direct Purchaser Antitrust Litig., 2015 U.S. Dist. LEXIS 143329 (E.D. Pa., Aug. 31, 2015)*

Prior History: *In re Mushroom Direct Purchaser Antitrust Litig., 54 F. Supp. 3d 382, 2014 U.S. Dist. LEXIS 146120 (E.D. Pa., 2014)*

Core Terms

mushrooms, horizontal, rule of reason, vertical, distributors, prices, conspiracy, growers, plaintiffs', Farms, per se rule, Cooperative, price fixing, competitors, membership, entities, anticompetitive, packaging, integrated, marketing, manufacturer, defendants', antitrust, producer, partial summary judgment, downstream, nonmember, products, broker, resale price

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Judges: THOMAS N. O'NEILL, JR., J.

Opinion by: THOMAS N. O'NEILL, JR.

Opinion

MEMORANDUM

Before me in this antitrust litigation are: certain defendants' motion to adjudicate plaintiffs' antitrust claims under the rule of reason[1] (Dkt. No. 492), plaintiffs' opposition to defendants' motion seeking application of the rule of reason

[1] Moving defendants are: **[*18]** the Eastern Mushroom Market Cooperative (EMMC), Robert A. Feranto, Jr. t/a Bella Mushroom Farms; Brownstone Mushroom Farms, Inc.; Brownstone Farms, Inc.; Brownstone Mushroom Farm; To-Jo Fresh Mushrooms, Inc.; Country Fresh Mushroom Co.; Gino Gaspari & Sons, Inc.; Kaolin Mushroom Farms, Inc.; South Mill Mushroom Farms, Inc.; Southmill Mushroom Sales, Inc.; Modern Mushroom Farms, Inc.; C&C Carriage Mushroom Co.; Sher-Rockee Mushroom Farm,

and cross-motion for partial summary judgment on their Sherman Act § 1 claim (Dkt. No. 495) and the responses and replies to each motion (Dkt. Nos. 496, 498, 501-08, 511).[2] I held oral argument on the motions on February 4, 2014. Following oral argument, plaintiffs filed a letter brief (Dkt. No. 624) and defendants filed a letter response. (Dkt. No. 630.) After considering all of the above, and as is further set forth below, I will grant in part and deny in part moving defendants' motion. I will deny plaintiffs' cross-motion for partial summary judgment.

BACKGROUND

Plaintiffs in this putative antitrust class action are purchasers of mushrooms. **[*19]** Dkt. No. 185 (Revised Consolidated Class Action Compl.) at ¶ 1.[3] The putative "direct purchaser class consists of more than a thousand purchasers of agaricus mushrooms." Dkt. No. 496 (Pls.' Statement of Facts) at ¶ 1. Defendants include the Eastern Mushroom Marketing Cooperative and other entities that were members of the EMMC or were affiliates of members of the EMMC. See Dkt. No. 496 (Pls.' Statement of Facts) at ¶¶ 27-28. Under the 2001 EMMC membership agreement, the stated "objective of the Cooperative" was:

> to improve conditions in the mushroom industry for the mutual benefit of its members as producers by promoting, fostering and encouraging the intelligent and orderly marketing of mushrooms through cooperation; eliminating speculation, waste and fluctuating prices, making the distribution of agricultural byproducts between producers and consumers as direct as can be efficiently done, thereby eliminating any manipulation of the price by middlemen, stabilizing the marketing of agricultural products, encouraging efficiency and economy in marketing; preventing the demoralizing of markets resulting from dumping and predatory practices; mitigating the recognized evils of a marketing **[*20]** system under which prices are set for the entire industry by the weakest producer; and fostering the ability of the members of this Cooperative to obtain prices for their mushrooms in competitive markets, which are fair prices but not prices inflated beyond the reasonable value of such products by reason of artificially created scarcity of such products or other predatory trade practices which would injure the public interest.

Dkt. No. 497, Ex. 50 (Executed Membership Agreement for Bella Farms) at 2.

In their revised consolidated class action complaint, **[*21]** plaintiffs claim, inter alia, that in seeking to achieve their objective, defendants violated *Section 1 of the Sherman Act* through the EMMC's implementation of a supply control scheme — purchasing and leasing mushroom farms in order to place deed restrictions on the properties prohibiting the conduct of business related to the production of mushrooms. Dkt. No. 185 at ¶ 94; see also id. at ¶¶ 69, 73-81. Specifically, plaintiffs claim that

> [t]hrough membership dues and a "Supply Control Assessment," EMMC collected approximately $6 million from its members during 2001-2002. EMMC, acting as an agent of its members, then spent approximately $3 million to purchase four mushroom farms and to acquire lease options on two additional mushroom farms in the eastern United States for the purpose of shutting them down and reducing the mushroom production capacity available for nonmember non-conspirators to grow mushrooms in competition with the Defendants.

LLC; Oakshire Mushroom Farm, Inc.; Phillips Mushroom Farms, Inc.; Louis M. Marson, Jr., Inc.; Monterey Mushrooms, Inc.; and John Pia (Dkt. No. 513). Pursuant to a stipulation filed on November 13, 2014, plaintiffs' claims against defendants Gaspari Bros., Inc., LRP Mushrooms, Inc., and Michael Pia have been dismissed with prejudice. Dkt. No. 613.

[2] Also now pending in this action are several motions in limine seeking to exclude expert testimony, various other motions for summary judgment and the direct purchaser class plaintiffs' motion for class certification of the putative class of direct purchasers. Dkt. Nos. 513, 514, 515, 516, 518, 520, 521, 583, 584, 638, 641.

[3] Pursuant to my Order of June 5, 2006 consolidating seven previously filed antitrust class actions and one non-class action, on June 26, 2006, plaintiffs filed a consolidated amended class action complaint against defendants. Dkt. No. 49. On November 13, 2007, plaintiffs filed a revised consolidated class action amended complaint (Dkt. No. 185) pursuant to my Order of November 9, 2007 (Dkt. No. 184) which granted plaintiffs leave to file a complaint consolidating the June 26, 2006 complaint and an October 27, 2006 complaint by former class representative Theodore J. Katsiroubas — which were brought on behalf of the same putative class.

Id. at ¶ 72. Defendants do not contest "that the EMMC, despite various members' contrary opinions, did buy and/or lease certain properties that, at some point in time, were operated as mushroom farms that were unprofitable and closed at the time of the EMMC's purchase." **[*22]** Dkt. No. 505 (Defs.' Counter-Statement of Material Facts) at 7. Nor do they contest "that deed restrictions were imposed on these properties when they were later sold by the EMMC." Id. Defendants contend, however, that "not all EMMC members supported or participated in the supply control program." Id.[4]

Plaintiffs also claim that defendants violated *Section 1 of the Sherman Act* by "conspir[ing] among themselves and in conjunction with nonmember distributors to set artificially-inflated prices" for mushrooms. See Dkt. No. 185 at ¶ 93. On January 9, **[*23]** 2001, the EMMC held "a general membership meeting to discuss and sign the membership agreement." Dkt. No. 497, Ex. 27 (EMMC January 9, 2001 Meeting Minutes) at 1. "Pricing policies and minimum pricing for fresh mushroom products by region were discussed. Minimum price for individual products were discussed and agreed to by region." Id. Members of the EMMC agreed "not to sell or otherwise dispose of mushrooms except as provided under the terms of [the membership] Agreement and the Articles of Incorporation and Bylaws of the Cooperative." Dkt. No. 497, Ex. 50 (Executed Membership Agreement for Bella Farms) at 4, ¶ 6. EMMC members agreed "to sell mushrooms to all customers only on the terms authorized by the Cooperative." Id. at 5, ¶ 7. They also agreed "to handle and market all crops of mushrooms under [their] control during the term of [the membership] Agreement, pursuant to the terms and conditions of [the membership] Agreement and the Articles of Incorporation and Bylaws of the Cooperative." Id. at 4, ¶ 3 (emphasis added). Members agreed that they would "arrange or negotiate with buyers for the sale of mushrooms produced by or for [the member]." Id. at 4, ¶ 4.

Effective February 2001, the EMMC adopted a minimum pricing policy that established minimum pricing for various types, grades, sizes and packaging modes of mushrooms. See Dkt. No. 497, Ex. 9 (EMMC Current Policies, Revision **[*24]** Date Feb. 13, 2001). The agreement with respect to pricing applied to "sales to the retailers, wholesalers and to the non-members." Dkt. No. 497, Ex. 33 (A. David Carroll, Jr. Dep.) at 130:5-18; see also Dkt. No. 497 at Ex. 37 (Michael Basciani Dep.) at 75:18-24 ("Q. . . . one of the policies that the EMMC adopted was to try to set prices for — the downstream price that shippers got when they sold their product to wholesalers and retailers, correct? A. Yes, sir."). In other words, the EMMC set floor pricing for mushrooms that came out of packaging operations, not for mushrooms that came out of growing operations. See Dkt. No. 497 at Ex. 39 (Michael P. Cardile Dep. at 145:9-147:4.).

Under the policy which was revised effective February 13, 2001, members agreed, inter alia, that "[t]he pricing listed for each product is the minimum price for that product delivered to a customer in a region." Dkt. No. 497, Ex. 9 (EMMC Current Policies, Revision Date Feb. 13, 2001) at 1. The policy provided that the

> FOB[5] pricing minimum for each product is equal to $.50 less than the delivered price for the region [in which] the farm is located. For example, the minimum FOB price for a farm in the Mid Atlantic region is $.50 less than the delivered price for that product **[*25]** in the Mid Atlantic region.

Id. The policy provided that "[n]on-member mushroom farms are to be sold to at the same FOB price as customers." Id. Under the policy, "[n]o pricing is set for member-to-member (sideways sales within the cooperative. The members buying and selling will agree individually to the pricing for each sideway[s] sale." Id. The policy also

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[4] On December 16, 2004, the United States Department of Justice filed an antitrust complaint against the EMMC after an eighteen-month investigation of the EMMC's membership activities, qualifications as a cooperative and marketing practices. See United States v. E. Mushroom Mktg. Coop., Inc., No. 04-5829 (E.D. Pa. Dec. 16, 2004). On September 9, 2005, the EMMC and the DOJ entered into a consent judgment that required the EMMC to nullify deed restrictions that had been placed on six properties that the EMMC had sold or transferred. See Dkt. No. 497, Ex. 21. The consent judgment also prohibited the EMMC from placing restrictions on other properties for ten years. Id.

[5] FOB or "free on board" means that goods are "delivered free of charge on the means of conveyance, such as air, rail, or sea." Free on board, Black's Law Dictionary (10th ed. 2014). The term allocates "the rights and duties of the buyer and the seller of goods with respect to delivery, payment, and risk of loss, whereby the seller must clear the goods for export, and the buyer must arrange for transportation." Id.

provided that "[m]embers with off site Distribution Facilities" — "defined as off site distribution facilities owned (51% or greater ownership by the member and whose sales pricing is controlled by the member)" — "must sell to other wholesalers at or above the minimum pricing for that product." Id.

When the EMMC met on March 12, 2002, "[a] pricing list for every product sold was distributed." Dkt. No. 497, Ex. 28 (EMMC Meeting Minutes March 12, 2002) **[*26]** at 2. At the March meeting the cooperative discussed a Budget Audit Committee which was "to do mandatory individual audits on members. They will take the minimum pricing list and match it to members' books." Id. at 1. The EMMC met again on April 9, 2002, where, inter alia, "[a] motion was made, seconded and so adopted to increase the price of retail washed, sliced mushrooms by $.20 per [p]ound and have the product so labeled by a vote of 20 to 4." Dkt. No. 497, Ex. 29 (EMMC Meeting Minutes April 9, 2002) at 3. Under the EMMC policy revised on April 24, 2002, members were "never permitted to offer pricing below EMMC minimums to obtain the current business of a non-member in an new or shared account." Dkt. No. 497, Ex. 11 (EMMC Current Policies, Revision Date, Apr. 24, 2002) at 4. Members were "never permitted to offer prices below the EMMC minimums to counter a purported offer from an EMMC member." Id. The policy also set forth a procedure to petition for matching price permission for members wishing to make offers below EMMC minimum prices. Id. at 4-5. In light of the above, plaintiffs assert that "[d]efendants engaged in naked-price fixing [sic]." Dkt. No. 185 at ¶ 93.

Moving defendants do not contest the EMMC's implementation **[*27]** of a minimum pricing policy.[6] Dkt. No. 505 (Defs.' Counter-Statement of Material Facts) at 2 ("it is not disputed that the EMMC issued minimum price lists and distributed them to [] the member Defendants"). Instead, they assert that "the EMMC made little or no effort to enforce the regulations regarding the Minimum Pricing Policy." Id. They contend that "the EMMC minimum pricing policy was not actually followed by each and every member of the EMMC." Id. at 4-5. They contend that "[t]he evidence of record does not substantiate Plaintiffs' contention that EMMC pricing applied to all sales made by all non-EMMC distributor entities as opposed to the grower member entities."[7] Id. at 5. Moving defendants also contend that the EMMC was "an attempt to stabilize prices for fresh mushrooms in order to prevent the industry from turning to an oligopoly, controlled by [] three or four large-scale producers rather than a large number of smaller, family owned farms." Dkt. No. 501 (Defs.' Rule of Reason Reply) at 5. They assert that dire market conditions existed for mushrooms at the time of the EMMC's formation, including the Sixth Circuit's voiding of the Mandatory Assessment Provisions of the Mushroom Promotion Research **[*28]** and Consumer Information Act of 1990 (a statute that had funded the advertising and promotion of mushrooms) and the bankruptcy and closing of Money's Mushrooms, then the largest mushroom producer in United States and Canada. See Dkt. No. 492 (Defs.' Rule of Reason Mot.) at ¶¶ 6, 7. Finally, moving defendants assert that

> [t]hey formed the EMMC pursuant to the advice of counsel and under the good faith belief that under the Capper-Volsted Act, they could as constituted act cooperatively to promote and jointly market their mushrooms and stabilize the prices [for mushrooms] paid by the large retail and institutional middlemen without exposure to antitrust liability.

Dkt. No. 492 (Defs.' Rule of Reason Mot.) at ¶ 9.[8]

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[6] Defendant M.D. Basciani & Sons contests plaintiffs' contentions that "the EMMC adopted and amended various minimum pricing policies for mushrooms" and that "all EMMC members agreed to follow the EMMC minimum pricing policies." Dkt. No. 502 (M.D. Basciani & Sons, Inc.s' Resps. To Pls.' Statement of Undisputed Facts) at 1-2. It contends instead that "[d]uring the time that M.D. Basciani was a member of the EMMC, the EMMC provided it with documents labeled 'EMMC Current Policies,' which documents, **[*29]** being in writing, speak for themselves." Id.

[7] Moving defendants also contend that the members of the EMMC "voted to voluntarily abandon the Minimum Pricing Policy in August of 2005 . . . ." Dkt. No. 492 (Defs.' Rule of Reason Mot.) at ¶ 12.

[8] Plaintiffs argue that "absent Capper-Volstead immunity, [d]efendants' conduct is simply naked price fixing subject to condemnation under the per se rule." Dkt. No. 624 (Pls. Letter Br.) at 3. Moving defendants, in support of their motion seeking application of the rule of reason, assert that "the DOJ concluded that the EMMC was an agricultural cooperative organized pursuant to the Capper-Volsted Act . . . and did not challenge the EMMC's Minimum Pricing Policy." See Dkt. No. 492 (Defs.' Rule of Reason Mot.) at ¶ 12. I am not bound by the DOJ's conclusion with respect to the applicability of the Capper-Volsted Act immunity and, as is set forth below, have previously found that the protections of the Capper-Volsted Act were not available to

Under the EMMC membership agreement, each member agreed that it was "one of numerous producers engaged in the production and marketing of mushrooms." Dkt. No. 497, Ex. 50 (Executed Membership Agreement for Bella Farms) at 1. Each member "expressly represent[ed] and warrant[ed] that it [was then] engaged in **[*32]** the production of mushrooms, that it [was] in a position to control the mushrooms subject to [the] Agreement and that it [would] be able to perform according to [the] Agreement." Id. at 7, ¶ 14. Each member also agreed that it "competes with other members for the same customers." Id. at 4, ¶ 4.

Plaintiffs contend that "the EMMC's membership did not include solely growers [of mushrooms]. The EMMC's membership included . . . non-grower members . . . . In addition, the members of the EMMC included several integrated companies that processed, packaged, shipped and marketed mushrooms in addition to growing mushrooms." Dkt. No. 496 (Pls.' Statement of Facts) at ¶ 3 (citations omitted). At oral argument, plaintiffs' counsel explained that "some of the EMMC members were also distributors . . . . [T]he members of the EMMC, some of them were growers and distributors, [and] some of them were just growers and had . . . relationships with distributors." Dkt. No. 628 (Oral Arg. Tr.) at 55:12-18; see also Dkt. No. 497, Ex. 9 (EMMC Current Policies, Revision Date Feb. 13, 2001) at 1 (addressing pricing for EMMC "[m]embers with off site Distribution Facilities"). As was explained in a January 23, 2001 letter from then-EMMC counsel to John Pia, President **[*33]** of the EMMC:[9]

> Among the EMMC membership there are several different organizational structures used for the conduct of business. As we know, all EMMC members are "producers", i.e. mushroom growers and farmers.[10] However,

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the EMMC. See *In re Mushroom Direct Purchaser Antitrust Litig., 655 F.3d 158, 162 (3d Cir. 2011)* ("Neither DOJ determination — that EMMC acted anticompetitively or that EMMC was a properly formed Capper-Volstead cooperative — is binding upon the District Court or th[e] Court [of Appeals].").

On March 26, 2009, after **[*30]** the close of Phase I discovery, I denied certain defendants' motions for summary judgment and plaintiffs' cross motion for summary judgment on the issue of Capper-Volstead immunity. I found that the inclusion of Mario Cutone Mushroom Co. Inc. (M. Cutone), a non-grower distributor, in the EMMC's membership was sufficient to destroy Capper-Volstead immunity. *In re Mushroom Direct Purchaser Antitrust Litig., 621 F. Supp. 2d 274, 283-86 (E.D. Pa. 2009)*. I also found that the Act's exemption did not extend to protect cooperatives that conspire with entities not engaged in agricultural production as was the case with Kaolin/South Mill and its distribution entities and LRP-M/ Manfredini Enterprises. *Id. at 286-91 (E.D. Pa. 2009)* ("for the EMMC and its members to fix prices with affiliated distributors when the distribution entities are not a single economic unit with their affiliated member grower constitutes a conspiracy that destroys the EMMC's Capper-Volsted exemption"). I denied defendants' request to certify my Order for appeal pursuant to *28 U.S.C. § 1292(b)*. Dkt. No. 315. Defendants then filed an interlocutory appeal which was dismissed by the Court of Appeals for the Third Circuit on August 23, 2011. The Court of Appeals found that a prejudgment order denying the protections of the Capper-Volstead Act was not a collateral **[*31]** order subject to interlocutory appeal. *In re Mushroom, 655 F.3d at 167*.

On January 6, 2014, certain defendants filed a motion seeking reconsideration of my March 26, 2009 Capper-Volstead decision. On October 14, 2014, I denied defendants' motion for reconsideration. *In re Mushroom Direct Purchaser Antitrust Litig., 54 F. Supp. 3d 382, 395 (E.D. Pa. 2014)*. I found that neither *American Needle, Inc. v. National Football League et al., 560 U.S. 183, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)*, nor *Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820 (3d Cir. 2010)*, required reversal of my prior finding that the membership of M. Cutone in the EMMC destroyed the EMMC's immunity from antitrust liability under the Capper-Volstead Act. *In re Mushroom, 54 F. Supp. 3d, at *390-91*. I also found that reconsideration did not require reversal of my prior finding that EMMC member-grower Kaolin and the non-EMMC member South Mill distribution entities do not constitute a single economic entity. *Id. at 388-89*.

I certified my reconsideration decision on the Capper-Volsted questions for interlocutory appeal pursuant to *28 U.S.C. § 1292(b)*. *Id. at 394-95*. On December 2, 2014, the Court of Appeals denied M.D. Basciani, Inc. and the EMMC's petitions for leave to file an interlocutory appeal. Dkt. No. 614.

[9] The letter was produced pursuant to a "limited waiver of the attorney-client privilege." Dkt. No. 492 (Defs.' Rule of Reason Mem.) at 12 n. 3.

[10] Of course, subsequent to this letter, the Court determined that not all of the EMMC members were producers given the inclusion of M. Cutone, a non-grower distributor, in the EMMC's membership, an inclusion that I found was sufficient to destroy Capper-Volstead **[*35]** immunity. See *In re Mushroom, 621 F. Supp. 2d at 289-90*; see also *In re Mushroom, 54 F. Supp. 3d at 391* ("M. Cutone was a non-grower member [of the EMMC] who had the power to participate in the control and policymaking of

> because of internal operational/organizational choices or relationships with affiliates and/or wholly owned operational/organizational choices or relationships with affiliates and/or wholly owned subsidiaries, almost all of the producer/member organizations also either process, package, market and or sell mushrooms. Generally speaking, this is accomplished in the following ways:
> a. by a single legal entity performing all related tasks;
> b. by a parent, and a wholly owned-subsidiary which separate the growing and sales function into separate but related legal entities;
> c. by related legal entities which share common or similar ownership and which are generally operated by a core family control group; and
> d. in the case of the Mushroom Alliance, on a cooperative basis similar to, but smaller than, EMMC.

Dkt. No. 492, Ex. A. at 1-2. The letter further explained that

> EMMC is organized in a "non-traditional" sense in terms of the "classic" cooperative. Most, but not all, agricultural **[*34]** cooperatives differ from EMMC in that they tend to combine grower organizations for the collective purpose of consolidating and sharing the "getting-to-market" function for agricultural products, i.e., processing, handling, sales and marketing. These "classic" coops include organizations like Land O'Lakes, Sunmaid, Welch's, Sunkist and Ocean Spray. EMMC is not like those cooperatives given that EMMC members will continue to conduct independent businesses.

Id. at 3. Plaintiffs assert that "although certain owners of the growing companies may have created downstream packaging and distribution companies for various reasons, in some instances the owners of packaging and distribution companies created growing operations in order to participate in the EMMC." Dkt. No. 496 (Pls.' Statement of Facts) at ¶ 2.

On the record now before the Court, the members of the EMMC included both grower-only entities and vertically integrated entities whose operations included both growing and distribution of mushrooms. See Dkt. No. 492, Ex. A. at 1-2 ("almost all of the producer/member organizations also either process, package, market and/or sell mushrooms"); Dkt. No. 497, Ex. 1 at EMMC-DOJ-03544-45 (EMMC Response to Civil Investigative Demand No. 22366, identifying "each member's business activities since January 1, 2000"). As I have previously found the EMMC members also included one non-grower distributor for a non-EMMC member grower: Mario Cutone Mushroom Co. Inc.[11] *In re Mushroom Direct Purchaser Antitrust Litig., 621 F. Supp. 2d 274, 285 (E.D. Pa. 2009)*.

Specifically, defendants include the following entities which plaintiffs **[*36]** claim "[j]oined the EMMC at some time during the period from 2001 to 2005": (1) Robert A. Feranto, Jr., t/a Bella Mushroom Farms; (2) Brownstone Mushroom Farms; (3) Cardile Mushrooms, Inc.; (4) Country Fresh Mushroom Co.; (5) Forest Mushrooms Inc.; (6) Franklin Farms Inc.; (7) Gino Gaspari & Sons; Inc., (8) Giorgi Mushroom Company; (9) Kaolin Mushroom Farms, Inc.; (10) Leone Pizzini & Son, Inc.; (11) LRP-M Mushrooms, Inc.;[12] (12) Modern Mushroom Farms, Inc.; (13) Oakshire Mushroom Farm, Inc.; (14) Phillips Mushroom Farms, Inc.; (15) Harvest Fresh Farms, Inc.; (16) Louis M. Marson, Inc.; (17) Mario Cutone Mushroom Co. Inc.; (18) M.D. Basciani & Sons, Inc.; (19) Monterey Mushrooms, Inc.; (20) Masha & Toto, Inc.; (21) W&P Mushroom, Inc.; (22) Mushroom Alliance, Inc.;[13] (23) Kitchen Pride

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the association through voting. . . . M. Cutone cannot become a grower for the purposes of satisfying the Capper-Volsted Act's requirements by asserting the single-entity defense in this context.")

[11] M. Cutone was a distributor for grower and non-EMMC member, non-defendant M&V Enterprises. Unlike the other EMMC members, it was not itself a grower of mushrooms.

[12] "LRP-M sold all of the mushrooms it grew to Manfredini Enterprises, its affiliated distributor." *In re Mushroom, 54 F. Supp. 3d at 389*. To date, the Court has not been presented with facts which would be "determinative of whether LRP-M and Manfredini Enterprises are separate decisionmakers pursuing separate economic interests." **[*37]** Id.

[13] The Mushroom Alliance, Inc. was a small cooperative whose members included Country Fresh (who was also an EMMC member on its own for some period of time), JM Farms, Kitchen Pride and Creekside.

Mushrooms; (24) JM Farms, Inc.; and (25) United Mushroom Farms Cooperative, Inc.[14] Dkt. No. 496 (Pls.' Statement of Facts) at ¶ 27.

Defendants also include the following non-members of the EMMC who are "distributors who were affiliated with members of the EMMC": Cardile Brothers Mushroom Packaging, Inc.; C&C Carriage Mushroom, Co.; To-Jo Mushrooms, **[*38]** Inc.;[15] Sher-Rockee Mushroom Farm; and South Mill Mushroom Sales, Inc.[16] Dkt. No. 496 (Pls.' Statement of Facts) at ¶ 28. Moving defendants assert that "it is significant that the downstream affiliate Defendants were never members of the EMMC and did not themselves agree to follow any of its rules and regulations regarding pricing." Dkt. No. 505 (Defs.' Counter-Statement of Material Facts) at 2, ¶ 16. Sher-Rockee Mushroom Farm is another non-EMMC member defendant, but it is not a distributor. Instead, it "is a grower that sold mushrooms exclusively to C&C Carriage Co. or Modern Mushroom Farms." Dkt. No. 505 (Defs.' Counter-Statement of Material Facts) at 12, ¶ 28.[17]

STANDARD OF REVIEW

Moving defendants move under *Rules 16(c)(2)(A)* and (D) of the Federal Rules of Civil Procedure for a pre-trial order "providing that Plaintiffs' antitrust claims against Defendants be adjudicated under the Rule of Reason." Dkt. No. 492 (Defs.' Rule of Reason Mot.) at 1. *Rule 16(c)(2)* provides, in relevant part, that "[a]t any pretrial conference, the court may consider and take appropriate action on . . . formulating and simplifying the issues, and eliminating frivolous claims or defenses" and "avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under *Federal Rule of Evidence 702*." *Fed. R. Civ. P. 16(c)(2)(A)* and (D). Moving defendants argue that their motion is necessary to "formulat[e] and simplify[] the issues" and avoid "unnecessary proof" and contend that it concerns the resolution of a "purely legal question" as to the standard to be used to adjudicate plaintiffs' claims. Dkt. No. 492 (Defs.' Rule of Reason Mem.) at 3-4. In support of their motion, moving defendants cite to *North Jackson Pharmacy, Inc. v. Caremark RX, Inc., 385 F. Supp. 2d 740 (N.D. Ill. 2005)*, where **[*40]** the Court decided to apply the rule of reason to the plaintiff's antitrust claim pursuant to Rule 16. Dkt. No. 492 (Defs.' Rule of Reason Mem.) at 3-4. In North Jackson, the Court explained that "the proper standard to be applied to North Jackson's Sherman Act claim[]is one of law that can be resolved based on the allegations of the [complaint] and facts that neither party disputes." *385 F. Supp. 2d at 743* (emphasis added); see also *Procaps S.A. v. Patheon Inc., 36 F. Supp. 3d 1306, 1323 (S.D. Fla. 2014)* ("Determining whether the rule of reason analysis or per se analysis applies in a given case is a question of law for the Court."); *In re Se. Milk Antitrust Litig., 801 F. Supp. 2d 705, 718 (E.D. Tenn. 2011)* ("the weight of authority supports defendants' argument that determination of the appropriate rule of

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"Creekside has negotiated a settlement with both the class plaintiffs and the individual Giant Eagle and Publix plaintiffs. Stipulations of dismissal have been entered in the individual actions, and Creekside is currently working with the class plaintiffs to prepare a Motion for Preliminary Approval of the class settlement." Dkt. No. 218 at ECF p. 2 n.3; see also Dkt. No. 213.

[14] Moving defendants assert that "many of the Defendants listed above resigned from the EMMC during the time period in question. Dkt. No. 505 (Defs.' Counter-Statement of Material Facts) at ¶ 27. Defendants contend that "[t]hese resignations began shortly after the EMMC was formed, beginning with Defendants[] Cutone, M&T, and the Mushroom Alliance (including Country Fresh, Creekside, Kitchen Pride and JM)." Id. at ¶ 27.

[15] To-Jo Fresh Mushrooms, Inc. is an affiliate of EMMC member Brownstone Mushroom Farms. See Dkt. No. 497, Ex. 3 (Linda Pizzini Johnson Dep.) at 191:6-24 (explaining that ToJo was a packager/shipper and Brownstone was the grower).

[16] I previously decided that "Kaolin/South Mill and its distribution entities are separate decisionmakers pursuing separate economic interests" and that they "cannot constitute a single entity . . . ." *In re Mushroom, 54 F. Supp. 3d at 389*; see also *In re Mushroom, 621 F. Supp. 2d at 279* ("The Kaolin/South Mill distribution centers were not EMMC members, did not grow mushrooms but sold mushrooms grown by defendant **[*39]** Kaolin.").

[17] Except as is set forth herein, I will not here further specify whether any specific defendant was a grower-only, a distributor-only or an integrated grower-distributor because I find that questions of fact remain with respect to the organizational structure of many of the defendants.

law to be applied is a question of law to be decided by the Court"). At the same time, "while the mode of analysis is certainly a question of law, 'underpinning that purely legal decision are numerous factual questions.'" *In re Blue Cross Blue Shield Antitrust Litig., 26 F.Supp.3d 1172, 1186 (N.D. Ala. 2014)*, quoting *In re Wholesale Grocery Prods. Antitrust Litig., 752 F.3d 728, 733-34 (8th Cir. 2014)*.

Plaintiffs contend in their initial brief that moving defendants' Rule 16 motion is instead akin to a motion for "partial summary judgment" which "should be judged pursuant to the standards of *Fed. R. Civ. P. 56(a)*." Dkt. No. 498 (Pls.' Opp'n Mem.) at 5. Plaintiffs also ask me to enter partial summary judgment in their favor finding that the EMMC and **[*41]** its members along with distributors affiliated with EMMC members engaged in a per se illegal horizontal conspiracy to fix prices and restrict supply." Dkt. No. 495 at 1. Summary judgment will be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The party moving for summary judgment bears the burden of demonstrating that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*; see *Celotex, 477 U.S. at 322-23*. If the movant sustains its burden, the nonmovant must set forth facts demonstrating the existence of a genuine dispute. See *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A dispute as to a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. A fact is "material" if it might affect the outcome of the case under governing law. Id.

At oral argument counsel for plaintiffs noted plaintiffs' "agree[ment] that the facts are undisputed with respect to whether the rule of reason or the per se rule applies" and conceded that "the result is going to be the same" whether the question is analyzed **[*42]** under *Rule 56* or Rule 16. Dkt. No. 628 (Oral Arg. Tr.) at 26:5-11. Given that the parties are in accord that there are no relevant facts in dispute, I will proceed to select the appropriate mode of antitrust analysis as a question of law. See *Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 829 n.7 (3d Cir. 2010)* ("The selection of a mode of antitrust analysis is a question of law.").

DISCUSSION

I. Rule of Reason vs. Per Se Rule

Section 1 of the Sherman Act provides in relevant part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. To establish their claim under *Section 1*, plaintiffs must show: (1) that each defendant was "a party to a contract, combination . . . or conspiracy" and (2) "that the conspiracy to which the defendant was a party imposed an unreasonable restraint on trade." *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 315 (3d Cir. 2010)* (citations omitted). The reasonableness of a restraint of trade under *Section 1 of the Sherman Act* is judged according to the rule of reason, the per se rule or the intermediate quick look analysis. "[T]he three modes of analysis should be viewed as a single inquiry that, depending on the circumstances, may sometimes be conducted by applying various presumptions." *Deutscher Tennis Bund, 610 F.3d at 831*. "[T]here is generally no categorical **[*43]** line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment." *California Dental Ass'n v. Federal Trade Comm'n, 526 U.S. 756, 780-81, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)*; see also *Nat'l Coll. Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 104 n.26, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)* (noting that no "bright line separat[es] per se from Rule of Reason analysis"). "[I]n deciding what rubric to apply, the Court is engaged more in art than science. An overly-formalistic and literal approach is to be avoided." *In re ATM Fee Antitrust Litig., 554 F. Supp. 2d 1003, 1016 (N.D. Cal. 2008)*, citing *Broad. Music, Inc. v. Columbia Broad., 441 U.S. 1, 9, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*; see also *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 887, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)* (citation and internal quotation omitted) ("[A] departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing."); *United States v. Brown Univ. in Providence in State of R.I., 5 F.3d 658, 670 (3d Cir. 1993)* ("the test for determining what constitutes per se unlawful price-fixing is one of substance, not semantics"). "Regardless of the standard used, the purpose of the inquiry is always to assess the effect of the conduct on competition . . . 'whether or not the challenged restraint enhances competition.'" *Deutscher Tennis Bund, 610 F.3d at 830*, quoting *NCAA, 468 U.S. at 104*. The determination of whether a challenged practice warrants treatment under the rule of reason or the per se rule is important because that determination affects the quantum of proof plaintiffs must offer to sustain their claim. See *Rossi v. Standard Roofing, Inc., 156 F.3d 452, 461 (3d Cir. 1998)* **[*44]** .

The Supreme "Court presumptively applies rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful." *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)* (citations omitted); see also *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)* (holding that whether a restraint is unreasonable and in conflict with the Act is normally evaluated under the "rule of reason"); *Cont'l Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499, 509 (4th Cir. 2002)* ("if the reasonableness of a restraint cannot be determined without a thorough analysis of its net effects on competition in the relevant market, courts must apply a full rule-of-reason analysis"). "[T]here is a strong presumption in favor of the rule of reason because applying the per se rule carries the risk of condemning activity that promotes competition." *Procaps, 36 F. Supp. 3d at 1323*.

> [C]ourts cannot act perfunctorily when distinguishing restraints that merit a per se approach from those that deserve rule of reason analysis, and only if a restraint clearly and unquestionably falls within one of the handful of categories that have been collectively deemed per se anticompetitive can a court be justified in failing to apply an appropriate economic analysis to make this determination.

Expert Masonry, Inc. v. Boone Cnty., Ky., 440 F.3d 336, 343 (6th Cir. 2006).

"The rule of reason requires **[*45]** the fact-finder to 'weigh [] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.'" *Deutscher Tennis Bund, 610 F.3d at 830*, quoting *Brown Univ., 5 F.3d at 668*. Analysis under the rule of reason requires application of a burden shifting framework that first obligates a plaintiff to show that the challenged conduct has produced anti-competitive effects within the market. *Brown Univ., 5 F.3d at 668*. When a plaintiff meets this burden, the burden shifts to the defendants to show that the challenged conduct promotes a sufficiently procompetitive justification; upon this showing, the plaintiff may rebut by showing that the restraint was not reasonably necessary to achieve the procompetitive objective. Id. In applying the rule of reason, the fact finder "must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *State Oil, 522 U.S. at 10*. The inquiry focuses on whether the restraint "is one that promotes competition or one that suppresses competition." *Deutscher Tennis Bund, 610 F.3d at 830*, quoting **[*46]** *Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*.

Certain conduct "presumed to unreasonably restrain competition" is not analyzed under the rule of reason, but rather is analyzed as per se illegal "without elaborate inquiry as to the precise harm [it has] caused or the business excuse for [its] use." *In re Flat Glass Antitrust Litig., 385 F.3d 350, 356 (3d Cir. 2004)*, quoting *Rossi, 156 F.3d at 461*. "[P]er se analysis, permits courts to make 'categorical judgments' that certain practices, including [some types of] price fixing,[18] horizontal output restraints, and market-allocation agreements, are illegal per se. *Cont'l Airlines, Inc., 277 F.3d at 509*. "Per se rules of illegality are judicial constructs . . . and are based in large part on economic predictions that certain types of activity will more often than not unreasonably restrain competition." *Brown Univ., 5 F.3d at 670* (citations omitted). "For the sake of business certainty and litigation efficiency, [the Supreme Court has] tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable." *Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 344, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*. But, "[o]ver the past

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[18] Continental Airlines was decided prior to the Supreme Court's decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 882, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*, which held that vertical price restraints, once found to be per se illegal, are to be "judged by the rule of reason," as is further set forth herein.

several decades, the Supreme Court has narrowed the applicability of per se analysis expressing a reluctance to apply this standard 'in the context of business relationships where the economic impact of certain practices is not immediately obvious.'" **[*47]** *RDK Truck Sales & Serv. Inc. v. Mack Trucks, Inc., No. 04-4007, 2009 U.S. Dist. LEXIS 43245, 2009 WL 1441578, at *4 (E.D. Pa. May 19, 2009)*, quoting *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)* (further citations omitted); see also *Behrend v. Comcast Corp., No. 03-6604, 2012 U.S. Dist. LEXIS 51889, 2012 WL 1231794, at *11* ("The authorities agree that this 'modern approach' to antitrust analysis should apply where the rationale of the per se rule does not neatly fit the industry involved.") (E.D. Pa. April 12, 2012); *In re Se. Milk, 801 F. Supp. 2d at 719* ("the category of agreements to be analyzed under a per se analysis has been shrinking over the last few years"). "Per se liability is reserved for only those agreements that are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." *Texaco, 547 U.S. at 5* (internal quotation and citation omitted); see also *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 103-04, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)* ("Per se rules are invoked when [the] surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct."). "[T]he per se rule is appropriate only after courts have had considerable experience with the type of restraint at issue . . . and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason." *Leegin, 551 U.S. at 886-87* (citations omitted); see also *In re Sulfuric Acid Antitrust Litig., 703 F.3d 1004, 1011-12 (7th Cir. 2012)* ("The per se rule is designed for cases in which experience has convinced **[*48]** the judiciary that a particular type of business practice has no (or trivial) redeeming benefits ever."). This form of analysis is applied where a "practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19-20, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*; see also *Major League Baseball Props. Inc. v. Salvino, Inc., 542 F.3d 290, 340 n.10 (2d Cir. 2008)* (Sotomayor, J., concurring) ("When empirical analysis is required to determine a challenged restraint's net competitive effect, neither a per se nor a quick-look approach is appropriate . . . ."). "To justify a per se prohibition a restraint must have manifestly anticompetitive effects, and lack . . . any redeeming virtue." *Leegin, 551 U.S. at 886* (internal quotations omitted); see also *In re Se. Milk, 801 F. Supp. 2d at 717* ("A per se rule is inappropriate where the effects of a particular restraint are unclear, even where aspects of the restraint may appear to be facially anti-competitive.") (citation omitted).[19]

A. Price Fixing Claim

To determine whether the rule of reason or the per se rule applies to the claimed agreements to fix prices and restrict the supply of mushrooms, I must first consider **[*50]** the nature of the relationships between the parties to the agreements. Whether any agreement by defendants to restrain the trade of mushrooms is horizontal or vertical in nature is relevant to my determination of whether the rule of reason or the per se rule should be applied to plaintiffs' Sherman Act Section 1 claim. See *In re Se. Milk Antitrust Litig., 739 F.3d 262, 272 (6th Cir. 2014)* ("When determining whether to use the per se rule or the rule of reason, courts must consider the type of restraint at issue — whether it is horizontal or vertical."). "The labels attached to the conduct by the [parties] are not determinative . . ., i.e. that plaintiffs repeatedly state that the conspiracy they allege is a horizontal, per se illegal conspiracy to fix prices . . . does not make it so." *In re Se. Milk, 801 F. Supp. 2d at 718*.

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[19] An abbreviated rule of reason analysis, "quick look," is applied in those cases where the per se rule is inappropriate but where "no elaborate **[*49]** industry analysis is required to demonstrate the anticompetitive character of an inherently suspect restraint." *Brown Univ., 5 F.3d at 669* (internal quotation marks omitted). The "quick look" analysis is used in cases where "[s]ome restraints of trade are 'highly suspicious' yet 'sufficiently idiosyncratic that judicial experience with them is limited.'" *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 317 (3d Cir. 2010)*, quoting 11 Herbert Hovenkamp, ***Antitrust Law*** ¶ 1911a (2d ed. 2005). Under this "intermediate" standard, "the competitive harm is presumed, and 'the defendant must promulgate some competitive justification' for the restraint." *Deutscher Tennis Bund, 610 F.3d at 830*, quoting *Brown Univ., 5 F.3d at 669*. The Court presumes "adverse competitive impact prevails and [] condemns the practice without ado" if the defendant provides no legitimate competitive justifications, but "must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis" if "sound procompetitive justifications" are set forth. *Deutscher Tennis Bund, 610 F.3d at 830*, quoting *Brown Univ., 5 F.3d at 669*. Neither plaintiffs nor defendants have argued that a quick look analysis is warranted in this case.

"'An arrangement is said to be 'horizontal' when its participants are (1) either actual or potential rivals at the time the agreement is made; and (2) the agreement eliminates some avenue of rivalry among them.'" *In re Sulfuric Acid Antitrust Litig., 743 F. Supp. 2d 827, 867 (N.D. Ill. 2010)*; quoting 11 H. Hovenkamp, ***Antitrust Law*** ¶ 1901b, p. 203 (2d ed. 2005). Horizontal price fixing is conduct wherein "competitors at the same market level agree to fix or control the prices they will charge for their respective foods or services." *Brown Univ., 5 F.3d at 670* (emphasis added); **[*51]** see also *Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 730, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)* ("Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints."). Horizontal price fixing has generally been held to be per se illegal. *Brown Univ., 5 F.3d at 670*, citing *F.T.C. v. Superior Ct. Trial Lawyers Ass'n, 493 U.S. 411, 435-36, 110 S. Ct. 768, 107 L. Ed. 2d 851 (1990)*; see *Leegin, 551 U.S. at 886* ("Restraints that are per se unlawful include horizontal agreements among competitors to fix prices."); *In re Flat Glass, 385 F.3d at 356* (finding horizontal price fixing to be per se unreasonable); see also *Maricopa Cnty. Med. Soc'y, 457 U.S. at 344-47* ("We have not wavered in our enforcement of the per se rule against price fixing."); *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)* ("Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se."). However, "[n]ot all arrangements among actual or potential competitors that have an impact on price are per se violations of the Sherman Act or even unreasonable restraints." *Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 23, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*. The Supreme Court has explained that

> Mergers among competitors eliminate competition, including price competition, but they are not per se illegal, and many of them withstand attack under any existing antitrust standard. Joint ventures and other cooperative arrangements are also not usually unlawful, at **[*52]** least not as price-fixing schemes, where the agreement on price is necessary to market the product at all.

Id.

"Vertical conspiracies, on the other hand, involve agreements among actors at different levels of market structure to restrain trade, 'such as agreements between a manufacturer and its distributors to exclude another distributor from a given product and geographic market.'" *In re Se. Milk, 801 F. Supp. 2d at 718*, quoting *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F.2d 802, 805 (6th Cir. 1988)*. Vertical price restraints, once also found to be per se illegal, are now "judged by the rule of reason." *Leegin, 551 U.S. at 882*; see also *Mooney v. AXA Advisors, L.L.C., 19 F. Supp. 3d 486, 498 (S.D.N.Y. 2014)* ("agreements between persons or entities at different levels of a market structure, such as between a manufacturer and distributor — commonly referred to as 'vertical restraints' — are analyzed under the rule of reason"). In Leegin, the Supreme Court overturned its prior precedent which had permitted the application of per se liability to vertical restraints.[20] It found that "a manufacturer might be able to achieve the procompetitive benefits of resale price maintenance by integrating downstream and selling its products directly to consumers." *551 U.S. at 903*. The Supreme Court explained that its prior precedent,

> tilts the relative costs of vertical integration and vertical agreement by making the **[*53]** former more attractive based on the per se rule, not on real market conditions. . . . This distortion might lead to inefficient integration that would not otherwise take place, so that consumers must again suffer the consequences of the suboptimal distribution strategy. And integration, unlike vertical price restraints, eliminates all intrabrand competition.

Id. Accordingly, the Supreme Court determined that continued adherence to the per se rule against vertical price restraints was inappropriate. Id. The Supreme Court explained:

> [a] horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, per se unlawful. . . . To the extent a vertical

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[20] In *Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 408, 31 S. Ct. 376, 55 L. Ed. 502 (1911)*, the plaintiff, a manufacturer of medicines, sold its products only to distributors who agreed to resell them at set prices. The Supreme Court found the manufacturer's control of resale prices to be unlawful, explaining that the pricing agreements would advantage the **[*54]** distributors, not the manufacturer, and thus the arrangement was analogous to a combination among competing distributors, which the law treated as void. *Dr. Miles, 220 U.S. at 407-08*.

> agreement setting minimum resale prices is entered upon to facilitate either type of cartel, it, too, would need to be held unlawful under the rule of reason.

Leegin, 551 U.S. at 893 (2007) (citation omitted).

In their motion, moving defendants contend that the conspiracy alleged by plaintiffs "is more akin to a vertical agreement between the Defendant growing companies who were members of the EMMC and their downstream packaging and distribution companies (most of which are also defendants in this case) who actually sold mushrooms to customers." Dkt. No. 492 (Defs.' Rule of Reason Mot.) at ¶ 13. They argue that "the essential alleged price-fixing activity complained of here involved a vertical agreement to sell mushrooms at EMMC minimum prices between the corporate defendants who were EMMC member/growers and the corporate defendants and non-defendants who were the downstream packagers and distributors of the mushrooms." Dkt. No. 492 (Defs.' Rule of Reason Mem.) at 2. In their response to plaintiffs' motion, moving defendants assert that "there were a series of vertical arrangements between the EMMC member companies and the separately incorporated downstream non-EMMC member companies that packaged and sold the mushrooms but were not, themselves **[*55]** subject to the EMMC's policies and regulations." Dkt. No. 501 (Defs.' Rule of Reason Reply) at 4. Moving defendants argue that "[s]ince the non-member downstream companies actually sold most of the mushrooms to the purchasers, these vertical arrangements were essential to the success of the EMMC's minimum pricing policy." Id. Moving defendants contend that because the claimed conspiracy to fix prices typifies a vertical, rather than a horizontal conspiracy, it should be subject to analysis under the rule of reason. Id. They contend that

> it is well-established that the Rule of Reason applies where the claims of price-fixing involve agreements that are vertical in nature, precisely like those between the Cutone family-owned grower and the Cutone family-owned distributor, between Kaolin/Southmill and its distribution companies in Texas, Louisiana and Georgia and between LRPM (the grower) and its packager and distributor, Manfredini Enterprises, Inc.

Dkt. No. 492 (Defs.' Rule of Reason Mem.) at 10-11.

Plaintiffs contend, in their response to moving defendants' motion, that there was "a horizontal conspiracy among mushroom growers and distributors to fix prices and restrict the supply of mushrooms." **[*56]** Dkt. No. 496 (Pls.' Statement of Facts) at ¶ 3. They assert that "the growers, packagers and shippers [in the EMMC] are horizontal competitors, not parts of a vertical distribution chain." Id. at ¶ 3; see also Dkt. No. 498 (Pls.' Opp'n Mem.) at 8. Plaintiffs assert that their "claim is that horizontal competitors consisting of growers and their associated distributors conspired to sell at fixed prices and restrict supply. In contrast, a resale price maintenance claim would challenge prices independently set by the growers and imposed on downstream resellers." Dkt. No. 508 (Pls.' Reply in Support of Cross-Motion) at 4 n.3. In support of their argument plaintiffs note that the EMMC's written policies referred to transactions between members — to which minimum pricing did not apply — as 'sideways' sales." Dkt. No. 496 (Pls.' Statement of Facts) at ¶ 3. Plaintiffs assert that "[t]he fact that some members of the EMMC had vertical relationships with distributors who were bound to sell at EMMC prices does not change the fact that the EMMC brought together horizontal competitors to fix prices and restrict supply." Id. They argue that "[w]hile the 'vertical' relationships of some EMMC members with non-member distributors destroyed the EMMC's Capper-Volsted **[*57]** immunity," Dkt. No. 498 (Pls.' Opp'n Mem.) at 3-4, the growers, packagers and shippers in the EMMC "are horizontal competitors, not parts of a vertical distribution chain." Id. at 8. Plaintiffs contend that "[t]he fact that a horizontal conspiracy among competitors has 'vertical aspects' . . . does not transform a horizontal agreement subject to per se condemnation into a vertical agreement." Id. at 9.

At oral argument, however, the parties painted a picture of a more complex conspiracy — one which is neither purely vertical or purely horizontal. Moving defendants argued that the alleged price fixing conspiracy is "a hybrid . . . . [T]here is a horizontal conspiracy amongst the members of the EMMC, which are the growers, and then they sold through their distributors. And we're saying that those resale price agreements were each vertical between each grower and each distributor." Dkt. No. 628 (Oral Arg. Tr.) at 7:4-9. Moving defendants argued that

> the growers and their distributors are two separate levels of commerce. The growers do not sell to the class or the individual Plaintiffs except for those few growers [who] are fully integrated vertically. . . . [T]he distributors don't grow what they sell to the class. . . .

> To the extent **[*58]** that a distributor agreed to sell at a minimum price, that was an agreement between itself and the grower who was a member of the EMMC. . . . [W]ith the exception of [non-grower] Cutone as a member of the EMMC, with that exception there is no evidence that a distributor had an agreement with the EMMC about minimum prices. The only evidence may be that there was an agreement between — that a grower instructed its distributor to sell at the EMMC price. That's a vertical resale price maintenance agreement and nothing more.

Id. at 10:2-17 (emphasis added). Moving defendants conceded that "there is a[n] . . . alleged horizontal conspiracy among the EMMC members, but with respect to those who use distributors, that those are each individual vertical resale price maintenance agreements as they're alleged." Id. at 7:14-18. Moving defendants further argued that "we have a situation where you have an agreement at the producer level which is in large part carried out through some unknown agreements with [distributors] — on a vertical basis" and that, "there's virtually no evidence that there was any evidence that there was any conspiracy at the distributor level." Id. at 45:23-24, 46:7-9.

Plaintiffs agreed **[*59]** with moving defendants at oral argument "that this is a hybrid agreement, it's a horizontal agreement with facilitating vertical agreements. So those vertical agreements between the growers and the distributors facilitated the horizontal agreement between the growers to fix the prices." Id. at 26:16-21. Plaintiffs argued, however, that the horizontal element to their claims is what matters: "the agreement of the EMMC members to set prices and limit supply." Id. at 31:10-12. They argued that the

> growers in the EMMC all got together and horizontally agreed to set the price. And the price that they agreed to set was not the price that they sold to the distributor, but they agreed that when they had a relationship with a distributor, they would set that distributor's price. And that's that horizontal agreement between the growers to impose this . . . price on [their] distributors.

Id. at 29:18-23. Plaintiffs characterize the conspiracy which is subject to their claims as "an agreement where competitors with distribution interests entered into a horizontal conspiracy to fix distribution prices." Dkt. No. 624 (Pls.' Letter Br.) at 4 (emphasis added). They argue that "the membership of a distributor **[*60]** in the EMMC only serves to reinforce that the EMMC was a front for horizontal distributor-level price fixing. . . . [T]he EMMC was used to coordinate the horizontal-distributor-level prices of mushrooms either by the EMMC members themselves or their related distributors." Id. (emphasis added). Plaintiffs also assert that

> the fact that M. Cutone was a member of the EMMC does not alter the fact that the EMMC fixed the prices of horizontal competitors. The EMMC was formed by growers *and* their related distributors to fix *distribution* prices. This is horizontal conduct by competitors at the same level of distribution to fix prices, not the kind of vertical resale price maintenance imposed by a manufacturer that is potentially precompetitive and entitled to be considered under the rule of reason.

Id. at 2.

I find that there are both horizontal and vertical agreements in play in the alleged conspiracy in this case and am thus faced with the question of what rule of decision to apply in such a circumstance. Plaintiffs have argued that "when you have [a] hybrid a[greement] involving both horizontal — a horizontal agreement facilitated by vertical agreements [—] that the horizontal part of that agreement is subject **[*61]** to the per se rule." Dkt. No. 628 (Oral Arg. Tr.) at 27:1-4. They assert that "[t]he law is that the horizontal part of the agreement is judged by the per se rule. If there's an attack on [the] vertical part of the agreement, that vertical part of the agreement is subject to the rule of reason." Id. at 30:18-25. Moving defendants contend that "the vertical aspect of the resale price maintenance agreements to facilitate the alleged horizontal agreement . . . requires the rule of reason to be applied in this case . . . ." Id. at 12:4-7. Two post-Leegin cases from the Court of Appeals are instructive.

In the first case, *Toledo Mack Sales and Service, Inc. v. Mack Trucks, Inc., 530 F.3d 204 (3d Cir. 2008)*, the plaintiff alleged a Sherman Act § 1 claim involving a two-part conspiracy: it claimed first, that defendant Mack, a manufacturer of heavy-duty trucks, entered into a competition-restricting agreement with its authorized dealers, and second, that Mack dealers entered into agreements with each other not to compete on price. See id. at *530 F. 3d at 210*. "At the close of evidence at trial, the District Court granted Mack's motion for judgment as a matter of law on

Toledo's Sherman Act claim." *Id. at 216*. On appeal, the Court of Appeals bifurcated its consideration of the restraints claimed by the plaintiff. First, the **[*62]** Court held that "[i]t is readily apparent that, if there were an agreement among Mack dealers as alleged, it involved horizontal competitors colluding to control prices, and therefore, would be per se unlawful." *Id. at 221*. The Court then considered Toledo's evidence of an unlawful agreement between the dealers and Mack. The Court explained that, "[i]n contrast to horizontal price-fixing agreements between entities at the same level of a product's distribution chain, the legality of a vertical agreement that imposes a restriction on the dealer's ability to sell the manufacturer's product is governed by the rule of reason." *Id. at 224*, citing *Leegin, 551 U.S. at 906-07*. The Court continued, explaining that "[t]he rule of reason analysis applies even when, as in this case, the plaintiff alleges that the purpose of the vertical agreement between a manufacturer and its dealers is to support illegal horizontal agreements between multiple dealers." *Toledo Mack, 530 F.3d at 225*, citing *Leegin, 551 U.S. at 893*. In a footnote, the Court explained "[a]fter Leegin, vertical agreements to set prices are no longer per se unlawful but subject to the rule of reason. . . . In light of Leegin, we conclude that the rule of reason, not per se analysis, applies to the vertical agreement Toledo alleges was in existence **[*63]** here." *Toledo Mack, 530 F.3d at 225 n.15*.

In the second case, *In re Insurance Brokerage Antitrust Litigation, 618 F.3d 300, 336 (3d Cir. 2010)*, on appeal from orders of dismissal under Rule 12(b)(6), the Court of Appeals considered several agreements involving insurance brokers — middlemen like the distributor defendants in this case — and insurance companies who provided insurance — similar to the grower defendants in this case who provided mushrooms to the distributors. Certain agreements in the case — the "broker centered conspiracies" — were agreements made only between individual insurance companies and the insurance brokers. The Court of Appeals found that it was not possible to "plausibly infer a horizontal agreement among a broker's insurer partners from the mere fact that each insurer entered into a similar contingent commission agreement with the broker." *Id. at 327*. Because there were not "plausible grounds to infer a horizontal agreement," the Court explained that the plaintiffs had not pled "a per se violation of *§ 1 of the Sherman Act*," although this did "not mean that [the] defendants' alleged treatment of insurance purchasers was praiseworthy — or even lawful . . . ." *Id. at 335-36*.

The plaintiffs in the Insurance Brokerage case had also alleged that certain insurance companies had engaged in bid-rigging — "quintessentially **[*64]** collusive behavior subject to per se condemnation" — through a broker that had a vertical relationship with each company. *Id. at 336*. The insurance company defendants argued that the vertical involvement of the broker required their horizontal conspiracy to be judged under the rule of reason. With respect to the bid-rigging allegations, the Court of Appeals explained, "'defendants cannot escape the per se rule [for certain horizontal restraints of trade] simply because their conspiracy depended upon the participation of a 'middle-man', even if that middleman conceptualized the conspiracy, orchestrated it . . . and collected most of the booty.'" *Id. at 337*, quoting *United States v. All Star Indus., 962 F.2d 465, 473 (5th Cir. 1992)* (omission in original). The Court "agree[d] that [the] plaintiffs' allegations portray a conspiracy masterminded and directed by defendant broker Marsh, but this fact does not make implausible the inference of a horizontal agreement among the insurers." *In re Ins. Brokerage, 618 F.3d at 337*. "Marsh may have been an essential conduit and coordinator, but the insurers' agreement to provide protective bids to one another was also instrumental to the operation of the asserted broker-centered conspiracy." *Id. at 338*. Ultimately, the Court found that the plaintiffs' allegations were sufficient **[*65]** to "suggest a plausible horizontal agreement among the insurers" and that while, "[o]n the complaint's own account, the conspiracy was instigated, coordinated and policed by Marsh" this did "not belie the alleged horizontal agreement." *Id. at 344*. The Court cautioned that "[i]f all horizontal agreements that exist to facilitate vertical ones . . . must be tested by the rule of reason, then per se condemnation of hub-and-spoke conspiracies would appear to be impossible."[21] *Id. at 347*.

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[21] In reaching its conclusion in Insurance Brokerage, the Court also noted that the defendants were "unable to identify among plaintiffs' allegations any procompetitive venture to which the insurers' alleged horizontal agreement not to compete for incumbent business could reasonably be deemed integral." *In re Ins. Brokerage, 618 F.3d at 346*. In contrast in this case, defendants argue that "there is substantial evidence that the EMMC member companies believed that the minimum pricing and supply control policies were necessary to prevent further farm closings and bankruptcies heralded by the bankruptcy of a large

Neither Toledo Mack **[*66]** nor Insurance Brokerage provide a perfect analogy to the facts now before me. By plaintiffs' own characterization, the claimed mushroom price-fixing conspiracy is a horizontal and vertical "hybrid," and there are "intermediate vertical distributors . . . identified . . . as . . . conspirators in the conspiracy." Dkt. No. 628 at 54:12-13; 88:4-7. Plaintiffs contend that "those vertical agreements between the growers and the distributors facilitated the horizontal agreement between the growers to fix the prices." Id. at 26:18-21. If the EMMC members' agreement had been an agreement to fix the prices which EMMC members themselves charged for the sale of mushrooms they themselves grew to third-party distributors, I would find that the per se rule should apply to their agreement. Clearly such an agreement would "involve[] horizontal competitors colluding to control prices, and therefore, would be per se unlawful." *Toledo Mack, 530 F.3d at 221*. But the conspiracy alleged here involves an agreement by the members of the EMMC to fix not the prices which they themselves charged, but rather the prices charged by vertically oriented distributors — some of whom are integrated with EMMC members and some of whom are not. The **[*67]** agreement of the EMMC members is thus also distinguishable from the horizontal bid-rigging agreement in Insurance Brokerage, as there the agreement between the insurance companies mandated conduct to be undertaken by the insurance companies themselves — the provision of protective bids to one another — and did not mandate any particular conduct by the vertically oriented broker. Here, absent cooperation from the vertically oriented distributors, integrated and not, the EMMC's agreement to fix mushroom distribution prices would be meaningless.

Further, to the extent that non-EMMC member distributor defendants followed the EMMC's mushroom pricing policies, they are clearly vertically oriented such that their conduct in the claimed conspiracy should be subject to the rule of reason. "In contrast to horizontal price-fixing agreements between entities at the same level of a product's distribution chain, the legality of a vertical agreement that imposes a restriction on the [distributor's] ability to sell the [grower's] product is governed by the rule of reason." *Toledo Mack, 530 F.3d at 224*, citing *Leegin, 551 U.S. at 906-07*. As I have previously explained, there is not necessarily a "unity of interest between the growers and the distributors **[*68]** in this case." *In re Mushroom Direct Purchaser Antitrust Litig., 621 F. Supp. 2d 274 (E.D. Pa. 2009)*. "[T]he growers are selling to distributors who sell at EMMC prices. . . . In this relationship, the price fixing does not protect the economic interests of the grower and therefore the entities' interests are not congruent." Id.

And finally, here I cannot ignore the presence in the claimed conspiracy of the EMMC-member defendants with integrated growing and distribution operations. The effect of the presence of similar entities with dual roles in the claimed conspiracies was not addressed in either Toledo Mack or Insurance Brokerage. I find that the inclusion of these integrated entities is sufficient to prevent me from finding that the claimed conspiracy in this case is a clear parallel to other conspiracies which have been subjected to per se liability. It has been held that the "per se rule is inapplicable" where a defendant is "both a manufacturer and a retail distributor of its products." *House of Brides, Inc. v. Alfred Angelo, Inc., No. 11-7834, 2014 U.S. Dist. LEXIS 1850, 2014 WL 64657, at *5 (N.D. Ill. Jan. 8, 2014)* (finding that such an arrangement is a "'dual distribution' system" and that "[r]estraints in dual distribution systems are analyzed under the rule of reason") (citations omitted); see also *AT & T Corp. v. JMC Telecom, LLC, 470 F.3d 525, 531 (3d Cir. 2006)* ("Vertical restraints are generally not per se violations of the Sherman Act, even where a distributor **[*69]** and manufacturer also compete at the distribution level, i.e., have some form of horizontal relationship (a/k/a/ dual distributor arrangement) . . . ."); *Beyer Farms, Inc. v. Elmhurst Dairy, Inc., 35 F. App'x 29 (2d Cir. 2002)* ("Beyer alleged in its complaint that Elmhurst and Bartlett were engaged in a dual-distributorship relationship, or both a vertical and horizontal relationship. Had Beyer alleged a purely horizontal relationship between Elmhurst and Bartlett, Beyer would have alleged a per se violation of *§ 1 of the Sherman Act*. Because Beyer did not so plead, its complaint was subject to scrutiny under the 'rule of reason.'"). The presence of the integrated defendants prevents me from simply bifurcating my consideration of the claimed agreement to fix mushroom distribution prices into horizontal and vertical components with the former being subject to per se liability and the latter subject to consideration under the rule of reason. Because I am unable to untangle the vertical and horizontal aspects of the conduct of the integrated defendants in the alleged conspiracy to fix mushroom distribution prices, I find that it is appropriate to apply the rule of reason to the entirety of plaintiffs' claim that defendants violated *Section 1 of the Sherman Act* by "conspir[ing] among **[*70]** themselves and in conjunction with

Canadian-based mushroom producer operating several growing, packaging and distribution facilities in the United States." Dkt. No. 501 at 6.

nonmember distributors to set artificially-inflated prices" for mushrooms. Dkt. No. 185 at ¶ 93. See *In re Aluminum Warehousing Antitrust Litig., No. 13-2481, 2014 U.S. Dist. LEXIS 121435, 2014 WL 4277510, at *25 (S.D.N.Y. Aug. 29, 2014)* ("Most antitrust claims are evaluated under the rule of reason. . . . Most vertical agreements and mixed agreements (those with both horizontal and vertical aspects) are analyzed in this manner.") (emphasis added); see also *Dimidowich v. Bell & Howell, 803 F.2d 1473, 1481 (9th Cir. 1986)* (finding that the rule of reason applied where the alleged conspirators were "in a 'hybrid arrangement composed of both a dual distributorship and a horizontal relationship" because the Court did "not have enough experience with this type of arrangement to say with any confidence that a concerted refusal to deal in this context almost always will be anticompetitive"); *Black Box Corp. v. Avaya, Inc., No. 07-6161, 2008 U.S. Dist. LEXIS 72821, 2008 WL 4117844, at *18 (D.N.J. Aug. 29, 2008)* ("Here, there was a dual distributor arrangement in the market for PBX systems and a horizontal relationship in the service and maintenance aftermarket. . . . [T]his Court does not have enough experience with this type of arrangement to say that it will almost always be anticompetitive. Therefore, the Court concludes that a Rule of Reason analysis is appropriate.").

As counsel to the EMMC explained in 2001, the EMMC is not a "classic" cooperative:

> Most, but not all, agricultural **[*71]** cooperatives differ from EMMC in that they tend to combine grower organizations for the collective purpose of consolidating and sharing the "getting-to-market" function for agricultural products, i.e., processing, handling, sales and marketing. . . . EMMC is not like those cooperatives given that EMMC members will continue to conduct independent businesses.

Dkt. No. 492, Ex. A. at 3. "It is a bad idea to subject a novel way of doing business (or an old way in a new and previously unexamined context, which may be a better description of this case) to per se treatment under ***antitrust law***." *In re Sulfuric Acid Antitrust Litig., 703 F.3d 1004, 1011 (7th Cir. 2012)*. "[E]ven if the agreement is horizontal in the way Plaintiffs now claim, applying the rule of reason is the default position and can be applied to horizontal restraints as well if they do not fit into existing categories of per se violations." *In re Se. Milk, 739 F.3d at 273* (finding that, "especially at the summary judgment stage, [it was] not a 'clear cut' case of an obviously anticompetitive trade restraint").

Where "there is evidence [the growers] were the impetus for a vertical price restraint, there is a greater likelihood that the restraint facilitates a retailer cartel or supports a dominant, inefficient retailer." *Leegin, 551 U.S. at 897-98*. This can be **[*72]** determined, however, through application of the rule of reason which is "designed and used to eliminate anticompetitive transactions from the market." *Id. at 898*; see *F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447, 459, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)* ("[A] refusal to compete with respect to the price term of an agreement[] impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them. Absent some countervailing procompetitive virtue — such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services . . . — such an agreement limiting consumer choice by impeding the ordinary give and take of the market place . . . cannot be sustained under the Rule of Reason.") (citations and internal quotations omitted).[22]

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[22] "A plaintiff seeking application of the per se rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects." *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 298, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985)*. "[E]ven when the per se label has been applied to a category of anticompetitive conduct, the cases establish that courts may still look to see whether the economic effects of a particular **[*73]** practice in a particular industry justify abandoning a rule of reason analysis" as the default position. *Behrend v. Comcast Corp., No. 03-6604, 2012 U.S. Dist. LEXIS 51889, 2012 WL 1231794, at *11 (E.D. Pa. Apr. 12, 2012)*. Certain pro-competitive conditions "can render an industry practice 'substantially different from the classic' horizontal restraints subjected to per se treatment." *2012 U.S. Dist. LEXIS 51889, [WL] at *12*, quoting *Eichorn v. AT & T Corp., 248 F.3d 131, 139 (3d Cir. 2001)* (further citations omitted).

Moving defendants argue that their price fixing conduct should be subject to the rule of reason because "the historical procompetitive benefits of growers forming the EMMC [were] clear": to "salvage their farms and the mushroom industry as a whole" during claimed dire market conditions. Dkt. No. 492 (Defs.' Rule of Reason Mem.) at 16-18. Plaintiffs assert that "the

D. Supply Control Claim

Despite my conclusion that the rule of reason should be applied to plaintiffs' price fixing claims, I find that plaintiffs' claim that the supply control program violated *Section 1 of the Sherman Act* is instead subject to per se antitrust liability. "An agreement among competitors to restrict the production of a certain good equates to a price-fixing agreement, because conspiracies to limit output are designed to raise, stabilize, or otherwise fix the price of goods." *In re Sulfuric Acid Antitrust Litig., 743 F. Supp. 2d 827, 867 (N.D. Ill. 2010)*; see also *Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 226 (7th Cir. 1978)* ("an agreement to restrict the production of uranium unquestionably is a price fixing arrangement"). The claimed supply control conspiracy is different from the claimed conspiracy to fix the distribution prices of mushrooms because no secondary agreements with vertically aligned distribution entities were necessary to implement the claimed supply control agreement. **[*76]** Instead, the claimed agreement to purchase or lease properties in order to remove them from mushroom production is a straightforward agreement among the members of the EMMC. Such an agreement "facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Broad. Music, Inc., 441 U.S. at 19-20*. As such, the claimed conduct giving rise to plaintiffs' supply control claim is a restraint on competition which is per se unreasonable.

II. Plaintiffs' Motion for Partial Summary Judgment

In their motion for partial summary judgment, plaintiffs argue that because the defendants' "agreement to engage in price fixing and output restrictions was per se illegal and therefore not subject to any defense based on market conditions or business justification," I "should enter summary judgment establishing the liability of the EMMC, its members, and distributors affiliated with EMMC members." Dkt. No. 498 (Pls.' Opp'n Mem.) at 19. But at oral argument, plaintiffs conceded that summary judgment would be inappropriate if the Court were to find that the rule of reason governs plaintiffs' claims. Dkt. No. 628 at 90:14-19 ("if it's rule of reason, we'll have to show that there was actually some **[*77]** anti-competitive effect"). Because that is precisely what I have found with respect to

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EMMC agreement has no redeeming efficiency producing benefits and was admittedly implemented for the purpose of limiting competition." Dkt. No. 624 (Pls.' Letter Br.) at 1-2. Plaintiffs argue that

> [d]efendants' horizontal conspiracy to fix prices and limit supply created neither a new product nor expanded production. . . . Nor did the EMMC integrate the abilities of its members in any way to create a new and more efficient way of competing. After joining the EMMC, [d]efendants remained separate competitors with separate brands, sales forces **[*74]** and customers. . . . The only benefit of membership was that the EMMC fixed distribution prices and limited supply to keep prices high.

Dkt. No. 624 (Pls.' Letter Br. at 3).

I do not here decide that the procompetitive benefits argued by moving defendants are sufficient on their own to justify application of the rule of reason. I write only to note that the Court of Appeals for the Seventh Circuit has held that "[e]ven price fixing by agreement between competitors [and] . . . . other agreements that restrict competition . . . are governed by the rule of reason, rather than being per se illegal, if the challenged practice when adopted could reasonably have been believed to promote 'enterprise and productivity.'" *In re Sulfuric Acid, 703 F.3d at 1011-12*, citing *Broad. Music, Inc. v. Columbia Broad., 441 U.S. 1, 24, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*, and *Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185, 189 (7th Cir. 1985)*. The Seventh Circuit has also held that "[a] court must ask whether an agreement promoted enterprise and productivity at the time it was adopted. If it arguably did, then the court must apply the Rule of Reason." *Polk Bros., 776 F.2d at 189* (emphasis added); see also *Procaps S.A. v. Patheon Inc., 36 F. Supp. 3d 1306, 1328 (S.D. Fla. 2014)* ("[D]etermining whether an agreement is 'naked' requires a broader examination of whether the restraint would be likely to increase economic efficiency and render markets more, rather than less, competitive. . . . If the net plausible effects **[*75]** might be procompetitive, then courts will apply the rule of reason to strike the balance.") (citations and internal quotations omitted). But cf. *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221-22, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)* ("[Congress] has no more allowed genuine or fancied competitive abuses as a legal justification for [price-fixing] schemes than it has the good intentions of the members of the combination.").

plaintiffs' price fixing claims under *Section 1 of the Sherman Act*, I will deny plaintiffs' motion to the extent that it seeks partial summary judgment on those claims.

To the extent that plaintiffs seek summary judgment with respect to their supply control claims under *Section 1 of the Sherman Act*, I will deny summary judgment as well. Even though I find these claims are subject to per se liability, I find that questions of fact remain with respect to whether each defendant "participate[d]" or "knowingly acquiesce[d]" in the alleged anticompetitive activity. See *Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1017 (3d Cir. 1994)*; see also *In re Processed Egg Prods. Antitrust Litig., 821 F. Supp. 2d 709, 723 (E.D. Pa. 2011)* ("[M]ere membership in a trade group . . . cannot alone sufficiently plead agreement to a conspiracy.")

An appropriate Order follows.

ORDER

AND NOW, this 26th day of May, 2015, upon consideration of certain defendants' motion to adjudicate plaintiffs' antitrust claims under the rule of reason (Dkt. No. 492),[23] plaintiffs' opposition to the motion seeking application of the rule of reason and plaintiffs' cross-motion for partial summary judgment on their Sherman Act § 1 claim (Dkt. No. 495), and the responses and replies to each motion (Dkt. Nos. 496, 498, 501-08, 511, 624, 630), following **[*78]** oral argument on the motions and consistent with the accompanying memorandum of law, it is ORDERED that:

1. Defendants' motion to adjudicate plaintiffs' antitrust claims under the rule of reason (Dkt. No. 492) is GRANTED IN PART AND DENIED IN PART as follows:

    a. the motion is GRANTED to the extent that it seeks application of the rule of reason to plaintiffs' claim that defendants violated *Section 1 of the Sherman Act* by "conspir[ing] among themselves and in conjunction with nonmember distributors to set artificially-inflated prices" for mushrooms. Dkt. No. 185 at ¶ 93;

    b. the motion is DENIED to the extent that it seeks application of the rule of reason to plaintiffs' claim that defendants violated *Section 1 of the Sherman Act* through the EMMC's implementation of a supply control scheme — purchasing and leasing mushroom farms in order to place deed restrictions on the properties prohibiting the conduct of business related to the production of mushrooms. Dkt. No. 185 at ¶ 94. The Court will apply per se liability to plaintiffs' *Section 1* supply control claims.

2. Plaintiff's cross motion for partial summary judgment (Dkt. No. 495) is DENIED.

It is FURTHER ORDERED that, because this Order and the accompanying memorandum of law may contain confidential information, it has been filed under seal pending review by the parties to permit them to meet and confer and propose a single jointly redacted version of the Order and the accompanying memorandum of law. The parties shall submit their proposed redacted Order and accompanying memorandum of law, if any, on or before June 8, 2015. Thereafter, the Court will issue a publicly-available version of this Order and the accompanying memorandum of law.

/s/ Thomas N. O'Neill, Jr.

THOMAS N. O'NEILL, JR., J.

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[23] Moving defendants are: the Eastern Mushroom Market Cooperative (EMMC), Robert A. Feranto, **[*79]** Jr. t/a Bella Mushroom Farms; Brownstone Mushroom Farms, Inc.; Brownstone Farms, Inc.; Brownstone Mushroom Farm; To-Jo Fresh Mushrooms, Inc.; Country Fresh Mushroom Co.; Gino Gaspari & Sons, Inc.; Kaolin Mushroom Farms, Inc.; South Mill Mushroom Farms, Inc.; Southmill Mushroom Sales, Inc.; Modern Mushroom Farms, Inc.; C&C Carriage Mushroom Co.; Sher-Rockee Mushroom Farm, LLC; Oakshire Mushroom Farm, Inc.; Phillips Mushroom Farms, Inc.; Louis M. Marson, Jr., Inc.; Monterey Mushrooms, Inc.; and John Pia (Dkt. No. 513).

HCF Ins. Agency v. Patriot Underwriters, Inc.

Court of Appeal of California, Second Appellate District, Division Five

May 27, 2015, Opinion Filed

Civil No. B257715

Reporter

80 Cal. Comp. Cases 522 *; 2015 Cal. App. Unpub. LEXIS 3744 **

HCF INSURANCE AGENCY, Plaintiff and Respondent, v. PATRIOT UNDERWRITERS, INC., Defendant and Appellant.

Notice: NOT TO BE PUBLISHED IN OFFICIAL REPORTS. *CALIFORNIA RULES OF COURT, RULE 8.1115(a)*, PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY *RULE 8.1115(b)*. THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF *RULE 8.1115*.

Prior History: **[**1]** Los Angeles County Superior Court No. BC521271—Richard Edward Rico, Judge

Disposition: Appeal from a order of the Superior Court of Los Angeles County. Order *affirmed* and plaintiff to *recover* costs from defendant.

Core Terms

arbitration, cause of action, sub-producer, insurer, captive, insurance agency, alleges, trial court, motion to compel arbitration, first amended complaint, antitrust, parties, arbitration clause, compel arbitration, competitors, agreement to arbitrate, arbitration agreement, workers' compensation, public policy, economic advantage, employees, commerce, intentional interference, scope of arbitration, group boycott, Underwriters, horizontal, terminated, demurrer, cases

California Compensation Headnotes/Summary

Headnotes

Insurance Agreements > Enforceability of Arbitration Clauses

Court of Appeal held that arbitration clause of agreement between plaintiff and [*523] defendant was unenforceable for plaintiff's causes of action for fraud and intentional interference with economic advantage because, under agreement, arbitration was allowed for only breach of contract and breach of implied covenant of fair dealing, and cause of action for anti-trust violation could not be arbitrated under applicable Florida law, when Court of Appeal found that plaintiff provided brokerage and agency services for several lines of insurance, including workers' compensation insurance to employers in health care industry, that defendant provided program administration and management of underwriter services for workers' compensation and specialized in creating and managing new individual, agency, group, or captive workers' compensation insurers, that plaintiff and defendant entered sub-producer agreement, which was to be followed by captive insurer agreement, that defendant terminated sub-producer agreement, and that plaintiff brought civil action against defendant and others.

[See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 33.01[1], [6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 3, § 3.04.]

Counsel: For defendant and appellant—Chamberlin Keaster & Brockman, by Robert W. Keaster, Michael A. Miller

For plaintiff and respondent—Winget Spadafora & Schwartzberg, by Brandon S. Reif, David Maurer, Rafael DeAquino Villar

Judges: TURNER, P. J.; KRIEGLER, J., GOODMAN, J.* concurred.

Opinion by: Turner, P.J.

Opinion

I. INTRODUCTION

Defendant, Patriot Underwriters, Incorporated, appeals from an order partially denying its amended motion to compel arbitration against plaintiff, HCF Insurance Agency. Plaintiff filed a first amended complaint containing multiple causes of action against defendant and other parties. As to defendant, plaintiff alleges the following causes of action: contract breach (first); breach of the implied covenant of good faith and fair dealing (second); fraud (third); intentional interference with economic advantage (fourth); and unlawful group boycott in violation of *Business and Professions Code section 16720 et seq.*, also known as the Cartwright Act (ninth). Defendant moved to compel arbitration pursuant **[**2]** to an agreement signed by plaintiff. The trial court ordered arbitration as to the contract and implied covenant breach claims because those two causes of action were within the scope of the arbitration agreement. The trial court denied the arbitration petition as to the fraud and intentional interference with economic advantage causes of action. The trial court ruled those two claims did not fall within the scope of the arbitration agreement. The trial court also denied the arbitration petition as to the Cartwright Act cause of action. The trial court ruled application of the arbitration clause's Florida choice-of-law provision prevented plaintiff from securing any relief. The trial court found the group boycott claim involved an important public policy because it is California's antitrust statute. We affirm the order partially denying defendant's motion to compel arbitration.

II. BACKGROUND

A. Plaintiff's Allegations

On September 12, 2013, plaintiff filed its complaint. Defendant moved to compel arbitration on October 25, 2013. Plaintiff subsequently filed a first **[*524]** amended complaint on December 16, 2013, against: defendant; Intercare Specialty Risk Services, its fictitious business names **[**3]** and successors in interest; Kevin Hamm, president and chief shareholder of Intercare Specialty Risk Services; Renee Iaia, president of Phoenix Risk Management Insurance Services, a related business to Intercare Specialty Risk Services; and Shomer Insurance Agency, Incorporated. We will focus on plaintiff's claims against defendant.

Plaintiff provides brokerage and agency services for casualty, accident and health, property, life and surplus lines of insurance. Plaintiff is a California corporation with its principal place of business in Los Angeles. Plaintiff is authorized to conduct business in California. Shomer Insurance Agency, Incorporated and Intercare Specialty Risk Services are direct competitors with plaintiff in the insurance market in the greater Los Angeles area. They specialize in brokering workers' compensation policies for extended care facilities. Defendant had a sub-producer agreement with Intercare Specialty Risk Services and Shomer Insurance Agency, Incorporated.

Defendant is a Delaware corporation with its principal place of business in Fort Lauderdale, Florida. Defendant is a program administrator and managing general underwriter servicing regional and national workers' **[**4]**

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

compensation insurance carriers. Defendant provides products to insurance agencies and wholesalers with expertise in workers' compensation. Defendant also offers services such as claims and risk management. Defendant is in competition with other managing general underwriters in California such as Safety National Casualty Company.

Defendant specializes in the creation and management of new individual, agency, or group captive insurers for workers' compensation. A captive insurer is a dedicated in-house subsidiary entity which provides insurance to its owner, a parent corporation. The parent corporation pays premiums to the captive insurer rather than an outside firm to insure some business risk. The captive insurer reinvests the premiums it receives and then pays claims by drawing on the principal and return on its investment. Captive insurers can lower costs and facilitate coverage for certain hard-to-insure risks that traditional carriers may not underwrite.

Around July 2012, defendant considered entering into a business relationship with plaintiff. The enterprise was to involve plaintiff's healthcare-based workers' compensation business. Defendant's former regional vice president, **[**5]** David Duvall, requested significant proprietary information. The request was made so defendant could evaluate whether to enter into a group or agency captive insurer agreement. The proprietary information disclosed included five years of confidential client lists, effective dates, premiums, payroll figures and loss ratios. On August 27, 2012, plaintiff and defendant entered into a sub-producer agreement. The August 27, 2012 sub-producer agreement was a precursor to forming captive insurer agreements. The August 27, 2012 sub-producer agreement allowed plaintiff to access defendant's products directly without going through competitors like Intercare Specialty Risk Services or Shomer Insurance Agency, Incorporated. Plaintiff and defendant expected to execute an agency captive insurer agreement in **[*525]** November 2012. Within the first few months after the August 27, 2012 sub-producer agreement was entered into, plaintiff submitted substantial “business” to defendant.

Around late August or early September of 2012, Intercare Specialty Risk Services and Shomer Insurance Agency, Incorporated employees learned of plaintiff's anticipated captive insurer agreement with defendant. Intercare Specialty **[**6]** Risk Services and Shomer Insurance Agency, Incorporated employees agreed to exert pressure on defendant to exclude plaintiff as their brokerage market competitor. During or around September or October 2012, Mr. Hamm telephoned Steve Mariano, defendant's chief executive officer. Mr. Hamm threatened to “pull business” from defendant if it did not cancel its sub-producer agreement with plaintiff. An unidentified employee of Shomer Insurance Agency, Incorporated also communicated with defendant to cease “doing business” with plaintiff.

Defendant agreed to cancel the sub-producer agreement because of the threats of Intercare Security Risk Services' and Shomer Insurance Agency, Incorporated's employees. An unspecified employee of defendant instructed Mr. Duvall not to discuss these conversations with individuals employed by plaintiff. In November 2012, Jason Adelman, plaintiff's president, asked Mr. Duvall if defendant had approved the captive insurer agreement. Mr. Duvall reiterated that Mr. Mariano, defendant's chief executive officer, had approved it. In December 2012, defendant refused to enter into a captive insurer agreement with plaintiff. Defendant refused to do so despite numerous **[**7]** representations the captive insurer agreement was approved and finalized. On or around January 1, 2013, defendant terminated the sub-producer agreement. As previously noted, plaintiff alleges the following causes of action against defendant: contract breach (first); implied covenant breach (second); fraud (third); intentional economic advantage interference (fourth); and unlawful group boycott in violation of the Cartwright Act under *Business and Professions Code section 16720, et seq.* (ninth). Because they are the relevant factual matters in this appeal, we will discuss the allegations in the third, fourth and ninth cause of action in detail.

The allegations in the third cause of action for fraud are difficult to follow. But the following are the relevant allegations. Since 2012, discussions between unspecified employees of plaintiff and defendant were held about entering into a captive insurer agreement. As part of that process, plaintiff shared confidential information with defendant. As noted, Mr. Duvall was defendant's former regional vice-president. On August 27, 2012, Mr. Duvall told Mr. Adelman, plaintiff's president, that defendant had approved group and agency captive insurer agreements. Thereafter for several weeks, Mr. Duvall **[**8]** made similar statements. As late as October 19, 2012, Mr. Duvall relayed a statement by Mr. Mariano, defendant's chief executive officer, of the approval of the agency captive insurer agreement with plaintiff. However, Mr. Mariano's statements were false and he knew them to be so. The purpose of Mr. Mariano's false statements was to: continue negotiation between plaintiff and defendant; maintain the appearance of good faith; keep plaintiff from securing workers' compensation insurance for its clients; continue **[*526]** securing confidential information from plaintiff; and further the boycott's objectives. (We will describe the boycott allegations shortly.) Had unidentified employees of plaintiff known that Mr. Mariano's statements concerning the agency captive insurer agreement were untrue, negotiations would have ceased. Plaintiff would have pursued other agency opportunities with other companies.

For the intentional economic advantage interference cause of action, plaintiff alleges unidentified employees were having similar discussions regarding captive insurer agreements with Safety National Insurance. Plaintiff provided National Safety Insurance with significant confidential information. **[**9]** Defendant knew: of the economic relationship between plaintiff and National Safety Insurance; plaintiff had a significant and profitable “book of business” with National Safety Insurance; and the economic relationship between plaintiff and National Safety Insurance would be interrupted if Mr. Mariano's false statements concerning the captive insurer agreement turned out to be true. By its actions, defendant disrupted and interfered with plaintiff's economic relationship with Safety National Insurance. Defendant caused plaintiff to suspend its negotiations regarding entering a captive insurer agreement with Safety National Insurance.

As to the group boycott antitrust claim, plaintiff alleges, Intercare Specialty Risk Services and Shomer Insurance Agency Incorporated are horizontal competitors. Intercare Specialty Risk Services and Shomer Insurance Agency Incorporated entered into an agreement to threaten defendant. The first amended complaint describes the relationship between plaintiff, Intercare Specially Risk Services and Shomer Insurance Agency Incorporated as follows: “At all relevant times, … Intercare [Specialty Risk Services] and Shomer [Insurance Agency Incorporated] provided **[**10]** brokerage services and sold various lines of specialized commercial insurance products to a significantly overlapping base of actual or potential customers in direct competition with [plaintiff]. In some cases, [plaintiff], Intercare [Specially Risk Services] and Shomer [Insurance Agency Incorporated] were all brokers for defendant.” According to the first amended complaint, Intercare Specially Risk Services and Shomer Insurance Agency Incorporated entered into an agreement to threaten defendant. The purpose of the threat was to force defendant to terminate plaintiff's existing sub-producer agreement. The threat was designed to remove plaintiff as a competitor of Intercare Specially Risk Services and Shomer Insurance Agency Incorporated. The first amended complaint describes the threat thusly: “To remove [plaintiff] as a direct competitor for brokering workers' compensation coverage to extended care facilities, Intercare [Specialty Risk Services] and Shomer [Insurance Agency Incorporated], as horizontal competitors, entered into an agreement to threaten [defendant], and demand that, unless [defendant] terminated [plaintiff's] existing Producer Agreement and refused to engage in further **[**11]** dealings with [plaintiff], Intercare [Specialty Risk Services] and Shomer [Insurance Agency Incorporated] would cease to provide brokerage services and stop doing business with [defendant]. Intercare [Specialty Risk Services'] and Shomer [Insurance Agency Incorporated's] accounts represent a substantial portion of [defendant's] book of business.”
[*527]

In January 2013, defendant terminated the existing sub-producer agreement with plaintiff. Defendant stopped doing business with plaintiff in furtherance of the unlawful group boycott. Plaintiff was thereby denied important access to defendant's unique captive insurer products. Plaintiff's ability to compete has been severely impaired by defendant's conduct. Plaintiff alleges the foregoing anticompetitive conduct produced an antitrust injury.

B. Defendant's Initial and Amended Motion to Compel Arbitration

As noted, on October 25, 2013, defendant moved to compel arbitration. After plaintiff filed its first amended complaint, defendant filed its amended motion to compel arbitration on January 21, 2014. Defendant asserted the sub-producer agreement between plaintiff and defendant contained an arbitration provision.

At Section XVIII, entitled, “ARBITRATION,” **[**12]** the sub-producer agreement provides, “(A) If any dispute, claim or difference arises out of or relates in any fashion or manner to this Agreement (referred to herein after as a ‘dispute’, including a dispute for which a party seeks specific performance, such Dispute shall be [submitted] to arbitration.” At Section XIX, entitled, “APPLICABLE LAW,” the sub-producer agreement provides: “If any question arises at any time as to the validity, construction, interpretation or performance of this Agreement, the law of the

State of Florida shall govern and control, without regard to its conflicts of law principles. The laws of the State of Florida shall be the exclusive law governing any dispute arising under this contract to the exclusion of the laws of any other state or jurisdiction." Under the choice-of-law provision, defendant asserted its motion to compel arbitration pursuant to the Revised Florida Arbitration Code. (*Fla. Stats., § 682.01 et seq.*) On March 20, 2014, plaintiff filed its opposition. Plaintiff argued the arbitration clause was unconscionable. Plaintiff asserted California law must apply because the choice of law provision violates fundamental public policy. Plaintiff contended that its antitrust cause **[**13]** of action would be de facto waived if Florida law applied.

C. Order Denying in Part Defendant's Amended Motion to Compel Arbitration

On May 22, 2014, following a hearing, the trial court granted in part defendant's amended motion to compel arbitration. The amended motion to compel arbitration was granted as to plaintiff's first and second causes of action for contract and implied covenant breach respectively. The trial court ruled the first and second causes of action clearly arise from and relate to the sub-producer agreement. The amended motion to compel arbitration was denied as to the third, fourth and ninth causes of action. The trial court concluded the third and fourth causes of action did not arise from or relate to the sub-producer agreement under Florida law. The trial court found that enforcing the choice of law provision for the ninth cause of action would create a fundamental conflict with California law and denied the motion to compel arbitration. Proceedings concerning the third, fourth and ninth causes of action were stayed pending resolution of arbitration as **[*528]** to the first and second causes of action. Defendant timely appealed the partial denial of its amended motion **[**14]** to compel arbitration.

III. DISCUSSION

A. The Amended Motion to Compel Arbitration is Not Equivalent to Demurrer or Answer

Defendant argues plaintiff should have sought leave of court to file its first amended complaint. Defendant has failed to identify any provision of Florida law that supports this contention. But even if California law applies, defendant's contention has no merit. Defendant relies on *Code of Civil Procedure section 472*, which provides, "Any pleading may be amended once by the party of course, and without costs, at any time before the answer or demurrer is filed, or after demurrer and before the trial of the issue of law thereon … ." Defendant also relies upon *Code of Civil Procedure section 1281.7*, which provides, "A petition pursuant to *Section 1281.2* [to compel arbitration] may be filed in lieu of filing an answer to a complaint." Defendant argues that under these two sections, a petition to compel arbitration is a proper responsive pleading. Under defendant's reasoning, since the petition to compel arbitration is like an answer, plaintiff should have been required to seek leave of court before amending its complaint.

Plaintiff contends defendant failed to preserve this issue on appeal by not raising it before the trial court and thus waiving it. **[**15]** We agree. Defendant never objected to the filing of plaintiff's first amended complaint. Defendant cites to a declaration from its counsel, who declared: "Plaintiff's First Amended Complaint was filed without leave of Court after [defendant] filed its original Motion to Compel Arbitration." This is neither an objection nor is it an argument. It is undisputed plaintiff did not seek leave of the trial court to file the first amended complaint. Nowhere in the declaration nor in any of defendant's papers filed in the trial court does defendant complain that plaintiff's amendment was improper.

Even if this issue was properly raised, we disagree with defendant's argument. *Code of Civil Procedure section 422.10* provides, "The pleadings allowed in civil actions are complaints, demurrers, answers, and cross-complaints." *Code of Civil Procedure section 422.10* unambiguously defines what pleadings are. Motions, such as the petition to compel arbitration, are not listed therein. No California statute states a motion to compel arbitration is the equivalent of an answer or a demurrer. Defendant relies on *Simmons v. Allstate Insurance Co. (2001) 92 Cal. App. 4th 1068, 1073 [112 Cal. Rptr. 2d 397]* (*Simmons*) and argues litigants may not "amend[] around" well-taken motions. In *Simmons*, the defendant, at the hearing on a *section 425.16* special motion to strike, was denied leave to **[**16]** amend his cross-complaint. (*Id. at p. 1072*.) Here, no such facts are present. The concerns raised by the special motion to strike are inapplicable here. No error occurred in connection with the filing of the first amended complaint without the trial court's permission.

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B. Legal Standard for Arbitration

1. Florida's appellate standard of review of arbitration issues

We apply the following standard of review under Florida law to the issue of whether the parties agreed to arbitrate the fraud and economic interference causes of action: "The question of whether a disputed issue is subject to arbitration is a matter of contract interpretation, and our review is *de novo. Ocwen Fed. Bank FSB v. LVWD, Ltd., 766 So.2d 248, 249 (Fla. 4th DCA 2000)*. In *Citigroup, Inc. v. Boles, 914 So.2d 23 (Fla. 4th DCA 2005)*, this court discussed the application of arbitration provisions: [¶] Notwithstanding that arbitration is favored in the law, construction of an arbitration clause remains subject to the contract law requirement 'that the court discern the intent of the parties from the language used in their agreement.' *Citigroup, Inc. v. Amodio, 894 So.2d 296, 298 (Fla. 4th DCA 2005)*. '[A]rbitration is mandatory only where the subject matter of the controversy falls within what the parties have agreed will be submitted to arbitration.' *Ocwen Fed. Bank FSB v. LVWD, Ltd., 766 So.2d 248, 249 (Fla. 4th DCA 2000)*. '[I]t is the language of the agreement that defines the scope of an arbitration agreement.' **[**17]** *Amodio, 894 So.2d at 298*." (*Florida Environmental Services, Inc. v. Rentoumis (Fla.Dist.Ct.App. 2007) 950 So.2d 466, 470*.) Under Florida law, in determining whether a cause of action is within the scope of an arbitration agreement, we examine the factual allegations of the first amended complaint. (*Ibid.*; *Singer v. Gaines (Fla.Dist.Ct.App. 2005) 896 So.2d 851, 854*.)

In addition, the Federal Arbitration Act applies to this action. "*Section 2* of the [Federal Arbitration Act] … declares that a written agreement to arbitrate in any contract involving interstate commerce or a maritime transaction 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract[]' … ." (*Volt Information Services, Inc. v. Board of Trustees of Leland Stanford Junior University (1989) 489 U.S. 468 [103 L. Ed. 2d 488, 474, 109 S. Ct. 1248]* (*Volt*), citing *9 U.S.C. § 2*.) As previously stated, plaintiff is a California corporation with its principle place of business in Los Angeles, California. Defendant is a Delaware corporation with its principle place of business in Fort Lauderdale, Florida. Our case arises from a contract evidencing a transaction involving commerce.

The United States Supreme Court held: "The [Federal Arbitration Act] was designed 'to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate,' [citation], and place such agreements '"upon the same footing as other contracts,"' [citations]." (*Volt, supra, 489 U.S. at p. 478*.) "Arbitration under the Act is a matter of **[**18]** consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, [citation], so too may they specify by contract the rules under which that arbitration will be conducted. Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the [Federal Arbitration Act] … ." (*Id. at p. 479*.) Unless subject to the limited preemptive **[*530]** effect of the Federal Arbitration Act, it is undisputed that the arbitration provision at issue is subject to Florida law.

Under Florida's arbitration statutes, the following are the controlling principles which apply to plaintiff's fraud and economic interference claims: "[T]here are three elements for courts to consider in ruling on a motion to compel arbitration of a given dispute: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived. (See *Terminix Int'l Co., LP v. Ponzio (Fla.Dist.Ct.App. 1997) 693 So.2d 104, 106*.)" (*Seifert v. U.S. Home Corp. (Fla. 1999) 750 So.2d 633, 636* (*Seifert*).) The parties do not dispute the existence of a valid arbitration agreement, nor do they **[**19]** argue waiver of the right to arbitrate has occurred. As to whether an arbitrable issue exists, the Florida Supreme Court held: "[T]he determination of whether an arbitration clause requires arbitration of a particular dispute necessarily 'rests on the intent of the parties.' [Citations.] A natural corollary of this rule is that no party may be forced to submit a dispute to arbitration that the party did not intend and agree to arbitrate. [Citations.]" (*Id. at p. 636*; see *Seaboard Coast Line R.R. Co. v. Trailer Train Co. (11th Cir. 1982) 690 F.2d 1343, 1352*.) The Florida Supreme Court concluded in the context of "arising out of or relating to" agreements: "[E]ven in contracts containing broad arbitration provisions, the determination of whether a particular claim must be submitted to arbitration necessarily depends on the existence of some nexus between the dispute and the contract containing the arbitration clause. [¶] Disputes arise in many and varied contexts and the mere coincidence that the parties in dispute have a contractual relationship will ordinarily not be enough to mandate arbitration of the dispute. In other words, the mere fact that the dispute would have arisen but for the existence of the contract and consequent relationship between the parties is insufficient by itself **[**20]** to transform a dispute into one 'arising out of or relating to' the agreement. [Citations.] These cases hold that for a tort claim to be considered 'arising out of or relating to' an agreement, it must, at a minimum, raise some issue the resolution of which requires reference to or construction of some portion of the contract itself. [Citations.]" (*Seifert, supra, 750 So.2d at p. 638*; see *Hersman, Inc. v. Fleming Cos., Inc. (M.D.Ala. 1998) 19 F.Supp.2d 1282, 1286-1287*.)

2. Fraud cause of action

Here, the arbitration clause applied to "any dispute, claim, or difference aris[ing] out of or relat[ing] in any fashion or manner to" the sub-producer agreement. The third cause of action alleges defendant made false representations regarding entering into an agency captive insurer agreement. The proposed agency captive insurer contract is different from the sub-producer agreement. The alleged misrepresentations caused plaintiff to forego other agency captive insurer or similar agreements. The third cause of action concerns issues with defendant's conduct as to the proposed agency captive insurer agreement. This does not arise out of or relate to the sub-producer agreement.

Defendant contends that plaintiff cannot distinguish Florida cases that have held fraud claims fall within the broad scope of the arbitration clause at issue **[**21]** here. **[*531]** Defendant's argument is unmeritorious. Florida courts have held that fraud claims are related to broad arbitration clauses because the deceit allegedly induced the contract formation or actually involved interpretation of the agreement. (See *Jackson v. Shakespeare Foundation, Inc. (Fla. 2013) 108 So.3d 587, 595* [party's fraud claim within scope of arbitration provision and inextricably intertwined with contract]; *Beazer Homes Corp. v. Bailey (Fla.Dist.Ct.App. 2006) 940 So.2d 453, 459* [fraud in inducement claim was within broad arbitration clause as it could have been restated as contract breach claim]; *Passerrello v. Robert L. Lipton, Inc. (Fla.Dist.Ct.App. 1997) 690 So.2d 610, 611* [fraud in inducement claim as to entire contract was within broadly stated arbitration clause].) Here, no such contractual nexus exists between the alleged fraud and the sub-producer agreement. Under Florida law, plaintiff's fraud claim does not "raise some issue the resolution of which requires reference to or construction of some portion of" the sub-producer agreement. (*Seifert, supra, 750 So.2d at 638*; see *Vernett v. American-Indian Enterprises, Inc. (Fla.Dist.Ct.App. 2014) 152 So.3d 856, 858*.)

3. Intentional Prospective Economic Advantage Interference Cause of Action

The fourth cause of action alleges defendant interfered with plaintiff's economic relationship with Safety National Insurance. As previously recounted, plaintiff was also discussing entering into a captive insurer agreement with Safety National Insurance. Because of **[**22]** Mr. Mariano's alleged misrepresentations concerning a potential agreement, plaintiff ceased its negotiations with Safety National Insurance. This interference with a potential agreement with Safety National Insurance does not arise out of or relate to the sub-producer agreement.

Defendant's citation to Florida cases is unpersuasive. None of the Florida cases support defendant's assertion. (See *Xerox Corp. v. Smartech Document Management, Inc. (Fla.Dist.Ct.App. 2007) 979 So.2d 957, 959-960* [intentional interference with advantageous business relationship claim fell within broadly stated clause]; *Henderson v. Idowu (Fla.Dist.Ct.App. 2002) 828 So.2d 451, 453* [intentional interference with advantageous business relationship claim fell within broad arbitration clause because it related to employment contract containing the agreement to arbitrate].) Here, plaintiff's intentional interference with prospective economic advantage cause of action has no nexus to the sub-producer agreement. It does not require "reference to or construction of" the sub-producer agreement. (*Seifert, supra, 750 So.2d at 638*; see *Kolsky v. Jackson (Fla.Dist.Ct.App 2010) 28 So.3d 965, 969*.) The trial court did not err by finding this cause of action not arbitrable.

C. Ninth Cause of Action

The ninth cause of action, violation of the Cartwright Act, raises different issues than the foregoing analysis concerning the third and fourth causes of action. To begin with, **[**23]** the ninth cause of action arises out of or relates to the sub-producer agreement. Plaintiff alleges that defendant terminated the sub-producer agreement under threat from Intercare Specially Risk Services and Shomer Insurance Agency **[*532]** Incorporated. This cause of action thus necessarily requires "reference to or construction of" the sub-producer agreement as it relates to defendant. (*Seifert, supra, 750 So.2d at p. 638*; see *BKD Twenty-One Management Co., Inc. v. Delsordo (Fla.Dist.Ct.App. 2012) 127 So.3d 527, 531*.) Because the ninth cause of action arises out of or relates to the sub-producer agreement, under Florida contract law, it potentially is subject to the arbitration agreement.

Under Florida law, the controlling revision concerning enforcement of arbitration agreements is *Florida Statutes section 682.02, subdivisions (1)* and *(2)* which state: "(1) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract. [¶] (2) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." Any inconsistency between *Florida Statutes section 682.02* and the Federal Arbitration Act must be resolved in favor of the federal law. (*Rewards Hotel Management Company, LLC v. Elite General Contractors, Inc. (Fla.Dist.Ct.App. 2003) 860 So.2d 1011, 1014*; *Trojan Horse, Inc. v. Lakeside Games (Fla.Dist.Ct.App. 1988) 526 So.2d 194, 196*.) Under **[**24]** Florida law, any challenge to the *enforceability* of an arbitration agreement on public policy grounds is resolved by the trial court, not the arbitrator. (*Shotts v. OP Winter Haven, Inc. (Fla. 2011) 86 So.3d 456, 471* (*Shotts*); *AMS Staff Leasing, Inc. v. Taylor (Fla.Dist.Ct.App. 2015) 158 So.3d 682, 685*.)

The Florida Supreme Court has held that an agreement to arbitrate is unenforceable if it violates public policy. (*Gessa v. Manor Care of Florida, Inc. (Fla. 2011) 86 So.3d 484, 493* (*Gessa*); *Shotts, supra, 86 So.3d at p. 465*.) Under Florida law, an arbitration agreement violates public policy if it defeats the purpose of a remedial statute. (*McKenzie Checked Advance of Florida, LLC v. Betts (Fla. 2013) 112 So.3d 1176, 1183*; *Lacey v. Healthcare & Retirement Corp. of America (Fla.Dist.Ct.App. 2005) 918 So.2d 333, 334*.) Similarly, an arbitration agreement that diminishes or circumvents remedies provided by a remedial statute violates public policy and is thus unenforceable. (*Gessa, supra, 86 So.3d at p. 493*; *Shotts, supra, 86 So.3d at p. 474*.) A remedial statute is one that provides redress for a grievance or that confers or changes a remedy. (*Capone v. Philip Morris USA, Inc. (Fla. 2013) 116 So.3d 363, 376*; *Blankfield v. Richmond Health Care, Inc. (Fla.Dist.Ct.App. 2005) 902 So.2d 296, 298*.) A remedial statute provides regulations which are conducive to the public good. (*Capone v. Philip Morris USA, Inc., supra, 116 So.3d at p. 376*; *Lacey v. Healthcare & Retirement Corp. of America, supra, 918 So.2d at p. 334*.)

We now turn to Florida's antitrust laws to determine if their enforcement will diminish any of plaintiff's rights. Florida has its own antitrust statutes. (See *MYD Marine Distributor, Inc. v. Internat. Paint Limited (Fla.Dist.Ct.App. 2011) 76 So.3d 42, 46*; *Duck Tours Seafari, Inc. v. City of Key West (Fla.Dist.Ct.App. 2004) 875 So.2d 650, 652*.) *Florida Statutes section 542.18* states, "Every contract, combination, or conspiracy in restraint of trade or commerce in this state is unlawful." *Florida Statutes section 542.19* states, "It is unlawful for any person to **[*533]** monopolize, attempt to monopolize, or combine or conspire with any other person or persons to monopolize **[**25]** any part of trade or commerce in this state." An unlawful horizontal restraint can occur when competitors conspire to induce an entity which deals with them to cease dealing with another market competitor. (*Parts Depot Company, L.P. v. Florida Auto Supply, Inc. (Fla.Dist.Ct.App. 1996) 669 So.2d 321, 324*; *St. Petersburg Yacht Charters, Inc. v. Morgan Yacht, Inc. (Fla.Dist.Ct.App. 1984) 457 So.2d 1028, 1040*.) Plaintiff argues that if Florida ***antitrust law*** applies, it cannot recover for losses incurred outside that state. The only Florida anti-trust decision expressly on point is *Oce Printing Systems USA, Inc. v. Mailers Data Services, Inc. (Fla.Dist.Ct.App. 2000) 760 So.2d 1037, 1041*, which holds: "[I]t appears from the plain language of the Antitrust Act that it is aimed at regulating trade or commerce that occurs in Florida, regardless of where the contract, conspiracy, or monopoly occurs. It is the effect on trade that must occur in Florida, not the actions giving rise to the effect on trade."].) Plaintiff's alleged damages were sustained in California. Plaintiff alleges it, Intercare Specialty Risk Services and Shomer Insurance Agency, Incorporated are competitors in the same insurance field in the greater Los Angeles area. Plaintiff alleges the misconduct all occurred in Los Angeles County. Thus, plaintiff would be unable to state a claim under *Florida Statutes, sections 542.18* and *542.19*. None of the allegations in the first amended complaint allege any effect on trade or commerce in Florida. Under Florida ***antitrust law***, **[**26]** plaintiff is unable to recover *any damages* for any of the conduct occurring in Los Angeles County. Thus, under Florida law, the agreement to arbitrate plaintiff's antitrust claims violates that state's public policy. Plaintiff cannot recover for any damages sustained in Los Angeles County arising from the alleged horizontal restraint on trade under Florida law. Thus, as to plaintiff's horizontal restraint claims, the arbitration agreement is unenforceable. We need not address the parties' alternative arguments concerning a violation of California's fundamental public policies.

IV. DISPOSITION

The order denying in part the amended motion to compel arbitration is affirmed. Plaintiff, HCF Insurance Agency, may recover its appeal costs from defendant, Patriot Underwriters, Incorporated.

Turner, P.J.

We concur:

Kriegler, J.

Goodman, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

LexisNexis

Hanger v. Berkley Grp., Inc.

United States District Court for the Western District of Virginia, Harrisonburg Division

May 28, 2015, Decided; May 28, 2015, Filed

Civil Action No 5:13-cv-113

Reporter

2015 U.S. Dist. LEXIS 68751 *; 2015-1 Trade Cas. (CCH) P79,189; 2015 WL 3439255

ABIGAIL HANGER, et al., Plaintiffs, v. THE BERKLEY GROUP, INC., et al., Defendants.

Prior History: *Great Eastern Resort Corp. v. Bluegreen Corp., 2008 Va. Cir. LEXIS 211 (Va. Cir. Ct., Apr. 23, 2008)*

Core Terms

timeshare, allegations, conspiracy, resorts, hire, employees, plaintiffs', Parties, non-solicitation, geographic, non-competition, restraint of trade, amended complaint, rule of reason, confidentiality, Antitrust, per se rule, lawsuits, affiliates, employment agreement, motion to dismiss, Sherman Act, anticompetitive, salespersons, terms, eBay, market power, non-compete, sales, relevant market

Counsel: **[*1]** For Abigail Hanger, J. R. Collins, Chris Howard, Jeanette Alexander Collins, Steven Ferrell, individually and on behalf of others similarly situated, Matthew Wolf, individually and on behalf of all others similarly situated, Plaintiffs: Timothy Lawrence Coffield, LEAD ATTORNEY, Keswick, VA.

For The Berkley Group, Inc., Great Eastern Resort Corporation, Inc., Williamsburg Plantation, Inc., Defendants: Francis H. Casola, Frank K. Friedman, Heman Alexander Marshall , III, LEAD ATTORNEY, Woods Rogers PLC, Roanoke, VA; Howard Feller, Michelle Mary Christian, LEAD ATTORNEY, McGuireWoods LLP, One James Center, Richmond, VA; Marion Peebles Harrison, LEAD ATTORNEY, ROSE HARRISON & GILREATH SUITE 1, KILL DEVIL HILLS, NC; Joshua Richard Treece, Woods Rogers PLC, Roanoke, VA; Providence Ebubechi Napoleon, McGuireWoods LLP, One James Center, Richmond, VA.

Judges: Michael F. Urbanski, United States District Judge.

Opinion by: Michael F. Urbanski

Opinion

MEMORANDUM OPINION

This matter is before the court on defendants' motion to dismiss plaintiffs' amended complaint. Dkt. # 79. Plaintiffs allege that defendants entered into and enforced an agreement restraining competition for each other's employees in violation of *Section 1* of the Sherman **[*2]** Act, *15 U.S.C. § 1*; the Virginia Antitrust Act, *Va. Code § 59.1-9.5*; and the Virginia Business Conspiracy Act, *Va. Code § 18.2-499*. The issues have been fully briefed, and oral argument was held on January 8, 2015. Because plaintiffs' allegations do not plausibly allege an agreement that unreasonably restrains trade in violation of *Section 1* of the Sherman Act or the Virginia Antitrust Act, and plaintiffs' personal employment interests are not subject to redress under the Virginia Business Conspiracy Act, defendants' motion must be **GRANTED** and the amended complaint dismissed.

I.

Abigail Hanger, J.R. Collins, Chris Howard, Jeanette Alexander Collins, Steven Ferrell, and Matthew Wolf ("plaintiffs")[1] all worked as at-will sales representatives for defendant Great Eastern Resort Corporation ("Great Eastern") at its Massanutten Resort in Rockingham County, Virginia. Am. Compl., Dkt. # 71, at ¶¶ 24-29. Chris Howard currently works as a sales representative for defendant Williamsburg Plantation, Inc., ("Williamsburg Plantation") and Jeanette Alexander Collins worked as a sales representative for Williamsburg Plantation in the past. Id. at ¶¶ 26-27. Defendant The Berkley Group, Inc. ("Berkley Group") shares a common directorate and corporate headquarters **[*3]** with Great Eastern and Williamsburg Plantation and manages the development, sales, and marketing operations of Great Eastern's and Williamsburg Plantation's Virginia resorts.[2] Id. at ¶¶ 30, 33.

At its Massanutten and Williamsburg, Virginia timeshare resorts, Berkley Group employs timeshare salespersons. Berkley Group requires these salespersons to sign an employment agreement containing non-compete, confidentiality, and non-solicitation clauses that, over time, have varied in the time periods and geographic regions covered. Id. at ¶¶ 76, 77. Each of the plaintiffs each entered into an employment agreement containing restrictive covenants against competition for a period of one (1) year within an eighty-five (85) mile radius of their place of employment and against the **[*4]** disclosure of confidential information or solicitation of employees, customers, suppliers, or vendors for two (2) years.[3] Def.'s Mem. In Supp. of Mot. to Dismiss, Ex. A, Dkt. # 80-1.

In 2006, certain Berkley Group sales representatives from Massanutten and Williamsburg, not including the plaintiffs, accepted employment with Bluegreen Corporation ("Bluegreen"), the owner and operator of timeshare resorts in Louisa County and Williamsburg, Virginia. Challenging the legality of these **[*5]** defections, Berkley Group filed lawsuits against Bluegreen in Virginia state court alleging tortious interference with contract and statutory business conspiracy.[4] Am. Compl., Dkt. # 71, at ¶ 69. In addition, Berkley Group sued Bluegreen in federal court in Florida for trademark infringement, unfair competition and unjust enrichment.[5] Ultimately, Berkley Group agreed with Bluegreen to settle all three lawsuits in a Global Settlement Agreement ("GSA") dated October 16, 2007. Id. at ¶ 70.[6]

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[1] Plaintiffs claim to bring this suit on behalf of themselves and all others employed as sales representatives by one or more of the defendants for at least 90 days beginning on or after February 5, 2010. Because plaintiffs' amended complaint fails to state a claim upon which relief can be granted, class certification need not be addressed.

[2] As appropriate, the court will refer collectively to defendants as "Berkley Group."

[3] It is worth noting that plaintiffs do not challenge the legal validity of their non-competition, non-solicitation and confidentiality agreements with Berkley Group. Nor could they, as the agreements are reasonably limited in substantive scope, time and geography. For example, the non-compete provision is limited in its substantive scope to "performing the same or substantially similar duties they performed for [the Berkley Group resort] in the six (6) months prior to their departure"; in temporal scope to one year; and in geographic scope to an eighty-five (85) mile radius of the Berkley Group resort location where they worked in the six (6) months prior to their departure. Am. Compl., Dkt. No. 71, at ¶ 77.

[4] Great Eastern Resort Corp. v. Bluegreen Corp., et al., CL06-00600 (Va. Cir. 2006) (Rockingham County); Williamsburg Plantation, Inc. v. Bluegreen Corp., et al., CL06000441-00 (Va. Cir. 2006) (James City County).

[5] The Berkley Group, Inc. v. Bluegreen Corp., et al., Case No. 07-8039 (S.D. Fl. 2007).

[6] Plaintiffs refer throughout their Amended Complaint to the GSA but did not attach it as an exhibit. Defendants attached the GSA as Exhibit A to their Memorandum in Support of Defendants' Partial Motion to Dismiss. Dkt. # 14-1. In considering a *Rule 12(b)(6)* motion, the court may consider documents "attached to the motion to dismiss, so long as they are integral to the complaint and authentic." *Philips v. Pitt Cnty. Mem. Hosp., 572 F.3d 176, 180 (4th Cir. 2009)*. Plainly, the GSA is integral **[*6]** to

The GSA had a number of provisions, including payment of substantial monies by Bluegreen (¶ 1); the dismissal of the lawsuits (¶ 2); the transfer of 2,000 Florida timeshare prospects to the Berkley Group (¶ 3); a non-compete acknowledgement and notice provision (¶ 4); and mutual releases (¶ 5).

In this lawsuit, plaintiffs contend ¶ 4 of the GSA violates the antitrust laws. Paragraph 4 states:

> 4. Each party hereto acknowledges that the Berkley Parties and their affiliates, and the Bluegreen Parties and their affiliates, may enter into written employment agreements with their respective employees, which may contain non-competition, non-solicitation or confidentiality provisions. The Berkley Parties (for themselves and their affiliates) and the Bluegreen Parties (for themselves and their affiliates) agree to honor each other's non-competition, nonsolicitation and confidentiality agreements of which they have actual knowledge and are contained in written agreements that have not been held unenforceable by a **[*7]** court of competent jurisdiction as to the particular employee. The Bluegreen Parties agree not to challenge in a judicial proceeding a confidentiality, non-competition or non-solicitation provision contained in any employment agreement between an employee and a Berkley party or to assist any person in challenging any such provision. The Berkley Parties agree not to challenge in a judicial proceeding a confidentiality, non-competition or non-solicitation provision contained in any employment agreement between an employee and a Bluegreen party or to assist any person in challenging any such provision.
>
> To help to enforce this agreement, the Berkley Parties and the Bluegreen Parties shall, and shall cause their affiliates to, include in their pre-employment application process written questions that require the applicant to provide the name of his or her current and previous employers, and to disclose whether he or she has ever entered into a written employment agreement that included a noncompetition, non-solicitation or confidentiality agreement or other employment-related restrictive covenant. The Berkley Parties (for themselves and their affiliates) and the Bluegreen Parties (for themselves **[*8]** and their affiliates), agree that, in the event that any Berkley Party or affiliate or Bluegreen Party or affiliate hires a new employee subject to either a non-competition, non-solicitation or confidentiality agreement that has not been declared unenforceable by a court of competent jurisdiction as to such employee, the hiring party shall terminate the newly-hired employee within 10 days after it receives written notice from the other party of such non-competition or non-solicitation agreement, accompanied by a true copy of such agreement, and such termination shall be the exclusive remedy for such hiring.

The Amended Complaint alleges that after the settlement, senior management of the Berkley Group and Bluegreen monitored compliance with the GSA and corresponded about violations of its terms. Am. Compl., Dkt. # 71, at ¶ 80. For example, plaintiffs allege that in April 2011, Bluegreen refused to hire an applicant who previously entered into an employment agreement with Berkley Group's Williamsburg Plantation resort, despite the fact that he left Williamsburg Plantation's employment in August 2009 and his non-compete expired in August 2010, because of the confidentiality and non-solicitation **[*9]** clauses of longer duration. Id. In making the decision not to hire the applicant, Bluegreen sought the Berkley Group's "position" with regard to the former employee and its "interpretation of paragraph 4 of the [GSA]." Id. at ¶ 81. Berkley Group's counsel responded that

> [Berkley] is not interested in re-negotiating the terms of this agreement. The agreement clearly provides that neither party may hire a former employee of the other who is subject to a noncompetition or non-solicitation agreement. These provisions were part of the deal, reviewed by counsel for both sides, and signed off by both parties.

Id. at ¶ 82. Bluegreen replied that it

> will agree to honor Berkley's interpretation of the GSA (meaning that Bluegreen will not hire an employee who it knows is still covered by a Berkley non-compete or non-solicitation), and in return we expect Berkley to not hire an employee who it knows is still covered by a Bluegreen non-compete OR non-solicitation.

Id. at ¶ 83 (emphasis in original).

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the complaint, and no issue has been raised as to its authenticity. Therefore, the court will consider the GSA attached to defendants' motion to dismiss in considering the *Rule 12(b)(6)* motion.

Plaintiffs allege that the GSA "ended recruitment and hiring between these competing employers and profoundly chilled employee mobility. Throughout the course of the agreement, Bluegreen repeatedly declined **[*10]** opportunities to hire current or former Berkley sales employees." Id. at ¶ 85. Plaintiffs allege that the GSA disrupted the normal functioning of wage setting and hiring of skilled timeshare sales personnel, id. at ¶¶ 93, and effectively eliminated competition for timeshare sales services. Id. at ¶ 94. Plaintiffs do not allege that they ever sought or were denied employment with Bluegreen because of the GSA or that Berkley Group and Bluegreen entered into an explicit agreement to suppress wages. Rather, they claim that absent the GSA, Bluegreen could freely solicit Berkley Group's employees, thus driving up the overall compensation and mobility of Berkley Group's employees. Id. at ¶ 66.

Berkley Group argues that plaintiffs' allegations fail to plausibly allege an antitrust claim under federal or state law and that plaintiffs' personal employment interests are not subject to redress under the Virginia Business Conspiracy Act. The court agrees.

II.

To survive a motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)*, a complaint must contain sufficient factual matter which, accepted as true, "state[s] a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. This plausibility standard requires a plaintiff to demonstrate **[*11]** more than "a sheer possibility that a defendant has acted unlawfully." Id. When ruling on a motion to dismiss, the court must "accept the well-pled allegations of the complaint as true" and "construe the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff." *Ibarra v. United States. 120 F.3d 472, 474 (4th Cir. 1997)*. While the court must accept as true all well-pleaded factual allegations, the same is not true for legal conclusions. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal, 556 U.S. at 678*. Similarly, the court need not "accept as true allegations that contradict matters properly subject to judicial notice or by exhibit." *Veney v. Wyche, 293 F.3d 726, 730 (4th Cir. 2002)* (quoting *Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001))*. Determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id. at 679*.

III.

Section 1 of the Sherman Act states that: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. To prove a *Section 1* violation, a plaintiff must first plead and then prove "(1) a contract, combination, **[*12]** or conspiracy; (2) that imposed an unreasonable restraint of trade."[7] *Robertson v. Sea Pines Real Estate Cos., Inc., 679 F.3d 278, 284 (4th Cir. 2012)* (quoting *Dickson v. Microsoft Corp., 309 F.3d 193, 202 (4th Cir. 2002))*. Where, as here, the plaintiffs' claims stem from an explicit horizontal agreement,[8] the question becomes whether the plaintiffs adequately pleaded an unreasonable restraint of trade.

A.

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[7] The same analysis applies to the plaintiffs' Virginia Antitrust Act claim. *Va. Code Ann. § 59.1-9.17*; *Stephen Jay Photography, Ltd. v. Olan Mills, Inc., 903 F.2d 988, 991 n.3 (4th Cir. 1990)*.

[8] "[A]n agreement among competitors on the way in which they will compete with one another." *NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 99, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*.

For this inquiry, "the Supreme Court has authorized three methods of analysis: (1) *per se* analysis, for obviously anticompetitive restraints, (2) quick-look analysis, for those with some procompetitive justification, and (3) the full 'rule of reason,' for restraints whose net impact on competition is particularly difficult to determine." *Cont'l Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499, 508-09 (4th Cir. 2002)*. "The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of *§ 1*." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*. "Resort to *per se* rules is confined to restraints ... 'that would always or almost always tend to restrict competition and decrease output.'" *Id. at 888* (quoting *Business Electronics Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (2006))*.

The *per se* rule applies only in those cases where the business practice in question is one, which on its face, has "no purpose except stifling of competition." **[*13]** *White Motor Co. v. United States, 372 U.S. 253, 263, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963)*; see also *Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289-90, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985)* (*per se* rule confined to limited types of anticompetitive practices); *Larry Muko, Inc. v. Sw. Pa. Bldg. & Const. Trades Council, 670 F.2d 421, 429 (3d Cir.)* (1982) ("Generally, the application of the *per se* rule has been limited to those 'classic' boycotts in which a group of business competitors seek to benefit economically by excluding other competitors from the marketplace.").

The Supreme Court has been cautious in extending the *per se* approach to claims that fall outside certain previously enumerated categories of liability. See e.g. *NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 100 n.21, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)* ("[J]udicial inexperience with a particular arrangement counsels against extending the reach of the *per se* rules."); *Broad. Music, Inc. v. Columbia Broad. Sys. Inc., 441 U.S. 1, 20 n.33, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)* ("[T]he *per se* rule is not employed until after considerable experience with the type of challenged restraint."); *Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 344, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)* ("[E]xperience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it . . . ."). Because of the fact specific inquiry involved in antitrust analysis, the Supreme Court has recognized that claims not within established categories of antitrust liability are more appropriately analyzed under the rule of reason where courts can balance the effect of the alleged anticompetitive activity against its competitive purposes within the relevant product and geographic **[*14]** markets.

Plaintiffs argue that the GSA is a naked restraint of trade subject to *per se* analysis because the GSA serves no purpose other than allocating employees between Berkley Group and Bluegreen based on an employee's current or former employer. Am. Compl., Dkt. # 71, at ¶ 76. This argument is undone, however, by the allegations of the Amended Complaint and the terms of the GSA itself. Rather than reflect a naked restraint of trade, Berkley Group entered into the GSA to resolve multiple lawsuits in multiple forums and to avoid future similar litigation. As such, it is an ancillary restraint that must be analyzed under the rule of reason.

Plaintiffs' allegations mirror those in *Weisfeld v. Sun Chemical Corp. , 210 F.R.D. 136 (D.N.J. 2002)*. Joseph Weisfeld, an employee of Sun Chemical, alleged that Sun Chemical and certain of its competitors violated *Section 1* of the Sherman Act by agreeing to restrain the labor market for technical employees in the printing ink industry. *Id. at 142*. The agreement arose out of the settlement of a lawsuit challenging the hiring of a Sun employee by Flint, one of its competitors. As part of the settlement agreement, Sun and Flint agreed that for a period of five years neither company would solicit the other's employees and agreed **[*15]** to notify the other if they were planning to hire an unsolicited employee. Weisfeld alleged that over time the scope of the unlawful agreement expanded to encompass an agreement not to hire or consider hiring each other's employees for an indefinite period. As a result, Weisfeld claimed, on behalf of himself and a putative class of similarly situated employees, that the agreement constituted a *per se* violation of *Section 1*. *Id. at 137*. Relying on *Eichorn v. AT&T Corp., 248 F.3d 131 (3dCir. 2001)*, a case which applied the rule of reason to no hire agreements executed subsequent to the sale of a company, the Weisfeld court concluded that its "case is properly within the rubric of the rule of reason." *Id. at 143*. Indeed, in Eichom, the Third Circuit found "no relevant case law" supporting those plaintiffs' allegations that a "no-hire agreement was *per se* illegal because it was a horizontal group boycott and a price fixing conspiracy." Eichorn, 248 F.3d at 143.[9]

In arguing for application of the *per se* rule, plaintiffs principally rely on two cases out of the Northern District of California, In re High-Tech Employee Antitrust Litigation, 856 F. Supp. 2d 1103 (N.D. Cal. 2012), and United States v. eBay, Inc., 968 F. Supp. 2d 1030 (N.D. Cal. 2013), but those cases do not resemble the circumstances presented here.

In re High-Tech Employee Antitrust Litigation was a class action suit arising out of an investigation by the Antitrust Division of the Department of Justice into the employment and recruitment practices of several high tech companies, namely Adobe Systems, Inc., Apple Inc., Google Inc., Intel Corp., Intuit Inc., Lucasfilm Ltd. and Pixar. "According to Plaintiffs, the conspiracy consisted of an interconnected web of express bilateral agreements, each with the active involvement and **[*17]** participation of a company under the control of the late Steven P. Jobs . . . and/or a company whose board shared at least one member of Apple's board of directors." 856 F. Supp. 2d at 1110. The plaintiffs claimed the defendants agreed not to recruit employees of each other's companies through cold calling and acted to oversee and enforce their agreements. Defendants moved to dismiss the complaint, arguing that the conspiracy alleged was implausible because the plaintiffs failed to allege a relevant market and that defendants had power within that market. The court disagreed, concluding that the plaintiffs' allegations were sufficient.

> Here, Plaintiffs allege that Defendants are high-tech companies in the market for skilled labor, where cold calling plays an important role in determining salaries and labor mobility. CAC ¶¶ 41-54. Plaintiffs further allege that the labor market for skilled high-tech labor is national. Id. ¶¶ 30, 39. Finally, Plaintiffs allege that "Defendants succeeded in lowering the compensation and mobility of their employees below what would have prevailed in a lawful and properly functioning labor market." Id. ¶ 108. Thus, the Court accepts as true, as the Court must on a motion to dismiss, **[*18]** Plaintiffs' allegation that Defendants succeeded in distorting the market through their agreements. Accordingly, it is reasonable to infer that Defendants had the market power to do so. Cf. *Theme Promotions, Inc. v. News Am. Mktg. FSI, 546 F.3d 991, 1001 (9th Cir. 2008)* ("Evidence of restricted output and supracompetitive prices is direct evidence of market power." (quoting Forsyth v. Humana, Inc., 114 F.3d 1467, 1475 (9th Cir. 1997))).

856 F. Supp. 2d at 1122.

Similarly, the court declined to determine whether to apply the *per se* rule, quick look or full blown rule of reason analysis at the motion to dismiss stage in United States v. eBay, Inc., 968 F. Supp. 2d 1030 (N.D. Cal. 2013). In that case, the government alleged that eBay and Intuit entered into a no-solicitation/no-hire agreement with each other. The alleged agreement arose out of conversations between eBay executives and Scott Cook, founder and chairman of Intuit, who also served on eBay's board. The complaint alleged Cook had stated that "'we don't recruit from board companies, period' and '[w]e're passionate on this.'" Id. at 1033. The court concluded the "allegations concerning the agreement between eBay and Intuit, taken as true, suffice to state a horizontal market allocation agreement." Id. at 1039. The court declined to determine at the pleadings stage whether to apply the *per se* rule, determining that factual development was necessary to **[*19]** resolve the question.

> eBay challenges the United States' assertion that the alleged agreement is a naked one, instead arguing that the agreement is ancillary to a legitimate procompetitive business purpose: Mr. Cook's service on eBay's board. The court agrees with eBay's contention that the fact that the United States labeled the agreement a

[9] Plaintiffs argue that the no-hire agreement in Eichom was limited to a period of eight months following the sale of the company, and that the GSA is not so limited. But that argument misses the point of the GSA. To be sure, the GSA itself is not time-limited, but all it does is bind Berkley Group and Bluegreen to honor valid **[*16]** restrictive covenants in each other's employment contracts. The non-competition provision in the Berkley Group employment contracts is limited to one year, and the non-solicitation and confidentiality provisions to two years. In substance, the GSA does little more than bind Berkley Group and Bluegreen not to tortiously interfere with valid employment contracts. Given the context in which the GSA arose, to settle just such lawsuits, the GSA is not properly subject to the *per se* rule.

> naked one does not make it so. By the same token, however, the court cannot hold that the agreement is ancillary simply because eBay posits that it is. The court must instead make that determination based on factual evidence relating to the agreement's formation and character.
>
> * * * *
>
> Though the parties supply substantial legal argument to support their respective positions, they do so without the benefit of discovery, and thus without sufficient factual evidence to support their contentions. At this stage in this action, the court simply cannot determine with certainty the nature of the restraint, and by extension, the level of analysis to apply.

Id. at 1039-40.

This case presents a far different situation — and far different allegations — than those presented in *High-Tech Employees* and *United States v. eBay*. Unlike in either of those two cases, which alleged **[*20]** naked restraints of trade, the amended complaint in this case makes it plain that ¶ 4 of the GSA was not. Rather, the restraint challenged in this lawsuit is one piece of a global settlement agreement between the parties to resolve three suits in two states alleging breach of non-competition agreements, related business torts, trademark infringement and unfair competition. Unlike in *High-Tech Employees* and *United States v. eBay*, where the pleadings did not contain any suggestion that the non-solicitation agreement was ancillary to anything, the pleadings in this case clearly establish that the provisions of ¶ 4 at issue in this case were part of a larger agreement to settle multiple lawsuits in multiple forums. It is clear from the terms of the GSA and the context in which it arose that ¶ 4 exists to keep the parties from becoming embroiled in future lawsuits making similar allegations.

In that regard, it is likewise important to focus on what ¶ 4 of the GSA actually provides. Unlike the allegations in *High-Tech Employees* and *United States v. eBay*, ¶ 4 of the GSA does not contain a blanket no hire, no cold calling or no solicitation agreement. The GSA is far narrower, reflecting only **[*21]** an agreement "to honor each other's non-competition, non-solicitation and confidentiality agreements of which they have actual knowledge that are contained in written agreements that have not been held unenforceable by a court of competent jurisdiction as to the particular employee." Mem. Supp. Partial Mot. to Dismiss, Ex. A, Dkt. #14-1. In short, the agreement is little more than a covenant not to violate the law by intentionally interfering with each other's employment contracts. And because the restrictive covenants in the Berkley Group employment contracts are narrowly drawn in terms of substantive scope, time and geography, the alleged restraint posed by the GSA is correspondingly narrow. For example, as the Berkley Group non-competes are limited to 85 miles surrounding the employee's last place of employment with Berkley Group, the agreement to honor each other's non-competes is necessarily limited only to areas where Berkley Group and Bluegreen have timeshare resorts within 85 miles of one another. The parties also agreed not to challenge the validity of confidentiality, non-competition or non-solicitation provisions of each other's employment agreements, to ask job applicants **[*22]** whether they were subject to such agreements, and to terminate a newly-hired employee subject to such an agreement upon receiving notice from the other party. Id. Having been subject to multiple lawsuits in multiple forums, the agreement crafted by the parties in 4 of the GSA is plainly designed to forestall future litigation. Consistent with the analysis employed by the court in Weisfeld, ¶ 4 of the GSA cannot be divorced from the context in which it arose and its express terms reflecting that it was part of a broader settlement agreement. See *Weisfeld, 210 F.R.D. at 138, 142*. As such, ¶ 4 of the GSA cannot be considered to be a naked restraint of trade with obvious anticompetitive effects subject to the *per se* rule.[10] Rather, the validity of such an agreement must be assessed under the rule of reason.[11]

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[10] Nor does the "quick look" method of analysis apply here. "'Quick look' is essentially an abbreviated form of rule of reason analysis, to be used in cases in which the likelihood of anticompetitive effects is so obvious that 'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.'" *Madison Square Garden, L.P. v. Nat'l Hockey League, 270 F. App'x 56, 58 (2d Cir. 2008)* (quoting *Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999))*.

[11] Defendants **[*23]** filed a partial motion to dismiss the original complaint, asking the court to find that plaintiffs' claim that the *per se* rule or quick look approach did not apply to this case. After briefing on argument, the court did just that, stating as follows:

B.

While *§ 1* of the Sherman Act is framed in broad terms, the courts have long limited its application to concerted activity that unreasonably restrains trade. **[*24]** "Not every instance of cooperation between two people is a potential 'contract, combination . . . or conspiracy, in restraint of trade.'" *Loren Data Corp. v. GXS, Inc., 501 Fed. Appx. 275, 280 (4th Cir. 2012)* (quoting *Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 189-90, 130 S. Ct. 2201, 176 L. Ed. 2d 947(2010)*. Indeed, "*Section 1* applies only to concerted action that restrains trade." *Am. Needle, 560 U.S. at 190*. Thus, to establish a claim under *§ 1* of the Sherman Act, a plaintiff must establish that the conspiracy produced adverse, anticompetitive effects within relevant product and geographic markets. See, e.g., *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* (Analysis under the rule of reason requires "an inquiry into market power and market structure designed to assess the combination's actual effect.") "In the rule of reason analysis, 'the reasonableness of a restraint is evaluated based on its impact on competition as a whole within the relevant market." *Dickson v. Microsoft Corp., 309 F. 3d 193, 206 (4th Cir. 2002)* (quoting *Oksanen v. Page Mem. Hosp., 945 F. 2d 696, 708 (4th Cir. 1991))*. As the Fourth Circuit noted in Dickson v. Microsoft Corp.:

> This evaluation requires a showing of "anticompetitive effect" resulting from the agreement in restraint of trade. To have an "anticompetitive effect," conduct "must harm the competitive *process* and thereby harm consumers." *United States v. Microsoft, 253 F.3d 34, 58, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)*. "[H]arm to one or many competitors will not suffice." *Id.* "The [Sherman Act] directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly **[*25]** tends to destroy competition itself." *Id.* (internal quotation marks omitted). Thus, an inquiry into the lawfulness of the restraint begins "by identifying the ways in which a challenged restraint might possibly impair competition." 7 [Phillip E.] Areeda & [Herbert] Hovenkamp [***Antitrust Law***] ¶ 1503a, at 372 (1995). After identifying the type of possible harm to competition alleged, we must proceed "to determine whether that harm is not only possible but likely and significant," which requires "examination of market circumstances," including market power and share. 7 *id.* ¶¶ 1503a 1503b, at 374-77.

309 F.3d at 206.

Berkley Group argues that the amended complaint does not plausibly allege an unreasonable restraint of trade, the existence of market power or relevant product and geographic markets. Plaintiffs respond that the amended complaint sufficiently alleges a conspiracy between Berkley Group and Bluegreen to restrain trade in the purchase of timeshare sales services and posits two relevant geographic markets consisting of the areas around the Great Eastern timeshare resorts at Massanutten and in Williamsburg, Virginia. "'Theorizing about conceivable impairments of competition does not, of course, **[*26]** prove that any such impairment has occurred or is likely,' or much less is 'substantial in magnitude.'" *Dickson v. Microsoft Corp., 309 F.3d at 207* (quoting 7 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 1503a, at 373 (1995)). The court must examine whether plaintiffs have "alleged the likelihood of a substantial anti-competitive harm caused by [the GSA], an inquiry that requires [plaintiffs] to allege facts demonstrating 'that defendants played a significant role in the relevant market.'" Id. (quoting *Oksanen. 945 F.2d at 709*).

> [T]his is not a naked, horizontal restraint of trade. This is not horizontal market allocation. This is not bid-rigging. This is not price fixing. This is not an agreement to exchange customers. This is an ancillary restraint of trade, if you call it that, that is resulting from the settlement of a lawsuit over non-competes. And it seems to me that all this thing does is — the agreement says we're not going to violate the law. We won't break the law by stealing your customers if you agree not to break the law by stealing my customers.

Trans. of April 3, 2014 Hearing, Dkt. No. 60, at 3. At that juncture, defendants did not challenge the legal sufficiency of the complaint under the rule of reason. Following the filing of the amended complaint, defendants did so, which the court addresses herein.

"Because market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant. . . market." *Todd v. Exxon Corp., 275 F.3d 191, 199-200 (2d Cir. 2001)*. Such hesitancy is unwarranted in this case, however, due to the innate implausibility of plaintiff's allegations.

"To survive a *Rule 12(b)(6)* motion to dismiss, an alleged product market must bear a rational relation to the methodology courts prescribe to define a market for antitrust purposes—analysis of the interchangeability of use or the cross-elasticity of demand, and it must be plausible." *Todd, 275 F.3d at 200* (internal citation and quotation marks omitted). "The criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant **[*27]** product market." *Brown Shoe Co. v. United States, 370 U.S. 294, 336, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. The geographic market must "both correspond to the commercial realities of the industry and be economically significant." *Id. at 336-37* (internal quotations removed).

In product market terms, plaintiffs allege a buyer-side conspiracy affecting the market in which employers compete to purchase the services of timeshare salespersons. Am. Compl., Dkt.# 71, at ¶ 47. While such a broad allegation sounds nefarious, the actual restraint found in the GSA is far less so.

First, the restraint only involves two timeshare owners, Berkley Group and Bluegreen. A relevant product market of purchasers of timeshare salesperson services cannot plausibly be limited to these two entities. While plaintiffs concede in the amended complaint that "[c]ompanies in the same or similar industries often compete to hire and retain talented employees," Am. Compl., Dkt. # 71, at ¶ 47, they make no effort to identify such companies or industries, or even assign market shares to Berkley Group and Bluegreen in their artificially and arbitrarily drawn market. At most, the amended complaint alleges that Bluegreen and Berkley Group are in the timeshare resort business and compete as buyers of timeshare salespersons' services. **[*28]** But the Amended Complaint is devoid of any factual allegation that these two entities have market power, enjoy any measure of market share, are so unique as to constitute the entire product market, or that timeshare sales personnel could not look elsewhere for employment.

In short, plaintiffs seek to define an unreasonably narrow and implausible product market limited to just two timeshare sales companies. In Eichorn, the plaintiffs made similar allegations, seeking to define the market as:

> potential employers within a 35 mile radius of Holmdel/Middletown with the capacity and capability of employing or utilizing large numbers of persons with specialized experience in high speed data communications equipment of the sort Paradyne develops and makes . . . who can provide continuity of the pension benefits which have accrued to [plaintiffs] under the AT & T and/or Lucent pension plans.

248 F.3d at 147 (citation omitted). This definition had the effect of including only the defendants in the relevant market. Id. The Eichorn court held that the proper market definition "includes all those technology companies and network services providers who actively compete for employees with the skills and training possessed **[*29]** by plaintiffs." *Id. at 147-48*. The same is true here. Not only do plaintiffs' allegations fail to consider competition posed by other timeshare resorts, they wholly fail to account for competition posed by purchasers of salespersons' services generally. Even if industry specific knowledge will not directly benefit a prospective employer, sales experience is highly sought after in numerous industries, which the plaintiffs have failed to even attempt to identify. Plaintiffs make no effort to consider, as they must, the reasonable interchangeability and cross-elasticity of demand for their services. Absent some allegation suggesting that Bluegreen and the Berkley Group are the only purchasers of timeshares salespersons' services, there is no plausible basis to suggest, much less allege, that the Bluegreen and Berkley Group constitute the entirety of the relevant market. Plaintiffs cannot, and do not, allege that Bluegreen and Berkley Group are the only buyers of such services to whom persons seeking timeshare sales jobs could turn or have market power in an appropriately defined market. Thus, it is implausible to suggest that the relevant product market be confined just to them.

Even more implausible **[*30]** is the relevant geographic market proposed by plaintiffs. The plaintiffs focus on the two areas of Virginia, Massanutten and Williamsburg, where Berkley Group and Bluegreen have timeshare resorts within eighty-five (85) miles of each other. Am. Compl., Dkt. # 71, at ¶ 88. It is utterly unrealistic to suggest that the relevant geographic market be confined to two enclaves in non-contiguous regions of Virginia. The plaintiffs do not and cannot even allege that these are the only two areas in Virginia having timeshare resorts. In short, it simply makes "no economic sense," *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*, for plaintiffs to gerrymand a relevant geographic market exclusively limited to an eighty-five (85) mile area surrounding the Berkley Group timeshare resorts in Massanutten and Williamsburg and ignore, for example, competition posed by timeshare resorts in other parts of Virginia and surrounding areas. For example, while Virginia Beach and the Outer Banks of North Carolina are in close proximity to Williamsburg, plaintiffs arbitrarily exclude timeshare resorts located there from the relevant market. The reason, of course, that plaintiffs must strain to confine the relevant geographic market to these localities is **[*31]** because the GSA itself has only an isolated territorial impact. In the GSA, Bluegreen agrees to honor noncompetition agreements involving Berkley Group employees. These noncompetition provisions are limited to a radius of eighty-five (85) miles surrounding the timeshare resort where the employee worked for defendants. Thus, the GSA only applies to areas where Bluegreen has a timeshare resort within eighty-five (85) miles of a resort operated by Berkley Group. Such a geographic market is entirely artificial and bears no relation to the economic realities of the market. It is utterly implausible. Plaintiffs' failure to properly allege relevant product and geographic markets, and, thus, to plausibly allege Berkley Group and Bluegreen's market share, or the exercise of market power, therein, is fatal to their claims. Absent such plausible allegations, plaintiffs cannot establish that the GSA is "capable of causing any substantial harm to competition." *Dickson, 309 F.3d at 208*.

Because the plaintiffs have failed to plausibly allege an unreasonable restraint of trade and have not put forth a plausible product market or geographic market, they cannot state a claim under either *Section 1* of the Sherman Act or the corresponding **[*32]** Virginia Antitrust Act.

IV.

Plaintiffs also fail to state a claim under the Virginia Business Conspiracy Act, *Va. Code § 18.2-499*. "[I]t is well-settled that [*§ 18.2-499*] applies only to injuries 'to business and property interests, not to personal or employment interests.'" *Shirvinski v. U.S. Coast Guard, 673 F.3d 308, 321 (4th Cir. 2012)* (quoting *Andrews v. Ring, 266 Va. 311, 585 S.E.2d 780, 784 (2003))*. The harm alleged throughout the amended complaint concerns the employment interests of timeshare salespersons. For example, ¶ 67 alleges that "[t]he agreement harmed and continues to harm employees by reducing the pay, benefits, and employment opportunities they might otherwise have earned if competition had not been eliminated." Am. Compl., Dkt. # 71, at ¶ 67. Likewise, in ¶ 90, the amended complaint alleges "[t]he agreement between Berkley and Bluegreen was an ideal tool to suppress employee compensation." Id. at ¶ 90. Paragraph 131 claims that "this agreement suppressed competition between Berkley and Bluegreen for skilled workers, with the natural and intended effect of reducing their compensation, and limiting affected employees' ability to secure better compensation, benefits and working conditions." Id. at ¶ 131. Despite these allegations, plaintiffs seek on brief to skirt this well recognized limitation on the Virginia Business Conspiracy **[*33]** Act by characterizing the injury as suppressed price. But even this argument is unavailing as the price they claim has been suppressed is their compensation. A claim of reduced compensation is simply not actionable under the Virginia Business Conspiracy Act.

In Shirvinski, the plaintiff was a private consultant working at a United States Coast Guard facility. After workplace tensions flared out of hand, the plaintiff was terminated by the subcontractor who employed him. The plaintiff alleged a conspiracy under *Va. Code § 18.2-499*, but the Fourth Circuit Court of Appeals concluded that the plaintiff's claim failed because he could not "demonstrate an injury to a business interest." *673 F.3d at 321*. Because the plaintiff "neither owned a company, did business as a separate organization, nor had a separate tax identification number for his contractor status[ ] . . . [he] suffered damage only to his personal employment prospects." *Id*. Here, plaintiffs' injury is only to their employment interests. Plaintiffs are not private contractors or individual companies, nor do they allege they conduct their timeshare sales as a separate organization or under separate tax identification numbers. The only alleged injury is to their **[*34]** employment interests in their personal wages.

The cases cited by plaintiffs are distinguishable from this case. In *Wuchenich v. Shenandoah Mem. Hosp., 215 F.3d 1324* [published in full-text format at *2000 U.S. App. LEXIS 11557], 2000 WL 665633* (4th Cir. 2000) (unpublished table decision), Dr. Wuchenich provided anesthesiology services to the hospital's patients under a written twelve-month Physician Guarantee Agreement with mutual covenants and agreements. *2000 U.S. App. LEXIS 11557, 2000 WL 665633 at *1*. In order to begin working at the hospital, Dr. Wuchenich closed his well established private practice in California and opened a new private practice in Woodstock, Virginia. Unlike the plaintiffs, Dr. Wuchenich maintained his own business, a private practice, through which he associated with and provided services to the hospital and its patients under a contract. Similarly, in *Luckett v. Jennings, 246 Va. 303, 435 S.E.2d 400, 10 Va. Law Rep. 296 (1993)*, Luckett alleged harm to his separate "business of real estate development." *246 Va. at 305, 435 S.E.2d at 400*. Luckett "describe [d] the nature of [his] business as a real estate developer, including the specific types of activities he undert[ook] in the conduct of his business." *Id. at 307-08, 435 S.E.2d at 402*. In contrast, plaintiffs' claims are solely rooted in their employment relationships with Berkley Group and do not constitute injury to a business or property interest. As such, plaintiffs' employment interests are not subject to redress under the Virginia Business **[*35]** Conspiracy Act.

V.

In sum, plaintiffs fail to plausibly allege an unreasonable restraint of trade in a properly defined relevant product or geographic market. Further, they seek redress for merely employment interests, not business or property interests. As a result, plaintiffs have failed to allege a plausible claim under *Section 1* of the Sherman Act, *15 U.S.C. § 1*; the Virginia Antitrust Act, *Va. Code § 59.1-9.5*; or the Virginia Business Conspiracy Act, *Va. Code § 18.2-499*, and the defendant's motion to dismiss must be **GRANTED**. Plaintiffs have already had an opportunity to amend their complaint, and the court believes that further amendment would be futile. Accordingly, plaintiffs' claim will be dismissed with prejudice.

An appropriate Order will be entered.

Entered: 05-28-15

/s/ Michael F. Urbanski

Michael F. Urbanski

United States District Judge

ORDER

For the reasons stated in the accompanying Memorandum Opinion entered this day, defendants' Motion to Dismiss (Dkt. # 79) is hereby **GRANTED**. Accordingly, this case is **DISMISSED WITH PREJUDICE** and **STRICKEN** from the active docket of the court.

It is **SO ORDERED**.

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

Entered: May 28, 2015

/s/ Michael F. Urbanski

Michael F. Urbanski

United **[*36]** States District Judge

[In re Evanston Northwestern Corp. Antitrust Litig.](#)

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

May 28, 2015, Decided; May 28, 2015, Filed

No. 07-cv-04446

Reporter
2015 U.S. Dist. LEXIS 198712 *

IN RE: EVANSTON NORTHWESTERN CORPORATION ANTITRUST LITIGATION

Prior History: *In re Evanston Northwestern Healthcare, 2008 U.S. Dist. LEXIS 42437 (N.D. Ill., May 29, 2008)*

Core Terms

discovery, merger, accrue, discovery rule, reasons, limitations, cases, summary judgment motion, outstanding, accrual, parties, argues, antitrust claim, monopolization, certification, antitrust, tolling

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Judges: Honorable Edmond E. Chang, United States District Judge.

Opinion by: Edmond E. Chang

Opinion

ORDER

Evanston Northwestern Healthcare merged with Highland Park Hospital and later became NorthShore University HealthSystem. R. 676, Def.'s Sum. J. Br. at 1. Seven years after the merger, this class action was filed, R. 1, Compl.,[1] alleging that the union violated federal antitrust laws. In a pending motion for summary judgment, NorthShore argues that the Class **[*4]** sued too late. R. 675, Mot. Summ. J. Now, the Class wants more time to complete outstanding discovery that it says it must have to respond to NorthShore's motion. To obtain that time and discovery, the Class has moved under *Rule 56(d)*—formerly 56(f)—of the Federal Rules of Civil Procedure. R. 680, 56(d) Mot. As explained below, the motion is granted.

I. Legal Standard

"If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to ... take discovery; or (3) issue any other appropriate order." *Fed. R. Civ. P. 56(d)*. "[This] Rule places the burden on the non-movant that believes additional discovery is required to 'state the reasons why the party cannot adequately respond to the summary judgment motion without further discovery.'" *Sterk v. Redbox Automated Retail, LLC, 770 F.3d 618, 628 (7th Cir. 2014)* (quoting *Deere & Co. v. Ohio Gear, 462 F.3d 701, 706 (7th Cir. 2006))*.

II. Analysis

The Class's *Rule 56(d)* motion and NorthShore's underlying summary judgment motion turn on when the Class's claims accrued and whether, after they accrued, they were somehow tolled. NorthShore argues the claims accrued on the date of the merger, expired four years later, and were never tolled. R. 690, Def.'s Opp. Br. at 2. The **[*5]** discovery that the Class wants, says NorthShore, could not possibly undermine these premises. The Class disagrees. 56(d) Mot. ¶¶ 3-6. The Class names various accrual rules and tolling doctrines, arguing that, alone or in combination, they might make its claims timely, depending on what the outstanding discovery shows. *Id.*

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[1] Subject-matter jurisdiction is proper under *28 U.S.C. § 1331*. Citations to the record filings are "R." followed by the docket number and then a page or paragraph number.

For the reasons explained below, both for pragmatic case-management reasons and because the Court disagrees with NorthShore's take on the relevant law, the Class's *Rule 56(d)* motion is granted and NorthShore's motion for summary judgment is denied without prejudice. NorthShore may refile its summary judgment motion following the discovery cutoff, which is now set for July 31, 2015. R. 671. The underlying summary judgment motion is denied—as opposed to deferred—because NorthShore should update and refile the motion to account for what this Order says about the applicable statute-of-limitations law and for what is found in discovery (if anything).

A. Case Management

At this stage of the litigation, case management alone justifies granting the Class's *Rule 56(d)* motion. As discussed later, there is some uncertainty in the limitations-period law that applies to the Class's claims. If the Court **[*6]** were to cutoff limitations-related discovery now, but it turns out later (on appeal, for example) that certain doctrines do apply, then the parties would be without the facts to apply the doctrines. If instead the parties are allowed to engage in the discovery now, then the factual premises will be available for the parties to argue; indeed, the uncovered facts might even render unnecessary definitive decisions on certain doctrines, because the facts might not support them. The point is that it is worth accounting for the possibility that the Seventh Circuit will disagree with this Court's limitations rulings. The Seventh Circuit has not decided the statute-of-limitations questions at issue in the underlying summary judgment motion: it has not decided when purchaser-plaintiffs' merger-based monopolization claims under *§ 2* of the Sherman Act accrue; it has not decided when purchaser-plaintiffs' claims under *§ 7* of the Clayton Act accrue; and it has not decided whether the continuing violation doctrine or the discovery rule apply to either type of claim. And, as two leading commentators on ***antitrust law*** put it, when it comes to antitrust limitations law, "the cases are inconsistent and often **[*7]** hypertechnical." Areeda & Hovenkamp, ***Antitrust Law*** *§ 320* (4th ed., 2014).

Under these circumstances, more information—including the information sought by the Class—is better. More information might assist this Court in reaching an accurate result. And more information might assist the Seventh Circuit in the same way, or perhaps by giving it alternate grounds to consider. *See, e.g., Burns v. Orthotek, Inc. Employees' Pension Plan & Trust, 657 F.3d 571, 575 (7th Cir. 2011)* (Seventh Circuit "can affirm on any ground that the record fairly supports and the appellee has not waived"). It would be better to put the parties in a position to avoid a remand, if possible.

This is especially so because the Class is asking for a modest amount of limitations-related discovery. 56(d) Mot. ¶¶ 7-10, 13. The outstanding discovery—a motion to compel, three depositions (at least two already scheduled), and a document subpoena (already served)—might even conclude by the existing fact-discovery cut-off, just two months away. Even if there is some follow-up discovery, the deadline is do-able, or at least any extension would likely be short. The Class is not proposing an undue discovery undertaking, at least when considered in the context of this already sprawling litigation. They are proposing only **[*8]** to complete what they began—if not as soon as they could have—at least in time to have a reasonable expectation that they would meet the current deadline.

B. Accrual of the Class's Claims

Of course if the answer to the limitations-period questions were clear, there would be no case-management need to allow discovery. NorthShore argues that it has a sure-thing winner on the limitations defense, relying on *Z Technologies Corp. v. Lubrizol Corp., 753 F.3d 594 (6th Cir. 2014)*, and *Midwestern Mach. Co. v. Nw. Airlines, Inc., 392 F.3d 265 (8th Cir. 2004)*. With these cases, NorthShore makes a simple argument: All antitrust claims are subject to a four-year statute of limitations; all antitrust claims challenging mergers accrue on the date of the merger; and here, the Class sued more than four years after the merger. Def.'s Opp. Br. at 1-3. No tolling or alternative accrual doctrines apply, so the Class has no wiggle room. *Id.* at 3. Its claims are hopelessly time barred. For at least two reasons, the situation is not as hopeless as NorthShore thinks.

1. *Berkey Photo, Inc. v. Eastman Kodak Co.*

The Class's monopolization claim under § 2 of the Sherman Act (15 U.S.C. § 2) might well be timely under Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 294-96 (2d Cir. 1979). *Berkey* held that a "purchaser's [§ 2] claim cannot accrue until [the purchaser] actually pays" to the monopolist a supracompetitive price. Id. at 295. Here, the Class members **[*9]** likely made purchases from NorthShore at allegedly supracompetitive prices within the limitations period. So claims based on those payments, at least,[2] would be timely were Berkey to control.

And *Berkey* likely would control. Although the Seventh Circuit has not yet adopted *Berkey*, there are reasons to believe it probably would if given the chance. First, the Seventh Circuit has frequently relied on *Berkey*'s lengthy treatment of what conduct is unlawful monopolization, as distinct from lawful competition. Goldwasser v. Ameritech Corp., 222 F.3d 390, 397 (7th Cir. 2000); Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic, 65 F.3d 1406, 1412-13 (7th Cir. 1995), *as amended on denial of reh'g* (Oct. 13, 1995); Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 376 (7th Cir. 1986); MCI Commc'ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1106 (7th Cir. 1983). Given that *Berkey*'s accrual rule flowed, in part, from its decision that anticompetitive conduct is required to violate § 2 (as opposed to simply possessing monopoly power), it would be odd for this Circuit to approve of *Berkey*'s holding on that point without also adopting its take on accrual of antitrust claims.[3]

What's more, the Seventh Circuit has even cited *Berkey*'s limitations analysis with approval, albeit not in an antitrust case. Taylor v. Meirick, 712 F.2d 1112, 1118 (7th Cir. 1983). *Taylor* cited *Berkey* for the "general principle that the statute of limitations does not begin to run on a continuing wrong till the wrong is over and done with." *Id.*[4] It would be strange **[*10]** for the Court to welcome *Berkey* as a "general principle" but then refuse to apply it in the context it came from. Moreover, if the Circuit were to extend its adoption of *Berkey* formally into antitrust, it would not be alone. Several other courts have followed *Berkey*'s accrual rule. In re Aggrenox Antitrust Litig., 94 F. Supp. 3d 224, 2015 WL 1311352, at *8 (D. Conn. 2015) ("Courts in other districts and circuits have used the same reasoning applied in *Berkey*.") (citing four other district-court cases).

On top of all of that, *Berkey* does make sense. Without it, purchaser-plaintiffs' monopolization claims would supposedly accrue before the plaintiffs are even injured, and it is no surprise that general limitations-period law starts the clock on injury, which is the point in time when plaintiffs know (or should know) that there is a claim. Moreover, the rule NorthShore advocates—that, without exception, all merger-based antitrust claims expire four

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[2] Overcharges as far back as February 10, 2000—just 40 days after the merger—may also be recoverable. The Class filed its complaint on August 7, 2007. Compl. That would ordinarily only allow the Class to reach back to 2003, but 15 U.S.C. § 16(i) tolls private rights of action whenever overlapping government cases are pending: "[w]henever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws ... the running of the statute of limitations in respect to every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter." Here, the Federal Trade Commission "instituted" a proceeding against NorthShore based on the merger on February 10, 2004. So the limitations period for all related "right[s] of action" that existed on that date, including the Class's, were then "suspended" until the FTC action resolved. The FTC action lasted until well after the Class filed. Case Timeline, Federal Trade Commission, available at https://www.ftc.gov/enforcement/cases-proceedings/0110234/evanston-northwestern-healthcare-corporation-enh-medical-group . So, in short, whatever rights the Class had 40 days after the merger, were likely still around when the Class filed its complaint.

[3] It is worth noting that the Seventh Circuit often relies on the two leading antitrust commentators mentioned earlier in the opinion, and those commentators approve of the *Berkey* accrual rule. Areeda & Hovenkamp, ***Antitrust Law*** § 320c4 ("[C]ustomers of the monopolist are not injured until after the monopolist causes them injury through higher prices.").

[4] *Taylor*'s treatment of *Berkey* exemplifies how courts have had a hard time categorizing the case. *Taylor*, with its reference to "continuing wrongs," appears to consider *Berkey* a continuing-violation-doctrine case. 712 F.2d at 1118. Other courts identify *Berkey* as a straight-forward application of the rule from Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338-40, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971), which is that "the cause of action for future damages, if they ever occur, will accrue only on the date they are suffered." *See* Rite Aid Corp. v. Am. Exp. Travel Related Servs. Co., 708 F. Supp. 2d 257, 267 (E.D.N.Y. 2010) ("*Berkey*'s purchaser accrual rule is based on the rationale that a purchaser's damages for paying overcharges are 'entirely speculative' until the purchaser actually pays the overcharge.").

years after the merger—lends a potential windfall to companies that merge into monopoly in year zero but then only begin to exploit their market power after year four. NorthShore's rule would leave purchaser-plaintiffs in that situation without recourse—never mind that those plaintiffs may have **[*11]** had no reason to sue until it was too late.

In light of *Berkey*, the cases relied on by NorthShore (*Z Technologies* and *Midwestern*) are less persuasive. For starters, neither case discusses—much less distinguishes—*Berkey. Midwestern* is also distinguishable because it did not involve a monopolization claim under *§ 2* of the Sherman Act. *Midwestern* only dealt with *§ 7* of the Clayton Act (*15 U.S.C. § 18*). *392 F.3d at 268*. This is a crucial point when trying to apply that case here. *Midwestern* relied on the difference between the *§ 2* and *§ 7* claims in deciding that *§ 7* claims accrued on the date of the merger. *Id. at 270-73*. And one of the reasons it accepted the accrual-on-merger rule for *§ 7*, in spite of the possibility that some plaintiffs' claims would expire before those plaintiffs were injured, was because those plaintiffs could still sue under *§ 2*. *Id. at 272* ("Finding that a continuing violation theory does not apply to *§ 7* does not give a 'green light' to monopolists ... because merged firms, like all firms, are still subject to *[§ 2]*."). Contrary to what NorthShore says, this part of *Midwestern* actually implies that *§ 2* claims accrue sometime *after* the merger; that, in effect, *Berkey* is right. Even *Midwestern*'s reasons for rejecting the continuing violation doctrine **[*12]** were specific to *§ 7*, which the court again contrasted against *§ 2*. *Id. at 271* ("Unlike ... maintaining [ ] a monopoly, a merger is a discrete act.").

It is true that *Z Technologies* is not so readily distinguishable, because it involved both *§ 2* and *§ 7* claims. 753 F.3d at 595. But it focused almost exclusively on the continuing violation doctrine. *Id.* at 598-600. In other words, it took accrual-on-merger as a given and then considered tolling. (It appears, from a review of the briefing in the Sixth Circuit in *Z Technologies*, that the parties there did not mention *Berkey*.) So the Court could agree with *Z Technologies* that the continuing violation doctrine does not apply to merger cases and still decide against NorthShore by relying on *Berkey*, all without contradicting anything in *Z Technologies*.

2. The Discovery Rule

Like *Berkey*, the discovery rule might also assist the Class. Under the discovery rule, "[s]tatutes of limitations in federal civil cases ... begin to run upon discovery of the injury from the alleged violation." *In re Sulfuric Acid Antitrust Litig., 703 F.3d 1004, 1014 (7th Cir. 2012)*. The Class argues that the outstanding discovery will help it prove that it could not have discovered its injuries until after the merger; specifically, until long enough after the merger to make its claims timely. **[*13]** NorthShore responds—but does not cite anything in support—that the discovery rule does not apply to merger-based antitrust claims.

NorthShore is almost certainly wrong. Over and over the Seventh Circuit has affirmed that the rule is general to all federal civil statutes absent contrary word from Congress. *See, e.g., In re Copper Antitrust Litig., 436 F.3d 782, 789 (7th Cir. 2006)* ("As in other areas of the law, however, in the absence of a contrary directive from Congress this rule is qualified by the discovery rule, which postpones the beginning of the limitations period from the date when the plaintiff is wronged to the date when he discovers he has been injured.") (internal citations and quotations omitted); *Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450-51 (7th Cir.1991)* (discovery rule is "read into statutes of limitations in federal-question cases ... in the absence of a contrary directive from Congress"). There is no word from Congress about merger-based *§ 2* and *§ 7* claims, so if and when the limitations summary-judgment motion is renewed after discovery, the Court likely will rely on the Seventh Circuit's very broad statements of the rule's applicability, even though the Circuit has never expressly held that it applies to cases like this one. Like *Berkey*, the discovery rule justifies the modest delay sought **[*14]** by the Class.

C. NorthShore's Remaining Objections

1. Diligence

The Court does have concerns about the Class's diligence in pursuing the outstanding discovery. The Class has had 1,236 days to conduct that discovery. This, of course, does not count the days when discovery was stayed.[5] The Class has known that NorthShore's statute-of-limitations argument was coming that whole time. It was the only argument in NorthShore's motion to dismiss, R. 32, Mot. Dismiss, which was filed more than seven years ago. Since then, the argument has changed little. The argument relies now, as it did then, on the same principles and even pretty much the same case law. The Court thought long and hard about whether the Class has already had enough time.

The Court came down in the Class's favor for three reasons. First, NorthShore made only a token argument about diligence, offering no specifics. Def.'s Opp. Br. at 4 (a single sentence). Second, the Class could reasonably have believed that all of the limitations-related discovery would have been complete by the current discovery deadline. So this is not the case were there was a total failure to plan; only, at worst, a decision to cut it very close. And finally, **[*15]** in a case of this size and complexity, it is hard for the Court to say definitively—especially absent argument from NorthShore—that the Class's failure to sew up this part of the case earlier was due to a lack of diligence rather than a calculated, reasonable choice to pursue other objectives earlier on.

2. Futility

NorthShore makes two additional arguments that both amount to calling the outstanding discovery futile. First, NorthShore argues that the "undisputed evidence" defeats the Class's potential reliance on the discovery rule. *Id.* at 3. Although NorthShore's recitation of the evidence that the class representatives were aware of the merger is compelling, it is not so lopsided that the Court can say that more discovery is futile. The Court will not, in effect, decide the summary judgment without the benefit of the Class's response and all the information. Next, NorthShore argues that all the information sought by the outstanding discovery came out in the FTC proceeding, the files of which the Class already has. *Id.* at 4. This argument fails because the FTC was not interested in when the Class discovered its claims, so the FTC had no reason to ask the questions or seek the documents that the Class **[*16]** now wants.

3. Class Certification Concerns

NorthShore pointed out that how a class chooses to oppose affirmative defenses can impact the propriety of class certification. *Id.* at 4, n.3; *see also* *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S. Ct. 2541, 2561, 180 L. Ed. 2d 374 (2011)*. Courts have become increasingly cautious about how affirmative defenses might interfere with certification. *See, e.g.,* *Monaco v. Bear Stearns Cos., 2012 U.S. Dist. LEXIS 189628, 2012 WL 10006987, at *9-10 (C.D. Cal. Dec. 10, 2012)* (denying class certification because affirmative defenses raised individual issues that destroyed predominance). The Class is warned that any theory it raises to combat NorthShore's statute-of-limitations defense must be compatible with class certification, or else risk a motion for decertification. In other words, the Class's responses to the limitations defense should rely, if possible, on common proof (to avoid predominance problems) and not assume that NorthShore will be disallowed at trial from presenting its defenses to individual claims (to avoid Rules Enabling Act and Due Process problems).

III. Conclusion

The Class's *Rule 56(d)* motion [680] is granted and, under *Rule 56(d)(1)*, the Court now denies NorthShore's summary judgment motion [675] without prejudice. NorthShore may update the motion to address the Court's take

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[5] Discovery was open for all purposes from, at the latest, March 11, 2008, until it was stayed on April 6, 2010. R. 56, Scheduling Order ("Full discovery will commence immediately upon entry of this order."); R. 388, Discovery Stay. That period is 756 days. Discovery was reopened on December 16, 2013. R. 588. From then until the motion for summary judgment, R. 675, was filed on April 10, 2015, was an additional 480 days.

on the substantive law—including *Berkey*—and refile after the close of fact discovery. **[*17]** In view of this decision, the parties shall confer further on the limitations-related discovery, and shall promptly bring good-faith, post-conferral disputes to the Court's attention via motion.

ENTERED:

/s/ Edmond E. Chang

Honorable Edmond E. Chang

United States District Judge

Date: May 28, 2015

[Tex. Spine & Joint Hosp., Ltd. v. Blue Cross & Blue Shield of Tex.](#)

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

May 28, 2015, Decided; May 28, 2015, Filed

CIVIL NO. 6:14-CV-952-JDL

Reporter
2015 U.S. Dist. LEXIS 192514 *

TEXAS SPINE & JOINT HOSPITAL, LTD., Plaintiff, vs. BLUE CROSS AND BLUE SHIELD OF TEXAS, A DIVISION OF HEALTH CARE SERVICE CORPORATION, Defendant.

Core Terms

antitrust, motion to dismiss, argues, negligent misrepresentation claim, cause of action, alleges, promissory estoppel, competitor, negligent misrepresentation, Commerce, statute of limitations, consumer, sovereign immunity, antitrust claim, quantum meruit, promise, fails, quantum meruit claim, sufficient facts, matter of law, violations, insureds, reimbursement claim, relevant market, healthcare, in-network, restrained, benefits, asserts, courts

Counsel: **[*1]** For Christopher Nolland, Mediator: Christopher Marc Nolland, LEAD ATTORNEY, Law Office of Christopher Nolland, Dallas, TX USA.

For Texas Spine & Joint Hospital, Ltd., Plaintiff: Lynne Ellen Sassi, LEAD ATTORNEY, Sassi Law Firm PC, Houston, TX USA; Lindsey Scott Birdsong, Birdsong & Armstrong PC, Tyler, TX USA.

For Blue Cross And Blue Shield of Texas, A Division of Health Care Service Corporation, Defendant: Martin James Bishop, LEAD ATTORNEY, Reed Smith LLP - Chicago, Chicago, IL USA; Blaire Bruns Johnson, Edison, McDowell & Hetherington LLP, Houston, TX USA.

Judges: JOHN D. LOVE, UNITED STATES MAGISTRATE JUDGE.

Opinion by: JOHN D. LOVE

Opinion

JURY TRIAL DEMANDED

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Before the Court is Defendant Blue Cross and Blue Shield of Texas' ("BCBS") Motion to Dismiss Original Petition for Failure to State a Claim Under *Fed. R. Civ. P. 12(b)(1)* and *(6)* ("MOTION") (Doc. No. 6). Plaintiff Texas Spine & Joint Hospital ("Plaintiff") filed a response ("RESPONSE") (Doc. No. 14), and BCBS filed a reply ("REPLY") (Doc. No. 21). The Court held a hearing on Defendant's Motion on February 12, 2015. For the reasons stated below, the Court **RECOMMENDS** that Defendant's Motion be **GRANTED-IN-PART** and **DENIED-IN-PART [*2]** .

BACKGROUND

Texas Spine filed suit in the District Court of Smith County, Texas on November 11, 2014, and BCBS removed this action to the Eastern District of Texas on December 17, 2014 (Doc. No. 1). Plaintiff's Original Petition ("PETITION") (Doc. No. 1-1) alleges: 1) statutory causes of action under the Texas Administrative Code, the Texas Insurance Code, the Texas Business and Commerce Code, and the Texas Free Enterprise and Antitrust Act ("TFEAA")[1]; and 2) common law causes of action for negligence and negligent misrepresentation, promissory estoppel, and quantum meruit.

Plaintiff is an acute care hospital located in Tyler, Texas, specializing in spine and orthopedic surgery. BCBS is a division of Health Care Services Corporation,[2] and insures and administers health care plans in the State of Texas. Plaintiff alleges that it began providing medical services and treatments to patients insured by BCBS in 2002 (PETITION at ¶ 11). Plaintiff does not have a contract with BCBS, and consequently, has been providing medical services and treatment to BCBS's insureds on an out-of-network basis. *Id.* Plaintiff's claims address two interrelated issues. First, Plaintiff's causes of action for violations **[*3]** of the Texas Administrative Code, the Texas Insurance Code, and the Texas Business and Commerce Code, as well as for negligence and negligent misrepresentation, promissory estoppel, and quantum meruit, are all based on alleged misrepresentations made by BCBS regarding the amount of reimbursement BCBS would provide to Plaintiff for out-of-network health insurance benefits claims, and Defendant's alleged failure to pay the full amount of those claims. *See id.* ¶¶ 8-29. The foregoing causes of action seek recovery based on more than 26,000 individual healthcare claims for reimbursement (PETITION at 3).[3] Second, Plaintiff's cause of action under the TFEAA is premised on Defendant's alleged exclusive in-network contract with Trinity Mother Frances Health System.

BCBS moves for dismissal of certain of Plaintiff's claims under *12(b)(1)* and *12(b)(6)*, arguing that: 1) Plaintiff's negligent misrepresentation cause of action, along with its claims under the Texas Insurance Code and the Texas Business and Commerce Code should be dismissed for failure to meet the pleading requirements of *Federal Rule of Civil Procedure 9(b)* (MOTION at 5); 2) Plaintiff's **[*4]** TFEAA claim fails as a matter of law (MOTION at 8-9); 3) Plaintiff's claim under 28 Texas Administrative Code § 19.1724 fails because that section has not appeared in the text of that code since 2012 (MOTION at 13); 4) Plaintiff's promissory estoppel claim fails because Plaintiff does not allege that BCBS made any promise to Plaintiff or that Plaintiff foreseeably relied on any alleged promise (MOTION at 13-14); 5) Plaintiff fails to state a quantum meruit claim (MOTION at 15); and 6) Plaintiff's claims are preempted by ERISA and Federal Employee Health Benefit Act ("FEBHA"), and/or barred by the doctrine sovereign immunity, and under the applicable statutes of limitations (MOTION at 16-24).

Plaintiff responds, arguing that: 1) it has alleged sufficient facts to support its claims for negligence, negligent misrepresentation, Texas statutory violations, promissory estoppel, and quantum meruit ("RESPONSE at 6); 2) *Rule 9(b)* does not apply to its negligent misrepresentation claim, and even if it does, the pleadings meet that standard ("RESPONSE at 8-10); 3) BCBS's arguments based on preemption, sovereign immunity, and the statute of limitations are premature ("RESPONSE at 12-14, 19-20); 4) it has alleged sufficient facts to support **[*5]** its TFEAA claim ("RESPONSE at 14-19); and 5) its claim under 28 Texas Administrative Code § 19.1724 should not be dismissed based on a "scrivener's error", and that its claim is still viable under current sections of the code ("RESPONSE at 21-22).

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[1] The Texas Free Enterprise and Antitrust Act is codified under Chapter 15 of the Texas Business and Commerce Code.

[2] Blue Cross and Blue Shield of Texas is a division of Health Care Service Corporation, an Illinois Mutual Legal Reserve Company, with its principal place of business located in Chicago, Illinois. *See* Doc. No. 1 at 2. For diversity jurisdiction purposes, Defendant is not considered a citizen of Texas. *See* *Hesse v. Blue Cross Blue Shield of Texas, No. 4:11-CV-362, 2011 U.S. Dist. LEXIS 102012, 2011 WL 4025453, at *2 (E.D. Tex. Aug. 15, 2011)*, *report and recommendation adopted*, *No. 4:11-CV-362, 2011 U.S. Dist. LEXIS 102001, 2011 WL 4025514 (E.D. Tex. Sept. 9, 2011)* ("In this case, it is clear that Defendant is a division of HCSC, an Illinois corporation, with its principal place of business in Illinois. Therefore, Defendant is not a citizen of Texas for diversity purposes, diversity does exist between the parties . . . .").

[3] The Petition references an exhibit containing a comprehensive list of the medical care and treatment Plaintiff allegedly provided to BCBS insureds. In the Petition filed with the Court, Plaintiff states that the foregoing exhibit "will be produced under separate cover to the Defendant's attorney of record, and is not filed with the Court." (PETITION at 3).

LEGAL STANDARDS

Motions to dismiss under *Rule 12(b)(6)* for failure to state a claim "are viewed with disfavor and are rarely granted." *Test Masters Educ. Servs., Inc. v. Singh, 428 F.3d 559, 570 (5th Cir. 2005)*; *Lormand v. US Unwired, Inc., 565 F.3d 228, 232 (5th Cir. 2009)*. The Court utilizes a "two-pronged approach" in considering a motion to dismiss. *Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. First, the Court identifies and excludes legal conclusions that "are not entitled to the assumption of truth." *Id.* Second, the Court considers the remaining "well-pleaded factual allegations." *Id.* The Court must accept as true all facts alleged in a plaintiff's complaint, and the Court views the facts in the light most favorable to a plaintiff. *In re Katrina Canal Breaches Litig., 495 F.3d 191, 205 (5th Cir. 2007)*. A plaintiff's complaint survives a defendant's *Rule 12(b)(6)* motion to dismiss if it includes facts sufficient "to raise a right to relief above the speculative level." *Id.* (quotations and citations omitted). In other words, the Court must consider whether a plaintiff has pleaded "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

The Fifth Circuit has consistently recognized that a dismissal for lack of subject matter jurisdiction **[*6]** pursuant to *12(b)(1)* "should be granted sparingly." *Martin v. Morgan Drive Away, Inc., 665 F.2d 598, 602 (5th Cir. 1982)* (quoting *Chatham Condo. Assos. v. Century Village, Inc., 597 F.2d 1002, 1012-13 (5th Cir. 1979))*. In evaluating a *12(b)(1)* motion to dismiss, "a court may evaluate 1) the complaint alone, 2) the complaint supplemented by undisputed facts evidenced in the record, or 3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Den Norske Stats Oljeselskap As v. HeereMac Vof, 241 F.3d 420, 424 (5th Cir. 2001)*.

ANALYSIS

1. Negligent Misrepresentation, Texas Insurance Code, and Texas Business and Commerce Code

BCBS argues that Plaintiff's negligent misrepresentation claim, along with its claims under Section 541 of the Texas Insurance Code and *Section 17.46 of the Texas Business and Commerce Code*, should be dismissed for failure to meet the pleading requirements of *Federal Rule of Civil Procedure 9(b)* (MOTION at 5).[4] *Rule 9(b)* provides in pertinent part that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." BCBS asserts that the heightened pleading standard applies because "[t]he majority of Plaintiff's causes of action rest on alleged misrepresentations by BCBSTX" (MOTION at 1), relying primarily on *Frith v. Guardian Life Insurance Co. of America, 9 F. Supp. 2d 734 (S.D. Tex. 1998)*, and *Williams v. WMX Technologies, Inc., 112 F.3d 175, 177 (5th Cir. 1997)*, as cited therein.

Negligent Misrepresentation

With regard to Plaintiff's negligent misrepresentation claim, both *Frith* and *Williams* are inapposite. Those cases stand for the proposition that *Rule 9(b)* applies to negligent misrepresentation **[*7]** claims only when the plaintiff fails to distinguish negligent misrepresentation claims from fraud claims. *See Am. Realty Trust, Inc. v. Hamilton Lane Advisors, Inc., 115 Fed. App'x 662, 668 n.30 (5th Cir. 2004)*; *see also Encompass Office Solutions, Inc. v. Ingenix, Inc., 775 F. Supp. 2d 938, 956 (E.D. Tex. 2011)* (finding 9(b) applicable to negligent misrepresentation claim where plaintiff combined "allegations of fraud and negligent misrepresentation without specifying which allegations are for the fraud claim and which are for the negligent misrepresentation claim."). In *American Realty*

[4] The section of the Petition titled "Insurance Code Violations" includes claims under *Texas Insurance Code §§ 541.051*, *541.052*, and *541.056*, along with claims under the *Texas Business and Commerce Code § 17.46* (titled Deceptive Trade Practices Unlawful) and 28 Texas Administrative Code § 19.1724. For the reasons stated below, Plaintiffs claims under 28 Texas Administrative Code § 19.1724 are dismissed, because that section is no longer a part of the code.

Trust, the Fifth Circuit held that where claims of negligent misrepresentation are sufficiently distinct from claims of fraud, *Rule 9(b)* does not apply to the negligent misrepresentation claims. *115 Fed. App'x at 668 n.30* (recognizing that "plaintiffs properly distinguished between their fraud and negligent misrepresentation claims and correctly argued that the *Rule 9(b)* requirement of particularized pleading of fraud by its terms does not apply to negligent misrepresentation claims."); *see also McArdle v. Mattel Inc., 456 F. Supp. 2d 769, 785 (E.D. Tex. 2006)* ("Our circuit clearly holds that *Rule 9(b)*'s particularity requirement is inapplicable to claims for negligent misrepresentation . . . ." (citing *Am. Realty Trust, 115 Fed. App'x at 668 n.30*)); *Kitchell v. Aspen Exploration, Inc., 562 F. Supp. 2d 843, 852 (E.D. Tex. 2007)* (discussing the difference between the *Williams* line of cases and *American Realty Trust*).

Here, Plaintiff has not alleged a fraud claim. Therefore, the heightened pleading standard of *Rule 9(b)* does not apply. **[*8]** *Gen. Elec. Capital Corp. v. Posey, 415 F.3d 391, 394 (5th Cir. 2005)* ("The district court properly dispensed with the *rule 9(b)* argument, concluding that GECC had not alleged any fraud claims and thus was not subject to the heightened pleading requirements of *rule 9(b)*.").[5] Therefore, Plaintiff's negligent misrepresentation claim, and its claims under the Texas Insurance Code and the Texas Business and Commerce Code are subject to the more liberal pleading standard of *Rule 8(a)*. BCBS does not argue that the pleadings fall short of the requirements of *Rule 8(a)*. In any event, the Court finds that the foregoing claims satisfy that standard. Plaintiff alleges that its employees contacted BCBS, "received preauthorization for all treatment provided to [BCBS] members, and expectations of payment," provided treatment to BCBS members, submitted claims to BCBS for payment, and received reimbursement at a rate of 14.5% and 12.3% of the billed charges for inpatient and outpatient admissions, respectively (PETITION at 3, 4). The foregoing facts give rise to a plausible negligent misrepresentation claim.

Texas Insurance Code and Texas Business and Commerce Code

BCBS argues that Plaintiff's claims under Section 541 of the Texas Insurance Code and *Section 17.46 of the Texas Business and Commerce Code* fail to satisfy the requirements of *Rule 9(b)* because Plaintiff merely recites the code sections, **[*9]** and states that the "causes of action arise out of [those] violations." (MOTION at 6-7 (alteration in original)). While the foregoing claims are likely subject to the *Rule 9(b)* standard, *see Encompass Office Solutions, 775 F. Supp. 2d at 965*, the Court finds that these claims fail even under the more liberal *Rule 8(a)* standard. The section of the Petition alleging violations of Section 541 of the Texas Insurance Code and *Section 17.46 of the Texas Business and Commerce Code* contains the exact type of "formulaic recitation of the elements of a cause of action" devoid of "further factual enhancement" that fails to meet the *Rule 8(a)* pleading standard. *Twombly, 550 U.S. at 555, 557*; *see Iqbal, 556 U.S. at 678*.

Accordingly, the Court **RECOMMENDS** that BCBS's Motion to Dismiss as to Plaintiff's negligent misrepresentation cause of action be **DENIED**. The Court further **RECOMMENDS** that BCBS's Motion to Dismiss be **GRANTED-IN-PART** as to Plaintiff's claims under Section 541 of the Texas Insurance Code and *Section 17.46 of the Texas Business and Commerce Code*. However, the Court further **RECOMMENDS** that Plaintiff should be permitted to amend the Petition for the purpose of alleging claims under Section 541 of the Texas Insurance Code and *Section 17.46 of the Texas Business and Commerce Code*.

2. Texas Free Enterprise and Antitrust Act

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[5] BCBS also references *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC, 594 F.3d 383 (5th Cir. 2010)*, which offers little support for its argument that *Rule 9(b)* applies to Plaintiff's negligent misrepresentation claim. In *Lone Star*, the Court found that the claims "sound[ed] in fraud and negligent misrepresentation," and that *Rule 9(b)* applied because the plaintiff did not urge a separate focus on the negligent misrepresentation claim. *Id. at 387 n.3*. There, the complaint pleaded with particularity the exact representations the plaintiff claimed were false. *Id.* Here—as BCBS argues—Plaintiff has not pleaded with particularity the exact representations it claims are false.

BCBS first argues that Plaintiff is unable to establish standing under the TFEAA because it is neither a competitor nor consumer in relation to BCBS (MOTION at 8). In addition, BCBS argues that Plaintiff's TFEAA claim fails as a matter of law because Plaintiff's "sole **[*10]** factual allegation in support of its TFEAA claim is that BCBSTX has entered into an exclusive provider agreement with another entity." (MOTION at 9). Finally, BCBS argues that Plaintiff's TFEAA claim fails to meet the requirements of the Supreme Court's three-part inquiry to determine whether an exclusive agreement rises to the level of an antitrust violation under *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*.

Standing

Plaintiff has asserted claims under *Sections 15.05(a)* and *(b)* of the TFEAA. Texas courts interpret the TFEAA in harmony with comparable federal antitrust statutes, namely the Sherman and Clayton Acts. *Tex. Bus. & Com. Code § 15.04*; *Caller-Times Pub. Co. v. Triad Commc'ns, Inc., 826 S.W.2d 576, 580 (Tex. 1992)*. Since "standing under the Texas Antitrust Act is co-extensive with the judicial interpretations of the Sherman Act," the federal antitrust standing requirements as articulated by the Supreme Court and the Fifth Circuit apply. *Tessera, Inc. v. Micron Tech., Inc., No. 2:05-CV-94, 2005 U.S. Dist. LEXIS 24759, 2005 WL 1661106, at *1 (E.D. Tex. July 13, 2005)*; *see also* *Abbott Labs. v. Segura, 907 S.W.2d 503, 505 (Tex. 1995)*. Courts in the Fifth Circuit apply the standing factors established in *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*, which include: 1) the causal connection between the alleged antitrust violation and the harm to the plaintiff; 2) the nature of the alleged injury, including whether the plaintiff is a consumer or a competitor in the relevant market; 3) the directness of the alleged injury, **[*11]** and whether the alleged damages are too speculative; 4) the potential for duplicative recovery; and 5) the complexity of apportioning damages. *See* *Tessera, 2005 U.S. Dist. LEXIS 24759, 2005 WL 1661106, at *2*; *see also* *Bell v. Dow Chemical Co., 847 F.2d 1179, 1183 (5th Cir. 1988)*. None of the foregoing factors are determinative, and they must be considered on balance. *Tessera, 2005 U.S. Dist. LEXIS 24759, 2005 WL 1661106, at *2*.

BCBS asserts that Plaintiff lacks standing to bring a TFEAA claim because it is neither a consumer nor a competitor of BCBS, relying exclusively on *Maranatha Temple, Inc. v. Enterprise Prods. Co., 893 S.W.2d 92, 105 (Tex. App.—Houston [1st Dist.] 1994, writ denied)* (MOTION at 8). Thus, BCBS's argument is directed only to the second factor of the *General Contractors* analysis—the nature of the alleged injury. Under this factor, courts examine whether a plaintiff has suffered an antitrust injury. In other words, a "plaintiff's injury must be the type that the antitrust laws were intended to prevent." *Bell, 847 F.2d at 1183* (citing *Brunswick Corp v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*. "The court's focus must be upon competition in the allegedly restrained market." *Id.* BCBS's assertion that Plaintiff is unable to establish antitrust standing because it is neither a consumer nor a competitor *of BCBS* is misguided. In determining whether a plaintiff has suffered an antitrust injury, the Fifth Circuit examines whether the plaintiff is a consumer or competitor *in the allegedly restrained market. See id.* ("Restraint in the market affects **[*12]** consumers and competitors in the market; as such they are the parties that have standing to sue."); *Norris v. Hearst Trust, 500 F.3d 454, 467 (5th Cir. 2007)* (finding plaintiffs did not suffer antitrust injury because they were "neither consumers nor competitors in the market attempted to be restrained."); *General Contractors, 459 U.S. at 539* (noting that the plaintiff "was neither a consumer nor a competitor in the market in which trade was restrained."). Thus, there is no requirement that Plaintiff be a competitor *of BCBS* in order to have antitrust standing. Here, Plaintiff alleges that BCBS entered into an exclusive in-network agreement with one of its competitors, Trinity Mother Frances Health System, which has resulted in anticompetitive restraint of the Tyler and East Texas hospital healthcare market. *See* PETITION at 9-10. BCBS has made no showing that Plaintiff has failed to satisfy any of the remaining factors under the *General Contractors* antitrust standing test. Accordingly, BCBS has failed to demonstrate that Plaintiff lacks standing to bring a TFEAA claim.

Exclusive Agreement

BCBS argues that Plaintiff's antitrust claim fails as a matter of law because it is premised solely on an alleged exclusive in-network contract between BCBS and Trinity Mother Frances (MOTION **[*13]** at 9). BCBS relies solely on *Apani Southwest., Inc. v. Coca-Cola Enterprises, Inc., 300 F.3d 620, 633 (5th Cir. 2002)*, arguing that, "[a]s a matter of law, the mere assertion that parties have entered into an exclusive agreement is not sufficient to establish an antitrust claim." (MOTION at 9). That is not the holding of *Apani*. In *Apani*, "[t]he district court dismissed all of Apani's antitrust claims, finding Apani's geographic market definition legally insufficient as a matter of law." *300 F.3d at 628*. The Fifth Circuit affirmed the district court's dismissal of the antitrust claims on the same grounds. *Id. at 633*. The Court did not hold that an exclusive agreement is insufficient to establish an antitrust claim as a matter of law.[6] Thus, BCBS's argument in favor of dismissal on this basis fails.

Probable Effect of Substantially Lessening Competition

BCBS also argues that Plaintiff has failed to allege facts sufficient to create an inference that BCBS had enough market power to create a monopoly (MOTION at 10). BCBS asserts that the Petition fails to meet the three-prong test established by the Supreme Court in *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*. The *Tampa Electric* test is applied to alleged violations of *Section 3* of the Clayton Act, *15 U.S.C. §14*, and the ultimate question it contemplates is whether a tying or exclusive-dealing arrangement "forecloses **[*14]** competition in a substantial share of the line of commerce involved."[7] *Tampa Elec., 365 U.S. at 329*. *Section 3* of the Clayton Act mirrors *Section 15.05(c)* of the TFEAA. However, Plaintiff has only asserted claims under *Sections 15.05(a)* and *(b)* of the TFEAA.[8] Thus, BCBS's arguments based on *Tampa Electric* are irrelevant for the purposes of this case.

"While a plaintiff must plead facts concerning every element of his antitrust claim, there is no heightened pleading requirement in antitrust cases," and therefore "an antitrust plaintiff is not required to plead the particulars of his or her claim." *Genico, Inc. v. Ethicon, Inc., No. 5:04-CV-229, 2006 U.S. Dist. LEXIS 96909, 2006 WL 7134667, at *3 (E.D. Tex. Mar. 23, 2006)* (internal citation omitted). "Provided the plaintiff has described a defendant's practice in a manner consistent with its antitrust theory, the court considers only whether other allegations made in the complaint undermine the claim." *2006 U.S. Dist. LEXIS 96909, 2006 WL 7134667, at *3*. "In cases where it is uncertain whether relief is available under ***antitrust law***, the district court should not dismiss the claim if there is any interpretation of the facts alleged that would sustain a recovery under some viable antitrust theory." *Id.* (citing *Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081, 1093 (7th Cir. 1992))*. As observed above, Plaintiff has asserted antitrust claims **[*15]** under *Sections 15.05(a)* and *(b)* of the Texas Business and Commerce Code.

In order to make out a claim under *Section 15.05(a)*, "a plaintiff must show that the alleged contract, combination, or conspiracy is unreasonable and has an adverse effect on competition in the relevant market." *Marlin v. Robertson, 307 S.W.3d 418, 427 (Tex. App.—San Antonio 2009, no pet.)*. In determining whether a restraint on trade is

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[6] In affirming the district court's ruling on a separate claim for tortious interference with existing business relations, the Court mentioned "that entering into an exclusive agreement, in and of itself, does constitute an unreasonable restraint on trade." *Apani, 300 F.3d at 634*. Nothing in the opinion indicates that this statement was the basis for affirming the district court's dismissal of the antitrust claim at issue.

[7] BCBS cites the *Tampa Electric* test as applied by the Court in *Apani*. In *Apani*, the plaintiff alleged antitrust claims under *Section 3* of the Clayton Act and *Section 15.05(c) of the Texas Business and Commerce Code*. *See Apani Southwest, Inc. v. Coca-Cola Enters.*, No. 5:00-CV-228, Doc. No. 3 (N.D. Tex. Aug. 2, 2000).

[8] In fact, both *Section 3* of the Clayton Act and *Section 15.05(c) of the Texas Business and Commerce Code* only apply to contracts involving the sale or lease of goods. *Section 15.05(c)* provides in pertinent part: `It is unlawful for any person to sell, lease, or contract for the sale or lease of any goods, whether patented or unpatented, for use, consumption, or resale or to fix a price for such use, consumption, or resale or to discount from or rebate upon such price . . . . `*Tex. Bus. & Com. Code Ann. § 15.05(c)*. Other Courts have reached the same conclusion in the context of *Section 3* of the Clayton Act. *Tri—State Broadcasting Co. v. United Press Intern., Inc., 369 F.2d 268, 269 (5th Cir. 1966)*; *see also Marion Healthcare LLC v. S. Illinois Healthcare, No. 12-CV-871, 2013 U.S. Dist. LEXIS 120722, 2013 WL 4510168, at *6-7 (S.D. Ill. Aug. 26, 2013)* (dismissing *Section 3* claims against health insurer because "[t]he dominant nature of the transaction at issue is surely services . . . .").

unreasonable, courts examine two categories of restrictive practices: 1) those that are illegal per se; and 2) "practices whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons for its imposition." *Id.* (citing *Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978))*. For the second category, "courts apply the 'rule of reason' under which the fact-finder weighs all the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Id.* (citing *Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 37, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977))*. "To establish a violation under the rule of reason, a plaintiff must prove the restrictive practice has an adverse effect on competition in the relevant market." *Id. at 429*.

To establish a claim under *Section 15.05(b)*, a plaintiff must show two elements: "1) the possession of monopoly power in the relevant market; and 2) the willful acquisition or maintenance of that power **[*16]** as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." *Caller-Times Pub, 826 S.W.2d at 580* (quoting *United States v. I.T.T. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))*.

The Court finds that Plaintiff has alleged sufficient facts to support its claims under *Sections 15.05(a)* and *(b)* of the Texas Business and Commerce Code. In the Petition, Plaintiff alleges: 1) BCBS entered into contractual agreements with Trinity Mother Frances Health System to be the exclusive in-network hospital provider for the Tyler, Texas area; 2) Trinity Mother Frances Hospital and Trinity Mother Frances Rehabilitation Hospital are the only two in-network hospital health care providers in the Tyler and East Texas marketplace; 3) that these contractual agreements restrain trade, injure competition in the marketplace, and cause direct injury to Plaintiff; and 4) BCBS attempted or conspired to monopolize the Tyler, Texas market by unlawful means (PETITION at 9-10). Moreover, it is apparent from the Petition that Plaintiff has identified the relevant market as hospital healthcare services in the Tyler and East Texas area. *See id.* at 3, 9-10.

Accordingly, the Court **RECOMMENDS** that BCBS's Motion to Dismiss as to Plaintiff's claims under the TFEAA be **DENIED**.

3. 28 Texas Administrative Code § 19.1724

BCBS seeks dismissal **[*17]** of Plaintiff's claim under 28 Texas Administrative Code § 19.1724 because that section "has not appeared in the text of that code since 2012, and therefore is not currently the basis for a valid claim for relief." (MOTION at 13). Plaintiff acknowledges that Section 19.1724 does not exist under the current version of the Administrative Code, but argues that the relevant portions of its claim fall under *28 Texas Administrative Code §§ 19.1701-19.1719* ("RESPONSE at 21). Plaintiff cannot state a claim based upon a non-existent code provision. Accordingly, the Court **RECOMMENDS** that BCBS's Motion to Dismiss be **GRANTED-IN-PART** as to Plaintiff's claim under Texas Administrative Code § 19.1724. However, the Court further **RECOMMENDS** that Plaintiff should be permitted to amend the Petition for the purpose of alleging a claim under *28 Texas Administrative Code §§ 19.1701-19.1719*.

4. Promissory Estoppel

BCBS seeks dismissal of Plaintiff's promissory estoppel claim, arguing that Plaintiff has not set forth sufficient facts alleging that BCBS made any promise to Plaintiff or that Plaintiff foreseeably relied on any alleged promise (MOTION at 14). In order to state a claim for promissory estoppel, a plaintiff must allege: 1) a promise; 2) foreseeability of reliance on the promise by the promisor; and 3) detrimental reliance by the promise. As discussed **[*18]** in the context of Plaintiff's negligent misrepresentation claim, Plaintiff alleges that its employees contacted BCBS, "received preauthorization for all treatment provided to [BCBS] members, and expectations of payment," provided treatment to BCBS members, submitted claims to BCBS for payment, and received reimbursement at a rate of 14.5% and 12.3% of the billed charges for inpatient and outpatient admissions, respectively (PETITION at 3, 4). Plaintiff further alleges that BCBS "made a promise to pay a reasonable and fair amount for the medical care and treatment provided to its members." *Id.* at 8. Based on the foregoing, the Court finds that Plaintiff has alleged sufficient facts give rise to a plausible promissory estoppel claim under *Rule 8(a)*. Accordingly, the Court **RECOMMENDS** that BCBS's Motion to Dismiss as to Plaintiff's promissory estoppel claim be **DENIED**.

5. Quantum Meruit

BCBS argues that Plaintiff fails to state a quantum meruit claim (MOTION at 15). "To recover under quantum meruit a claimant must prove that: 1) valuable services were rendered or materials furnished; 2) for the person sought to be charged; 3) which services and materials were accepted by the person sought to be charged, used **[*19]** and enjoyed by him; 4) under such circumstances as reasonably notified the person sought to be charged that the plaintiff in performing such services was expecting to be paid by the person sought to be charged." *Vortt Exploration Co. v. Chevron U.S.A., Inc., 787 S.W.2d 942, 944 (Tex. 1990)*. "In addition, the evidence must show that the efforts were undertaken for the person to be charged and not just that the efforts benefitted that person." *KUV Partners, LLC v. Fares, No. 02-09-246-CV, 2011 Tex. App. LEXIS 2005, 2011 WL 944453, at *16 (Tex. App.—Fort Worth March 17, 2011, pet. denied)* (mem. op.) (citing *McFarland v. Sanders, 932 S.W.2d 640, 643 (Tex. App.—Tyler 1996, no writ))*. BCBS asserts that Plaintiff cannot state a quantum meruit claim because Plaintiff did not furnish services directly upon BCBS (MOTION at 15). While the Petition contains sufficient facts explaining how Plaintiff conferred benefits upon BCBS's insureds, Plaintiff fails to explain how it has provided any direct benefits to BCBS. Thus, Plaintiff has failed to plead an integral element of its quantum meruit claim—that "services were rendered . . . for the person sought to be charged."[9] *Vortt Exploration, 787 S.W.2d at 944*; *Encompass Office Solutions, 775 F. Supp. 2d at 966* (granting motion to dismiss quantum meruit claim against healthcare insurer where medical provider plaintiff failed to plead facts showing it conferred benefits on the insurer). Accordingly, the Court **RECOMMENDS** that BCBS's Motion to Dismiss as to Plaintiff's quantum meruit **[*20]** claim be **GRANTED**.

6. ERISA and FEBHA Preemption, Sovereign Immunity, and Statute of Limitations

As BCBS correctly notes, Plaintiff's claims for violation of the Texas Insurance Code, promissory estoppel, and quantum meruit all seek recovery based on more than 26,000 individual healthcare claims for reimbursement (MOTION at 16). First, BCBS argues that any and all of the 26,000 claims for reimbursement governed by ERISA, and FEBHA should be dismissed because they are pre-empted. *Id.* at 16, 19-21. Second, BCBS argues that any of the foregoing claims involving enrollees of the Service Benefit Plan are barred by the doctrine of sovereign immunity. *Id.* at 16-19. Third, BCBS asserts that "each of Plaintiff's purported causes of action . . . rests on and is intertwined with events that occurred as far back as 2008," and that accordingly, certain of Plaintiff's causes of action based on reimbursement claims are barred under the applicable statutes of limitations. *Id.* at 21-24. Fourth, BCBS argues that Plaintiff's TFEAA claim is time barred under the statute of limitations because the cause of action "arose long ago." *Id.* at 23. BCBS also contends that Plaintiff improperly filed suit without understanding and investigating the **[*21]** bases of its allegations (REPLY at 9).

BCBS refers to Exhibit A of the Petition, which apparently contains a comprehensive list of the more than 26,000 individual claims for reimbursement. *See* MOTION at 16. As discussed above, Plaintiff did not attach that exhibit to the copy of the Petition filed with the Court. Moreover, Defendant fails to identify exactly which of the more than 26,000 individual claims should be dismissed, and did not include the exhibit in the instant motion. While certain individual reimbursement claims may be pre-empted, barred by the doctrine of sovereign immunity, and/or time-barred under the relevant statutes of limitation, the Court declines to make a preliminary ruling dismissing Plaintiff's

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[9] It is unclear how Plaintiff could confer any benefits upon BCBS under these circumstances. *See Electrostim Med. Servs., Inc. v. Health Care Serv. Corp., 962 F. Supp. 2d 887, 899 (S.D. Tex. 2013)* (dismissing quantum meruit claim based on healthcare services provided to beneficiaries of a healthcare insurance policy); *see also Travelers Indem. Co. of Connecticut v. Losco Grp., Inc., 150 F. Supp. 2d 556, 563 (S.D.N.Y. 2001)* ("It is counterintuitive to say that services provided to an insured are also provided to its insurer. The insurance company derives no benefit from those services; indeed, what the insurer gets is a ripened obligation to pay money to the insured—which hardly can be called a benefit.").

claims without Defendant identifying the exact claims it is referring to. Moreover, BCBS has failed to demonstrate that Plaintiff's TFEAA claim is time barred under the applicable statute of limitations. TFEAA claims must be filed within four years after the cause of action accrued. *Tex. Bus. & Com. Code § 15.25(a)*. BCBS vaguely argues that Plaintiff's antitrust cause of action "arose long ago when BCBSTX allegedly entered into the exclusivity contact with Trinity" rather than identifying a specific **[*22]** date when the cause of action actually accrued. In addition, while BCBS argues in passing that Plaintiff failed to investigate the bases for its allegations, BCBS has not established that Plaintiff failed to comply with its obligations under *Rules 8* and *11*.

Accordingly, the Court **RECOMMENDS** that BCBS's Motion to Dismiss based on ERISA and FEBHA Preemption, Sovereign Immunity, and the Statute of Limitations be **DENIED**. However, BCBS may file a letter brief seeking leave to file a motion for summary judgment on the foregoing bases.

CONCLUSION

For the reasons stated above, the Court **RECOMMENDS** that BCBS's Motion to Dismiss (Doc. No. 6) as to Plaintiff's: 1) claims for negligent misrepresentation; 2) alleged violations of the TFEAA; and 3) promissory estoppel be **DENIED**. The Court further **RECOMMENDS** that BCBS's Motion to Dismiss based upon ERISA and FEBHA preemption, sovereign immunity, and the applicable statutes of limitations be **DENIED**. The Court further **RECOMMENDS** that BCBS's Motion to Dismiss be **GRANTED-IN-PART** as to Plaintiff's claim under Texas Administrative Code § 19.1724, but that Plaintiff should be permitted to amend the Petition for the purpose of alleging a claim under *28 Texas Administrative Code §§ 19.1701-19.1719*. The Court further **RECOMMENDS [*23]** that BCBS's Motion to Dismiss be **GRANTED-IN-PART** as to Plaintiff's claims under Section 541 of the Texas Insurance Code and *Section 17.46 of the Texas Business and Commerce Code*, but that Plaintiff should be permitted to amend the Petition for the purpose of alleging claims under Section 541 of the Texas Insurance Code and *Section 17.46 of the Texas Business and Commerce Code*. Finally, the Court **RECOMMENDS** that BCBS's Motion to Dismiss as to Plaintiff's quantum meruit claim be **GRANTED**.

So ORDERED and SIGNED this 28th day of May, 2015.

/s/ John D. Love

JOHN D. LOVE

UNITED STATES MAGISTRATE JUDGE

Marion HealthCare, LLC v. S. Ill. Healthcare

United States District Court for the Southern District of Illinois

May 29, 2015, Decided; May 29, 2015, Filed

Case No. 12-cv-871-SMY-PMF

Reporter
2015 U.S. Dist. LEXIS 69749 *; 2015-1 Trade Cas. (CCH) P79,210; 2015 WL 3466585

MARION HEALTHCARE, LLC, Plaintiff, vs. SOUTHERN ILLINOIS HEALTHCARE and HEALTH CARE SERVICE CORPORATION doing business as BlueCross and BlueShield of Illinois, Defendants.

Prior History: *Marion HealthCare LLC v. S. Ill. Healthcare, 2013 U.S. Dist. LEXIS 120722 (S.D. Ill., Aug. 26, 2013)*

Core Terms

Sherman Act, Antitrust, outpatient, alleges, inpatient, buyer, motion to dismiss, Clayton Act, surgical services, tying arrangement, foreclosure, Counts, relevant market, monopoly power, anticompetitive, contracts, purchaser, geographic area, market power, monopolization, patients, argues, exclusionary, commerce, provider, fails, hospital service, anti trust law, geographic, in-network

Counsel: **[*1]** For Marion HealthCare, LLC, Plaintiff: Thomas J. Pliura, LEAD ATTORNEY, Law Offices of Thomas J. Pliura, Generally Admitted, Leroy, IL.

For Southern Illinois Healthcare, Defendant: David Marx, Jr., LEAD ATTORNEY, Karne O Newburn, Michelle S. Lowery, Stephen Y. Wu, McDermott, Will et al. - Chicago, Chicago, IL.

For Health Care Service Corporation, doing business as BlueCross and BlueShield of Illinois, Defendant: Helen E. Witt, LEAD ATTORNEY, James H. Mutchnik, Kirkland - Ellis LLP - Chicago, Chicago, IL.

Judges: STACI M. YANDLE, UNITED STATES DISTRICT JUDGE.

Opinion by: STACI M. YANDLE

Opinion

MEMORANDUM AND ORDER

This matter comes before the Court on (1) defendant Health Care Service Corporation, doing business as BlueCross and BlueShield of Illinois' ("BCBSI") Motion to Dismiss Plaintiff Marion HealthCare, LLC's ("MHC") Second Amended Complaint (Doc. 59); (2) BCBSI's Motion to Strike Amended Complaint (Doc. 61); and (3) Defendant Southern Illinois Healthcare's ("SIH") Motion to Dismiss for Failure to State a Claim (Doc. 62).

Procedural History

In its First Amended Complaint, Plaintiff raised the following five claims against SIH: (1) Count I — exclusive dealing with BCBSI in violation of *Section 1* of the Sherman Act (*15 U.S.C. § 1*) and Clayton **[*2]** Act (*15 U.S.C. § 14*); (2)

Count III — exclusive dealing with BCBSI in violation of the Illinois Antitrust Act; (3) Count V — tying arrangement with BCBSI in violation of *Section 1* of the Sherman Act (*15 U.S.C. § 1*) and Clayton Act (*15 U.S.C. § 14*); (4) Count Six — tying arrangement with BCBSI in violation of the Illinois Antitrust Act (*740 ILCS 10/3*); and (5) Count IX — monopolization in violation of *Section 2* of the Sherman Act (*15 U.S.C. § 2*).

In its First Amended Complaint, Plaintiff raised the following six claims against BCBSI: (1) Count II — exclusive dealing with SIH in violation of *Section 1* of the Sherman Act and Clayton Act (*15 U.S.C. § 14*; (2) Count IV — exclusive dealing with SIH in violation of the Illinois Antitrust Act; (3) Count VII - tying arrangement with SIH in violation of *Section 1* of the Sherman Act (*15 U.S.C. § 1*) and Clayton Act (*15 U.S.C. § 14*); (4) Count VIII - tying arrangement with SIH in violation of the Illinois Antitrust Act (*740 ILCS 10/3*); (5) Count X — price discrimination against MHC in violation of Section 2 of the Clayton Act (*15 U.S.C. § 13*); and (6) Count XI — tortious interference with a business expectancy.

With respect to MHC's First Amended Complaint, Judge Herndon dismissed with prejudice the following claims: (1) Counts I, II, V, VII, and X to the extent those counts stated claims pursuant to *Sections 2* or *3* of the Clayton Act; **[*3]** (2) the tying claim contained in Count VII; (3) the monopolization claim contained in Count IX; (4) the Illinois Antitrust claims contained in Counts III, IV, VI, and VII to the extent that each is based upon the portion of the Illinois law that is substantially similar to the Clayton Act; (5) the Illinois Antitrust claims contained in Count IV as to BCBSI to the extent it is based on the portion of Illinois law that is substantially similar to the Sherman Act based upon tying; and (6) the tortious interference with a business expectancy contained in Count XI claim against BCBSI (Doc. 57).

Judge Herndon dismissed without prejudice the following claims: (1) Plaintiff's Sherman Act claims as to SIH contained in Counts I, V, and IX; (2) the Sherman Act claim as to BCBSI regarding exclusive dealing contained in Count II; (3) the Illinois Antitrust claims contained in Counts III and VI as to SIH to the extent that each is based upon the portion of Illinois law that is substantially similar to the Sherman Act; and (4) the Illinois Antitrust claims contained in Count IV as to BCBSI to the extent it is based on the portion of Illinois law that is substantially similar to the Sherman Act based **[*4]** upon exclusive dealing (Doc. 57).

Thereafter, MHC filed its Second Amended Complaint raising the following claims: (1) Count I — exclusive dealing against SIH in violation of *Section 1* of the Sherman Act (*15 U.S.C. § 1*); (2) Count II — exclusive dealing against BCBSI in violation of *Section 1* of the Sherman Act (*15 U.S.C. § 1*); (3) Count III — exclusive dealing against SIH in violation of the Illinois Antitrust Act; (4) Count IV — exclusive dealing against BCBSI in violation of the Illinois Antitrust Act; (5) Count V — tying against SIH in violation of *Section 1* of the Sherman Act (*15 U.S.C. § 1*); (6) Count VI — tying against SIH in violation of the Illinois Antitrust Act (*740 ILCS 10/3*); and (7) Count VII — monopolization against SIH in violation of *Section 2* of the Sherman Act (*15 U.S.C. § 2*). Defendants bring their Motions to Dismiss MHC's Second Amended Complaint for failure to state a claim.

Background

Plaintiff, MHC, is a multi-specialty freestanding outpatient surgery center which offers outpatient surgical services. Plaintiff does not offer inpatient services. Plaintiff opened for business in 2004, and is located in the relevant geographic area, defined by Plaintiff as the counties of Williamson and Jackson, and the surrounding areas bordering these counties. Defendant SIH is a **[*5]** nonprofit corporation that owns a variety of acute-care hospitals which provide both inpatient and outpatient medical services. Further, SIH owns various freestanding outpatient surgical service providers.

Plaintiff alleges that the relevant product markets consist of two distinct sets, "the first set encompassing the second." The first set consists of "(a) general acute-care inpatient hospital services, including pediatric services and neonatal care services (generally referred to as "hospital services"), and (b) outpatient surgical services, where both (a) and (b) services may be reimbursed by any payors, including commercial insurance, government payors (e.g., Medicare, Medicaid) and self-pay." (Doc. 58 p. 2, par. 1). The second set of relevant product markets are submarkets of the first set and consist of "(1) general acute-care inpatient hospital services, including pediatric services and neonatal care services (generally referred to as "hospital services") reimbursed by commercial health insurers, and (2) outpatient surgical services reimbursed by commercial health insurers." *Id.*

Plaintiff alleges the relevant geographic markets are comprised of Williamson County, Illinois, Jackson **[*6]** County, Illinois and the surrounding area. *Id.* (par. 3). In the relevant geographic market, Plaintiff maintains SIH is a "must have" hospital system for health plans because it is the largest hospital in the region and the only local provider of certain essential services. Plaintiff alleges that within the relevant geographic area, SIH has a 77% market share for inpatient surgical cases (*Id.*, par 81 (h)) and a 76% market share of outpatient surgical cases. *Id.* (p. 30 par. 82 (a)).

Defendant BCBSI is allegedly the largest health insurance company in Illinois and the dominate health insurer in the relevant geographic area. Thus, BCBSI is the dominant provider of health insurance covering inpatient and outpatient services. Plaintiff claims that it has submitted multiple applications to BCBSI seeking acceptance as an in-network provider and that BCBSI has denied their request each time. Plaintiff alleges BCBSI informed them that BCBSI had an exclusive contract with SIH, which prohibited or precluded BCBSI from contracting with competitors for in-network coverage in the area. Plaintiff further alleges that it, and others, cannot remain competitive as long as this agreement with BCBSI and **[*7]** SIH exists. It is this exclusive agreement that forms the foundation of Plaintiff's claims.

Plaintiff claims that SIH willfully maintained and extended its monopoly power through the use of exclusionary contracts. Particularly, Plaintiff alleges that BCBSI had a compelling business need to include SIH in its network of inpatient service providers. Yet, in consideration of discounts to BCBSI on inpatient services, SIH included exclusionary language in the agreements with commercial insurers. Plaintiff argues the agreement improperly and illegally tied discounts for coverage of SIH's inpatient hospital services with exclusive contracting for in-network coverage of SIH's outpatient services and illegally coerced BCBSI into entering the agreement. This arrangement prohibits BCBSI from contracting for in-network coverage with competing freestanding outpatient surgery centers in the region. As such, Plaintiff contends the arrangement constitutes exclusive "dealing and tying" in violation of the Sherman Antitrust Act.

Plaintiff maintains that as a result of the agreement between SIH and BCBSI, SIH has been able to retain monopoly power in the two relevant markets in the defined geographical **[*8]** area. Plaintiff contends that it and others cannot effectively compete because SIH and BCBSI have substantially reduced the number of patients who would otherwise use SIH's competitors. Plaintiff claims that patients have been required to pay more at SIH for services, compared to the same procedure in a non-SIH owned facility. Thus, Plaintiff alleges that SIH's contracts have prevented the public from receiving competitive services from other competitors for the cheapest costs.

In sum, Plaintiff maintains that SIH, via its exclusionary contracts with BCBSI, has violated ***antitrust law*** through exclusive dealing, tying, and monopolization. Plaintiff alleges that SIH's exclusionary contracts with BCBSI violate ***antitrust law*** and have delayed and prevented expansion by competitors in the relevant geographic area, have limited price competition, have reduced quality competition in the area and have reduced healthcare options for patients in need of outpatient surgery, all without a valid business justification.

Analysis

A motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)* allows for dismissal upon "failure to state a claim upon which relief can be granted." To state a claim, a pleading need only contain "a short **[*9]** and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. Further, the court must review a complaint in the light most favorable to the plaintiff, accept as true all well-pleaded facts alleged, and draw all possible inferences in the plaintiff's favor. *Tamayo v. Blagojevich, 526 F. 3d 1074, 1081 (7th Cir. 2008)*. Detailed factual allegations are not required, but the pleading must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). A plaintiff can plead himself out of court by pleading facts that show that he has no legal claim." *Atkins v. City of*

Chicago, 631 F.3d 823, 832 (7th Cir. 2011). Finally, the court must not apply a heightened pleading standard in antitrust cases. Endsley v. City of Chicago, 230 F.3d 276, 282 (7th Cir. 2000).

BCBSI's Motion to Dismiss (Doc. 59)

BCBSI contends Plaintiff's Second Amended Complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). Specifically, BCBSI asserts that as a matter of law, MHC cannot assert exclusive dealing claims against it as a purchaser of the services at issue. BCBSI further asserts that MHC has failed to plead the essential elements of an exclusive dealing claim against it. BCBSI argues dismissal is appropriate for following reasons: (1) BCBSI cannot be held liable under Section 1 of the Sherman Act or Section 3(4) of the Illinois Antitrust Act **[*10]** because BCBSI is a "purchaser"; (2) MHC's claims fail to the extent they allege the same relevant product markets that this Court rejected when it dismissed MHC's First Amended Complaint for failure to plead a plausible relevant product market; (3) MHC's relevant geographic market definition is too vague to permit an assessment of substantial foreclosure; and (4) MHC only makes conclusory allegations of substantial foreclosure and fails to allege facts sufficient to support a plausible claim of substantial foreclosure from the market for outpatient surgery services. The Court only considers BCBSI's first argument for the following reason.

Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. To plead a violation of § 1 of the Sherman Act, a plaintiff must plead: "(1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in [a] relevant market; and (3) an accompanying injury." Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 335 (7th Cir. 2012). Because "[t]he purpose of the Sherman Act is to protect consumers from injury that results from diminished competition," **[*11]** "the plaintiff must allege, not only an injury to himself, but an injury to the market as well." Agnew, 683 F.3d at 334-35.

MHC brings its exclusive dealing claims against BCBSI under Section 1 of the Sherman Act and Section 3(4) of the Illinois Antitrust Act. (Doc. 58 Counts II and IV). However, if an exclusive dealing claim "does not fall within the broader prescription of [Section] 3 of the Clayton Act, it follows that it is not forbidden by those of [Section 1]." Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 335, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961). Further, Illinois courts—when interpreting claims under the Illinois Antitrust Act—are tasked with looking to federal courts' construction of antitrust laws that are substantially similar to those of Illinois. State of Ill., ex rel. Burris v. Panhandle E. Pipe Line Co., 935 F.2d 1469, 1479-80 (7th Cir. 1991).

Courts have held that Section 3 of the Clayton Act defines liability in terms of a person who makes a sale or contracts for sale, but does not provide for liability of the buyer. McGuire v. Columbia Broad Sys., Inc., 399 F.2d 902, 906 (9th Cir. 1968); *see* Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1110 (7th Cir. 1984), *cert. denied*, *470 U.S. 1054, 105 S. Ct. 1758, 84 L. Ed. 2d 821 (1985)* (finding a buyer liable under Section 1 of the Sherman Act "'would undermine the principles of competition the antitrust laws were designed to secure'")(citing Dunn& Mavis, Inc. v. Nu-Car Driveaway, Inc., 691 F. 2d 241, 244 (6th Cir. 1982)).

More on point is Genetic Sys. Corp. v. Abbott Labs., 691 F. Supp. 407 (D.D.C. 1988). In that case, defendant Red Cross entered into a two-year exclusive agreement with defendant Abbott Laboratories to supply equipment used to screen donated blood for transmissible diseases, including hepatitis, and the **[*12]** HTLV antibody (AIDS). Id. at 410. Plaintiff Genetic Systems claimed that this agreement effectively froze the plaintiff out of the market for blood test equipment and jeopardized the company's ability to survive. Id. at 412. Plaintiff filed suit against Red Cross and Abbott alleging violations of Section 1 of the Sherman Act and Section 3 of the Clayton Act. Id. at 413. The district court dismissed the exclusive dealing claims against the buyer Red Cross. Id. at 414. Specifically, the district court derived "from the plain language of the statute, the relevant legislative history, and the observations of commentators" that Section 3 of the Clayton Act does not impose any liability on purchasers or buyers for exclusive dealing contracts. Id. at 414 (citing McGuire v. Columbia Broadcasting Sys., Inc., 399 F. 2d 902 (9th Cir. 1968); *see also* J. von Kalinowski, *Antitrust Laws and Trade Regulation*, Section 12.02(3) (1988). Further, the district court determined that this conclusion to not impose liability on the buyer "is consistent with the fundamental antitrust concept that the alleged sins of the sellers should not be visited on buyers because of the risk of chilling competition." *Id. at 415*. Plaintiff nevertheless alleged that the defendant acted as more than solely a purchaser, and entered into "active collaboration" in "knowingly join[ing]" in the exclusionary **[*13]** contract. *Id.* However, the district court determined that the plaintiff's attempt to fit the "square conduct" of the defendant into the "round hole of *Section 3* [of the Clayton Act] cannot succeed." *Id.*

Here we find nearly identical facts to those addressed by the Court in *Genetic Sys.* BCBSI contends that exclusive dealing claims under *Section 3* of the Clayton Act—and thus *section 1* of the Sherman Act and *Section 3(4)* of the Illinois Antitrust Act—may not be brought against the buyer of the at-issue service (Doc. 60). MHC admits that BCBSI is the buyer/purchaser of these outpatient surgical services. Further, MHC does not refute that *Section 3* does not impose liability to buyers or purchasers (Doc. 72, p. 4). Instead, Plaintiff argues that "[i]n the exceptional case where the buyer has actively (and aggressively) promoted the exclusive arrangement, in close collaboration with the seller, the buyer has 'partaken of and promoted the sins' and should, therefore, be liable under *Section 1*." *Id.* (p. 5).

MHC fails, as did the plaintiff in *Genetic Sys.*, to direct the Court's attention to any case that has construed *Section 3* of the Clayton Act to cover "the sins of the purchaser or buyer". Instead, like the plaintiff in *Genetic Sys.*, MHC urges the Court to extend **[*14]** liability because BCBSI has "actively (and aggressively) promoted the exclusive arrangement." However, the Court cannot simply ignore the above-referenced case law.

This Court finds that MHC's claims against BCBSI for violations of *Section 1* of the Sherman Act—as well as *Section 3(4)* of the Illinois Antitrust Act—cannot stand. Thus, BCBSI's Motion to Dismiss Counts II and IV of Plaintiff's Second Amended Complaint is **GRANTED** with prejudice. Given that all counts against BCBSI are dismissed, BCBSI's Motion to Strike (Doc. 61) is **DENIED as MOOT**.

SIH's Motion to Dismiss

MHC alleges three distinct causes of action against SIH in violation of federal and state ***antitrust law***: Count I — exclusive dealing claims against SIH in violation of *Section 1* of the Sherman Act (*15 U.S.C. § 1*); Count III — exclusive dealing against SIH in violation of the Illinois Antitrust Act (*740 ILCS 10/3*); Count V — tying against SIH in violation of *Section 1* of the Sherman Act (*15 U.S.C. § 1*); Count VI — tying against SIH in violation of the Illinois Antitrust Act (*740 ILCS 10/3*); and Count VII — monopolization against SIH in violation of *Section 2* of the Sherman Act (*15 U.S.C. § 2*).

SIH moves to dismiss MHC's Second Amended Complaint pursuant to *Fed. R. Civ. P. 12(b)(6)*. Specifically, SIH contends that (1) MHC's tying claim under *§ 1* One of the Sherman **[*15]** Act and the Illinois Antitrust Act fails to allege facts supporting Plaintiff's claims that SIH forced or coerced BCBSI to contract with SIH for outpatient surgery services as a condition of contract for inpatient hospital services; (2) MHC's exclusive dealing claim under the *§ 1* of the Sherman Act and the Illinois Antitrust Act fails to allege that the exclusive contract between SIH and BCBSI foreclosed MHC from the alleged market for the sale of inpatient and outpatient surgery services to all potential buyers, including commercial payors, government payors, and patients who self-pay; and (3) MHC fails to allege that SIH acquired or maintained its allegedly dominant position in the alleged relevant markets through anticompetitive conduct. (Doc. 62, p. 2).

In cases involving exclusive dealing, courts have determined that an exclusive-dealing arrangement does not violate antitrust laws unless the court believes that performance of the contract will preclude competition in a "substantial share of the line of commerce affected." *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*. In *Tampa Elec. Co. v. Nashville Coal Co.*, the Supreme Court set forth factors to consider in order to determine what constitutes a "substantial share" including: **[*16]** (1) "the line of commerce involved must be determined, where it is in controversy, on the basis of the facts peculiar to the case"; (2) "the area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies"; and (3) the competition foreclosed by the contract must be found to constitute a substantial share of the relevant market." *Id. at 327-28*. Foreclosure exists when there is a significant limitation on other's ability to enter or remain in the market. *Id.* In order to further determine substantiality, courts have weighed the probable effect the contract will have on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce in relation to the total volume of commerce in the relevant market area, and the immediate and future effects which pre-emption of the share of the market might have on effective competition. *Id. at 329*. However, a mere showing that the alleged contract itself involves a substantial amount of dollars is "ordinarily of little consequence." *Id.*

SIH does not dispute **[*17]** the existence of the first two factors set forth in *Tampa Elec. Co.* Instead, it argues that MHC fails to allege an exclusive dealing claim because it did not properly plead substantial foreclosure from the relevant market. (Doc. 63, p. 7). In particular, SIH contends that MHC only alleges foreclosure from 30 percent of patients in the relevant geographic market, leaving 70 percent for access by MHC. *Id.* (p. 8). Further, SIH argues that this 30 percent is an overstatement, and even if true, is not substantial enough to constitute foreclosure according to case law. *See id.* MHC counters that it is not the percentage of the patients that is at issue, but the revenue generated. (Doc. 71, p. 5). MHC argues that it is foreclosed from the higher reimbursement rates of commercial insurers and cannot make up the difference with the "non-negotiable, typically at or below cost" reimbursements from Medicare, Medicaid and TRICARE. *Id.* (p. 6).

This Court has previously held that a vertical exclusive dealing arrangement, like the one alleged in the current case, is not presumed illegal. (Doc. 57). Thus, the Court determined that the analysis is subject to the Rule of Reason framework. *Id.* Under Rule **[*18]** of Reason analysis (the standard framework):

> The plaintiff carries the burden of showing that an agreement or contract has an anticompetitive effect on a given market within a given geographic area. As a threshold matter, a plaintiff must show that the defendant has market power—that is, the ability to raise prices significantly without going out of business—without which the defendant could not cause anticompetitive effects on market pricing. If the plaintiff meets his burden, the defendant can show that the restraint in question actually has a procompetitive effect on balance, while the plaintiff can dispute this claim or show that the restraint in question is not reasonably necessary to achieve the procompetitive objective.

Agnew, 683 F.3d at 335-36 .

Taking this into consideration, MHC has sufficiently pled its claims against SIH. MHC has alleged substantial foreclosure in detail and provided substantiation of those contentions. (Doc. 58, p. 29-31, par.'s 81-82). Specifically, MHC has alleged that it has been foreclosed access to payments for both inpatient and outpatient surgical services from all payors (*Id.*, par. 81 (b)(72.3%) & 82 (e)(77.2%)). Further, MHC alleges the market power that SIH wields in the **[*19]** relevant geographic area is substantial. The Second Amended Complaint states that within the relevant geographic area, SIH has a 77% market share for inpatient surgical cases (*Id.*, par 81 (h)) and a 76% market share of outpatient surgical cases. *Id.* (p. 30 par. 82 (a)). The complaint further alleges that, as a result of SIH's market power in the relevant product, and geographic market, competitors have been unable to expand. *Id.* (p. 26, par. 76-79). These amounts are well above the 30-40 percent range. As a result, SIH's market power would seem to be a "substantial share" or "significant fraction" of the relevant market. SIH's substantial share of the market power has prevented entry or maintenance in the in-network surgical services market of BCBSI. Accordingly, SIH's Motion to Dismiss Count I and III of MHC's Second Amended Complaint is **DENIED**.

SIH next argues MHC's claims of an illegal tying arrangement alleged in Counts II and IV must be dismissed. An essential characteristic of an invalid tying claim is the "seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all or might have preferred **[*20]** to purchase elsewhere on different terms." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*, *abrogated on other grounds by* *Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)*. When there is "forcing" present, competition on the merits in the market for the tied item is improperly restrained, and there is a violation of the Sherman Act. *Id.* The Supreme Court has condemned tying arrangements where the seller has some "market power" to improperly force a purchaser to do something that he normally would not have done in a competitive market. Id. at 13. In order to establish the *per se* illegality of a tying arrangement, a plaintiff must demonstrate that (1) the tying arrangement is between two distinct products or services, (2) the defendant has sufficient economic power in the tying market to appreciably restrain free competition in the market for the tied product, and (3) a not insubstantial amount of interstate commerce is affected." Reifert v. South Cent. Wisconsin MLS Corp., 450 F.3d 312, 316 (7th Cir. 2006).

MHC alleges that SIH has monopoly power in the inpatient surgical services market. MHC alleged that SIH maintained a 75% share of the market for acute care services and used this power to coerce BCBSI to agree to not provide in-network insurance coverage for outpatient surgical services provided by MHC. (Doc. 58, p. 58-59, par. 157 & par. 158). According to **[*21]** MHC, SIH was able to achieve this agreement by granting BCBSI access to discounted rates from SIH for services in exchange for an "agreement to exclude." *Id.* Lastly, MHC argues that BCBSI would not have agreed to this arrangement had SIH not been a "must have" inpatient surgical services hospital. *Id.* (p. 59, par. 161). SIH maintains that despite the use of "coercion" many times throughout the complaint, BCBSI and SIH negotiated the rates and arrangements of the contract. (Doc. 63, p. 10 (citing Doc. 58, par. 20)). According to the SIH, this negotiation refutes MHC's claims of "coercion." *Id.*

MHC has properly alleged an illegal tying arrangement between SIH and BCBSI in violation of the Sherman Act. MHC asserts that because SIH has significant market power in the in- and out- patient services market (72.3% and 76% respectively), MHC agreed to exclude out-of-network outpatient surgical service providers. MHC further asserts that BCBSI agreed to its arrangement with SIH because SIH is a "must have" surgical services provider hospital. According to MHC, SIH coerced BCBSI, and it was not the exercise reasonable and independent business judgment that led BCBSI to agree to the arrangement. **[*22]** Accordingly, SIH's Motion to Dismiss Count V and Count VI is **DENIED**.

Lastly, SIH seeks to dismiss Count VII of Plaintiff's Second Amended Complaint, arguing MHC fails to plead that SIH acquired or maintained an alleged monopolistic position unlawfully. Section 2 of the Sherman Act, 15 U.S.C. § 2, makes it unlawful for a firm to "monopolize." To prove monopolization under § 2, a plaintiff must allege: "(1) the possession of monopoly power in the relevant market and (2) the willful . . . maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966).

The Supreme Court has defined monopoly power as "the power to control prices or exclude competition." United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956). A plaintiff may establish monopoly power by evidence that a firm has profitably raised prices above the competitive level. United States v. Microsoft Corp., 253 F.3d 34, 51, 346 U.S. App. D.C. 330 (D.C. Cir. 2001). In the absence of direct proof, market power may be derived from circumstantial evidence, including "a firm's possession of a dominant share of a relevant market that is protected by entry barriers." *Id.* Without countervailing evidence of the possibility of competition from new entrants, evidence of a dominant market share is sufficient to show monopoly **[*23]** power. *Id.* However, possessing monopoly power does not by itself constitute monopolization.. Grinnell Corp., 384 U.S. at 570-71. Rather § 2 of the Sherman Act makes it unlawful to maintain monopoly power through exclusionary conduct. Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004).

The test for exclusionary conduct is set forth in *United States. v. Microsoft Corp.* First, a plaintiff must prove that a monopolist's conduct has had an "anticompetitive effect." Microsoft, 253 F.3d at 58. Second, if a plaintiff is successful in showing an anticompetitive effect, the alleged monopolist may proffer a non-pretextual "procompetitive justification" for its conduct. Id. at 59. Lastly, if the alleged monopolist's proffering of procompetitive justification is unrebutted, the plaintiff "must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit." Id.

Here, MHC has pled sufficient facts to infer market power due to SIH's charging of "supracompetitve prices" for the sustained period, without consequence. *See* Doc. 58, p. 42, par.'s 116-17. Additionally, market-share data, provided by MHC, allows an inference of SIH's monopoly power. *See id.* (p. 29-30).

MHC also alleges that SIH has willfully maintained its monopoly through its actions of exclusive dealing and tying arrangements **[*24]** in violation of *§ 2*. (Doc. 58, p. 66 par. 178). In order to show an anticompetitive effect, MHC alleges significant foreclosure from the most profitable health-insurance contracts and thus, foreclosure from the ability to compete adequately in the market. *See id.* (par. 107). MHC maintains that as a result of this foreclosure, it and others cannot remain viable and competitive with SIH. *Id.* (par. 179) and that this arrangement has prevented significant competition and has harmed consumers in the relevant geographic market. *See id.* (par. 179, 180); *see also* *Microsoft Corp., 253 F.3d at 58* ("[The anticompetitive effect] must harm the competitive process and thereby harm consumers."). MHC claims consumers have suffered direct harm through increased prices for patients and employers, suppressing price competition, decreasing the number of options available, and decreasing the overall quality of care. *Id.* These alleged facts allow the inference that the exclusive dealing and tying arrangements had an anticompetitive effect on the relevant markets. Accordingly, SIH's Motion to Dismiss Count VII of MHC's Second Amended Complaint is **DENIED**.

Conclusion

Defendant BCBSI's Motion to Dismiss Counts II and IV of Plaintiff's Second **[*25]** Amended Complaint (Doc. 59) is **GRANTED with prejudice**. The Court **DENIES** Defendant BCBSI's Motion to Strike (Doc. 61) as **MOOT**.

Defendant SIH's Motion to Dismiss Counts I, III, V, VI, and VII of Plaintiff's Second Amended Complaint (Doc. 62) is **DENIED in its entirety**.

IT IS SO ORDERED.

DATED: May 29, 2015

/s/ Staci M. Yandle

STACI M. YANDLE

DISTRICT JUDGE

LexisNexis

Teladoc, Inc. v. Tex. Med. Bd.

United States District Court for the Western District of Texas, Austin Division

May 29, 2015, Decided; May 29, 2015, Filed

1-15-CV-343 RP

Reporter
112 F. Supp. 3d 529 *; 2015 U.S. Dist. LEXIS 90230 **

TELADOC, INC., ET AL., Plaintiffs, V. TEXAS MEDICAL BOARD, ET AL., Defendants.

Subsequent History: Motion denied by *Teladoc, Inc. v. Tex. Med. Bd., 2015 U.S. Dist. LEXIS 166754 (W.D. Tex., Dec. 14, 2015)*

Motion denied by *Teladoc, Inc. v. Tex. Med. Bd., 2016 U.S. Dist. LEXIS 107443, 2016 WL 4362208 (W.D. Tex., Aug. 15, 2016)*

Appeal dismissed by *Teladoc, Inc. v. Tex. Med. Bd., 2016 U.S. App. LEXIS 25114 (5th Cir., Oct. 17, 2016)*

Prior History: *Teladoc, Inc. v. Tex. Med. Bd., 453 S.W.3d 606, 2014 Tex. App. LEXIS 13888 (Tex. App. Austin, Dec. 31, 2014)*

Core Terms

patient, irreparable injury, consultation, anti-competitive, regulations, preliminary injunction, anti trust law, present evidence, injunction, telephone, site, medical record, registrant, antitrust, provider, business model, prescription, technology, visits, physical examination, medical practice, on call, procompetitive, Additionally, healthcare, telehealth, diagnosis, follow-up, immunity, damages

Counsel: **[**1]** For Teladoc, Inc., Teladoc Physicians, P.A., Kyon Hood, Emmette A. Clark, Plaintiffs: Drew Navikas, LEAD ATTORNEY, PRO HAC VICE, Cleary Gottlieb Steen & Hamilton, LLP, Washington, DC; Dudley D. McCalla, LEAD ATTORNEY, Jackson Walker LLP, Austin, TX; George Cary, Cleary Gottlieb Steen & Hamilton, LLP, LEAD ATTORNEYS, Cleary Gottlieb Steen & Hamilton, LLP, Washington, DC; Joshua A. Romero, LEAD ATTORNEY, Jackson Walker LLP, Austin, TX; Matt Dow, Jackson Walker, LLP, Austin, TX.

For Texas Medical Board, Michael Arambula, M.D., Pharm. D., in his official and individual capacity, Manuel G. Guajardo, M.D., in his official and individual capacity, John R. Guerra, D.O., in his official and individual capacity, J. Scott Holliday, D.O., M.B.A., in his official and individual capacity, Margaret McNeese, M.D., in his official and individual capacity, Allan N. Shulkin, M.D., in his official and individual capacity, Robert B. Simonson, D.O., in his official and individual capacity, Wynne M. Snoots, M.D., in his official and individual capacity, Karl Swann, M.D., in his official and individual capacity, Surendra K. Varma, M.D., in her official and individual capacity, Stanley Wang, M.D., J.D., MPH, **[**2]** in his official and individual capacity, George Willeford, III, M.D., in his official and individual capacity, Julie K. Attebury, M.B.A., in her official and individual capacity, Paulette Barker Southard, in her official and individual capacity, Defendants: James Carlton Todd, LEAD ATTORNEY, Office of the Attorney General, State of Texas, Austin, TX.

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For Texas Nurse Practitioners, Amicus: Randy Howry, LEAD ATTORNEY, HowryBreen & Herman, LLP, Austin, TX.

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For Texas Neurodiagnostic Associates, Inc., William L. High, M.D., PhD, Amicus: George James Mallios, LEAD ATTORNEY Mallios & Associates, Austin, TX.

For Texas Medical Association, Amicus: Donald P. Wilcox, LEAD ATTORNEY, Texas Medical Association, Austin, **[**3]** TX.

For American Osteopathic Association, Texas Osteopathic Medical Association, Amicuses: Mark D. Tillman, LEAD ATTORNEY, Tillman Batchelor LLP, Irving, TX.

For Southwest Pharmacy Solutions, Inc., doing business as, American Pharmacies, Amicus: Miguel S. Rodriguez, LEAD ATTORNEY, Taylor Dunham and Rodriguez LLP, Austin, TX.

Judges: ROBERT L. PITMAN, UNITED STATES DISTRICT JUDGE.

Opinion by: ROBERT L. PITMAN

Opinion

[*532] **ORDER**

Before the Court are Plaintiffs' Application for a Temporary Restraining Order and Preliminary Injunction Before June 3, 2015 and Brief in Support, filed April 29, 2015 (Clerk's Dkt. #10), the responsive pleadings thereto, as well as Amicus briefs filed both in support of, and opposition to, Plaintiffs' application. The Court conducted **[*533]** a hearing on the application on May 22, 2015. Having considered the application, response, record in the case, and the applicable law, the Court is of the opinion that Plaintiff's application for a preliminary injunction should be granted. *See Fed. R. Civ. P. 65(b)*.

I. BACKGROUND

Plaintiffs Teladoc, Inc. and Teladoc Physicians, P.A. (jointly "Teladoc"), Kyon Hood, M.D., and Emmette Clark, M.D. bring this action against defendants the Texas Medical Board ("TMB"), and fourteen **[**4]** members of the TMB in their official and individual capacities[1] challenging recent regulatory changes adopted by the TMB.

The TMB is a state agency "statutorily empowered to regulate the practice of medicine in Texas." *22 Tex. Admin. Code § 161.1*. Teladoc describes itself as providing "telehealth services," utilizing telecommunication technologies to provide health care services outside the traditional models wherein medical professionals provides services in an in-person office or hospital setting. According to Plaintiffs, "[t]elehealth providers are generally available 24 hours per day, 365 days per year, for a fraction of the cost of a visit to a physician's office, urgent care center, or hospital emergency room." (Compl. ¶ 3).

Teladoc's services are typically available to individuals whose employer has contracted with Teladoc for a per-member subscription fee. Individuals register with Teladoc either by **[**5]** telephone or online, creating a personal account, including information such as a medical history, physician, contact information, and medical records.

[1] The members of the TMB have not yet made an appearance in their individual capacities. Only the TMB and its members in their official capacities filed a response to the application for a preliminary injunction. The Court refers herein to both the TMB and its members in their official capacities as the TMB.

Registrants may also upload photographs and medical records to Teladoc's system for inclusion with their medical history. (*Id.* ¶¶ 43-44).

Registrants seeking a physician consultation can log into Teladoc's web portal or call a toll-free number to place a request for consultation. Teladoc employs board certified physicians who are provided specialized training in treatment and diagnosis via telephone. Once a Teladoc physician accepts the request for consultation, the physician reviews the requesting registrant's information and medical records through the website, then calls the registrant by telephone and consults with him or her. Based on the medical records and history, reported symptoms, and other information the physician elicits during the consultation, the physician dispenses medical advice, including referring the registrant to a physician's office, dentist, or emergency room. When deemed appropriate, the physician can prescribe certain medications.[2] Following the consultation, the Teladoc physician enters notes and findings into **[**6]** the registrant's record, which is available to the registrant and, if the registrant chooses, is forwarded to his or her primary-care physician. (*Id.* ¶¶ 45, 68-71, 76-84).

This action relates to the TMB's adoption on April 10, 2015 of revisions to Chapter 190 of the Texas Administrative Code title which governs the TMB. Chapter 190 sets forth disciplinary guidelines for the practice of medicine in Texas. *22 Tex. Admin. Code § 190.1*. Plaintiffs specifically complain of the revisions to *section 190.8(1)(L)* ("New *Rule 190.8*) which sets **[*534]** forth practices the TMB deems to be violations of the Texas Medical Practices Act.

As originally adopted by the TMB in 2003, *section 190.8(1)(L)* ("Old *Rule 190.8*) prohibits prescription of any "dangerous drug or controlled substance" without first establishing a "proper professional relationship" which requires, in pertinent part, "establishing a diagnosis through the use of acceptable medical practices such as patient history, mental status examination, physical examination, and appropriate diagnostic and laboratory testing." *22 Tex. Admin. Code § 190.8(1)(L)*. New **[**7]** *Rule 190.8* prohibits prescription of any "dangerous drug or controlled substance" without first establishing a "defined physician-patient relationship" which "must include," in pertinent part, "documenting and performing" a "physical examination that must be performed by either a face-to-face visit or in-person evaluation" elsewhere defined as requiring the provider and patient to be in the same physical location or at an established medical site. (Def. Resp. Ex. 15).

In 2004 the TMB adopted regulations specifically governing "telemedicine." *22 Tex. Admin. Code §§ 174.1, et seq.* Effective October 2010, the TMB amended its telemedicine regulations, restricting the definition of "telemedicine" to consultations using "advanced telecommunications technology that allows the distant site provider to see and hear the patient in real time." 22 TEX. ADMIN. CODE § 174.2. The amended regulations also made clear that, to establish a "proper physician-patient relationship," telemedicine providers were required to conduct a physical examination of a patient. *Id. § 174.8*.

In June 2011, the TMB issued a letter to Teladoc, stating the language of Old *Rule 190.8* required a "face-to-face" examination prior to prescription of a dangerous drug or controlled **[**8]** substance. The letter makes clear the TMB considered Teladoc and its physicians to be engaging in a prohibited practice by issuing prescriptions following telephone-only consultation. (Plf. Appl. Ex. 1 ("Navikas Decl.") Ex. A).

Teladoc sought legal recourse by bringing suit against the TMB in Texas state court. The court of appeals held the "TMB's pronouncements in its June 2011 letter are tantamount to amendments to the existing text," finding the TMB had effectively substituted "including" for the actual "such as" phrase. *Teladoc, Inc. v. Texas Med. Bd., 453 S.W.3d 606, 620 (Tex. App.—Austin 2014, pet. filed)*. Thus, the court found the " TMB's pronouncements hardly 'track' [Old] *Rule 190.8* . . . rather, they depart from and effectively change that text," rendering the June 2011 letter a procedurally invalid amendment to Old *Rule 190.8*. *Id.*

In response, the TMB issued an "emergency" rule on January 16, 2015, amending Old *Rule 190.8*. The emergency amendment mandated a "face-to-face visit or in-person evaluation" before a physician can issue a prescription.

[2] According to Teladoc, its physicians do not prescribe "DEA-controlled substances (including narcotics) or what are referred to as lifestyle drugs (i.e., Viagra, or diet pills)." (Compl. ¶ 81).

(Compl. ¶ 111). Teladoc sought and obtained a temporary injunction of the emergency rule in Texas state court. (Navikas Decl. Ex. U). The TMB then engaged in a formal rulemaking, resulting in an April 10, 2015 vote by the TMB to adopt New *Rule 190.8*. (Navikas **[**9]** Decl. Ex. B).

Plaintiffs filed this action on April 29, 2015, asserting Defendants have committed a violation of ***antitrust law***, as well as the *Commerce Clause of the Constitution* in adopting New *Rule 190.8*. Plaintiffs now seek a preliminary injunction preventing enforcement of New *Rule 190.8*, which is to go into effect on June 3, 2015. The parties have filed responsive pleadings. The Court conducted a hearing on May 22, 2015 and the matter is now ripe for review.

[*535] II. STANDARD OF REVIEW

A preliminary injunction is an extraordinary remedy and the decision to grant a preliminary injunction is to be treated as the exception rather than the rule. *Valley v. Rapides Parish Sch. Bd., 118 F.3d 1047, 1050 (5th Cir. 1997)*. The party seeking a preliminary injunction may be granted relief *only* if the moving party establishes: (1) a substantial likelihood of success on the merits; (2) a substantial threat that failure to grant the injunction will result in irreparable injury; (3) that the threatened injury out-weighs any damage that the injunction may cause the opposing party; and (4) that the injunction will not disserve the public interest. *See Hoover v. Morales, 146 F.3d 304, 307 (5th Cir.1998)*; *Wenner v. Texas Lottery Comm'n, 123 F.3d 321, 325 (5th Cir. 1997)*; *Cherokee Pump & Equip. Inc. v. Aurora Pump, 38 F.3d 246, 249 (5th Cir. 1994)*. The party seeking a preliminary injunction must clearly carry the burden of persuasion on all four requirements to merit relief. *Mississippi Power & Light Co., 760 F.2d 618, 621 (5th Cir. 1985)*.

III. ANALYSIS

A. Likelihood of Success

Plaintiffs **[**10]** contend they are likely to succeed on the merits both of their antitrust claim as well as their claim under the *Commerce Clause*. To show a substantial likelihood of success, "the plaintiff must present a prima facie case, but need not prove that he is entitled to summary judgment." *Daniels Health Sciences, L.L.C. v. Vascular Health Sciences, L.L.C., 710 F.3d 579, 582 (5th Cir. 2013)*. *See also Janvey v. Alguire, 647 F.3d 585, 596 (5th Cir. 2011)* (same, citing CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, 11A FEDERAL PRACTICE & PROCEDURE § 2948.3 (2d ed. 1995) ("All courts agree that plaintiff must present a prima facie case but need not show that he is certain to win.")).

1. Antitrust

This case presents an atypical situation under antitrust laws. States are generally permitted to regulate their economies in ways they see fit, including "impos[ing] restrictions on occupations, confer[ring] exclusive or shared rights to dominate a market, or otherwise limit[ing] competition to achieve public objectives." *N. Carolina State Bd. of Dental Examiners v. F.T.C., 135 S. Ct. 1101, 1109, 191 L. Ed. 2d 35 (2015)*. Thus, in most situations "federal antitrust laws are subject to supersession by state regulatory programs." *F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621, 632, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992)*. As a result, the Supreme Court has "interpreted the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity." *Id. at 1110* (citing *Parker v. Brown, 317 U.S. 341, 350-51, 63 S. Ct. 307, 87 L. Ed. 315 (1942)*. Specifically, state regulation is granted *Parker* immunity from ***antitrust law*** where the challenged **[**11]** restraint is "clearly articulated and affirmatively expressed as state policy" and is "actively supervised by the State itself." *California Retail Liquor Dealers Ass'n v. Midcal Alum., Inc., 445 U.S. 97, 105, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)*.

Significantly, in this case, the TMB declined to assert any immunity defenses, including *Parker* immunity, solely as to Plaintiffs' application for a preliminary injunction. The normal deference afforded to a state under ***antitrust law*** is, therefore, not an issue in reviewing Plaintiff's application for a preliminary injunction. The Court's opinion is properly read through that narrow, and unusual, lens.

[*536] a. Governing Law

Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . is declared to be illegal." *15 U.S.C. § 1*. Thus, to establish a violation of *Section 1* of the Sherman Act, "plaintiffs must show that the defendants (1) engaged in a conspiracy (2) that produced some anti-competitive effect (3) in the relevant market." *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, 776 F.3d 321, 327 (5th Cir. 2015)*. More particularly, *Section 1* prohibits concerted action which unreasonably restrained trade in the relevant market. *American Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 190, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)* ("*Section 1* applies only to concerted action that restrains trade"); *Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n, 751 F.3d 368, 375 (5th Cir. 2014)* (plaintiffs must allege facts showing defendants "unreasonably restrained trade" in market); *Consol. Metal Prods., Inc. v. Am. Petroleum Inst., 846 F.2d 284, 289 (5th Cir.1988)* (only "unreasonable **[**12]** restraint[s]" violate *Section 1*). For the purpose of Plaintiffs' request for immediate injunctive relief, the TMB does not contest the existence of a conspiracy. Rather, it maintains Plaintiffs cannot demonstrate the requisite anti-competitive effect.

To seek relief for anti-competitive conduct, a plaintiff must show both an injury to the plaintiff as well as an "antitrust injury." *Jebaco, Inc. v. Harrah's Operating Co., 587 F.3d 314, 318-19 (5th Cir. 2009)* (quoting *Doctor's Hosp., Inc. v. Se. Med. Alliance, 123 F.3d 301, 305 (5th Cir. 1997))*. Antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl—O—Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. Put another way, a plaintiff "must show that the defendants' activities caused an injury to competition." *Doctor's Hosp., 123 F.3d at 307*. *See also* *Felder's Collision Parts, Inc. v. All Star Adver. Agency, Inc., 777 F.3d 756, 757 (5th Cir. 2015)* ("It would not be an antitrust opinion without the line that the antitrust laws were designed for the protection of competition, not competitors") (internal quotation omitted).

Assessing whether an injury to competition has occurred utilizes a sliding scale of analysis. *N. Carolina State Bd. of Dental Examiners v. F.T.C., 717 F.3d 359, 373 (4th Cir. 2013)*, *aff'd*, *135 S. Ct. 1101, 191 L. Ed. 2d 35 (2015)*. At one end of the scale are practices considered anti-competitive per se. *N. Tex. Speciality Physicians v. FTC, 528 F.3d 346, 362 (5th Cir. 2008)*. At the other end of the scale, restraints are analyzed under the "rule of reason." which "requires the factfinder to decide whether under all the circumstances of **[**13]** the case the restrictive practice imposes an unreasonable restraint on competition." *Id.* (quoting *Arizona v. Maricopa County Med. Soc., 457 U.S. 332, 343, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982))*. Courts apply a middle ground called "quick look" analysis only "when the great likelihood of anticompetitive effects can easily be ascertained," and "after assessing and rejecting [the] logic of proffered procompetitive justifications." *Id.* (quoting *Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770-71, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999))*.

b. Discussion

The parties in this case disagree which analysis the Court should apply. Plaintiffs maintain the quick—look analysis is warranted, while the TMB argues the rule of reason should be applied. This dispute need not be addressed as the Court concludes **[*537]** Plaintiffs' challenge succeeds under both analyses.

Plaintiffs maintain the effect of New *Rule 190.8* will be increased prices, reduced choice, reduced access, reduced innovation, and a reduced overall supply of physician services. As the TMB itself concedes, the types of harm identified by Plaintiffs are clearly "the kind of injuries that the antitrust laws were enacted to prevent." (Def. Resp. at 4 (quoting *Nilavar v. Mercy Health Sys.-W. Ohio, 494 F. Supp. 2d 604, 617 (S.D. Ohio 2005))*. However, the TMB argues Plaintiffs have presented only speculation, not concrete data, which shows the identified injuries are actually likely to occur should New *Rule 190.8* go into effect.

The Court **[**14]** disagrees. Plaintiffs' evidence shows the average costs of visits to a physician or emergency room are $145 and $1957, respectively, and the cost for a Teladoc consultation is typically $40. (Plf. Appl. Ex. 8 ("Miller Decl.") ¶ 69). Plaintiffs also cite to research finding companies using Teladoc's services achieved reduced monthly employee healthcare costs. (Miller Decl. ¶ 70). Additionally, Plaintiffs present evidence that patients choose telehealth for a number of reasons, including reduced travel and waiting time. (Plf. App. Ex. 3 ("DePhillips Decl.") ¶ 52; Ex. 5 ("Hood Decl.") ¶ 14. Ex. 7 ("Smythe Decl.) ¶ 28). One physician stated that, without Teladoc, some of his patients would have gone without treatment. (Hood Decl. ¶ 14). Another suggested access to telehealth would reduce delay in obtaining treatment. (Smythe Decl. ¶ 24).

Plaintiffs have also cited evidence that Teladoc increases opportunities for physicians to provide health care. One physician testified telehealth allowed him to continue to practice medicine on a flexible schedule in his semiretirement. (Plf. Appl. Ex. 6 ("Clark Decl.") ¶¶ 15-16). Another testified, without telehealth, he would treat fewer patients. (Hood **[**15]** Decl. ¶ 8). This evidence is significant in light of the evidence presented by Plaintiffs that Texas suffers from a shortage of doctors, particularly in rural areas, and that approximately 50% of Teladoc's client patients do not have a regular physician. (Hood. Decl. ¶ 11; Smythe Decl. ¶ 26; DePhillips Decl. ¶ 18). Elimination of physicians providing healthcare would thus negatively impact not just the competitor physicians, but consumers, a classic antitrust injury.

The Court finally notes the TMB's own evidence supports Plaintiffs' contention that Teladoc provides benefits to the market. As one physician stated, "one cannot help but realize the care [Teladoc is] attempting to deliver decreases the costs for insurance companies and large employers that are self insured." (Def Resp. Ex. 5 ("Curran Aff.") at 3). In addition, a study conducted in California concluded "Teladoc appears to be expanding access to patients who are not connected to other providers." (Def. Resp. Ex. 22 ("RAND study") at 1). Accordingly, the Court concludes Plaintiffs have presented sufficient evidence, at this preliminary stage, to meet their burden to show an anti-competitive effect by New *Rule 190.8*. *See Palmyra Park Hosp., Inc. v. Phoebe Putney Mem'l Hosp., 604 F.3d 1291, 1305 (11th Cir. 2010)* ("higher premiums **[**16]** and decreased choices [are] two evils within the ambit of the antitrust laws.").

The Court thus turns to the second part of the analysis, balancing the anti-competitive effect of the challenged regulation with the pro-competitive justification offered in support. *See PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 615 F.3d 412, 417 (5th Cir. 2010)* (under rule of reason court balances "anticompetitive evils" of challenged regulation "against any procompetitive benefits or justifications"); *Speciality Physicians, 528 F.3d at 362* (to justify quick-look analysis, **[*538]** the burden remains on challenger to demonstrate proffered procompetitive effect does not result in net procompetitive effect). The sole justification the TMB offers is that New *Rule 190.8* will lead to improved quality of medical care. *See McWane, Inc. v. F.T.C., 783 F.3d 814, 841 (11th Cir. 2015)* (noting cognizable procompetitive justifications include improving product quality or service). *See also Marucci Sports, 751 F.3d at 377* (addressing failure to improve quality as anticompetitive evil).

As an threshold matter, the Court notes all physicians licensed by Texas, including Teladoc physicians, are bound to the same standard of care and ethical rules. *See 22 Tex. Admin. Code § 190.8(1)(A)* ("Failure to practice in an acceptable professional manner consistent with public health and welfare within the meaning of the [Medical Practices] Act includes, but is not **[**17]** limited to . . . failure to treat a patient according to the generally accepted standard of care."). As Plaintiffs point out, Teladoc physicians refer patients who cannot be diagnosed reasonably and safely via the telephone to an in-person physician. (DePhillips Decl. ¶ 25). As the TMB itself makes clear, it has the authority to, and regularly does, investigate complaints against physicians who do not meet the standards of care for practicing in Texas. In light of the existing restrictions on poor quality care, the Court finds TMB's assertion of additional improvement in the quality of care by the adoption of New Rule 190.8 suspect.

In support of this contention the TMB first cites to affidavit testimony presented by medical practitioners detailing deficiencies in telephone-only diagnosis. (Def. Resp. Ex. 3 ("Malone Aff") (noting complaint of left shoulder pain without acute injury cannot be diagnosed without face to face encounter with patient); Ex. 4 ("Douglass Aff.") (relating example of mistreatment by Teladoc physician of ear pain with antibiotic ear drops, where correct diagnosis of sinus infection was only made following physical exam); Curran Aff. at 3 (relating two examples where physical **[**18]** examination aided in diagnosis); Ex. 12 ("Yount Aff") (noting two examples of "poor care" provided via telephone contact). As Plaintiffs point out, this testimony is essentially anecdotal, reflecting the opinion of the affiants, but not necessarily statistically reliable evidentiary studies. *See* [Wells v. SmithKline Beecham Corp., 601 F.3d 375, 380-81 (5th Cir. 2010)] (finding testimony based on "anecdotal evidence" did not meet threshold for admission of expert testimony under *Daubert* standard). Moreover, to the degree anecdotal evidence is informative, Plaintiffs have submitted countervailing testimony from patients extolling the value of Teladoc's services. (DePhillips Decl. ¶¶ 33-36 (detailing examples of positive results of Teladoc services); Ex. 10 ("Stowell Decl.") Ex. B (describing incident in which Teladoc physician identified early stages of heart attack and directed patient to immediately go to emergency room, stating "I would definitely not have done this if I did not call Teladoc because I did not understand the severity of the situation.").

It is also worth noting Plaintiffs have submitted expert testimony summarizing pertinent research, and concluding "there is empirical evidence suggesting widespread improper antibiotic prescribing by physicians **[**19]** following in-person physical examination." (Plf. Reply Ex. 2 ("Mehrotra Decl.") ¶ 45).

The TMB also suggests notes made by a regular treating physician, in contrast with a Teladoc consulting physician, become "part of the patient's permanent medical record, which will follow her to future locations and can be accessed by future treating personnel." (Def. Resp. at 11). As **[*539]** the TMB acknowledges, however, Teladoc permits patients to send their Teladoc record to their primary care physician, although apparently only roughly one-third agree to do so. (*Id.).* Moreover, in reality, patients do not have a singular "permanent medical record." Rather, patients have records scattered across a variety of providers. (Mehrotra Decl. ¶¶ 52-53).

Plaintiffs further contend the TMB's contention of increased quality of care is rebutted by the continued acceptance of "on call" coverage by one physician for another's patients. The TMB maintains the service provided by Teladoc is not comparable, relying on affidavit testimony in which physicians describe on call coverage as based on a shared practice, in which physicians have a common knowledge of skills and values, as well as access to the patient's medical **[**20]** record. (Curran Aff. at 2; Def. Resp. Ex. 9 ("Arambula Aff.")). As noted above, Plaintiffs have presented evidence rebutting the notion that a patient has a singular record. The Court additionally notes that, while the TMB's evidence suggests an on call physician has access to patient records, it does not establish the on call physician checks those records before treating a patient. Indeed, one physician has testified that, as an on call physician, he had no access to electronic medical records, and would rely on the patient's account of symptoms and medical history. (Clark Decl. ¶ 5).

Further, affidavit testimony provided by Plaintiffs indicates there may not be empirical evidence supporting the distinction between Teladoc's service and that of an on call physician. (Mehrotra Decl. ¶ 51). Additionally, affidavit testimony from a Texas physician notes that physician assistants in Texas may enter into agreements with supervising doctors delegating prescription writing authority. Under such an agreement, the physician assistant may issue a prescription without examining the patient, by listening to the patient's descriptions of his or her symptoms over the phone. (Smythe Decl. ¶ 25). **[**21]**

Finally, and troublingly, the TMB cites a study performed in California, assessing use of Teladoc by a large public employer. In its proffered justification for adopting New [Rule 190.8], the TMB stated that "[t]he study found:

> Teladoc's model could actually further fragment healthcare;
> Teladoc's physicians are unable to use visual cues to aid in diagnosis;
> The limitations of telephone only consult could lead to misdiagnosis and higher rates of follow-up care - findings that have already been demonstrated with e-visits and telephone consultations;
> The adult users of Teladoc, in the study, were younger and healthier and lived in more affluent communities; and
> The population of patients attracted to Teladoc - a more affluent and likely more technologically savvy group - might have fewer access needs than people living in area's [sic] characterized by shortage of primary care or socio-economic disadvantage. And further research is needed to understand whether Teladoc might be improving access for patients with lower income and those in rural areas, and if not, can it be positioned to do so in the future.

(Def. Resp. Ex. 11 ("Freshour Aff.") Ex. (c) at 12).

Plaintiffs, in turn, have provided the affidavit of one **[**22]** of the two researchers who conducted the study, Ateev Mehrotra ("Mehrotra"). According to Mehrotra, the TMB has mischaracterized his research by "present[ing] to the Court a number of conclusions that are purportedly drawn from my 2014 study that are not accurate descriptions of my findings" but rather **[*540]** "hypotheses laid out in the introduction of the study." (Mehrotra Decl. ¶ 24).

Mehrotra specifically takes exception to the statement that his study "found" that Teladoc consultations "could lead to misdiagnosis and higher need for follow-up visits." (*Id.* ¶ 25). Instead, he states the "data showed that, across the three leading conditions treated by Teladoc, 13% of visits to physicians' offices and 20% of visits to the emergency room led to follow-up care, whereas only 6% of Teladoc calls led to follow-up care," results which "do not support the hypothesis that Teladoc has higher rates of misdiagnosis or mismanagement." (*Id.* ¶ 26).

In fact, the first page of the study, which is attached to the TMB's response to Plaintiffs' application, summarized the study as showing "Patients who uses Teladoc were less likely to have a follow-up visit to any setting, compared to those patients who visited a physician's **[**23]** office or emergency department." (RAND Study at 1). Plaintiffs also cite a second research study examining the impact of Teladoc on employees fo Home Depot. In pertinent part, the researchers concluded "Teladoc users had significantly lower rates of follow-up office visits, ER visits, and hospitalizations at both 7 and 30 days." (Plf. Appl. Ex. 2 ("Gorevic Decl.") Ex. A at 15). In sum, Plaintiffs have presented significant evidence which undermines the TMB's contention that the quality of medical care will be improved by New *Rule 190.8*.

The TMB suggests Plaintiffs' countervailing evidence is an insufficient basis for enjoining New *Rule 190.8*. The TMB points to the Supreme Court's statement that "certain practices by members of a learned profession might survive scrutiny under the Rule of Reason even though they would be viewed as a violation of the Sherman Act in another context." *Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 686, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*. *See also* *Goldfarb v. Va. State Bar, 421 U.S. 773, 788 n.17, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975)*. While the decision does indeed include that quotation, in *Professional Engineers* the Supreme Court explicitly rejected the notion that improved public safety was a sufficient justification for a society of professionals to adopt an anti-competitive policy. *Prof'l Eng'rs, 435 U.S. at 695* (attempt to justify anti-competitive policy "on the basis of the potential **[**24]** threat that competition poses to the public safety and the ethics of its profession is nothing less than a frontal assault on the basic policy of the Sherman Act"). The Supreme Court has continued to reject such justifications. *See* *F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447, 463, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)* (rejecting argument "that an unrestrained market in which consumers are given access to the information they believe to be relevant to their choices will lead them to make unwise and even dangerous choices" as justification for anti-competitive policy).[3]

The Court thus concludes Plaintiffs have presented evidence and argument which makes a prima facie showing they are likely to succeed on the merits of their claim under the Sherman **[**25]** Act.

[*541] 2. Dormant *Commerce Clause*

Plaintiffs maintain New *Rule 190.8* violates the *Commerce Clause* because it discriminates against physicians who are licensed in Texas, but are physically located out of state. The Supreme Court has made clear "[t]ime and again," that state laws violate the *Commerce Clause* if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Granholm v. Heald, 544 U.S. 460, 472, 125 S. Ct. 1885, 161 L. Ed. 2d 796 (2005)* (quoting *Oregon Waste Sys., Inc. v. Dep't of Envt'l Quality, 511 U.S. 93, 99, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994))*. The TMB maintains Plaintiffs cannot establish more than "an indirect

[3] The TMB also suggests the proper standard for reviewing its justification is whether its "conclusions are so baseless that no reasonable medical practitioner could have reached those conclusions after reviewing the same set of facts." *Willman v. Heartland Hosp. E., 34 F.3d 605, 611 (8th Cir. 1994)*. At issue in *Willman*, however, was whether specific corrective action against a physician violated antitrust laws if the physician's peer reviewers had legitimate medical reasons to believe that the physician provided substandard care. TMB's reliance on *Willman* in this case is simply not appropriate.

burden on interstate commerce" which does not violate the Commerce Clause. Dickerson v. Bailey, 336 F.3d 388, 396 (5th Cir. 2003).

As the Court has concluded Plaintiffs have shown a likelihood of success on their antitrust claim, Plaintiffs have satisfied the first element of the test for grant of a preliminary injunction. The Court thus declines to address this claim.

B. Substantial Threat of Irreparable Injury

As to the second element, Plaintiffs contend they face irreparable injury. First, the plaintiff physicians maintain they would no longer be able to engage in providing medical care under the Teladoc model. Although the parties do not directly address this issue, as noted above, both Plaintiff Hood and Clark have submitted declarations in support of the application for preliminary injunction. **[**26]** Hood, as a Virginia resident, testifies he would be unable to provide care to Texas residents were New *Rule 190.8* to go into effect and would lose substantial income. (Hood Decl. ¶¶ 27-29). Clark testifies he is nearing retirement and anticipates earning income through Teladoc to support himself. According to Clark, absent that income, he will have to delay his retirement. (Clark. Decl. ¶¶ 15-18).

Monetary losses are generally not considered to satisfy the irreparable injury required to obtain a preliminary injunction. *See* *Bluefield Water Ass'n, Inc. v. City of Starkville, 577 F.3d 250, 253 (5th Cir. 2009)* (there is no irreparable injury where any harm is financial, and monetary compensation will make plaintiff whole if plaintiff prevails). *See also* *Heil Trailer Int'l Co. v. Kula, 542 F. App'x 329, 335 (5th Cir. 2013)* (irreparable injury is one that cannot be undone by monetary damages). However, Clark suggests money damages alone are insufficient to compensate him for delaying his requirement. (Clark. Decl. ¶ 18). Similarly, Hood would be forced to choose between continuing to practice in Virginia or moving to Texas. Finally, implementation of New *Rule 190.8* would eliminate the possibility that Clark and Hood could continue to provide healthcare via telephone consultation, effectively rendering their current business practices impossible. As discussed **[**27]** more fully below, destruction of a business model may constitute irreparable injury.

As to the remaining plaintiffs, succinctly put, Teladoc maintains it would no longer be in business in Texas, or otherwise. Unquestionably, New *Rule 190.8* would prevent Teladoc from providing its telephone-only service to patients in Texas. In 2014 23% of Teladoc's revenue was generated by Texas consultations or service payments. (Gorevic Decl. ¶ 5). Teladoc contends deprivation of its ability to do business in Texas would destroy its business model, causing "harm for which there is no adequate remedy at law." *Daniels, 710 F.3d at 585*. At least two circuit courts have recognized destruction of a business model may constitute irreparable injury. *See* *Stuller, Inc. v. Steak N Shake Enters.,* ***[*542]*** *Inc., 695 F.3d 676, 680 (7th Cir. 2012)* (evidence that change in pricing policy would be significant change to business model, negatively affecting revenue, and that reestablishing previous business model without loss of goodwill and reputation would be difficult, met threshold for irreparable injury); *Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 18-19 (1st Cir. 1996)* (evidence defendant's product was integral component of plaintiff's business model, customers relied on availability of product, and product line served as "a beacon to attract potential customers," sufficed to show potential loss **[**28]** of consumer goodwill and threat of irreparable injury).

The TMB contends Plaintiffs' claims that they will no longer be able to provide healthcare services in Texas is overblown for two reasons. First, they maintain Plaintiffs have not shown they cannot continue to do business in Texas by utilizing the provisions in the TMB's regulations permitting telemedicine through the use of video equipment.

The Court notes, however, those regulations require "the use of advanced telecommunications technology that allows the distant site provider to *see and hear* the patient in *real time."* *22 Tex. Admin. Code § 174.2(10)* (emphasis added). Under the regulations, a patient presents at an "established medical site," which must be staffed with a licensed health care provider, and then communicates with the distant health care professional via real time video. *Id.* *§ 174.2(2)* & *(7)*. The site must have "sufficient technology and medical equipment to allow for adequate physical evaluation, as appropriate for the patient's presenting complaint." *Id.* *174.2(2)*. The current regulations provide that a "patient's private home is not considered an established medical site." *Id.* However, the regulations have recently been amended to permit **[**29]** a patient's home to be considered an established medical site if the home has "sufficient communication and remote medical diagnostic technology to allow the physician to carry out an adequate physical examination appropriate for the patient's presenting condition while seeing and hearing the patient in real time." (Def. Resp. Ex. 13). In short, these regulations do not permit Teladoc to simply substitute video technology for its current telephone consultation model.

Moreover, the president of Teladoc testifies since 2011 Teladoc has explored operating by way of establishing remote medical sites in Texas, but has concluded the associated costs would prevent it from competing and would prevent it from serving a diffusely located patient population. (Plf. Reply Ex. 2 ("Gorevic Supp. Decl.") ¶ 15). Teladoc also considered partnering with physicians and employers in Texas to provides services at their offices, as well as sending physicians to specific sites at specific times, but rejected both options for the same reasons of cost and diffusely located patients. (Gorevic Supp. Decl. ¶¶ 16-17).

Second, Defendants point out Teladoc has clients in states other than Texas. However, as noted above, **[**30]** Plaintiffs have presented evidence that nearly one-quarter of their business is generated in Texas. Plaintiffs have also presented evidence that its subscribers include multi-state employers who demand healthcare services be available in all states. (Gorevic Decl. ¶ 18; Murphy Decl. App. C).

Additionally, Plaintiffs correctly point out an irreparable injury includes one for which monetary damages would be "especially difficult to calculate.*"* *Heil Trailer, 542 F. App'x at 335*. According to Teladoc's statistics, it has experienced rapid growth, quadrupling its revenues between 2012 and 2014. (Gorevic Supp. Decl. Ex. C-I). Teladoc's evidence further suggests the telehealth industry as a whole **[*543]** is at an early stage, making future growth especially difficult to estimate. (Gorevic Decl. ¶ 20; Murphy Decl. ¶ 44).

Teladoc further maintains it is at an especially vulnerable point in its growth. Teladoc characterizes itself as a young business, dependent on ongoing funding from new sources to maintain and grow its business. (Gorevic Decl. ¶ 22). Further, Teladoc is planning an initial public offering of common stock. Teladoc's president states Teladoc's investment bankers have advised that the stock offering will not go forward **[**31]** if New *Rule 190.8* is put into effect. (Gorevic Decl. ¶ 14; Gorevic Supp. Decl. ¶¶ 8-9). Teladoc additionally points out some of its physicians, the quality of which are key to patient satisfaction and Teladoc's continued viability, are declining to continue to provide services through Teladoc. (DePhillips Decl. Ex. C; Murphy Decl. App. at 22-24).

Finally, Plaintiffs argue they face irreparable injury because, even if monetary compensation was sufficient, it is unlikely they will be able to recover monetary damages from the defendants. According to Teladoc, Plaintiffs' trebled antitrust damages would run into at least the tens of millions of dollars and likely outstrip the individual defendants' ability to pay. (Murphy Decl. ¶¶ 31-36). The Fifth Circuit recently noted the district court did not abuse its discretion in considering there was a "substantial probability that [plaintiff] would be unable to collect a judgment against [defendant]" in finding the plaintiff faced irreparable harm. *Aspen Tech., Inc. v. M3 Tech., Inc., 569 Fed. Appx. 259, 273 (5th Cir. 2014)*. *See also* *Specialty Healthcare Mgmt., Inc. v. St. Mary Parish Hosp., 220 F.3d 650, 658 (5th Cir. 2000)* (noting there is some authority for proposition that inability to actually collect on money judgment may suffice to make injury irreparable). The possibility that the TMB will **[**32]** assert immunity from monetary damages as a state agency also weighs in favor of finding Plaintiffs face irreparable harm. *See* *Crowe & Dunlevy, P.C. v. Stidham, 640 F.3d 1140, 1157 (10th Cir. 2011)* (imposition of money damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury); *Harris v. Cantu, 81 F. Supp. 3d 566, 2015 U.S. Dist. LEXIS 8351, 2015 WL 338938, at *11 (S.D. Tex. Jan. 26, 2015)* (where defendants entitled to *Eleventh Amendment* immunity from money damages, plaintiff "has suffered and—if no injunction is issued—will continue to suffer irreparable injury for which money damages are inadequate").

The Court thus finds Plaintiffs have shown they face a substantial threat of irreparable injury.

C. Balancing of Respective Interests

The final two prongs of the preliminary injunction inquiry require weighing of the respective interests of the parties and the public. Specifically, that the threatened injury out-weighs any damage that the injunction may cause the opposing party and that the injunction will not disserve the public interest. In this case, the inquiry essentially collapses because the interests asserted by the TMB are in the form of protecting the public from injury.

The TMB contends Plaintiffs have failed to meet their burden to show the harm they would suffer if New *Rule 190.8* were permitted to take effect does not outweigh the **[**33]** threat to public safety the rule poses. The TMB characterizes Plaintiffs' evidence of harm as merely "speculative." As discussed above, however, Plaintiffs have presented specific evidence detailing the financial harm they will suffer, likely including destruction of Teladoc's business model and ability to do business in Texas, in addition to other non-monetary harms. **[*544]** Plaintiffs have also presented evidence casting into doubt their ability to receive monetary damages, even if such damages were sufficient to compensate them for the injury suffered.

As to the threat to public safety and health, the TMB has presented only anecdotal evidence of possible public harm. As reviewed above, Plaintiffs have presented countervailing anecdotal evidence, as well as evidence suggesting the basis for TMB's conclusions concerning Teladoc are poorly founded. In addition, Plaintiffs have presented evidence that consumers will face higher prices for medical care, as well as reduced access.

Finally, Plaintiffs point out a Texas state court considered this very issue in February in considering whether to enjoin enforcement of the emergency rule adopted by the TMB in January 2015. That court concluded "No **[**34]** imminent peril to public health, safety or welfare existed on January 16, 2015, or exists at the present time to justify adoption of the emergency rule." (Navikas Decl. Ex. U ¶ 2). At the injunction hearing, Plaintiffs suggested this ruling should be viewed as collaterally estopping the TMB from asserting otherwise in this action. While the Court declines to adopt Plaintiffs' view, the ruling additionally weighs against the TMB"s arguments.

In light of the evidence presented by Plaintiffs, the Court concludes the balance of respective interests of the parties and the public weigh in favor of granting Plaintiffs' application for a preliminary injunction.

IV. CONCLUSION

Plaintiffs' Application for a Temporary Restraining Order and Preliminary Injunction Before June 3, 2015 (Clerk's Dkt. #10) is hereby **GRANTED**.

Accordingly, it is hereby **ORDERED** that New *Rule 190.8* is enjoined from taking effect and Defendants are enjoined from taking any action to implement, enact and enforce New *Rule 190.8* from taking effect pending final resolution of the claims brought by Plaintiffs in their Complaint.

SIGNED on May 29, 2015.

/s/ Robert L. Pitman

ROBERT L. PITMAN

UNITED STATES DISTRICT JUDGE

Xtreme Caged Combat v. Cage Fury Fighting Championships

United States District Court for the Eastern District of Pennsylvania

May 29, 2015, Decided; May 29, 2015, Filed

CIVIL ACTION 14-5159

Reporter
2015 U.S. Dist. LEXIS 69796 *; 2015-1 Trade Cas. (CCH) P79,211; 2015 WL 3444274

XTREME CAGED COMBAT, et al, Plaintiffs, v. CAGE FURY FIGHTING CHAMPIONSHIPS, et. al., Defendants.

Subsequent History: Summary judgment granted, in part, summary judgment denied, in part by, Without prejudice, Dismissed by, in part *Kerwin v. Cage Fury Fighting Championships, 2015 U.S. Dist. LEXIS 110667 (E.D. Pa., Aug. 20, 2015)*

Motion denied by, Motion granted by, in part *Kerwin v. Cage Fury Fighting Championships, 2015 U.S. Dist. LEXIS 114311 (E.D. Pa., Aug. 27, 2015)*

Motion denied by *Kerwin v. Cage Fury Fighting Championships, 2015 U.S. Dist. LEXIS 154969 (E.D. Pa., Nov. 17, 2015)*

Core Terms

casinos, monopolize, plaintiffs', motion to dismiss, venues, amended complaint, allegations, geographic, antitrust, Sherman Act, competitors, monopolist, compl, Combat, fight, specific intent, conspiracy, conspire, host, interstate commerce, relevant market, anti trust law, anticompetitive, contracts, promotor, pleaded, conspiracy to monopolize, antitrust violation, factual allegations, concerted effort

Counsel: **[*1]** For XTREME CAGED COMBAT, Plaintiff: A. JORDAN RUSHIE, MULVIHILL & RUSHIE LLC, PHILADELPHIA, PA.

RYAN KERWIN, Plaintiff, Pro se, LANGHORNE, PA.

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For VALLEY FORGE CASINO RESORT, JOEL FREEDMAN, Defendants: PETER MICHAEL RYAN, LEAD ATTORNEY, THOMAS M. O'ROURKE, COZEN O'CONNOR, PHILADELPHIA, PA.

For CHESTER DOWNS & MARINA LLC, Defendant: LAWRENCE M. KELLY, MINTZER SAROWITZ ZERIS LEDVA & MEYERS, PHILADELPHIA, PA; STEPHEN T. BISSELL, MINTZER, SAROWITZ, ZERIS, LEDVA & MEYERS LLP, PHILADELPHIA, PA.

Judges: LAWRENCE F. STENGEL, J.

Opinion by: LAWRENCE F. STENGEL, J.

Opinion

MEMORANDUM

Stengel, J.

Ryan Kerwin and Xtreme Caged Combat filed this *pro se* antitrust complaint against several competing mixed martial arts fight promotors, two casinos and one casino executive. Plaintiffs also append a count for tortious interference with prospective contractual relations. The casinos and the executive now move to dismiss the amended complaint. For the reasons that **[*2]** follow, I will grant the motion in part.

I Background

Ryan Kerwin owns and operates Xtreme Caged Combat (XCC). XCC is licensed by the Commonwealth of Pennsylvania to promote mixed martial arts (MMA) events. Am. compl. ¶¶ 3, 4. MMA is a combat sport which features two competitors fighting inside an enclosed area. Id. ¶ 66. Rob Haydak owns defendant Cage Fury Fighting Championships (CFFC). Id. ¶¶ 5, 7. David Feldman owns defendant Xtreme Fight Events (XFE). Id. ¶¶ 6, 8. CFFC and XFE also promote MMA events in Pennsylvania and New Jersey. Id. ¶¶ 5, 6. Since plaintiffs allege that XFE has merged into CFFC, Id. ¶ 45, I will refer to CFFC when discussing allegations against the fight promotor defendants

Plaintiffs allege that CFFC illegally conspired with Chester Downs and Marina LLC and Valley Forge Casino Resort to monopolize and restrict trade in the MMA events market in the Philadelphia Region. Id. ¶¶ 65 - 72. Chester Downs and Marina LLC operates a casino in Chester, Pennsylvania more commonly known as Harrah's. Id. ¶ 9. Valley Forge Casino Resort operates a casino in Valley Forge, Pennsylvania. Id. ¶ 12. Valley Forge employs Joel Freedman as its Vice President of Player Development. Id. **[*3]** ¶ 15. Mr. Feldman and Mr. Freedman are friends, and Mr. Feldman leveraged this relationship to secure exclusive venue agreements between CFFC and each casino. Id. ¶¶ 19, 34, 95.

Pursuant to the exclusive venue contracts, Harrah's or Valley Forge will pay CFFC $10,000 for every match it hosts at its respective casino. Id. ¶¶ 19, 20, 34. The casinos provide CFFC with a free venue, chairs, tables and other perks. Id. The contract gives CFFC the exclusive right to host MMA events at the casinos. Id. As a result, plaintiffs are blocked from hosting events at both casinos. Id. Plaintiffs admit that there are other facilities where they can host MMA events. Id. ¶ 52. However, MMA promotors are unable to make a profit at these other venues. Id. ¶¶ 31, 52. According to plaintiffs, by controlling these casino venues, CFFC will drive its competition out of business and achieve a monopoly in the MMA event market in the Philadelphia region. Id. ¶ 61. As a result of its dominant market position, CFFC has already increased ticket prices for its events. Id. ¶ 60. CFFC has also signed over 60 professional fighters to exclusive deals. Id. ¶ 61.

On September 8, 2014, Mr. Kerwin filed a *pro se* antitrust **[*4]** complaint on behalf of himself and XCC. By orders dated October 27, 2014 and November 10, 2014, I advised Mr. Kerwin, who is not an attorney, that he may not represent XCC. *See* *Simbraw, Inc. v. United States, 367 F.2d 373, 373-74 (3d Cir.1966)* (holding that a corporation may not be represented by its president in court and that an attorney must appear for it and represent it in the litigation). Subsequently, attorney Jordan Rushie entered his appearance for Xtreme Caged Combat. The casino defendants moved to dismiss the complaint. Doc. no. 4 (Valley Forge); doc. no. 39 (Harrah's). Plaintiffs filed an amended complaint, as of right, which added the charges against Mr. Freedman. Doc. no. 45. The casinos and Mr. Freedman renewed their objections to the allegations in separate motions to dismiss the amended complaint. Doc. no. 47 (Valley Forge); doc. no. 53 (Harrah's); doc. no. 56 (Freedman's notice of joinder in Valley Forge's motion).

II Standard of Review

A complaint must set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. This statement must "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (quoting *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))*. A complaint need not contain detailed factual allegations, **[*5]** but a plaintiff must provide "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action" to show entitlement to relief as prescribed by *Rule 8(a)(2)*. *Id. at 1965*; *Evancho v. Fisher, 423 F.3d 347, 350 (3d Cir. 2005)*. A defendant may attack a complaint by a motion under *Rule 12(b)(6)* for failure to state a claim upon which relief can be granted.

In deciding a motion to dismiss under *Rule 12(b)(6)*, I may consider "the allegations contained in the complaint, exhibits attached to the complaint and matters of public record." *Pension Ben.Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993)*. The court is required to accept as true all of the factual allegations in the complaint, *Erickson v. Pardus, 551 U.S. 89, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)*, and all reasonable inferences permitted by the factual allegations, *Watson v. Abington Twp., 478 F.3d 144, 150 (3d Cir. 2007)*, viewing them in the light most favorable to the plaintiff. *Kanter v. Barella, 489 F.3d 170, 177 (3d Cir. 2007)*. The court is not, however, "compelled to accept unsupported conclusions and unwarranted inferences or a legal conclusion couched as a factual allegation." *Baraka v. McGreevey, 481 F.3d 187, 195 (3d Cir. 2007)* (quotations and citations omitted). If the facts alleged are sufficient to "raise a right to relief above the speculative level" such that the plaintiffs' claim is "plausible on its face," a complaint will survive a motion to dismiss. *Bell Atlantic Corp., 127 S. Ct. at 1965, 1974*; *Victaulic Co. v. Tieman, 499 F.3d 227, 234-35 (3d Cir. 2007)*.

III Discussion

a) Antitrust Standing

Standing is a threshold requirement in all actions in federal court. *Ethypharm S.A. France v. Abbott Labs., 707 F.3d 223, 232 (3d Cir. 2013)*. Section 4 of the Clayton **[*6]** Act creates a private cause of action and confers standing on persons injured by an antitrust violation. The statute provides:

> any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States ... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15(a). "Questions of statutory standing, like other factual issues, are considered under the same pleading requirements as a motion to dismiss pursuant to *Fed.R.Civ.P. 12(b)(6)*." *Animal Sci. Products, Inc. v. China Minmetals Corp., 34 F. Supp. 3d 465, 2014 WL 3695329 (D.N.J. 2014)* (citing *Baldwin v. Univ. of Pittsburgh Med. Ctr., 636 F.3d 69, 73 (3d Cir.2011)*.

Interpreting the statute, the Supreme Court has recognized that "Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property." *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 535, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* (quoting *Blue Shield of Va. v. McCready, 457 U.S. 465, 477, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982))*. Courts have narrowed antitrust standing and consider the following factors to determine if the complaint is filed by the proper plaintiff:

> (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with **[*7]** neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

Ethypharm S.A. France, 707 F.3d at 233 (citing In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1165-66 (3d Cir.1993).

The casinos deny that plaintiffs have pleaded an antitrust injury, which "is a necessary but insufficient condition of antitrust standing." Ethypharm S.A. France, 707 F.3d at 233 (citing Barton & Pittinos, Inc. v. SmithKline Beecham Corp., 118 F.3d 178, 182 (3d Cir.1997)). Plaintiffs must plead an injury to competition in the relevant market and that plaintiffs are competitors or consumers in the relevant market. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977) (An antitrust injury is "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful"); Ethypharm S.A. France, 707 F.3d at 233. The injury cannot impact the plaintiffs alone. Eichorn v. AT & T Corp., 248 F.3d 131, 140 (3d Cir.2001) (citations omitted). The injury must have a wider impact on the competitive market, and plaintiffs' injury must be attributable to the anticompetitive conduct at issue. *Id*.; Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990). "[T]he existence of antitrust injury is not typically **[*8]** resolved through motions to dismiss." Schuylkill Energy Res., Inc. v. Pennsylvania Power & Light Co., 113 F.3d 405, 417 (3d Cir. 1997) (citing Brader v. Allegheny Gen. Hosp., 64 F.3d 869, 876 (3d Cir. 1995)).

To determine the existence of a competitive injury, a court "must always be attuned to the particular structure and circumstances of the industry at issue." ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 283 (3d Cir.2012). Due to the economics of mixed martial arts promotion, a promotor cannot stay in business without access to casino venues. Am. compl. ¶ 52. By restricting access to the casinos, CFFC will eliminate all competition in the relevant geographic market. Id. ¶ 61. CFFC has achieved dominant market position through its control of the casinos and has considerably raised prices as a result. Id. On this basis, plaintiffs have alleged harm to competition. *See* Harrison Aire, Inc. v. Aerostar Int'l, Inc., 423 F.3d 374, 381 (3d Cir. 2005) (supracompetitive pricing is evidence of an antitrust violation); Gulfstream III Associates, Inc. v. Gulfstream Aerospace Corp., 995 F.2d 425, 429 (3rd Cir.1993) (decrease in competition is harm contemplated by antitrust laws).

Contrary to the casinos' position, the amended complaint alleges that plaintiffs are competitors in the MMA market. *See* Gulfstream III Associates, Inc., 995 F.2d at 429 ("The second requirement is generally met if the plaintiff is a 'competitor [ ]or a consumer in the relevant market.'"). According to defendants, plaintiffs are not the proper parties to bring this action because plaintiffs are not licensed to promote MMA **[*9]** events in Pennsylvania. *See* Ethypharm S.A. France, 707 F.3d at 237 (plaintiff drug maker did not suffer antitrust injury because it was not authorized by the FDA to sell relevant product in the United States). This is a compelling argument, but it is based on facts in direct contradiction to plaintiffs' allegations. Accepting as true the well pleaded facts in the amended complaint, Mr. Kerwin holds a matchmaker's license for Xtreme Caged Combat. Am. compl. ¶ 4. Henry Marchione, Mr. Kerwin's employee, holds a promoter's license for Xtreme Caged Combat. Id. With these licenses, Xtreme Caged Combat may legally host and promote MMA events. Id. Defendants' protestations to the contrary are improper at this point in the litigation. Plaintiffs have plausibly claimed an antitrust injury, and for the purposes of this motion, I find that the plaintiffs have standing.[1]

b) Count 1 - Refusal to Deal

In Count 1, plaintiffs allege that defendants have refused to deal in violation of section 1 **[*10]** of the Sherman Act. The statute provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States ... is declared to be illegal." 15 U.S.C. § 1. To state a claim under section 1, plaintiffs must allege concerted effort; an unreasonable restraint on trade and an effect on interstate commerce. Armstrong Surgical Ctr., Inc. v. Armstrong Cnty. Mem'l Hosp., 185 F. 3d 154, 157 (3d Cir. 1999) (citing Fuentes v. South Hills Cardiology, 946 F.2d 196, 201 (3d Cir.1991)).

[1] "[W]hereas lack of antitrust standing affects a plaintiff's ability to recover, but does not implicate the subject matter jurisdiction of the court[,]" Sullivan v. DB Investments, Inc., 667 F.3d 273, 307 (3d Cir. 2011) (internal citations and quotation marks omitted), I will not consider the remaining standing elements *sua sponte*.

1) Concerted effort

Concerted action is the catchall term for contract, combination and conspiracy set out in the Sherman Act. To plead this element, the plaintiffs must allege facts plausibly showing a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*; *see also* *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chem. Corp., 579 F.2d 20, 33 (3d Cir. 1978)* ("[T]he alleged conspirators had a unity of purpose or a common design and understanding or a meeting of minds in an unlawful arrangement."). The casinos challenge the allegations on two fronts. First, the casinos argue that they cannot conspire with CFFC because the casinos are not in competition with CFFC. Second, the casinos deny that plaintiffs have sufficiently alleged the existence of an agreement. I am not persuaded by either argument.

The casinos contend that only direct competitors can conspire to violate the Sherman Act. According to this theory, the amended complaint must be dismissed because it does not allege concerted efforts between Harrah's and Valley Forge.[2] However, the casinos ignore a large swath of ***antitrust law*** scrutinizing agreements between customers and suppliers known as vertical restraints on trade. *See, e.g.*, *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 136, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)* (finding that **[*11]** a vertical restraint which deprives a supplier of a potential customer is subject to the rule of reason analysis); *Bus. Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 730, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)* (distinguishing between vertical and horizontal restraints on trade). In the vertical restraint context, courts have cautioned that exclusive dealing[3] agreements "can have adverse economic consequences by allowing one supplier of goods or services unreasonably to deprive other suppliers of a market for their goods." *ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 270 (3d Cir. 2012)* (citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 45, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984))*. Plaintiffs allege a vertical agreement between CFFC and the casinos which prohibits plaintiffs and other promotors from hosting MMA events at the casinos. This is actionable concerted effort in ***antitrust law***.

I recognize the logical force of the casinos' argument, but it lacks support in the law. It is hard to imagine what would motivate the casinos to restrict trade in a market in which they do not compete, but in this section 1 claim, the casinos can be liable even though they have no intent to reduce competition. *See* *Spectators' Commc'n Network Inc. v. Colonial Country Club, 253 F.3d 215, 221 (5th Cir. 2001)* ("Conspirators who are not competitors of the victim may have no interest in curtailing competition in a market in which they do not compete; nevertheless, when they have been enticed or coerced to share in an anticompetitive scheme, there is still a combination within the meaning of the Sherman Act."). It is sufficient to have alleged that CFFC devised a plan to reduce competition in the MMA market, and the casinos consciously committed to CFFC's illegal scheme. *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1243 (3d Cir. 1993)* ("However, we have made it clear that the defendants need not share the *same* motive. Rather, all that is required is that they each have a motive to conspire" (citing *Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 214-15 (3d Cir.1992)))*. Accordingly, an agreement between the casinos **[*13]** and CFFC is actionable concerted conduct.

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[2] "Plaintiffs make no factual allegations to state a plausible claim that [Harrah's] agreed with Defendant Valley Forge or any other casino not to deal with Plaintiffs' MMA promotion" Harrah's mot. to dismiss, doc. no. 53, 8; *See* Valley Forge's mot. to dismiss, doc. no. 47, 17.

[3] "Exclusive dealing exists when a buyer and seller enter into an agreement in which the buyer will only purchase goods or services from that one seller and the agreement forecloses competition." *BanxCorp v. Bankrate, Inc., 07-CV-3398, 2009 U.S. Dist. LEXIS 84151, 2009 WL 2986126, at *4 (D.N.J. Sept. 14, 2009)* (citing *Barr Laboratories, Inc. v. Abbott Laboratories, 978 F.2d 98, 110 (3d Cir.1992)*. The venue agreement allegedly **[*12]** provides that the casinos will purchase MMA promotion services from CFFC and no other fight promotor. This foreclosed all other fight promotors from holding MMA events at the casinos, and is exclusive dealing.

In the alternative, the casinos submit the written contracts they executed with CFFC. According to the casinos, the contracts conclusively disprove any exclusive arrangement.[4] The contracts contradict the amended complaint's well pleaded allegation which I must accept as true at this stage of the case. Furthermore, the contracts, provided they are authentic, are not the only evidence of concerted action. *See* *Monsanto Co., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)* (concerted effort may be shown through direct and circumstantial evidence). A court will "look past the terms of the contract to ascertain the relationship between the parties and the effect of the agreement 'in the real world.'" *ZF Meritor, LLC, 696 F.3d at 270* (citing *United States v. Dentsply Int'l, Inc., 399 F.3d 181 at 191 (3d Cir. 2005)*. "A plaintiff may plead an agreement by alleging direct or circumstantial evidence, or a combination of the two." *W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 99-100 (3d Cir. 2010)*. Among other things, plaintiffs allege that Mr. Feldman must consent before another fight promotor can gain entry into the defendant casinos. Am. compl. ¶¶ 50, 51. The complaint contains circumstantial evidence of exclusive dealing and is adequately pleaded. *See* *W. Penn Allegheny Health Sys. Inc., 627 F.3d at 99-100* ("If a complaint includes non-conclusory allegations of direct evidence of an agreement, a court need go no further on the question **[*14]** whether an agreement has been adequately pled." (citing *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 323 (3d Cir. 2010))*).

2) Unreasonable Restraint on Trade

There are two different standards used to determine if a restraint on trade is unreasonable. Typically, restraints on trade are judged by the rule of reason. *Ins. Brokerage, 618 F.3d at 315* (citing *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 882, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007))*. Under a rule-of-reason analysis, the plaintiffs "bear[] the initial burden of showing that the alleged [agreement] produced an adverse, anticompetitive effect within the relevant [product] and geographic market." *Id. at 315* (citing *Gordon v. Lewistown Hosp., 423 F.3d 184, 210 (3d Cir.2005))*. "If the plaintiff carries this burden, the court will need to decide whether the anticompetitive effects of the practice are justified by any countervailing pro-competitive benefits." *Id. at 316* (citing *Eichorn v. AT & T Corp., 248 F.3d 131, 143 (3d Cir.2001))*. On the other hand, there are some agreements which are deemed *per se* illegal and are conclusively presumed to be unreasonable "because of their pernicious effect on competition and lack of any redeeming virtue...." *United States v. Brown Univ. in Providence in State of R.I., 5 F.3d 658, 669 (3d Cir. 1993)* (citing *Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958))*.

Plaintiffs urge me to find that the agreement alleged **[*15]** between CFFC and the casinos is *per se* illegal. I will decline the invitation because the agreements, as alleged, did not impose price constraints on CFFC or the casinos.[5] *NYNEX Corp., 525 U.S. at 136* ("[V]ertical restraint is not illegal *per se* unless it includes some agreement on price or price levels." (citing *Business Electronics Corp. V. Sharp Electronics Corp., 485 U.S. 717, 735-36, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988))*); *ZF Meritor, LLC, 696 F.3d at 271* ("Due to the potentially procompetitive benefits of exclusive dealing agreements, their legality is judged under the rule of reason." (citing *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 at 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961))*). To plausibly state a claim for exclusive dealing subject to the rule of reason, plaintiffs must plead: 1.) the relevant product market; 2.) the relevant geographic market and 3.) that the contract forecloses a substantial share of the competition in the relevant product and geographic markets. *Tampa Elec. Co., 365 U.S. at 327 - 28*. Defendants contend that the relevant markets are ill-defined.

"The outer boundaries of a product market are determined by the reasonable interchangeability **[*16]** of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. In other words, the relevant market includes all products a

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[4] An amendment to CFFC's contract with Harrah's provides CFFC with a right to first refusal for any MMA event to be scheduled at Chester Downs between August 27, 2013 and March 7, 2014. Harrah's mot. to dismiss am. compl., doc. no. 48, Ex. C.

[5] In response to defendants' motion, plaintiffs assert he alleged a price fixing scheme. The only allegation of price fixing is between CFFC and XFE. How such price fixing could occur after CFFC and XFE merged is questionable. In any event, plaintiffs do not allege that the promotors conspired with the casinos to fix prices.

buyer would purchase if the seller's product was unavailable or too expensive. *See United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 394, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. While the proper product market is best determined by the trier of fact, *Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 199 (3d Cir.1992)*, a complaint is legally insufficient when the proposed market clearly excludes interchangeable products. *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997)*. Such a problem arises when plaintiffs unnecessarily narrow the relevant product market to increase the defendant's relative market power. *See Id. at 438* (Court rejected plaintiff's alleged relevant product market which was limited to pizza ingredients approved for use by Domino's; product market included pizza ingredients used by all pizza restaurants).

The parties dispute what product is at issue in this litigation. Plaintiffs define the relevant product as MMA events. Am. compl. ¶ 65. Defendants, on the other hand, claim that the relevant product market is MMA event venues. Defendants maintain that plaintiffs' product definition is deficient because it fails to consider the interchangeability of casinos with other MMA event venues.[6] Given that this is a motion to dismiss, plaintiffs' **[*17]** theory of the case controls. Plaintiffs aver that CFFC's exclusive access to the casinos will eliminate competition in the MMA event market. The proper interchangeability inquiry considers what other fight events spectators will attend if CFFC becomes the only promoter of MMA events and raises prices.[7] Focusing, instead, on what other venues spectators will patronize is largely irrelevant if CFFC is the only company promoting MMA events. Therefore, plaintiffs have not clearly ignored substitute products by defining the product as MMA events.

Defendants **[*18]** attack plaintiffs' proposed geographic market as impermissibly vague. The geographic market must "correspond to the commercial realities of the industry," and may be as small as a single metropolitan area. *Brown Shoe Co., 370 U.S. at 336*. It is quite clear that plaintiffs have limited the geographic area to the Philadelphia region. Am. compl. ¶68. Indeed, the term "Relevant Geographic Market" is set out in bold under its own heading in the amended complaint. Defendants protest that plaintiffs do not apply this definition consistently throughout the complaint. I disagree. Any pleadings pertaining to events outside the Philadelphia region give context to the allegations and do not alter the defined geographic market. If discovery supports an expansion of the geographic market, I will reconsider the issue on a motion for summary judgment, but for the purposes of this motion, the pleaded geographic market is satisfactory.

3) Affecting interstate commerce

"[T]he interstate commerce requirement of the Sherman Act may be satisfied by demonstrating that defendant's activities either are in interstate commerce or affect interstate commerce." *Brader v. Allegheny Gen. Hosp., 64 F.3d 869, 873 (3d Cir. 1995)* (citing *McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 242, 100 S. Ct. 502, 62 L. Ed. 2d 441 (1980)*. CFFC's allegedly anti-competitive conduct is purely local; therefore, plaintiffs **[*19]** must identify how CFFC's actions affected activity in interstate commerce. *McLain, 444 U.S. at 242*. According to the amended complaint, CFFC's control of the casino venues has allowed CFFC to sign nearly 100 fighters to exclusive contracts in both Pennsylvania and New Jersey. Am. compl. ¶¶ 59, 60. Given the broad reach of the Sherman Act, these allegations easily satisfy plaintiffs' pleading burden. *See Brader, 64 F.3d at 873*. As a result, plaintiffs have plausibly pleaded each element of a section 1 claim, and I will deny the motions to dismiss Count 1.

c) Count 2 — Essential Facilities Doctrine

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[6] "There are other casinos in Pennsylvania, Delaware and New Jersey .... None are considered or explained in the context of the supply and demand conditions in Plaintiffs' alleged product market definition. Nor is there any discussion of non-casino venues, such as Plaintiffs' current venue, that can host MMA events. Valley Forge's Mot. to Dismiss, doc. no 47-1, 20.

[7] Defendants also complain that plaintiffs do not consider boxing events in their market definition. I disagree. Plaintiffs' product definition is broad enough to include boxing matches, i.e. a combat sport which features two competitors fighting inside an enclosed area. Am. compl ¶ 66.

"[U]nder the 'essential facilities' or 'bottleneck' doctrine, 'a business or group of businesses which controls a scarce facility has an obligation to give competitors reasonable access to it.'" *Cyber Promotions, Inc. v. Am. Online, Inc., 948 F. Supp. 456, 460 (E.D. Pa. 1996)* (citing *Byars v. Bluff City News Co., Inc., 609 F.2d 843, 846, 856 & n. 34 (6th Cir.1980)*). The elements of an essential facility claim are: "(1) control of the essential facility by a monopolist; (2) the competitor's inability practically or reasonably to duplicate the essential facility; (3) denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility." *Ideal Dairy Farms, Inc. v. John Labatt, Ltd., 90 F.3d 737, 748 (3d Cir. 1996)*.

Plaintiffs cannot plead a viable essential facilities claim against the casinos because plaintiffs have not alleged that the **[*20]** casinos are monopolists. The proper defendant for an essential facility claim is the *monopolist* in control of the facility. *See* *Id., at 748*; *Cyber Promotions, Inc., 948 F. Supp. at 460* (dismissing essential facility claim because defendant was not a monopolist). I am unaware of any caselaw supporting essential facility liability against the *facility* which is controlled by a third party monopolist. CFFC, not the casinos, is the "monopolist" in the plaintiffs' view. There is no allegation that either casino is attempting to monopolize the MMA market in the Philadelphia region. Rather, the casino venues are being controlled by the alleged monopolist. Plaintiffs have not stated an essential facilities claim against the casinos, and I will dismiss Count 2 with prejudice as to the moving defendants.

d) Count 3 — Attempt to Monopolize

Section 2 of the Sherman Act provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States ... shall be deemed guilty of a felony...." *15 U.S.C. § 2*.[8] The Clayton Act authorizes private individuals who are injured by conduct proscribed by the Sherman Act to bring a civil action against the monopolist **[*21]** causing them harm. *15 U.S.C. § 15 (a)*. A plaintiff suing a monopolist under *section 2* of the Sherman Act may assert three distinct causes of action: 1.) monopolization, 2.) attempted monopolization, and 3.) conspiracy to monopolize. *See* *Carpet Grp. Int'l v. Oriental Rug Importers Ass'n, Inc., 256 F. Supp. 2d 249, 282 (D.N.J. 2003)*. While Count 3 is labeled attempt to monopolize, the allegations sound more in conspiracy to monopolize. Either way, the amended complaint fails to state a claim.[9]

The elements of an attempted monopolization claim are: "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly **[*22]** power." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*. A claim of conspiracy to monopolize may arise from conduct demonstrating: "(1) an agreement to monopolize; (2) an overt act in furtherance of the conspiracy; (3) a specific intent to monopolize; and (4) a causal connection between the conspiracy and the injury alleged." *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 602 F.3d 237, 253 (3d Cir. 2010)* (citing *United States v. Yellow Cab Co., 332 U.S. 218, 224-25, 67 S. Ct. 1560, 91 L. Ed. 2010 (1947)*; *Am. Tobacco Co. v. United States, 328 U.S. 781, 788, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946))*.

Count 3 is not a plausible statement of either claim against the casinos. Instead, the pleadings are almost entirely directed at CFFC. The paragraphs detail how CFFC has gained control of the casino venues in order to restrict trade in the MMA event market. Am. compl. ¶¶ 88, 89. The plaintiffs believe that CFFC's control over the casino venues has allowed CFFC to achieve dominant market power. Id. ¶¶ 91, 92. They then jump to the conclusion that, "Both Casino defendants ... have participated in this very same monopoly conspiracy being carried out by [CFFC]."

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[8] To the extent plaintiffs assert an attempt to monopolize claim under *section 1* of the Sherman Act, the claim is dismissed. An attempt to monopolize claim only exists under *section 2* of the Sherman Act.

[9] To the extent plaintiffs plead a conspiracy to attempt to monopolize, such a claim does not exist. IIIB, Phillip Areeda and Herbert Hoovenkamp, ***Antitrust Law*** ¶809 (3d ed. 2006) ("An occasional complaint has alleged that the defendant conspired to attempt to monopolize. Courts have correctly held that *§2* states no such offense. Nor is there any need for it, because the combination that offends antitrust policy violates *§ 1*.")

This conclusory statement is insufficient to plead a cause of action for either attempted monopolization or conspiracy to monopolize. *See* [Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 602 F.3d 237, 255 (3d Cir. 2010)] ("But to survive dismissal it does not suffice to simply say that the defendants had knowledge; there must be factual allegations to plausibly suggest as much." (citing *Twombly, 550 U.S. at 564*)).

Further, the attempted monopolization **[*23]** and conspiracy claims have a common element of specific intent to monopolize. This specific intent requirement sets *section 2* claims apart from section 1 claims. *See* *Int'l Distribution Centers, Inc. v. Walsh Trucking Co., 812 F.2d 786, 793 (2d Cir. 1987)* ("Unlike the proof required to establish a conspiracy to monopolize under *section 2*, a specific intent to create a monopoly is not required under *section 1*."). In support of their section 1 claim, plaintiffs do not allege that the casinos intended to monopolize the MMA event market. Rather, allegations of CFFC's intent to restrict trade in the relevant market combined with the casinos' conscious commitment to the conspiracy were sufficient with respect to Count 1. *See* *Petruzzi's IGA Supermarkets, Inc., 998 F.2d at 1243*. Different standards apply to *section 2* claims; plaintiffs must plead specific intent as to each party. *See* *Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1460 n. 35 (11th Cir. 1991)* ("[W]e analyze the conduct of [each defendant] separately to determine whether [plaintiff] has a valid *section 2* claim for relief."). There are no allegations regarding the casinos' intent to monopolize the MMA market. Because the casinos do not compete in the MMA event market, there is no basis to infer they acted with specific intent to monopolize. I will dismiss Count 3 with prejudice.

e) Count 4 — Tortious Interference with Contract

Plaintiffs allege Mr. Freedman tortiously interfered with plaintiffs' **[*24]** prospective contractual relations with Valley Forge. Am. compl. ¶¶ 33, 34, 95; Pls.' Resp. Br., doc. no. 61, 29. To prevail on this claim, plaintiffs must show: "(1) a prospective contractual relation; (2) the purpose or intent to harm the plaintiff by preventing the relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual damage resulting from the defendant's conduct." *Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 184 (3d Cir. 1997)* (citing *Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 412 A.2d 466, 471 (1979)*).[10] Pennsylvania imposes a two year statute of limitations for this cause of action. *42 Pa.C.S. § 5524(3)*; *Torchia v. Keystone Foods Corp., 431 Pa. Super. 83, 635 A.2d 1082, 1086 (1993)*.

As Vice President of Player Development at Valley Forge, Mr. Freedman cannot possibly be liable for interfering with plaintiffs' prospective contract with Valley Forge. "Essential to the right of recovery on this theory is the existence of a contractual relationship between the plaintiff and a party other than the defendant." *Nix v. Temple Univ. of Com. Sys. of Higher Educ., 408 Pa. Super. 369, 596 A.2d 1132, 1137 (Pa. Super. 1991)* (citations omitted). Agency principals dictate that a corporate officer acts on behalf of the corporation; therefore, a corporate officer is not a third party when acting in **[*26]** his official capacity. *Nix, 596 A.2d at 1137* (citing *Menefee v. Columbia Broadcasting System, Inc., 458 Pa. 46, 329 A.2d 216 (Pa. 1974)*). If Mr. Freedman frustrated plaintiffs' efforts to

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[10] I have federal question jurisdiction over plaintiffs' antitrust claims. *28 U.S.C. § 1331*. I have supplemental jurisdiction over the pendent state law claims. *§ 1367*. When considering the motions to dismiss the state law counts, I must apply Pennsylvania law as interpreted by the Pennsylvania Supreme Court. *McKenna v. Pac. Rail Serv., 32 F.3d 820, 825 (3d Cir. 1994)* (citing *Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)*) ("In so doing, we are not free to impose our own view of what state law should be; we are to apply state law as interpreted by the state's highest court."); *Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 701 (3d Cir. 1993)* (applying Erie to claims under supplemental jurisdiction). When the Supreme Court has not spoken on the issue, I refer to the decisions of the Pennsylvania Superior Court and Pennsylvania Commonwealth **[*25]** Court to predict how the high court would rule. *See* *McKenna, 32 F.3d at 825*. Additionally, I will follow Third Circuit's interpretation of Pennsylvania law unless it is inconsistent with a subsequent holding of the state Supreme or intermediate appellate courts. *Aceto v. Zurich Ins. Co., 440 F.2d 1320, 1322 (3d Cir. 1971)* ("No one may properly rely upon what we have held as more than persuasive on a question of Pennsylvania law so long as the Pennsylvania Supreme Court has not ruled upon that legal question."); *Largoza v. Gen. Elec. Co., 538 F. Supp. 1164, 1166 (E.D. Pa. 1982)* ("[I]t is axiomatic that this court is bound by a decision of the Third Circuit predicating Pennsylvania law unless the state supreme court issues a contrary decision or it appears from a subsequent decision of the appellate courts that the court of appeals erred.").

host an MMA event at Valley Forge, that was a business decision which does not support a claim for tortious interference.

In response, plaintiffs argue that Mr. Freedman was employed by Harrah's when he interfered with plaintiffs' prospective contract with Valley Forge. Plaintiffs submit a series of emails exchanged between Mr. Kerwin and Jennifer Woodeshick, National Sales Manager for Valley Forge Casino. The emails are dated between November 29, 2011 and December 5, 2011 and discuss scheduling an MMA fight in early April 2012. This conduct happened more than two years before the complaint was filed on September 8, 2014. Any claims arising from the April 2012 events would be time barred. I will dismiss Count 4 as to Mr. Freedman with prejudice.

f) Mr. Kerwin's continued representation of Xtreme Caged Combat

Mr. Kerwin is proceeding in this action *pro se*. Although he is not an attorney, Mr. Kerwin also attempted to represent XCC. By orders dated October 27, 2014 and November 10, 2014, I instructed XCC to retain counsel. Mr. Rushie entered his appearance on behalf of XCC on December 4, 2014, the same day **[*27]** as the Rule 16 conference in this matter. Nonetheless, a filing error suggests that Mr. Rushie's representation is a sham.

Valley Forge moved to dismiss the original complaint on September 29, 2014. Doc. no. 4. As the parties discussed at the Rule 16 conference, plaintiffs chose not to respond to Valley Forge's motion and instead filed an amended complaint. Doc. no. 45. Valley Forge renewed its objections and filed a motion to dismiss the amended complaint on January 2, 2015. Doc. no. 47. Valley Forge served the January 2, 2015 motion on Mr. Rushie by the court's electronic filing system. Since Mr. Kerwin is not an ECF user, Valley Forge attempted to serve the January 2, 2015 motion on Mr. Kerwin by email. However, defense counsel inadvertently emailed Mr. Kerwin the September 29, 2014 motion.

Plaintiffs filed a joint brief in opposition which erroneously responded to the September 29, 2014 motion. Doc. no. 50. This is evident because plaintiffs' brief did not address several key arguments which were made in the January 2, 2015 motion, but were not raised in the September 29, 2014 motion. The parties recognized the error, doc. no. 68 at 13-14, and I granted plaintiffs leave to file a supplemental **[*28]** brief to address the missing arguments. Doc. no. 66.

Mr. Rushie could not have prepared a response to a motion which he never received. Valley Forge served Mr. Rushie with the January 2 motion. Mr. Rushie did not enter his appearance until December 4, 2014, so he did not receive original service of the September 29, 2014 motion. Furthermore, the plaintiffs decided to file an amended complaint on December 4, 2014, so there is no reason to believe that Mr. Rushie ever reviewed the September 29, 2014 motion. Mr. Kerwin, on the other hand, received the September 29, 2014 motion twice. Mr. Kerwin only obtained the January 2, 2015 motion after filing plaintiffs' brief in opposition. Since plaintiffs' opposition responded to the September 29, 2014 motion, which Mr. Kerwin possessed, and not the January 2, 2015 motion, which was served on Mr. Rushie, I can only conclude that Mr. Kerwin prepared the opposition brief on behalf of both plaintiffs without the assistance of Mr. Rushie.

Plaintiffs' conduct is in direct contravention of my orders dated October 27, 2014 and November 10, 2014. Mr. Kerwin's continued representation of XCC is a continuing violation of the rules of procedure and my orders. **[*29]** These continuing violations could lead to a finding of contempt. Appropriate sanctions for contempt may include dismissal of the complaint with prejudice.

IV Conclusion

For the foregoing reasons, I will grant defendants' motions to dismiss in part. Counts 2, 3, and 4 are dismissed with prejudice as to Chester Downs and Marina LLC, Valley Forge Casino Resort and Joel Freedman. The motions are otherwise denied.

An appropriate order follows.

ORDER

AND NOW, this 29th day of May 2015, upon consideration of defendant Valley Forge Casino Resort's motion to dismiss (doc. no. 47), defendant Chester Downs and Marina, LLC's motion to dismiss (doc. no. 48, 53), defendant Joel Freedman's joinder in Valley Forge's motion to dismiss (doc. no. 56), plaintiffs' responses thereto (doc. nos. 50, 61), and upon further consideration of defendants' replies (doc. nos. 63, 67), and plaintiffs' surreplies (doc. nos. 64, 68, 69), **IT IS HEREBY ORDERED** that:

1. Defendants' motions to dismiss (doc. nos. 47, 48, 53) are **GRANTED in part**.

2. Counts 2, 3 and 4 are **DISMISSED WITH PREJUDICE** as to Valley Forge Casino Resort, Chester Downs & Marina LLC and Joel Freedman.

3. The motions to dismiss are otherwise **DENIED**.

4. Ryan **[*30]** Kerwin's legal representation of XCC is a continuing violation of the rules of procedure and the previous orders of this court. These continuing violations could lead to a finding of contempt. Appropriate sanctions for contempt may include dismissal of the complaint with prejudice.

BY THE COURT

/s/ L. Felipe Restrepo for

LAWRENCE F. STENGEL, J.

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In re Auto Body Shop Antitrust Litig.

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

June 3, 2015, Decided; June 3, 2015, Filed

MDL Case No: 6:14-md-2557-Orl-31TBS; Individual Case Nos: 6:14-cv-6006-Orl-31TBS; 6:14-cv-6007-Orl-31TBS; 6:14-cv-6009-Orl-31TBS; 6:14-cv-6010-Orl-31TBS; 6:14-cv-6011-Orl-31TBS; 6:14-cv-6012-Orl-31TBS; 6:14-cv-6013-Orl-31TBS; 6:14-cv-6014-Orl-31TBS; 6:14-cv-6015-Orl-31TBS; 6:14-cv-6008-Orl-31TBS; 6:14-cv-6020-Orl-31TBS; 6:14-cv-6018-Orl-31TBS; 6:14-cv-6019-Orl-31TBS; 6:15-cv-6022-Orl-31TBS

Reporter

2015 U.S. Dist. LEXIS 114292 *; 2015 WL 4887882

IN RE: AUTO BODY SHOP ANTITRUST LITIGATION

Subsequent History: Adopted by, in part, Modified by, in part, Dismissed by, in part, Dismissed without prejudice by, in part *A & E Auto Body, Inc. v. 21st Century Centennial Ins. Co., 120 F. Supp. 3d 1352, 2015 U.S. Dist. LEXIS 114291 (M.D. Fla., Aug. 17, 2015)*

Magistrate's recommendation at *Legends Collision Ctr., LLC v. State Farm Mut. Auto. Ins. Co., 2016 U.S. Dist. LEXIS 178129 (M.D. Fla., Apr. 29, 2016)*

Prior History: *In re Auto Body Shop Antitrust Litig., 37 F. Supp. 3d 1388, 2014 U.S. Dist. LEXIS 110156 (J.P.M.L., Aug. 8, 2014)*

Core Terms

unjust enrichment, cases, Plaintiffs', insurance company, repairs, unfair, quantum meruit, courts, allegations, cause of action, restitution, recommend, tortious interference, insureds, Defendants', claimants, quasi-estoppel, practices, parties, enrichment, circumstances, complaints, quantum meruit claim, motion to dismiss, consumer, conspiracy, deceptive, amended complaint, violations, customers

LexisNexis® Headnotes

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

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

HN1[] **Judges, Discretionary Powers**

District courts have very limited discretion to deny leave to amend when a plaintiff has had only one chance to plead its claims.

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

HN2[] Complaints, Requirements for Complaint

Fed. R. Civ. P. (8)(a)(2) requires a short and plain statement of a claim showing that the pleader is entitled to relief so as to give the defendant fair notice of what the claim is and the grounds upon which it rests.

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

Civil Procedure > Pleading & Practice > Motion Practice > General Overview

HN3[] Motions to Dismiss, Failure to State Claim

A *Fed. R. Civ. P. 12(b)(6)* motion to dismiss for failure to state a claim merely tests the sufficiency of the complaint; it does not decide the merits of the case. In ruling on a motion to dismiss, a court must accept the factual allegations as true and construe the complaint in the light most favorable to the plaintiff. The court must limit its consideration to the pleadings and any exhibits attached to the pleadings. *Fed. R. Civ. P. 10(c)*, *12(d)*.

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

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

HN4[] Motions to Dismiss, Failure to State Claim

A plaintiff must provide sufficient factual allegations to raise its right to relief above the speculative level, and to indicate the presence of the required elements. Conclusory allegations, unwarranted factual deductions, or legal conclusions masquerading as facts will not prevent dismissal.

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

HN5[] Complaints, Requirements for Complaint

While a complaint need not contain detailed factual allegations *Fed. R Civ. P. 8(a)(2)* demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement. Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not show—that the plaintiff is entitled to relief. *Fed. R. Civ. P. 8(a)(2)*.

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

HN6[] Heightened Pleading Requirements, Fraud Claims

Allegations of fraud are subject to heightened pleading requirements. *Fed. R. Civ. P. 9(b)* states: In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Ordinarily, a plaintiff cannot satisfy the requirements of *Rule 9(b)* through group pleading.

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

HN7[] Complaints, Requirements for Complaint

The use of group pleading may also result in a complaint failing to meet the more lenient pleading standard in Fed. R. Civ. P. 8(a). Rule 8(a) is violated where a plaintiff, by engaging in group pleading, fails to give each defendant fair notice of the claims against it.

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

HN8[] Complaints, Requirements for Complaint

A complaint which lumps all defendants together and does not sufficiently allege who did what to whom, fails to state a claim for relief because it does not provide fair notice of the grounds for the claims made against a particular defendant. By lumping all the defendants together in each claim and providing no factual basis to distinguish their conduct, a plaintiff's complaint fails to satisfy the minimum standard of Fed. R. Civ. P. 8.

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

HN9[] Complaints, Requirements for Complaint

There are cases in which group pleading may be acceptable. When multiple defendants are named in a complaint, the allegations can be and usually are to be read in such a way that each defendant is having the allegation made about him individually.

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

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

HN10[] Motions to Dismiss, Failure to State Claim

A district court's task in determining whether a complaint states a claim upon which relief can be granted is a context-specific task that requires the court to draw on its judicial experience and common sense. But, at a minimum, plaintiffs should allege sufficient facts specific to each defendant, or at least each corporate family of defendants, to tie that defendant to the wrongdoing alleged.

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

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

HN11[] State Regulation, Claims

Michigan, New Jersey, Washington, and Virginia statutes that are similar to the Sherman Act, 15 U.S.C.S. § 1, in that they all outlaw contracts, combinations, and conspiracies in restraint of trade or commerce. To recover under these state statutes, a plaintiff must plausibly plead the existence of an agreement between the defendants.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN12[] **Types of Contracts, Quasi Contracts**

As a measure of recovery, quantum meruit means the reasonable value of the work performed or the services rendered by a plaintiff for a defendant. In addition to being a measure of recovery, quantum meruit is often pleaded as a cause of action. Courts and parties have used the term "quantum meruit," along with its lesser-known cousin "quantum valebant," to refer to two types of cases: those where the parties entered an implied-in-fact contract but did not agree on a specific price, and those where the parties had no contract but it would be unjust for the defendant to retain the benefit on the plaintiff's performance without paying for it. In cases that fall into the latter category, courts often invoke the legal fiction that the parties' conduct creates a "contract implied in law" or "quasi-contract." Liability in these cases is not in reality contractual in character, but is imposed in the absence of any agreement to prevent unjust enrichment.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Trade Secrets Law > ... > Remedies > Damages > Unjust Enrichment

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN13[] **Types of Contracts, Quasi Contracts**

The unjust enrichment principle is the basis not only for "quasi-contract" but also for a host of equitable remedies including constructive trust, subrogation, and equitable lien. There is a trend in American law to affiliate various restitutionary remedies, such as quasi contracts and constructive trusts with a common animating principle of unjust enrichment.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN14[] **Types of Contracts, Quasi Contracts**

Some states retain subsidiary actions like "quantum meruit" or "quasi contract" and require a plaintiff to plead and prove long-established elements of those actions. Courts refer to the action as being for "unjust enrichment." These states typically require a showing that the plaintiff "conferred" a benefit on the defendant, and that the defendant "appreciated" or "knew" of the benefit and "accepted" or "retained" it. They may also focus on whether the plaintiff reasonably expected to receive compensation for the benefit. An unjust enrichment claim requires a showing that: (1) the plaintiff conferred a benefit on the defendant; (2) the defendant appreciated the benefit; and (3) the defendant accepted and retained the benefit under inequitable and/or unjust circumstances. For a party to prevail under the theory of unjust enrichment, they must prove three elements: (1) benefit conferred upon defendant at plaintiff's expense; (2) a resulting appreciation of benefit by defendant; and (3) inequitable retention of benefit without payment for its value. It is well-settled that, to establish unjust enrichment, a plaintiff must establish that (1) the plaintiff conferred a benefit on the defendant; (2) the defendant was aware that it had received a benefit; and (3) under the circumstances, it would be unjust for the defendant to retain the benefit without paying for it.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Contracts Law > Remedies > Restitution

HN15[] Types of Contracts, Quasi Contracts

In California, Michigan, Washington, and Illinois, a plaintiff can establish an unjust enrichment claim by meeting the requirements of section 1 of the Restatements: the defendant was enriched at the plaintiff's expense and the enrichment was unjust. Under the law of restitution, an individual may be required to make restitution if he is unjustly enriched at the expense of another. To sustain an unjust enrichment claim, a plaintiff must demonstrate (1) the defendant's receipt of a benefit from the plaintiff and (2) an inequity to plaintiff as a result. A claim of unjust enrichment requires proof of three elements—(1) the defendant receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Contracts Law > Remedies > Restitution

HN16[] Types of Contracts, Quasi Contracts

There is no cause of action in California for unjust enrichment. Unjust enrichment is synonymous with restitution. This distinction appears to be one of form, rather than function. In any event, there is no particular form of pleading necessary to invoke the doctrine of restitution.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN17[] Types of Contracts, Quasi Contracts

Although the elements of an unjust enrichment claim under Michigan law require that the defendant receive a benefit from the plaintiff, Michigan does not require that the benefit be conferred directly by the plaintiff to the defendant.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN18[] Types of Contracts, Quasi Contracts

Courts in Pennsylvania have advanced both formulations for unjust enrichment. Where one party has been unjustly enriched at the expense of another, he is required to make restitution to the other. In order to recover, there must be both (1) an enrichment, and (2) an injustice resulting if recovery for the enrichment is denied. The elements necessary to prove unjust enrichment are: (1) benefits conferred on defendant by plaintiff; (2) appreciation of such benefits by defendant; and (3) acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN19[] Types of Contracts, Quasi Contracts

Under New Jersey law, an unjust enrichment plaintiff must show not only that the defendant was enriched and that the enrichment was unjust, but also that the plaintiff expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN20[] Types of Contracts, Quasi Contracts

To recover for unjust enrichment, a plaintiff must show at least that the defendant obtained a benefit at the plaintiff's expense and that the defendant's enrichment was "unjust" or "inequitable."

Contracts Law > Remedies > Restitution

HN21[] Remedies, Restitution

There is no liability in restitution for an unrequested benefit voluntarily conferred, unless the circumstances of the transaction justify the claimant's intervention in the absence of contract. Instead of proposing a bargain, the restitution claimant first confers a benefit, then seeks payment for its value. When this manner of proceeding is unacceptable—as it usually is, if the claimant neglects an opportunity to contract—a claim based on unjust enrichment will be denied. Because contract is strongly preferred over restitution as a basis for private obligations, restitution is not usually available to a claimant who has neglected a suitable opportunity to make a contract beforehand.

Contracts Law > Remedies > Restitution

HN22[] Remedies, Restitution

One who voluntarily confers a benefit on another, which is to say in the absence of a contractual obligation to do so, ordinarily has no legal claim to be compensated. If the parties could have contracted but did not, the plaintiff generally is denied recovery of the non-cash benefit. Courts in the applicable states deny restitution to those who confer benefits officiously. Moreover, some states require unjust enrichment plaintiffs to show a reasonable expectation of compensation, a requirement that effectively denies recovery to the officious intermeddler.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN23[] Types of Contracts, Quasi Contracts

A plaintiff is not entitled to employ the legal fiction of quasi-contract to substitute one promisor or debtor for another.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Contracts Law > Remedies > Restitution

HN24[] **Types of Contracts, Quasi Contracts**

Section 25 of the Restatement (Third) of Restitution and Unjust Enrichment provides that a plaintiff will have a restitution claim against a defendant who benefits from the plaintiff's uncompensated performance of an obligation to a third party only when: (a) liability in restitution will not subject the defendant to a forced exchange; (b) absent liability in restitution, the plaintiff will not be compensated for the performance and the defendant will retain the benefit of it without paying for it; and (c) restitution will not subject the defendant to an obligation from which the parties understood the defendant would be free. Comment b to this section explains that the second requirement will not be satisfied where the plaintiff sues the defendant for restitution instead of pursuing a viable contract claim against the other party to the plaintiff's contract.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN25[] **Types of Contracts, Quasi Contracts**

Quantum meruit rests upon the equitable principle that a party is not allowed to enrich itself at the expense of another. A quasi-contract, or constructive contract, is based on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN26[] **Types of Contracts, Quasi Contracts**

Michigan and Pennsylvania courts have held that claims for "quantum meruit" and "unjust enrichment" are the same.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN27[] **Types of Contracts, Quasi Contracts**

The Alabama Supreme Court has explained that recovery on a theory of quantum meruit arises when a contract is implied. The court identified two kinds of implied contracts—those implied in fact and those implied in law. Contracts implied in law are more properly described as quasi or constructive contracts where the law fictitiously supplies the promise to pay for the labor or services of another] to prevent a manifest injustice or unjust enrichment, etc. Thus, "quantum meruit" under Alabama law is used to refer both to situations involving contracts implied in fact, which are based on agreement, and contracts implied in law, which are not based on agreements but are legal fictions imposed to prevent unjust enrichment.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN28[] **Types of Contracts, Quasi Contracts**

Illinois courts recognize a cause of action for quantum meruit where (1) the plaintiff performed a service to benefit the defendant, (2) the plaintiff did not perform this service gratuitously, (3) the defendant accepted this service, and (4) no contract existed to prescribe payment for this service. The plaintiff must show that it would be unjust for the defendant to retain any benefit without paying.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN29[] **Types of Contracts, Quasi Contracts**

New Jersey courts recognize a cause of action for quantum meruit that is at least nominally (though probably not functionally) different from a claim for unjust enrichment. To recover under a theory of quantum meruit, a plaintiff must establish: (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services. In addition, the expectation of compensation must be reasonable.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN30[] **Types of Contracts, Quasi Contracts**

In Kentucky, to recover on a quantum meruit theory, a plaintiff must show (1) that it rendered valuable services or furnished materials; (2) to the defendant; (3) that the services were rendered with defendant's knowledge or consent, or alternatively that the defendant accepted or received them; (4) under such circumstances as reasonably notified the defendant that the plaintiff expected to be paid by the defendant. Recovery under quantum meruit does not depend upon the conferment or retention of a benefit, whereas unjust enrichment requires that a benefit be conferred and retained.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Contracts Implied in Fact

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

HN31[] **Types of Contracts, Contracts Implied in Fact**

Under Washington law, a claim for quantum meruit is unquestionably different than one for unjust enrichment. Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it, while quantum meruit is the method of recovering the reasonable value of services provided under a contract implied in fact. The elements of a contract implied in fact are: (1) the defendant requests work, (2) the plaintiff expects payment for the work, and (3) the defendant knows or should know the plaintiff expects payment for the work.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN32[] **Types of Contracts, Quasi Contracts**

Courts in Virginia have listed two different sets of elements for "quantum meruit" claims. Under the first line of authority, the elements of a quantum meruit claim largely parallel those of an unjust enrichment claim. The elements of a quantum meruit claim are listed as (1) a benefit conferred by the plaintiff on the defendant; (2) the defendant's knowledge of the conferring of the benefit; and (3) acceptance or retention of the benefit under circumstances that would make it unjust to retain it without paying for its value. The second line of authority recognizes quantum meruit claims where the plaintiff has shown that (i) he rendered valuable services, (ii) to the defendant, (iii) which were requested and accepted by the defendant, (iv) under such circumstances as reasonably notified the defendant that the claimant, in performing the work, expected to be paid by the defendant.

Torts > ... > Business Relationships > Intentional Interference > Elements

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

HN33[] **Intentional Interference, Elements**

The elements of claims for tortious interference with business relationships or prospective advantage differ slightly from state to state, but in virtually every state a plaintiff must show that the defendant intentionally and improperly interfered with the plaintiff's prospective contractual relationship and that as a result, the plaintiff failed to reap the benefits of the prospective relationship. Arizona, Michigan, California, Illinois, Washington, Virginia, and Missouri include as an additional element that the defendant must know of the prospective relationship.

Torts > ... > Business Relationships > Intentional Interference > Elements

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

HN34[] **Intentional Interference, Elements**

Arizona, Pennsylvania, New Jersey, and Kentucky use the multi-factor test outlined in the *Restatement (Second) of Torts § 767* to determine when interference for a tortious interference with business and/or contract claim is improper. The factors are: (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties. Michigan, Oregon, and Washington allow recovery where the defendant has an improper purpose or employs improper means. The improper interference can be shown by either proving (1) the intentional doing of an act wrongful per se, or (2) the intentional doing of a lawful act with malice and unjustified in law for the purpose of invading plaintiffs' contractual right or business relationship. Virginia allows recovery for tortious interference with prospective contracts only when improper methods are used.

Torts > ... > Business Relationships > Intentional Interference > Elements

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

HN35[] **Intentional Interference, Elements**

Other states cast the impropriety requirement for a tortious interference with business and/or contract claim in terms of "justification" or "privilege." Some Pennsylvania courts list the absence of privilege or justification on the part of the defendant among the elements for the tort, although it appears that a showing of impropriety based on the Restatement factors would satisfy this element.

Torts > ... > Contracts > Intentional Interference > Defenses

Torts > ... > Business Relationships > Intentional Interference > Defenses

HN36[] **Intentional Interference, Defenses**

Under Illinois law, for a tortious interference with business and/or contract claim, a party acting to enhance its own business interests has a privilege to act in a way that may harm the business expectancy of others. In Illinois, the privilege to interfere is greater with respect to prospective contracts than it is with respect to existing contracts. Still, acts taken pursuant to the privilege must take a socially sanctioned form. Under Illinois law, privilege is an affirmative defense. By contrast, Missouri requires a plaintiff to produce substantial evidence to establish lack of justification, a burden which is met if the defendant acted with an improper purpose and sought not only to further his own interests, but in doing so employs improper means.

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

Torts > ... > Business Relationships > Intentional Interference > Elements

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

HN37[] **Motions to Dismiss, Failure to State Claim**

Under Pennsylvania, Illinois and Missouri law, well-pleaded allegations that the defendants made false and defamatory statements about the plaintiffs' businesses should be sufficient to survive a motion to dismiss for a tortious interference with business and/or contract claim.

Torts > ... > Business Relationships > Intentional Interference > Elements

HN38[] **Intentional Interference, Elements**

For a tortious interference with business claim, Alabama uniquely includes an element that the defendant be "a stranger" to the interfered-with relationship. One is not a stranger to the contract just because one is not a party to the contract. If the parties are part of a comprehensive interwoven set of contracts, they are not strangers.

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

HN39[] **Intentional Interference, Elements**

Arizona, Michigan, and Illinois allow a plaintiff to state a claim for tortious interference with prospective contractual relationships based on interference with an identifiable class of customers. By contrast, Washington expressly requires specific, identifiable third parties, and Virginia requires a specific, existing contract or business expectancy. Alabama law requires the existence of a protectable business relationship, and there is no support in Alabama case law for identifiable class tortious interference claims.

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

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

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

HN40[] **Motions to Dismiss, Failure to State Claim**

Absent well pleaded allegations that the defendants joined in a conspiracy or acted in concert, liability for tortious interference must be established on an individualized basis. A general allegation that some unidentified defendants—or all defendants—interfered with some unidentified customers of some unnamed plaintiff does not satisfy the requirements of *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)*.

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

Torts > Business Torts > Commercial Interference > General Overview

Torts > Intentional Torts > Defamation > General Overview

HN41[] **Heightened Pleading Requirements, Fraud Claims**

Fed. R. Civ. P. 9(b) provides: In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Fraud requires more than misrepresentation, and *Rule 9(b)* will not be triggered simply because the plaintiff alleges that the defendant said something that was not true. Falsity is also a required element in defamation cases, but defamation need not be pleaded with particularity under *Rule 9(b)*. Similarly, tortious interference claims based on a defendant's allegedly false and disparaging statements to prospective customers are not subject to *Rule 9(b)*.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

HN42[] **Consideration, Promissory Estoppel**

"Promissory estoppel" is the term many courts use to describe the doctrine that is recognized in the *Restatement (Second) of Contracts § 90(1)*. *Restatement § 90* provides that a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. Every state with the exception of Virginia, has recognized a cause of action under the circumstances described in *§ 90*.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

Governments > Courts > Authority to Adjudicate

HN43[] Federal & State Interrelationships, Erie Doctrine

Federal courts deciding state-law claims are supposed to apply state law, not rewrite it. While a federal court must be sensitive to the doctrinal trends of the jurisdiction whose law it applies, it is beyond the authority of a federal court in such circumstances to create entirely new causes of action.

Torts > Intentional Torts > Conversion > Elements

HN44[] Conversion, Elements

California only recognizes claims for the conversion of money when there is a specific, identifiable sum involved. Under California law, a generalized claim for money is not actionable as conversion.

Business & Corporate Compliance > ... > Industry Practices > Unfair Business Practices > Private Causes of Action

Governments > Legislation > Statutory Remedies & Rights

Business & Corporate Compliance > ... > Industry Practices > Unfair Business Practices > Unfair Trade Practices Acts

HN45[] Unfair Business Practices, Private Causes of Action

The Pennsylvania Unfair Insurance Practices Act, *40 Pa. Stat. § 1171.1 et seq.*, does not afford a private right of action.

Governments > Legislation > Statutory Remedies & Rights

HN46[] Legislation, Statutory Remedies & Rights

Illinois does not recognize a free-ranging private right of action to enforce statutory duties; rather, the existence of such a claim depends on the particular statute.

Governments > Legislation > Statutory Remedies & Rights

HN47[] Legislation, Statutory Remedies & Rights

As a general matter, when a law expressly provides for a cause of action, courts will not imply one in order to expand the legislature's chosen remedial scheme.

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

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

HN48[] State Regulation, Claims

The elements of an Illinois Consumer Fraud Act (ICFA), *815 ILCS 505/2*, claim are: (1) a deceptive or unfair act or practice by the defendant; (2) made during a course of conduct involving trade or commerce; (3) made with the intent that the plaintiff rely on the deceptive or unfair practice; (4) causation; and (5) damages. The ICFA proscribes two kinds of practices: those that are "unfair," and those that are "deceptive." A plaintiff may state a claim under the ICFA's unfair" prong without alleging that the conduct is deceptive. The Illinois Uniform Deceptive Trade Practices Act, *815 ILCS 510/2*, by contrast, only outlaws "deceptive" practices, that is, practices that create a likelihood of confusion or misunderstanding. *815 ILCS 510/2(a)*.

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

HN49[] State Regulation, Claims

The California Unfair Competition Law proscribes "unfair competition," which is defined as any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising. *Cal. Bus. & Prof. Code § 17200*.

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

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

HN50[] State Regulation, Claims

The California Unfair Competition Law (UCL) allows any person who has suffered injury in fact and has lost money or property as a result of unfair competition, to bring a civil action against the person or persons engaged in the unfair competition. *Cal. Bus. & Prof. Code §§ 17203*, *17204*. A court may enjoin violations of the UCL and order restitution. *Cal. Bus. & Prof. Code § 17203*. But, the UCL "s not an all-purpose substitute for a tort or contract action, and does not allow a plaintiff to recover monetary damages.

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

HN51[] Trade Practices & Unfair Competition, State Regulation

Under the California Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200*, statutory unfair competition may take one of three forms: unlawful, unfair, or fraudulent.

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

Business & Corporate Compliance > ... > Industry Practices > Unfair Business Practices > Unfair Trade Practices Acts

HN52[] Trade Practices & Unfair Competition, State Regulation

By proscribing any unlawful business act or practice, the California Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200*, borrows rules set out in other laws and makes violations of those rules independently actionable. An unlawful act is one forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made. As a general matter, a UCL claim may be based on a violation of a law that itself provides no private right of action. However, UCL claims may not rest exclusively on violations of the California Unfair Insurance Practices Act, *Cal. Ins. Code. § 790 et seq.*

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

HN53[] **Trade Practices & Unfair Competition, State Regulation**

Even if an act or practice is not prohibited by another statute, it may still qualify as "unfair competition" under the "unfair" or "fraudulent" prongs of the California Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200*. In permitting the restraining of all unfair business practices, the UCL undeniably establishes only a wide standard to guide the courts of equity. Given the creative nature of the scheming mind, the legislature evidently concluded that a less inclusive standard would not be adequate. While the scope of this provision is sweeping, it is not unlimited, and courts may not simply impose their own notions of the day as to what is fair or unfair.

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

HN54[] **Trade Practices & Unfair Competition, State Regulation**

When a plaintiff who claims to have suffered injury from a direct competitor's "unfair" act or practice invokes *Cal. Bus. & Prof. Code § 17200*, the word "unfair" in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

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

HN55[] **Trade Practices & Unfair Competition, State Regulation**

The Oregon Unfair Trade Practices Act (OUTPA) does not expressly limit private claims to consumers, and no Oregon court has addressed whether a plaintiff must be a consumer to have standing under OUTPA. However, the United States District Court for the District of Oregon has held in a number of cases that only "consumers" have standing under OUTPA. Most of these cases have construed the word "person" in OUTPA's civil remedy provision, *Or. Rev. Stat. § 646.638(1)* to mean "consumer." The U.S. District Court for the Middle District of Florida is not persuaded by the reasoning in these decisions for interpreting "person" to mean "consumer."

Governments > Legislation > Interpretation

HN56[] **Legislation, Interpretation**

In interpreting a statute, the court's task is to discern the intent of the legislature.

Governments > Legislation > Interpretation

HN57[] Legislation, Interpretation

The Oregon Supreme Court has cautioned against adopting narrowing constructions of statutorily defined terms based on conclusions about the statute's purpose drawn from legislative history.

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

HN58[] Deceptive & Unfair Trade Practices, State Regulation

The Washington Consumer Protection Act (CPA), *Wash. Rev. Code § 19.86.020*, declares unlawful all unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. Any person who is injured in his or her business or property by a violation of *Wash. Rev. Code § 19.86.020* may bring a civil action for an injunction or damages. *Wash. Rev. Code § 19.86.090*. To prevail in a private CPA action a plaintiff must establish five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) causation.

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

HN59[] Deceptive & Unfair Trade Practices, State Regulation

A plaintiff may establish the first two elements of a Washington Consumer Protection Act, *Wash. Rev. Code § 19.86.020*, claim in one of two ways: first, by showing that (1) the act or practice has a capacity to deceive a substantial portion of the public and (2) has occurred in the conduct of any trade or commerce, or second, by showing that the defendant engaged in an act that the Washington legislature has defined to be a per se unfair trade practice.

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

Torts > ... > Commercial Interference > Business Relationships > General Overview

HN60[] Deceptive & Unfair Trade Practices, State Regulation

As with tortious interference, liability under the Washington Consumer Protection Act, *Wash. Rev. Code § 19.86.020*, for the sort of conduct proscribed in *Wash. Admin. Code § 284-30-390* must be established on an individualized basis.

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

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

HN61[] Amendment of Pleadings, Leave of Court

District courts can and should require a litigant who has filed an improper shotgun pleading to replead.

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For Collision Concepts of Delray, LLC, 6:14-cv-310, FLMD, Plaintiff (6:14-md-02557-GAP-TBS): Alan Brent Geohagan, LEAD ATTORNEY, A. Brent Geohagan, PA, Lakeland, FL; Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur **[*3]** Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Scottie McPherson, Tucker H. Byrd & Associates, PA; Tucker H. Byrd, Tucker H. Byrd & Associates, PA.

For Elite Euro Cars Collision Services, Inc., 6:14-cv-310, FLMD, Plaintiff (6:14-md-02557-GAP-TBS): Alan Brent Geohagan, LEAD ATTORNEY, A. Brent Geohagan, PA, Lakeland, FL; Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Scottie McPherson, Tucker H. Byrd & Associates, PA; Tucker H. Byrd, Tucker H. Byrd & Associates, PA.

For Express Paint & Body, 6:14-cv-310, FLMD, Plaintiff (6:14-md-02557-GAP-TBS): Alan Brent Geohagan, LEAD ATTORNEY, A. Brent Geohagan, PA, Lakeland, FL; Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Scottie McPherson, Tucker H. Byrd & Associates, PA; Tucker H. Byrd, Tucker H. Byrd & Associates, **[*4]** PA.

For Gunder's Auto Center, Inc., 6:14-cv-310, FLMD, Plaintiff (6:14-md-02557-GAP-TBS): Alan Brent Geohagan, LEAD ATTORNEY, A. Brent Geohagan, PA, Lakeland, FL; Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Scottie McPherson, Tucker H. Byrd & Associates, PA; Tucker H. Byrd, Tucker H. Byrd & Associates, PA.

For Justice Collision, LLC, 6:14-cv-310, FLMD, Plaintiff (6:14-md-02557-GAP-TBS): Alan Brent Geohagan, LEAD ATTORNEY, A. Brent Geohagan, PA, Lakeland, FL; Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Scottie McPherson, Tucker H. Byrd & Associates, PA; Tucker H. Byrd, Tucker H. Byrd & Associates, PA.

For Marshalls Body Masters, LLC, 6:14-cv-310, FLMD, Plaintiff (6:14-md-02557-GAP-TBS): Alan Brent Geohagan, LEAD ATTORNEY, A. Brent Geohagan, PA, Lakeland, FL; Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, **[*5]** Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Scottie McPherson, Tucker H. Byrd & Associates, PA; Tucker H. Byrd, Tucker H. Byrd & Associates, PA.

For Old Dixie Paint and Body LLC, 6:14-cv-310, FLMD, Plaintiff (6:14-md-02557-GAP-TBS): Alan Brent Geohagan, LEAD ATTORNEY, A. Brent Geohagan, PA, Lakeland, FL; Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Scottie McPherson, Tucker H. Byrd & Associates, PA; Tucker H. Byrd, Tucker H. Byrd & Associates, PA.

For Orlando Auto Body, Inc., 6:14-cv-310, FLMD, Plaintiff (6:14-md-02557-GAP-TBS): Alan Brent Geohagan, LEAD ATTORNEY, A. Brent Geohagan, PA, Lakeland, FL; Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Scottie McPherson, Tucker H. Byrd & Associates, PA; Tucker H. Byrd, Tucker H. Byrd & Associates, PA.

For Quality **[*6]** Collision Repair, Inc., 6:14-cv-310, FLMD, Plaintiff (6:14-md-02557-GAP-TBS): Alan Brent Geohagan, LEAD ATTORNEY, A. Brent Geohagan, PA, Lakeland, FL; Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Scottie McPherson, Tucker H. Byrd & Associates, PA; Tucker H. Byrd, Tucker H. Byrd & Associates, PA.

For Stewart Agency, Inc., 6:14-cv-310, FLMD, doing business as Earl Stewart Toyota of North Palm Beach, Plaintiff (6:14-md-02557-GAP-TBS): Alan Brent Geohagan, LEAD ATTORNEY, A. Brent Geohagan, PA, Lakeland, FL; Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Scottie McPherson, Tucker H. Byrd & Associates, PA; Tucker H. Byrd, Tucker H. Byrd & Associates, PA.

For Stewart Auto Repair, Inc., 6:14-cv-310, FLMD, Plaintiff (6:14-md-02557-GAP-TBS): Alan Brent Geohagan, LEAD ATTORNEY, A. Brent Geohagan, PA, Lakeland, FL; Allison **[*7]** P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Scottie McPherson, Tucker H. Byrd & Associates, PA; Tucker H. Byrd, Tucker H. Byrd & Associates, PA.

For Stewart Collision Group, LLC, 6:14-cv-310, FLMD, doing business as Bernie's Body Shop, Plaintiff (6:14-md-02557-GAP-TBS): Alan Brent Geohagan, LEAD ATTORNEY, A. Brent Geohagan, PA, Lakeland, FL; Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Boca's Courtesy Collision, Inc., 6:14-cv-310, FLMD, Plaintiff (6:14-md-02557-GAP-TBS): Alan Brent Geohagan, LEAD ATTORNEY, A. Brent Geohagan, PA, Lakeland, FL; Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Tucker H. Byrd, Tucker H. Byrd & Associates, PA.

For C&C Automotive, Inc., 6:14-cv-310, FLMD, Plaintiff (6:14-md-02557-GAP-TBS): **[*8]** Alan Brent Geohagan, LEAD ATTORNEY, A. Brent Geohagan, PA, Lakeland, FL; Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Scottie McPherson, Tucker H. Byrd & Associates, PA; Tucker H. Byrd, Tucker H. Byrd & Associates, PA.

For Hauser of the Palm Beaches, Inc., 6:14-cv-310, FLMD, Plaintiff (6:14-md-02557-GAP-TBS): Alan Brent Geohagan, LEAD ATTORNEY, A. Brent Geohagan, PA, Lakeland, FL; Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Scottie McPherson, Tucker H. Byrd & Associates, PA; Tucker H. Byrd, Tucker H. Byrd & Associates, PA.

For North Bay Auto Service, Inc., 6:14-cv-310, FLMD, Plaintiff (6:14-md-02557-GAP-TBS): Alan Brent Geohagan, LEAD ATTORNEY, A. Brent Geohagan, PA, Lakeland, FL; Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John **[*9]** Arthur Eaves, Attorney at

Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Scottie McPherson, Tucker H. Byrd & Associates, PA; Tucker H. Byrd, Tucker H. Byrd & Associates, PA.

For Capitol Body Shop, Inc., 6:14-cv-6000, MSSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Ellie F. Turnage, LEAD ATTORNEY, Dockins, Turnage & Banks, PLLC, Jackson, MS; Halbert Edwin Dockins, Jr., LEAD ATTORNEY, Dockins Turnage & Banks PLLC, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Automotive Alignment & Body Service, Inc., 6:14-cv-6000, MSSD, doing business as Pitalo Auto Paint & Body, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Ellie F. Turnage, LEAD ATTORNEY, Dockins, Turnage & Banks, PLLC, Jackson, MS; Halbert Edwin Dockins, Jr., LEAD ATTORNEY, Dockins Turnage & Banks PLLC, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John **[*10]** Arthur Eaves, Attorneys at Law, Jackson, MS.

For Alexander Body Shop, LLC, 6:14-cv-6000, MSSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Ellie F. Turnage, LEAD ATTORNEY, Dockins, Turnage & Banks, PLLC, Jackson, MS; Halbert Edwin Dockins, Jr., LEAD ATTORNEY, Dockins Turnage & Banks PLLC, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Bill Fowler's Bodyworks, LLC, 6:14-cv-6000, MSSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Ellie F. Turnage, LEAD ATTORNEY, Dockins, Turnage & Banks, PLLC, Jackson, MS; Halbert Edwin Dockins, Jr., LEAD ATTORNEY, Dockins Turnage & Banks PLLC, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Bolden Body Shop, LLC, 6:14-cv-6000, MSSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Ellie F. Turnage, **[*11]** LEAD ATTORNEY, Dockins, Turnage & Banks, PLLC, Jackson, MS; Halbert Edwin Dockins, Jr., LEAD ATTORNEY, Dockins Turnage & Banks PLLC, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Capitol Body Shop of Ridgeland, Inc., 6:14-cv-6000, MSSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Ellie F. Turnage, LEAD ATTORNEY, Dockins, Turnage & Banks, PLLC, Jackson, MS; Halbert Edwin Dockins, Jr., LEAD ATTORNEY, Dockins Turnage & Banks PLLC, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Capitol Body Shop of Byram, Inc., 6:14-cv-6000, MSSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Ellie F. Turnage, LEAD ATTORNEY, Dockins, Turnage & Banks, PLLC, Jackson, MS; Halbert Edwin Dockins, Jr., LEAD ATTORNEY, Dockins Turnage & Banks PLLC, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney **[*12]** at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Clinton Body Shop, Inc., 6:14-cv-6000, MSSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Ellie F. Turnage, LEAD ATTORNEY, Dockins, Turnage & Banks, PLLC, Jackson, MS; Halbert Edwin Dockins, Jr., LEAD ATTORNEY, Dockins Turnage & Banks PLLC, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Clinton Body Shop of Richland, Inc., 6:14-cv-6000, MSSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Ellie F. Turnage, LEAD ATTORNEY, Dockins, Turnage & Banks, PLLC, Jackson, MS; Halbert Edwin Dockins, Jr., LEAD ATTORNEY, Dockins Turnage & Banks PLLC, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Crystal Car Care, Inc., 6:14-cv-6000, MSSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, **[*13]** Attorneys at Law, Jackson, MS; Ellie F. Turnage, LEAD ATTORNEY, Dockins, Turnage & Banks, PLLC, Jackson, MS; Halbert Edwin Dockins, Jr., LEAD ATTORNEY, Dockins Turnage & Banks PLLC, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Hypercolor Automotive Reconditioning, Inc., 6:14-cv-6000, MSSD, doing business as Autoworks Collision Specialist, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Ellie F. Turnage, LEAD ATTORNEY, Dockins, Turnage & Banks, PLLC, Jackson, MS; Halbert Edwin Dockins, Jr., LEAD ATTORNEY, Dockins Turnage & Banks PLLC, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Lakeshore Body Shop, Inc., 6:14-cv-6000, MSSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Ellie F. Turnage, LEAD ATTORNEY, Dockins, Turnage & Banks, PLLC, Jackson, MS; Halbert Edwin Dockins, Jr., LEAD ATTORNEY, Dockins **[*14]** Turnage & Banks PLLC, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Patriot Auto Body, LLC, 6:14-cv-6000, MSSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Ellie F. Turnage, LEAD ATTORNEY, Dockins, Turnage & Banks, PLLC, Jackson, MS; Halbert Edwin Dockins, Jr., LEAD ATTORNEY, Dockins Turnage & Banks PLLC, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Porter's Body Shop, Inc., 6:14-cv-6000, MSSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Ellie F. Turnage, LEAD ATTORNEY, Dockins, Turnage & Banks, PLLC, Jackson, MS; Halbert Edwin Dockins, Jr., LEAD ATTORNEY, Dockins Turnage & Banks PLLC, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Protouch Collision, LLC, 6:14-cv-6000, **[*15]** MSSD, doing business as Boler-Phillips Body Shop, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Ellie F. Turnage, LEAD ATTORNEY, Dockins, Turnage & Banks, PLLC, Jackson, MS; Halbert Edwin Dockins, Jr., LEAD ATTORNEY, Dockins Turnage & Banks PLLC, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Ridgeland Body Shop, Inc., 6:14-cv-6000, MSSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Ellie F. Turnage, LEAD ATTORNEY, Dockins, Turnage & Banks, PLLC, Jackson, MS; Halbert Edwin Dockins, Jr., LEAD ATTORNEY, Dockins Turnage & Banks PLLC, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Roy Rogers Body Shop, Inc., 6:14-cv-6000, MSSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Ellie F. Turnage, LEAD ATTORNEY, Dockins, Turnage & Banks, **[*16]** PLLC, Jackson, MS; Halbert Edwin Dockins, Jr., LEAD ATTORNEY, Dockins Turnage & Banks PLLC, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Smith Brothers Body Shop, Inc., 6:14-cv-6000, MSSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Ellie F. Turnage, LEAD ATTORNEY, Dockins, Turnage & Banks, PLLC, Jackson, MS; Halbert Edwin Dockins, Jr., LEAD ATTORNEY, Dockins Turnage & Banks PLLC, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Smith Brothers Collision Center, Inc., 6:14-cv-6000, MSSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Ellie F. Turnage, LEAD ATTORNEY, Dockins, Turnage & Banks, PLLC, Jackson, MS; Halbert Edwin Dockins, Jr., LEAD ATTORNEY, Dockins Turnage & Banks PLLC, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, **[*17]** John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Walkers Collision Center, Inc., 6:14-cv-6000, MSSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Ellie F. Turnage, LEAD ATTORNEY, Dockins, Turnage & Banks, PLLC, Jackson, MS; Halbert Edwin Dockins, Jr., LEAD ATTORNEY, Dockins Turnage & Banks PLLC, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Mark Cook, 6:14-cv-6000, MSSD, individually and, doing business as European Coachworks, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Ellie F. Turnage, LEAD ATTORNEY, Dockins, Turnage & Banks, PLLC, Jackson, MS; Halbert Edwin Dockins, Jr., LEAD ATTORNEY, Dockins Turnage & Banks PLLC, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Barry Lewis, 6:14-cv-6000, MSSD, individually and, doing business as European Coachworks, LTD., Plaintiff (6:14-md-02557-GAP-TBS): **[*18]** Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Ellie F. Turnage, LEAD ATTORNEY, Dockins, Turnage & Banks, PLLC, Jackson, MS; Halbert Edwin Dockins, Jr., LEAD ATTORNEY, Dockins Turnage & Banks PLLC, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Canton Collision, LLC, 6:14-cv-6000, MSSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Ellie F. Turnage, LEAD ATTORNEY, Dockins, Turnage & Banks, PLLC, Jackson, MS; Halbert Edwin Dockins, Jr., LEAD ATTORNEY, Dockins Turnage & Banks PLLC, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For East McComb Body Shop, Inc., 6:14-cv-6000, MSSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Ellie F. Turnage, LEAD ATTORNEY, Dockins, Turnage & Banks, PLLC, Jackson, MS; Halbert Edwin Dockins, Jr., LEAD ATTORNEY, Dockins Turnage & Banks PLLC, **[*19]** Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For George Carr Buick Pontiac Cadillac GMC, Inc., 6:14-cv-6000, MSSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Ellie F. Turnage, LEAD ATTORNEY, Dockins, Turnage & Banks, PLLC, Jackson, MS; Halbert Edwin Dockins, Jr., LEAD ATTORNEY, Dockins Turnage & Banks PLLC, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For B & W Body Shop, Inc., 6:14-cv-6000, MSSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Ellie F. Turnage, LEAD ATTORNEY, Dockins, Turnage & Banks, PLLC, Jackson, MS; Halbert Edwin Dockins, Jr., LEAD ATTORNEY, Dockins Turnage & Banks PLLC, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Indiana Autobody Association, Inc., 6:14-cv-6001, **[*20]** INSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Mark W. Sniderman, LEAD ATTORNEY, Sniderman Nguyen LLP, Indianapolis, IN; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Gary Conns Collision Center, Inc., 6:14-cv-6001, INSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Mark W. Sniderman, LEAD ATTORNEY, Sniderman Nguyen LLP, Indianapolis, IN; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Cross Paint & Body Shop, Incorporated, 6:14-cv-6001, INSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Mark W. Sniderman, LEAD ATTORNEY, Sniderman Nguyen LLP, Indianapolis, IN; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Dan T. Gratz Body Shop, Inc., **[*21]** 6:14-cv-6001, INSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Mark W. Sniderman, LEAD ATTORNEY, Sniderman Nguyen LLP, Indianapolis, IN; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Decker & Vickery, Inc., 6:14-cv-6001, INSD terminated second amended complaint doc. #151, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Mark W. Sniderman, LEAD ATTORNEY, Sniderman Nguyen LLP, Indianapolis, IN; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Enneking's Auto Body, Inc., 6:14-cv-6001, INSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Mark W. Sniderman, LEAD ATTORNEY, Sniderman Nguyen LLP, Indianapolis, IN; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, **[*22]** MS.

For Excel Auto Body, Inc., 6:14-cv-6001, INSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Mark W. Sniderman, LEAD ATTORNEY, Sniderman Nguyen LLP, Indianapolis, IN; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Jon's Body Shop, Inc., 6:14-cv-6001, INSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Mark W. Sniderman, LEAD ATTORNEY, Sniderman Nguyen LLP, Indianapolis, IN; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Main Street Body Shop, Inc., 6:14-cv-6001, INSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Mark W. Sniderman, LEAD ATTORNEY, Sniderman Nguyen LLP, Indianapolis, IN; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Minton Body **[*23]** Shop, Inc., 6:14-cv-6001, INSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Mark W. Sniderman, LEAD ATTORNEY, Sniderman Nguyen LLP, Indianapolis, IN; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Prestige Auto Body Repair, Inc., 6:14-cv-6001, INSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Mark W. Sniderman, LEAD ATTORNEY, Sniderman Nguyen LLP, Indianapolis, IN; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Francis X. Nolan Sutherland, Asbill & Brennan, LLP.

For Kevin Wells, 6:14-cv-6001, INSD, doing business as KNJ LLC, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Mark W. Sniderman, LEAD ATTORNEY, Sniderman Nguyen LLP, Indianapolis, IN; William R. Sevier, John Arthur **[*24]** Eaves, Attorneys at Law, Jackson, MS.

For Southlake Collision Center, Inc., 6:14-cv-6001, INSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John

Arthur Eaves, Attorney at Law, Jackson, MS; Mark W. Sniderman, LEAD ATTORNEY, Sniderman Nguyen LLP, Indianapolis, IN; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Team 150, Inc., 6:14-cv-6001, INSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Mark W. Sniderman, LEAD ATTORNEY, Sniderman Nguyen LLP, Indianapolis, IN; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Carl Thurman, 6:14-cv-6001, INSD, doing business as Thurman Body Shop LLC, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Mark W. Sniderman, LEAD ATTORNEY, Sniderman Nguyen LLP, Indianapolis, IN; William R. Sevier, **[*25]** John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Brewer Body Shop, LLC, 6:14-cv-6002, TNWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Halbert Edwin Dockins, Jr., LEAD ATTORNEY, Dockins Turnage & Banks PLLC, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For AAA Collision Center, LLC, 6:14-cv-6002, TNWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Halbert Edwin Dockins, Jr., LEAD ATTORNEY, Dockins Turnage & Banks PLLC, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Icon Collision Services, LLC, 6:14-cv-6002, TNSD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Halbert Edwin Dockins, Jr., LEAD ATTORNEY, Dockins Turnage & Banks PLLC, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Alpine Straightening Systems, Inc., 6:14-cv-6003 UTD, doing business as Alpine Body Shop, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys **[*26]** at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Mark L. Shurtleff, LEAD ATTORNEY, Shurtleff Law Firm, Salt Lake City, UT; Robert Reed Pruyn, LEAD ATTORNEY, R. Reed Pruyn Attorney at Law, Salt Lake City, UT; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For A.F. Collision Repair, Inc., 6:14-cv-6003, UTD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Mark L. Shurtleff, LEAD ATTORNEY, Shurtleff Law Firm, Salt Lake City, UT; Robert Reed Pruyn, LEAD ATTORNEY, R. Reed Pruyn Attorney at Law, Salt Lake City, UT; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Perks Auto Repair, Inc., 6:14-cv-6003, UTD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Mark L. Shurtleff, LEAD ATTORNEY, Shurtleff Law Firm, Salt Lake City, UT; Robert Reed Pruyn, LEAD ATTORNEY, R. Reed Pruyn Attorney **[*27]** at Law, Salt Lake City, UT; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Jenson Enterprises, Inc., 6:14-cv-6003, UTD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Mark L. Shurtleff, LEAD ATTORNEY, Shurtleff Law Firm, Salt Lake City, UT; Robert Reed Pruyn, LEAD ATTORNEY, R. Reed Pruyn Attorney at Law, Salt Lake City, UT; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For B&B Auto Body & Paint, Inc., 6:14-cv-6003, UTD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Mark L. Shurtleff, LEAD ATTORNEY, Shurtleff Law Firm, Salt Lake City, UT; Robert Reed Pruyn, LEAD ATTORNEY, R. Reed Pruyn Attorney at Law, Salt Lake City, UT; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Lindon Collision Center L.L.C., 6:14-cv-6003, UTD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys **[*28]** at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Mark L. Shurtleff, LEAD ATTORNEY, Shurtleff Law Firm, Salt Lake City, UT; Robert Reed Pruyn, LEAD ATTORNEY, R. Reed Pruyn Attorney at Law, Salt Lake City, UT; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For J.P.'s Custom Body & Paint, Inc., 6:14-cv-6003, UTD, doing business as J.P.'s Collision Center, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Mark L. Shurtleff, LEAD ATTORNEY, Shurtleff Law Firm, Salt Lake City, UT; Robert Reed Pruyn, LEAD ATTORNEY, R. Reed Pruyn Attorney at Law, Salt Lake City, UT; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Dave's Body Shop, Inc., 6:14-cv-6003, UTD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Mark L. Shurtleff, LEAD ATTORNEY, Shurtleff Law Firm, Salt Lake City, UT; Robert Reed **[*29]** Pruyn, LEAD ATTORNEY, R. Reed Pruyn Attorney at Law, Salt Lake City, UT; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Chris Body & Paint, Inc., 6:14-cv-6003, UTD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Mark L. Shurtleff, LEAD ATTORNEY, Shurtleff Law Firm, Salt Lake City, UT; Robert Reed Pruyn, LEAD ATTORNEY, R. Reed Pruyn Attorney at Law, Salt Lake City, UT; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Parker Auto Body Inc, 6:14-cv-6004, LAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Auto Body Specialists Inc, 6:14-cv-6004, LAWD, **[*30]** Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Reynolds Body Works L L C, 6:14-cv-6004, LAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Jay Smith, doing business as Precision Collision, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, **[*31]** LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr. John Arthur Eaves, Attorney at Law.

For Bradshaws Body Shop Inc, 6:14-cv-6004, LAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Mitchell Body & Frame Shop Inc, 6:14-cv-6004, LAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin David Alexander, **[*32]** LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Advantage Collision Center Inc, 6:14-cv-6004, LAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Medines Collision Center L L C, 6:14-cv-6004, LAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William **[*33]** R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Robert Jordan, 6:14-cv-6004, LAWD, doing business as Jordans Automotive & Performance, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., John Arthur Eaves, Attorney at Law, Jackson, MS.

For Jims Body Shop L L C, 6:14-cv-6004, LAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Adams Collision L L C, 6:14-cv-6004, LAWD, Plaintiff **[*34]** (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Big Easy Collision L L C, 6:14-cv-6004, LAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For LeJeunes Body Works Inc, 6:14-cv-6004, LAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, **[*35]** Daniel P. Parker, APC, Monroe, LA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Brouillettes Paint & Body L L C, 6:14-cv-6004, LAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For C & C Automotive L L C, 6:14-cv-6004, LAWD, doing business as Miles Paint & Body, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, **[*36]** Attorney at Law, Jackson, MS; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Guillorys Collision Center Inc, 6:14-cv-6004, LAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Complete Collision Center L L C, 6:14-cv-6004, LAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, **[*37]** Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., John Arthur Eaves, Attorney at Law, Jackson, MS.

For Goldstons Auto Body L L C, 6:14-cv-6004, LAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Johnnies Paint & Body Shop Inc, 6:14-cv-6004, LAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Krystal Auto Collision **[*38]** Inc, 6:14-cv-6004, LAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Brileys Paint & Body Inc, 6:14-cv-6004, LAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Bobbys Paint & Body Shop & Auto Sales L L C, 6:14-cv-6004, LAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys **[*39]** at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Ginns Automotive Frame Shop L L C, 6:14-cv-6004, LAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Taylor Auto Body L L C, 6:14-cv-6004, LAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; John Arthur Eaves, Jr., LEAD ATTORNEY, **[*40]** John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Battery Warehouse of Natchitoches Inc, 6:14-cv-6004, LAWD, doing business as Tonys Body Shop, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Lloyd Lauw Collision Repair Center L L C, 6:14-cv-6004, LAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin David Alexander, **[*41]** LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Stubbs Inc, 6:14-cv-6004, LAWD, doing business as Expressway Paint & Body, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Country Club Auto Repair Inc, 6:14-cv-6004, LAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn **[*42]** et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Final Touch Collision Repair Inc, 6:14-cv-6004, LAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Keith's Paint & Body L L C, 6:14-cv-6004, LAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Martins Paint & Body Inc, 6:14-cv-6004, **[*43]** LAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Antleys Collision & Repair Center L L C, 6:14-cv-6004, LAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For David Profit, 6:14-cv-6004, LAWD, doing business as Daves Auto Body, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys **[*44]** at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., John Arthur Eaves, Attorney at Law, Jackson, MS.

For Dominic Landry, 6:14-cv-6004, LAWD, doing business as Dom's Paint & Body, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., John Arthur Eaves, Attorney at Law, Jackson, MS.

For Christopher Robertson, 6:14-cv-6004, LAWD, doing business as Chris Auto Body Shop, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; Kevin David **[*45]** Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., John Arthur Eaves, Attorney at Law, Jackson, MS.

For A W Staggs, 6:14-cv-6004, LAWD, doing business as Staggs Auto Body Shop, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., John Arthur Eaves, Attorney at Law, Jackson, MS.

For Edward Duchesne, 6:14-cv-6004, LAWD, doing business as Duchesne Paint & Body, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt **[*46]** Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., John Arthur Eaves, Attorney at Law, Jackson, MS.

For Kencade Enterprises Inc, 6:14-cv-6004, LAWD, doing business as Kens Kustom Body Shop, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., John Arthur Eaves, Attorney at Law, Jackson, MS.

For Eagle Auto Body & Paint Service Inc, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Daniel P. Parker, LEAD ATTORNEY, Daniel P. Parker, APC, Monroe, LA; Kevin David Alexander, LEAD ATTORNEY, Kevin D. Alexander, APLC, Monroe, LA; Michael L DuBos, LEAD ATTORNEY, Breithaupt Dunn et al, Monroe, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., John Arthur Eaves, **[*47]** Attorney at Law, Jackson, MS.

For Southern Collision & Restoration, LLC, 6:14-cv-6005, LAED, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Brian P. Marcelle, LEAD ATTORNEY, Huber, Slack, Thomas & Marcelle, New Orleans, LA; Charles Marshall Thomas, LEAD ATTORNEY, Huber, Slack, Thomas & Marcelle, New Orleans, LA; Stephen M. Huber, LEAD ATTORNEY, Huber, Slack, Thomas & Marcelle, New Orleans, LA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Haury's Auto Body, Inc., 6:14-cv-6015, WDWA, doing business as Haury's Lake City Collision, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Joseph W. Moore, LEAD ATTORNEY, Olive|Bearb Law Group PLLC, Seattle, WA; Paul Michael Veillon, LEAD ATTORNEY, Galileo Law, PLLC, Seattle, WA; Timothy Aurelien Bearb, LEAD ATTORNEY, Olive|Bearb Law Group PLLC, Seattle, WA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., John Arthur Eaves, Attorney at Law, Jackson, MS.

For Paramount Centre, Inc., 6:14-cv-6015, WDWA, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. **[*48]** Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Joseph W. Moore, LEAD ATTORNEY, Olive|Bearb Law Group PLLC, Seattle, WA; Paul Michael Veillon, LEAD ATTORNEY, Galileo Law, PLLC, Seattle, WA; Timothy Aurelien Bearb, LEAD ATTORNEY, Olive|Bearb Law Group PLLC, Seattle, WA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Eurotech Bodywerkes, Inc., 6:14-cv-6015, WDWA, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Joseph W. Moore, LEAD ATTORNEY, Olive|Bearb Law Group PLLC, Seattle, WA; Paul Michael Veillon, LEAD ATTORNEY, Galileo Law, PLLC, Seattle, WA; Timothy Aurelien Bearb, LEAD ATTORNEY, Olive|Bearb Law Group PLLC, Seattle, WA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Collision Masters, LLC, 6:14-cv-6015, WDWA, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Joseph W. Moore, LEAD ATTORNEY, Olive|Bearb Law Group PLLC, Seattle, WA; Paul Michael Veillon, LEAD ATTORNEY, Galileo Law, PLLC, Seattle, WA; Timothy Aurelien Bearb, LEAD ATTORNEY, Olive|Bearb Law Group PLLC, Seattle, WA; **[*49]** William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Prostar Collision, LLC, 6:14-cv-6015, WDWA, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Joseph W. Moore, LEAD ATTORNEY, Olive|Bearb Law Group PLLC, Seattle, WA; Paul Michael Veillon, LEAD ATTORNEY, Galileo Law, PLLC, Seattle, WA; Timothy Aurelien Bearb, LEAD ATTORNEY, Olive|Bearb Law Group PLLC, Seattle, WA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Center Collision, LLC, 6:14-cv-6015, WDWA, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Joseph W. Moore, LEAD ATTORNEY, Olive|Bearb Law Group PLLC, Seattle, WA; Paul Michael Veillon, LEAD ATTORNEY, Galileo Law, PLLC, Seattle, WA; Timothy Aurelien Bearb, LEAD ATTORNEY, Olive|Bearb Law Group PLLC, Seattle, WA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Accurate Auto Body, Inc., 6:14-cv-6015, WDWA, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Joseph W. Moore, LEAD ATTORNEY, Olive|Bearb Law Group PLLC, **[*50]** Seattle, WA; Paul Michael Veillon, LEAD ATTORNEY, Galileo Law, PLLC, Seattle, WA; Timothy Aurelien Bearb, LEAD ATTORNEY, Olive|Bearb Law Group PLLC, Seattle, WA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Legends Collision LLC, 6:14-cv-6006, AZD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Elaine Ann Ryan, LEAD ATTORNEY, Bonnett Fairbourn Friedman & Balint PC - Phoenix, AZ, Phoenix, AZ; Eric David Zard, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; H. Sullivan Bunch, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, P.C., Signal Mountain, TN; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., John Arthur Eaves, Attorney at Law, Jackson, MS.

For Raintree Auto Body Incorporated, 6:14-cv-6006, AZD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Elaine Ann Ryan, LEAD ATTORNEY, Bonnett Fairbourn Friedman & Balint PC - Phoenix, AZ, Phoenix, AZ; Eric David Zard, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; H. Sullivan Bunch, LEAD **[*51]** ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, P.C., Signal Mountain, TN; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Jan's European Auto Body Incorporated, 6:14-cv-6006, AZD, doing business as Jan's Spectrum Collision Center, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Elaine Ann Ryan, LEAD ATTORNEY, Bonnett Fairbourn Friedman & Balint PC - Phoenix, AZ, Phoenix, AZ; Eric David Zard, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; H. Sullivan Bunch, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, P.C., Signal Mountain, TN; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Robert K Isham, 6:14-cv-6006, AZD, doing business as New Image Paint and Body Shop Inc., Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Elaine Ann Ryan, LEAD ATTORNEY, Bonnett Fairbourn Friedman & Balint PC - Phoenix, AZ, Phoenix, AZ; Eric David Zard, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; H. Sullivan Bunch, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, P.C., **[*52]** Signal Mountain, TN; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Airport Enterprises Incorporated, 6:14-cv-6006, AZD, doing business as Airport Auto Center, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Elaine Ann Ryan, LEAD ATTORNEY, Bonnett Fairbourn Friedman & Balint PC - Phoenix, AZ, Phoenix, AZ; Eric David Zard, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; H. Sullivan Bunch, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, P.C., Signal Mountain, TN; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Orlando Auto Body, Inc., 6:14-cv-6006, AZD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Elaine Ann Ryan, LEAD ATTORNEY, Bonnett Fairbourn Friedman & Balint PC - Phoenix, AZ, Phoenix, AZ; Eric David Zard, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; H. Sullivan Bunch, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, P.C., Signal Mountain, TN; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William **[*53]** R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Scottie McPherson, Tucker H. Byrd & Associates, PA; Tucker H. Byrd, Tucker H. Byrd & Associates, PA.

For H.D. Way Corporation, a Michigan corporation; 6:14-cv-6007, MIWD, doing business as Alpine Collision Center, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Andrew John Rodenhouse, LEAD ATTORNEY, Rodenhouse Kuipers, PC, Grand Rapids, MI; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Jerry's Body Shop, Inc., a Michigan corporation; 6:14-cv-6007, MIWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Andrew John Rodenhouse, LEAD ATTORNEY, Rodenhouse Kuipers, PC, Grand Rapids, MI; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Judd's Body Shop, Inc., a Michigan corporation; 6:14-cv-6007, MIWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Andrew John Rodenhouse, LEAD ATTORNEY, Rodenhouse Kuipers, PC, Grand Rapids, MI; William R. Sevier, John Arthur Eaves, Attorneys at Law, **[*54]** Jackson, MS.

For Lantagne's Auto Body, LLC, a Michigan limited liability corporation; 6:14-cv-6007, MIWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Andrew John Rodenhouse, LEAD ATTORNEY, Rodenhouse Kuipers, PC, Grand Rapids, MI; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Northville Collision, Inc., a Michigan coporation; 6:14-cv-6007, MIWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Andrew John Rodenhouse, LEAD ATTORNEY, Rodenhouse Kuipers, PC, Grand Rapids, MI; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Professional Finish, Inc., a Michigan corporation; 6:14-md-6007, MIWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Andrew John Rodenhouse, LEAD ATTORNEY, Rodenhouse Kuipers, PC, Grand Rapids, MI; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For R & R Auto Body Repair, Inc., a Michigan corporation; 6:14-cv-6007, MIWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur **[*55]** Eaves, Attorneys at Law, Jackson, MS; Andrew John Rodenhouse, LEAD ATTORNEY, Rodenhouse Kuipers, PC, Grand Rapids, MI; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Rodenhouse Body Shop, Inc., a Michigan corporation; 6:14-cv-6007, MIWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Andrew John Rodenhouse, LEAD ATTORNEY, Rodenhouse Kuipers, PC, Grand Rapids, MI; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., John Arthur Eaves, Attorney at Law, Jackson, MS.

For Bernardi & Judge Corp., 6:14-cv-6007, MIWD, doing business as Berkley Collision, Inc., Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Andrew John Rodenhouse, LEAD ATTORNEY, Rodenhouse Kuipers, PC, Grand Rapids, MI; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Clarkston Auto Body II, Inc., a Michigan corporation; 6:14-cv-6007, MIWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Andrew John Rodenhouse, LEAD ATTORNEY, Rodenhouse **[*56]** Kuipers, PC, Grand Rapids, MI; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Clarkston Auto Body, Inc., a Michigan corporation; 6:14-cv-6007, MIWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Andrew John Rodenhouse, LEAD ATTORNEY, Rodenhouse Kuipers, PC, Grand Rapids, MI; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Classic Auto Collision, Inc., a Michigan corporation; 6:14-cv-6007, MIWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Andrew John Rodenhouse, LEAD ATTORNEY, Rodenhouse Kuipers, PC, Grand Rapids, MI; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For The Only One, Inc., 6:14-cv-6009, ALND, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John William Gray, LEAD ATTORNEY, Gray, Lawrence & Jenkins, Birmingham, AL; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., John Arthur Eaves, Attorney at Law, Jackson, MS.

For Homewood Auto Body Specialists Inc, 6:14-cv-6009, **[*57]** ALND, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John William Gray, LEAD ATTORNEY, Gray, Lawrence & Jenkins, Birmingham, AL; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For McDaniel Enterprises, Inc., 6:14-cv-6009, ALND, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John William Gray, LEAD ATTORNEY, Gray, Lawrence & Jenkins, Birmingham, AL; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Hayes Auto Body, Inc., 6:14-cv-6008, PAWD; 6:14-cv-6020, PAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Kevin Raymond Lomupo, LEAD ATTORNEY, Gilardi, Oliver & Lomupo, Pittsburgh, PA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; James R. Huff, II, Sullivan, Forr, Stokan, Huff, Kormanski & Naugle.

For Juniper Auto Body, Inc., 6:14-cv-6008, PAWD, 6:14-cv-6020 PAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; James R. Huff, II, LEAD ATTORNEY, Sullivan, **[*58]** Forr, Stokan, Huff, Kormanski & Naugle, Altoona, PA; Kevin Raymond Lomupo, LEAD ATTORNEY, Gilardi, Oliver & Lomupo, Pittsburgh, PA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Kilkeary's Auto Body, Inc., 6:14-cv-6008, PAWD; 6:14-cv-6020, PAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; James R. Huff, II, LEAD ATTORNEY, Sullivan, Forr, Stokan, Huff, Kormanski & Naugle, Altoona, PA; Kevin Raymond Lomupo, LEAD ATTORNEY, Gilardi, Oliver & Lomupo, Pittsburgh, PA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For L.I.P. Collision, Inc., 6:14-cv-6008, PAWD, 6:14-cv-6020, PAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; James R. Huff, II, LEAD ATTORNEY, Sullivan, Forr, Stokan, Huff, Kormanski & Naugle, Altoona, PA; Kevin Raymond Lomupo, LEAD ATTORNEY, Gilardi, Oliver & Lomupo, Pittsburgh, PA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Nigro's Auto Body, Inc., 6:14-cv-6008, PAWD; 6:14-cv-6020, PAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John **[*59]** Arthur Eaves, Attorneys at Law, Jackson, MS; James R. Huff, II, LEAD ATTORNEY, Sullivan, Forr, Stokan, Huff, Kormanski & Naugle, Altoona, PA; Kevin Raymond Lomupo, LEAD ATTORNEY, Gilardi, Oliver & Lomupo, Pittsburgh, PA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Opeka Auto Repair Co., Inc., 6:14-cv-6008, PAWD; 6:14-cv-6020, PAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; James R. Huff, II, LEAD ATTORNEY, Sullivan, Forr, Stokan, Huff, Kormanski & Naugle, Altoona, PA; Kevin Raymond Lomupo, LEAD ATTORNEY, Gilardi, Oliver & Lomupo, Pittsburgh, PA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Professional, Inc., 6:14-cv-6008, PAWD; 6:14-cv-6020, PAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; James R. Huff, II, LEAD ATTORNEY, Sullivan, Forr, Stokan, Huff, Kormanski & Naugle, Altoona, PA; Kevin Raymond Lomupo, LEAD ATTORNEY, Gilardi, Oliver & Lomupo, Pittsburgh, PA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Total Performance Automotive, LLC, 6:14-cv-6008, PAWD; **[*60]** 6:14-cv-6020, PAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; James R. Huff, II, LEAD ATTORNEY, Sullivan, Forr, Stokan, Huff, Kormanski & Naugle, Altoona, PA; Kevin Raymond Lomupo, LEAD ATTORNEY, Gilardi, Oliver & Lomupo, Pittsburgh, PA; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Oak Mountain Body Shop LLC, 6:14-CV-6009, ALND, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John William Gray, LEAD ATTORNEY, Gray, Lawrence & Jenkins, Birmingham, AL; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Henslee Auto Body Inc, 6:14-CV-6009, ALND, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John William Gray, LEAD ATTORNEY, Gray, Lawrence & Jenkins, Birmingham, AL; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Myers Auto Collison Repair Inc, 6:14-CV-6009, ALND, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John William Gray, LEAD ATTORNEY, **[*61]** Gray, Lawrence & Jenkins, Birmingham, AL; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Pleasant Grove Collision Inc, 6:14-CV-6009, ALND, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John William Gray, LEAD ATTORNEY, Gray, Lawrence & Jenkins, Birmingham, AL; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Pacific Coast Auto Body, Inc., 6:14-cv-6010, CACD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Mark L. Shurtleff, LEAD ATTORNEY, Shurtleff Law Firm, Salt Lake City, UT; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., John Arthur Eaves, Attorney at Law, Jackson, MS.

For Campbell's Auto Body, Inc., 6:14-cv-6010, CACD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Mark L. Shurtleff, LEAD ATTORNEY, Shurtleff Law Firm, Salt Lake City, UT; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For D and M Auto Body, Inc., 6:14-cv-6010, CACD, Plaintiff (6:14-md-02557-GAP-TBS): **[*62]** Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Mark L. Shurtleff, LEAD ATTORNEY, Shurtleff Law Firm, Salt Lake City, UT; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Amato's Auto Body, Inc., 6:14-cv-6010, CACD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Mark L. Shurtleff, LEAD ATTORNEY, Shurtleff Law Firm, Salt Lake City, UT; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Kallemeyn Collision Center, Inc., 6:14-cv-6011, ILND, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Elaine Ann Ryan, LEAD ATTORNEY, Bonnett Fairbourn Friedman & Balint PC - Phoenix, AZ, Phoenix, AZ; Eric David Zard, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., John Arthur Eaves, Attorney at Law, Jackson, MS.

For Knebel Autobody Center, Inc., 6:14-cv-6011, ILND, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; **[*63]** Elaine Ann Ryan, LEAD ATTORNEY, Bonnett Fairbourn Friedman & Balint PC - Phoenix, AZ, Phoenix, AZ; Eric David Zard, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Mitchell's Motors, Inc., 6:14-cv-6011, ILND, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Elaine Ann Ryan, LEAD ATTORNEY, Bonnett Fairbourn Friedman & Balint PC - Phoenix, AZ, Phoenix, AZ; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Eric David Zard, Bonnett, Fairbourn, Friedman & Balint, PC.

For S. Danihel Collission, Inc., 6:14-cv-6011, ILND, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Elaine Ann Ryan, LEAD ATTORNEY, Bonnett Fairbourn Friedman & Balint PC - Phoenix, AZ, Phoenix, AZ; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Eric David Zard, Bonnett, Fairbourn, Friedman & Balint, PC.

For Quality Auto Painting Center of Roselle, Inc., 6:14-cv-6012, NJD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys **[*64]** at Law, Jackson, MS; Joshua S. Bauchner, LEAD ATTORNEY, Ansell Grimm & Aaron, Clifton, NJ; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., John Arthur Eaves, Attorney at Law, Jackson, MS.

For Ultimate Collision Repair, Inc., Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Joshua S. Bauchner, LEAD ATTORNEY, Ansell Grimm & Aaron, Clifton, NJ; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., John Arthur Eaves, Attorney at Law, Jackson, MS.

For Blue Island Broadway Auto Rebuilders, Inc., 6:14-cv-6011, ILND, doing business as Broadway Collision Center, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Elaine Ann Ryan, LEAD ATTORNEY, Bonnett Fairbourn Friedman & Balint PC - Phoenix, AZ, Phoenix, AZ; Eric David Zard, Bonnett, Fairbourn, Friedman & Balint, PC.

For Douglas Autobody, Inc., 6:14-cv-6011, ILND, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Elaine Ann Ryan, LEAD ATTORNEY, Bonnett Fairbourn Friedman **[*65]** & Balint PC - Phoenix, AZ, Phoenix, AZ; Eric David Zard, Bonnett, Fairbourn, Friedman & Balint, PC.

For Collision Craft Auto Body & Frame, Inc., 6:14-cv-6011, ILND, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Elaine Ann Ryan, LEAD ATTORNEY, Bonnett Fairbourn Friedman & Balint PC - Phoenix, AZ, Phoenix, AZ; Eric David Zard, Bonnett, Fairbourn, Friedman & Balint, PC.

For Leif's Auto Collision Centers, LLC, an Oregon limited liability company, 6:14-cv-6014, ORD, doing business as Leif's Auto Collision Centers, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Michael Clark Willes, LEAD ATTORNEY, Tonkon Torp LLP, Portland, OR; Paul W. Conable, LEAD ATTORNEY, Tonkon Torp LLP, Portland, OR; Steven D. Olson, LEAD ATTORNEY, Tonkon Torp LLP, Portland, OR; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For State of Louisiana, Plaintiff (6:14-md-02557-GAP-TBS): Ex Rel, James D. Buddy" Caldwell, Attorney General 6:14-cv-6017-LA Edmond Wade Shows, LEAD ATTORNEY, **[*66]** Shows, Cali, Berthelot & Walsh, LLp, Baton Rouge, LA; James David Caldwell, Sr., LEAD ATTORNEY, Louisiana Attorney Generals Office, Baton Rouge, LA; Stacie L. deBlieux, LEAD ATTORNEY, Louisiana Department of Justice, Baton Rouge, LA; Allison P. Fry, John Arthur Eaves, Attorneys at Law.

For Campbell County Auto Body, Inc., 6:14-CV-6018, EDKY, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; David A. Futscher, LEAD ATTORNEY, Parry Deering Futscher & Sparks PSC, Covington, KY; Eric David Zard, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; Van Bunch, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; John Arthur Eaves, Jr., John Arthur Eaves, Attorney at Law, Jackson, MS.

For Crawford's Auto Center, Inc., 6:14-cv-6016, NDIL, Plaintiff (6:14-md-02557-GAP-TBS): David F. Sorensen, LEAD ATTORNEY, Berger & Montague, PC, Philadelphia, PA; Jennifer Winter Sprengel, LEAD ATTORNEY, Cafferty Clobes Meriwether & Sprengel LLP, Chicago, IL; John W. Barrett, LEAD ATTORNEY, Bailey & Glasser, LLP, Charleston, WV; Steven L. Bloch, LEAD ATTORNEY, PRO HAC VICE, Bailey & Glasser, LLP, Charleston, **[*67]** WV; Patricia M. Kipnis, Bailey & Glasser, LLP, Haddonfield, NJ; Allison P. Fry, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For K & M Collision, LLC, 6:14-cv-6016, NDIL, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; David F. Sorensen, LEAD ATTORNEY, Berger & Montague, PC, Philadelphia, PA; Jennifer Winter Sprengel, LEAD ATTORNEY, Cafferty Clobes Meriwether & Sprengel LLP, Chicago, IL; John W. Barrett, LEAD ATTORNEY, Bailey & Glasser, LLP, Charleston, WV; Steven L. Bloch, LEAD ATTORNEY, PRO HAC VICE, Bailey & Glasser, LLP, Charleston, WV.

For Alliance Of Automotive Service Providers, Inc., 6:14-cv-6020 PAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Kevin Raymond Lomupo, LEAD ATTORNEY, Gilardi, Oliver & Lomupo, Pittsburgh, PA; James R. Huff, II, Sullivan, Forr, Stokan, Huff, Kormanski & Naugle; John Arthur Eaves, Jr., John Arthur Eaves, Attorney at Law, Jackson, MS.

For Main Paint & Body, Inc., Plaintiff (6:14-md-02557-GAP-TBS): On behalf of itself and all others similarly situated, 6:15-cv-6021, OHND Allison P. Fry, LEAD ATTORNEY, John Arthur **[*68]** Eaves, Attorneys at Law, Jackson, MS; Dennis A. Becker, LEAD ATTORNEY, Becker & Cade, Loveland, OH; Erica L. Eversman, LEAD ATTORNEY, Akron, OH; James B. Rosenthal, LEAD ATTORNEY, Cohen, Rosenthal & Kramer, LLP, Cleveland, OH; Jason R. Bristol, LEAD ATTORNEY, Cohen, Rosenthal & Kramer, LLP, Cleveland, OH; Joshua R. Cohen, LEAD ATTORNEY, Cohen, Rosenthal & Kramer, LLP, Cleveland, OH; Peter D. Traska, LEAD ATTORNEY, Traska Law Firm, Cleveland, OH.

For Alan's Auto Center & Leasing Corp., 6:14-cv-6020, PAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Kevin Raymond Lomupo, LEAD ATTORNEY, Gilardi, Oliver & Lomupo, Pittsburgh, PA; James R. Huff, II, Sullivan, Forr, Stokan, Huff, Kormanski & Naugle.

For Concord Auto Body, Inc, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Tonna K. Farrar, LEAD ATTORNEY, BONNETT AND FAIRBOURN, PC, Phoenix, AZ; John Arthur Eaves, Jr., John Arthur Eaves, Attorney at Law, Jackson, MS.

For Michael's Paint & Body, Inc., 6:14-cv-310, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys **[*69]** at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Scottie McPherson, Tucker H. Byrd & Associates, PA; Tucker H. Byrd, Tucker H. Byrd & Associates, PA.

For Joseph S. Kelley, 6:14-cv-6004, LAWD, doing business as Kelley Kustoms, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS.

For Keith Mazarac, 6:14-cv-6004, LAWD, doing business as Precision Body and Frame, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS.

For NAPA Collision Center of Bastrop, LLC, 6:14-cv-6004, LAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS.

For Body By Cook, Inc., 6:14-cv-6004, LAWD, Plaintiff (6:14-md-02557-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; **[*70]** John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS.

For 21st Century Centennial Insurance Company, 6:14-cv-310, FLMD; 6:14-cv-6004, LAWD; 6:14-cv-6011, ILND; 6:14-cv-6012, NJD; 6:14-cv-6013, NJD; 6:14-cv-6016, NDIL; 6019, EDVA, Defendant (6:14-md-02557-GAP-TBS): Brian Ignatius Hays, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; David L. Yohai, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Katherine Heid Harris, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; Randall Allan Hack, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; Brian J. D'Amico, Weil, Gotshal & Manges, LLP, Miami, FL.

For Acceptance Indemnity Insurance Company, 6:14-cv-310, FLMD, Defendant (6:14-md-02557-GAP-TBS): Andrew Abramovich, LEAD ATTORNEY, Boyd & Jenerette, PA, Jacksonville, FL; Glen Alan McClary, LEAD ATTORNEY, Boyd & Jenerette, P.A., Jacksonville, FL; Hal K. Litchford, LEAD ATTORNEY, Baker, **[*71]** Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Allstate Fire and Casualty Insurance Company, 6:14-cv-310, FLMD; 6:14-cv-6003, UTD; 6:14-cv-6004, LAWD; 6:14-cv-6006, AZD; 6:14-cv-6008, PAWD; 6:14-cv-6011, ILND; 6:14-cv-6014, ORD; 6:14-cv-6015, WDWA; 6:14cv6016,NDIL; 6:14-cv-6018, EDKY; 6019, VAED, 6:15-cv-6021, OHND, 6:15-cv-6022, MOED, Defendant (6:14-md-02557-GAP-TBS): Anthony C. Kaye, LEAD ATTORNEY, BALLARD SPAHR LLP (UT), SALT LAKE CITY, UT; Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Deborah C. Druley, LEAD ATTORNEY, DENTONS US LLP - ST. LOUIS, St. Louis, MO; Emily L. Wegener, LEAD ATTORNEY, BALLARD SPAHR LLP (UT), SALT LAKE CITY, UT; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Michael Murphy, LEAD ATTORNEY, Stewart Bernstiel Rebar, Blue Bell, PA; Mindy G. Barfield, LEAD ATTORNEY, Dinsmore & Shohl LLP - Lexington, Lexington, KY; Nancy S. Portney, LEAD ATTORNEY, Stewart Bernstiel Rebar & Smith, Blue Bell, PA; Richard L. Fenton, LEAD ATTORNEY, Dentons **[*72]** US LLP, Chicago, IL.

For Allstate Insurance Co., Defendant (6:14-md-02557-GAP-TBS): Anthony C. Kaye, LEAD ATTORNEY, BALLARD SPAHR LLP (UT), SALT LAKE CITY, UT; Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Deborah C. Druley, LEAD ATTORNEY, DENTONS US LLP - ST. LOUIS, St. Louis, MO; Emily L. Wegener, LEAD ATTORNEY, BALLARD SPAHR LLP (UT), SALT LAKE CITY, UT; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly E. Howard, LEAD ATTORNEY, SMITH FISHER MAAS & HOWARD, P.C., Indianapolis, IN; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Michael Murphy, LEAD ATTORNEY, Stewart Bernstiel Rebar, Blue Bell, PA; Mindy G. Barfield, LEAD ATTORNEY, Dinsmore & Shohl LLP - Lexington, Lexington, KY; Nancy S. Portney, LEAD ATTORNEY, Stewart Bernstiel Rebar & Smith, Blue Bell, PA; Rebecca Jean Maas, LEAD ATTORNEY, SMITH FISHER MAAS & HOWARD, Indianapolis, IN; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL; William C. Griffin, LEAD ATTORNEY, Currie, Johnson, Griffin & Myers, PA, Jackson, MS.

For Bristol West Insurance **[*73]** Company, 6:14-cv-310, FLMD; 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Brian Ignatius Hays, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; D. Matthew Moscon, LEAD ATTORNEY, STOEL RIVES, SALT LAKE CITY, UT; David L. Yohai, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Katherine Heid Harris, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; Lauren A. Shurman, LEAD ATTORNEY, PRO HAC VICE, Stoel Rives LLP, Salt Lake City, UT; Randall Allan Hack, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; Brian J. D'Amico, Weil, Gotshal & Manges, LLP, Miami, FL.

For Direct General Insurance Company, 6:14-cv-310, FLMD; 6:14-cv-6002, TNWD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jennifer Remy-Estorino, LEAD ATTORNEY, Kubicki Draper, Miami, FL; Peter S. Baumberger, LEAD ATTORNEY, Kubicki Draper, Miami, FL.

For Encompass **[*74]** Indemnity Company, 6:14-cv-310, FLMD; 6:14-cv-6004, LAWD; 6:14-cv-6008, PAWD; 6:14-cv-6016, ILND, 6:15-cv-6021, OHND, Defendant (6:14-md-02557-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Michael Murphy, LEAD ATTORNEY, Stewart Bernstiel Rebar, Blue Bell, PA; Nancy S. Portney, LEAD ATTORNEY, Stewart Bernstiel Rebar & Smith, Blue Bell, PA; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Esurance Property & Casualty Insurance Company, 6:14-cv-310, FLMD; 6:14-cv-6008, PAWD; 6:14-cv-6009, ALND; 6:14-cv-6011, ILND; 6:14-cv-6016, ILND; 6-14-cv-6019, VAED, 6:15-cv-6021, OHND, Defendant (6:14-md-02557-GAP-TBS): Deborah C. Druley, LEAD ATTORNEY, DENTONS US LLP - ST. LOUIS, St. Louis, MO; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, **[*75]** Dentons US LLP, Chicago, IL; Michael Murphy, LEAD ATTORNEY, Stewart Bernstiel Rebar, Blue Bell, PA; Nancy S. Portney, LEAD ATTORNEY, Stewart Bernstiel Rebar & Smith, Blue Bell, PA; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL; Bonnie Lau DENTONS US LLP.

For First Acceptance Insurance Company, Inc., 6:14-cv-310, TNMD; 6:14-cv-6009, ALND; 6:14-cv-6011, ILND, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Marc James Ayers, LEAD ATTORNEY, Bradley, Arant, Boult & Cummings, LLP, Birmingham, AL; Michael R. Pennington, LEAD ATTORNEY, Bradley, Arant, Boult & Cummings, LLP, Birmingham, AL.

For Florida Farm Bureau General Insurance Company, 6:14-cv-310, FLMD, Defendant (6:14-md-02557-GAP-TBS): A. Abidemi Oladipo, LEAD ATTORNEY, Colodny, Fass,Talenfeld, Karlinsky & Abate, PA, Ft Lauderdale, FL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Maria Elena Abate, LEAD ATTORNEY, Colodny Fass, PA, Sunrise, FL.

For Foremost Insurance Company, 6:14-cv-310, FLMD, Defendant (6:14-md-02557-GAP-TBS): David L. Yohai, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal **[*76]** & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Brian J. D'Amico, Weil, Gotshal & Manges, LLP, Miami, FL.

For Geico General Insurance Company, Defendant (6:14-md-02557-GAP-TBS): Amy F. Sorenson, LEAD ATTORNEY, Snell & Wilmer, LLP, Salt Lake City, UT; Bradford D. Box, LEAD ATTORNEY, RAINEY KIZER REVIERE & BELL, Jackson, TN; Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Debra H. Miller, LEAD ATTORNEY, MILLER & FISHER LLC, Indianapolis, IN; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Ian Matthew Fischer, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Jared C. Fields, LEAD ATTORNEY, SNELL & WILMER (UT), SALT LAKE CITY, UT; Jason H. Nash, LEAD ATTORNEY, PRO HAC VICE, Hinkhouse Williams Walsh, LLP, Chicago, IL; John Patrick Marino, LEAD ATTORNEY, Smith, Gambrell **[*77]** & Russell, LLP, Jacksonville, FL; John T. Williams, LEAD ATTORNEY, PRO HAC VICE, Hinkhouse Williams Walsh, LLP, Chicago, IL; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Keith R. Raulston, LEAD ATTORNEY, Jones Walker LLP, Jackson, MS; Lindsey R. Trowell, LEAD ATTORNEY, Smith, Gambrell & Russell, LLP, Jacksonville, FL; Mark G. Arnzen, LEAD ATTORNEY, Arnzen, Molloy, & Storm, P.S.C., Covington, KY; Neville H. Boschert, LEAD ATTORNEY, Jones Walker LLP - Jackson, Jackson, MS.

For Hartford Accident and Indemnity Company, 6:14-cv-310, FLMD; 6:14-cv-6004, LAWD; 6:14-cv-6008, PAWD; 6:14-cv-6009, ALND; 6:14-cv-6011, ILND; 6:14-cv-6014, ORD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Suzanne M. Lehner, LEAD ATTORNEY, Hamilton, Miller & Birthisel, LLP, Tampa, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Hartford Underwriters Insurance Company, 6:14-cv-310, FLMD; 6:14-cv-6008, PAWD; 6:14-cv-6009, ALND; 6:14-cv-6011, ILND; 6:14-cv-6012, NJD; 6:14-cv-6013, NJD; 6:14-cv-6014, ORD; 6:14-cv-6015, WDWA,, Defendant (6:14-md-02557-GAP-TBS): Hal K. **[*78]** Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Suzanne M. Lehner, LEAD ATTORNEY, Hamilton, Miller & Birthisel, LLP, Tampa, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Horace Mann Insurance Company, 6:14-cv-310, FLMD; 6:14-cv-6007, MIWD; 6:14-cv-6008, PAWD; 6:14-cv-6011, ILND; 6:14-cv-6014, ORD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jennifer Remy-Estorino, LEAD ATTORNEY, Kubicki Draper, Miami, FL; Marjorie M. Salazar, LEAD ATTORNEY, Lugenbuhl, Wheaton, Peck, Rankin & Hubbard, Houston, TX; Peter S. Baumberger, LEAD ATTORNEY, Kubicki Draper, Miami, FL; Seth A. Schmeeckle, LEAD ATTORNEY, Lugenbuhl, Wheaton, Peck, Rankin & Hubbard, New Orleans, LA.

For Infinity Auto Insurance Company, 6:14-cv-310, FLMD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Marc James Ayers, LEAD ATTORNEY, Bradley, Arant, Boult & Cummings, LLP, Birmingham, AL; Michael R. Pennington, LEAD ATTORNEY, Bradley, Arant, Boult & Cummings, LLP.

For Liberty Mutual **[*79]** Insurance Company, 6:14-cv-310, FLMD; 6:14-cv-6001, INSD; 6:14-cv-6004, LAWD; 6:14-cv-6006, AZD; 6:14-cv-6007, MIWD; 6:14-cv-6016, NDIL; 6:14-cv-6018, EDKY, Defendant (6:14-md-02557-GAP-TBS): Dennis F. Cantrell, LEAD ATTORNEY, CANTRELL, STRENSKI & MEHRINGER, LLP, Indianapolis, IN; Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Joseph Edward Ezzie, LEAD ATTORNEY, Baker & Hostetler, LLP, Columbus, OH; Kimberly E. Howard, LEAD ATTORNEY, SMITH FISHER MAAS & HOWARD, P.C., Indianapolis, IN; M. Scott McIntyre, LEAD ATTORNEY, Baker & Hostetler LLP - CINCINNATI, OH, Cincinnati, OH; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Michael S. Vitale, LEAD ATTORNEY, Baker & Hostetler, LLP, Orlando, FL; Salomon Laguerre, LEAD ATTORNEY, Baker & Hostetler, LLP, Orlando, FL; Trischa Snyder Chapman, LEAD ATTORNEY, Baker Hostetler Llp, Columbus, OH; William Kevin Kane, LEAD ATTORNEY, Baker Hostetler LLP, Chicago, IL.

For Mercury Insurance Company of Florida, 6:14-cv-310, FLMD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, **[*80]** Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Julius F. Parker, III, LEAD ATTORNEY, Butler Weihmuller Katz Craig LLP, Tallahassee, FL; Kathy J. Maus, LEAD ATTORNEY, Butler Pappas, LLP, Tallahassee, FL.

For MGA Insurance Company, Inc., 6:14-cv-310, FLMD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Sam A. Camardo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For National General Insurance Online, Inc., 6:14-cv-310, FLMD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Karl E. Sturge, LEAD ATTORNEY, Marlow, Connell, Abrams, Adler, Newman & Lewis, Coral Gables, FL; Rosemary B. Wilder, LEAD ATTORNEY, Marlow, Connell, Abrams, Adler, Newman & Lewis, Coral Gables, FL.

For Nationwide Insurance Company of Florida, Inc., 6:14-cv-310, FLMD, Defendant (6:14-md-02557-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, **[*81]** FL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH.

For Nationwide Mutual Insurance Company, 6:14-cv-310, FLMD; 6:14-cv-6000, MSSD; 6:14-cv-6001, INSD; 6:14-cv-6002, TNWD; 6:14-cv-6004, LAWD; 6:14-cv-6006, AZD; 6:14-cv-6008, PAWD; 6:14-cv-6009, ALND; 6:14-cv-6011, ILND;6:14-cv-6012, NJD; 6013, NJD; 6014, ORD; 6016, NDIL; 6018, EDKY; 6019, EVDA, Defendant (6:14-md-02557-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jackson H. Ables, III, LEAD ATTORNEY, Daniel, Coker, Horton, & Bell, PA, Jackson, MS; Jeffrey C. Mando, LEAD ATTORNEY, Adams, Stepner, Woltermann & Dusing, P.L.L.C., Covington, KY; Josh Goldberg, LEAD ATTORNEY, Carpenter Lipps & Leland **[*82]** LLP, Chicago, IL; Kathleen Ann DeLaney, LEAD ATTORNEY, DELANEY & DELANEY LLC, Indianapolis, IN; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH.

For Ocean Harbor Casualty Insurance Company, 6:14-cv-310, FLMD, Defendant (6:14-md-02557-GAP-TBS): Dale Lyn Friedman, LEAD ATTORNEY, Conroy Simberg Ganon Krevans Abel Lurvey Morrow & Schefer PA, Hollywood, FL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Rebecca J. Williams, LEAD ATTORNEY, Conroy Simberg Ganon Krevans Abel Lurvey Morrow & Schefer PA, Hollywood, FL.

For Old Republic Insurance Company, 6:14-cv-310, FLMD, Defendant (6:14-md-02557-GAP-TBS): Amy S. Rubin, LEAD ATTORNEY, Fox Rothschild, LLP, West Palm Beach, FL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; W Scott Mason, LEAD ATTORNEY, Fox Rothschild, **[*83]** LLP, West Palm Beach, FL.

For Safeco Insurance Company of America, 6:14-cv-310, FLMD; 6:14-cv-6003, UTD; 6:14-cv-6004, LAWD; 6:14-cv-6006, AZD; 6:14-cv-6008, PAWD;6:14-cv-6010, CACD; 6:14-cv-6014, ORD; 6:14-cv-6016, NDIL; 6:14-cv-6018, EDKY; 6:15-cv-6021, OHND, Defendant (6:14-md-02557-GAP-TBS): Carl F. Huefner, LEAD ATTORNEY, SUITTER AXLAND, SALT LAKE CITY, UT; Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jesse C Trentadue, LEAD ATTORNEY, SUITTER AXLAND, SALT LAKE CITY, UT; Joseph Edward Ezzie, LEAD ATTORNEY, Baker & Hostetler, LLP, Columbus, OH; M. Scott McIntyre, LEAD ATTORNEY, Baker & Hostetler LLP - CINCINNATI, OH, Cincinnati, OH; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Michael S. Vitale, LEAD ATTORNEY, Baker & Hostetler, LLP, Orlando, FL; Salomon Laguerre, LEAD ATTORNEY, Baker & Hostetler, LLP, Orlando, FL; Trischa Snyder Chapman, LEAD ATTORNEY, Baker Hostetler Llp, Columbus, OH; William Kevin Kane, LEAD ATTORNEY, Baker Hostetler LLP, Chicago, IL.

For Security National Insurance Company, 6:14-cv-310, FLMD, Defendant (6:14-md-02557-GAP-TBS): **[*84]** David L. Yohai, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Brian J. D'Amico, Weil, Gotshal & Manges, LLP, Miami, FL.

For Sentry Insurance, A Mutual Company, 6:14-cv-310, FLMD; 6:14-cv-6004, LAWD; 6:14-cv-6006, AZD, Defendant (6:14-md-02557-GAP-TBS): Edward Keenan Cottrell, LEAD ATTORNEY, Smith, Gambrell & Russell, LLP, Jacksonville, FL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kristen Wenger, LEAD ATTORNEY, Smith, Gambrell & Russell, LLP, Jacksonville, FL.

For State Farm Mutual Automobile Insurance Company, Defendant (6:14-md-02557-GAP-TBS): Abigayle Clary McDowell Farris, LEAD ATTORNEY, Stone, Pigman, Walther, Wittmann, LLC (New Orleans), New Orleans, LA; Alicyn Marie Freeman, LEAD ATTORNEY, Broening Oberg Woods & Wilson PC, Phoenix, AZ; Brent R. Austin, LEAD ATTORNEY, PRO HAC VICE, Eimer Stahl LLP, Chicago, IL; D Michael Reilly, **[*85]** LEAD ATTORNEY, LANE POWELL PC, SEATTLE, WA; Daniel E. Wilke, LEAD ATTORNEY, WILKE AND WILKE, P.C., St. Louis, MO; David T. Klapheke, LEAD ATTORNEY, Boehl, Stopher & Graves - Louisville KY, Louisville, KY; David Danny O'Brien, LEAD ATTORNEY, Miller Canfield Paddock & Stone PLC (Ann Arbor), Ann Arbor, MI; Elizabeth Helmer, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Emerson Barney Robinson, III, LEAD ATTORNEY, Butler Snow, LLP, Ridgeland, MS; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; James Dalton Courson, LEAD ATTORNEY, Stone, Pigman, Walther, Wittmann, LLC (New Orleans), New Orleans, LA; Jason A. Perkins, LEAD ATTORNEY, Carlton Fields Jorden Burt, PA, Orlando, FL; Jessica Walder, LEAD ATTORNEY, LANE POWELL PC, SEATTLE, WA; Johanna W. Clark, LEAD ATTORNEY, Carlton Fields Jorden Burt, PA, Orlando, FL; John B. Drummy, LEAD ATTORNEY, KIGHTLINGER & GRAY, Indianapolis, IN; Joshua Dustin Moore, LEAD ATTORNEY, Carlton Fields Jorden Burt, PA, Orlando, FL; Lesli D. Harris, LEAD ATTORNEY, Stone, Pigman, Walther, Wittmann, LLC - N.O., New Orleans, LA; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael L. McCluggage, **[*86]** LEAD ATTORNEY, Eimer Stahl LLP, Chicago, IL; Paul M. Belnap, LEAD ATTORNEY, STRONG & HANNI, SALT LAKE CITY, UT; Randall D. Noel, LEAD ATTORNEY, BUTLER SNOW LLP, Memphis, TN; Robert Thomas Aquinas Sullivan, LEAD ATTORNEY, Broening Oberg Woods & Wilson PC - Phoenix, AZ, Phoenix, AZ; Rudy Albert Englund, LEAD ATTORNEY, LANE POWELL PC, SEATTLE, WA; Thomas W. Cranmer, LEAD ATTORNEY, Miller Canfield Paddock & Stone PLC (Troy), Troy, MI; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Wayne J. Lee, LEAD ATTORNEY, Stone, Pigman, Walther, Wittmann, LLC (New Orleans), New Orleans, LA; Kevin M. Young, Tucker Ellis, LLP, Cleveland, OH.

For The Cincinnati Insurance Company, 6:14-cv-310, FLMD, Defendant (6:14-md-02557-GAP-TBS): Darryl M. Bloodworth, LEAD ATTORNEY, Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, PA, Orlando, FL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Matthew C. Blickensderfer, LEAD ATTORNEY, Frost, Brown & Todd, LLC, Cincinnati, OH; Timothy W. Sobczak, LEAD ATTORNEY, Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, PA, Orlando, FL.

For The Travelers Indemnity Company, 6:14-cv-310, FLMD; 6:14-cv-6004, **[*87]** LAWD, Defendant (6:14-md-02557-GAP-TBS): Amelia W. Koch, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Steven F. Griffith, Jr., LEAD ATTORNEY, PRO HAC VICE, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL.

For USAA Casualty Insurance Company, 6:14-cv-310, FLMD; 6:14-cv-6000, MSSD; 6:14-cv-6002, TNWD; 6:14-cv-6003, UTD; 6:14-cv-6004, LAWD; 6:14-cv-6006, AZD; 6:14-cv-6008, PAWD; 6009, ALND;6010, CACD; 6011, ILND;6012, NJD; 6013, NJD; 6014, ORD; 6015, WDWA; 6018 EDKY; 6019, EVDA; 15-6022, MOED, Defendant (6:14-md-02557-GAP-TBS): Amelia W. Koch, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Chad E. Wallace, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell, Berkowitz - Johnson City, Johnson City, TN; David Friederich Maron, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, **[*88]** PC, Jackson, MS; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Steven F. Griffith, Jr., LEAD ATTORNEY, PRO HAC VICE, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Kyle A. Diamantas, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Westfield Insurance Company, 6:14-cv-310, FLMD; 6:14-cv-6011, ILND; 6:15-cv-6021, OHND, Defendant (6:14-md-02557-GAP-TBS): Alejandro M. Miyar, LEAD ATTORNEY, Fox Rothschild LLP, Miami, FL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John J. Haggerty, LEAD ATTORNEY, PRO HAC VICE, Fox Rothschild, LLP, Warrington, PA.

For Windhaven Insurance Company, 6:14-cv-310, FLMD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jennifer Remy-Estorino, LEAD ATTORNEY, Kubicki Draper, Miami, FL; Peter S. Baumberger, LEAD ATTORNEY, Kubicki Draper, Miami, FL.

For Zurich American Insurance Company, 6:14-cv-310, FLMD; 6:14-cv-6001, INSD; 6:14-cv-6006, AZD, Defendant (6:14-md-02557-GAP-TBS): Amelia T. Rudolph, LEAD ATTORNEY, Sutherland, Asbill & Brennan, **[*89]** LLP, Atlanta, GA; Cynthia M Locke, LEAD ATTORNEY, CANTRELL STRENSKI & MEHRINGER, LLP, Indianapolis, IN; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Patricia A. Gorham, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, Atlanta, GA; Thomas William Curvin, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, Atlanta, GA.

For United Services Automobile Association, 6:14-cv-310, FLMD; 6:14-cv-6000, MSSD; 6:14-cv-6002, TNWD; 6:14-cv-6003, UTD; 6:14-cv-6006, AZD; 6:14-cv-6007, MIWD; 6:14-cv-6009, ALND;6:14-cv-6010, CACD; 6:14-cv-6012, NJ; 14cv6014, ORD; 6:14cv6015, WDWA; 6:14-cv-6018, EDKY; 6:15-cv-6022, MOED, Defendant (6:14-md-02557-GAP-TBS): Amelia W. Koch, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Chad E. Wallace, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell, Berkowitz - Johnson City, Johnson City, TN; David Friederich Maron, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Jackson, MS; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Steven F. Griffith, Jr., LEAD ATTORNEY, PRO HAC VICE, Baker, Donelson, Bearman, Caldwell & **[*90]** Berkowitz, PC, New Orleans, LA; Kyle A. Diamantas, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For 21st Century Indemnity Insurance Company, 6:14-cv-310, FLMD; 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Brian Ignatius Hays, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; David L. Yohai, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Katherine Heid Harris, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; Randall Allan Hack, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; Brian J. D'Amico, Weil, Gotshal & Manges, LLP, Miami, FL.

For Esurance Insurance Company, 6:14-cv-310, FLMD; 6:14-cv-6004, LAWD; 6:14-cv-6007, MIWD; 6:14-cv-6008, PAWD; 6:14-cv-6009, ALND; 6:14-cv-6011, ILND, 6:14-cv-6014, ORD; 6:14-cv-6016, ILND; 6:14-cv-6019, VAED, 6:15-cv-6021, OHND, Defendant (6:14-md-02557-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD **[*91]** ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Michael Murphy, LEAD ATTORNEY, Stewart Bernstiel Rebar, Blue Bell, PA; Nancy S. Portney, LEAD ATTORNEY, Stewart Bernstiel Rebar & Smith, Blue Bell, PA; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Progressive American Insurance Company, 6:14-cv-310, FLMD; 6:14-cv-6001, INSD, 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Eric C. McNamar, LEAD ATTORNEY, LEWIS WAGNER LLP, Indianapolis, IN; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; John Carl Trimble, LEAD ATTORNEY, LEWIS WAGNER LLP, Indianapolis, IN; Joseph T. Kissane, LEAD ATTORNEY, Cole, Scott & Kissane, PA, Jacksonville, FL; Kimberly E. Howard, LEAD ATTORNEY, SMITH FISHER MAAS & HOWARD, P.C., **[*92]** Indianapolis, IN; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael Brian Galibois, LEAD ATTORNEY, Chittenden, Murday & Novotny, LLC, Chicago, IL; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA; Paula Anastasia Parker, Cole, Scott & Kissane, PA, Jacksonville, FL.

For Progressive Select Insurance Company, 6:14-cv-310, FLMD; 6:14-CV-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Elizabeth Doolin, LEAD ATTORNEY, PRO HAC VICE, Chittenden, Murday & Novotny LLC, Chicago, IL; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Joseph T. Kissane, LEAD ATTORNEY, Cole, Scott & Kissane, PA, Jacksonville, FL; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael Brian Galibois, LEAD ATTORNEY, Chittenden, Murday & Novotny, LLC, Chicago, IL; Michael R. **[*93]** Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA; Paula Anastasia Parker, Cole, Scott & Kissane, PA, Jacksonville, FL.

For Florida Farm Bureau Casualty Insurance Company, 6:14-cv-310, FLMD, Defendant (6:14-md-02557-GAP-TBS): A. Abidemi Oladipo, LEAD ATTORNEY, Colodny, Fass,Talenfeld, Karlinsky & Abate, PA, Ft Lauderdale, FL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Maria Elena Abate, LEAD ATTORNEY, Colodny Fass, PA, Sunrise, FL.

For State Farm Fire and Casualty Company, Defendant (6:14-md-02557-GAP-TBS): Abigayle Clary McDowell Farris, LEAD ATTORNEY, Stone, Pigman, Walther, Wittmann, LLC (New Orleans), New Orleans, LA; Alicyn Marie Freeman, LEAD ATTORNEY, Broening Oberg Woods & Wilson PC, Phoenix, AZ; Brent R. Austin, LEAD ATTORNEY, PRO HAC VICE, Eimer Stahl LLP, Chicago, IL; D Michael Reilly, LEAD ATTORNEY, LANE POWELL PC, SEATTLE, WA; Daniel E. Wilke, LEAD ATTORNEY, WILKE AND WILKE, P.C., St. Louis, MO; David T. Klapheke, LEAD ATTORNEY, Boehl, Stopher & Graves - Louisville KY, Louisville, KY; David Danny O'Brien, LEAD ATTORNEY, Miller Canfield Paddock **[*94]** & Stone PLC (Ann Arbor), Ann Arbor, MI; Elizabeth Helmer, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Emerson Barney Robinson, III, LEAD ATTORNEY, Butler Snow, LLP, Ridgeland, MS; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; James Dalton Courson, LEAD ATTORNEY, Stone, Pigman, Walther, Wittmann, LLC (New Orleans), New Orleans, LA; Jason A. Perkins, LEAD ATTORNEY, Carlton Fields Jorden Burt, PA, Orlando, FL; Jessica Walder, LEAD ATTORNEY, LANE POWELL PC, SEATTLE, WA; John B. Drummy, LEAD ATTORNEY, KIGHTLINGER & GRAY, Indianapolis, IN; Joshua Dustin Moore, LEAD ATTORNEY, Carlton Fields Jorden Burt, PA, Orlando, FL; Lesli D. Harris, LEAD ATTORNEY, Stone, Pigman, Walther, Wittmann, LLC - N.O., New Orleans, LA; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael L. McCluggage, LEAD ATTORNEY, Eimer Stahl LLP, Chicago, IL; Randall D. Noel, LEAD ATTORNEY, BUTLER SNOW LLP, Memphis, TN; Robert Thomas Aquinas Sullivan, LEAD ATTORNEY, Broening Oberg Woods & Wilson PC - Phoenix, AZ, Phoenix, AZ; Rudy Albert Englund, LEAD ATTORNEY, LANE POWELL PC, SEATTLE, WA; Tanya Durkee Urbach, LEAD ATTORNEY, Lane Powell, PC, Portland, **[*95]** OR; Thomas W. Cranmer, LEAD ATTORNEY, Miller Canfield Paddock & Stone PLC (Troy), Troy, MI; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Wayne J. Lee, LEAD ATTORNEY, Stone, Pigman, Walther, Wittmann, LLC (New Orleans), New Orleans, LA; Johanna W. Clark, Carlton Fields Jorden Burt, PA, Orlando, FL; Kevin M. Young, Tucker Ellis, LLP, Cleveland, OH; Michael B Beers, Butler Snow LLC, Montgomery, AL.

For Progressive Gulf Insurance Company, 6:14-cv-6000, MSSD; 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Benjamin B. Morgan, LEAD ATTORNEY, Adams and Reese, LLP, Ridgeland, MS; Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Elizabeth Doolin, LEAD ATTORNEY, PRO HAC VICE, Chittenden, Murday & Novotny LLC, Chicago, IL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael Brian Galibois, LEAD ATTORNEY, Chittenden, Murday & Novotny, LLC, Chicago, IL; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, **[*96]** NY; William C. Brabec, LEAD ATTORNEY, Adams and Reese LLP, Jackson, MS; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA.

For Progressive Casualty Insurance Company, 6:14-cv-6000, MSSD; 6:14-cv-6001, INSD; 6:14-cv-6006, AZD; 6:14-cv-6008, PAWD; 6:14-cv-6014, ORD; 6:14-cv-6015, WDWA; 6:14-cv-6018, EDKY; 6:14-cv-6016, NDIL; 6:15-cv-6022, MOED, Defendant (6:14-md-02557-GAP-TBS): Benjamin B. Morgan, LEAD ATTORNEY, Adams and Reese, LLP, Ridgeland, MS; Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Elizabeth Doolin, LEAD ATTORNEY, PRO HAC VICE, Chittenden, Murday & Novotny LLC, Chicago, IL; Eric C. McNamar, LEAD ATTORNEY, LEWIS WAGNER LLP, Indianapolis, IN; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; John Carl Trimble, LEAD ATTORNEY, LEWIS WAGNER LLP, Indianapolis, IN; John W. Walters, LEAD ATTORNEY, Golden & Walters PLLC, Lexington, KY; Kimberly E. Howard, LEAD ATTORNEY, SMITH FISHER MAAS & HOWARD, P.C., Indianapolis, IN; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael Brian Galibois, **[*97]** LEAD ATTORNEY, Chittenden, Murday & Novotny, LLC, Chicago, IL; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; William C. Brabec, LEAD ATTORNEY, Adams and Reese LLP, Jackson, MS; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Allstate Property and Casualty Company, 6:14-cv-6000, MSSD; 6:14-cv-6001, INSD; 6:14-cv-6003, UTD, Defendant (6:14-md-02557-GAP-TBS): Anthony C. Kaye, LEAD ATTORNEY, BALLARD SPAHR LLP (UT), SALT LAKE CITY, UT; Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Deborah C. Druley, LEAD ATTORNEY, DENTONS US LLP - ST. LOUIS, St. Louis, MO; Emily L. Wegener, LEAD ATTORNEY, BALLARD SPAHR LLP (UT), SALT LAKE CITY, UT; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly E. Howard, LEAD ATTORNEY, SMITH FISHER MAAS & HOWARD, P.C., Indianapolis, IN; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Rebecca Jean Maas, LEAD ATTORNEY, SMITH FISHER MAAS & HOWARD, Indianapolis, IN; Richard L. Fenton, **[*98]** LEAD ATTORNEY, Dentons US LLP, Chicago, IL; William C. Griffin, LEAD ATTORNEY, Currie, Johnson, Griffin & Myers, PA, Jackson, MS.

For Nationwide Property and Casualty Insurance Company, 6:14-cv-6000, MSSD; 6:14-cv-6001, INSD; 6:14-cv-6002, TNWD; 6:14-cv-6007, MIWD; 6:14-cv-6008, PAWD; 6:14-cv-6009, ALND; 6:14-cv-6011, ILND; 6:14-cv-6016, NDIL; 6:14-cv-6019, EVDA, Defendant (6:14-md-02557-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jackson H. Ables, III, LEAD ATTORNEY, Daniel, Coker, Horton, & Bell, PA, Jackson, MS; Josh Goldberg, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Chicago, IL; Kathleen Ann DeLaney, LEAD ATTORNEY, DELANEY & DELANEY LLC, Indianapolis, IN; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; **[*99]** Peter T. Snow, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH.

For Geico Indemnity Company, Defendant (6:14-md-02557-GAP-TBS): Bradford D. Box, LEAD ATTORNEY, RAINEY KIZER REVIERE & BELL, Jackson, TN; Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Debra H. Miller, LEAD ATTORNEY, MILLER & FISHER LLC, Indianapolis, IN; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Ian Matthew Fischer, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Jason H. Nash, LEAD ATTORNEY, PRO HAC VICE, Hinkhouse Williams Walsh, LLP, Chicago, IL; John T. Williams, LEAD ATTORNEY, PRO HAC VICE, Hinkhouse Williams Walsh, LLP, Chicago, IL; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Keith R. Raulston, LEAD ATTORNEY, Jones Walker LLP, Jackson, MS; Mark G. Arnzen, LEAD ATTORNEY, Arnzen, Molloy, & Storm, P.S.C., Covington, KY; Neville H. Boschert, LEAD ATTORNEY, Jones Walker LLP - Jackson, Jackson, MS.

For Safeco Insurance Company of Illinois, 6:14-cv-6000, MSSD; 6:14-cv-6002, TNWD; 6:14-cv-6008, PAWD; 6:14-cv-6009, **[*100]** ALND; 6:14-cv-6011, ILND; 6:14-cv-6015, WDWA; 6:14-cv-6016, NDIL, 6:15cv6021, OHND; 6:15-cv-6022, MOED, Defendant (6:14-md-02557-GAP-TBS): Clifford (Ford) K. Bailey, III, LEAD ATTORNEY, Wells, Marble & Hurst, PLLC, Ridgeland, MS; Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Joseph Edward Ezzie, LEAD ATTORNEY, Baker & Hostetler, LLP, Columbus, OH; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Trischa Snyder Chapman, LEAD ATTORNEY, Baker Hostetler Llp, Columbus, OH; William Kevin Kane, LEAD ATTORNEY, Baker Hostetler LLP, Chicago, IL.

For Shelter Mutual Insurance Company, 6:14-cv-6000, MSSD; 6:14-cv-6001, INSD; 6:14-cv-6002, TNWD; 6:14-cv-6004, LAWD; 6:14-cv-6018, EDKY; 6:15-cv-6022, MOED, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Julia E. Dimick, LEAD ATTORNEY, ALERDING CASTOR HEWITT LLP, Indianapolis, IN; Robert Bradley Best, LEAD ATTORNEY, Holcomb Dunbar Watts Best Masters & Golmon, PA, Oxford, MS; Jonathan Stuart Masters, Holcomb Dunbar Watts **[*101]** Best Masters & Golmon, PA, Oxford, MS; Gregg A. Wilkes, Cook, Yancey, King & Galloway, APLC.

For Direct General Insurance Company of Mississippi, 6:14-cv-6000, MSSD, Defendant (6:14-md-02557-GAP-TBS): Charles G. Copeland, LEAD ATTORNEY, Copeland, Cook, Taylor & Bush, PA, Ridgeland, MS; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; James R. Moore, LEAD ATTORNEY, Copeland, Cook, Taylor & Bush, PA, Ridgeland, MS; Walker Reece Gibson, LEAD ATTORNEY, Copeland, Cook, Taylor & Bush, PA, Ridgeland, MS.

For Shelter General Insurance Company, 6:14-cv-6000, MSSD; 6:14-cv-6001, INSD; 6:14-cv-6002, TNWD; 6:14-cv-6004, LAWD; 6:14-cv-6018, EDKY, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Julia E. Dimick, LEAD ATTORNEY, ALERDING CASTOR HEWITT LLP, Indianapolis, IN; Robert Bradley Best, LEAD ATTORNEY, Holcomb Dunbar Watts Best Masters & Golmon, PA, Oxford, MS; Jonathan Stuart Masters, Holcomb Dunbar Watts Best Masters & Golmon, PA, Oxford, MS; Gregg A. Wilkes, Cook, Yancey, King & Galloway, APLC.

For Mississippi Farm Bureau Casualty Insurance Company, 6:14-cv-6000, **[*102]** MSSD, Defendant (6:14-md-02557-GAP-TBS): Charles G. Copeland, LEAD ATTORNEY, Copeland, Cook, Taylor & Bush, PA, Ridgeland, MS; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; James R. Moore, LEAD ATTORNEY, Copeland, Cook, Taylor & Bush, PA, Ridgeland, MS; Walker Reece Gibson, LEAD ATTORNEY, Copeland, Cook, Taylor & Bush, PA, Ridgeland, MS.

For State Farm General Insurance Company, 6:14-cv-6001, INSD; 6:14-cv-6004, LAWD; 6:14-cv-6005, LAED; 6:14-cv-6016, NDIL; 6:14-cv-6017-LA, Defendant (6:14-md-02557-GAP-TBS): Abigayle Clary McDowell Farris, LEAD ATTORNEY, Stone, Pigman, Walther, Wittmann, LLC (New Orleans), New Orleans, LA; Brent R. Austin, LEAD ATTORNEY, PRO HAC VICE, Eimer Stahl LLP, Chicago, IL; Elizabeth Helmer, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; James Dalton Courson, LEAD ATTORNEY, Stone, Pigman, Walther, Wittmann, LLC (New Orleans), New Orleans, LA; Jason A. Perkins, LEAD ATTORNEY, Carlton Fields Jorden Burt, PA, Orlando, FL; John B. Drummy, LEAD ATTORNEY, KIGHTLINGER & GRAY, Indianapolis, IN; Joshua Dustin Moore, LEAD **[*103]** ATTORNEY, Carlton Fields Jorden Burt, PA, Orlando, FL; Lesli D. Harris, LEAD ATTORNEY, Stone, Pigman, Walther, Wittmann, LLC - N.O., New Orleans, LA; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael L. McCluggage, LEAD ATTORNEY, Eimer Stahl LLP, Chicago, IL; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Wayne J. Lee, LEAD ATTORNEY, Stone, Pigman, Walther, Wittmann, LLC (New Orleans), New Orleans, LA; Johanna W. Clark, Carlton Fields Jorden Burt, PA, Orlando, FL.

For Progressive Classic Insurance Company, 6:14-cv-6001, INSD; 6:14-cv-6003, UTD; 6:14-cv-6014, ORD; 6:14-cv-6015, WDWA; 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Elizabeth Doolin, LEAD ATTORNEY, PRO HAC VICE, Chittenden, Murday & Novotny LLC, Chicago, IL; Eric C. McNamar, LEAD ATTORNEY, LEWIS WAGNER LLP, Indianapolis, IN; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; John Carl Trimble, **[*104]** LEAD ATTORNEY, LEWIS WAGNER LLP, Indianapolis, IN; Kimberly E. Howard, LEAD ATTORNEY, SMITH FISHER MAAS & HOWARD, P.C., Indianapolis, IN; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Mark L. Anderson, LEAD ATTORNEY, Black & Weintraub, PA, Miami, FL; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA.

For Progressive Direct Insurance Company, 6:14-cv-6001, INSD; 6:14-cv-6003, UTD; 6:14-cv-6008, PAWD; 6:14-CV-6009, ALND; 6:14-cv-6011, ILND; 6:14-cv-6014, ORD; 6:14-cv-6015, WDWA; 6:14-cv-6018, EDKY; 6:14-cv-6016, NDIL; 6:15-cv-6022, MOED, Defendant (6:14-md-02557-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Elizabeth Doolin, LEAD ATTORNEY, PRO HAC VICE, Chittenden, Murday & Novotny LLC, Chicago, IL; Eric C. McNamar, LEAD ATTORNEY, LEWIS WAGNER LLP, Indianapolis, IN; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; **[*105]** John Carl Trimble, LEAD ATTORNEY, LEWIS WAGNER LLP, Indianapolis, IN; John W. Walters, LEAD ATTORNEY, Golden & Walters PLLC, Lexington, KY; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Mark L. Anderson, LEAD ATTORNEY, Black & Weintraub, PA, Miami, FL; Michael Brian Galibois, LEAD ATTORNEY, Chittenden, Murday & Novotny, LLC, Chicago, IL; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA.

For Progressive Max Insurance Company, 6:14-cv-6001, INSD, 6:14-cv-6014, ORD; 6:14-cv-6015, WDWA, Defendant (6:14-md-02557-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Eric C. McNamar, LEAD ATTORNEY, LEWIS WAGNER LLP, Indianapolis, IN; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; John Carl Trimble, LEAD ATTORNEY, LEWIS WAGNER LLP, Indianapolis, IN; Kimberly E. Howard, LEAD ATTORNEY, SMITH FISHER MAAS & HOWARD, P.C., Indianapolis, IN; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New **[*106]** York, NY; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Indiana Farmers Mutual Insurance Company, 6:14-cv-6001, INSD, Defendant (6:14-md-02557-GAP-TBS): Brian Scott Jones, LEAD ATTORNEY, Bose, McKinney & Evans, LLP, Indianapolis, IN; Curtis Tre Jones, LEAD ATTORNEY, Bose, McKinney & Evans, LLP, Indianapolis, IN; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Joel T. Nagle, LEAD ATTORNEY, BOSE MCKINNEY & EVANS, LLP, Indianapolis, IN.

For Allstate Indemnity Company, 6:14-cv-6001, INSD; 6:14-cv-6002, TNWD; 6:14-cv-6004, LAWD; 6:14-cv-6006, AZD; 6:14-cv-6008, PAWD; 6:14-cv-6009, ALND; 6:14-cv-6010, CACD; 6:14-cv-6011, ILND; 6:14-cv-6014, ORD; 6:14-cv-6016, ILND; 6:14-cv-6018, KYED; 6019, VAED, 6:15-cv-6021, OHND, Defendant (6:14-md-02557-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD

ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly E. Howard, LEAD ATTORNEY, SMITH FISHER MAAS & HOWARD, P.C., Indianapolis, **[*107]** IN; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Michael Murphy, LEAD ATTORNEY, Stewart Bernstiel Rebar, Blue Bell, PA; Mindy G. Barfield, LEAD ATTORNEY, Dinsmore & Shohl LLP - Lexington, Lexington, KY; Nancy S. Portney, LEAD ATTORNEY, Stewart Bernstiel Rebar & Smith, Blue Bell, PA; Rebecca Jean Maas, LEAD ATTORNEY, SMITH FISHER MAAS & HOWARD, Indianapolis, IN; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Allstate Vehicle And Property Insurance Company, 6:14-cv-6001, INSD; 6:14-cv-6008, PAWD, Defendant (6:14-md-02557-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly E. Howard, LEAD ATTORNEY, SMITH FISHER MAAS & HOWARD, P.C., Indianapolis, IN; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Rebecca Jean Maas, LEAD ATTORNEY, SMITH FISHER MAAS & HOWARD, Indianapolis, IN; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, **[*108]** IL.

For Nationwide Assurance Company, 6:14-cv-6001, INSD; 6:14-CV-6009, ALND, Defendant (6:14-md-02557-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kathleen Ann DeLaney, LEAD ATTORNEY, DELANEY & DELANEY LLC, Indianapolis, IN; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH.

For American Family Mutual Insurance Company, 6:14-cv-6001, INSD; 6:14-cv-6003, UTD; 6:14-cv-6006, AZD; 6:14-cv-6011, ILN D; 6:14-cv-6014, ORD; 6:14-cv-6015, WDWA; 6:15-cv-6021, OHND, 6:15-cv-6022, MOED, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Heather Carson Perkins, LEAD ATTORNEY, **[*109]** Faegre Baker Daniels, LLP, Denver, CO; James L. McCrystal, Jr., LEAD ATTORNEY, Brzytwa, Quick & McCrystal, Cleveland, OH; Kathy Lynn Osborn, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN; Maralyn M. English, LEAD ATTORNEY, Snow, Christensen & Martineau, Salt Lake City, UT; Michael Sean McCarthy, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Denver, CO; Nathan F. Studeny, LEAD ATTORNEY, Brzytwa, Quick & McCrystal, Cleveland, OH; Ryan Michael Hurley, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN; Sarah Jenkins, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN.

For Zurich American Insurance Company of Illinois, 6:14-cv-6001, INSD; 6:14-cv-6014, ORD, Defendant (6:14-md-02557-GAP-TBS): Amelia T. Rudolph, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, Atlanta, GA; Cynthia M Locke, LEAD ATTORNEY, CANTRELL STRENSKI & MEHRINGER, LLP, Indianapolis, IN; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Patricia A. Gorham, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, Atlanta, GA; Thomas William Curvin, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, Atlanta, GA.

For Tennessee Farmers Mutual Insurance Company, **[*110]** 6:14-cv-6002, TNWD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Progressive Hawaii Insurance Corporation, 6:14-cv-6002, TNWD, Defendant (6:14-md-02557-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, Sutherland, Asbill & Brennan, LLP, New York, NY; Jeffrey S. Cashdan King & Spalding, LLP Kymberly Kochis, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Liberty Mutual Fire Insurance Company, 6:14-cv-6002, TNWD; 6:14-cv-6003, UTD; 6:14-cv-6004, LAWD; 6:14-cv-6009, ALND; 6:14-cv-6010, CACD; 6:14-cv-6011, ILND; 6:14-cv-6012, NJD; 6:14-cv-6013, NJD; 6:14-cv-6014, ORD; 6015 WDWA; 6016, NDI;6018, EDKY; 15cv6021, OHND; 15-6022, MOED;, Defendant (6:14-md-02557-GAP-TBS): Carl F. Huefner, LEAD ATTORNEY, SUITTER AXLAND, SALT LAKE CITY, UT; Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal **[*111]** K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jesse C Trentadue, LEAD ATTORNEY, SUITTER AXLAND, SALT LAKE CITY, UT; Joseph Edward Ezzie, LEAD ATTORNEY, Baker & Hostetler, LLP, Columbus, OH; M. Scott McIntyre, LEAD ATTORNEY, Baker & Hostetler LLP - CINCINNATI, OH, Cincinnati, OH; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Trischa Snyder Chapman, LEAD ATTORNEY, Baker Hostetler Llp, Columbus, OH; William Kevin Kane, LEAD ATTORNEY, Baker Hostetler LLP, Chicago, IL.

For Travelers Property Casualty Insurance Company, 6:14-cv-6002, TNWD; 6:14-cv-6008, PAWD; 6:14-CV-6009, ALND; 6:14-CV-6019, EDVA, Defendant (6:14-md-02557-GAP-TBS): Gordon A. Coffee, LEAD ATTORNEY, Winston & Strawn LLP, Washington, DC; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Norman K. Beck, Winston & Strawn, LLP, Chicago, IL.

For Travelers Indemnity Company of America, 6:14-cv-6002, TNWD; 6:14-cv-6004, LAWD, Defendant (6:14-md-02557-GAP-TBS): Hal **[*112]** K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Norman K. Beck, Winston & Strawn, LLP, Chicago, IL.

For Hartford Fire Insurance Company, 6:14-cv-6002, TNWD; 6:14-cv-6004, LAWD; 6:14-cv-6008, PAWD; 6:14-cv-6009, ALND; 6:14-cv-6011, ILND; 6:14-cv-6012, NJD; 6:14-cv-6013, NJD; 6:14-cv-6014, ORD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT; Jeffrey E. Nicoson, Leitner, Williams, Dooley & Napolitan, PLLC, Memphis, TN; Ronald L. Harper, LEITNER WILLIAMS DOOLEY & NAPOLITAN-Memphis, Memphis, TN.

For Hartford Casualty Insurance Company, 6:14-cv-6002, TNWD; 6:14-cv-6004, LAWD; 6:14-cv-6006, AZD; 6:14-cv-6007, MIWD; 6:14-cv-6008, PAWD; 6:14-cv-6009, ALND; 6:14-cv-6011, ILND; 6:14-cv-6014, ORD; 6:14-cv-6015, WDWA,, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, **[*113]** FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT; Jeffrey E. Nicoson, Leitner, Williams, Dooley & Napolitan, PLLC, Memphis, TN; Ronald L. Harper, LEITNER WILLIAMS DOOLEY & NAPOLITAN-Memphis, Memphis, TN.

For Hartford Property and Casualty Insurance Company, 6:14-cv-6002, TNWD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey E. Nicoson, LEAD ATTORNEY, Leitner, Williams, Dooley & Napolitan, PLLC, Memphis, TN; Ronald L. Harper, LEITNER WILLIAMS DOOLEY & NAPOLITAN-Memphis, Memphis, TN;LEAD ATTORNEY Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Hartford Insurance Company of the Midwest, 6:14-cv-6002, TNWD; 6:14-cv-6004, LAWD; 6:14-cv-6007, MIWD; 6:14-cv-6008, PAWD; 6:14-cv-6009, ALND; 6:14-cv-6012, NJD; 6:14-cv-6013, NJD; 6:14-cv-6014, ORD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT; Jeffrey E. Nicoson, Leitner, Williams, Dooley & Napolitan, PLLC, Memphis, TN; **[*114]** Ronald L. Harper, LEITNER WILLIAMS DOOLEY & NAPOLITAN-Memphis, Memphis, TN.

For Auto-Owners Insurance Company, 6:14-cv-6002, TNWD; 6:14-cv-6007, MIWD; 6:14-cv-6009, ALND; 6:14-cv-6011, ILND; 6:14-cv-6018, EDKY, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Joseph L. Hamilton, LEAD ATTORNEY, PRO HAC VICE, Sites & Harbison, PLLC, Louisville, KY; Lori McAllister, LEAD ATTORNEY, Dykema Gossett, PLLC, Lansing, MI; Theodore Joseph Greeley, LEAD ATTORNEY, Dykema Gossett, PLLC, Lansing, MI.

For State Auto Property and Casualty Insurance Company, 6:14-cv-6002, TNWD; 6:14-cv-6018, EDKY, Defendant (6:14-md-02557-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Joseph Edward Ezzie, LEAD ATTORNEY, Baker & Hostetler, LLP, Columbus, OH; M. Scott McIntyre, LEAD ATTORNEY, Baker & Hostetler LLP - CINCINNATI, OH, Cincinnati, OH; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For State Automobile Mutual Insurance Company, 6:14-cv-6002, TNWD; 6:14-cv-6007, MIWD; 6:14-cv-6008, **[*115]** PAWD; 6:14-cv-6009, ALND; 6:14-cv-6018, EDKY, Defendant (6:14-md-02557-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Joseph Edward Ezzie, LEAD ATTORNEY, Baker & Hostetler, LLP, Columbus, OH; M. Scott McIntyre, LEAD ATTORNEY, Baker & Hostetler LLP - CINCINNATI, OH, Cincinnati, OH; Michael B Beers, LEAD ATTORNEY, Butler Snow LLC, Montgomery, AL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For First Acceptance Insurance Company of Tennessee, Inc., 6:14-cv-6002, TNWD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael R. Pennington, LEAD ATTORNEY, Bradley, Arant, Boult & Cummings, LLP.

For Pennsylvania National Mutual Casualty Insurance Company, 6:14-cv-6002, TNWD; 6:14-cv-6008, PAWD, Defendant (6:14-md-02557-GAP-TBS): Amanda Lynn Ingersoll, LEAD ATTORNEY, Marshall, Dennehey, Warner, Coleman & Goggin, Jacksonville, FL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael A. Packer, LEAD **[*116]** ATTORNEY, Marshall, Dennehey, Warner, Coleman & Goggin, Ft Lauderdale, FL.

For Farmers Insurance Group, Inc., 6:14-cv-6003, UTD, Defendant (6:14-md-02557-GAP-TBS): David L. Yohai, LEAD ATTORNEY, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Mid-Century Insurance Company, 6:14-cv-6003, UTD; 6:14-cv-6010, CACD; 6:14-cv-6011, ILND, Defendant (6:14-md-02557-GAP-TBS): Brian Ignatius Hays, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; D. Matthew Moscon, LEAD ATTORNEY, STOEL RIVES, SALT LAKE CITY, UT; David L. Yohai, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Katherine Heid Harris, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; Lauren A. Shurman, LEAD ATTORNEY, PRO HAC VICE, Stoel Rives LLP, Salt Lake City, UT; Randall Allan Hack, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; Brian J. D'Amico, Weil, **[*117]** Gotshal & Manges, LLP, Miami, FL.

For Farm Bureau Property & Casualty Company, 6:14-cv-6003, UTD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Mark J. Criser, LEAD ATTORNEY, Hill Ward Henderson, PA, Tampa, FL; Matthew F. Hall, LEAD ATTORNEY, Hill Ward Henderson, PA, Tampa, FL.

For Western United Insurance, 6:14-cv-6003, UTD, doing business as AAA Insurance Company, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Richard Wardell Loveland, LEAD ATTORNEY, Coddington, Hicks & Danforth, Redwood City, CA.

For United Automobile Insurance Company, 6:14-cv-6003, UTD; 6:14-cv-6006, AZD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lara Judith Edelstein, LEAD ATTORNEY, United Automobile Insurance Co., Office of General Counsel, Miami Gardens, FL; Paul E. Susz, LEAD ATTORNEY, United Automobile Insurance Co., Office of General Counsel, Miami Gardens, FL.

For United Insurance Company, 6:14-cv-6003, UTD, doing business as United Insurance Group, **[*118]** Defendant (6:14-md-02557-GAP-TBS): Gregory J. Sanders, LEAD ATTORNEY, Kipp & Christian, PC, Salt Lake City, UT; Hal

K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; S. Shane Stroud, LEAD ATTORNEY, Kipp & Christian, PC, Salt Lake City, UT.

For Safeco Insurance Company of Indiana, 6:14-cv-6001, INSD; 6:14-cv-6008, PAWD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Ernest E. Vargo Baker & Hostetler, LLP Michael E. Mumford Baker & Hostetler, LLP.

For American States Insurance Company, 6:14-cv-6001, INSD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Ernest E. Vargo, Baker & Hostetler, LLP, Cleveland, OH; Michael E. Mumford, Baker & Hostetler, LLP, Cleveland, OH.

For Indiana Insurance Company, 6:14-cv-6001, INSD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Ernest E. Vargo, Baker & Hostetler, LLP, Cleveland, OH; Michael E. Mumford, Baker & Hostetler, LLP, Cleveland, OH.

For Progressive Security **[*119]** Insurance Co, 6:14-cv-6004, LAWD; 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Elizabeth Doolin, LEAD ATTORNEY, PRO HAC VICE, Chittenden, Murday & Novotny LLC, Chicago, IL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael Brian Galibois, LEAD ATTORNEY, Chittenden, Murday & Novotny, LLC, Chicago, IL; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Paloverde Insurance Co, 6:14-cv-6004, LAWD, Defendant (6:14-md-02557-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA.

For Allstate Property & Casualty Insurance Company, 6:14-cv-6004, LAWD; **[*120]** 6:14-cv-6006, AZD; 6:14-cv-6007, MIWD; 6:14-cv-6008, PAWD; 6:14-cv-6009, ALND; 6:14-cv-6011, ILND; 6:14-cv-6014, ORD; 6:14-cv-6015, WAWD; 6:14-cv-6016, ILND; 6:14-cv-6018, EDKY; 6019, VAED, 6:15-cv-6021, OHND; 15-6022 MOED, Defendant (6:14-md-02557-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Deborah C. Druley, LEAD ATTORNEY, DENTONS US LLP - ST. LOUIS, St. Louis, MO; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Michael Murphy, LEAD ATTORNEY, Stewart Bernstiel Rebar, Blue Bell, PA; Mindy G. Barfield, LEAD ATTORNEY, Dinsmore & Shohl LLP - Lexington, Lexington, KY; Nancy S. Portney, LEAD ATTORNEY, Stewart Bernstiel Rebar & Smith, Blue Bell, PA; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Louisiana Farm Bureau Casualty Insurance Co, 6:14-cv-6004, LAWD, Defendant (6:14-md-02557-GAP-TBS): Andrew Lane Plauche, Jr., LEAD ATTORNEY, Plauche Maselli Parkerson LLP, New Orleans, LA; Elizabeth Babin Carville, LEAD ATTORNEY, Plauche Maselli Parkerson **[*121]** LLP, New Orleans, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; James Keith Ordeneaux, LEAD ATTORNEY, Plauche Maselli Parkerson LLP, New Orleans, LA.

For GoAuto Insurance Co, 6:14-cv-6004, LAWD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Julie M. McCall, LEAD ATTORNEY, Kantrow, Spaht, Weaver & Blitzer, PLC, Baton Rouge, LA; Richard F. Zimmerman, Jr., LEAD ATTORNEY, Kantrow, Spaht, Weaver & Blitzer, PLC, Baton Rouge, LA.

For Safeway Insurance Co of Louisiana, 6:14-cv-6004, LAWD, Defendant (6:14-md-02557-GAP-TBS): Christopher Charles Skambis, Jr., LEAD ATTORNEY, The Skambis Law Firm, Orlando, FL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Government Employee's Insurance Company, 6:14-cv-6004, LAWD; 6:14-cv-6006, AZD; 6:14-cv-6008, PAWD; 6:14-cv-6009, ALND; 6:14-cv-6011, ILND; 6:14-cv-6012, NJD; 6:14-cv-6013, NJD; 6:14-cv-6015, WDWA; 6:14-cv-

6016, NDIL; 6:14-cv-6018, EDKY; 6:14-cv-6019, EVDA; 6:15cv6021, OHND; 6:15-cv-6022, MOED, Defendant (6:14-md-02557-GAP-TBS): Dan W. Goldfine, LEAD **[*122]** ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Ian Matthew Fischer, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Jason H. Nash, LEAD ATTORNEY, PRO HAC VICE, Hinkhouse Williams Walsh, LLP, Chicago, IL; John T. Williams, LEAD ATTORNEY, PRO HAC VICE, Hinkhouse Williams Walsh, LLP, Chicago, IL; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Mark G. Arnzen, LEAD ATTORNEY, Arnzen, Molloy, & Storm, P.S.C., Covington, KY.

For Direct General Insurance Co of Louisiana, 6:14-cv-6004, LAWD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Sentry Select Insurance Company, 6:14-cv-6004, LAWD, Defendant (6:14-md-02557-GAP-TBS): Edward Keenan Cottrell, LEAD ATTORNEY, Smith, Gambrell & Russell, LLP, Jacksonville, FL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kristen Wenger, LEAD ATTORNEY, Smith, Gambrell & Russell, LLP, Jacksonville, FL. **[*123]**

For Hanover Insurance Company, 6:14-cv-6004, LAWD; 6:14-cv-6007, MIWD; 6:14-cv-6012, NJD; 6:14-cv-6013, NJD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori McAllister, LEAD ATTORNEY, Dykema Gossett, PLLC, Lansing, MI; Marjorie M. Salazar, LEAD ATTORNEY, Lugenbuhl, Wheaton, Peck, Rankin & Hubbard, Houston, TX; Seth A. Schmeeckle, LEAD ATTORNEY, Lugenbuhl, Wheaton, Peck, Rankin & Hubbard, New Orleans, LA; Theodore Joseph Greeley, LEAD ATTORNEY, Dykema Gossett, PLLC, Lansing, MI.

For Hanover American Insurance Co, 6:14-cv-6004, LAWD; 6:14-cv-6007, MIWD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori McAllister, LEAD ATTORNEY, Dykema Gossett, PLLC, Lansing, MI; Marjorie M. Salazar, LEAD ATTORNEY, Lugenbuhl, Wheaton, Peck, Rankin & Hubbard, Houston, TX; Seth A. Schmeeckle, LEAD ATTORNEY, Lugenbuhl, Wheaton, Peck, Rankin & Hubbard, New Orleans, LA; Theodore Joseph Greeley, LEAD ATTORNEY, Dykema Gossett, PLLC, Lansing, MI.

For Encompass Insurance Company of America, 6:14-cv-6004, LAWD; 6:14-cv-6008, PAWD, 6:15-cv-6021, **[*124]** OHND, Defendant (6:14-md-02557-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Michael Murphy, LEAD ATTORNEY, Stewart Bernstiel Rebar, Blue Bell, PA; Nancy S. Portney, LEAD ATTORNEY, Stewart Bernstiel Rebar & Smith, Blue Bell, PA; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Encompass Property & Casualty Co, 6:14-cv-6004, LAWD; 6:14-cv-6011, ILND, Defendant (6:14-md-02557-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Travelers Casualty & Surety Company, 6:14-cv-6004, LAWD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, **[*125]** Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Norman K. Beck, Winston & Strawn, LLP, Chicago, IL.

For Travelers Casualty & Surety Company of America, 6:14-cv-6004, LAWD; 6:14-cv-6006, AZD; 6:14-cv-6018, EDKY, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Michael E. Nitardy, LEAD ATTORNEY, Frost, Brown, Todd, LLC - Florence, Florence, KY; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; William T. Robinson, III, LEAD ATTORNEY, Frost, Brown, Todd, LLC - Florence, Florence, KY; Norman K. Beck, Winston & Strawn, LLP, Chicago, IL.

For Travelers Casualty Insurance Company of America, 6:14-cv-6004, LAWD; 6:14-cv-6006, AZD; 6:14-cv-6018, EDKY, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Michael E. **[*126]** Nitardy, LEAD ATTORNEY, Frost, Brown, Todd, LLC - Florence, Florence, KY; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; William T. Robinson, LEAD ATTORNEY, III, Frost, Brown, Todd, LLC - Florence, Florence, KY; Norman K. Beck, Winston & Strawn, LLP, Chicago, IL.

For Travelers Indemnity Company of Connecticut, 6:14-cv-6004, LAWD; 6:14-cv-6018, EDKY, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Michael E. Nitardy, LEAD ATTORNEY, Frost, Brown, Todd, LLC - Florence, Florence, KY; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; William T. Robinson, LEAD ATTORNEY, III, Frost, Brown, Todd, LLC - Florence, Florence, KY; Norman K. Beck, Winston & Strawn, LLP, Chicago, IL.

For Travelers Property Casualty Company of America, 6:14-cv-6004, LAWD; 6:14-cv-6018, EDKY; 6:14-cv-6019, EDVA, Defendant (6:14-md-02557-GAP-TBS): Gordon A. Coffee, LEAD ATTORNEY, Winston & Strawn LLP, Washington, DC; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura **[*127]** E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Michael E. Nitardy, LEAD ATTORNEY, Frost, Brown, Todd, LLC - Florence, Florence, KY; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; William T. Robinson, LEAD ATTORNEY, III, Frost, Brown, Todd, LLC - Florence, Florence, KY; Norman K. Beck, Winston & Strawn, LLP, Chicago, IL.

For Farmers Insurance Exchange, 6:14-cv-6004, LAWD; 6:14-cv-6006, AZD; 6:14-cv-6007, MIWD; 6:14-cv-6009, ALND;6:14-cv-6010, CACD6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Brian Ignatius Hays, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; David L. Yohai, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Katherine Heid Harris, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; Randall Allan Hack, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; Brian J. D'Amico, Weil, Gotshal & Manges, LLP, Miami, FL.

For United Fire & Casualty Company, **[*128]** 6:14-cv-6004, LAWD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Howard Bruce Kaplan, LEAD ATTORNEY, Bernard Cassica Elliot & Davis, Metairie, LA; Karina Isabel Perez, Kubicki Draper, PA, Tampa, FL.

For United Fire & Indemnity Co, 6:14-cv-6004, LAWD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Howard Bruce Kaplan, LEAD ATTORNEY, Bernard Cassica Elliot & Davis, Metairie, LA; Karina Isabel Perez, Kubicki Draper, PA, Tampa, FL.

For 21st Century North American Insurance Company, 6:14-cv-6004, LAWD; 6:14-cv-6011, ILND, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; David L. Yohai Weil, Gotshal & Manges, LLP Eric Hochstadt Weil, Gotshal & Manges, LLP John Mastando, III Weil, Gotshal & Manges, LLP.

For America First Insurance Co, 6:14-cv-6004, LAWD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Ernest E. Vargo, Baker & Hostetler, LLP, Cleveland, OH; **[*129]** Michael E. Mumford, Baker & Hostetler, LLP, Cleveland, OH.

For American National General Insurance Co, 6:14-cv-6004, LAWD, Defendant (6:14-md-02557-GAP-TBS): Christopher Raymond Pennison, LEAD ATTORNEY, Larzelere Picou Wells Simpson Lonero, LLC, Metairie, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For American National Property & Casualty Co., 6:14-cv-6004, LAWD; 6:14-cv-6014, ORD, Defendant (6:14-md-02557-GAP-TBS): Christopher Raymond Pennison, LEAD ATTORNEY, Larzelere Picou Wells Simpson Lonero, LLC, Metairie, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jay Lonero, LEAD ATTORNEY, Larzelere Picou Wells Simpson Lonero, LLC, Metairie, LA; Thomas H. Peyton, LEAD ATTORNEY, Larzelere Picou Wells Simpson Lonero, LLC, Metairie, LA.

For Fireman's Fund Insurance Company, 6:14-cv-6004, LAWD, Defendant (6:14-md-02557-GAP-TBS): Elizabeth Swingle Horn, LEAD ATTORNEY, Stanley, Reuter, Ross, Thornton & Alford, New Orleans, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Richard C. Stanley, LEAD ATTORNEY, Stanley & Flanagan, L.L.C., **[*130]** New Orleans, LA.

For Imperial Fire & Casualty Insurance Co, 6:14-cv-6004, LAWD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For U.S. Agencies Casualty Insurance Company, 6:14-cv-6004, LAWD, Defendant (6:14-md-02557-GAP-TBS): Anthony J. Rollo, LEAD ATTORNEY, McGlinchey Stafford, PLLC, Baton Rouge, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey R. Seewald, LEAD ATTORNEY, McGlinchey Stafford, PLLC-Houston, Houston, TX; Randy R. Dow, LEAD ATTORNEY, McGlinchey Stafford, PLLC, Ft Lauderdale, FL.

For Safeco Insurance Company of Oregon, 6:14-cv-6004, LAWD; 6:14-cv-6014, ORD; 6:14-cv-6015, WDWA, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Ernest E. Vargo, Baker & Hostetler, LLP, Cleveland, OH; Michael E. Mumford, Baker & Hostetler, LLP, Cleveland, OH.

For USAA General Indemnity Company, 6:14-cv-6004, LAWD; 6:14-cv-6006, AZD; 6:14-cv-6009, ALND; 6:14-cv-6011, ILND; 6:14-cv-6012, NJD; 6:14-cv-6013, NJD; 6:14-cv-60156:14-cv-6018, EDKY; WDWA; 6019, EVDA, Defendant **[*131]** (6:14-md-02557-GAP-TBS): Amelia W. Koch, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Chad E. Wallace, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell, Berkowitz - Johnson City, Johnson City, TN; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Steven F. Griffith, Jr., LEAD ATTORNEY, PRO HAC VICE, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Kyle A. Diamantas, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For AIG Property Casualty Company, 6:14-cv-6004, LAWD; 6:14-cv-6011, ILND; 6:14-cv-6019, EDVA, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jason B. Bonk, LEAD ATTORNEY, Cozen O'Connor, New York, NY; John J. Sullivan, LEAD ATTORNEY, Cozen O'Connor, New York, NY; Michael B. de Leeuw, LEAD ATTORNEY, Cozen O'Connor, New York, NY.

For State Farm Mutual Auto Insurance Company, 6:14-cv-6004, LAWD; 6:14-cv-6008, PAWD, 6:14-cv-6009, ALSD, Defendant (6:14-md-02557-GAP-TBS): Elizabeth Helmer, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, **[*132]** Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael L. McCluggage, LEAD ATTORNEY, Eimer Stahl LLP, Chicago, IL; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA.

For Farmers Insurance Company of Arizona, 6:14-cv-6006, AZD; 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Brian Ignatius Hays, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; David L. Yohai, LEAD ATTORNEY, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Katherine Heid Harris, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; Randall Allan Hack, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; Brian J. D'Amico, Weil, Gotshal & Manges, LLP, Miami, FL.

For Progressive Preferred Insurance Company, 6:14-cv-6006, AZD; 6:14-cv-6008, PAWD; 6:14-cv-6014, ORD; 6:14-cv-6018, EDKY; 6016, NDIL; 6:15-cv-6022, MOED, **[*133]** Defendant (6:14-md-02557-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Elizabeth Doolin, LEAD ATTORNEY, PRO HAC VICE, Chittenden, Murday & Novotny LLC, Chicago, IL; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; John W. Walters, LEAD ATTORNEY, Golden & Walters PLLC, Lexington, KY; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael Brian Galibois, LEAD ATTORNEY, Chittenden, Murday & Novotny, LLC, Chicago, IL; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA.

For Progressive Advanced Insurance Company, 6:14-cv-6006, AZD; 6:14-cv-6008, PAWD; 6:14-cv-6014, ORD; 6:14-cv-6018, EDKY; 6:14-cv-6016, NDIL; 6:15-cv-6022, MOED, Defendant (6:14-md-02557-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Elizabeth Doolin, LEAD ATTORNEY, PRO HAC VICE, Chittenden, Murday & Novotny LLC, Chicago, **[*134]** IL; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; John W. Walters, LEAD ATTORNEY, Golden & Walters PLLC, Lexington, KY; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael Brian Galibois, LEAD ATTORNEY, Chittenden, Murday & Novotny, LLC, Chicago, IL; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA.

For CSAA Fire & Casualty Insurance Company, 6:14-cv-6006, AZD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Richard Wardell Loveland Coddington, Hicks & Danforth.

For Nationwide Insurance Company of America, 6:14-cv-6006, AZD; 6:14-cv-6008, PAWD; 6:14-cv-6011, ILND; 6:14-cv-6014, ORD; 6:14-cv-6016, NDIL; 6:14-cv-6018, EDKY;15-6022, MOED, Defendant (6:14-md-02557-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, **[*135]** LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey C. Mando, LEAD ATTORNEY, Adams, Stepner, Woltermann & Dusing, P.L.L.C., Covington, KY; Josh Goldberg, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Chicago, IL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH.

For Nationwide Affinity Insurance Company Of America, 6:14-cv-6006, AZD; 6:14-cv-6008, PAWD; 6:14-cv-6014, ORD; 6:14-cv-6016, NDIL; 6:14-cv-6018, EDKY; 15-6022, MOED, Defendant (6:14-md-02557-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey C. Mando, LEAD ATTORNEY, Adams, **[*136]** Stepner, Woltermann & Dusing, P.L.L.C., Covington, KY; Josh Goldberg, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Chicago, IL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH.

For Metropolitan Property and Casualty Insurance Company, 6:14-cv-6006, AZD; 6:14-cv-6009, ALND; 6:14-cv-6014, ORD; 6:14-cv-6018, EDKY; 14-cv-6006, AZD;6009,AZD; 6018, AZD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Mindy G. Barfield, LEAD ATTORNEY, Dinsmore & Shohl LLP - Lexington, Lexington, KY; P. Bruce Converse, LEAD ATTORNEY, Steptoe & Johnson, LLP, Phoenix, AZ; Floyd Beinstock, Steptoe & Johnson, LLP, Phoenix, AZ.

For Metropolitan Casualty Insurance Company, 6:14-cv-6006, AZD; 6:14-cv-6009, ALND; 6:14-cv-6014, ORD; 6:14-cv-6018, EDKY; 14-cv-6006, AZD;6009, AZD; 6018, AZD, Defendant (6:14-md-02557-GAP-TBS): **[*137]** Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Mindy G.

Barfield, LEAD ATTORNEY, Dinsmore & Shohl LLP - Lexington, Lexington, KY; P. Bruce Converse, LEAD ATTORNEY, Steptoe & Johnson, LLP, Phoenix, AZ; Floyd Beinstock, Steptoe & Johnson, LLP.

For Metropolitan Group Property and Casualty Insurance Company, 6:14-cv-6006, AZD; 6:14-cv-6009, ALND; 14-cv-6006, AZD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; P. Bruce Converse, LEAD ATTORNEY, Steptoe & Johnson, LLP, Phoenix, AZ; Floyd Beinstock, Steptoe & Johnson, LLP.

For Infinity Insurance Company, 6:14-cv-6006, AZD; 6:14-cv-6010, CACD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael R. Pennington, Bradley, Arant, Boult & Cummings, LLP.

For Travelers Property Casualty Company, 6:14-cv-6006, AZD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Norman K. Beck, **[*138]** Winston & Strawn, LLP, Chicago, IL.

For Travelers Indemnity Company, 6:14-cv-6006, AZD; 6:14-cv-6008, PAWD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Norman K. Beck, Winston & Strawn, LLP, Chicago, IL.

For Safeway Insurance Company, 6:14-cv-6006, AZD; 6:14-cv-6011, ILND, Defendant (6:14-md-02557-GAP-TBS): Christopher Charles Skambis, Jr., LEAD ATTORNEY, The Skambis Law Firm, Orlando, FL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Country Mutual Insurance Company, 6:14-cv-6006, AZD; 6:14-cv-6009, ALND; 6:14-cv-6011, ILND; 6:14-cv-6014, ORD, Defendant (6:14-md-02557-GAP-TBS): Charles I. Hadden, LEAD ATTORNEY, Troutman Sanders, LLP, Washington, DC; David F. Cutter, LEAD ATTORNEY, Troutman Sanders, LLP, Chicago, IL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Karen Southworth Weaver, LEAD ATTORNEY, Soha & Lang, PS, Seattle, WA; William James Kelly, **[*139]** III, LEAD ATTORNEY, Kelly & Walker LLC, Denver, CO.

For Grange Insurance Co. of Michigan, an Ohio corporation; 6:14-cv-6007, MIWD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Joseph Edward Ezzie, LEAD ATTORNEY, Baker & Hostetler, LLP, Columbus, OH.

For Hastings Mutual Insurance Company, a Michigan corporation; 6:14-cv-6007, MIWD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Scott Lee Mandel, LEAD ATTORNEY, Foster, Swift, Collins & Smith, PC, Lansing, MI.

For Meemic Insurance Company, a Michigan corporation; 6:14-cv-6007, MIWD, Defendant (6:14-md-02557-GAP-TBS): G. Calvin Hayes, LEAD ATTORNEY, Buchanan Ingersoll & Rooney, PC | Fowler White Boggs, Tampa, FL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Michigan Millers Mutual Insurance Company, a Michigan corporation; 6:14-cv-6007, MIWD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori McAllister, LEAD ATTORNEY, Dykema Gossett, **[*140]** PLLC, Lansing, MI; Theodore Joseph Greeley, LEAD ATTORNEY, Dykema Gossett, PLLC, Lansing, MI.

For Nationwide Mutual Fire Insurance Company, an Ohio corporation; 6:14-cv-6007, MIWD; 6:14-cv-6008, PAWD; 6:14-cv-6011, ILND; 6:14-cv-6016, NDIL; 6:14-cv-6019, EVDA, Defendant (6:14-md-02557-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Josh Goldberg, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Chicago, IL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH.

For Pioneer State Mutual Insurance Company, a Michigan corporation; 6:14-cv-6007, MIWD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, **[*141]** PC, Orlando, FL; Scott Lee Mandel, LEAD ATTORNEY, Foster, Swift, Collins & Smith, PC, Lansing, MI.

For Progressive Marathon Ins. Co., a Michigan insurance company; 6:14-cv-6007; 6:14-CV-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Elizabeth Doolin, LEAD ATTORNEY, PRO HAC VICE, Chittenden, Murday & Novotny LLC, Chicago, IL; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael Brian Galibois, LEAD ATTORNEY, Chittenden, Murday & Novotny, LLC, Chicago, IL; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA.

For Progressive Michigan Ins. Co., a Michigan insurance company; 6:14-cv-6007, MIWD; 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Elizabeth Doolin, **[*142]** LEAD ATTORNEY, PRO HAC VICE, Chittenden, Murday & Novotny LLC, Chicago, IL; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael Brian Galibois, LEAD ATTORNEY, Chittenden, Murday & Novotny, LLC, Chicago, IL; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA.

For Secura Insurance a Mutual Company, a Wisconsin corporation; 6:14-cv-6007, MIWD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Scott Lee Mandel, LEAD ATTORNEY, Foster, Swift, Collins & Smith, PC, Lansing, MI.

For Secura Supreme Insurance Company, a Wisconsin corporation; 6:14-cv-6007, MIWD; 6:14-cv-6011, ILND, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Scott Lee Mandel, **[*143]** LEAD ATTORNEY, Foster, Swift, Collins & Smith, PC, Lansing, MI.

For Wolverine Mutual Insurance Company, 6:14-cv-6007, MIWD, Defendant (6:14-md-02557-GAP-TBS): David Michael Peterson, II, LEAD ATTORNEY, Wolverine Mutual Insurance Company, Dowagiac, MI; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Allmerica Financial Alliance Insurance Company, a New Hampshire insurance company; 6:14-cv-6007, MIWD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori McAllister, LEAD ATTORNEY, Dykema Gossett, PLLC, Lansing, MI.

For Auto Club Group Insurance Company, a Michigan corporation; 6:14-cv-6007, MIWD, Defendant (6:14-md-02557-GAP-TBS): G. Calvin Hayes, LEAD ATTORNEY, Buchanan Ingersoll & Rooney, PC | Fowler White Boggs, Tampa, FL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Auto Club Property-Casualty Insurance Company, a Michigan corporation; 6:14-cv-6007, MIWD, Defendant (6:14-md-02557-GAP-TBS): G. Calvin Hayes, LEAD ATTORNEY, Buchanan Ingersoll & Rooney, PC | Fowler White Boggs, Tampa, FL; Hal K. **[*144]** Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Cincinnati Insurance Company, 6:14-cv-6007, MIWD; 6:14-cv-6018, EDKY, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Nitardy, LEAD ATTORNEY, Frost, Brown, Todd, LLC - Florence, Florence, KY; Matthew C. Blickensderfer Frost, Brown & Todd, LLC.

For Citizens Insurance Company of America, a Michigan corporation; 6:14-cv-6007, MIWD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori McAllister, LEAD ATTORNEY, Dykema Gossett, PLLC, Lansing, MI; Theodore Joseph Greeley, LEAD ATTORNEY, Dykema Gossett, PLLC, Lansing, MI.

For Donegal Mutual Insurance Company, a Pennsylvania corporation; 6:14-cv-6007, MIWD; 6:14-cv-6008, PAWD; 6:14-cv-6019, EDVA, Defendant (6:14-md-02557-GAP-TBS): Gary J. Mouw, LEAD ATTORNEY, Varnum Riddering Schmidt & Howlett LLP (Grand Rapids), Grand Rapids, MI; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Holly L. Cline, LEAD ATTORNEY, Rhoads & Sinon, **[*145]** LLP, Harrisburg, PA; Kyle Patrick Konwinski, LEAD ATTORNEY, Varnum LLP, Grand Rapids, MI; Maurice Francis Mullins, LEAD ATTORNEY, Spotts Fain PC, Richmond, VA; Thomas A. French, LEAD ATTORNEY, Rhoads & Sinon, LLP, Harrisburg, PA; Timothy J. Nieman, LEAD ATTORNEY, Rhoads & Sinon, LLP, Harrisburg, PA.

For Farm Bureau General Insurance Company of Michigan, a Michigan corporation; 6:14-cv-6007, MIWD, Defendant (6:14-md-02557-GAP-TBS): Anthony S. Kogut, LEAD ATTORNEY, Willingham & Cote PC, East Lansing, MI; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Farm Bureau Mutual Insurance Company of Michigan, a Michigan corporation; 6:14-cv-6007, MIWD, Defendant (6:14-md-02557-GAP-TBS): Anthony S. Kogut, LEAD ATTORNEY, Willingham & Cote PC, East Lansing, MI; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Foremost Property and Casualty Insurance Company, a Michigan corporation; 6:14-cv-6007, MIWD, Defendant (6:14-md-02557-GAP-TBS): David L. Yohai, LEAD ATTORNEY, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; **[*146]** Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Brian J. D'Amico, Weil, Gotshal & Manges, LLP, Miami, FL.

For Frankenmuth Mutual Insurance Company, a Michigan corporation; 6:14-cv-6007, MIWD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Scott Lee Mandel, LEAD ATTORNEY, Foster, Swift, Collins & Smith, PC, Lansing, MI.

For Harleysville Preferred Insurance Company, 6:14-cv-6008, PAWD; 6:14-cv-6019, EDVA, Defendant (6:14-md-02557-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps **[*147]** & Leland LLP, Columbus, OH; Peter T. Snow, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH.

For Hartford Insurance Company of Illinois, 6:14-cv-6008, PAWD; 6:14-cv-6011, ILND, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback Axinn, Veltrop & Harkrider, LLP.

For Hartford Insurance Company of the Southeast, 6:14-cv-6008, PAWD, Defendant (6:14-md-02557-GAP-TBS): Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT; Hal K. Litchford Baker, Donelson, Bearman, Caldwell & Berkowitz, PC.

For Horace Mann Property And Casualty Insurance Company, 6:14-cv-6008, PAWD; 6:14-cv-6011, ILND; 6:14-cv-6014, ORD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Marjorie M. Salazar, LEAD ATTORNEY, Lugenbuhl, Wheaton, Peck, Rankin & Hubbard, Houston, TX; Seth A. Schmeeckle, LEAD ATTORNEY, Lugenbuhl, Wheaton, Peck, Rankin & Hubbard, New Orleans, LA.

For Kemper Independence Insurance Company, 6:14-cv-6008, PAWD; 6:14-cv-6011, ILND, Defendant (6:14-md-02557-GAP-TBS): Daniel M. Kavouras, LEAD **[*148]** ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH;

Edmund W. Searby, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael K. Farrell, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For LM General Insurance Company, 6:14-cv-6008, PAWD; 6:14-cv-6009, ALND; 6:14-cv-6011, ILND; 6:14-cv-6014, ORD; 6:14-cv-6016; NDIL 6:14-cv-6019, EDVA, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Joseph Edward Ezzie, LEAD ATTORNEY, Baker & Hostetler, LLP, Columbus, OH; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Trischa Snyder Chapman, LEAD ATTORNEY, Baker Hostetler Llp, Columbus, OH; William Kevin Kane, LEAD ATTORNEY, Baker Hostetler LLP, Chicago, IL; Ernest E. Vargo, Baker & Hostetler, LLP, Cleveland, OH.

For Liberty Insurance Corporation, 6:14-cv-6008, PAWD; 6:14-cv-6011, ILND; 6:14-cv-6012, NJD; 6:14-cv-6013, NJD; 6:14-cv-6014, ORD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, **[*149]** LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Ernest E. Vargo, Baker & Hostetler, LLP, Cleveland, OH.

For Nationwide General Insurance Company, 6:14-cv-6008, PAWD; 6:14-CV-6009, ALND; 6019, EVDA, Defendant (6:14-md-02557-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH.

For Progressive Northern Insurance Company, 6:14-cv-6008, PAWD; 6:14-cv-6011, ILND; 6:14-cv-6014, ORD; 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Elizabeth Doolin, LEAD ATTORNEY, PRO HAC VICE, Chittenden, Murday & Novotny LLC, Chicago, IL; **[*150]** Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael Brian Galibois, LEAD ATTORNEY, Chittenden, Murday & Novotny, LLC, Chicago, IL; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA.

For Property and Casualty Insurance Company of Hartford, 6:14-cv-6008, PAWD; 6:14-cv-6009, ALND; 6:14-cv-6014, ORD; 6:14-cv-6015, WDWA; 6:14-cv-6019, EDVA, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For State Auto Property And Casualty Company, 6:14-cv-6008, PAWD; 6:14-cv-6009, ALND, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Travco Insurance Company, 6:14-cv-6008, PAWD; 6:14-cv-6019, **[*151]** EDVA, Defendant (6:14-md-02557-GAP-TBS): Gordon A. Coffee, LEAD ATTORNEY, Winston & Strawn LLP, Washington, DC; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL.

For Travelers Casualty Company of Connecticut, 6:14-cv-6008, PAWD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Norman K. Beck, Winston & Strawn, LLP, Chicago, IL.

For Travelers Indemnity Insurance Company Of Connecticut, 6:14-cv-6008, PAWD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Norman K. Beck, Winston & Strawn, LLP, Chicago, IL.

For Travelers Personal Security Insurance Company, **[*152]** 6:14-cv-6008, PAWD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL.

For USA General Indemnity Company, 6:14-cv-6008, PAWD; 6:14-cv-6011, ILND; 6:14-cv-6012, NJ;15-6022, MOED, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For United States Automobile Association, 6:14-cv-6008, PAWD;6019, EVDA, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For AAA Mid-Atlantic Insurance Company, 6:14-cv-6008, PAWD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Richard Wardell Loveland, Coddington, Hicks & Danforth, Redwood City, CA.

For Allstate Northbrook Indemnity Company, 6:14-cv-6008, PAWD, Defendant (6:14-md-02557-GAP-TBS): Michael Murphy, LEAD ATTORNEY, Stewart Bernstiel **[*153]** Rebar, Blue Bell, PA; Nancy S. Portney, LEAD ATTORNEY, Stewart Bernstiel Rebar & Smith, Blue Bell, PA; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL; Hal K. Litchford, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Hal K. Litchford, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, Rumberger, Kirk & Caldwell, PA; Mark L. Hanover, Dentons US LLP.

For Encompass Home And Auto Insurance Company, 6:14-cv-6008, PAWD; 6:14-cv-6011, ILND, 6:15-cv-6021, OHND, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Michael Murphy, LEAD ATTORNEY, Stewart Bernstiel Rebar, Blue Bell, PA; Nancy S. Portney, LEAD ATTORNEY, Stewart Bernstiel Rebar & Smith, Blue Bell, PA; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL; Hal K. Litchford, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Mark L. Hanover, Dentons US LLP, Chicago, IL.

For Farmers New Century Insurance Company, 6:14-cv-6008, PAWD, Defendant (6:14-md-02557-GAP-TBS): David L. Yohai, LEAD ATTORNEY, **[*154]** Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Brian J. D'Amico, Weil, Gotshal & Manges, LLP, Miami, FL; Hal K. Litchford, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Geico Casualty Company, 6:14-cv-6004, LAWD; 6:14-cv-6006, AZD; 6:14-cv-6008, PAWD;6:14-CV-6009, ALND; 6:14-cv-6010, CACD; 6:14-cv-6011, ILND; 6:14-cv-6012, NJD; 6:14-cv-6013, NJD; 6:14-cv-6014, ORD; 6:14-cv-6016, ILND; 6:14-cv-6018, KYED, 6:15-cv-6021, OHND, 6:15-cv-6022, MOED, Defendant (6:14-md-02557-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Ian Matthew Fischer, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Jason H. Nash, LEAD ATTORNEY, PRO HAC VICE, Hinkhouse Williams Walsh, LLP, Chicago, IL; John T. Williams, LEAD ATTORNEY, PRO HAC VICE, Hinkhouse Williams Walsh, LLP, Chicago, IL; Joshua **[*155]** Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Mark G. Arnzen, LEAD ATTORNEY, Arnzen, Molloy, & Storm, P.S.C., Covington, KY.

For Progressive Specialty Insurance Company, 6:14-CV-6009, ALND; 6:14-cv-6014, ORD; 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Elizabeth Doolin, LEAD ATTORNEY, PRO HAC VICE, Chittenden, Murday & Novotny LLC, Chicago, IL;

Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael Brian Galibois, LEAD ATTORNEY, Chittenden, Murday & Novotny, LLC, Chicago, IL; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA.

For Travelers Commercial Insurance Company, 6:14-cv-6008, PAWD; 6:14-CV-6009, ALND; 6:14-cv-6011, ILND; 6:14-cv-6014, ORD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD **[*156]** ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL.

For Travelers Home and Marine Insurance Company, 6:14-cv-6008, PAWD; 6:14-CV-6009, ALND, 6:14-cv-6011, ILND; 6:14-cv-6014, ORD; 6:14-cv-6018, EDKY, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Michael E. Nitardy, LEAD ATTORNEY, Frost, Brown, Todd, LLC - Florence, Florence, KY; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; William T. Robinson, LEAD ATTORNEY, III, Frost, Brown, Todd, LLC - Florence, Florence, KY.

For First Liberty Insurance Corporation, 6:14-cv-6009, ALND; 6:14-cv-6016, NDIL; 6:15-cv-6021, OHND, Defendant (6:14-md-02557-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, **[*157]** Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Joseph Edward Ezzie, LEAD ATTORNEY, Baker & Hostetler, LLP, Columbus, OH; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Trischa Snyder Chapman, LEAD ATTORNEY, Baker Hostetler Llp, Columbus, OH; William Kevin Kane, LEAD ATTORNEY, Baker Hostetler LLP, Chicago, IL.

For Metropolitan General Insurance Company, 6:14-cv-6009, ALND, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Floyd Beinstock, Steptoe & Johnson, LLP; P. Bruce Converse Steptoe & Johnson, LLP.

For Owners Insurance Company, 6:14-cv-6009, ALND, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Safeway Insurance Company of Alabama, 6:14-cv-6009, ALND, Defendant (6:14-md-02557-GAP-TBS): Christopher Charles Skambis, Jr., LEAD ATTORNEY, The Skambis Law Firm, Orlando, FL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Sentinel Insurance Company, Ltd., Defendant (6:14-md-02557-GAP-TBS): ; 6:14-cv-6009, ALND Hal K. Litchford, **[*158]** LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Twin City Fire Insurance Company, Defendant (6:14-md-02557-GAP-TBS): ; 6:14-cv-6009, ALND Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For ACCC Insurance Company, 6:14-cv-6009, ALND, Defendant (6:14-md-02557-GAP-TBS): Edward Russ McNees, LEAD ATTORNEY, Holcomb Dunbar Watts Best Masters & Golmon, PA, Oxford, MS; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Robert Bradley Best, LEAD ATTORNEY, Holcomb Dunbar Watts Best Masters & Golmon, PA, Oxford, MS.

For Interinsurance Exchange of the Automobile Club, 6:14-cv-6010, CACD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Mercury Insurance Company, 6:14-cv-6010, CACD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Julius F. Parker, III, Butler Weihmuller Katz Craig LLP, Tallahassee, FL; Kathy J. Maus Butler Pappas, LLP.

For CSAA Insurance Exchange, 6:14-cv-6010, CACD, Defendant (6:14-md-02557-GAP-TBS): **[*159]** Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Richard Wardell Loveland, Coddington, Hicks & Danforth, Redwood City, CA.

For Progressive West Insurance Company, 6:14-cv-6010, CACD; 6:14-cv-6014, ORD;6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Elizabeth Doolin, LEAD ATTORNEY, PRO HAC VICE, Chittenden, Murday & Novotny LLC, Chicago, IL; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael Brian Galibois, LEAD ATTORNEY, Chittenden, Murday & Novotny, LLC, Chicago, IL; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA.

For United Financial Casualty Company, 6:14-cv-6010, CACD; 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King **[*160]** & Spalding, LLP, Atlanta, GA; Elizabeth Doolin, LEAD ATTORNEY, PRO HAC VICE, Chittenden, Murday & Novotny LLC, Chicago, IL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael Brian Galibois, LEAD ATTORNEY, Chittenden, Murday & Novotny, LLC, Chicago, IL; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Wawanesa General Insurance Company, 6:14-cv-6010, CACD; 6:14-cv-6014, ORD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Tinley Brooks, LEAD ATTORNEY, Sheppard, Mullin, Richter & Hampton, LLP, San Diego, CA; John Michael Landry, LEAD ATTORNEY, Sheppard, Mullin, Richter & Hampton, LLP, Los Angeles, CA.

For 21st Century Insurance Company, 6:14-cv-6010, CACD; 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Brian Ignatius **[*161]** Hays, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; David L. Yohai, LEAD ATTORNEY, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Katherine Heid Harris, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; Randall Allan Hack, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; Brian J. D'Amico, Weil, Gotshal & Manges, LLP, Miami, FL.

For Alliance United Insurance Company, 6:14-cv-6010, CACD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Coast National Insurance Company, 6:14-cv-6010, CACD; 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Brian Ignatius Hays, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; David L. Yohai, LEAD ATTORNEY, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, **[*162]** PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Katherine Heid Harris, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; Randall Allan Hack, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; Brian J. D'Amico, Weil, Gotshal & Manges, LLP, Miami, FL.

For American Family Insurance Company, 6:14-cv-6010, CACD; 6:15-cv-6021, OHND, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Heather Carson Perkins, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Denver, CO; Kathy Lynn Osborn, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN; Michael Sean McCarthy, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Denver, CO; Ryan Michael Hurley, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN; Sarah Jenkins, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN.

For Amica Mutual Insurance Company, 6:14-cv-6010, CACD; 6:14-cv-6011, ILND; 6:14-cv-6014, ORD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Julia C. Webb, LEAD ATTORNEY, Locke Lord, LLP, Chicago, IL; Matthew T. Furton, **[*163]** LEAD ATTORNEY, Locke Lord, LLP, Chicago, IL; Rowe W. Snider, LEAD ATTORNEY, Locke Lord, LLP, Chicago, IL.

For California Automobile Insurance Company, Defendant (6:14-md-02557-GAP-TBS): ;6:14-cv-6010, CACD Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Julius F. Parker, III, Butler Weihmuller Katz Craig LLP, Tallahassee, FL; Kathy J. Maus, Butler Pappas, LLP, Tallahassee, FL.

For Erie Indemnity Company, 6:14-cv-6011, ILND, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Erie Insurance Company, 6:14-cv-6011, ILND; 6:14-cv-6020, PAWD; 6:15-cv-6021, OHND, Defendant (6:14-md-02557-GAP-TBS): Anderson T. Bailey, LEAD ATTORNEY, Jones Day, Pittsburgh, PA; Eric P. Berlin, LEAD ATTORNEY, Jones Day, Chicago, IL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffery D. Ubersax, LEAD ATTORNEY, Jones Day, Cleveland, OH; James Michael Jones, Jones Day, Pittsburgh, PA; Joseph R. Coburn, PRO HAC VICE, Jones Day, Cleveland, OH.

For Farmers Automobile Management Corporation, 6:14-cv-6011, ILND, Defendant (6:14-md-02557-GAP-TBS): **[*164]** Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Founders Insurance Company, 6:14-cv-6011, ILND, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Grange Indemnity Insurance Company, 6:14-cv-6011, ILND; 6:15-cv-6021, OHND, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Joseph Edward Ezzie, LEAD ATTORNEY, Baker & Hostetler, LLP, Columbus, OH.

For Grange Mutual Casualty Company, 6:14-cv-6011, ILND; 6:14-cv-6018, EDKY; 6:15-cv-6021, OHND, Defendant (6:14-md-02557-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Joseph Edward Ezzie, LEAD ATTORNEY, Baker & Hostetler, LLP, Columbus, OH; M. Scott McIntyre, LEAD ATTORNEY, Baker & Hostetler LLP - CINCINNATI, OH, Cincinnati, OH; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Great Northern Insurance Company, 6:14-cv-6011, ILND, Defendant (6:14-md-02557-GAP-TBS): Hal **[*165]** K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Harleysville Lake States Insurance Company, 6:14-cv-6011, ILND, Defendant (6:14-md-02557-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH.

For Illinois Farmers Insurance Company, 6:14-cv-6011, ILND; 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Brian Ignatius Hays, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; David L. Yohai, LEAD ATTORNEY, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, **[*166]** Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Katherine Heid Harris, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; Randall Allan Hack, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; Brian J. D'Amico, Weil, Gotshal & Manges, LLP, Miami, FL.

For LM Insurance Corporation, 6:14-cv-6011, ILND; 6:14-cv-6012, NJD; 6:14-cv-6013, NJD; 6:14-cv-6014, ORD; 6:14-cv-6019, EDVA, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Ernest E. Vargo, Baker & Hostetler, LLP, Cleveland, OH.

For Mercury Insurance Company of Illinois, 6:14-cv-6011, ILND, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Julius F. Parker, III, LEAD ATTORNEY, Butler Weihmuller Katz Craig LLP, Tallahassee, FL; Kathy J. Maus, LEAD ATTORNEY, Butler Pappas, LLP, Tallahassee, FL.

For Property and Casualty Company of Hartford, 6:14-cv-6011, ILND, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, **[*167]** LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Safe Auto Insurance Company, 6:14-cv-6011, ILND; 6:14-cv-6018, EDKY; 6:14-cv-6019, EDVA; 15-6022, MOED, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Robert L. Steinmetz, LEAD ATTORNEY, Gwin Steinmetz & Baird PLLC, Louisville, KY.

For Unique Insurance Company, 6:14-cv-6011, ILND, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Universal Casualty Company, 6:14-cv-6011, ILND, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For West Bend Mutual Insurance Company, 6:14-cv-6011, ILND, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Affirmative Insurance Company, 6:14-cv-6011, ILND, Defendant (6:14-md-02557-GAP-TBS): Kathy J. Maus, Butler Pappas, LLP, Tallahassee, FL; Hal K. Litchford, LEAD ATTORNEY, Baker, **[*168]** Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey R. Seewald, LEAD ATTORNEY, McGlinchey Stafford, PLLC-Houston, Houston, TX; Randy R. Dow, LEAD ATTORNEY, McGlinchey Stafford, PLLC, Ft Lauderdale, FL.

For Allied Property and Casualty Insurance Company, 6:14-cv-6011, ILND; 6:14-cv-6016, NDIL; 6:15-cv-6022, MOED, Defendant (6:14-md-02557-GAP-TBS): David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Josh Goldberg, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Chicago, IL; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Mark J. Botti, Squire Patton Boggs (US) LLP, Washington, DC.

For American Access Casualty Company, 6:14-cv-6011, ILND, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For American Bankers Insurance Company of Florida, 6:14-cv-6011, ILND, Defendant (6:14-md-02557-GAP-TBS): C. **[*169]** Todd Willis, LEAD ATTORNEY, Carlton Fields Jorden Burt, PA, Washington, DC; Franklin G. Burt, LEAD ATTORNEY, Carlton Fields Jorden Burt, PA, Washington, DC; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For American Freedom Insurance Company, 6:14-cv-6011, ILND, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For American Heartland Insurance Company, 6:14-cv-6011, ILND, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Apollo Casualty Company, 6:14-cv-6011, ILND, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Country Casualty Insurance Company, 6:14-cv-6011, ILND; 6:14-cv-6014, ORD, Defendant (6:14-md-02557-GAP-TBS): Charles I. Hadden, LEAD ATTORNEY, Troutman Sanders, LLP, Washington, DC; David F. Cutter, LEAD ATTORNEY, Troutman Sanders, LLP, Chicago, IL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Karen Southworth Weaver, LEAD **[*170]** ATTORNEY, Soha & Lang, PS, Seattle, WA; William James Kelly, III, Kelly & Walker LLC, Denver, CO.

For Country Preferred Insurance Company, 6:14-cv-6011, ILND; 6:14-cv-6014, ORD, Defendant (6:14-md-02557-GAP-TBS): Charles I. Hadden, LEAD ATTORNEY, Troutman Sanders, LLP, Washington, DC; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Karen Southworth Weaver, LEAD ATTORNEY, Soha & Lang, PS, Seattle, WA; David F. Cutter Troutman Sanders, LLP William James Kelly, III, Kelly & Walker LLC, Denver, CO.

For Dairyland Insurance Company, 6:14-cv-6011, ILND; 6:14-cv-6019, EDVA, Defendant (6:14-md-02557-GAP-TBS): Edward Keenan Cottrell, LEAD ATTORNEY, Smith, Gambrell & Russell, LLP, Jacksonville, FL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Delphi Casualty Company, 6:14-cv-6011, ILND, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Progressive Freedom Insurance Company, 6:14-cv-6012, NJD; 6:14-cv-6013, NJD, Defendant (6:14-md-02557-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, **[*171]** Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael J. Kurtis, LEAD ATTORNEY, Nelson Brown & Co., Blue Bell, PA; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA.

For State Farm Guaranty Insurance Company, 6:14-cv-6012, NJD; 6:14-cv-6013, NJD; 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Brent R. Austin, LEAD ATTORNEY, PRO HAC VICE, Eimer Stahl LLP, Chicago, IL; Elizabeth Helmer, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael L. McCluggage, LEAD ATTORNEY, Eimer Stahl LLP, Chicago, IL; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Johanna W. Clark, Carlton Fields Jorden Burt, PA, Orlando, **[*172]** FL.

For State Farm Indemnity Company, 6:14-cv-6012, NJD; 6:14-cv-6013, NJD; 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Brent R. Austin, LEAD ATTORNEY, PRO HAC VICE, Eimer Stahl LLP, Chicago, IL; Elizabeth Helmer, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael L. McCluggage, LEAD ATTORNEY, Eimer Stahl LLP, Chicago, IL; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Johanna W. Clark, Carlton Fields Jorden Burt, PA, Orlando, FL.

For Progressive Garden State Insurance Company, 6:14-cv-6012, NJD; 6:14-cv-6013, NJD;6:14-cv-6016,NDIL, Defendant (6:14-md-02557-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Elizabeth Doolin, LEAD ATTORNEY, PRO HAC VICE, Chittenden, Murday & Novotny LLC, Chicago, IL; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, **[*173]** GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael Brian Galibois, LEAD ATTORNEY, Chittenden, Murday & Novotny, LLC, Chicago, IL; Michael J. Kurtis, LEAD ATTORNEY, Nelson Brown & Co., Blue Bell, PA; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA.

For Allstate New Jersey Insurance Company, 6:14-cv-6012, NJD; 6:14-cv-6013, NJD; 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL;

Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL; Lori J. Caldwell, Rumberger, Kirk & Caldwell, PA, Orlando, FL.

For Liberty Mutual Mid-Atlantic Insurance Company, 6:14-cv-6012, NJD; 6:14-cv-6013, NJD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Ernest E. Vargo, Baker & Hostetler, LLP, Cleveland, OH.

For 21st Century Assurance Company, **[*174]** 6:14-cv-6012, NJD; 6:14-cv-6013, NJD; 6:14-cv-6019, EDVA, Defendant (6:14-md-02557-GAP-TBS): David L. Yohai, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Brian J. D'Amico, Weil, Gotshal & Manges, LLP, Miami, FL.

For 21st Century Pinnacle Insurance Company, 6:14-cv-6012, NJD; 6:14-cv-6013, NJ, Defendant (6:14-md-02557-GAP-TBS): David L. Yohai, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Brian J. D'Amico, Weil, Gotshal & Manges, LLP, Miami, FL.

For Allstate New Jersey Property and Casualty Insurance Company, 6:14-cv-6012, NJD; 6:14-cv-6013, NJD; 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): **[*175]** Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL; Lori J. Caldwell, Rumberger, Kirk & Caldwell, PA, Orlando, FL.

For American Family Home Insurance Company, 6:14-cv-6012, NJ, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; James L. McCrystal, Jr., LEAD ATTORNEY, Brzytwa, Quick & McCrystal, Cleveland, OH; Nathan F. Studeny, LEAD ATTORNEY, Brzytwa, Quick & McCrystal, Cleveland, OH.

For Farmers Insurance Company of Oregon, 6:14-cv-6014, ORD; 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Brian Ignatius Hays, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; David L. Yohai, LEAD ATTORNEY, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Katherine Heid Harris, **[*176]** LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; Randall Allan Hack, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; Timothy W. Snider, LEAD ATTORNEY, Stoel Rives, LLP, Portland, OR; Brian J. D'Amico, Weil, Gotshal & Manges, LLP, Miami, FL.

For Farmers Insurance Company of Washington, 6:14-cv-6015, WDWA; 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Aric Hamilton Jarrett, LEAD ATTORNEY, STOEL RIVES (WA), SEATTLE, WA; Brian Ignatius Hays, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; David L. Yohai, LEAD ATTORNEY, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Katherine Heid Harris, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; Randall Allan Hack, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; Timothy W. Snider, LEAD ATTORNEY, Stoel Rives, LLP, Portland, OR; Brian J. D'Amico, Weil, Gotshal & Manges, LLP, Miami, FL.

For United Services Auto Association, 6:14-cv-6012, NJD; 6:14-cv-6013, NJD, Defendant (6:14-md-02557-GAP-TBS): **[*177]** Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For First National Insurance Company of America, 6:14-cv-6015, WDWA, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Ernest E. Vargo, Baker & Hostetler, LLP, Cleveland, OH; Michael E. Mumford, Baker & Hostetler, LLP, Cleveland, OH.

For Garrison Property and Casualty Insurance Company, 6:14-cv-6015, WDWA, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Unitrin Auto & Home Insurance Company, 6:14-cv-6015 WDWA, Defendant (6:14-md-02557-GAP-TBS): Edmund W. Searby, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael K. Farrell, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Daniel M. Kavouras, Baker & Hostetler, LLP, Cleveland, OH.

For Enumclaw Property and Casualty Insurance Company, 6:14-cv-6014, ORD; 6:15-cv-6022 MOED;, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, **[*178]** Caldwell & Berkowitz, PC, Orlando, FL; James L. Hiller, Hitt Hiller Monfils Williams LLP.

For Grange Insurance Association, 6:14-cv-6014, ORD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; William F. Knowles, LEAD ATTORNEY, Cozen O'Connor, Seattle, WA.

For California Casualty General Insurance Company of Oregon, 6:14-cv-6014, ORD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For American Commerce Insurance Company, 6:14-cv-6014, ORD, Defendant (6:14-md-02557-GAP-TBS): Barry L. Davis, LEAD ATTORNEY, Thornton, Davis & Fein, PA, Miami, FL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Matthew C. Henning, LEAD ATTORNEY, Thornton, Davis & Fein, PA, Miami, FL; Eric D. Ruben, Thornton, Davis & Fein, PA.

For Mutual of Enumclas Insurance Company, 6:14-cv-6014, ORD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; James L. Hiller, Hitt Hiller Monfils Williams LLP.

For Metropolitan Direct Property **[*179]** and Casualty Insurance Company, 6:14-cv-6014, ORD; 6:14-cv-6018, EDKY;6:14-cv-6009, AZD; 6-14-cv-6018, AZD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Mindy G. Barfield, LEAD ATTORNEY, Dinsmore & Shohl LLP - Lexington, Lexington, KY; P. Bruce Converse, LEAD ATTORNEY, Steptoe & Johnson, LLP, Phoenix, AZ; Floyd Beinstock, Steptoe & Johnson, LLP.

For Pemco Mutual Insurance Company, 6:14-cv-6014, ORD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jay W. Beattie, LEAD ATTORNEY, Lindsay Hart, LLP, Portland, OR; John W. Phillips, LEAD ATTORNEY, The Phillips Law Group, Seattle, WA; Nikola Jones, LEAD ATTORNEY, Lindsay Hart, LLP, Portland, OR.

For Omni Insurance Company, 6:14-cv-6014, ORD, Defendant (6:14-md-02557-GAP-TBS): Daniel E. Thenell, LEAD ATTORNEY, Thenell Law Group P.C., Portland, OR; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kirsten Lynn Curtis, LEAD ATTORNEY, Thenell Law Group, PC, Portland, OR.

For State Farm Mutual Automobile Insurance Company of Oregon, **[*180]** 6:14-cv-6014, ORD, Defendant (6:14-md-02557-GAP-TBS): Brent R. Austin, LEAD ATTORNEY, PRO HAC VICE, Eimer Stahl LLP, Chicago, IL; Elizabeth Helmer, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael L. McCluggage, LEAD ATTORNEY, Eimer Stahl LLP, Chicago, IL; Tanya Durkee Urbach, LEAD ATTORNEY, Lane Powell, PC, Portland, OR; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Johanna W. Clark, Carlton Fields Jorden Burt, PA, Orlando, FL.

For Progressive Northwestern Insurance Company, 6:14-cv-6014, ORD; 6:14-cv-6016, NDIL; 6:15-cv-6022, MOED, Defendant (6:14-md-02557-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Elizabeth Doolin, LEAD ATTORNEY, PRO HAC VICE, Chittenden, Murday & Novotny LLC, Chicago, IL; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly **[*181]** Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael Brian Galibois, LEAD ATTORNEY, Chittenden, Murday & Novotny, LLC, Chicago, IL; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA.

For Viking Insurance Company of Wisconsin, 6:14-cv-6014, ORD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Oregon Mutual Insurance Company, 6:14-cv-6014, ORD, Defendant (6:14-md-02557-GAP-TBS): Carl R. Rodrigues, LEAD ATTORNEY, Lehner & Rodrigues, Portland, OR; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jennifer L. Maks, LEAD ATTORNEY, Lehner & Rodrigues, Portland, OR.

For Progressive Universal Insurance Company, 6:14-cv-6014, ORD; 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Elizabeth Doolin, LEAD ATTORNEY, PRO HAC VICE, Chittenden, Murday & Novotny LLC, Chicago, IL; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, **[*182]** LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael Brian Galibois, LEAD ATTORNEY, Chittenden, Murday & Novotny, LLC, Chicago, IL; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA.

For Sublimity Insurance Company, 6:14-cv-6014, ORD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kurt C. Peterson, Kilmer Voorhees & Laurick, P.C., Portland, OR; Robert S. May, Kilmer Voorhees & Laurick, P.C., Portland, OR.

For Unigard Insurance Company, 6:14-cv-6014, ORD, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kendall W. Harrison, LEAD ATTORNEY, Godfrey & Kahn, SC, Madison, WI.

For Erie Insurance Exchange, Defendant (6:14-md-02557-GAP-TBS): Anderson T. Bailey, LEAD ATTORNEY, Jones Day, Pittsburgh, PA; Eric P. Berlin, LEAD ATTORNEY, Jones Day, **[*183]** Chicago, IL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; James Michael Jones, LEAD ATTORNEY, Jones Day, Pittsburgh, PA; Jeffery D. Ubersax, LEAD ATTORNEY, Jones Day, Cleveland, OH; Joseph R. Coburn, PRO HAC VICE, Jones Day, Cleveland, OH.

For GEICO Advantage Insurance Company, 6:14-cv-6016, NDIL; 6:14-cv-6019, EVDA, Defendant (6:14-md-02557-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Ian Matthew Fischer, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Jason H. Nash, LEAD ATTORNEY, PRO HAC VICE, Hinkhouse Williams Walsh, LLP, Chicago, IL; John T. Williams, LEAD ATTORNEY, PRO HAC VICE, Hinkhouse Williams Walsh, LLP, Chicago, IL; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ.

For GEICO Casualty, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Dan W. Goldfine, Lewis Roca Rothgerber, LLP, Phoenix, AZ; **[*184]** Ian Matthew Fischer, Snell & Wilmer, LLP; Jamie L. Halavais, Snell & Wilmer, LLP; Joshua Grabel, Lewis Roca Rothgerber, LLP, Phoenix, AZ.

For GEICO Choice Insurance Company, 6:14-cv-6016, NDIL; 6:14-cv-6019, EVDA, Defendant (6:14-md-02557-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Ian Matthew Fischer, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Jason H. Nash, LEAD ATTORNEY, PRO HAC VICE, Hinkhouse Williams Walsh, LLP, Chicago, IL; John T. Williams, LEAD ATTORNEY, PRO HAC VICE, Hinkhouse Williams Walsh, LLP, Chicago, IL; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ.

For GEICO Secure Insurance Company, 6:14-cv-6016, NDIL; 6:14-cv-6019, EVDA, Defendant (6:14-md-02557-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Ian Matthew Fischer, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; **[*185]** Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Jason H. Nash, LEAD ATTORNEY, PRO HAC VICE, Hinkhouse Williams Walsh, LLP, Chicago, IL; John T. Williams, LEAD ATTORNEY, PRO HAC VICE, Hinkhouse Williams Walsh, LLP, Chicago, IL; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ.

For The Travelers Home and Marine Insurance Company, Defendant (6:14-md-02557-GAP-TBS): Gordon A. Coffee, LEAD ATTORNEY, Winston & Strawn LLP, Washington, DC; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL.

For Virginia Farm Bureau Town and Country Insurance Company, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kenneth Hardt, LEAD ATTORNEY, Sinnott, Nuckols & Logan, PC, Midlothian, VA; Kevin V. Logan, LEAD ATTORNEY, Sinnott, Nuckols & Logan, PC, Midlothian, VA.

For Travelers Commercial Insurance Company, 6:14-CV-6019, **[*186]** EDVA, Defendant (6:14-md-02557-GAP-TBS): Gordon A. Coffee, LEAD ATTORNEY, Winston & Strawn LLP, Washington, DC; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL.

For Farmers Insurance Company, Inc., 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Brian Ignatius Hays, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; David L. Yohai, LEAD ATTORNEY, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Katherine Heid Harris, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; Randall Allan Hack, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; Brian J. D'Amico, Weil, Gotshal & Manges, LLP, Miami, FL.

For Elephant Insurance Company, 6:14-cv-6019, EDVA, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, **[*187]** FL; Robert Francis Reklaitis, LEAD ATTORNEY, LeClairRyan, Washington, DC; Charles M. Sims, Leader, Leader & Landau, PL, Ft Lauderdale, FL; Cynthia Fleming Crawford, LeClairRyan, Washington, DC; Laurin H. Mills, LeClairRyan, Alexandria, VA.

For General Insurance Company of America, 6:14-cv-6019, EDVA, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Progressive Mountain Insurance Company, 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Elizabeth Doolin, LEAD ATTORNEY, PRO HAC VICE, Chittenden, Murday & Novotny LLC, Chicago, IL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael Brian Galibois, LEAD ATTORNEY, Chittenden, Murday & Novotny, LLC, Chicago, IL; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA; Francis **[*188]** X. Nolan, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Progressive Choice Insurance Company, 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Elizabeth Doolin, LEAD ATTORNEY, PRO HAC VICE, Chittenden, Murday & Novotny LLC, Chicago, IL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael Brian Galibois, LEAD ATTORNEY, Chittenden, Murday & Novotny, LLC, Chicago, IL; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Progressive County Mutual Insurance Company, 6:14-CV-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Elizabeth Doolin, LEAD ATTORNEY, PRO HAC VICE, Chittenden, Murday & Novotny LLC, Chicago, IL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, **[*189]** Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael Brian Galibois, LEAD ATTORNEY, Chittenden, Murday & Novotny, LLC, Chicago, IL; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Progressive Paloverde Insurance Company, 6:14-cv-6004, LAWD; 6:14-CV-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Elizabeth Doolin, LEAD ATTORNEY, PRO HAC VICE, Chittenden, Murday & Novotny LLC, Chicago, IL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael Brian Galibois, LEAD ATTORNEY, Chittenden, Murday & Novotny, LLC, Chicago, IL; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & **[*190]** Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Progressive Premier Insurance of IL, 6:14-CV-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Elizabeth Doolin, LEAD ATTORNEY, PRO HAC VICE, Chittenden, Murday & Novotny LLC, Chicago, IL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael Brian Galibois, LEAD ATTORNEY, Chittenden, Murday & Novotny, LLC, Chicago, IL; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Progressive Southeastern Insurance Company, 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Elizabeth Doolin, LEAD ATTORNEY, PRO HAC VICE, Chittenden, **[*191]** Murday & Novotny LLC, Chicago, IL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael Brian Galibois, LEAD ATTORNEY, Chittenden, Murday & Novotny, LLC, Chicago, IL; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Truck Insurance Exchange, 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Brian Ignatius Hays, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; David L. Yohai, LEAD ATTORNEY, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Katherine Heid Harris, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; Randall Allan Hack, LEAD ATTORNEY, Locke **[*192]** Lord LLP, Chicago, IL; Brian J. D'Amico, Weil, Gotshal & Manges, LLP, Miami, FL.

For Grange Property & Casualty Insurance Company, 6:14-cv-6018, KYED; 6:15-cv-6021, OHND, Defendant (6:14-md-02557-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K.

Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Joseph Edward Ezzie, LEAD ATTORNEY, Baker & Hostetler, LLP, Columbus, OH; M. Scott McIntyre, LEAD ATTORNEY, Baker & Hostetler LLP - CINCINNATI, OH, Cincinnati, OH; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Foremost County Mutual Insurance Company, 6:14-CV-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Brian Ignatius Hays, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; David L. Yohai, LEAD ATTORNEY, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Katherine Heid Harris, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; Randall Allan Hack, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; Brian J. D'Amico, Weil, Gotshal & Manges, **[*193]** LLP, Miami, FL.

For Foremost Insurance Company Grand Rapids, 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Brian Ignatius Hays, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; David L. Yohai, LEAD ATTORNEY, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Katherine Heid Harris, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; Randall Allan Hack, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; Hal K. Litchford, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Allstate Corporation, 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Allstate County Mutual Insurance Company, 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC **[*194]** VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For State Farm County Mutual Insurance Company of Texas, Defendant (6:14-md-02557-GAP-TBS): Brent R. Austin, LEAD ATTORNEY, PRO HAC VICE, Eimer Stahl LLP, Chicago, IL; Elizabeth Helmer, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael L. McCluggage, LEAD ATTORNEY, Eimer Stahl LLP, Chicago, IL; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Johanna W. Clark, Carlton Fields Jorden Burt, PA.

For Artisan & Truckers Casualty Company, 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Elizabeth Doolin, LEAD ATTORNEY, PRO HAC VICE, Chittenden, Murday & Novotny LLC, Chicago, IL; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, **[*195]** GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael Brian Galibois, LEAD ATTORNEY, Chittenden, Murday & Novotny, LLC, Chicago, IL; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA.

For Liberty Mutual Holding Company, Inc., 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Joseph Edward Ezzie, LEAD ATTORNEY, Baker & Hostetler, LLP, Columbus, OH; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Trischa Snyder Chapman, LEAD ATTORNEY, Baker Hostetler Llp, Columbus, OH; William Kevin Kane, LEAD ATTORNEY, Baker Hostetler LLP, Chicago, IL; Hal K. Litchford, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Liberty County Mutual Insurance Company, Texas, 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Joseph Edward Ezzie, LEAD ATTORNEY, Baker & Hostetler, LLP, Columbus, OH; Michael E. Mumford, LEAD

ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Trischa Snyder Chapman, LEAD ATTORNEY, Baker Hostetler Llp, Columbus, **[*196]** OH; William Kevin Kane, LEAD ATTORNEY, Baker Hostetler LLP, Chicago, IL.

For Liberty Mutual Group Inc., 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Joseph Edward Ezzie, LEAD ATTORNEY, Baker & Hostetler, LLP, Columbus, OH; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Trischa Snyder Chapman, LEAD ATTORNEY, Baker Hostetler Llp, Columbus, OH; William Kevin Kane, LEAD ATTORNEY, Baker Hostetler LLP, Chicago, IL.

For Peerless Insurance Company, 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Joseph Edward Ezzie, LEAD ATTORNEY, Baker & Hostetler, LLP, Columbus, OH; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Trischa Snyder Chapman, LEAD ATTORNEY, Baker Hostetler Llp, Columbus, OH; William Kevin Kane, LEAD ATTORNEY, Baker Hostetler LLP, Chicago, IL.

For AMCO Insurance Company, 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Josh Goldberg, LEAD **[*197]** ATTORNEY, Carpenter Lipps & Leland LLP, Chicago, IL; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Mark J. Botti Squire Patton Boggs (US) LLP.

For Colonial County Mutual Insurance Company, 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Josh Goldberg, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Chicago, IL; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Mark J. Botti, Squire Patton Boggs (US) LLP, Washington, DC.

For Depositors Insurance Company, 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell **[*198]** & Berkowitz, PC, Orlando, FL; Josh Goldberg, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Chicago, IL; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Mark J. Botti, Squire Patton Boggs (US) LLP, Washington, DC.

For Nationwide Agribusiness Insurance Company, 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Josh Goldberg, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Chicago, IL; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Mark J. Botti, Squire Patton Boggs (US) LLP, Washington, DC.

For GEICO County Mutual Insurance Company, 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, **[*199]** AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Ian Matthew Fischer, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Jason H. Nash, LEAD ATTORNEY, PRO HAC VICE, Hinkhouse Williams Walsh, LLP, Chicago, IL; John T. Williams, LEAD ATTORNEY, PRO HAC VICE, Hinkhouse Williams Walsh, LLP, Chicago, IL; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ.

For The Progressive Corporation, 6:14-cv-6016, NDIL, Defendant (6:14-md-02557-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Elizabeth Doolin, LEAD ATTORNEY, PRO HAC VICE, Chittenden, Murday & Novotny LLC, Chicago, IL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael Brian Galibois, LEAD ATTORNEY, Chittenden, Murday & Novotny, LLC, Chicago, IL; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, Sutherland, **[*200]** Asbill & Brennan, LLP, New York, NY.

For Liberty Insurance Company, Defendant (6:14-md-02557-GAP-TBS): Ernest E. Vargo, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, Baker & Hostetler, LLP, Cleveland, OH.

For Ohio Casualty Insurance Company, Defendant (6:14-md-02557-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Ohio Security Insurance Company, Defendant (6:14-md-02557-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Northbrook Indemnity Company, Defendant (6:14-md-02557-GAP-TBS): Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, **[*201]** IL; Hal K. Litchford, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For General Automobile Insurance Company, Inc., Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Heather Carson Perkins, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Denver, CO; James L. McCrystal, Jr., LEAD ATTORNEY, Brzytwa, Quick & McCrystal, Cleveland, OH; Kathy Lynn Osborn, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN; Michael Sean McCarthy, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Denver, CO; Nathan F. Studeny, LEAD ATTORNEY, Brzytwa, Quick & McCrystal, Cleveland, OH; Ryan Michael Hurley, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN; Sarah Jenkins, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN.

For United States Liability Insurance Company, Defendant (6:14-md-02557-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Trustgard Insurance Co., Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell **[*202]** & Berkowitz, PC, Orlando, FL; Joseph Edward Ezzie, LEAD ATTORNEY, Baker & Hostetler, LLP, Columbus, OH.

For LM General Insurance Corporation, Defendant (6:14-md-02557-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For West American Insurance Company, Defendant (6:14-md-02557-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For LM Insurance Company, Defendant (6:14-md-02557-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Peerless Indemnity Insurance Company, Defendant (6:14-md-02557-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, **[*203]** LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Mid American Fire and Casualty Insurance Company, Defendant (6:14-md-02557-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For American Fire and Casualty Company, Defendant (6:14-md-02557-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For American Standard Insurance Company of Ohio, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Heather Carson Perkins, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Denver, CO; James L. McCrystal, Jr., LEAD ATTORNEY, Brzytwa, Quick & McCrystal, Cleveland, OH; Kathy Lynn Osborn, LEAD ATTORNEY, Faegre Baker Daniels, **[*204]** LLP, Indianapolis, IN; Michael Sean McCarthy, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Denver, CO; Nathan F. Studeny, LEAD ATTORNEY, Brzytwa, Quick & McCrystal, Cleveland, OH; Ryan Michael Hurley, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN; Sarah Jenkins, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN.

For Permanent General Assurance Corporation of Ohio, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Heather Carson Perkins, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Denver, CO; James L. McCrystal, Jr., LEAD ATTORNEY, Brzytwa, Quick & McCrystal, Cleveland, OH; Kathy Lynn Osborn, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN; Michael Sean McCarthy, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Denver, CO; Nathan F. Studeny, LEAD ATTORNEY, Brzytwa, Quick & McCrystal, Cleveland, OH; Ryan Michael Hurley, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN; Sarah Jenkins, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN.

For Permanent General Assurance Corporation, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, **[*205]** Caldwell & Berkowitz, PC, Orlando, FL; Heather Carson Perkins, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Denver, CO; James L. McCrystal, Jr., LEAD ATTORNEY, Brzytwa, Quick & McCrystal, Cleveland, OH; Kathy Lynn Osborn, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN; Michael Sean McCarthy, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Denver, CO; Nathan F. Studeny, LEAD ATTORNEY, Brzytwa, Quick & McCrystal, Cleveland, OH; Ryan Michael Hurley, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN; Sarah Jenkins, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN.

For Westfield National Insurance, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John J. Haggerty, LEAD ATTORNEY, PRO HAC VICE, Fox Rothschild, LLP, Warrington, PA.

For American Select Insurance Company, Defendant (6:14-md-02557-GAP-TBS): Alejandro M. Miyar, LEAD ATTORNEY, Fox Rothschild LLP, Miami, FL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John J. Haggerty, LEAD ATTORNEY, PRO HAC VICE, Fox Rothschild, LLP, Warrington, PA.

For Automobile Club Inter-Insurance Exchange, **[*206]** Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Farmers Insurance Company, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Farm Bureau Town & Country Insurance Company of Missouri, Defendant (6:14-md-02557-GAP-TBS): Katherine Baber Fezzi, LEAD ATTORNEY, Brown & James, PC, St. Louis, MS; Steven Howard Schwartz, LEAD ATTORNEY, Brown & James, PC, St. Louis, MS.

For American Standard Insurance Company of Wisconsin, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For LM General Insurance Company, Defendant (6:14-md-02557-GAP-TBS): Hal K. Litchford, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Farmers Texas County Mutual Insurance Company, Defendant (6:14-md-02557-GAP-TBS): David L. Yohai, LEAD ATTORNEY, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Brian **[*207]** J. D'Amico, Weil, Gotshal & Manges, LLP, Miami, FL.

For Alfa Vision Insurance Corporation, Defendant (6:14-md-02557-GAP-TBS): Elizabeth Skilling, LEAD ATTORNEY, Harman Claytor Corigan Wellman, PC, Glen Allen, VA.

For Alfa Specialty Insurance Corporation, Defendant (6:14-md-02557-GAP-TBS): Elizabeth Skilling, LEAD ATTORNEY, Harman Claytor Corigan Wellman, PC, Glen Allen, VA.

For Legends Collision LLC, Plaintiff (6:14-cv-06006-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Elaine Ann Ryan, LEAD ATTORNEY, Bonnett Fairbourn Friedman & Balint PC - Phoenix, AZ, Phoenix, AZ; Eric David Zard, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; H. Sullivan Bunch, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, P.C., Signal Mountain, TN; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Raintree Auto Body Incorporated, Plaintiff (6:14-cv-06006-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Elaine Ann Ryan, LEAD ATTORNEY, Bonnett Fairbourn Friedman & Balint PC - Phoenix, AZ, Phoenix, **[*208]** AZ; Eric David Zard, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; H. Sullivan Bunch, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, P.C., Signal Mountain, TN; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Jan's European Auto Body Incorporated, doing business as Jan's Spectrum Collision Center, Plaintiff (6:14-cv-06006-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Elaine Ann Ryan, LEAD ATTORNEY, Bonnett Fairbourn Friedman & Balint PC - Phoenix, AZ, Phoenix, AZ; Eric David Zard, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; H. Sullivan Bunch, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, P.C., Signal Mountain, TN; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Robert K Isham, formerly known as New Image Paint and Body Shop Inc., Plaintiff (6:14-cv-06006-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Elaine Ann Ryan, LEAD ATTORNEY, Bonnett Fairbourn Friedman & Balint PC - Phoenix, AZ, Phoenix, AZ; **[*209]** Eric David Zard, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; H. Sullivan Bunch, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, P.C., Signal Mountain, TN; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Airport Enterprises Incorporated, 6:14-cv-6006, AZD, doing business as Airport Auto Center, Plaintiff (6:14-cv-06006-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Elaine Ann Ryan, LEAD ATTORNEY, Bonnett Fairbourn Friedman & Balint PC - Phoenix, AZ, Phoenix, AZ; Eric David Zard, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; H. Sullivan Bunch, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, P.C., Signal Mountain, TN; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Orlando Auto Body, Inc., Plaintiff (6:14-cv-06006-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Elaine Ann Ryan, LEAD ATTORNEY, Bonnett Fairbourn Friedman **[*210]** & Balint PC - Phoenix, AZ, Phoenix, AZ; Eric David Zard, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; H. Sullivan Bunch, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, P.C., Signal

Mountain, TN; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For State Farm Mutual Automobile Insurance Company, Defendant (6:14-cv-06006-GAP-TBS): Alicyn Marie Freeman, LEAD ATTORNEY, Broening Oberg Woods & Wilson PC, Phoenix, AZ; Elizabeth Helmer, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael L. McCluggage, LEAD ATTORNEY, Eimer Stahl LLP, Chicago, IL; Robert Thomas Aquinas Sullivan, LEAD ATTORNEY, Broening Oberg Woods & Wilson PC - Phoenix, AZ, Phoenix, AZ; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Johanna W. Clark, Carlton Fields Jorden Burt, PA, Orlando, FL.

For State Farm Fire and Casualty Company, Defendant (6:14-cv-06006-GAP-TBS): Alicyn Marie Freeman, LEAD ATTORNEY, **[*211]** Broening Oberg Woods & Wilson PC, Phoenix, AZ; Elizabeth Helmer, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael L. McCluggage, LEAD ATTORNEY, Eimer Stahl LLP, Chicago, IL; Robert Thomas Aquinas Sullivan, LEAD ATTORNEY, Broening Oberg Woods & Wilson PC - Phoenix, AZ, Phoenix, AZ; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Johanna W. Clark, Carlton Fields Jorden Burt, PA, Orlando, FL.

For Farmers Insurance Company of Arizona, Defendant (6:14-cv-06006-GAP-TBS): David L. Yohai, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Brian J. D'Amico, Weil, Gotshal & Manges, LLP, Miami, FL.

For Farmers Insurance Exchange, Defendant (6:14-cv-06006-GAP-TBS): David L. Yohai, LEAD ATTORNEY, PRO HAC VICE, Weil, **[*212]** Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Brian J. D'Amico, Weil, Gotshal & Manges, LLP, Miami, FL.

For Zurich American Insurance Company, Defendant (6:14-cv-06006-GAP-TBS): Amelia T. Rudolph, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Patricia A. Gorham, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, Atlanta, GA; Thomas William Curvin, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, Atlanta, GA.

For Progressive Preferred Insurance Company, Defendant (6:14-cv-06006-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, **[*213]** GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA.

For Progressive Advanced Insurance Company, Defendant (6:14-cv-06006-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA.

For Progressive Casualty Insurance Company, Defendant (6:14-cv-06006-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey **[*214]** S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA.

For Geico Casualty Company, Defendant (6:14-cv-06006-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Ian Matthew Fischer, Snell & Wilmer, LLP, Phoenix, AZ.

For GEICO General Insurance Company, Defendant (6:14-cv-06006-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Ian Matthew Fischer, Snell & Wilmer, LLP, Phoenix, AZ.

For Geico Indemnity **[*215]** Company, Defendant (6:14-cv-06006-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Ian Matthew Fischer, Snell & Wilmer, LLP, Phoenix, AZ.

For Government Employee's Insurance Company, Defendant (6:14-cv-06006-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Ian Matthew Fischer, Snell & Wilmer, LLP, Phoenix, AZ.

For Allstate Fire and Casualty Insurance Company, Defendant (6:14-cv-06006-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; **[*216]** Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Allstate Indemnity Company, Defendant (6:14-cv-06006-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Allstate Insurance Company, Defendant (6:14-cv-06006-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Allstate Property and Casualty Insurance Company, Defendant (6:14-cv-06006-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, **[*217]** Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For United Services Automobile Association, Defendant (6:14-cv-06006-GAP-TBS): Amelia W. Koch, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kyle A. Diamantas, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Steven F. Griffith, Jr., LEAD ATTORNEY, PRO HAC VICE, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA.

For USAA Casualty Insurance Company, Defendant (6:14-cv-06006-GAP-TBS): Amelia W. Koch, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kyle A. Diamantas, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Steven F. Griffith, Jr., LEAD ATTORNEY, PRO HAC VICE, **[*218]** Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA.

For USAA General Indemnity Company, Defendant (6:14-cv-06006-GAP-TBS): Amelia W. Koch, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kyle A. Diamantas, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Steven F. Griffith, Jr., LEAD ATTORNEY, PRO HAC VICE, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA.

For American Family Mutual Insurance Company, Defendant (6:14-cv-06006-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Heather Carson Perkins, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Denver, CO; Kathy Lynn Osborn, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN; Michael Sean McCarthy, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Denver, CO; Ryan Michael Hurley, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN; Sarah Jenkins, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN.

For Liberty Mutual Insurance Company, Defendant (6:14-cv-06006-GAP-TBS): Ernest **[*219]** E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Safeco Insurance Company of America, Defendant (6:14-cv-06006-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Hartford Casualty Insurance Company, Defendant (6:14-cv-06006-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Hartford Insurance Company of the Midwest, Defendant (6:14-cv-06006-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For CSAA Fire & Casualty Insurance Company, Defendant (6:14-cv-06006-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Richard Wardell Loveland, LEAD ATTORNEY, Coddington, Hicks & Danforth, Redwood City, CA.

For Nationwide Insurance Company **[*220]** of America, Defendant (6:14-cv-06006-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For Nationwide Mutual Insurance Company, Defendant (6:14-cv-06006-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps **[*221]** & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For Nationwide Affinity Insurance Company Of America, Defendant (6:14-cv-06006-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell &

Berkowitz, PC, Orlando, FL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For Sentry Insurance Mutual Company, named in caption as: Sentry Insurance a Mutual Company, Defendant (6:14-cv-06006-GAP-TBS): Edward Keenan Cottrell, LEAD ATTORNEY, Smith, Gambrell & Russell, LLP, Jacksonville, FL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Metropolitan **[*222]** Casualty Insurance Company, Defendant (6:14-cv-06006-GAP-TBS): Floyd Beinstock, LEAD ATTORNEY, Steptoe & Johnson, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; P. Bruce Converse, LEAD ATTORNEY, Steptoe & Johnson, LLP, Phoenix, AZ.

For Metropolitan Group Property and Casualty Insurance Company, Defendant (6:14-cv-06006-GAP-TBS): Floyd Beinstock, LEAD ATTORNEY, Steptoe & Johnson, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; P. Bruce Converse, LEAD ATTORNEY, Steptoe & Johnson, LLP, Phoenix, AZ.

For Metropolitan Property and Casualty Insurance Company, Defendant (6:14-cv-06006-GAP-TBS): Floyd Beinstock, LEAD ATTORNEY, Steptoe & Johnson, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; P. Bruce Converse, LEAD ATTORNEY, Steptoe & Johnson, LLP, Phoenix, AZ.

For Infinity Insurance Company, Defendant (6:14-cv-06006-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael R. Pennington, LEAD ATTORNEY, Bradley, Arant, Boult & Cummings, **[*223]** LLP, Birmingham, AL.

For Travelers Property Casualty Company, Defendant (6:14-cv-06006-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL.

For Travelers Casualty and Surety Company of America, Defendant (6:14-cv-06006-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL.

For Travelers Casualty Insurance Company of America, Defendant (6:14-cv-06006-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, **[*224]** IL.

For Travelers Indemnity Company, Defendant (6:14-cv-06006-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL.

For Safeway Insurance Company, Defendant (6:14-cv-06006-GAP-TBS): Christopher Charles Skambis, Jr., LEAD ATTORNEY, The Skambis Law Firm, Orlando, FL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Country Mutual Insurance Company, Defendant (6:14-cv-06006-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; William James Kelly, III, LEAD ATTORNEY, Kelly & Walker LLC, Denver, CO.

For United Automobile Insurance Company, Defendant (6:14-cv-06006-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lara Judith Edelstein, LEAD

ATTORNEY, United Automobile Insurance Co., Office of General Counsel, Miami Gardens, FL; Paul E. Susz, LEAD ATTORNEY, United **[*225]** Automobile Insurance Co., Office of General Counsel, Miami Gardens, FL.

For Rodenhouse Body Shop, Inc., a Michigan corporation, Plaintiff (6:14-cv-06007-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Andrew John Rodenhouse, Rodenhouse Kuipers, PC, Grand Rapids, MI.

For Bernardi & Judge Corp., a Michigan corporation, doing business as Berkley Collision, Inc., Plaintiff (6:14-cv-06007-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Andrew John Rodenhouse, Rodenhouse Kuipers, PC, Grand Rapids, MI.

For Clarkston Auto Body, Inc., a Michigan corporation, Plaintiff (6:14-cv-06007-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Andrew John Rodenhouse, Rodenhouse Kuipers, PC, Grand Rapids, MI.

For Clarkston Auto Body II, Inc., a Michigan corporation, Plaintiff (6:14-cv-06007-GAP-TBS): **[*226]** Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Andrew John Rodenhouse, Rodenhouse Kuipers, PC, Grand Rapids, MI.

For Classic Auto Collision, Inc., a Michigan corporation, Plaintiff (6:14-cv-06007-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Andrew John Rodenhouse, Rodenhouse Kuipers, PC, Grand Rapids, MI.

For H.D. Way Corporation, a Michigan corporation, doing business as Alpine Collision Center, Plaintiff (6:14-cv-06007-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Andrew John Rodenhouse, Rodenhouse Kuipers, PC, Grand Rapids, MI.

For Jerry's Body Shop, Inc., a Michigan corporation, Plaintiff (6:14-cv-06007-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Andrew John Rodenhouse, Rodenhouse Kuipers, PC, Grand Rapids, MI.

For Judd's Body Shop, Inc., a Michigan **[*227]** corporation, Plaintiff (6:14-cv-06007-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Andrew John Rodenhouse, Rodenhouse Kuipers, PC, Grand Rapids, MI.

For Lantagne's Auto Body, LLC, a Michigan limited liability corporation, Plaintiff (6:14-cv-06007-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Andrew John Rodenhouse, Rodenhouse Kuipers, PC, Grand Rapids, MI.

For Northville Collision, Inc., a Michigan corporation, Plaintiff (6:14-cv-06007-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Andrew John Rodenhouse, Rodenhouse Kuipers, PC, Grand Rapids, MI.

For Professional Finish, Inc., a Michigan corporation, Plaintiff (6:14-cv-06007-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Andrew John Rodenhouse, Rodenhouse Kuipers, PC, Grand Rapids, MI.

For **[*228]** R & R Auto Body Repair, Inc., a Michigan corporation, Plaintiff (6:14-cv-06007-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Andrew John Rodenhouse, Rodenhouse Kuipers, PC, Grand Rapids, MI.

For State Farm Mutual Automobile Insurance Company, an Illinois insurance company, Defendant (6:14-cv-06007-GAP-TBS): Elizabeth Helmer, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Johanna W. Clark, LEAD ATTORNEY, Carlton Fields Jorden Burt, PA, Orlando, FL; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael L. McCluggage, LEAD ATTORNEY, Eimer Stahl LLP, Chicago, IL; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; David Danny O'Brien, Miller Canfield Paddock & Stone PLC (Ann Arbor), Ann Arbor, MI; Thomas W. Cranmer, Miller Canfield Paddock & Stone PLC (Troy), Troy, MI.

For State Farm Fire and Casualty Company, an Illinois insurance company, Defendant (6:14-cv-06007-GAP-TBS): Elizabeth Helmer, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Hal **[*229]** K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael L. McCluggage, LEAD ATTORNEY, Eimer Stahl LLP, Chicago, IL; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; David Danny O'Brien, Miller Canfield Paddock & Stone PLC (Ann Arbor), Ann Arbor, MI; Thomas W. Cranmer, Miller Canfield Paddock & Stone PLC (Troy), Troy, MI.

For Auto Club Group Insurance Company, a Michigan corporation, Defendant (6:14-cv-06007-GAP-TBS): G. Calvin Hayes, LEAD ATTORNEY, Buchanan Ingersoll & Rooney, PC | Fowler White Boggs, Tampa, FL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Auto Club Property-Casualty Insurance Company, a Michigan corporation, Defendant (6:14-cv-06007-GAP-TBS): G. Calvin Hayes, LEAD ATTORNEY, Buchanan Ingersoll & Rooney, PC | Fowler White Boggs, Tampa, FL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Auto-Owners Insurance Company, a Michigan corporation, Defendant (6:14-cv-06007-GAP-TBS): **[*230]** Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori McAllister, Dykema Gossett, PLLC, Lansing, MI; Theodore Joseph Greeley, Dykema Gossett, PLLC, Lansing, MI.

For Progressive Marathon Ins. Co., a Michigan insurance company, Defendant (6:14-cv-06007-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA.

For Progressive Michigan Ins. Co., a Michigan insurance company, Defendant (6:14-cv-06007-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, **[*231]** PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA.

For Allstate Insurance Company, an Illinois insurance corporation, Defendant (6:14-cv-06007-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Allstate Property & Casualty Insurance Company, an Illinois insurance company, Defendant (6:14-cv-06007-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, **[*232]** Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Allmerica Financial Alliance Insurance Company, a New Hampshire insurance company, Defendant (6:14-cv-06007-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori McAllister, LEAD ATTORNEY, Dykema Gossett, PLLC, Lansing, MI; Theodore Joseph Greeley, LEAD ATTORNEY, Dykema Gossett, PLLC, Lansing, MI.

For Hanover American Insurance Company, The, a New Hampshire insurance company, Defendant (6:14-cv-06007-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori McAllister, Dykema Gossett, PLLC, Lansing, MI; Theodore Joseph Greeley, Dykema Gossett, PLLC, Lansing, MI.

For Hanover Insurance Company, The, a New Hampshire insurance company, Defendant (6:14-cv-06007-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori McAllister, Dykema Gossett, PLLC, Lansing, MI; Theodore Joseph Greeley, Dykema Gossett, PLLC, Lansing, MI.

For Citizens Insurance Company of America, a Michigan corporation, Defendant (6:14-cv-06007-GAP-TBS): Hal K. **[*233]** Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori McAllister, Dykema Gossett, PLLC, Lansing, MI; Theodore Joseph Greeley, Dykema Gossett, PLLC, Lansing, MI.

For Farm Bureau General Insurance Company of Michigan, a Michigan corporation, Defendant (6:14-cv-06007-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John A. Yeager, LEAD ATTORNEY, Willingham & Cote', P.C., East Lansing, MI; Anthony S. Kogut, Willingham & Cote PC, East Lansing, MI.

For Farm Bureau Mutual Insurance Company of Michigan, a Michigan corporation, Defendant (6:14-cv-06007-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John A. Yeager, LEAD ATTORNEY, Willingham & Cote', P.C., East Lansing, MI; Anthony S. Kogut, Willingham & Cote PC, East Lansing, MI.

For Liberty Mutual Insurance Company, a Massachusetts corporation, Defendant (6:14-cv-06007-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker **[*234]** & Hostetler, LLP, Cleveland, OH.

For Nationwide Mutual Fire Insurance Company, an Ohio corporation, Defendant (6:14-cv-06007-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For Nationwide Property and Casualty Insurance Company, an Ohio corporation, Defendant (6:14-cv-06007-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark **[*235]** J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For Frankenmuth Mutual Insurance Company, a Michigan corporation, Defendant (6:14-cv-06007-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Scott Lee Mandel, LEAD ATTORNEY, Foster, Swift, Collins & Smith, PC, Lansing, MI.

For United Services Automobile Association, a Texas corporation, Defendant (6:14-cv-06007-GAP-TBS): Amelia W. Koch, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kyle A. Diamantas, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Steven F. Griffith, Jr., LEAD ATTORNEY, PRO HAC VICE, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA.

For Pioneer State Mutual Insurance Company, a Michigan corporation, Defendant (6:14-cv-06007-GAP-TBS): Hal K. Litchford, **[*236]** LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Scott Lee Mandel, LEAD ATTORNEY, Foster, Swift, Collins & Smith, PC, Lansing, MI.

For Hartford Casualty Insurance Company, an Indiana corporation, Defendant (6:14-cv-06007-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Hartford Insurance Company of the Midwest, an Indiana corporation, Defendant (6:14-cv-06007-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Grange Insurance Co. of Michigan, an Ohio corporation, Defendant (6:14-cv-06007-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Joseph Edward Ezzie, LEAD ATTORNEY, Baker & Hostetler, LLP, Columbus, OH.

For Michigan Millers Mutual Insurance Company, a Michigan corporation, Defendant (6:14-cv-06007-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori McAllister, **[*237]** Dykema Gossett, PLLC, Lansing, MI; Theodore Joseph Greeley, Dykema Gossett, PLLC, Lansing, MI.

For Hastings Mutual Insurance Company, a Michigan corporation, Defendant (6:14-cv-06007-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Scott Lee Mandel, LEAD ATTORNEY, Foster, Swift, Collins & Smith, PC, Lansing, MI.

For Foremost Property and Casualty Insurance Company, a Michigan corporation, Defendant (6:14-cv-06007-GAP-TBS): David L. Yohai, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Brian J. D'Amico, Weil, Gotshal & Manges, LLP, Miami, FL.

For Farmers Insurance Exchange, a California corporation, Defendant (6:14-cv-06007-GAP-TBS): David L. Yohai, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, **[*238]** Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Brian J. D'Amico, Weil, Gotshal & Manges, LLP, Miami, FL.

For Esurance Insurance Company, a Wisconsin corporation, Defendant (6:14-cv-06007-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For State Automobile Mutual Insurance Company, an Ohio corporation, Defendant (6:14-cv-06007-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Wolverine Mutual Insurance Company, a Michigan corporation, Defendant (6:14-cv-06007-GAP-TBS): David Michael Peterson, II, LEAD ATTORNEY, Wolverine Mutual Insurance Company, **[*239]** Dowagiac, MI; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Cincinatti Insurance Company, The, an Ohio corporation, Defendant (6:14-cv-06007-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Matthew C. Blickensderfer, LEAD ATTORNEY, Frost, Brown & Todd, LLC, Cincinnati, OH.

For Secura Insurance a Mutual Company, a Wisconsin corporation, Defendant (6:14-cv-06007-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Scott Lee Mandel, LEAD ATTORNEY, Foster, Swift, Collins & Smith, PC, Lansing, MI.

For Secura Supreme Insurance Company, a Wisconsin corporation, Defendant (6:14-cv-06007-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Scott Lee Mandel, LEAD ATTORNEY, Foster, Swift, Collins & Smith, PC, Lansing, MI.

For Horace Mann Insurance Company, an Illinois corporation, Defendant (6:14-cv-06007-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Marjorie M. Salazar, LEAD ATTORNEY, Lugenbuhl, Wheaton, Peck, Rankin **[*240]** & Hubbard, Houston, TX; Seth A. Schmeeckle, LEAD ATTORNEY, Lugenbuhl, Wheaton, Peck, Rankin & Hubbard, New Orleans, LA.

For Donegal Mutual Insurance Company, a Pennsylvania corporation, Defendant (6:14-cv-06007-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Gary J. Mouw, Grand Rapids, MI, Varnum Riddering Schmidt & Howlett LLP (Grand Rapids), Bridgewater Place; Holly L. Cline, Rhoads & Sinon, LLP, Harrisburg, PA; Kyle Patrick Konwinski, Varnum LLP, Grand Rapids, MI; Thomas A. French, Rhoads & Sinon, LLP, Harrisburg, PA.

For Meemic Insurance Company, a Michigan corporation, Defendant (6:14-cv-06007-GAP-TBS): G. Calvin Hayes, LEAD ATTORNEY, Buchanan Ingersoll & Rooney, PC | Fowler White Boggs, Tampa, FL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For The Only One Inc., Plaintiff (6:14-cv-06009-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; John William Gray, LEAD ATTORNEY, Gray, Lawrence & Jenkins, Birmingham, AL; William R. Sevier, LEAD ATTORNEY, **[*241]** John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Homewood Auto Body Specialists Inc, Plaintiff (6:14-cv-06009-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John William Gray, LEAD ATTORNEY, Gray, Lawrence & Jenkins, Birmingham, AL; William R. Sevier, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For McDaniel Enterprises Inc, Plaintiff (6:14-cv-06009-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John William Gray, LEAD ATTORNEY, Gray, Lawrence & Jenkins, Birmingham, AL; William R. Sevier, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Corlett Auto Restoration Inc, Plaintiff (6:14-cv-06009-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John William Gray, LEAD ATTORNEY, Gray, Lawrence & Jenkins, Birmingham, AL.

For Earl's Body Shop Inc, Plaintiff (6:14-cv-06009-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John William Gray, LEAD ATTORNEY, Gray, Lawrence & Jenkins, Birmingham, AL.

For Oak Mountain Body Shop LLC, Plaintiff (6:14-cv-06009-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, **[*242]** John Arthur Eaves, Attorneys at Law, Jackson, MS; John William Gray, LEAD ATTORNEY, Gray, Lawrence & Jenkins, Birmingham, AL; William R. Sevier, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For ACE Body Shop Inc, Plaintiff (6:14-cv-06009-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John William Gray, LEAD ATTORNEY, Gray, Lawrence & Jenkins, Birmingham, AL.

For Myers Auto Collison Repair Inc, Plaintiff (6:14-cv-06009-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John William Gray, LEAD ATTORNEY, Gray, Lawrence & Jenkins, Birmingham, AL; William R. Sevier, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Pleasant Grove Collision Inc, Plaintiff (6:14-cv-06009-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John William Gray, LEAD ATTORNEY, Gray, Lawrence & Jenkins, Birmingham, AL; William R. Sevier, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Alabama Paint & Body Inc, Plaintiff (6:14-cv-06009-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John William **[*243]** Gray, LEAD ATTORNEY, Gray, Lawrence & Jenkins, Birmingham, AL.

For Henslee Auto Body Inc, Plaintiff (6:14-cv-06009-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John William Gray, LEAD ATTORNEY, Gray, Lawrence & Jenkins, Birmingham, AL; William R. Sevier, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For State Farm Mutual Auto Insurance Company, Defendant (6:14-cv-06009-GAP-TBS): Elizabeth Helmer, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael B Beers, LEAD ATTORNEY, Butler Snow LLC, Montgomery, AL; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA.

For State Farm Fire and Casualty Company, Defendant (6:14-cv-06009-GAP-TBS): Elizabeth Helmer, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael B Beers, LEAD ATTORNEY, Butler Snow LLC, Montgomery, AL; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Tiffany L. Powers, LEAD **[*244]** ATTORNEY, Alston & Bird, LLP, Atlanta, GA.

For Allstate Insurance Company, Defendant (6:14-cv-06009-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Allstate Indemnity Company, Defendant (6:14-cv-06009-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Allstate Northbrook Indemnity Company, Defendant (6:14-cv-06009-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Allstate Property and Casualty Insurance Company, Defendant (6:14-cv-06009-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Nationwide Property and Casualty Insurance Company, Defendant (6:14-cv-06009-GAP-TBS): David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Mark **[*245]** J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For Nationwide Mutual Insurance Company, Defendant (6:14-cv-06009-GAP-TBS): David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For Nationwide Mutual Fire Insurance Company, Defendant (6:14-cv-06009-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly J. Donovan, LEAD ATTORNEY, Squire **[*246]** Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For Nationwide General Insurance Company, Defendant (6:14-cv-06009-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps

& Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For Nationwide Assurance Company, Defendant (6:14-cv-06009-GAP-TBS): David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, **[*247]** Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For Progressive Specialty Insurance Company, Defendant (6:14-cv-06009-GAP-TBS): Christine A. Hopkinson, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY, ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Progressive Direct Insurance Company, Defendant (6:14-cv-06009-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Claire Carothers Oates, LEAD ATTORNEY, **[*248]** King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Travelers Home and Marine Insurance Company, Defendant (6:14-cv-06009-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL.

For Travelers Property Casualty Insurance Company, Defendant (6:14-cv-06009-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL.

For Travelers Commercial Insurance Company, Defendant (6:14-cv-06009-GAP-TBS): Hal K. Litchford, LEAD **[*249]** ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL.

For GEICO General Insurance Company, Defendant (6:14-cv-06009-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Ian Matthew Fischer, Snell & Wilmer, LLP, Phoenix, AZ.

For Geico Casualty Company, Defendant (6:14-cv-06009-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Ian Matthew Fischer, Snell & Wilmer, LLP, Phoenix, AZ.

For Geico Indemnity Company, Defendant (6:14-cv-06009-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis **[*250]** Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Ian Matthew Fischer, Snell & Wilmer, LLP, Phoenix, AZ.

For Government Employee's Insurance Company, Defendant (6:14-cv-06009-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Ian Matthew Fischer, Snell & Wilmer, LLP, Phoenix, AZ.

For First Liberty Insurance Corporation, Defendant (6:14-cv-06009-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For United Services Automobile Association, Defendant (6:14-cv-06009-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, **[*251]** PC, Orlando, FL; Kyle A. Diamantas, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For USAA Casualty Insurance Company, Defendant (6:14-cv-06009-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kyle A. Diamantas, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For USAA General Indemnity Company, Defendant (6:14-cv-06009-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kyle A. Diamantas, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For LM General Insurance Company, Defendant (6:14-cv-06009-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Liberty Mutual Fire Insurance Company, Defendant (6:14-cv-06009-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Esurance Property & Casualty Insurance Company, Defendant (6:14-cv-06009-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Esurance Insurance Company, **[*252]** Defendant (6:14-cv-06009-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For State Auto Property And Casualty Company, Defendant (6:14-cv-06009-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For State Automobile Mutual Insurance Company, Defendant (6:14-cv-06009-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Property and Casualty Insurance Company of Hartford, Defendant (6:14-cv-06009-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Hartford Insurance Company of the Midwest, Defendant (6:14-cv-06009-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Hartford Underwriters Insurance Company, Defendant (6:14-cv-06009-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Hartford Casualty Insurance Company, Defendant (6:14-cv-06009-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, **[*253]** FL.

For Hartford Accident and Indemnity Company, Defendant (6:14-cv-06009-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Hartford Fire Insurance Company, Defendant (6:14-cv-06009-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Sentinel Insurance Company, Ltd., Defendant (6:14-cv-06009-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Twin City Fire Insurance Company, Defendant (6:14-cv-06009-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Farmers Insurance Exchange, Defendant (6:14-cv-06009-GAP-TBS): David L. Yohai, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Brian J. D'Amico, Weil, Gotshal & Manges, LLP, Miami, FL.

For Safeco Insurance **[*254]** Company of Illinois, Defendant (6:14-cv-06009-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Safeway Insurance Company of Alabama, Defendant (6:14-cv-06009-GAP-TBS): Christopher Charles Skambis, Jr., LEAD ATTORNEY, The Skambis Law Firm, Orlando, FL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Country Mutual Insurance Company, Defendant (6:14-cv-06009-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; William James Kelly, III, LEAD ATTORNEY, Kelly & Walker LLC, Denver, CO.

For First Acceptance Insurance Company, Inc., Defendant (6:14-cv-06009-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael R. Pennington, LEAD ATTORNEY, Bradley, Arant, Boult & Cummings, LLP, Birmingham, AL.

For Metropolitan Property and Casualty Insurance Company, Defendant (6:14-cv-06009-GAP-TBS): Floyd Beinstock, LEAD ATTORNEY, Steptoe & Johnson, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; P. Bruce Converse, **[*255]** LEAD ATTORNEY, Steptoe & Johnson, LLP, Phoenix, AZ.

For Metropolitan Group Property and Casualty Insurance Company, Defendant (6:14-cv-06009-GAP-TBS): Floyd Beinstock, LEAD ATTORNEY, Steptoe & Johnson, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; P. Bruce Converse, LEAD ATTORNEY, Steptoe & Johnson, LLP, Phoenix, AZ.

For Metropolitan General Insurance Company, Defendant (6:14-cv-06009-GAP-TBS): Floyd Beinstock, LEAD ATTORNEY, Steptoe & Johnson, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; P. Bruce Converse, LEAD ATTORNEY, Steptoe & Johnson, LLP, Phoenix, AZ.

For Metropolitan Casualty Insurance Company, Defendant (6:14-cv-06009-GAP-TBS): Floyd Beinstock, LEAD ATTORNEY, Steptoe & Johnson, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; P. Bruce Converse, LEAD ATTORNEY, Steptoe & Johnson, LLP, Phoenix, AZ.

For Auto Owner's Insurance Company, Defendant (6:14-cv-06009-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Owners Insurance **[*256]** Company, Defendant (6:14-cv-06009-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For ACCC Insurance Company, Defendant (6:14-cv-06009-GAP-TBS): Edward Russ McNees, LEAD ATTORNEY, Holcomb Dunbar Watts Best Masters & Golmon, PA, Oxford, MS; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Robert Bradley Best, LEAD ATTORNEY, Holcomb Dunbar Watts Best Masters & Golmon, PA, Oxford, MS.

For Pacific Coast Auto Body, Inc., Plaintiff (6:14-cv-06010-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Mark L. Shurtleff, Shurtleff Law Firm, Salt Lake City, UT.

For D and M Auto Body, Inc., Plaintiff (6:14-cv-06010-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Mark L. Shurtleff, Shurtleff Law Firm, Salt Lake City, UT.

For Campbell's Auto Body, Inc., Plaintiff (6:14-cv-06010-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; William R. **[*257]** Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Mark L. Shurtleff, Shurtleff Law Firm, Salt Lake City, UT.

For Amato's Auto Body, Inc., Plaintiff (6:14-cv-06010-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Mark L. Shurtleff, Shurtleff Law Firm, Salt Lake City, UT.

For State Farm Mutual Automobile Insurance Company, Defendant (6:14-cv-06010-GAP-TBS): Elizabeth Helmer, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael L. McCluggage, LEAD ATTORNEY, Eimer Stahl LLP, Chicago, IL; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Johanna W. Clark, Carlton Fields Jorden Burt, PA, Orlando, FL.

For Interinsurance Exchange of the Automobile Club, Defendant (6:14-cv-06010-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Allstate Indemnity Company, Defendant (6:14-cv-06010-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San **[*258]** Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Mercury Insurance Company, Defendant (6:14-cv-06010-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Julius F. Parker, III, LEAD ATTORNEY, Butler Weihmuller Katz Craig LLP, Tallahassee, FL; Kathy J. Maus, LEAD ATTORNEY, Butler Pappas, LLP, Tallahassee, FL.

For CSAA Insurance Exchange, Defendant (6:14-cv-06010-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Richard Wardell Loveland, LEAD ATTORNEY, Coddington, Hicks & Danforth, Redwood City, CA.

For Farmers Insurance Exchange, Defendant (6:14-cv-06010-GAP-TBS): Brian J. D'Amico, LEAD ATTORNEY, Weil, Gotshal & Manges, LLP, Miami, FL; David L. Yohai, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New **[*259]** York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY.

For Mid-Century Insurance Company, Defendant (6:14-cv-06010-GAP-TBS): David L. Yohai, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY.

For GEICO General Insurance Company, Defendant (6:14-cv-06010-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Ian Matthew Fischer, Snell & Wilmer, LLP, Phoenix, AZ.

For Infinity Insurance Company, Defendant (6:14-cv-06010-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, **[*260]** Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael R. Pennington, LEAD ATTORNEY, Bradley, Arant, Boult & Cummings, LLP, Birmingham, AL.

For 21st Century Insurance Company, Defendant (6:14-cv-06010-GAP-TBS): Brian J. D'Amico, LEAD ATTORNEY, Weil, Gotshal & Manges, LLP, Miami, FL; David L. Yohai, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY.

For Alliance United Insurance Company, Defendant (6:14-cv-06010-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Wawanesa General Insurance Company, Defendant (6:14-cv-06010-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Coast National Insurance Company, Defendant (6:14-cv-06010-GAP-TBS): Brian J. D'Amico, LEAD ATTORNEY, Weil, Gotshal & Manges, LLP, Miami, FL; David L. Yohai, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, **[*261]** LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY.

For United Financial Casualty Company, Defendant (6:14-cv-06010-GAP-TBS): Christine A. Hopkinson, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Progressive West Insurance Company, Defendant (6:14-cv-06010-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, **[*262]** Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA.

For American Family Insurance Company, Defendant (6:14-cv-06010-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Amica Mutual Insurance Company, Defendant (6:14-cv-06010-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Rowe W. Snider, LEAD ATTORNEY, Locke Lord, LLP, Chicago, IL; Julia C. Webb, Locke Lord, LLP, Chicago, IL; Matthew T. Furton, Locke Lord, LLP, Chicago, IL.

For California Automobile Insurance Company, Defendant (6:14-cv-06010-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Julius F. Parker, III, LEAD ATTORNEY, Butler Weihmuller Katz Craig LLP, Tallahassee, FL; Kathy J. Maus, LEAD ATTORNEY, Butler Pappas, LLP, Tallahassee, FL.

For **[*263]** USAA Casualty Insurance Company, Defendant (6:14-cv-06010-GAP-TBS): Amelia W. Koch, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kyle A. Diamantas, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Steven F. Griffith, Jr., LEAD ATTORNEY, PRO HAC VICE, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA.

For Safeco Insurance Company of America, Defendant (6:14-cv-06010-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Liberty Mutual Fire Insurance Company, Defendant (6:14-cv-06010-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For United Services Automobile Association, Defendant (6:14-cv-06010-GAP-TBS): **[*264]** Amelia W. Koch, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kyle A. Diamantas, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Steven F. Griffith, Jr., LEAD ATTORNEY, PRO HAC VICE, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA.

For Kallemeyn Collision Center, Inc., Plaintiff (6:14-cv-06011-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Eric David Zard, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Elaine Ann Ryan, Bonnett Fairbourn Friedman & Balint PC - Phoenix, AZ, Phoenix, AZ.

For Mitchell's Motors, Inc., Plaintiff (6:14-cv-06011-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Eric David Zard, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney **[*265]** at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Elaine Ann Ryan, Bonnett Fairbourn Friedman & Balint PC - Phoenix, AZ, Phoenix, AZ.

For Douglas Autobody, Inc., Plaintiff (6:14-cv-06011-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Eric David Zard, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Elaine Ann Ryan, Bonnett Fairbourn Friedman & Balint PC - Phoenix, AZ, Phoenix, AZ.

For S. Danihel Collission, Inc., Plaintiff (6:14-cv-06011-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Eric David Zard, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Elaine Ann Ryan, Bonnett Fairbourn Friedman & Balint PC - Phoenix, AZ, Phoenix, AZ.

For Collision Craft Auto Body & Frame, Inc., Plaintiff (6:14-cv-06011-GAP-TBS): **[*266]** Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Eric David Zard, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Elaine Ann Ryan, Bonnett Fairbourn Friedman & Balint PC - Phoenix, AZ, Phoenix, AZ.

For Blue Island Broadway Auto Rebuilders, Inc., doing business as Broadway Collision Center, Plaintiff (6:14-cv-06011-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Eric David Zard, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Elaine Ann Ryan, Bonnett Fairbourn Friedman & Balint PC - Phoenix, AZ, Phoenix, AZ.

For Knebel Autobody Center, Inc., Plaintiff (6:14-cv-06011-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Eric David Zard, LEAD ATTORNEY, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; John Arthur Eaves, **[*267]** Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS; Elaine Ann Ryan, Bonnett Fairbourn Friedman & Balint PC - Phoenix, AZ, Phoenix, AZ.

For 21st Century Centennial Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): David L. Yohai, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY.

For 21st Century North American Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): David L. Yohai, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY.

For Affirmative Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Anthony J. **[*268]** Rollo, LEAD ATTORNEY, McGlinchey Stafford, PLLC, Baton Rouge, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey R. Seewald, LEAD ATTORNEY, McGlinchey Stafford, PLLC-Houston, Houston, TX; Randy R. Dow, LEAD ATTORNEY, McGlinchey Stafford, PLLC, Ft Lauderdale, FL.

For AIG Property Casualty Company, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jason B. Bonk, LEAD ATTORNEY, Cozen O'Connor, New York, NY; John J. Sullivan, LEAD ATTORNEY, Cozen O'Connor, New York, NY; Michael B. de Leeuw, LEAD ATTORNEY, Cozen O'Connor, New York, NY.

For Allied Property and Casualty Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH.

For Allstate Fire & Casualty **[*269]** Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Allstate Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Allstate Indemnity Company, Defendant (6:14-cv-06011-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, **[*270]** PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Allstate Property & Casualty Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For American Family Mutual Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Heather Carson Perkins, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Denver, CO; Kathy Lynn Osborn, LEAD ATTORNEY, Faegre Baker

Daniels, LLP, Indianapolis, IN; Michael Sean McCarthy, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Denver, CO; Ryan Michael Hurley, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN; Sarah Jenkins, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN.

For American Access Casualty Company, Defendant (6:14-cv-06011-GAP-TBS): **[*271]** Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For American Bankers Insurance Company of Florida, Defendant (6:14-cv-06011-GAP-TBS): C. Todd Willis, LEAD ATTORNEY, Carlton Fields Jorden Burt, PA, Washington, DC; Franklin G. Burt, LEAD ATTORNEY, Carlton Fields Jorden Burt, PA, Washington, DC; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For American Freedom Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For American Heartland Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Amica Mutual Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Rowe W. Snider, LEAD ATTORNEY, Locke Lord, LLP, Chicago, IL; Julia C. Webb, Locke Lord, LLP, Chicago, IL; Matthew T. Furton, Locke Lord, LLP, Chicago, IL.

For Apollo Casualty Company, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, **[*272]** Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Auto-Owners Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori McAllister, LEAD ATTORNEY, Dykema Gossett, PLLC, Lansing, MI; Theodore Joseph Greeley, LEAD ATTORNEY, Dykema Gossett, PLLC, Lansing, MI.

For Country Casualty Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; William James Kelly, III, LEAD ATTORNEY, Kelly & Walker LLC, Denver, CO; Charles I. Hadden, Troutman Sanders, LLP, Washington, DC; David F. Cutter, Troutman Sanders, LLP, Chicago, IL.

For Country Mutual Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; William James Kelly, III, LEAD ATTORNEY, Kelly & Walker LLC, Denver, CO; Charles I. Hadden, Troutman Sanders, LLP, Washington, DC; David F. Cutter, Troutman Sanders, LLP, Chicago, IL.

For Country Preferred Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, **[*273]** Bearman, Caldwell & Berkowitz, PC, Orlando, FL; William James Kelly, III, LEAD ATTORNEY, Kelly & Walker LLC, Denver, CO; Charles I. Hadden, Troutman Sanders, LLP, Washington, DC; David F. Cutter, Troutman Sanders, LLP, Chicago, IL.

For Dairyland Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Edward Keenan Cottrell, LEAD ATTORNEY, Smith, Gambrell & Russell, LLP, Jacksonville, FL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Delphi Casualty Company, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Encompass Home And Auto Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Encompass Property & Casualty Co, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, **[*274]** Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL.

For Erie Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffery D. Ubersax, LEAD ATTORNEY, Jones Day, Cleveland, OH; Anderson T. Bailey, Jones Day, Pittsburgh, PA; Eric P. Berlin, Jones Day, Chicago, IL; James Michael Jones, Jones Day, Pittsburgh, PA; Joseph R. Coburn, PRO HAC VICE, Jones Day, Cleveland, OH.

For Erie Indemnity Company, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Esurance Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Esurance Property & Casualty Insurance **[*275]** Company, Defendant (6:14-cv-06011-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For First Acceptance Insurance Company, Inc., Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael R. Pennington, LEAD ATTORNEY, Bradley, Arant, Boult & Cummings, LLP, Birmingham, AL.

For Farmers Automobile Management Corporation, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Founders Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Geico Casualty Company, Defendant (6:14-cv-06011-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, **[*276]** Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Ian Matthew Fischer, LEAD ATTORNEY, Snell & Wilmer, LLP, Phoenix, AZ; Jamie L. Halavais, LEAD ATTORNEY, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ.

For GEICO General Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Ian Matthew Fischer, LEAD ATTORNEY, Snell & Wilmer, LLP, Phoenix, AZ; Jamie L. Halavais, LEAD ATTORNEY, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ.

For Geico Indemnity Company, Defendant (6:14-cv-06011-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Ian Matthew Fischer, LEAD ATTORNEY, Snell & Wilmer, LLP, Phoenix, AZ; Jamie L. Halavais, LEAD ATTORNEY, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ.

For Government Employee's Insurance **[*277]** Company, Defendant (6:14-cv-06011-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Ian Matthew Fischer, LEAD ATTORNEY, Snell & Wilmer, LLP, Phoenix, AZ; Jamie L. Halavais, LEAD ATTORNEY, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ.

For Grange Indemnity Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Joseph Edward Ezzie, LEAD ATTORNEY, Baker & Hostetler, LLP, Columbus, OH.

For Grange Mutual Casualty Company, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Joseph E. Ezzie, LEAD ATTORNEY, Baker & Hostetler - Columbus, Columbus, OH.

For Great Northern Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Harleysville Lake States Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire **[*278]** Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For Hartford Accident and Indemnity Company, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Hartford Casualty Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Hartford Fire Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, **[*279]** Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Hartford Insurance Company of Illinois (Illinois), Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Hartford Underwriters Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Horace Mann Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Marjorie M. Salazar, LEAD ATTORNEY, Lugenbuhl, Wheaton, Peck, Rankin & Hubbard, Houston, TX; Seth A. Schmeeckle, LEAD ATTORNEY, Lugenbuhl, Wheaton, Peck, Rankin & Hubbard, New Orleans, LA.

For Horace Mann Property And Casualty Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, **[*280]** FL; Marjorie M. Salazar, LEAD ATTORNEY, Lugenbuhl, Wheaton, Peck, Rankin & Hubbard, Houston, TX; Seth A. Schmeeckle, LEAD ATTORNEY, Lugenbuhl, Wheaton, Peck, Rankin & Hubbard, New Orleans, LA.

For Illinois Farmers Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Brian J. D'Amico, LEAD ATTORNEY, Weil, Gotshal & Manges, LLP, Miami, FL; David L. Yohai, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY.

For Kemper Independence Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Daniel M. Kavouras, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Edmund W. Searby, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael K. Farrell, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Liberty Insurance Corporation, Defendant (6:14-cv-06011-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, **[*281]** Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Liberty Mutual Fire Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For LM General Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For LM Insurance Corporation, Defendant (6:14-cv-06011-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Mercury Insurance Company of Illinois, Defendant **[*282]** (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Julius F. Parker, III, LEAD ATTORNEY, Butler Weihmuller Katz Craig LLP, Tallahassee, FL; Kathy J. Maus, LEAD ATTORNEY, Butler Pappas, LLP, Tallahassee, FL.

For Mid-Century Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): David L. Yohai, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY.

For Nationwide Insurance Company of America, Defendant (6:14-cv-06011-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael **[*283]** Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For Nationwide Mutual Fire Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For Nationwide Property & Casualty Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Mark J. Botti, LEAD ATTORNEY, **[*284]** Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For Nationwide Mutual Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For Progressive Direct Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, **[*285]** LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA.

For Progressive Northern Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA.

For Property and Casualty Company of Hartford, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Safe Auto Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): **[*286]** Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Robert L. Steinmetz, LEAD ATTORNEY, Gwin Steinmetz & Baird PLLC, Louisville, KY.

For Safeco Insurance Company of Illinois, Defendant (6:14-cv-06011-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Safeway Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Christopher Charles Skambis, Jr., LEAD ATTORNEY, The Skambis Law Firm, Orlando, FL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Secura Supreme Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For State Farm Fire and Casualty Company, Defendant (6:14-cv-06011-GAP-TBS): Brent R. Austin, LEAD ATTORNEY, Eimer Stahl LLP, Chicago, IL; Elizabeth Helmer, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, **[*287]** PC, Orlando, FL; Johanna W. Clark, LEAD ATTORNEY, Carlton Fields Jorden Burt, PA, Orlando, FL; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael L. McCluggage, Eimer Stahl LLP, Chicago, IL.

For State Farm Mutual Automobile Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Brent R. Austin, LEAD ATTORNEY, Eimer Stahl LLP, Chicago, IL; Elizabeth Helmer, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael L. McCluggage, Eimer Stahl LLP, Chicago, IL.

For Unique Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For The Travelers Home and Marine Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. **[*288]** Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL.

For Travelers Commercial Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL.

For Universal Casualty Company, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For USAA Casualty Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Amelia W. Koch, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kyle A. Diamantas, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Steven F. Griffith, Jr., LEAD ATTORNEY, PRO HAC VICE, Baker, Donelson, **[*289]** Bearman, Caldwell & Berkowitz, PC, New Orleans, LA.

For USAA General Indemnity Company, Defendant (6:14-cv-06011-GAP-TBS): Amelia W. Koch, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kyle A. Diamantas, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Steven F. Griffith, Jr., LEAD ATTORNEY, PRO HAC VICE, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA.

For West Bend Mutual Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Westfield Insurance Company, Defendant (6:14-cv-06011-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John J. Haggerty, LEAD ATTORNEY, PRO HAC VICE, Fox Rothschild, LLP, Warrington, PA.

For Traded as Prestige Auto Body, Plaintiff (6:14-cv-06012-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; **[*290]** Joshua S. Bauchner, LEAD ATTORNEY, Ansell Grimm & Aaron, Clifton, NJ; William R. Sevier, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For State Farm Indemnity Company, Defendant (6:14-cv-06012-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For State Farm Guaranty Insurance Company, Defendant (6:14-cv-06012-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Progressive Freedom Insurance Company, Defendant (6:14-cv-06012-GAP-TBS): Christine A. Hopkinson, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael J. Kurtis, LEAD ATTORNEY, Nelson Brown & Co., Blue Bell, PA; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, **[*291]** New York, NY.

For Progressive Garden State Insurance Company, Defendant (6:14-cv-06012-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael J. Kurtis, LEAD ATTORNEY, Nelson Brown & Co., Blue Bell, PA; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Allstate New Jersey Insurance Company, Defendant (6:14-cv-06012-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Nationwide **[*292]** Mutual Insurance Company, Defendant (6:14-cv-06012-GAP-TBS): David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For Government Employee's Insurance Company, Defendant (6:14-cv-06012-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Ian Matthew Fischer, LEAD ATTORNEY, Snell & Wilmer, LLP, Phoenix, AZ; Jamie L. Halavais, LEAD ATTORNEY, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ.

For Geico Casualty Company, Defendant (6:14-cv-06012-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, **[*293]** PC, Orlando, FL; Ian Matthew Fischer, LEAD ATTORNEY, Snell & Wilmer, LLP, Phoenix, AZ; Jamie L. Halavais, LEAD ATTORNEY, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ.

For Geico Indemnity Company, Defendant (6:14-cv-06012-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Ian Matthew Fischer, LEAD ATTORNEY, Snell & Wilmer, LLP, Phoenix, AZ; Jamie L. Halavais, LEAD ATTORNEY, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ.

For USAA Casualty Insurance Company, Defendant (6:14-cv-06012-GAP-TBS): Amelia W. Koch, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kyle A. Diamantas, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Steven F. Griffith, Jr., LEAD ATTORNEY, PRO HAC VICE, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA.

For United Services Auto Association, Defendant **[*294]** (6:14-cv-06012-GAP-TBS): Amelia W. Koch, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kyle A. Diamantas, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Steven F. Griffith, Jr., LEAD ATTORNEY, PRO HAC VICE, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA.

For USAA General Indemnity Company, Defendant (6:14-cv-06012-GAP-TBS): Amelia W. Koch, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kyle A. Diamantas, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Steven F. Griffith, Jr., LEAD ATTORNEY, PRO HAC VICE, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA.

For Liberty Mutual Fire Insurance Company, Defendant (6:14-cv-06012-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, **[*295]** LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Liberty Mutual Mid-Atlantic Insurance Company, Defendant (6:14-cv-06012-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Liberty Insurance Corporation, Defendant (6:14-cv-06012-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For LM Insurance Corporation, Defendant (6:14-cv-06012-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For 21st Century Centennial Insurance Company, Defendant (6:14-cv-06012-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For 21st Century Assurance **[*296]** Company, Defendant (6:14-cv-06012-GAP-TBS): David L. Yohai, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Brian J. D'Amico, Weil, Gotshal & Manges, LLP, Miami, FL.

For 21st Century Pinnacle Insurance Company, Defendant (6:14-cv-06012-GAP-TBS): David L. Yohai, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Brian J. D'Amico, Weil, Gotshal & Manges, LLP, Miami, FL.

For Hanover Insurance Company, Defendant (6:14-cv-06012-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Marjorie M. Salazar, LEAD ATTORNEY, Lugenbuhl, Wheaton, Peck, Rankin **[*297]** & Hubbard, Houston, TX; Seth A. Schmeeckle, LEAD ATTORNEY, Lugenbuhl, Wheaton, Peck, Rankin & Hubbard, New Orleans, LA.

For American Family Home Insurance Company, Defendant (6:14-cv-06012-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Hartford Fire Insurance Company, Defendant (6:14-cv-06012-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Hartford Insurance Company of the Midwest, Defendant (6:14-cv-06012-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Hartford Underwriters Insurance Company, Defendant (6:14-cv-06012-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Allstate New Jersey Property and Casualty Insurance Company, Defendant (6:14-cv-06012-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US **[*298]** LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Ultimate Collision Repair, Inc., Plaintiff (6:14-cv-06013-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Joshua S. Bauchner, LEAD ATTORNEY, Ansell Grimm & Aaron, Clifton, NJ; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For State Farm Indemnity Company, Defendant (6:14-cv-06013-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For State Farm Guaranty Insurance Company, Defendant (6:14-cv-06013-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Progressive Freedom Insurance Company, Defendant (6:14-cv-06013-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, **[*299]** GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael J. Kurtis, LEAD ATTORNEY, Nelson Brown & Co., Blue Bell, PA; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA.

For Progressive Garden State Insurance Company, Defendant (6:14-cv-06013-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael J. Kurtis, LEAD ATTORNEY, Nelson Brown & Co., Blue Bell, PA; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New **[*300]** York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA.

For Allstate New Jersey Insurance Company, Defendant (6:14-cv-06013-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Allstate New Jersey Property and Casualty Insurance Company, Defendant (6:14-cv-06013-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Nationwide Mutual Insurance Company, Defendant (6:14-cv-06013-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & **[*301]** Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Beekhuizen, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For Government Employee's Insurance Company, Defendant (6:14-cv-06013-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Ian Matthew Fischer, LEAD ATTORNEY, Snell & Wilmer, LLP, Phoenix, AZ; Jamie L. Halavais, LEAD ATTORNEY, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ.

For Geico Casualty Company, Defendant (6:14-cv-06013-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Ian Matthew Fischer, LEAD ATTORNEY, **[*302]** Snell & Wilmer, LLP, Phoenix, AZ; Jamie L. Halavais, LEAD ATTORNEY, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ.

For Geico Indemnity Company, Defendant (6:14-cv-06013-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Ian Matthew Fischer, LEAD ATTORNEY, Snell & Wilmer, LLP, Phoenix, AZ; Jamie L.

Halavais, LEAD ATTORNEY, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ.

For USAA Casualty Insurance Company, Defendant (6:14-cv-06013-GAP-TBS): Amelia W. Koch, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kyle A. Diamantas, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Steven F. Griffith, Jr., LEAD ATTORNEY, PRO HAC VICE, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA.

For United Services Auto Association, Defendant (6:14-cv-06013-GAP-TBS): Amelia W. Koch, LEAD **[*303]** ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kyle A. Diamantas, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Steven F. Griffith, Jr., LEAD ATTORNEY, PRO HAC VICE, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA.

For USAA General Indemnity Company, Defendant (6:14-cv-06013-GAP-TBS): Amelia W. Koch, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kyle A. Diamantas, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Steven F. Griffith, Jr., LEAD ATTORNEY, PRO HAC VICE, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA.

For Liberty Mutual Fire Insurance Company, Defendant (6:14-cv-06013-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Liberty Mutual Mid-Atlantic Insurance Company, Defendant (6:14-cv-06013-GAP-TBS): **[*304]** Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Liberty Insurance Corporation, Defendant (6:14-cv-06013-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For LM Insurance Corporation, Defendant (6:14-cv-06013-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For 21st Century Centennial Insurance Company, Defendant (6:14-cv-06013-GAP-TBS): David L. Yohai, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY.

For 21st Century Assurance Company, Defendant (6:14-cv-06013-GAP-TBS): David L. Yohai, LEAD ATTORNEY, PRO **[*305]** HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Brian J. D'Amico, Weil, Gotshal & Manges, LLP, Miami, FL.

For 21st Century Pinnacle Insurance Company, Defendant (6:14-cv-06013-GAP-TBS): David L. Yohai, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Brian J. D'Amico, Weil, Gotshal & Manges, LLP, Miami, FL.

For Hanover Insurance Company, Defendant (6:14-cv-06013-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Marjorie M. Salazar, LEAD ATTORNEY, Lugenbuhl, Wheaton, Peck, Rankin & Hubbard, Houston, TX; Seth A. Schmeeckle, LEAD ATTORNEY, Lugenbuhl, Wheaton, **[*306]** Peck, Rankin & Hubbard, New Orleans, LA.

For American Family Home Insurance Company, Defendant (6:14-cv-06013-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Hartford Insurance Company of the Midwest, Defendant (6:14-cv-06013-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Hartford Underwriters Insurance Company, Defendant (6:14-cv-06013-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Hartford Fire Insurance Company, Defendant (6:14-cv-06013-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Leif's Auto Collision Centers, LLC, an Oregon limited liability company, doing business as Leif's Auto Collision Centers, Plaintiff (6:14-cv-06014-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys **[*307]** at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Michael Clark Willes, LEAD ATTORNEY, Tonkon Torp LLP, Portland, OR; Steven D. Olson, LEAD ATTORNEY, Tonkon Torp LLP, Portland, OR; Paul W. Conable, Tonkon Torp LLP, Portland, OR; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For State Farm Mutual Automobile Insurance Company of Oregon, Defendant (6:14-cv-06014-GAP-TBS): Brent R. Austin, LEAD ATTORNEY, Eimer Stahl LLP, Chicago, IL; Elizabeth Helmer, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Johanna W. Clark, LEAD ATTORNEY, Carlton Fields Jorden Burt, PA, Orlando, FL; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael L. McCluggage, LEAD ATTORNEY, Eimer Stahl LLP, Chicago, IL; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Tanya Durkee Urbach, Lane Powell, PC, Portland, OR.

For State Farm Fire and Casualty Company, Defendant (6:14-cv-06014-GAP-TBS): Brent R. Austin, LEAD ATTORNEY, Eimer Stahl LLP, Chicago, IL; Elizabeth Helmer, LEAD ATTORNEY, Alston & Bird, LLP, **[*308]** Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael L. McCluggage, LEAD ATTORNEY, Eimer Stahl LLP, Chicago, IL; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Tanya Durkee Urbach, Lane Powell, PC, Portland, OR.

For Allstate Fire and Casualty Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Allstate Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Allstate Property and Casualty Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Allstate Indemnity Company, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Esurance Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Hal K. **[*309]** Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Progressive Northwestern Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Francis X. Nolan, Sutherland, Asbill & Brennan, LLP, New York, NY; Kymberly Kochis, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Progressive Direct Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Francis X. Nolan, Sutherland, Asbill & Brennan, LLP, New York, NY; Kymberly Kochis, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Progressive **[*310]** Advanced Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Francis X. Nolan, Sutherland, Asbill & Brennan, LLP, New York, NY; Kymberly Kochis, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Progressive Casualty Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Francis X. Nolan, Sutherland, Asbill & Brennan, LLP, New York, NY; Kymberly Kochis, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Progressive Classic Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, **[*311]** King & Spalding, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Francis X. Nolan, Sutherland, Asbill & Brennan, LLP, New York, NY; Kymberly Kochis, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Progressive Max Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Francis X. Nolan, Sutherland, Asbill & Brennan, LLP, New York, NY; Kymberly Kochis, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Progressive Northern Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & **[*312]** Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Francis X. Nolan, Sutherland, Asbill & Brennan, LLP, New York, NY; Kymberly Kochis, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Progressive Preferred Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Francis X. Nolan, Sutherland, Asbill & Brennan, LLP, New York, NY; Kymberly Kochis, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Progressive Specialty Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, **[*313]** Atlanta, GA; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New

York, NY; Francis X. Nolan, Sutherland, Asbill & Brennan, LLP, New York, NY; Kymberly Kochis, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Progressive West Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Francis X. Nolan, Sutherland, Asbill & Brennan, LLP, New York, NY; Kymberly Kochis, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Progressive Universal Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Francis **[*314]** X. Nolan, Sutherland, Asbill & Brennan, LLP, New York, NY; Kymberly Kochis, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Geico Indemnity Company, Defendant (6:14-cv-06014-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Ian Matthew Fischer, LEAD ATTORNEY, Snell & Wilmer, LLP, Phoenix, AZ; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ.

For Geico Casualty Company, Defendant (6:14-cv-06014-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Ian Matthew Fischer, LEAD ATTORNEY, Snell & Wilmer, LLP, Phoenix, AZ; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ.

For American Family Mutual Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, **[*315]** Orlando, FL; Heather Carson Perkins, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Denver, CO; Kathy Lynn Osborn, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN; Michael Sean McCarthy, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Denver, CO; Ryan Michael Hurley, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN; Sarah Jenkins, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN.

For Liberty Mutual Fire Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Liberty Insurance Corporation, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For LM General Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For LM Insurance Corporation, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Safeco Insurance Company of America, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, **[*316]** Caldwell & Berkowitz, PC, Orlando, FL.

For Safeco Insurance Company of Oregon, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For United Services Automobile Association, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For USAA Casualty Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For USAA General Indemnity Company, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Mutual of Enumclas Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; James L. Hiller, LEAD ATTORNEY, Hitt Hiller Monfils Williams LLP, Portland, OR.

For Enumclaw Property and Casualty Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; James L. Hiller, LEAD ATTORNEY, Hitt **[*317]** Hiller Monfils Williams LLP, Portland, OR.

For Nationwide Affinity Insurance Company Of America, Defendant (6:14-cv-06014-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH.

For Nationwide Insurance Company of America, Defendant (6:14-cv-06014-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD **[*318]** ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH.

For Nationwide Mutual Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH.

For Hartford Accident and Indemnity Company, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Hartford Casualty Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; **[*319]** Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Hartford Fire Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Hartford Insurance Company of the Midwest, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Hartford Underwriters Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Property and Casualty Insurance Company of Hartford, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Metropolitan Casualty Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Hal **[*320]** K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; P. Bruce Converse, LEAD ATTORNEY, Steptoe & Johnson, LLP, Phoenix, AZ.

For Metropolitan Direct Property and Casualty Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; P. Bruce Converse, LEAD ATTORNEY, Steptoe & Johnson, LLP, Phoenix, AZ.

For Metropolitan Property and Casualty Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; P. Bruce Converse, LEAD ATTORNEY, Steptoe & Johnson, LLP, Phoenix, AZ.

For The Travelers Home and Marine Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL.

For Travelers Commercial Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Norman K. **[*321]** Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL.

For Pemco Mutual Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jay W. Beattie, LEAD ATTORNEY, Lindsay Hart, LLP, Portland, OR; John W. Phillips, LEAD ATTORNEY, The Phillips Law Group, Seattle, WA; Nikola Jones, LEAD ATTORNEY, Lindsay Hart, LLP, Portland, OR.

For Grange Insurance Association, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; William F. Knowles, LEAD ATTORNEY, Cozen O'Connor, Seattle, WA.

For Country Casualty Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Karen Southworth Weaver, LEAD ATTORNEY, Soha & Lang, PS, Seattle, WA; William James Kelly, III, LEAD ATTORNEY, Kelly & Walker LLC, Denver, CO.

For Country Mutual Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, **[*322]** FL; Karen Southworth Weaver, LEAD ATTORNEY, Soha & Lang, PS, Seattle, WA; William James Kelly, III, LEAD ATTORNEY, Kelly & Walker LLC, Denver, CO.

For Country Preferred Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Karen Southworth Weaver, LEAD ATTORNEY, Soha & Lang, PS, Seattle, WA; William James Kelly, III, LEAD ATTORNEY, Kelly & Walker LLC, Denver, CO.

For California Casualty General Insurance Company of Oregon, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Amica Mutual Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Rowe W. Snider, LEAD ATTORNEY, Locke Lord, LLP, Chicago, IL; Julia C. Webb, Locke Lord, LLP, Chicago, IL; Matthew T. Furton, Locke Lord, LLP, Chicago, IL.

For Horace Mann Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Marjorie M. Salazar, LEAD ATTORNEY, Lugenbuhl, Wheaton, **[*323]** Peck, Rankin & Hubbard, Houston, TX; Seth A. Schmeeckle, LEAD ATTORNEY, Lugenbuhl, Wheaton, Peck, Rankin & Hubbard, New Orleans, LA.

For Horace Mann Property And Casualty Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Marjorie M. Salazar, LEAD ATTORNEY, Lugenbuhl, Wheaton, Peck, Rankin & Hubbard, Houston, TX; Seth A. Schmeeckle, LEAD ATTORNEY, Lugenbuhl, Wheaton, Peck, Rankin & Hubbard, New Orleans, LA.

For Farmers Insurance Company of Oregon, Defendant (6:14-cv-06014-GAP-TBS): Brian J. D'Amico, LEAD ATTORNEY, Weil, Gotshal & Manges, LLP, Miami, FL; David L. Yohai, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Timothy W. Snider, Stoel Rives, LLP, Portland, OR.

For American Commerce Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Barry L. Davis, LEAD ATTORNEY, Thornton, Davis & **[*324]** Fein, PA, Miami, FL; Eric D. Ruben, LEAD ATTORNEY, Thornton, Davis & Fein, PA, Miami, FL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Matthew C. Henning, LEAD ATTORNEY, Thornton, Davis & Fein, PA, Miami, FL.

For Oregon Mutual Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Carl R. Rodrigues, LEAD ATTORNEY, Lehner & Rodrigues, Portland, OR; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jennifer L. Maks, LEAD ATTORNEY, Lehner & Rodrigues, Portland, OR.

For American National Property and Casualty Company, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jay Lonero, LEAD ATTORNEY, Larzelere Picou Wells Simpson Lonero, LLC, Metairie, LA; Thomas H. Peyton, LEAD ATTORNEY, Larzelere Picou Wells Simpson Lonero, LLC, Metairie, LA; Christopher Raymond Pennison, Larzelere Picou Wells Simpson Lonero, LLC, Metairie, LA.

For Zurich American Insurance Company of Illinois, Defendant (6:14-cv-06014-GAP-TBS): Amelia T. Rudolph, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, Atlanta, GA; Hal K. Litchford, LEAD **[*325]** ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Patricia A. Gorham, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, Atlanta, GA; Thomas William Curvin, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, Atlanta, GA.

For Viking Insurance Company of Wisconsin, Defendant (6:14-cv-06014-GAP-TBS): Edward Keenan Cottrell, LEAD ATTORNEY, Smith, Gambrell & Russell, LLP, Jacksonville, FL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Wawanesa General Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Michael Landry, LEAD ATTORNEY, Sheppard, Mullin, Richter & Hampton, LLP, Los Angeles, CA; John Tinley Brooks, Sheppard, Mullin, Richter & Hampton, LLP, San Diego, CA.

For Sublimity Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kurt C. Peterson, LEAD ATTORNEY, Kilmer Voorhees & Laurick, P.C., Portland, OR; Robert S. May, LEAD ATTORNEY, Kilmer Voorhees & Laurick, P.C., Portland, OR.

For Omni Insurance Company, **[*326]** Defendant (6:14-cv-06014-GAP-TBS): Daniel E. Thenell, LEAD ATTORNEY, Thenell Law Group P.C., Portland, OR; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kirsten Lynn Curtis, Thenell Law Group, PC, Portland, OR.

For Unigard Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kendall W. Harrison, LEAD ATTORNEY, Godfrey & Kahn, SC, Madison, WI.

For GEICO General Insurance Company, Defendant (6:14-cv-06014-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Ian Matthew Fischer, LEAD ATTORNEY, Snell & Wilmer, LLP, Phoenix, AZ; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ.

For Haury's Auto Body, Inc., doing business as Haury's Lake City Collision, Plaintiff (6:14-cv-06015-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur **[*327]** Eaves, Attorney at Law, Jackson, MS; Timothy Aurelien Bearb, LEAD ATTORNEY, Olive|Bearb Law Group PLLC, Seattle, WA; William R. Sevier, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Paul Michael Veillon, Galileo Law, PLLC, Seattle, WA; Joseph W. Moore, Olive|Bearb Law Group PLLC, Seattle, WA.

For Paramount Centre, Inc., Plaintiff (6:14-cv-06015-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Timothy Aurelien Bearb, LEAD ATTORNEY, Olive|Bearb Law Group PLLC, Seattle, WA; William R. Sevier, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Paul Michael Veillon, Galileo Law, PLLC, Seattle, WA; Joseph W. Moore, Olive|Bearb Law Group PLLC, Seattle, WA.

For Eurotech Bodywerkes, Inc., Plaintiff (6:14-cv-06015-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Timothy Aurelien Bearb, LEAD ATTORNEY, Olive|Bearb Law Group PLLC, Seattle, WA; William R. Sevier, LEAD ATTORNEY, John Arthur Eaves, Attorneys at **[*328]** Law, Jackson, MS; Paul Michael Veillon, Galileo Law, PLLC, Seattle, WA; Joseph W. Moore, Olive|Bearb Law Group PLLC, Seattle, WA.

For Collision Masters, LLC, Plaintiff (6:14-cv-06015-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Timothy Aurelien Bearb, LEAD ATTORNEY, Olive|Bearb Law Group PLLC, Seattle, WA; William R. Sevier, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Paul Michael Veillon, Galileo Law, PLLC, Seattle, WA; Joseph W. Moore, Olive|Bearb Law Group PLLC, Seattle, WA.

For Prostar Collision, LLC, Plaintiff (6:14-cv-06015-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Timothy Aurelien Bearb, LEAD ATTORNEY, Olive|Bearb Law Group PLLC, Seattle, WA; William R. Sevier, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Paul Michael Veillon, Galileo Law, PLLC, Seattle, WA; Joseph W. Moore, Olive|Bearb Law Group PLLC, Seattle, WA.

For Center Collision, LLC, Plaintiff (6:14-cv-06015-GAP-TBS): **[*329]** Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Timothy Aurelien Bearb, LEAD ATTORNEY, Olive|Bearb Law Group PLLC, Seattle, WA; William R. Sevier, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Paul Michael Veillon, Galileo Law, PLLC, Seattle, WA; Joseph W. Moore, Olive|Bearb Law Group PLLC, Seattle, WA.

For Accurate Auto Body, Inc., Plaintiff (6:14-cv-06015-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Timothy Aurelien Bearb, LEAD ATTORNEY, Olive|Bearb Law Group PLLC, Seattle, WA; William R. Sevier, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Paul Michael Veillon, Galileo Law, PLLC, Seattle, WA; Joseph W. Moore, Olive|Bearb Law Group PLLC, Seattle, WA.

For State Farm Mutual Automobile Insurance Company, insurance companies, Defendant (6:14-cv-06015-GAP-TBS): D Michael Reilly, LEAD ATTORNEY, LANE POWELL PC, SEATTLE, WA; Elizabeth Helmer, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Hal K. Litchford, **[*330]** LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jessica Walder, LEAD ATTORNEY, LANE POWELL PC, SEATTLE, WA; Johanna W. Clark, LEAD ATTORNEY, Carlton Fields Jorden Burt, PA, Orlando, FL; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael L. McCluggage, LEAD ATTORNEY, Eimer Stahl LLP, Chicago, IL; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Rudy Albert Englund, LANE POWELL PC, SEATTLE, WA.

For State Farm Fire & Casualty Company, insurance companies, Defendant (6:14-cv-06015-GAP-TBS): D Michael Reilly, LEAD ATTORNEY, LANE POWELL PC, SEATTLE, WA; Elizabeth Helmer, LEAD ATTORNEY, Alston &

Bird, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jessica Walder, LEAD ATTORNEY, LANE POWELL PC, SEATTLE, WA; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael L. McCluggage, LEAD ATTORNEY, Eimer Stahl LLP, Chicago, IL; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Rudy Albert Englund, LANE POWELL PC, SEATTLE, WA.

For Farmers Insurance Company of **[*331]** Washington, insurance companies, Defendant (6:14-cv-06015-GAP-TBS): David L. Yohai, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Aric Hamilton Jarrett, STOEL RIVES (WA), SEATTLE, WA; Brian J. D'Amico, Weil, Gotshal & Manges, LLP, Miami, FL; Timothy W. Snider, Stoel Rives, LLP, Portland, OR.

For GEICO General Insurance Company, insurance companies, Defendant (6:14-cv-06015-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Ian Matthew Fischer, Snell & Wilmer, LLP, Phoenix, AZ.

For Geico Indemnity Company, insurance companies, Defendant (6:14-cv-06015-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, **[*332]** LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Ian Matthew Fischer, Snell & Wilmer, LLP, Phoenix, AZ.

For Government Employee's Insurance Company, insurance companies, Defendant (6:14-cv-06015-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Ian Matthew Fischer, Snell & Wilmer, LLP, Phoenix, AZ.

For Allstate Insurance Company, insurance companies, Defendant (6:14-cv-06015-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; **[*333]** Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Allstate Fire & Casualty Insurance Company, insurance companies, Defendant (6:14-cv-06015-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Allstate Property and Casualty Insurance Company, insurance companies, Defendant (6:14-cv-06015-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Safeco Insurance Company of Illinois, insurance companies, Defendant (6:14-cv-06015-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. **[*334]** Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Safeco Insurance Company of Oregon, insurance companies, Defendant (6:14-cv-06015-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For First National Insurance Company of America, insurance companies, Defendant (6:14-cv-06015-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Liberty Mutual Fire Insurance Company, insurance companies, Defendant (6:14-cv-06015-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For USAA Casualty **[*335]** Insurance Company, insurance companies, Defendant (6:14-cv-06015-GAP-TBS): Amelia W. Koch, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kyle A. Diamantas, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Steven F. Griffith, Jr., LEAD ATTORNEY, PRO HAC VICE, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA.

For USAA General Indemnity Company, insurance companies, Defendant (6:14-cv-06015-GAP-TBS): Amelia W. Koch, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kyle A. Diamantas, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Steven F. Griffith, Jr., LEAD ATTORNEY, PRO HAC VICE, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA.

For United Services Automobile Association, insurance companies, Defendant (6:14-cv-06015-GAP-TBS): Amelia W. Koch, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, **[*336]** LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kyle A. Diamantas, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Steven F. Griffith, Jr., LEAD ATTORNEY, PRO HAC VICE, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA.

For Garrison Property and Casualty Insurance Company, insurance companies, Defendant (6:14-cv-06015-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Progressive Casualty Insurance Company, insurance companies, Defendant (6:14-cv-06015-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Progressive Classic Insurance Company, insurance companies, Defendant **[*337]** (6:14-cv-06015-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Progressive Direct Insurance Company, insurance companies, Defendant (6:14-cv-06015-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Progressive Max Insurance Company, insurance companies, Defendant (6:14-cv-06015-GAP-TBS): **[*338]** Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY.

For American Family Mutual Insurance Company, insurance companies, Defendant (6:14-cv-06015-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Heather Carson Perkins, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Denver, CO; Kathy Lynn Osborn, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN; Michael Sean McCarthy, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Denver, CO; Ryan Michael Hurley, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN; Sarah Jenkins, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN.

For Hartford Underwriters Insurance Company, insurance companies, Defendant (6:14-cv-06015-GAP-TBS): Hal K. Litchford, **[*339]** LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Hartford Casualty Insurance Company, insurance companies, Defendant (6:14-cv-06015-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Property and Casualty Insurance Company of Hartford, insurance companies, Defendant (6:14-cv-06015-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Unitrin Auto & Home Insurance Company, insurance companies, Defendant (6:14-cv-06015-GAP-TBS): Daniel M. Kavouras, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Edmund W. Searby, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael K. Farrell, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Alliance Of Automotive Service Providers, Inc., Plaintiff **[*340]** (6:14-cv-06008-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; James R. Huff, II, LEAD ATTORNEY, Sullivan, Forr, Stokan, Huff, Kormanski & Naugle, Altoona, PA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Juniper Auto Body, Inc., Plaintiff (6:14-cv-06008-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; James R. Huff, II, LEAD ATTORNEY, Sullivan, Forr, Stokan, Huff, Kormanski & Naugle, Altoona, PA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For L.I.P. Collision, Inc., Plaintiff (6:14-cv-06008-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; James R. Huff, II, LEAD ATTORNEY, Sullivan, Forr, Stokan, Huff, Kormanski & Naugle, Altoona, PA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Total Performance Automotive, LLC, Plaintiff **[*341]** (6:14-cv-06008-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; James R. Huff, II, LEAD ATTORNEY, Sullivan, Forr, Stokan, Huff, Kormanski & Naugle, Altoona, PA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Alan's Auto Center & Leasing Corp., Plaintiff (6:14-cv-06008-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; James R. Huff, II, LEAD ATTORNEY, Sullivan, Forr, Stokan, Huff, Kormanski & Naugle, Altoona, PA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Professional, Inc., Plaintiff (6:14-cv-06008-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; James R. Huff, II, LEAD ATTORNEY, Sullivan, Forr, Stokan, Huff, Kormanski &

Naugle, Altoona, PA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Nigro's Auto Body, Inc., Plaintiff **[*342]** (6:14-cv-06008-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; James R. Huff, II, LEAD ATTORNEY, Sullivan, Forr, Stokan, Huff, Kormanski & Naugle, Altoona, PA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Opeka Auto Repair Co., Inc., Plaintiff (6:14-cv-06008-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; James R. Huff, II, LEAD ATTORNEY, Sullivan, Forr, Stokan, Huff, Kormanski & Naugle, Altoona, PA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Kilkeary's Auto Body, Inc., Plaintiff (6:14-cv-06008-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; James R. Huff, II, LEAD ATTORNEY, Sullivan, Forr, Stokan, Huff, Kormanski & Naugle, Altoona, PA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Hayes Auto Body, Inc., Plaintiff (6:14-cv-06008-GAP-TBS): **[*343]** Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; James R. Huff, II, LEAD ATTORNEY, Sullivan, Forr, Stokan, Huff, Kormanski & Naugle, Altoona, PA; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For State Farm Mutual Auto Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Elizabeth Helmer, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Johanna W. Clark, LEAD ATTORNEY, Carlton Fields Jorden Burt, PA, Orlando, FL; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael L. McCluggage, LEAD ATTORNEY, Eimer Stahl LLP, Chicago, IL; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA.

For State Farm Fire and Casualty Company, Defendant (6:14-cv-06008-GAP-TBS): Elizabeth Helmer, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael P. Kenny, LEAD ATTORNEY, Alston **[*344]** & Bird, LLP, Atlanta, GA; Michael L. McCluggage, LEAD ATTORNEY, Eimer Stahl LLP, Chicago, IL; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA.

For Nationwide Property and Casualty Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For Nationwide Mutual Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; **[*345]** Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For Nationwide Mutual Fire Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD

ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For Nationwide General Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs **[*346]** (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For Nationwide Affinity Insurance Company Of America, Defendant (6:14-cv-06008-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland **[*347]** LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For Nationwide Insurance Company of America, Defendant (6:14-cv-06008-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For Progressive Specialty Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly **[*348]** Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA.

For Progressive Advanced Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA.

For Progressive Preferred Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, **[*349]** LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA.

For Progressive Direct Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Progressive Northern Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey **[*350]** S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA.

For Travelers Home and Marine Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL.

For Travco Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL.

For Travelers Personal Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, **[*351]** Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL.

For Travelers Personal Security Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL.

For Travelers Indemnity Insurance Company Of Connecticut, Defendant (6:14-cv-06008-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL.

For Travelers Indemnity Company, Defendant (6:14-cv-06008-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, **[*352]** PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL.

For Travelers Casualty Company of Connecticut, Defendant (6:14-cv-06008-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL.

For Travelers Property Casualty Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL.

For Travelers Commercial Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; **[*353]** Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL.

For GEICO General Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Ian Matthew Fischer, LEAD ATTORNEY, Snell & Wilmer, LLP, Phoenix, AZ; Jamie L. Halavais, LEAD ATTORNEY, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ.

For Geico Casualty Company, Defendant (6:14-cv-06008-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Ian Matthew Fischer, LEAD ATTORNEY, Snell & Wilmer, LLP, Phoenix, AZ; Jamie L. Halavais, LEAD ATTORNEY, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ.

For Geico Indemnity Company, Defendant (6:14-cv-06008-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, **[*354]** Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Ian Matthew Fischer, LEAD ATTORNEY, Snell & Wilmer, LLP, Phoenix, AZ; Jamie L. Halavais, LEAD ATTORNEY, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ.

For Government Employee's Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Ian Matthew Fischer, LEAD ATTORNEY, Snell & Wilmer, LLP, Phoenix, AZ; Jamie L. Halavais, LEAD ATTORNEY, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ.

For Progressive Casualty Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, **[*355]** LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Liberty Insurance Corporation, Defendant (6:14-cv-06008-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For United States Automobile Association, Defendant (6:14-cv-06008-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kyle A. Diamantas, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For USAA Casualty Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Amelia W. Koch, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kyle A. Diamantas, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Steven F. Griffith, Jr., LEAD ATTORNEY, PRO HAC VICE, Baker, Donelson, **[*356]** Bearman, Caldwell & Berkowitz, PC, New Orleans, LA.

For USA General Indemnity Company, Defendant (6:14-cv-06008-GAP-TBS): Amelia W. Koch, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kyle A. Diamantas, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Steven F. Griffith, Jr., LEAD ATTORNEY, PRO HAC VICE, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA.

For LM General Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For First Liberty Mutual Fire Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For AAA Mid-Atlantic Insurance **[*357]** Company, Defendant (6:14-cv-06008-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Richard Wardell Loveland, LEAD ATTORNEY, Coddington, Hicks & Danforth, Redwood City, CA.

For Pennsylvania National Mutual Casualty Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Amanda Lynn Ingersoll, LEAD ATTORNEY, Marshall, Dennehey, Warner, Coleman & Goggin, Jacksonville, FL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael A. Packer, LEAD ATTORNEY, Marshall, Dennehey, Warner, Coleman & Goggin, Ft Lauderdale, FL.

For Donegal Mutual Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas A. French, LEAD ATTORNEY, Rhoads & Sinon, LLP, Harrisburg, PA; Timothy J. Nieman, LEAD ATTORNEY, Rhoads & Sinon, LLP, Harrisburg, PA.

For Encompass Home And Auto Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, **[*358]** PRO HAC VICE, Dentons US LLP, Chicago, IL; Nancy S. Portney, LEAD ATTORNEY, Stewart Bernstiel Rebar & Smith, Blue Bell, PA; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL; Michael Murphy, Stewart Bernstiel Rebar, Blue Bell, PA.

For Encompass Insurance Company of America, Defendant (6:14-cv-06008-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Nancy S. Portney, LEAD ATTORNEY, Stewart Bernstiel Rebar & Smith, Blue Bell, PA; Michael Murphy, Stewart Bernstiel Rebar, Blue Bell, PA.

For Encompass Indemnity Company, Defendant (6:14-cv-06008-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Nancy S. Portney, LEAD ATTORNEY, Stewart Bernstiel Rebar & Smith, Blue Bell, PA; Michael Murphy, Stewart Bernstiel Rebar, Blue Bell, PA.

For Esurance Property and Casualty Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Nancy S. Portney, LEAD ATTORNEY, Stewart Bernstiel Rebar & Smith, Blue Bell, PA; Michael Murphy, Stewart Bernstiel Rebar, Blue Bell, PA.

For Esurance Insurance **[*359]** Company, Defendant (6:14-cv-06008-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Nancy S. Portney, LEAD ATTORNEY, Stewart Bernstiel Rebar & Smith, Blue Bell, PA; Michael Murphy, Stewart Bernstiel Rebar, Blue Bell, PA.

For Harleysville Preferred Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For Horace Mann Property And Casualty Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Marjorie M. Salazar, LEAD ATTORNEY, **[*360]** Lugenbuhl, Wheaton, Peck, Rankin & Hubbard, Houston, TX; Seth A. Schmeeckle, LEAD ATTORNEY, Lugenbuhl, Wheaton, Peck, Rankin & Hubbard, New Orleans, LA.

For Horace Mann Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Marjorie M. Salazar, LEAD ATTORNEY, Lugenbuhl, Wheaton, Peck, Rankin & Hubbard, Houston, TX; Seth A. Schmeeckle, LEAD ATTORNEY, Lugenbuhl, Wheaton, Peck, Rankin & Hubbard, New Orleans, LA.

For State Auto Property And Casualty Company, Defendant (6:14-cv-06008-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For State Automobile Mutual Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Property and Casualty Insurance Company of **[*361]** Hartford, Defendant (6:14-cv-06008-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Hartford Insurance Company of the Southeast, Defendant (6:14-cv-06008-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Hartford Insurance Company of the Midwest, Defendant (6:14-cv-06008-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Hartford Underwriters Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Hartford Insurance Company of Illinois (Illinois), Defendant (6:14-cv-06008-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. **[*362]** Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Hartford Casualty Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Hartford Accident and Indemnity Company, Defendant (6:14-cv-06008-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Hartford Fire Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Farmers New Century Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): David L. Yohai, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Brian **[*363]** J. D'Amico, Weil, Gotshal & Manges, LLP, Miami, FL.

For Farmers Fire Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Kemper Independence Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Daniel M. Kavouras, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Edmund W. Searby, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael K. Farrell, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Safeco Insurance Company of America, Defendant (6:14-cv-06008-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Safeco Insurance Company of Illinois, Defendant (6:14-cv-06008-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD **[*364]** ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Safeco Insurance Company of Indiana, Defendant (6:14-cv-06008-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Allstate Fire and Casualty Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Nancy S. Portney, LEAD ATTORNEY, Stewart Bernstiel Rebar & Smith, Blue Bell, PA; Michael Murphy, Stewart Bernstiel Rebar, Blue Bell, PA.

For Allstate Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Nancy S. Portney, LEAD ATTORNEY, Stewart Bernstiel Rebar & Smith, Blue Bell, PA; Michael Murphy, Stewart Bernstiel Rebar, Blue Bell, PA.

For Allstate Indemnity Company, Defendant (6:14-cv-06008-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Nancy S. Portney, LEAD ATTORNEY, Stewart Bernstiel **[*365]** Rebar & Smith, Blue Bell, PA; Michael Murphy, Stewart Bernstiel Rebar, Blue Bell, PA.

For Allstate Northbrook Indemnity Company, Defendant (6:14-cv-06008-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Nancy S. Portney, LEAD ATTORNEY, Stewart Bernstiel Rebar & Smith, Blue Bell, PA; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL; Michael Murphy, Stewart Bernstiel Rebar, Blue Bell, PA.

For Allstate Property and Casualty Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Nancy S. Portney, LEAD ATTORNEY, Stewart Bernstiel Rebar & Smith, Blue Bell, PA; Michael Murphy, Stewart Bernstiel Rebar, Blue Bell, PA.

For Allstate Vehicle And Property Insurance Company, Defendant (6:14-cv-06008-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Nancy S. Portney, LEAD ATTORNEY, Stewart Bernstiel Rebar & Smith, Blue Bell, PA; Michael Murphy, **[*366]** Stewart Bernstiel Rebar, Blue Bell, PA.

For Alliance Of Automotive Service Providers, Inc., Plaintiff (6:14-cv-06020-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin Raymond Lomupo, LEAD ATTORNEY, Gilardi, Oliver & Lomupo, Pittsburgh, PA; William R. Sevier, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Juniper Auto Body, Inc., Plaintiff (6:14-cv-06020-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin Raymond Lomupo, LEAD ATTORNEY, Gilardi, Oliver & Lomupo, Pittsburgh, PA; William R. Sevier, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For L.I.P. Collision, Inc., Plaintiff (6:14-cv-06020-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin Raymond Lomupo, LEAD ATTORNEY, Gilardi, Oliver & Lomupo, Pittsburgh, PA; William R. Sevier, LEAD ATTORNEY, John **[*367]** Arthur Eaves, Attorneys at Law, Jackson, MS.

For Total Performance Automotive, LLC, Plaintiff (6:14-cv-06020-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin Raymond Lomupo, LEAD ATTORNEY, Gilardi, Oliver & Lomupo, Pittsburgh, PA; William R. Sevier, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Alan's Auto Center & Leasing Corp., Plaintiff (6:14-cv-06020-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin Raymond Lomupo, LEAD ATTORNEY, Gilardi, Oliver & Lomupo, Pittsburgh, PA; William R. Sevier, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Professional, Inc., Plaintiff (6:14-cv-06020-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin Raymond Lomupo, LEAD ATTORNEY, Gilardi, Oliver & Lomupo, Pittsburgh, PA; William R. Sevier, LEAD ATTORNEY, John **[*368]** Arthur Eaves, Attorneys at Law, Jackson, MS.

For Nigro's Auto Body, Inc., Plaintiff (6:14-cv-06020-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin Raymond Lomupo, LEAD ATTORNEY, Gilardi, Oliver & Lomupo, Pittsburgh, PA; William R. Sevier, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Opeka Auto Repair Co., Inc., Plaintiff (6:14-cv-06020-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin Raymond Lomupo, LEAD ATTORNEY, Gilardi, Oliver & Lomupo, Pittsburgh, PA; William R. Sevier, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Kilkeary's Auto Body, Inc., Plaintiff (6:14-cv-06020-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin Raymond Lomupo, LEAD ATTORNEY, Gilardi, Oliver & Lomupo, Pittsburgh, PA; William R. Sevier, LEAD ATTORNEY, John Arthur Eaves, **[*369]** Attorneys at Law, Jackson, MS.

For Hayes Auto Body, Inc., Plaintiff (6:14-cv-06020-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Kevin Raymond Lomupo, LEAD ATTORNEY, Gilardi, Oliver & Lomupo, Pittsburgh, PA; William R. Sevier, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Erie Insurance Exchange, Defendant (6:14-cv-06020-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffery D. Ubersax, LEAD ATTORNEY, Jones Day, Cleveland, OH; Anderson T. Bailey, Jones Day, Pittsburgh, PA; James Michael Jones, Jones Day, Pittsburgh, PA; Joseph R. Coburn, PRO HAC VICE, Jones Day, Cleveland, OH.

For Erie Insurance Company, Defendant (6:14-cv-06020-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffery D. Ubersax, LEAD ATTORNEY, Jones Day, Cleveland, OH; Anderson T. Bailey, Jones Day, Pittsburgh, PA; James Michael Jones, Jones Day, Pittsburgh, PA; Joseph R. Coburn, PRO HAC VICE, Jones Day, Cleveland, OH.

For Campbell County Auto Body, **[*370]** Inc., Plaintiff (6:14-cv-06018-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; David A. Futscher, LEAD ATTORNEY, Parry Deering Futscher & Sparks PSC, Covington, KY; Eric David Zard, LEAD ATTORNEY, PRO HAC VICE, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Van Bunch, LEAD ATTORNEY, PRO HAC VICE, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ; William R. Sevier, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For State Farm Mutual Automobile Insurance Company, Defendant (6:14-cv-06018-GAP-TBS): David T. Klapheke, LEAD ATTORNEY, Boehl, Stopher & Graves - Louisville KY, Louisville, KY; Elizabeth Helmer, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Johanna W. Clark, LEAD ATTORNEY, Carlton Fields Jorden Burt, PA, Orlando, FL; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael L. McCluggage, LEAD ATTORNEY, Eimer Stahl LLP, Chicago, IL; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA.

For State Farm Fire **[*371]** and Casualty Company, Defendant (6:14-cv-06018-GAP-TBS): David T. Klapheke, LEAD ATTORNEY, Boehl, Stopher & Graves - Louisville KY, Louisville, KY; Elizabeth Helmer, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael L. McCluggage, LEAD ATTORNEY, Eimer Stahl LLP, Chicago, IL; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA.

For Liberty Mutual Insurance Company, Defendant (6:14-cv-06018-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Joseph Edward Ezzie, LEAD ATTORNEY, Baker & Hostetler, LLP, Columbus, OH; M. Scott McIntyre, LEAD ATTORNEY, Baker & Hostetler LLP - CINCINNATI, OH, Cincinnati, OH; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Liberty Mutual Fire Insurance Company, Defendant (6:14-cv-06018-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, **[*372]** OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Joseph Edward Ezzie, LEAD ATTORNEY, Baker & Hostetler, LLP, Columbus, OH; M. Scott McIntyre, LEAD ATTORNEY, Baker & Hostetler LLP - CINCINNATI, OH, Cincinnati, OH; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Safeco Insurance Company of America, Defendant (6:14-cv-06018-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Joseph Edward Ezzie, LEAD ATTORNEY, Baker & Hostetler, LLP, Columbus, OH; M. Scott McIntyre, LEAD ATTORNEY, Baker & Hostetler LLP - CINCINNATI, OH, Cincinnati, OH; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Allstate Fire and Casualty Insurance Company, Defendant (6:14-cv-06018-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL; Mindy G. Barfield, Dinsmore & Shohl LLP - Lexington, Lexington, KY.

For Allstate Indemnity Company, Defendant (6:14-cv-06018-GAP-TBS): **[*373]** Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL; Mindy G. Barfield, Dinsmore & Shohl LLP - Lexington, Lexington, KY.

For Allstate Insurance Company, Defendant (6:14-cv-06018-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL; Mindy G. Barfield, Dinsmore & Shohl LLP - Lexington, Lexington, KY.

For Allstate Property and Casualty Insurance Company, Defendant (6:14-cv-06018-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL; Mindy G. Barfield, Dinsmore & Shohl LLP - Lexington, Lexington, KY.

For Progressive Direct Insurance Company, Defendant (6:14-cv-06018-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, **[*374]** PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA; John W. Walters, Golden & Walters PLLC, Lexington, KY.

For Progressive Casualty Insurance Company, Defendant (6:14-cv-06018-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA; John W. Walters, Golden & Walters PLLC, Lexington, KY.

For Progressive Preferred Insurance Company, Defendant (6:14-cv-06018-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, **[*375]** Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA; John W. Walters, Golden & Walters PLLC, Lexington, KY.

For Progressive Advanced Insurance Company, Defendant (6:14-cv-06018-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Christine A. Hopkinson, King & Spalding, LLP, Atlanta, GA; John W. Walters, Golden & Walters PLLC, Lexington, KY. **[*376]**

For United Services Automobile Association, Defendant (6:14-cv-06018-GAP-TBS): Amelia W. Koch, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kyle A. Diamantas, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Steven F. Griffith, Jr., LEAD ATTORNEY, PRO HAC VICE, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Chad E. Wallace, Baker, Donelson, Bearman, Caldwell, Berkowitz - Johnson City, Johnson City, TN.

For USAA Casualty Insurance Company, Defendant (6:14-cv-06018-GAP-TBS): Amelia W. Koch, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kyle A. Diamantas, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Steven F. Griffith, Jr., LEAD ATTORNEY, PRO HAC VICE, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Chad E. Wallace, Baker, Donelson, Bearman, Caldwell, Berkowitz - Johnson City, Johnson City, TN.

For USAA General Indemnity **[*377]** Company, Defendant (6:14-cv-06018-GAP-TBS): Amelia W. Koch, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kyle A. Diamantas, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Steven F. Griffith, Jr., LEAD ATTORNEY, PRO HAC VICE, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Chad E. Wallace, Baker, Donelson, Bearman, Caldwell, Berkowitz - Johnson City, Johnson City, TN.

For Geico Casualty Company, Defendant (6:14-cv-06018-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Ian Matthew Fischer, Snell & Wilmer, LLP, Phoenix, AZ; Mark G. Arnzen, Arnzen, Molloy, & Storm, P.S.C., Covington, KY.

For GEICO General Insurance Company, Defendant (6:14-cv-06018-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, **[*378]** AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Ian Matthew Fischer, Snell & Wilmer, LLP, Phoenix, AZ; Mark G. Arnzen, Arnzen, Molloy, & Storm, P.S.C., Covington, KY.

For Geico Indemnity Company, Defendant (6:14-cv-06018-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Ian Matthew Fischer, Snell & Wilmer, LLP, Phoenix, AZ; Mark G. Arnzen, Arnzen, Molloy, & Storm, P.S.C., Covington, KY.

For Government Employee's Insurance Company, Defendant (6:14-cv-06018-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, **[*379]** AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Ian Matthew Fischer, Snell & Wilmer, LLP, Phoenix, AZ; Mark G. Arnzen, Arnzen, Molloy, & Storm, P.S.C., Covington, KY.

For Nationwide Insurance Company of America, Defendant (6:14-cv-06018-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Jeffrey C. Mando, Adams, Stepner, Woltermann & Dusing, P.L.L.C., Covington, KY; Michael Beekhuizen, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For Nationwide Mutual Insurance Company, Defendant (6:14-cv-06018-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, **[*380]** LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Jeffrey C. Mando, Adams, Stepner, Woltermann & Dusing, P.L.L.C., Covington, KY; Michael Beekhuizen, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For Nationwide Affinity Insurance Company Of America, Defendant (6:14-cv-06018-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Jeffrey C. Mando, Adams, Stepner, Woltermann & Dusing, P.L.L.C., Covington, KY; Michael Beekhuizen, Carpenter Lipps **[*381]** & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For State Auto Property & Casualty Insurance Company, Defendant (6:14-cv-06018-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Joseph Edward Ezzie, LEAD ATTORNEY, Baker & Hostetler, LLP, Columbus, OH; M. Scott McIntyre, LEAD ATTORNEY, Baker & Hostetler LLP - CINCINNATI, OH, Cincinnati, OH; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For State Automobile Mutual Insurance Company, Defendant (6:14-cv-06018-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Joseph Edward Ezzie, LEAD ATTORNEY, Baker & Hostetler, LLP, Columbus, OH; M. Scott McIntyre, LEAD ATTORNEY, Baker & Hostetler LLP - CINCINNATI, OH, Cincinnati, OH; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Shelter Mutual Insurance Company, Defendant (6:14-cv-06018-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, **[*382]** Caldwell & Berkowitz, PC, Orlando, FL; Robert Bradley Best, LEAD ATTORNEY, Holcomb Dunbar Watts Best Masters & Golmon, PA, Oxford, MS.

For Shelter General Insurance Company, Defendant (6:14-cv-06018-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Robert Bradley Best, LEAD ATTORNEY, Holcomb Dunbar Watts Best Masters & Golmon, PA, Oxford, MS.

For Grange Mutual Casualty Company, Defendant (6:14-cv-06018-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Joseph Edward Ezzie, LEAD ATTORNEY, Baker & Hostetler, LLP, Columbus, OH;

M. Scott McIntyre, LEAD ATTORNEY, Baker & Hostetler LLP - CINCINNATI, OH, Cincinnati, OH; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Grange Property & Casualty Insurance Company, Defendant (6:14-cv-06018-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Joseph Edward Ezzie, LEAD ATTORNEY, Baker & Hostetler, LLP, Columbus, **[*383]** OH; M. Scott McIntyre, LEAD ATTORNEY, Baker & Hostetler LLP - CINCINNATI, OH, Cincinnati, OH; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For The Travelers Home and Marine Insurance Company, Defendant (6:14-cv-06018-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Michael E. Nitardy, LEAD ATTORNEY, Frost, Brown, Todd, LLC - Florence, Florence, KY; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; William T. Robinson, III, Frost, Brown, Todd, LLC - Florence, Florence, KY.

For Travelers Property Casualty Company of America, Defendant (6:14-cv-06018-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Michael E. Nitardy, LEAD ATTORNEY, Frost, Brown, Todd, LLC - Florence, Florence, KY; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, **[*384]** Chicago, IL; William T. Robinson, III, Frost, Brown, Todd, LLC - Florence, Florence, KY.

For Travelers Casualty and Surety Company of America, Defendant (6:14-cv-06018-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Michael E. Nitardy, LEAD ATTORNEY, Frost, Brown, Todd, LLC - Florence, Florence, KY; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; William T. Robinson, III, Frost, Brown, Todd, LLC - Florence, Florence, KY.

For Travelers Casualty Insurance Company of America, Defendant (6:14-cv-06018-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Michael E. Nitardy, LEAD ATTORNEY, Frost, Brown, Todd, LLC - Florence, Florence, KY; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; William T. Robinson, III, Frost, Brown, Todd, LLC - Florence, Florence, **[*385]** KY.

For The Travelers Indemnity Company of Connecticut, Defendant (6:14-cv-06018-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Michael E. Nitardy, LEAD ATTORNEY, Frost, Brown, Todd, LLC - Florence, Florence, KY; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; William T. Robinson, III, Frost, Brown, Todd, LLC - Florence, Florence, KY.

For Metropolitan Casualty Insurance Company, Defendant (6:14-cv-06018-GAP-TBS): Floyd Beinstock, LEAD ATTORNEY, Steptoe & Johnson, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; P. Bruce Converse, LEAD ATTORNEY, Steptoe & Johnson, LLP, Phoenix, AZ; Mindy G. Barfield, Dinsmore & Shohl LLP - Lexington, Lexington, KY.

For Metropolitan Direct Property and Casualty Insurance Company, Defendant (6:14-cv-06018-GAP-TBS): Floyd Beinstock, LEAD ATTORNEY, Steptoe & Johnson, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, **[*386]** Orlando, FL; P. Bruce Converse, LEAD ATTORNEY, Steptoe & Johnson, LLP, Phoenix, AZ; Mindy G. Barfield, Dinsmore & Shohl LLP - Lexington, Lexington, KY.

For Metropolitan Property and Casualty Insurance Company, Defendant (6:14-cv-06018-GAP-TBS): Floyd Beinstock, LEAD ATTORNEY, Steptoe & Johnson, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; P. Bruce Converse, LEAD ATTORNEY, Steptoe & Johnson, LLP, Phoenix, AZ; Mindy G. Barfield, Dinsmore & Shohl LLP - Lexington, Lexington, KY.

For Auto-Owners Insurance Company, Defendant (6:14-cv-06018-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Joseph L. Hamilton, LEAD ATTORNEY, Sites & Harbison, PLLC, Louisville, KY; Lori McAllister, LEAD ATTORNEY, Dykema Gossett, PLLC, Lansing, MI; Theodore Joseph Greeley, LEAD ATTORNEY, Dykema Gossett, PLLC, Lansing, MI.

For Cincinnati Insurance Company, Defendant (6:14-cv-06018-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Matthew C. Blickensderfer, LEAD ATTORNEY, Frost, Brown & Todd, LLC, Cincinnati, OH; Michael E. Nitardy, **[*387]** Frost, Brown, Todd, LLC - Florence, Florence, KY.

For Safe Auto Insurance Company, Defendant (6:14-cv-06018-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Robert L. Steinmetz, LEAD ATTORNEY, Gwin Steinmetz & Baird PLLC, Louisville, KY.

For Lee Pappas Body Shop, Inc., Plaintiff (6:14-cv-06019-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Peter Andrew Miller, LEAD ATTORNEY, Miller Legal LLC, Charlottesville, VA; William R. Sevier, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For David C. Brosius, doing business as Martins Auto Body Works, Inc., Plaintiff (6:14-cv-06019-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Peter Andrew Miller, LEAD ATTORNEY, Miller Legal LLC, Charlottesville, VA; William R. Sevier, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Art Walker Auto Service, Inc., Plaintiff (6:14-cv-06019-GAP-TBS): Allison **[*388]** P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Peter Andrew Miller, LEAD ATTORNEY, Miller Legal LLC, Charlottesville, VA; William R. Sevier, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For Whiteford Collision and Refinishing, Inc., Plaintiff (6:14-cv-06019-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; John Arthur Eaves, Jr., LEAD ATTORNEY, John Arthur Eaves, Attorney at Law, Jackson, MS; Peter Andrew Miller, LEAD ATTORNEY, Miller Legal LLC, Charlottesville, VA; William R. Sevier, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS.

For State Farm Mutual Automobile Insurance Company, Defendant (6:14-cv-06019-GAP-TBS): Elizabeth Helmer, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael L. McCluggage, LEAD ATTORNEY, Eimer Stahl LLP, Chicago, IL; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Johanna W. Clark, Carlton **[*389]** Fields Jorden Burt, PA, Orlando, FL.

For State Farm Fire and Casualty Company, Defendant (6:14-cv-06019-GAP-TBS): Elizabeth Helmer, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael L. McCluggage, LEAD ATTORNEY, Eimer Stahl LLP, Chicago, IL; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Johanna W. Clark, Carlton Fields Jorden Burt, PA, Orlando, FL.

For United Services Automobile Association, Defendant (6:14-cv-06019-GAP-TBS): Amelia W. Koch, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kyle A. Diamantas, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Steven F. Griffith, Jr., LEAD ATTORNEY, PRO HAC VICE, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA.

For USAA Casualty Insurance Company, Defendant (6:14-cv-06019-GAP-TBS): Amelia W. Koch, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, **[*390]** LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kyle A. Diamantas, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Steven F. Griffith, Jr., LEAD ATTORNEY, PRO HAC VICE, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA.

For USAA General Indemnity Company, Defendant (6:14-cv-06019-GAP-TBS): Amelia W. Koch, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kyle A. Diamantas, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Steven F. Griffith, Jr., LEAD ATTORNEY, PRO HAC VICE, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA.

For Government Employee's Insurance Company, Defendant (6:14-cv-06019-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, **[*391]** Phoenix, AZ; Ian Matthew Fischer, Snell & Wilmer, LLP, Phoenix, AZ.

For GEICO General Insurance Company, Defendant (6:14-cv-06019-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Ian Matthew Fischer, Snell & Wilmer, LLP, Phoenix, AZ.

For Geico Indemnity Company, Defendant (6:14-cv-06019-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Ian Matthew Fischer, Snell & Wilmer, LLP, Phoenix, AZ.

For GEICO Casualty, Defendant (6:14-cv-06019-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jamie L. Halavais, **[*392]** LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Ian Matthew Fischer, Snell & Wilmer, LLP, Phoenix, AZ.

For GEICO Advantage Insurance Company, Defendant (6:14-cv-06019-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Ian Matthew Fischer, Snell & Wilmer, LLP, Phoenix, AZ.

For GEICO Choice Insurance Company, Defendant (6:14-cv-06019-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Ian Matthew Fischer, Snell & Wilmer, LLP, Phoenix, AZ.

For GEICO Secure Insurance Company, Defendant (6:14-cv-06019-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca **[*393]** Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Ian Matthew Fischer, Snell & Wilmer, LLP, Phoenix, AZ.

For Allstate Property and Casualty Insurance Company, Defendant (6:14-cv-06019-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Allstate Insurance Company, Defendant (6:14-cv-06019-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD **[*394]** ATTORNEY, Dentons US LLP, Chicago, IL.

For Allstate Fire and Casualty Insurance Company, Defendant (6:14-cv-06019-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Allstate Indemnity Company, Defendant (6:14-cv-06019-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Esurance Property and Casualty Insurance Company, Defendant (6:14-cv-06019-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, **[*395]** LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Esurance Insurance Company, Defendant (6:14-cv-06019-GAP-TBS): Bonnie Lau, LEAD ATTORNEY, DENTONS US LLP, San Francisco, CA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Nationwide Mutual Insurance Company, Defendant (6:14-cv-06019-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Mark J. Botti, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, **[*396]** Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For Nationwide Property and Casualty Insurance Company, Defendant (6:14-cv-06019-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Mark J. Botti, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For Nationwide General Insurance Company, Defendant (6:14-cv-06019-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Michael Carpenter, **[*397]** LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Mark J. Botti, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For Nationwide Mutual Fire Insurance Company, Defendant (6:14-cv-06019-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Mark J. Botti, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For Erie Insurance Exchange, Defendant (6:14-cv-06019-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffery D. Ubersax, LEAD ATTORNEY, Jones Day, Cleveland, OH; Anderson T. Bailey, Jones Day, Pittsburgh, PA; James Michael Jones, **[*398]** Jones Day, Pittsburgh, PA; Joseph R. Coburn, PRO HAC VICE, Jones Day, Cleveland, OH.

For Virginia Farm Bureau Town and Country Insurance Company, Defendant (6:14-cv-06019-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kenneth Hardt, LEAD ATTORNEY, Sinnott, Nuckols & Logan, PC, Midlothian, VA; Kevin V. Logan, LEAD ATTORNEY, Sinnott, Nuckols & Logan, PC, Midlothian, VA.

For The Travelers Home and Marine Insurance Company, Defendant (6:14-cv-06019-GAP-TBS): Gordon A. Coffee, LEAD ATTORNEY, Winston & Strawn LLP, Washington, DC; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL.

For Travelers Commercial Insurance Company, Defendant (6:14-cv-06019-GAP-TBS): Gordon A. Coffee, LEAD ATTORNEY, Winston & Strawn LLP, Washington, DC; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock **[*399]** & Lavan, LLP, Miami, FL; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL.

For Travelers Property Casualty Insurance Company, Defendant (6:14-cv-06019-GAP-TBS): Gordon A. Coffee, LEAD ATTORNEY, Winston & Strawn LLP, Washington, DC; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL.

For Travelers Property Casualty Company of America, Defendant (6:14-cv-06019-GAP-TBS): Gordon A. Coffee, LEAD ATTORNEY, Winston & Strawn LLP, Washington, DC; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL.

For Travco Insurance Company, Defendant (6:14-cv-06019-GAP-TBS): Gordon A. Coffee, LEAD ATTORNEY, Winston & Strawn LLP, Washington, DC; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, **[*400]** Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL.

For LM General Insurance Company, Defendant (6:14-cv-06019-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For LM Insurance Corporation, Defendant (6:14-cv-06019-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Alfa Specialty Insurance Corporation, Defendant (6:14-cv-06019-GAP-TBS): Elizabeth Skilling, LEAD ATTORNEY, Harman Claytor Corigan Wellman, PC, Glen Allen, VA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Alfa Vision Insurance Corporation, Defendant (6:14-cv-06019-GAP-TBS): **[*401]** Elizabeth Skilling, LEAD ATTORNEY, Harman Claytor Corigan Wellman, PC, Glen Allen, VA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Elephant Insurance Company, Defendant (6:14-cv-06019-GAP-TBS): Charles M. Sims, LEAD ATTORNEY, Leader, Leader & Landau, PL, Ft Lauderdale, FL; Cynthia Fleming Crawford, LEAD ATTORNEY, LeClairRyan, Washington, DC; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laurin H. Mills, LEAD ATTORNEY, LeClairRyan, Alexandria, VA; Robert Francis Reklaitis, LEAD ATTORNEY, LeClairRyan, Washington, DC.

For 21st Century Centennial Insurance, Defendant (6:14-cv-06019-GAP-TBS): David L. Yohai, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY.

For 21st Century Assurance Company, Defendant (6:14-cv-06019-GAP-TBS): David L. Yohai, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & **[*402]** Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY.

For Dairyland Insurance Company, Defendant (6:14-cv-06019-GAP-TBS): Edward Keenan Cottrell, LEAD ATTORNEY, Smith, Gambrell & Russell, LLP, Jacksonville, FL; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Safe Auto Insurance Company, Defendant (6:14-cv-06019-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Robert L. Steinmetz, LEAD ATTORNEY, Gwin Steinmetz & Baird PLLC, Louisville, KY.

For AIG Property Casualty Company, Defendant (6:14-cv-06019-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jason B. Bonk, LEAD ATTORNEY, Cozen O'Connor, New York, NY; John J. Sullivan, LEAD ATTORNEY, Cozen O'Connor, New York, NY; Michael B. de Leeuw, LEAD ATTORNEY, Cozen O'Connor, New York, NY.

For Property and Casualty Insurance Company **[*403]** of Hartford, Defendant (6:14-cv-06019-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Thomas G. Rohback, LEAD ATTORNEY, Axinn, Veltrop & Harkrider, LLP, Hartford, CT.

For Harleysville Preferred Insurance Company, Defendant (6:14-cv-06019-GAP-TBS): Andrew R. Kruppa, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kimberly J. Donovan, LEAD ATTORNEY, Squire Patton Boggs (US), LLP, Miami, FL; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Mark J. Botti, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For General Insurance Company of America, Defendant (6:14-cv-06019-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Ian Matthew Fischer, Snell & Wilmer, LLP, Phoenix, AZ.

For Donegal Mutual Insurance Company, Defendant (6:14-cv-06019-GAP-TBS): **[*404]** Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Maurice Francis Mullins, LEAD ATTORNEY, Spotts Fain PC, Richmond, VA; Holly L. Cline, PRO HAC VICE, Rhoads & Sinon, LLP, Harrisburg, PA; Thomas A. French, PRO HAC VICE, Rhoads & Sinon, LLP, Harrisburg, PA.

For State Farm General Insurance Company, Defendant (6:14-cv-06019-GAP-TBS): Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA.

For Concord Auto Body, Inc, Plaintiff (6:15-cv-06022-GAP-TBS): Allison P. Fry, LEAD ATTORNEY, John Arthur Eaves, Attorneys at Law, Jackson, MS; Tonna K. Farrar, LEAD ATTORNEY, BONNETT AND FAIRBOURN, PC, Phoenix, AZ.

For State Farm Mutual Automobile Insurance Company, Defendant (6:15-cv-06022-GAP-TBS): Daniel E. Wilke, LEAD ATTORNEY, WILKE AND WILKE, P.C., St. Louis, MO; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Johanna W. Clark, LEAD ATTORNEY, Carlton Fields Jorden Burt, PA, Orlando, FL; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael L. McCluggage, LEAD ATTORNEY, Eimer Stahl LLP, Chicago, IL.

For State Farm Fire & Casualty Company, Defendant (6:15-cv-06022-GAP-TBS): **[*405]** Daniel E. Wilke, LEAD ATTORNEY, WILKE AND WILKE, P.C., St. Louis, MO; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Tiffany L. Powers, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael P. Kenny, LEAD ATTORNEY, Alston & Bird, LLP, Atlanta, GA; Michael L. McCluggage, LEAD ATTORNEY, Eimer Stahl LLP, Chicago, IL.

For American Family Mutual Insurance Company, Defendant (6:15-cv-06022-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Heather Carson Perkins, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Denver, CO; Kathy Lynn Osborn, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN; Michael Sean McCarthy, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Denver, CO; Ryan Michael Hurley, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN; Sarah Jenkins, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN.

For Shelter Mutual Insurance Company, Defendant (6:15-cv-06022-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Robert Bradley Best, LEAD ATTORNEY, Holcomb Dunbar Watts Best Masters & Golmon, PA, Oxford, MS. **[*406]**

For Farmers Insurance Company, Defendant (6:15-cv-06022-GAP-TBS): David L. Yohai, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Eric Hochstadt, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; John Mastando, III, LEAD ATTORNEY, PRO HAC VICE, Weil, Gotshal & Manges, LLP, New York, NY.

For Automobile Club Inter-Insurance Exchange, Defendant (6:15-cv-06022-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Safeco Insurance Company of Illinois, Defendant (6:15-cv-06022-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Geico Casualty Company, Defendant (6:15-cv-06022-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC **[*407]** VICE, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Ian Matthew Fischer, Snell & Wilmer, LLP, Phoenix, AZ.

For GEICO General Insurance Company, Defendant (6:15-cv-06022-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Ian Matthew Fischer, Snell & Wilmer, LLP, Phoenix, AZ.

For Geico Indemnity Company, Defendant (6:15-cv-06022-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Ian Matthew Fischer, Snell & Wilmer, LLP, Phoenix, AZ.

For Government Employee's Insurance Company, Defendant (6:15-cv-06022-GAP-TBS): Dan W. Goldfine, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, **[*408]** AZ; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jamie L. Halavais, LEAD ATTORNEY, PRO HAC VICE, Snell & Wilmer, LLP, Phoenix, AZ; Joshua Grabel, LEAD ATTORNEY, Lewis Roca Rothgerber, LLP, Phoenix, AZ; Ian Matthew Fischer, Snell & Wilmer, LLP, Phoenix, AZ.

For Progressive Casualty Insurance Company, Defendant (6:15-cv-06022-GAP-TBS): Christine A. Hopkinson, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Progressive Advanced Insurance Company, Defendant (6:15-cv-06022-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Francis X. **[*409]** Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Progressive Preferred Insurance Company, Defendant (6:15-cv-06022-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Progressive Direct Insurance Company, Defendant (6:15-cv-06022-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, **[*410]** LLP, Atlanta, GA; Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Progressive Northwestern Insurance Company, Defendant (6:15-cv-06022-GAP-TBS): Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Claire Carothers Oates, LEAD ATTORNEY, King & Spalding, LLP, Atlanta, GA; Francis X. Nolan, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Jeffrey S. Cashdan, LEAD ATTORNEY, PRO HAC VICE, King & Spalding, LLP, Atlanta, GA; Kymberly Kochis, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY; Michael R. Nelson, LEAD ATTORNEY, Sutherland, Asbill & Brennan, LLP, New York, NY.

For Allstate Fire and Casualty **[*411]** Insurance Company, Defendant (6:15-cv-06022-GAP-TBS): Deborah C. Druley, LEAD ATTORNEY, DENTONS US LLP - ST. LOUIS, St. Louis, MO; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Allstate Insurance Company, Defendant (6:15-cv-06022-GAP-TBS): Deborah C. Druley, LEAD ATTORNEY, DENTONS US LLP - ST. LOUIS, St. Louis, MO; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Allstate Property & Casualty Insurance Company, Defendant (6:15-cv-06022-GAP-TBS): Deborah C. Druley, LEAD ATTORNEY, DENTONS US LLP - ST. LOUIS, St. Louis, MO; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, **[*412]** Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Esurance Property & Casualty Insurance Company, Defendant (6:15-cv-06022-GAP-TBS): Deborah C. Druley, LEAD ATTORNEY, DENTONS US LLP - ST. LOUIS, St. Louis, MO; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Lori J. Caldwell, LEAD ATTORNEY, Rumberger, Kirk & Caldwell, PA, Orlando, FL; Mark L. Hanover, LEAD ATTORNEY, PRO HAC VICE, Dentons US LLP, Chicago, IL; Richard L. Fenton, LEAD ATTORNEY, Dentons US LLP, Chicago, IL.

For Farm Bureau Town & Country Insurance Company of Missouri, Defendant (6:15-cv-06022-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Steven Howard Schwartz, LEAD ATTORNEY, Brown & James, PC, St. Louis, MS; Katherine Baber Fezzi, Brown & James, PC, St. Louis, MS.

For Allied Property & Casualty Insurance Company, Defendant (6:15-cv-06022-GAP-TBS): David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell **[*413]** & Berkowitz, PC, Orlando, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For United Services Automobile Association, Defendant (6:15-cv-06022-GAP-TBS): Amelia W. Koch, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kyle A. Diamantas, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Steven F. Griffith, Jr., LEAD ATTORNEY, PRO HAC VICE, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA.

For USAA Casualty Insurance Company, Defendant (6:15-cv-06022-GAP-TBS): Amelia W. Koch, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kyle A. Diamantas, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Steven F. Griffith, **[*414]** Jr., LEAD ATTORNEY, PRO HAC VICE, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA.

For USAA General Indemnity Company, Defendant (6:15-cv-06022-GAP-TBS): Amelia W. Koch, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Kyle A. Diamantas, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Steven F. Griffith, Jr., LEAD ATTORNEY, PRO HAC VICE, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, New Orleans, LA.

For American Standard Insurance Company of Wisconsin, Defendant (6:15-cv-06022-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Heather Carson Perkins, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Denver, CO; Kathy Lynn Osborn, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN; Michael Sean McCarthy, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Denver, CO; Ryan Michael Hurley, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN; Sarah Jenkins, LEAD ATTORNEY, Faegre Baker Daniels, LLP, Indianapolis, IN.

For The Travelers Home and Marine **[*415]** Insurance Company, Defendant (6:15-cv-06022-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Laura E. Besvinick, LEAD ATTORNEY, Stroock & Stroock & Lavan, LLP, Miami, FL; Norman K. Beck, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL; Timothy J. Rooney, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL.

For Liberty Mutual Fire Insurance Company, Defendant (6:15-cv-06022-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For LM General Insurance Company, Defendant (6:15-cv-06022-GAP-TBS): Ernest E. Vargo, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Michael E. Mumford, LEAD ATTORNEY, Baker & Hostetler, LLP, Cleveland, OH.

For Nationwide Affinity Insurance Company Of America, Defendant (6:15-cv-06022-GAP-TBS): David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, **[*416]** Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For Nationwide Insurance Company of America, Defendant (6:15-cv-06022-GAP-TBS): David John Barthel, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL; Mark J. Botti, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Washington, DC; Michael Beekhuizen, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Michael Carpenter, LEAD ATTORNEY, Carpenter Lipps & Leland LLP, Columbus, OH; Peter T. Snow, Carpenter Lipps & Leland LLP, Columbus, OH.

For Cornerstone National Insurance Company, Defendant (6:15-cv-06022-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, FL.

For Safe Auto Insurance Company, Defendant (6:15-cv-06022-GAP-TBS): Hal K. Litchford, LEAD ATTORNEY, Baker, Donelson, Bearman, **[*417]** Caldwell & Berkowitz, PC, Orlando, FL; Robert L. Steinmetz, LEAD ATTORNEY, Gwin Steinmetz & Baird PLLC, Louisville, KY.

Judges: THOMAS B. SMITH, United States Magistrate Judge.

Opinion by: THOMAS B. SMITH

Opinion

REPORT AND RECOMMENDATIONS

Pending before me on referral from the presiding district judge are Defendants' motions to dismiss Plaintiffs' complaints in the following cases: 6:14-cv-6006 (Arizona); 6:14-cv-6007 (Michigan); 6:14-cv-6009 (Alabama); 6:14-cv-6010 (California); 6:14-cv-6011 (Illinois); 6:14-cv-6012 and 6:14-cv-6013 (New Jersey); 6:14-cv-6014 (Oregon); 6:14-cv-6015 (Washington); 6:14-cv-6008 and 6:14-cv-6020 (Pennsylvania); 6:14-cv-6018 (Kentucky); 6:14-cv-6019 (Virginia); and 6:15-cv-6022 (Missouri) (collectively, the "Pending Cases"). After due consideration, I respectfully recommend that the motions be **granted in part** and **denied in part**, that the complaints in the Pending Cases be dismissed, that the dismissals be without prejudice and with leave to amend except as otherwise stated in this report & recommendations, and that Plaintiffs be afforded 21 days' leave to file amended complaints.

I. Background

Plaintiffs are 64 auto body repair shops in 12 different states, a former owner of such a business, **[*418]** and a trade association for auto body shops based in the state of Pennsylvania. The Defendants are insurance companies that write automobile insurance in the states where Plaintiffs do business. In each case, Plaintiffs allege that Defendants conspired to fix prices and boycott Plaintiffs in violation of *§ 1* of the Sherman Act. Plaintiffs also assert a variety of state common law and statutory claims including unjust enrichment, tortious interference, conversion, quasi-estoppel, violations of state ***antitrust law***, and unfair trade practices. The allegations in these cases are similar to those in *A&E Auto Body, Inc. v. 21st Century Centennial Insurance Co., No. 6:14-cv-00310, 2015 U.S. Dist. LEXIS 16153, 2015 WL 304048, (M.D. Fla. Jan. 21, 2015)*, which the Court summarized in its Order granting the motions to dismiss in that case:

> The Defendants in this case are alleged to "exert control" over the Plaintiffs' businesses (and the hourly rates paid by the Defendants) in a number of ways, beginning with agreements generally referred to as "direct repair programs" or "DRPs". To participate in a particular insurer's DRP, a repair shop typically agrees to certain concessions in regard to such things as the prices it will charge and the priority given to vehicles **[*419]** owned by people who have insurance through that insurer. In exchange, the repair shop is listed as a "preferred provider". However, the Plaintiffs complain that the prices that they were permitted to charge under the DRPs were unfairly manipulated, that even repair shops that were not participating in DRPs were restricted to those price ceilings, and that repair shops that complained about these practices or tried to charge higher prices faced intimidation and boycotts from the insurers.
>
> As a general proposition, each DRP contains language obligating the repair shop to charge the insurance company no more than the "market rate" for repairs in the general area. State Farm Mutual Automobile Insurance Company ("State Farm"), a Defendant in this case, determines this market rate. State Farm surveys the repair shops in a given area, determines the hourly rate charged by each repair technician, and then designates a rate just above the midpoint of all rates charged to be the "market rate." However, the Plaintiffs complain that State Farm alters the survey results to achieve a "wholly artificial 'market rate'" and uses this artificially lowered result to negotiate price decreases from repair **[*420]** shops. If a repair shop attempts to raise its hourly rate, State Farm will, among other things, remove it or threaten to remove it from the DRP.
> The other Defendants, who do not perform such surveys, "specifically advised the Plaintiffs that they will pay no more than State Farm pays for labor." The Defendants refuse to pay a higher labor rate even to Plaintiffs who are not participating in a DRP.
> The Plaintiffs also allege that the Defendants improperly lowered the amounts that they paid for repairs by, among other things, refusing to pay for replacement parts even where the repair shop thought replacement was a better option than repair and by requiring utilization of used parts even where new parts were available.
> The Plaintiffs also complain that the Defendants (1) are refusing to abide by the estimates set forth in the industry's leading collision-repair-estimating databases; (2) that they are refusing to pay for certain required materials and practices on the grounds that those items are included in the price of the repair; and (3) that they have imposed arbitrary caps on the amount they are willing to pay for paint as part of a repair.

*2015 U.S. Dist. LEXIS 16153, [WL] at *1-2*.

Plaintiffs filed these lawsuits in 12 federal **[*421]** district courts between October 27 and November 7, 2014. On December 3, 2014, the United States Judicial Panel on Multidistrict Litigation ("JPML") transferred to this Court the cases from Arizona, Michigan, Alabama, California, Illinois, New Jersey, Oregon, and Washington, and one of the cases from Pennsylvania (6:14-cv-6008). (JPML, Case MDL No. 2557, Docs. 270, 271). Transfer of the Oregon case was stayed on December 6, 2014 (Id., Doc. 274). The JPML transferred the cases from Kentucky and Virginia on December 16, the remaining case from Pennsylvania (6:14-cv-6020) on December 23, and the Missouri action on February 6, 2015 (JPML, Case MDL No. 2557, Docs. 338, 364, 413). On April 1, 2015, the JPML vacated the stay of the transfer in the Oregon case (Id., Doc. 416).

In each case, Defendants have filed motions to dismiss,[1] Plaintiffs have filed a consolidated response, and Defendants have filed replies. District Judge Presnell has referred the pending motions to dismiss to me for preparation of reports and recommendations pursuant to *28 U.S.C. § 636(b)(1)(B)*.

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[1] In most of the Pending Cases, Defendants have filed two separate motions to dismiss. The Defendants affiliated with GEICO typically filed their own motion **[*422]** to dismiss, although their motion is joined by the CSAA Insurance Group Defendants in the Arizona and California cases and the MetLife Defendants in the Arizona case. With the exception of Oregon, all remaining

II. Legal Standard

HN2[] *Federal Rule of Civil Procedure 8(a)(2)* requires "a short and plain statement of the claim showing that the pleader is entitled to relief" so as to give the defendant fair notice of what the claim is and the grounds upon which it rests, *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*, overruled on other grounds *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. *HN3*[] A *Rule 12(b)(6)* motion to dismiss for failure to state a claim merely tests the sufficiency of the complaint; it does not decide the merits of the case. *Milburn v. United States, 734 F.2d 762, 765 (11th Cir.1984)*. In ruling on a motion to dismiss, the court must accept the factual allegations as true and construe **[*424]** the complaint in the light most favorable to the plaintiff. *SEC v. ESM Group, Inc., 835 F.2d 270, 272 (11th Cir.1988)*. The court must limit its consideration to the pleadings and any exhibits attached to the pleadings. *Fed.R.Civ.P. 10(c)*, *12(d)*; see also *GSW, Inc. v. Long County, Ga., 999 F.2d 1508, 1510 (11th Cir.1993)*.

HN4[] A plaintiff must provide sufficient factual allegations to raise its right to relief above the speculative level, *Twombly, 550 U.S. at 555*, and to indicate the presence of the required elements, *Watts v. Florida Int'l Univ., 495 F.3d 1289, 1302 (11th Cir.2007)*. Conclusory allegations, unwarranted factual deductions, or legal conclusions masquerading as facts will not prevent dismissal. *Davila v. Delta Air Lines, Inc., 326 F.3d 1183, 1185 (11th Cir.2003)*.

In *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*, the Supreme Court explained that, *HN5*[] while a complaint need not contain detailed factual allegations *Rule 8(a)(2)* "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." *Id. at 678* (internal citations and quotations omitted). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the plaintiff is entitled to relief.'" *Id. at 679* (quoting *Fed.R.Civ.P. 8(a)(2)*).

III. Discussion

A. Group Pleading

Defendants **[*425]** argue that the Court should dismiss all of the complaints because Plaintiffs engaged in impermissible group pleading by making collective allegations against "Defendants." In response, Plaintiffs argue that group pleading is perfectly acceptable, and that when they refer to "Defendants" collectively, they are only alleging that all Defendants engaged in the same conduct.

Defendants in each case have filed a "joint motion" to dismiss. In the Michigan case (6:14-cv-6007) and one of the Pennsylvania cases (6:14-cv-6020), no GEICO Defendant is a party so all Defendants have joined the joint motion. When discussing specific motions, the Court will refer to the Defendants who joined GEICO's motion as the "GEICO Defendants" and the Defendants who joined the joint motion as the "Non-GEICO Defendants."

Two defendants in the Oregon case (6:14-cv-6014) have filed their own motions to dismiss. Defendant American Commerce Insurance Company filed a brief five-page motion and notice of joinder in the motions of the GEICO and Non-GEICO Defendants (Id., Doc. 123). The motion asks for dismissal of the complaint "in its entirety and with prejudice" but does not explain why dismissal with prejudice is warranted. Defendant Omni Insurance Company filed a longer motion raising similar arguments to those raised in the two principal motions in the Oregon case, but requesting **[*423]** dismissal with prejudice and an award of attorney's fees under *ORS § 20.105*. (Id., Doc. 129). This motion also does not explain why dismissal with prejudice is warranted. The Eleventh Circuit has emphasized that *HN1*[] district courts have very limited discretion to deny leave to amend when a plaintiff has had only one chance to plead its claims. *Isbrandtsen Marine Services, Inc. v. M/V Inagua Tania, 93 F.3d 728, 734 (11th Cir. 1996)*. Absent some explanation why the Oregon Plaintiff should not be allowed to amend its claims against Defendants American Commerce and Omni, I cannot recommend dismissing the claims against them with prejudice. I recommend that the Court deny Omni's request for attorney's fees without prejudice to Omni re-filing its motion should the Court dismiss the claims against it with prejudice.

Plaintiffs' use of group pleading has been an issue since the start of this litigation. On June 11, 2014, the Court *sua sponte* dismissed the original complaint in the Florida case, in part because of the use of group pleading (Case No. 6:14-cv-310, Doc. 110). The Court explained:

> With limited exceptions, the allegations of wrongdoing are attributed, collectively, to every Defendant and alleged to have been perpetrated upon every Plaintiff. While there may be situations in which such collective descriptions are sufficient, at least some of claims asserted here require individualized allegations.

(Id. at 2). The Florida Plaintiffs amended their complaint by adding the following sentence to each paragraph that referred generally to "Defendants":

> The individual Defendants specifically included within the use of the term "the Defendants" **[*426]** in this paragraph include 21 Century Centennial Insurance Company, 21 Century Indemnity Insurance Company, Acceptance Indemnity Insurance Company, Allstate Fire and Casualty Insurance Company, Allstate Insurance Company, Bristol West Insurance Company, Direct General Insurance Company, Encompass Indemnity Company, Esurance Property & Casualty Insurance Company, Esurance Insurance Company, First Acceptance Insurance Company, Inc., Florida Farm Bureau General Insurance, Florida Farm Bureau Casualty Insurance Company, Foremost Insurance Company, GEICO General Insurance Company, Hartford Accident and Indemnity Company, Hartford Underwriters Insurance Company, Horace Mann Insurance Company, Infinity Auto Insurance Company, Liberty Mutual Insurance Company, Mercury Insurance Company of Florida, MGA Insurance Company, Inc., National General Insurance Online, Inc., Nationwide Insurance Company of Florida, Inc., Nationwide Mutual Insurance Company, Ocean Harbor Casualty Insurance Company, Old Republic Insurance Company, Progressive American Insurance Company, Progressive Select Insurance Company, Safeco Insurance Company of America, Security National Insurance Company, Sentry Insurance A Mutual **[*427]** Company, State Farm Mutual Automobile Insurance Company, The Cincinnati Insurance Company, Travelers Indemnity Company, USAA Casualty Insurance Company, United Services Automobile Association, Westfield Insurance Company, Windhaven Insurance Company, and Zurich American Insurance Company.

See *A & E Auto Body, 2015 U.S. Dist. LEXIS 16153, 2015 WL 304048, at *3*.

In its January 21, 2015 Order dismissing the Florida amended complaint the Court condemned this practice:

> Not surprisingly, the term "the Defendants" appears throughout the Amended Complaint. As a result of the unwarranted inclusion of these names wherever that phrase appears, the Amended Complaint is more than twice as long as the (already lengthy) Complaint, and much more difficult to read. This is unacceptable, and will result in sanctions if not cured in subsequent pleadings. A requirement to provide "individualized allegations" cannot reasonably be read as a requirement to repeat the name of every individual Defendant, over and over.
>
> Counsel for the Plaintiffs argue that, wherever they use the term "the Defendants," they always intend to refer to every single Defendant. But this does not appear to always be the case. For example, in the paragraphs quoted above, the Plaintiffs allege that "the **[*428]** Defendants" enter DRP agreements with the individual Plaintiffs. But according to the list that the Plaintiffs attached to the Amended Complaint, only a handful of the Defendants have entered into DRPs with any Plaintiff. (Doc. 167-4). And some Defendants have informed the Court that they have never participated in a DRP with any repair shop.[footnote] The Plaintiffs should insure that their references to "the Defendants" are, in fact, intended to encompass every single Defendant.

*2015 U.S. Dist. LEXIS 16153, [WL] at *3-4*. In a footnote, the Court observed:

> Plaintiffs have not addressed the Court's concerns over their attempt to proceed collectively on state law claims, such as conversion and unjust enrichment, which would seem to require individualized allegations. As those claims are being dismissed on other grounds, and in the absence of detailed briefing on the issue, the Court will not spend more time on the issue. However, the issue has not been settled, and any party may raise it in connection with future pleadings.

*2015 U.S. Dist. LEXIS 16153, [WL] at *4 n. 8*.

In orders adopting my reports and recommendations on motions to dismiss in the Tennessee, Utah, and Louisiana cases, the Court again addressed group pleading:

> As for the tortious interference claim, Magistrate **[*429]** Judge Smith concluded that the allegations were implausible, in that the Plaintiffs were alleging that all of the Defendants were interfering with the business of all of the Plaintiffs, including those with whom the Defendants had DRPs. Magistrate Judge Smith concluded that the generalized, shotgun nature of the Plaintiffs' contentions does not satisfy the applicable pleading standard and recommended that, in any amended complaint, the Plaintiffs be required to specify which Defendants interfered with which Plaintiffs. The Plaintiffs contend that this is an impractical pleading standard because it seeks to compel them to produce information "which is peculiarly within the possession and control of the Defendants." But there is nothing in the Complaint that explains why the Defendants, but not the Plaintiffs, would have this information. Surely the Plaintiffs must have some basis to believe that certain Defendants interfered with certain of the Plaintiffs' customers. A general allegation that some unidentified Defendants—or all Defendants—interfered with some unidentified customers of some unnamed Plaintiff does not satisfy the requirements of *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)*.

*Brewer Body Shop, LLC v. State Farm Mutual Auto. Ins. Co., __ F. Supp. 3d __, __, 2015 U.S. Dist. LEXIS 54836, 2015 WL 1911418, at *1 (M.D. Fla. Apr. 27, 2015)*; *Alpine Straightening Systems v. State Farm Mutual Auto. Ins. Co., No. 6:14-cv-6003, 2015 U.S. Dist. LEXIS 56562, 2015 WL 1911635, at *1 (M.D. Fla. Apr. 27, 2015)* **[*430]** ; *Parker Auto Body Inc. v. State Farm Mutual Auto. Ins. Co., Case No. 6:14-cv-6004, Doc. 118 at 3, 2015 U.S. Dist. LEXIS 56451 (M.D. Fla. Apr. 27, 2015)*; *Southern Collision & Restoration, LLC v. State Farm Mutual Auto. Ins. Co., No. 6:14-cv-6005, 2015 U.S. Dist. LEXIS 54854, 2015 WL 1911768, at *1 (M.D. Fla. Apr. 27, 2015)*.

Most cases addressing the subject of "group pleading" arise in the fraud context. *Frazier v. U.S. Bank Nat'l Ass'n, No. 11 C 8775, 2013 U.S. Dist. LEXIS 45330, 2013 WL 1337263, at *3 (N.D. Ill. Mar. 29, 2013)*. ***HN6***[] Allegations of fraud are subject to heightened pleading requirements. See *Fed. R. Civ. P. 9(b)* ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."). Ordinarily, a plaintiff cannot satisfy the requirements of *Rule 9(b)* through group pleading. *Targum v. Citrin Cooperman & Co., LLP, No. 12 Civ. 6909(SAS), 2013 U.S. Dist. LEXIS 164585, 2013 WL 6087400, at *6 n. 101 (S.D.N.Y. Nov. 19, 2013)*.

HN7[] The use of group pleading may also result in a complaint failing to meet the more lenient pleading standard in *Rule 8(a)*. "*Rule 8(a)* is violated where a plaintiff, by engaging in 'group pleading,' fails to give each defendant fair notice of the claims against it." *Holmes v. Allstate Corp., No. 11-CV-1543, 2012 U.S. Dist. LEXIS 24883, 2012 WL 627238, at *22 (S.D.N.Y. Jan. 27, 2012)*, report & recommendations adopted, *2012 U.S. Dist. LEXIS 24903, 2012 WL 626262 (Feb. 27, 2012)*.[2]

But, ***HN9***[] there are cases in which group pleading may be acceptable. For example, the Eleventh Circuit arguably endorsed the use of group pleading in *Crowe v. Coleman, 113 F.3d 1536, 1539 (11th Cir. 1997)*. In Crowe, the plaintiffs' former neighbor ran a gas station that was eventually shut down and sold. *Id. at 1537-38*. Plaintiffs sued both the current and former owners of the gas station property for nuisance alleging, among other

[2] See also *DeSoto v. Board of Parks and Recreation, 64 F. Supp. 3d 1070, 2014 WL 6680681, at *11 (M.D. Tenn. 2014)* (dismissing § 1983 claim in part based on group pleading, because "under *§ 1983*, a plaintiff must show that each defendant was personally involved in the alleged constitutional deprivation"); *Targum, 2013 U.S. Dist. LEXIS 164585, 2013 WL 6087400, at *6* (concluding that group pleading in complaint "fail[ed] to put [one of the defendants] on notice of the specific allegations against **[*431]** it"); *Eunice v. United States, No. 12cv1635-GPC(BGS), 2013 U.S. Dist. LEXIS 26992, 2013 WL 756168, at *3 (S.D. Cal. Feb. 26, 2013)* ("Lumping all 'defendants' together and facts regarding the incident does not put a particular defendant on notice as to the grounds for the allegations."); ***Tatone v. SunTrust Mortgage, Inc., 857 F. Supp. 2d 821, 831 (D. Minn. 2012)*** (***HN8***[] "A complaint which lumps all defendants together and does not sufficiently allege who did what to whom, fails to state a claim for relief because it does not provide fair notice of the grounds for the claims made against a particular defendant."); *Lane v. Capital Acquisitions & Mgmt. Co., No. 04-60602 CIV, 2006 U.S. Dist. LEXIS 96422, 2006 WL 4590705, at *5 (S.D. Fla. Apr. 14, 2006)* ("By lumping all the defendants together in each claim and providing no factual basis to distinguish their conduct, [Plaintiffs'] Complaint fails to satisfy the minimum standard of *Rule 8*.").

things, that "[t]he defendants have allowed the escape of gasoline from their property onto the property of the plaintiffs." Id. at 1539. The Eleventh Circuit explained **[*432]** that "[w]hen multiple defendants are named in a complaint, the allegations can be and usually are to be read in such a way that each defendant is having the allegation made about him individually." Id.

In *In re TFT-LCD (Flat Panel) Antitrust Litig., 599 F. Supp. 2d 1179 (N.D. Cal. 2009)*, a federal district court rejected challenges to a complaint based on group pleading. The court dismissed the original complaint because it "lacked allegations specific to each defendant," and granted the plaintiffs "leave to amend to more specifically plead how each defendant joined the alleged price-fixing conspiracy." *Id. at 1183*. The plaintiffs left the collective allegations in their amended complaint, but added paragraphs directed at specific defendants. *Id. at 1183-84*. The court rejected the defendants' "group pleading" challenge to the amended complaint because the new allegations "more than adequately allege[d] the involvement of each defendant and put defendants on notice of the claims against them." *Id. at 1184*; see also *id. at 1185* ("The complaints allege a complex, multinational price-fixing conspiracy and, taken as a whole, they sufficiently allege each defendants' participation in that conspiracy, as well as present a factual basis for the allegations of agency.").

The only specific allegations about most of the Defendants **[*433]** in the Pending Cases are that they are insurers who are licensed to do business in particular states. For example, the Arizona complaint mentions only State Farm and Safeco in the factual allegations, and the latter in only one paragraph. Unlike the amended complaint in *Flat Panel*, Plaintiffs' complaints do not include specific allegations linking each Defendant to a price-fixing conspiracy. Nor have Plaintiffs explained how the conduct of one Defendant in steering a customer away from one Plaintiff is related in any way to the conduct of a different Defendant in steering a different customer away from the same or a different Plaintiff. There is nothing in any of the complaints to support attributing the wrongful conduct of one Defendant to unrelated and independent wrongful conduct of another Defendant. Lumping together separate and unrelated conduct in this manner does not put Defendants on notice of the grounds for the claims against them.

This is not to say that I believe Plaintiffs must name, for every body shop and insurer, a customer who was steered by that particular insurer away from that particular body shop. As the Supreme Court emphasized in Iqbal,***HN10***[↑] a district court's task **[*434]** in determining whether a complaint states a claim upon which relief can be granted is "a context-specific task that requires the ... court to draw on its judicial experience and common sense." *556 U.S. at 679*. But, at a minimum, Plaintiffs should allege sufficient facts specific to each Defendant, or at least each corporate family of Defendants, to tie that Defendant to the wrongdoing alleged. Accordingly, I recommend that all of the complaints be dismissed without prejudice based upon improper group pleading.

B. Federal Antitrust Claims

In all of these cases, Plaintiffs bring counts alleging that Defendants engaged in horizontal price-fixing[3] and group boycotts[4] in violation of § 1 of the Sherman Act, *15 U.S.C. § 1*. The Washington Plaintiffs have also alleged that Defendants engaged in steering in violation of the Sherman Act.[5]

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[3] The counts in each case for price fixing under the Sherman Act are: Count I in Case No. 6:14-cv-6006; Count IX in Case No. 6:14-cv-6007; Count VII in Case No. 6:14-cv-6008 and 6:14-cv-6020; Count VII in Case No. 6:14-cv-6009; Count V in Case No. 6:14-cv-6010; Count VI in Case No. 6:14-cv-6011; Count VI in Case No. 6:14-cv-6012 and 6:14-cv-6013; "Count I" of the "Fifth Claim for Relief" in Case **[*435]** No. 6:14-cv-6014; the first unnumbered count in Case No. 6:14-cv-6015; Count I in Case No. 6:14-cv-6018; Count VI in Case No. 6:14-cv-6019; and Count I in Case No. 6:15-cv-6022.

[4] The counts in each case for group boycott under the Sherman Act are: Count II in Case No. 6:14-cv-6006; Count X in Case No. 6:14-cv-6007; Count VIII in Case No. 6:14-cv-6008 and 6:14-cv-6020; Count VIII in Case No. 6:14-cv-6009; Count VI in Case No. 6:14-cv-6010; Count VIII in Case No. 6:14-cv-6011; Count VII in Case No. 6:14-cv-6012 and 6:14-cv-6013; "Count II" of the "Fifth Claim for Relief" in Case No. 6:14-cv-6014; the third unnumbered count in Case No. 6:14-cv-6015; Count II in Case No. 6:14-cv-6018; Count VII in Case No. 6:14-cv-6019; and Count II in Case No. 6:15-cv-6022. There is no "Count VII" in Case No. 6:14-cv-6011.

[5] The steering count under the Sherman Act is the second unnumbered count in the Washington case (Case No. 6:14-cv-6015).

Defendants argue that Plaintiffs' federal antitrust claims should be dismissed for the reasons stated in the Court's Order in A & E Auto Body, as well as the reasons put forth in the motions to dismiss in that case "and in several other nearly identical cases before the **[*436]** Court." In A & E Auto Body, the Court dismissed Plaintiffs' amended complaint on the grounds that they had failed to allege facts plausibly suggesting that Defendants had made an agreement. *2015 U.S. Dist. LEXIS 16153, 2015 WL 304048, at *11*. The GEICO Defendants also argue that Plaintiffs' claims are subject to the rule of reason standard, and that Plaintiffs must plausibly allege a relevant market, market power, barriers to entry, anticompetitive effects that outweigh procompetitive benefits, and antitrust injury.

The New Jersey Plaintiffs argue that the Non-GEICO Defendants "make no specific arguments," and that their motion fails to meet the requirements of *Fed.R.Civ.P. 7(b)(1)(B)* because it does not state with particularity the grounds for seeking the order (Case No. 6:14-cv-6012, Doc. 39 at 25; Case No. 6:14-cv-6013, Doc. 41 at 24-25). The New Jersey Plaintiffs complain that they are "at a loss to respond" because "[d]ozens of motions have been filed in the Florida Action, with numerous arguments proffered." (Id.). They do, however, address the specific arguments made by the GEICO Defendants.

I disagree with Plaintiffs' suggestion that the Non-GEICO Defendants' motion to dismiss is insufficient. To be sure, Defendants' passing reference to motions **[*437]** to dismiss filed in other MDL cases is not sufficient to raise the arguments in those motions. But, Defendants have also argued that the Court should dismiss these complaints, which are substantively identical to the Florida amended complaint, for the reasons the Court dismissed the Florida amended complaint. In my previous reports and recommendations I have recommended the Court dismiss federal antitrust claims that were "indistinguishable from the claims asserted by the plaintiffs in A & E Auto Body ... for the reasons stated in the dismissal order in A & E Auto Body." See, e.g., *Capitol Body Shop, 2015 U.S. Dist. LEXIS 26509, 2015 WL 859477, at *9*.

In the remaining cases, Plaintiffs have incorporated by reference the arguments made in one of the New Jersey cases (No. 6:14-cv-6013), and in their replies, the Non-GEICO Defendants have incorporated by reference their motion to dismiss and their reply from that case. I do not understand what these Defendants were trying to accomplish by attaching the motion in the New Jersey case to every single reply. The New Jersey motion says nothing that the Non-GEICO Defendants' motions in the other cases do not.

Upon review, I conclude that Plaintiffs' price fixing and group boycott claims are indistinguishable from **[*438]** those asserted by the plaintiffs in A & E Auto Body. The Court's reasoning in dismissing the antitrust claims in that case applies with equal force here. Therefore, I recommend that Plaintiffs' counts for price fixing and group boycotts in violation of the Sherman Act be dismissed.

The steering claim in the Washington case does not allege the existence of an agreement to steer, or an attempt or conspiracy to monopolize a part of trade or commerce. This is a requirement to state a claim under either *§ 1* or *§ 2* of the Sherman Act. Accordingly, I conclude that the Washington Plaintiffs' steering claim under the Sherman Act should also be dismissed.

C. State Antitrust Claims

Plaintiffs in the Michigan,[6] New Jersey,[7] Washington,[8] and Virginia[9] cases allege violations of state antitrust laws. ***HN11***[] These state have statutes that are similar to the Sherman Act in that they all outlaw "contract[s]," "combination[s]," and "conspirac[ies]" "in restraint of trade or commerce." Compare *15 U.S.C. § 1* ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."); with *Mich. Comp. Laws § 445.772* ("A contract,

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[6] Count XI in Case No. 6:14-cv-6007.

[7] Count IV in Case No. 6:14-cv-6012 and 6:14-cv-6013.

[8] The fourth unnumbered count in Case No. 6:14-cv-6015.

[9] Count V in Case No. 6:14-cv-6019.

combination, or conspiracy between 2 **[*439]** or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful."); *N.J. Rev. Stat. § 56:9-3* ("Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, in this State, shall be unlawful."); *Va. Code § 59.1-9.5* ("Every contract, combination or conspiracy in restraint of trade or commerce of this Commonwealth is unlawful."); and *WRC 19.86.030* ("Every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is hereby declared unlawful."). To recover under these state statutes, a plaintiff must plausibly plead the existence of an agreement between the defendants. *Blair v. Checker Cab Co., 219 Mich. App. 667, 558 N.W.2d 439, 442 (Mich. Ct. App. 1996)* (noting that Michigan's ***antitrust law*** and the Sherman Act both "require similar evidence of concerted action or combination"); *Exxon Corp. v. Wagner, 154 N.J. Super. 538, 382 A.2d 45, 48 (N.J. App. Div. 1977)* ("For there to be a contract, combination or conspiracy in restraint of trade in violation of *N.J.S.A. 56:9-3*, there must exist a plurality of actors, that is, two or more persons, and concerted action"); *Reid v. Boyle, 259 Va. 356, 527 S.E.2d 137, 148 (Va. 2000)* (dismissing state-law antitrust claim where Plaintiffs "failed to prove the existence of any contract or conspiracy in restraint of trade or commerce"); *Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 738 P.2d 665, 677 (Wash. 1987)* ("An illegal combination in restraint of **[*440]** trade requires two factors to be present: (1) two or more actors, and (2) concerted action."). As explained above, see supra Part III.B, Plaintiffs have failed to plead facts raising a plausible inference of an agreement. Therefore, the state-law antitrust claims raised in these cases should be dismissed.

D. Unjust Enrichment and Quantum Meruit

All Plaintiffs assert claims for unjust enrichment and, in all but the Arizona, Missouri, California, and Oregon cases, separate claims for quantum meruit.[10] These claims are based on Plaintiffs' allegations that they were underpaid for parts and services provided to Defendants' insureds and claimants, and that Defendants were unjustly enriched as a result.

"Quantum meruit" is a legal term of ancient vintage that originated in the common-law action of assumpsit. *Alternatives Unlimited, Inc. v. New Baltimore City Board of School Commissioners, 155 Md. App. 415, 843 A.2d 252, 284 (Md. App. 2004)*; RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 31 cmt. e. It literally means "as much as he deserved." BLACK'S LAW DICTIONARY (10th ed. 2014). ***HN12***[] "As a measure of recovery, it means the reasonable value of the work performed or the services rendered by a plaintiff for a defendant." **[*442]** *Alternatives Unlimited, 843 A.2d at 291*. In addition to being a measure of recovery, quantum meruit is often pled as a cause of action. *Murdock-Bryant Constr., Inc. v. Pearson, 146 Ariz. 48, 703 P.2d 1197, 1201 (Ariz. 1985)*. Courts and parties have used the term "quantum meruit," along with its lesser-known cousin "quantum valebant," to refer to two types of cases: those where the parties entered an implied-in-fact contract but did not agree on a specific price, and those where the parties had no contract but it would be unjust for the defendant to retain the benefit on the plaintiff's performance without paying for it. *Murdock-Bryant, 703 P.2d at 1201*; RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 31 cmt. e; see also Candice L. Kovacic, A Proposal to Simplify Quantum Meruit Litigation, *35 Am. U. L. Rev. 547, 553 (1986)*. In cases that fall into the latter category, courts often invoke the legal fiction that the parties' conduct creates a "contract implied in law" or "quasi-contract." See *Alternatives Unlimited, 843 A.2d at 290-91*; *Campbell v. Tennessee Valley Authority, 421 F.2d 293, 296 (5th Cir. 1969)*; *RESTATEMENT (SECOND) OF CONTRACTS § 4, cmt. b*. Liability in these cases "is not in reality contractual in character,

[10] The counts entitled "Quantum Meruit" are: Count II in Case No. 6:14-cv-6007; Count II in Case No. 6:14-cv-6008 and 6:14-cv-6020; Count II in Case No. 6:14-cv-6009; Count II in Case No. 6:14-cv-6011; Count I in Case No. 6:14-cv-6012 and 6:14-cv-6013; the sixth unnumbered count in Case No. 6:14-cv-6015; Count IV in Case No. 6:14-cv-6018; **[*441]** and Count I in Case No. 6:14-cv-6019. The counts entitled "Unjust Enrichment" are: Count IV in Case No. 6:14-cv-6006; Count III in Case No. 6:14-cv-6007; Count III in Case No. 6:14-cv-6008 and 6:14-cv-6020; Count III in Case No. 6:14-cv-6009; Count III in Case No. 6:14-cv-6011; Count II in Case No. 6:14-cv-6012 and 6:14-cv-6013; the seventh unnumbered count in Case No. 6:14-cv-6015; Count V in Case No. 6:14-cv-6018; Count II in Case No. 6:14-cv-6019; and Count IV in Case No. 6:14-cv-6022. In Count I in Case No. 6:14-cv-6010 the California Plaintiffs allege a single count entitled "Quantum Meruit: Contract Implied in Law, Quasi-Contract, and Unjust Enrichment." In the "First Claim for Relief" in Case No. 6:14-cv-6014, the Oregon Plaintiffs allege a single count entitled "Quantum Meruit/Unjust Enrichment."

but is imposed in the absence of any [agreement] to prevent unjust enrichment." *Fidelity & Deposit Co. of Maryland v. Harris, 360 F.2d 402, 409 (9th Cir. 1966)* (citing *Bayne v. United States, 93 U.S. 642, 23 L. Ed. 997 (1876))*.

"Unjust enrichment" is a much newer term in the Anglo-American common-law system. Although courts have long appealed to notions of justice when imposing liability in the absence of an express **[*443]** contract, see 1 Dan B. Dobbs, LAW OF REMEDIES 251 (2d ed. 1993) (citing Lord Mansfield's opinion in Moses v. MacFerlan, 2 Burr. 1005, 97 Eng. Rep. 676 (K.B. 1760)), the idea that quasi-contract is justified by a broader principle of preventing unjust enrichment was first proposed in the late 1800s, see William Albert Keener, A TREATISE ON THE LAW OF QUASI-CONTRACTS 19-20 (1893) (arguing that the theory of quasi contract "rests upon the doctrine that a man shall not be allowed to enrich himself unjustly at the expense of another"); see also Review, A Treatise on the Law of Quasi-Contracts, 7 Harv. L. Rev. 245 (1893) (noting that Keener's "doctrine of unjust enrichment has not been acknowledged in terms to any great extent by the courts"); Ben Kremer, Review, Restatement Third of Restitution and Unjust Enrichment by the American Law Institute, *35 Melb. U. L. Rev. 1197, 1198 (2011)* (describing Keener's treatise as "a seminal work"). Keener's thesis—that liability in quasi-contract rests on the principle that one should not be allowed to enrich himself at the expense of another—has gained "almost universal assent" in academic literature, see Joseph M. Perillo, Restitution in a Contractual Context, 73 Colum. L. Rev. 1208, 1208-09 (1973), and has been repeated in some form by high courts in virtually every state, including the 12 where these 14 cases **[*444]** originated.[11] It is also the starting point for each of the Restatements of Restitution. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1; *RESTATEMENT (FIRST) OF RESTITUTION § 1*.

HN13[] The unjust enrichment principle is the basis not only for "quasi-contract" but also for a host of equitable remedies including constructive trust, subrogation, and equitable lien. 1 Dobbs, LAW OF REMEDIES 565. Scholars have identified a trend in American law "to affiliate various restitutionary remedies, such as quasi contracts and constructive trusts" with "a common animating principle" of unjust enrichment. Kelvin H. Dickinson, Divorce and Life Insurance: Post Mortem Remedies for Breach of a Duty to Maintain a Policy for a Designated Beneficiary, *61 Mo. L. Rev. 533, 569-70 (1996)*; see also 1 Dobbs, LAW OF REMEDIES 564 (stating that "the modern view is that unjust enrichment is a unifying principle" for a broad range of narrow common law and equitable actions). The Restitution Restatements, published 74 years apart, reflect this trend. The Restatement (First) of Restitution recognized the common unjust enrichment principle underlying quasi-contract and constructive trust, but was organized into separate parts for **[*445]** each. The Restatement (Third) of Restitution and Unjust Enrichment, by contrast, is organized into four parts, the first stating general principles, the second more specific substantive rules, the third addressing remedies and the fourth defenses.

As is typical in evolving areas of law, some states are faster to adopt changes than others. ***HN14***[] Some states retain subsidiary actions like "quantum meruit" or "quasi contract" and require a plaintiff to plead and prove long-established elements of those actions. See, e.g., *A & E Auto Body, 2015 U.S. Dist. LEXIS 16153, 2015 WL 304048, at *5* (citing *Hull & Co., Inc. v. Thomas, 834 So.2d 904 (Fla. 4th DCA 2003))*. Courts in these states sometimes refer to the action as being for "unjust enrichment." See id. (citing *Hillman Constr. Corp. v. Wainer, 636 So.2d 576, 577 (Fla. 4th DCA 1994))*. These states typically require a showing that the plaintiff "conferred" a benefit on the defendant, and that the defendant "appreciated" or "knew" of the benefit and "accepted" or "retained" it. They may also focus on whether the plaintiff reasonably expected to receive compensation for the benefit. Missouri, Virginia, Kentucky, Alabama, and Oregon fall into this category. See *Binkley v. American Equity Mortgage, Inc., 447 S.W.3d 194, 199 (Mo. 2014)* ("An unjust enrichment claim requires a showing that: '(1) the plaintiff conferred a benefit on

[11] See *Kentucky Ass'n of Counties All Lines Fund Trust v. McClendon, 157 S.W.3d 626, 632-33 (Ky. 2005)*; *Village of Bloomingdale v. CDG Enterprises, Inc., 196 Ill. 2d 484, 752 N.E.2d 1090, 1102, 256 Ill. Dec. 848 (Ill. 2001)*; *Hamm v. Scott, 258 Va. 35, 515 S.E.2d 773, 775 (Va. 1999)*; *Kammer Asphalt Paving Co. v. East China Township Schools, 443 Mich. 176, 504 N.W.2d 635, 640 (Mich. 1993)*; ***Carr v. Carr*, 120 N.J. 336, 576 A.2d 872, 880 (N.J. 1990)**; *Lynch v. Deaconess Medical Center, 113 Wn.2d 162, 776 P.2d 681, 683 (Wash. 1989)*; *Murdock-Bryant Constr., Inc. v. Pearson, 146 Ariz. 48, 703 P.2d 1197, 1201-02 (Ariz. 1985)*; *Opelika Production Credit Ass'n v. Lamb, 361 So.2d 95, 99 (Ala. 1978)*; *J.A. & W.A. Hess, Inc. v. Hazle Township, 465 Pa. 465, 350 A.2d 858, 861 (Pa. 1976)*; *Schroeder v. Schaefer, 258 Ore. 462, 483 P.2d 818, 821 (Or. 1971)*; *Polk Township v. Spencer, 364 Mo. 97, 259 S.W.2d 804, 807 (Mo. 1953)*; *Ruinello v. Murray, 36 Cal. 2d 687, 227 P.2d 251, 253 (Cal. 1951)*.

the defendant; (2) the defendant appreciated the benefit; and (3) the defendant accepted **[*446]** and retained the benefit under inequitable and/or unjust circumstances.'"); *Schmidt v. Household Finance Corp., II, 276 Va. 108, 661 S.E.2d 834, 838 (Va. 2008)* ("To state a cause of action for unjust enrichment, Schmidt had to allege that: (1) he conferred a benefit on Household Finance; (2) Household Finance knew of the benefit and should reasonably have expected to repay Schmidt; and (3) Household Finance accepted or retained the benefit without paying for its value."); *Jones v. Sparks, 297 S.W.3d 73, 78 (Ky. App. 2009)* ("For a party to prevail under the theory of unjust enrichment, they must prove three elements: (1) benefit conferred upon defendant at plaintiff's expense; (2) a resulting appreciation of benefit by defendant; and (3) inequitable retention of benefit without payment for its value."); *Portofino Seaport Village, LLC v. Welch, 4 So.3d 1095, 1098 (Ala. 2008)* ("To prevail on a claim of unjust enrichment under Alabama law, a plaintiff must show that: (1) the defendant knowingly accepted and retained a benefit, (2) provided by another, (3) who has a reasonable expectation of compensation."); *Winters v. County of Clatsop, 210 Or. App. 417, 421, 150 P.3d 1104 (Or. App. 2007)* ("It is well-settled that, to establish unjust enrichment, a plaintiff must establish that (1) the plaintiff conferred a benefit on the defendant; (2) the defendant was aware that it had received a benefit; and (3) under the circumstances, it would be unjust for the defendant to retain **[*447]** the benefit without paying for it.").

By contrast, ***HN15***[] in California, Michigan, Washington, and Illinois, a plaintiff can establish an unjust enrichment claim by meeting the requirements of *section 1 of the Restatements:* the defendant was enriched at the plaintiff's expense and the enrichment was unjust. See *Ghirardo v. Antonioli, 14 Cal. 4th 39, 57 Cal. Rptr. 2d 687, 924 P.2d 996, 1003 (Cal. 1996)* ("Under the law of restitution, an individual may be required to make restitution if he is unjustly enriched at the expense of another.")[12]; *AFT Michigan v. Michigan, 303 Mich. App. 651, 660-61, 846 N.W.2d 583 (Mich. App. 2014)* ("To sustain an unjust enrichment claim, a plaintiff must demonstrate (1) the defendant's receipt of a benefit from the plaintiff and (2) an inequity to plaintiff as a result." (citing *Dumas v. Auto Club Ins. Ass'n, 437 Mich. 521, 473 N.W.2d 652, 663 (Mich. 1991)*))[13]; *Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 254 P.3d 835, 844 (Wash. App. 1st Div. 2011)* ("A claim of unjust enrichment requires proof of three elements—'(1) the defendant receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment.'" (quoting *Young v. Young, 164 Wn.2d 477, 191 P.3d 1258, 1262 (Wash. 2008)*)); *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc., 131 Ill. 2d 145, 545 N.E.2d 672, 679, 137 Ill. Dec. 19 (Ill. 1989)* ("To state a cause of action based on a theory of unjust enrichment, a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience."). Although they use slightly **[*448]** different elements, Arizona courts require a plaintiff to satisfy the Restatement criteria plus "the absence of a remedy provided by law," a requirement which is satisfied by denying that a contract governs the relationship between the parties. See *Freeman v. Sorchych, 226 Ariz. 242, 245 P.3d 927, 936 (Ariz. App. 2011)* ("To recover under a theory of unjust enrichment, a plaintiff must demonstrate five elements: (1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and impoverishment, (4) the absence of justification for the enrichment and impoverishment, and (5) the absence of a remedy provided by law."); *In re Automotive Parts Antitrust Litig., 29 F. Supp. 3d 982, 1016 (E.D. Mich. 2014)*

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[12] California appellate courts often describe these claims as being for restitution, not unjust enrichment. For example, in *Dunkin v. Boskey, 82 Cal. App. 4th 171, 98 Cal. Rptr. 2d 44 (2000)*, the court explained: "The phrase 'Unjust Enrichment' does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so. *84 Cal. App. 4th at 198 n. 18* (citations and quotations omitted). See also *Durell v. Sharp Healthcare, 183 Cal. App. 4th 1350, 1370, 108 Cal. Rptr. 3d 682 (2010)* (***HN16***[] "'[T]here is no cause of action in California for unjust enrichment.' Unjust enrichment is synonymous with **[*449]** restitution." (quoting *Melchior v. New Line Productions, 106 Cal. App. 4th 779, 793, 131 Cal. Rptr. 2d 347 (2003)*)). This distinction appears to be one of form, rather than function. See *Dunkin, 82 Cal. App. 4th at 198 n. 18* ("'[I]n any event, ... there is no particular form of pleading necessary to invoke the doctrine' of restitution." (quoting *Dinosaur Development, Inc. v. White, 216 Cal.App.3d 1310, 1316, 265 Cal. Rptr. 525 (1989)*)).

[13] ***HN17***[] Although the elements of an unjust enrichment claim under Michigan law require that the defendant receive a benefit from the plaintiff, Michigan does not require that the benefit be conferred directly by the plaintiff to the defendant. See *In re Automotive Parts Antitrust Litig., 29 F. Supp. 3d 982, 1021 (E.D. Mich. 2014)*.

("Arizona courts define the adequate remedy at law element as 'whether there is a contract which governs the relationship between the parties.'" (citing *Trustmark Ins. Co. v. Bank One, Ariz., NA, 202 Ariz. 535, 48 P.3d 485, 491 n. 5 (Ariz. App. 2002))*).

HN18[] Courts in Pennsylvania have advanced both formulations. Compare *Meehan v. Cheltenham Township, 410 Pa. 446, 189 A.2d 593, 595 (Pa. 1963)* ("Where one party has been unjustly enriched at the expense of another, he is required to make restitution to the other. In order to recover, there must be both (1) an enrichment, and (2) an injustice resulting if recovery for the enrichment is denied."); with *Mitchell v. Moore, 1999 PA Super 77, 729 A.2d 1200, 1203 (Pa. Super. 1999)* ("The elements necessary to prove unjust enrichment are: '(1) benefits conferred on defendant by plaintiff; (2) appreciation of such benefits by defendant; and (3) acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value.'" (quoting *Schenck v. K.E. David, Ltd., 446 Pa. Super. 94, 666 A.2d 327, 328 (Pa. Super. 1995))*).

Finally, New Jersey takes a hybrid approach. ***HN19***[] Under New Jersey law, an unjust enrichment **[*450]** plaintiff must show not only that the defendant was enriched and that the enrichment was unjust, but also that the plaintiff "expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights." *VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 641 A.2d 519, 526 (N.J 1994)* (citations omitted).

Despite these differences, there is a common set of basic elements for unjust enrichment claims in these states. ***HN20***[] To recover, a plaintiff must show at least that the defendant obtained a benefit at the plaintiff's expense and that the defendant's enrichment was "unjust" or "inequitable."

1. Benefit

Case law differs from state to state regarding what counts as a "benefit" (or an "enrichment") for purposes of an unjust enrichment claim. In A & E Auto Body, the Court held that under Florida law, a third party who renders a benefit to an insured or claimant that the insurance company is ultimately responsible for paying for does not "confer" a benefit on the insurance company for purposes of an unjust enrichment claim. *2015 U.S. Dist. LEXIS 16153, 2015 WL 304048, at *5* (citing *Adventist Health System/Sunbelt, Inc. v. Medical Savings Ins. Co., 2004 U.S. Dist. LEXIS 30976, 2004 WL 6225293, at *6 (M.D. Fla. Mar. 8, 2004))*. Adventist, in turn favorably cited (among other cases) *Myrtle Beach Hospital, Inc. v. City of Myrtle Beach, 341c S.C. 1, 532 S.E.2d 868 (S.C. 2000)*, where the South Carolina Supreme Court rejected a quantum meruit claim by **[*451]** a hospital that provided uncompensated or undercompensated medical services to pre-trial detainees against the city that housed them. In Myrtle Beach, the court reasoned that the detainees, and not the city, received and retained the benefits conferred by the hospital. *Id. at 873*.

But other courts define "benefit" more broadly. In *Emergency Physicians Integrated Care v. Salt Lake County, 2007 UT 72, 1c67 P.3d 1080 (Utah 2007)*, the Utah Supreme Court explicitly rejected the South Carolina Supreme Court's holding in Myrtle Beach and concluded that a jailer did benefit from the provision of emergency medical care to inmates under his charge. *Id. at 1085*. The New Jersey Supreme Court reached a similar conclusion in *St. Barnabas Medical Center v. County of Essex, 111 N.J. 67, 543 A.2d 34 (N.J. 1988)*.[14] And, in Adventist the court noted (and disagreed with) a Pennsylvania appellate decision holding that a hospital conferred a benefit on a managed care company by providing health care services to the company's members. *2004 U.S. Dist. LEXIS*

[14] The New Jersey Plaintiffs interpret St. Barnabas to mean that whenever a plaintiff performs a duty owed by a defendant to a third party, the defendant is not only enriched, but *unjustly* enriched at the plaintiff's expense (Case No. 6:14-cv-6013, Doc. 41 at 4). But, in St. Barnabas, the New Jersey Supreme Court emphasized the fact that the hospital was under **[*452]** a duty, imposed by state regulation, to treat the indigent inmates. *Id. at 38*. Here, the New Jersey Plaintiffs were under no duty to repair the vehicles belonging to Defendants' insureds and claimants. Additionally, the county in St. Barnabas requested that the hospital provide medical care to the inmates; here, by contrast, the New Jersey Plaintiffs have not pled that Defendants or Defendants' agents asked them to perform any repairs.

30976, 2004 WL 6225293, at *5 n.7 (citing Temple Univ. Hospital, Inc. v. Healthcare Mgmt. Alternatives, Inc., 2003 PA Super 332, 832 A.2d 501, 507-08 (Pa. Super. Ct. 2003)).

Defendants urge the Court to adopt the reasoning of A & E Auto Body, Adventist, and Myrtle Beach and dismiss Plaintiffs' quantum meruit and unjust enrichment claims on this basis. However, in several of these cases Defendants cite little or no state-specific authority to advance their argument that the relevant states would interpret "benefit" narrowly, like Florida and South Carolina, rather than broadly, like Utah, Pennsylvania, New Jersey[15] and the comments to the Restitution Restatements. Because the states are divided on this issue, and because the complaints must be dismissed on other grounds, I do not address this issue on a state-by-state basis in this report and recommendations.[16]

2. Failure to Bargain

Assuming Plaintiffs' performance of repairs for Defendants' insureds and claimants constitutes a benefit, the unjust enrichment claims must still be dismissed because Plaintiffs have failed to allege facts showing that it would be unjust to allow Defendants to retain any benefit Plaintiffs may have conferred. The Restatement (Third) of Restitution and Unjust Enrichment explains that ***HN21***[] "[t]here is no liability in restitution for an unrequested benefit voluntarily conferred, unless the circumstances of the transaction justify the claimant's intervention in the absence of contract." Id. § 2(3). Comment (d) to this section explains:

> Instead of proposing a bargain, the restitution claimant first confers a benefit, then seeks payment for its value. When this manner of proceeding is unacceptable—as it usually is, if the claimant neglects an opportunity to contract—a claim based on unjust enrichment will be denied.
>
> The limitation of § 2(3) is traditionally expressed by denying restitution to a claimant characterized as "officious," an "intermeddler," or a **[*455]** "volunteer." This section states the same rule, substituting a functional explanation for the familiar epithets. Because contract is strongly preferred over restitution as a basis for private obligations, restitution is not usually available to a claimant who has neglected a suitable opportunity to make a contract beforehand.

As Judge Posner explained in Indiana Lumbermens Mutual Insurance Co. v. Reinsurance Results, Inc.,

> ***HN22***[] One who voluntarily confers a benefit on another, which is to say in the absence of a contractual obligation to do so, ordinarily has no legal claim to be compensated. E.g., *In re Grabill Corp., 983 F.2d 773, 776 (7th Cir.1993)*; American Law Institute, *Restatement (First) of Restitution § 2* (1937). If while you are sitting on your porch sipping Margaritas a trio of itinerant musicians serenades you with mandolin, lute, and hautboy, you have no obligation, in the absence of a contract, to pay them for their performance no matter how much you enjoyed it; and likewise if they were gardeners whom you had hired and on a break from their gardening

[15] Some case law from the District of New Jersey follows the no-benefit rule **[*453]** stated in Adventist and applied by this Court in the Florida case. See, e.g., *Broad Street Surgical Center, LLC v. Unitedhealth Group, Inc., Civ. No. 11-2775(JBS/JS), 2012 U.S. Dist. LEXIS 30466, 2012 WL 762498, at *8 (D.N.J. Mar. 6, 2012)*. Whether Broad Street can be reconciled with St. Barnabas on this issue is a question best left for a later time.

[16] In their memorandum in support of their motion to dismiss in the Kentucky case and their replies in the Alabama, New Jersey, and Washington cases, the GEICO Defendants suggest that Plaintiffs can never establish that performance of repairs constitutes a benefit to the insurance companies because "[i]t is common knowledge that insurance companies have a duty to pay for the damage to a vehicle, not to repair the vehicle." (Case No. 6:14-cv-6009, Doc. 27 at 4 n. 2; Case No. 6:14-cv-6013, Doc. 43 at 4 n. 3; Case No. 6:14-cv-6015, Doc. 24 at 3 n. 2; Case No. 6:14-cv-6018, Doc. 117 at 12, n. 2). This is hardly "common knowledge" or "obvious," and may not be true. GEICO's standard auto insurance policy for the state of Kentucky for example, expressly gives GEICO an option to "repair or replace the damaged or stolen property" instead of "pay[ing] for the loss." (See E.D. Ky. Case No. 5:14-cv-363-DCR-RW, Doc. 1-3 at 12). In any event, the Court cannot consider "matters outside the pleadings" without converting the **[*454]** motion to one for summary judgment, *Fed. R. Civ. P. 12(d)*, and even then, unsworn assertions in a brief or memorandum of law are not evidence, *Travaglio v. American Express Co., 735 F.3d 1266, 1270 (11th Cir. 2013)*.

> they took up their musical instruments to serenade you. When voluntary transactions are feasible (in economic parlance, when transaction costs are low), it is better and cheaper to require the parties to make their own **[*456]** terms than for a court to try to fix them-better and cheaper that the musicians should negotiate a price with you in advance than for them to go running to court for a judicial determination of the just price for their performance. In contrast, "when a businessman renders a valuable service in circumstances in which compensation would normally be expected, and though he is acting without the knowledge or consent of the recipient of the service there is no alternative because transacting with the owner would be infeasible (maybe the owner can't be located), an award of compensation is appropriate to encourage a valuable activity." *Nadalin v. Automobile Recovery Bureau, Inc., 169 F.3d 1084, 1086 (7th Cir.1999)*. That is the case of prohibitively high transaction costs. This is not such a case.

513 F.3d 652, 656-57 (7th Cir. 2008). Accord 1 Dobbs, Law of Remedies § 4.9(4) ("If the parties could have contracted but did not, the plaintiff generally is denied recovery of the non-cash benefit.").

Courts in the applicable states deny restitution to those who confer benefits officiously.[17] Moreover, some states require unjust enrichment plaintiffs to show a reasonable expectation of compensation, see, e.g., *Portofino, 4 So.3d at 1098 (Alabama)*, a requirement that effectively denies recovery to the officious intermeddler.

There is no allegation in any of these complaints that Defendants (rather than their insureds or claimants) asked any of the Plaintiffs to perform repairs. Plaintiffs must therefore plead facts sufficient to support a conclusion that their failure to bargain with Defendants before performing repairs was justified under the circumstances. The facts pled by Plaintiffs suggest the opposite is true. Plaintiffs do not allege that it was impossible or even impractical for them to bargain with Defendants over price before agreeing to perform repairs. Cf. *K.A.L. v. Southern Medical Business Services, 854 So.2d 106, 107-09 (Ala. App. 2003)* (patient liable to hospital for services rendered when patient was unconscious). Nor do they allege that agreeing to perform and performing any particular repairs was necessary to discharge a legal duty of their own or to otherwise protect their own interests. Cf. *Temple Univ. Hospital, 832 A.2d at 515-16* (allowing unjust enrichment claim by **[*458]** hospital against managed care organization, because the hospital was required to provide emergency medical care to the organization's members under the federal Emergency Medical Treatment and Active Labor Act). They also do not allege that they performed the repairs on account of any good faith mistake of fact. Cf. *Herman v. Jackson, 405 S.W.2d 9, 11-12 (Ky. App. 1966)* (allowing recovery to plaintiff who performed under mistaken belief that the parties had a contract). On the contrary, Plaintiffs' complaints allege that they knew Defendants would not pay what they were asking for. See *Capitol Body Shop, 2015 U.S. Dist. LEXIS 26509, 2015 WL 859477, at *6* ("Defendants' repeated and persistent refusal to pay the amounts demanded by Plaintiffs makes unreasonable any expectation on the part of Plaintiffs that Defendants would abruptly begin paying the amounts Plaintiffs believe their services are worth."); *Blue Ash Auto Body, Inc. v. Progressive Casualty Ins. Co., 2011-Ohio-5785, at ¶ 12, 2011 WL 5444201, at *3 (Ohio App. 2011)* (auto body shops could not demonstrate that any enrichment of insurance company was unjust, where shops entered into agreements with insureds knowing in advance insurance company's estimates for the work and were free to refuse to do the work).

The fact that insureds and claimants under Defendants' policies asked Plaintiffs **[*459]** to perform repairs does not justify Plaintiffs' failure to bargain separately with Defendants. As Dobbs explains in his treatise on remedies,

> A may contract with B but not with C, although the three are involved in a single project. The parties could have contracted each with both others, but they did not. The separate contracts convey clearly the limited kinds of

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[17] See, e.g., ***Allstate Ins. Co. v. Reeves, 440 So.2d 1086, 1089 (Ala. App. 1983)***; *Gould v. American Water Works Service Co., 52 N.J. 226, 245 A.2d 14, 16 (N.J. 1969)*; *Watkins v. Richmond College Trustees, 41 Mo. 302, 308-09 (1867)*; see also *Lynch v. Deaconess Medical Ctr., 113 Wn.2d 162, 776 P.2d 681 (Wash. 1989)* (an **[*457]** unjust enrichment plaintiff "cannot be a mere volunteer"); *Freeman v. Sorchych, 245 P.3d at 936-37* (under Arizona law, plaintiff must show that benefit was not conferred officiously); *Stein v. Simpson, 37 Cal. 2d 79, 230 P.2d 816, 821 (Cal. 1951)* ("A person who officiously confers a benefit upon another is not entitled to restitution."); *Plastics & Equipment Sales Co. v. DeSoto, Inc., 91 Ill. App. 3d 1011, 415 N.E.2d 492, 498, 47 Ill. Dec. 487 (Ill. App. 1st Dist. 1980)* ("Quasi-contractual relief is not available, however, where the benefit is conferred officiously....").

> liability and exposure each party has in mind. Each party may benefit by the work or payments of both other parties, but the parties understand that their responsibilities and rights are only those set up by the contract. Respect for that contract arrangement requires the courts to refuse restitution between the parties who did not contract with each other.

1 Dobbs, LAW OF REMEDIES § 4.9(4), p. 697. In other words, ***HN23***[] "[a] plaintiff is not entitled to employ the legal fiction of quasi-contract to 'substitute one promisor or debtor for another.'" *Callano v. Oakwood Park Homes Corp., 91 N.J. Super. 105, 219 A.2d 332, 335 (N.J. App. Div. 1966)* (quoting *Cascaden v. Magryta, 247 Mich. 267, 225 N.W. 511, 512 (Mich. 1929))*; see also *Chandler v. Washington Toll Bridge Authority, 17 Wn.2d 591, 137 P.2d 97, 102 (Wash. 1943)*; *Roman Mosaic & Tile Co. v. Vollrath, 226 Pa. Super. 215, 313 A.2d 305, 307 (Pa. Super. 1973)* (both citing Cascaden for the same proposition).[18] For this reason, I recommend that all of Plaintiffs' unjust enrichment claims be dismissed.

E. Legally Independent Quantum Meruit Claims

In the cases in which Plaintffs assert separate claims entitled "quantum meruit," they make clear that these quantum meruit claims are based on the unjust enrichment principle (Compare Case No. 6:14-cv-6011, Doc. 1, ¶ 148 (***HN25***[] "Quantum meruit rests upon the equitable principle that **[*461]** a party is not allowed to enrich itself at the expense of another"); with id. ¶ 152 ("A quasi-contract, or constructive contract, is based on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another.")). Consequently, there is significant overlap between Plaintiffs' unjust enrichment and quantum meruit claims in the cases in which they assert both.

HN26[] Michigan and Pennsylvania courts have held that claims for "quantum meruit" and "unjust enrichment" are the same. *Shafer Electric & Constr. v. Mantia, 96 A.3d 989, 993 (Pa. 2014)* (recognizing that "quantum meruit is essentially a claim for unjust enrichment"); *Morris Pumps v. Centerline Piping, Inc., 273 Mich. App. 187, 729 N.W.2d 898, 904 (Mich. App. 2006)*. Arizona courts describe "quantum meruit" as the measure of recovery in unjust enrichment cases. See, e.g., *Murdock-Bryant Constr., Inc. v. Pearson, 146 Ariz. 48, 703 P.2d 1197, 1202 (Ariz. 1985)* (explaining that a person may be entitled "to restitution in quantum meruit to prevent ... unjust enrichment"). Thus, the quantum meruit claims in the Michigan, Pennsylvania, and Arizona cases have no independent legal significance and should be dismissed for the same reasons as the unjust enrichment claims in those cases.

The six remaining states recognize claims for quantum meruit with elements at least formally different from claims for unjust enrichment. I discuss these states in **[*462]** turn.

1. Alabama

In *Mantiply v. Mantiply, 951 So.2d 638, 656 (Ala. 2006)*, ***HN27***[] the Alabama Supreme Court explained that "[r]ecovery on a theory of quantum meruit arises when a contract is implied." The court identified "'two kinds of implied contracts—those implied in fact and those implied in law. Contracts implied in law are more properly described as quasi or constructive contracts where the law fictitiously supplies the promise [to pay for the labor or services of another] to prevent a manifest injustice or unjust enrichment, etc.'" Id. (quoting *Green v. Hospital Building Authority of Bessemer, 294 Ala. 467, 318 So.2d 701, 704 (Ala. 1975))*. Thus, "quantum meruit" under Alabama law is used to refer both to situations involving contracts implied in fact, which are based on agreement,

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[18] Plaintiffs' claims also fail under § 25 of the Restatement (Third) of Restitution and Unjust Enrichment. ***HN24***[] Section 25 of the Restatement provides that a plaintiff will have a restitution claim against a defendant **[*460]** who benefits from the plaintiff's uncompensated performance of an obligation to a third party only when: (a) liability in restitution will not subject the defendant to a forced exchange; (b) absent liability in restitution, the plaintiff will not be compensated for the performance and the defendant will retain the benefit of it without paying for it; and (c) restitution will not subject the defendant to an obligation from which the parties understood the defendant would be free. Comment b to this section explains that the second requirement will not be satisfied where the plaintiff sues the defendant for restitution "instead of pursuing a viable contract claim" against the other party to the plaintiff's contract. Nowhere in any of these complaints do Plaintiffs allege that they cannot recover the contract price for the repairs from Defendants' insureds and claimants.

and contracts implied in law, which are not based on agreements but are legal fictions imposed to prevent unjust enrichment. To the extent that the Alabama Plaintiffs' quantum meruit claim is based on a contract implied in fact, it must be dismissed because they failed to allege '"mutual assent to terms essential to the contract."' Id. (quoting *Steiger v. Huntsville City Board of Education, 653 So.2d 975, 978 (Ala. 1995))*. To the extent that the Alabama Plaintiffs' quantum meruit claim is based on a contract "implied in law," it is functionally the same as their unjust enrichment claim and must be dismissed for the reasons explained in the **[*463]** previous section.

2. Illinois

HN28[] Illinois courts recognize a cause of action for quantum meruit where "(1) [the plaintiff] performed a service to benefit the defendant, (2) [the plaintiff] did not perform this service gratuitously, (3) [the] defendant accepted this service, and (4) no contract existed to prescribe payment for this service." *Installco Inc. v. Whiting Corp., 336 Ill. App. 3d 776, 784 N.E.2d 312, 317-18, 271 Ill. Dec. 94 (Ill. App. 1st Dist. 2002)*. The plaintiff must show that it would be unjust for the defendant to retain any benefit without paying. *Stark Excavating, Inc. v. Carter Constr. Services, Inc., 2012 IL App (4th) 110357, 967 N.E.2d 465, 475, 359 Ill. Dec. 735 (Ill. App. 4th Dist. 2012)*. The Illinois Plaintiffs have failed to plead facts showing that it would be unjust to deny them compensation from Defendants for any unrequested benefits they provided Defendants. Therefore, the Illinois Plaintiffs' quantum meruit claim should be dismissed.

3. New Jersey

HN29[] New Jersey courts recognize a cause of action for quantum meruit that is at least nominally (though probably not functionally) different from a claim for unjust enrichment. "To recover under a theory of quantum meruit, a plaintiff must establish: '(1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services.'" *Starkey, Kelly, Blaney & White v. Estate of Nicolaysen, 172 N.J. 60, 796 A.2d 238, 242-43 (N.J. 2002)*. In addition, the expectation **[*464]** of compensation must be reasonable. *Weichert Co. Realtors v. Ryan, 128 N.J. 427, 608 A.2d 280, 285 (N.J. 1992)*.

The New Jersey Plaintiffs could not have reasonably expected Defendants to pay them what they thought their services were worth, given Defendants' persistent refusal to do so in the past. To the extent that the New Jersey Plaintiffs provided a service to Defendants, the facts alleged show that it was not provided at Defendants' request or by mistake, or that doing the repairs without first negotiating price with Defendants was necessary to protect the interests of Plaintiffs, Defendants, or any third parties. Cf. *Cohen v. Home Ins. Co., 230 N.J. Super. 72, 552 A.2d 654, 659 (N.J. App. Div. 1989)* ("'A person who without mistake, coercion or request has unconditionally conferred a benefit upon another is not entitled to restitution, except where the benefit was conferred under circumstances making such action necessary for the protection of the interests of the other or of third persons.'" (quoting *Restatement (First) of Restitution § 112*)). Accordingly, the New Jersey Plaintiffs' quantum meruit claims must be dismissed.

4. Kentucky

At least one Kentucky appellate court has recognized quantum meruit and unjust enrichment as legally distinct claims. See *JP White, LLC v. Poe Companies, LLC, Nos. 2010-CA-000267-MR, 2010-CA-000299-MR, 2011 Ky. App. Unpub. LEXIS 392, 2011 WL 1706751 (Ky. App. May 6, 2011)*. However, **[*465]** as the Non-GEICO Defendants point out in their reply, Kentucky courts often conflate quantum meruit and unjust enrichment (See Case No. 6:14-cv-6018, Doc. 118 at 3 n. 3 (citing *Quadrille Business Systems v. Kentucky Cattlemens Ass'n, 242 S.W.3d 359, 365 (Ky. App. 2007)*; *Community Ties of America, Inc. v. NDT Care Services, LLC, No. 3:12-cv-00429-CRS, 2015 U.S. Dist. LEXIS 14990, 2015 WL 520960, at *18 (W.D. Ky. Feb. 9, 2015))*). Assuming arguendo that JP White accurately reflects Kentucky law on this point, the Kentucky Plaintiff's quantum meruit claim still fails.

HN30[] In Kentucky, to recover on a quantum meruit theory, the plaintiff must show (1) that it rendered valuable services or furnished materials; (2) to the defendant; (3) that the services were rendered with defendant's knowledge or consent, or alternatively that the defendant accepted or received them; (4) under such circumstances as reasonably notified the defendant that the plaintiff expected to be paid by the defendant. *JP White, 2011 Ky.*

App. Unpub. LEXIS 392, 2011 WL 1706751, at *5 (quoting Quadrille Business Systems v. Kentucky Cattlemens Ass'n, Inc., 242 S.W.3d 359, 366 (Ky. App. 2007)). In JP White, the court said that "recovery under quantum meruit does not depend upon the conferment or retention of a benefit," whereas unjust enrichment requires that "a benefit ... be conferred and retained." Id.

The Kentucky Plaintiff's quantum meruit claim fails because it has not alleged that it rendered any services or furnished any materials to Defendants (as opposed **[*466]** to Defendants' insureds and claimants). The services provided to insureds and claimants may (or may not, depending on state law) have conferred a "benefit" on Defendants that would satisfy the first element of an unjust enrichment claim, but conferral of a benefit is not one of the elements of a quantum meruit claim under Kentucky law.

5. Washington

HN31[] Under Washington law, a claim for quantum meruit is unquestionably different than one for unjust enrichment. In Young v. Young, 164 Wn.2d 477, 191 P.3d 1258 (Wash. 2008), the Washington Supreme Court "clarif[ied] the distinction between 'unjust enrichment' and 'quantum meruit.'" Id. at 1261. The court explained that "[u]njust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it," while "'quantum meruit' is the method of recovering the reasonable value of services provided under a contract implied in fact." Id. at 1262. "[T]he elements of a contract implied in fact are: (1) the defendant requests work, (2) the plaintiff expects payment for the work, and (3) the defendant knows or should know the plaintiff expects payment for the work." Id. at 1263. The Washington Plaintiffs fail to state a claim for quantum meruit under Washington law **[*467]** because they have not pled that any Defendant—as distinct from an insured—requested that any Plaintiff perform any repairs.

6. Virginia

HN32[] Courts in Virginia have listed two different sets of elements for "quantum meruit" claims. Under the first line of authority, the elements of a quantum meruit claim largely parallel those of an unjust enrichment claim. See, e.g. Centex Constr. v. Acstar Ins. Co., 448 F. Supp. 2d 697, 708 (E.D. Va. 2006) (listing the elements of a quantum meruit claim as (1) a benefit conferred by the plaintiff on the defendant; (2) the defendant's knowledge of the conferring of the benefit; and (3) acceptance or retention of the benefit under circumstances that would make it unjust to retain it without paying for its value). The Virginia Plaintiffs' claim fails under this first line of reasoning for the same reason their unjust enrichment claim fails: they have not alleged facts showing that it would be unjust to deny them compensation from Defendants for any unrequested (by Defendants) benefits they conferred on Defendants.

The second line of authority recognizes quantum meruit claims where the plaintiff has shown that "(i) he rendered valuable services, (ii) to the defendant, (iii) which were requested and accepted by the defendant, (iv) under **[*468]** such circumstances as reasonably notified the defendant that the claimant, in performing the work, expected to be paid by the defendant." Raymond, Colesar, Glaspy & Huss, P.C. v. Allied Capital Corp., 961 F.2d 489, 491 (4th Cir. 1992). The Virginia Plaintiffs have not stated a claim under this second line of cases because they have not pled that any Defendant requested any Plaintiff to perform any repair.

F. Tortious Interference

All Plaintiffs assert claims for tortious interference with business relationships or prospective advantage.[19] ***HN33***[] The elements of these claims differ slightly from state to state, but in virtually every state a plaintiff must show that

[19] The tortious interference counts are: Count III in Case No. 6:14-cv-6006; Count V in Case No. 6:14-cv-6007; Count V in Case No. 6:14-cv-6008 and 6:14-cv-6020; **[*469]** Count V in Case No. 6:14-cv-6009; Count II in Case No. 6:14-cv-6010; Count V in Case No. 6:14-cv-6011; Count V in Case No. 6:14-cv-6012 and 6:14-cv-6013; the "Third Claim for Relief" in Case No. 6:14-cv-6014; the eighth unnumbered count in 6:14-cv-6015; Count III in Case No. 6:14-cv-6018; Count IV in Case No. 6:14-cv-6019; and Count III in Case No. 6:15-cv-6022. The titles vary, with some complaints specifying the interference as being with "Business Relations" and others with "Prospective Economic Advantage," but the substance of each claim is the same.

the defendant intentionally and improperly interfered with the plaintiff's prospective contractual relationship and that as a result, the plaintiff failed to reap the benefits of the prospective relationship. See *Restatement (Second) of Torts § 766B*. Arizona, Michigan, California, Illinois, Washington, Virginia, and Missouri include as an additional element that the defendant must know of the prospective relationship. *Wagenseller v. Scottsdale Memorial Hospital, 147 Ariz. 370, 710 P.2d 1025, 1041 (Ariz. 1985)*, superseded by statute on other grounds as stated in, *Powell v. Washburn, 211 Ariz. 553, 125 P.3d 373 (Ariz. 2006)*; *Cedroni Ass'n, Inc. v. Tomblinson, Harburn Assocs., Architects & Planners, Inc., 492 Mich. 40, 821 N.W.2d 1, 3 (Mich. 2012)*; *Blank v. Kirwan, 39 Cal. 3d 311, 216 Cal. Rptr. 718, 703 P.2d 58, 70 (Cal. 1985)*; *Callis, Papa, Jackstadt & Halloran, P.C. v. Norfolk & Western Ry., 195 Ill. 2d 356, 748 N.E.2d 153, 161, 254 Ill. Dec. 707 (Ill. 2001)*; *Pacific Northwest Shooting Park Ass'n v. City of Sequim, 158 Wn.2d 342, 144 P.3d 276, 280 (Wash. 2006)*; *Glass v. Glass, 228 Va. 39, 321 S.E.2d 69, 76-77 (Va. 1985)*; *Community Title Co. v. Roosevelt Federal Savings & Loan Ass'n, 796 S.W.2d 369, 372 (Mo. 1990)*.

Defendants make several arguments for dismissal of the tortious interference claims. First, depending on the state, they either assert a privilege to interfere in the relationships between Plaintiffs and prospective customers because they would ultimately be responsible for paying the cost of repairs, or argue that any interference under these circumstances was not improper. Second, they argue that Plaintiffs' tortious interference claims should be dismissed because Plaintiffs failed to identify specific customers with whom Defendants interfered. In the same vein, Defendants argue that Plaintiffs' use of group pleading warrants dismissal **[*470]** of the tortious interference claims. Lastly, Defendants argue that heightened pleading requirements apply to the tortious interference claims, and that the claims should be dismissed because Plaintiffs failed to plead them with particularity. I address each of these arguments in turn.

1. Improper Interference/Privilege

The most significant difference between the states in this area of law is the way in which they determine when interference is improper. ***HN34***[] Arizona, Pennsylvania, New Jersey, and Kentucky use the multi-factor test outlined in the *Restatement (Second) of Torts § 767*.[20] *Wagenseller, 710 P.2d at 1043*; *Maverick Steel Co. v. Dick Corp./Barton Malow, 2012 PA Super 173, 54 A.3d 352, 355 (Pa. Super. 2012)*; *Nostrame v. Santiago, 213 N.J. 109, 61 A.3d 893, 901 (N.J. 2013)*; *NCAA ex rel. Bellarmine College v. Hornung, 754 S.W.2d 855, 858 (Ky. 1988)*. Michigan, Oregon, and Washington allow recovery where the defendant has an improper purpose or employs improper means. *Advocacy Organization for Patients & Providers v. Auto Club Ins. Ass'n, 257 Mich. App. 365, 670 N.W.2d 569, 580 (Mich. App. 2003)* ("The improper interference can be shown by either proving (1) the intentional doing of an act wrongful per se, or (2) the intentional doing of a lawful act with malice and unjustified in law for the purpose of invading plaintiffs' contractual right or business relationship."); *Top Service Body Shop, Inc. v. Allstate Ins. Co., 283 Ore. 201, 582 P.2d 1365, 1370-71 (Or. 1978)*; *Pacific Northwest, 144 P.3d at 280*. Virginia allows recovery for tortious interference with prospective contracts only when improper methods are used. *Peterson v. Cooley, 142 F.3d 181, 186* (citing *Duggin v. Adams, 234 Va. 221, 360 S.E.2d 832, 836, 4 Va. Law Rep. 820 (Va. 1987)*).

At least some of the conduct alleged by Plaintiffs in their complaints qualifies as improper interference under the law of each of these states. For instance, all Plaintiffs allege that Defendants made misrepresentations about Plaintiffs' integrity and the quality of their work. Making false and disparaging statements about another's business is tortious in and of itself, and such conduct, if properly alleged, should survive a motion to dismiss in states that follow the Restatement as well as states that use an improper means test.

HN35[] Other states cast the impropriety requirement in terms of "justification" or "privilege." Some Pennsylvania courts list "the absence of privilege or justification on the part of the Defendant" among the elements for the tort, see, e.g., *Foster, 2 A.3d at 655*, although it appears that a showing of impropriety based on the Restatement factors

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[20] The factors are: (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with **[*471]** which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties. Id.

would satisfy **[*472]** this element, see *Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 393 A.2d 1175, 1184 (Pa. 1978)* (using Restatement factors for determining whether conduct is "improper" to evaluate whether conduct is privileged).

HN36[] Under Illinois law, a party acting "to enhance its own business interests ... has a privilege to act in a way that may harm the business expectancy of others." *Curt Bullock Builders, Inc. v. H.S.S. Development, Inc., 225 Ill. App. 3d 9, 586 N.E.2d 1284, 1290, 167 Ill. Dec. 12 (Ill. App. 4th Dist. 1992)*. In Illinois, the privilege to interfere is greater with respect to prospective contracts than it is with respect to existing contracts. Id. Still, acts taken pursuant to the privilege must take a socially sanctioned form. *Miller v. Lockport Realty Group, Inc., 377 Ill. App. 3d 369, 878 N.E.2d 171, 176, 315 Ill. Dec. 945 (Ill. App. 1st Dist. 2007)*. Under Illinois law, privilege is an affirmative defense. *General Motors Corp. v. State Motor Vehicle Review Board, 224 Ill. 2d 1, 862 N.E.2d 209, 220, 308 Ill. Dec. 611 (Ill. 2007)*. By contrast, Missouri requires a plaintiff to "produce substantial evidence to establish lack of justification," a burden which is met if "the defendant act[ed] with an improper purpose and s[ought] not only to further his own interests, but in doing so employs improper means." *Community Title Co., 796 S.W.2d at 372*.

HN37[] Under Pennsylvania, Illinois and Missouri law, well-pled allegations that Defendants made false and defamatory statements about Plaintiffs' businesses should be sufficient to survive a motion to dismiss. See *Topper v. Midwest Division, Inc., 306 S.W.3d 117, 126 (Mo. App. W. Dist. 2010)* ("Misrepresentations and defamation certainly constitute improper means that serve to destroy any justification the defendants had."); *Soderlund Bros., Inc. v. Carrier Corp., 278 Ill. App. 3d 606, 663 N.E.2d 1, 10, 215 Ill. Dec. 251* ("As noted **[*473]** above, acts of competition which are never privileged include fraud, deceit, intimidation or deliberate disparagement.").

HN38[] Alabama uniquely includes an element that the defendant be "a stranger" to the interfered-with relationship. *White Sands Group, L.L.C. v. PRS II, LLC, 32 So.3d 5, 14 (Ala. 2009)*. "'One is not a stranger to the contract just because one is not a party to the contract.'" *Tom's Foods, Inc. v. Carn, 896 So.2d 443, 454 (Ala. 2004)* (quoting *Atlanta Market Center Mgmt. Co. v. McLane, 269 Ga. 604, 503 S.E.2d 278, 282 (Ga. 1998))*. If the parties are part of "a comprehensive interwoven set of contracts," they are not strangers. *Id. at 454-55*.[21] All of the Defendants argue that they are not strangers to the relationships between Plaintiffs and the insureds and claimants whose vehicles Plaintiffs repaired (Case No. 6:14-cv-6009, Doc. 23 at 23-24, Doc. 24 at 9-12). The Non-GEICO Defendants cite *Kirby's Spectrum Collision, Inc. v. Gov't Employees Ins. Co., 744 F. Supp. 2d 1220 (S.D. Ala. 2010)*, where a federal district court in Alabama rejected a tortious interference claim materially indistinguishable from the claim asserted by the Alabama Plaintiffs on the ground that an insurer was not a stranger to the relationship between the body shop and the insurer's insureds and third-party claimants. *Id. at 1234-36*. The Alabama Plaintiffs do not respond to this argument or address the stranger requirement in their brief. I agree with the analysis of Alabama law in *Kirby's Spectrum Collision* and recommend dismissal **[*474]** of the tortious interference claim in the Alabama case on this basis.

2. Prospective Contractual Relationship

Another point of difference between the laws of the different states is the level of specificity and certainty required before a prospective contractual relationship will be protected from interference. ***HN39***[] Arizona, Michigan, and Illinois allow a plaintiff to state a claim for tortious interference with prospective contractual relationships based on interference with an identifiable class of customers. *Dube v. Likins, 216 Ariz. 406, 167 P.3d 93, 101 (Ariz. App. 2007)*; *Lucas v. Monroe County, 203 F.3d 964, 979 (6th Cir. 2000)* (citing *Schipani v. Ford Motor Co., 102 Mich. App. 606, 302 N.W.2d 307, 314 (Mich. App. 1981))*; *Downers Grove Volkswagen, Inc. v. Wigglesworth Imports, Inc., 190 Ill. App. 3d 524, 546 N.E.2d 33, 37, 137 Ill. Dec. 409 (Ill. App. 2d Dist. 1989)*. By contrast, Washington expressly requires specific, identifiable third parties, *Pacific Northwest, 144 P.3d at 281* & n. 2, and Virginia requires a "*specific, existing* contract or business expectancy," *Masco Contractor Services East, Inc. v. Beals, 279 F. Supp. 2d 699, 709 (E.D. Va. 2003)* (emphasis in original).[22] Alabama law requires "the existence of a protectable

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[21] Alabama also recognizes an affirmative defense of justification in tortious interference cases, and a competitor's privilege to interfere. *White Sands, 32 So.3d at 12*; *Tom's Foods, 896 So.2d at 457-58*. However, the privilege does not allow the use of improper means. *Tom's Foods 896 So.2d at 458*.

business relationship," and there is no support in Alabama case law for "identifiable class" tortious interference claims. See *Hope for Families & Community Service, Inc. v. Warren, 721 F. Supp. 2d 1079, 1185-88 (M.D. Ala. 2010)*; *Pouncy v. Vulcan Materials Co., 920 F. Supp. 1566, 1585 (N.D. Ala. 1996)*. In the remaining states, the situation is less clear, as there is either no or very limited **[*475]** case law on the issue, or the parties cite conflicting cases.

3. Group Pleading

Even in those states that allow a plaintiff to establish a claim for tortious interference with business relationships or prospective economic advantage based on interference with an identifiable class of customers, rather than specific customers, a plaintiff must still plead the claim with sufficient **[*476]** factual detail to satisfy the requirements of *Rule 8(a)*. For the reasons I have already explained, all of the Plaintiffs' complaints fall short of this standard because they attribute "'allegations of wrongdoing ... collectively to every Defendant.'" Supra, Part III.A (quoting Case No. 6:14-cv-310, Doc. 110 at *2). ***HN40***[] Absent well pled allegations that the Defendants joined in a conspiracy or acted in concert, liability for tortious interference must be established on an individualized basis. As the Court explained in its Orders dismissing the Tennessee, Utah, and Louisiana actions, "[a] general allegation that some unidentified Defendants—or all Defendants—interfered with some unidentified customers of some unnamed Plaintiff does not satisfy the requirements of *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)*." *Brewer Body Shop, __ F. Supp. 3d at __, 2015 U.S. Dist. LEXIS 54836, 2015 WL 1911418, at *1*; *Alpine Straightening Systems, 2015 U.S. Dist. LEXIS 56562, 2015 WL 1911635, at *1*; *Parker Auto Body, Case No. 6:14-cv-6004, Doc. 118 at 3, 2015 U.S. Dist. LEXIS 56451*; *Southern Collision, 2015 U.S. Dist. LEXIS 54854, 2015 WL 1911768, at *1*. Because none of the Plaintiffs have adequately pled their tortious interference claims, I recommend the Court dismiss all of these claims.

4. Particularized Pleading

In several cases, Defendants argue that Plaintiffs' tortious interference claims should be dismissed because Plaintiffs allege Defendants made misrepresentations but do not plead any misrepresentations with particularity. **[*477]** I disagree. ***HN41***[] *Rule 9(b)* provides, "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fraud requires more than misrepresentation, and *Rule 9(b)* will not be triggered simply because the plaintiff alleges that the defendant said something that was not true. Falsity is also a required element in defamation cases, but defamation need not be pled with particularity under *Rule 9(b)*. *Caster v. Hennessey, 781 F.2d 1569, 1570 (11th Cir. 1986)* (per curiam); *Wenner v. Bank of America, NA, 637 F. Supp. 2d 944, 954 (D. Kan. 2009)*; *Banco Surinvest, S.A. v. Suntrust Bank, Alberta, 78 F. Supp. 2d 1366, 1370-71 (N.D. Ga. 1999)*. Similarly, tortious interference claims based on a defendant's allegedly false and disparaging statements to prospective customers are not subject to *Rule 9(b)*. *Banco Surinvest, 78 F. Supp. 2d at 1371*.

In the Michigan case, Defendants argue that state law requires Plaintiffs to plead "'with specificity[] affirmative acts by the defendant that corroborate the improper motive of the [tortious] interference.'" (Case No. 6:14-cv-6007, Doc. 36 at 15 (quoting *Nicklas v. Green Green & Adams, P.C., No. 299054, 2012 Mich. App. LEXIS 1087, 2012 WL 2126066 (Mich. App. Jun. 12, 2012))*). Any "heightened pleading standard" applied by Michigan courts to tortious interference claims is inapplicable in this Court, where *Rules 8* and *9 of the Federal Rules of Civil Procedure* control. *Caster, 781 F.2d at 1570* (citing *Hanna v. Plumer, 380 U.S. 460, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965))*.

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[22] Plaintiff cites *AWP, Inc. v. Commonwealth Excavating, Inc., No. 5:13cv031, 2013 U.S. Dist. LEXIS 103881, 2013 WL 3830500, at *8 (W.D. Va. 2013)*, in support of its argument that it can plead a tortious interference claim by alleging nothing more than interference with its customer base generally. In AWP, the plaintiff alleged that the defendant poached four "specific customers" with whom the plaintiff expected to reach an agreement. All Plaintiffs have offered in these cases are general allegations that Defendants interfered with a broadly defined class of potential customers. Indeed, the facts of this case are much closer to those in the case the AWP court distinguished. Like the plaintiff in *Gov't Employees Ins. Co. v. Google, 330 F. Supp. 2d 700 (E.D. Va. 2004)*, the Virginia Plaintiffs' tortious interference claim is "founded upon mere speculation that some unidentified potential ... customers" might take their business elsewhere. *AWP, 2013 U.S. Dist. LEXIS 103881, 2013 WL 3830600, at *8* (citing *GEICO 330 F. Supp. 2d at 705-06*).

G. Quasi-Estoppel

Plaintiffs in 12 cases assert claims for "Quasi Estoppel,"[23] "Estoppel/Quasi-Estoppel,"[24] or "Equitable Estoppel."[25] Defendants uniformly argue that these claims should be dismissed because, **[*478]** while many of these states recognize the doctrine of quasi-estoppel, none recognize it as an independent cause of action. No Plaintiff—in these 14 cases or the other seven in which the Court has already ruled on motions to dismiss—has identified a single case holding that quasi-estoppel is recognized as a cause of action in any jurisdiction.

The New Jersey Plaintiffs argue that New Jersey courts "have long permitted parties to assert quasi-estoppel offensively as both a claim and a counterclaim." (Case No. 6:14-cv-6013, Doc. 41 at 16). In support of this assertion, they point to *Kazin v. Kazin, 81 N.J. 85, 405 A.2d 360 (N.J. 1979)*, *Green v. State Health Benefits Commission, 373 N.J. Super. 408, 861 A.2d 867 (N.J. App. Div. 2004)*, and *Gilbert v. Durand Glass Manufacturing Co., 258 N.J. Super. 320, 609 A.2d 517 (N.J. App. Div. 1992)*. Kazin was a divorce case in which the wife sought alimony and equitable distribution or, in the alternative, separate maintenance. *405 A.2d at 361*. The husband defended that the parties were not lawfully married because his wife's prior Mexican divorce was invalid. Id. The New Jersey court held that the husband was estopped from making this claim because he played an active role in helping his wife obtain the Mexican divorce. *Id. at 367*. Thus, in *Kazin*, the Court allowed quasi-estoppel not as an independent cause of action, but simply to prevent a party from taking a position inconsistent with his prior conduct. Gilbert, was an "employment wrongful discharge action," *609 A.2d at 518*, and Green was an "appeal [of] a final determination of" a state agency regarding the scope of coverage under a health insurance plan issued to state employees, *861 A.3d at 868*. These cases do not support the New Jersey Plaintiffs' **[*480]** claim that quasi-estoppel is a free-standing cause of action under New Jersey law.

The Pennsylvania Plaintiffs suggest that a federal district court in their state "inchoately accepted" quasi-estoppel as a cause of action in *Sheehan v. Mellon Bank, N.A., Civ. No. 95-2969, 1996 U.S. Dist. LEXIS 14725, 1996 WL 571779 (E.D. Pa. Oct. 3, 1996)*, by dismissing "a claim for quasi-estoppel ... not because the claim was invalid but because the defendant had never occupied inconsistent positions." (Case No. 6:14-cv-6008, Doc. 95 at 16) In reality, the Sheehan court dismissed a § 1983 claim, not a claim for quasi-estoppel.

The Pennsylvania Plaintiffs argue that the Court should allow their quasi-estoppel claim because Pennsylvania has recognized a cause of action for promissory estoppel. ***HN42***[] "Promissory estoppel" is the term many courts use to describe the doctrine that is recognized in the *Restatement (Second) of Contracts § 90(1)*. *Restatement § 90* provides that "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Every state with the exception of Virginia, see *W.J. Schafer Assocs., Inc. v. Cordant, Inc., 254 Va. 514, 493 S.E.2d 512, 516 (Va. 1997)*, has recognized a cause of action under the circumstances described in *§ 90*. But, Plaintiffs still have not identified **[*481]** a single state that recognizes a free-standing cause of action for quasi-estoppel. This may be because promissory estoppel lends itself to enforcement as a cause of action in a way quasi-estoppel does not, because promissory estoppel involves the enforcement of a promise, while quasi-estoppel merely operates to prevent an opposing party from taking a particular position.

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[23] Count V in Case No. 6:14-cv-6006; Count IV in Case No. 6:14-cv-6007; Count IV in Case No. 6:14-cv-6011; Count III in Case No. 6:14-cv-6012 and 6:14-cv-6013; the "Second Claim for Relief" in Case No. 6:14-cv-6014; and Count III in Case No. 6:14-cv-6019.

[24] Count IV in Case No. 6:14-cv-6008 and 6:14-cv-6020; Count IV in Case No. 6:14-cv-6009; and the first of two counts numbered "Count VI" in Case No. 6:14-cv-6018.

[25] Count V in Case No. 6:15-cv-6022. Although the Missouri Plaintiff entitles this Count as one for "Equitable Estoppel," it refers to the doctrine of "quasi-estoppel" in the body of the complaint (Doc. 1, ¶ 137) and calls the claim one for "quasi-estoppel" in its response to the motions to dismiss and does not attempt to rebut Defendants' arguments that "equitable estoppel" is not a cause of action under Missouri law (Doc. 64 at 14). The Court **[*479]** will assume the Missouri Plaintiff meant to allege a claim for quasi-estoppel.

Finally, Plaintiffs in several cases argue that the Court should recognize a cause of action for quasi-estoppel because no state-court precedent holds that it is not a cause of action. The Court should decline this invitation. ***HN43***[] Federal courts deciding state-law claims "are supposed to apply state law, not rewrite it." *Bonney v. Canadian Nat'l Ry., 800 F.2d 274, 280 (1st Cir. 1986)*; see also *Wolk v. Saks Fifth Avenue, Inc., 728 F.2d 221, 223 (3d Cir. 1984)* ("While a federal court must be sensitive to the doctrinal trends of the jurisdiction whose law it applies, it is beyond the authority of a federal court in such circumstances to create entirely new causes of action.").

After due consideration, I conclude that the laws of Arizona, Michigan, Pennsylvania, Alabama, Illinois, New Jersey, Oregon, Kentucky, Virginia, and Missouri do not recognize quasi-estoppel as a cause of action. Therefore, I recommend that these claims be dismissed with prejudice. **[*482]**

H. Conversion

In nine cases, Plaintiffs have asserted claims for conversion.[26] Defendants argue that all of these claims should be dismissed because none of the applicable states recognize a conversion claim for failure to pay an ordinary debt. In all but two cases, Plaintiffs concede that their conversion claims should be dismissed.[27]

The Michigan Plaintiffs assert three distinct conversion claims for "Common Law Conversion of Profits,"[28] "Statutory Conversion of Profits,"[29] and "Common Law Conversion of Business."[30] Defendants argue that these conversion claims must fail because the failure to pay **[*483]** a debt does not amount to conversion, and the Michigan Plaintiffs have failed to identify the specific money or property Defendants allegedly converted (Case No. 6:14-cv-6009, Doc. 36, at 18-19). The Michigan Plaintiffs make no counterarguments. Instead, they suggest the Court should "decline to address" the conversion claims "at this time" because the Michigan Supreme Court recently heard oral argument in a case addressing "the parameters of claims in conversion." (Case No. 6:14-cv-6009, Doc. 38 at 17); see also *Aroma Wines & Equipment, Inc. v. Columbia Distribution Services, Inc., 497 Mich. 864, 852 N.W.2d 901 (Mich. 2014)* (order granting leave to appeal). Delaying resolution of the pending motions while the Michigan Supreme Court makes a decision would not further the just, speedy, and efficient resolution of this case. The conversion claims asserted by the Michigan Plaintiffs should be dismissed.

The California Plaintiffs emphasize the broad scope of conversion claims under California law (See Case No. 6:14-cv-6010, Doc. 22 at 16 (quoting *Welco Electronics, Inc. v. Mora, 223 Cal. App. 4th 202, 211, 166 Cal. Rptr. 3d 877 (2014)*, for the proposition that "every intangible benefit and prerogative susceptible of possession" may be the subject of a conversion claim)). However, ***HN44***[] California **[*484]** only recognizes claims for the conversion of money when "there is a specific, identifiable sum involved." *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP, 150 Cal. App. 4th 384, 395, 58 Cal. Rptr. 3d 516 (2007)*. Under California law, "[a] 'generalized claim for money [is] not actionable as conversion.'" Id. (quoting *Vu v. California Commerce Club, Inc., 58 Cal. App. 4th 229, 235, 68 Cal. Rptr. 2d 31 (1997))*. The California "Plaintiffs are seeking sums that they believe should have been paid to them, not specific money of which they have been deprived or that could be returned, as required to state a claim for conversion." *A & E Auto Body, 2015 U.S. Dist. LEXIS 16153, 2015 WL 304048, at *9*.

The California Plaintiffs note that California law imposes a statutory repairman's lien on repaired vehicles, and they suggest that "[b]y parity of reasoning..., the Plaintiff shops have at least an equitable claim to a lien on the funds or

[26] Count VI in Case No. 6:14-cv-6006; Counts VI—VIII in Case No. 6:14-cv-6007; Count VI in Case No. 6:14-cv-6008 and 6:14-cv-6020; Count VI in Case No. 6:14-cv-6009; Count III in Case No. 6:14-cv-6010; the ninth unnumbered count in Case No. 6:14-cv-6015; the second "Count VI" in Case No. 6:14-cv-6018; and Count VI in Case No. 6:14-cv-6022.

[27] See Case No. 6:14-cv-6006, Doc. 77 at 16; Case No. 6:14-cv-6008, Doc. 95 at 22; Case No. 6:14-cv-6020, Doc. 25 at 22; Case No. 6:14-cv-6009, Doc. 26 at 16; Case No. 6:14-cv-6015, Doc. 22 at 15; Case No. 6:14-cv-6018, Doc. 116 at 25; Case No. 6:15-cv-6022, Doc. 64 at 15.

[28] Count VI in Case No. 6:14-cv-6007.

[29] Count VII in Case No. 6:14-cv-6007.

[30] Count VIII in Case No. 6:14-cv-6007.

policy reserves in the accounts of the Defendant Insurers." (Case No. 6:14-cv-6010, Doc. 22 at 16). "If performance of repairs ... created a property interest in funds held in insurance company bank accounts, one would expect such an interest to ... be set out in some statute," like the repairman's lien, "or at least in some judicial decision." *Alpine Straightening Systems, 2015 U.S. Dist. LEXIS 56562, 2015 WL 1911635, at *8 n. 4*. Therefore, I recommend that the conversion claim in the California case be dismissed.

I. Insufficient Payment Claims

Plaintiffs in the Michigan,[31] Pennsylvania,[32] Alabama,[33] and Illinois[34] **[*485]** actions allege that Defendants breached their legal obligation to pay for repairs "[t]hrough intimidation, coercion, collusion, boycotts, and simple flat refusal." (Case No. 6:14-cv-6007, Doc. 1, ¶ 118; Case No. 6:14-cv-6008, Doc. 1, ¶ 142; Case No. 6:14-cv-6020, Doc. 1, ¶ 76; Case No. 6:14-cv-6009, Doc. 1, ¶ 126; Case No. 6:14-cv-6011, Doc. 1, ¶ 146). "Specifically," Plaintiffs aver,

> the Defendants have failed to provide the necessary proper and fair repairs through:
>
> a. Refusal to pay and/or fully pay for necessary and required procedures and processes to return a vehicle to its pre-accident condition;
>
> b. Utilizing used and/or recycled parts in contravention of the repair shops' expert professional opinion in order to save money and thereby compromising the safety of both the driver and passengers as well as all other members of the traveling public; and
>
> c. Requiring shops to purchase replacement parts of unknown manufacture, reliability, and/or quality merely because it is the least expensive option.

(Id.).

The Michigan Defendants seek dismissal of this claim because Plaintiffs **[*486]** have not identified the source of the alleged legal obligation. In their response, the Michigan Plaintiffs assert that "Defendants have a duty and obligation to pay for the repairs to the vehicles of their respective insureds and claimants so as to return those vehicles to pre-accident condition." (Id., Doc. 38 at 17). Tellingly, the Michigan Plaintiffs still have not identified the source of this alleged duty, and they do not cite any authority suggesting that Michigan law recognizes a cause of action for breach of an unspecified legal duty. Therefore, I recommend the Court dismiss Count I in the Michigan case.

The Pennsylvania Plaintiffs allege that Defendants violated regulations promulgated by the Pennsylvania Insurance Commissioner pursuant to the Commissioner's authority to enforce the Pennsylvania Unfair Insurance Practices Act ("UIPA"), *40 Pa. Stat. § 1171.1 et seq.*[35] See also *31 Pa. Code § 146.8*. Defendants argue that there is no private right of action under the UIPA. In their response, the Pennsylvania Plaintiffs do not contend that there is a private right of action to enforce the UIPA or its implementing regulations. Instead, they argue that violations of those statutes may provide the basis for a cause **[*487]** of action under the Pennsylvania Unfair Trade Practices and Consumer Protection Law (Case No. 6:14-cv-6008, Doc. 95 at 8-9). After due consideration, I find that ***HN45***[] the UIPA does not afford a private right of action to the Pennsylvania Plaintiffs, and recommend that Count I in the Pennsylvania cases.

The Alabama Plaintiffs withdrew their claim after Defendants filed their motion to dismiss (Case No. 6:14-cv-6009, Doc. 26 at 5). Accordingly, I recommend the Court dismiss Count I in the Alabama case.

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[31] Count I in Case No. 6:14-cv-6007, entitled "Defendants Have Breached Their Legal Obligation."

[32] Count I in Case No. 6:14-cv-6008 and 6:14-cv-6020, entitled "Defendants Have Breached Their Statutory Obligation."

[33] Count I in Case No. 6:14-cv-6009, entitled "Defendants Have Breached Their Statutory and Regulatory Obligation."

[34] Count I in Case No. 6:14-cv-6011, entitled "Defendants Have Breached Their Statutory Obligation."

[35] Plaintiffs also cite the Pennsylvania Motor Vehicle Physical Damage Appraiser Act in their complaints, but do not allege a violation of the statute (See Case No. 6:14-cv-6008, Doc. 1, ¶ 141; Case No. 6:14-cv-6020 Doc. 1, ¶ 75).

In their complaint, the Illinois Plaintiffs actually cite two separate statutes, which presumably provide the source of the obligation Defendants allegedly breached. Plaintiffs cite *§ 2* of the Illinois Consumer Fraud Act ("ICFA"), *815 ILCS 505/2*, which prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices" including practices defined as "deceptive" under *§ 2* of the Illinois Uniform Deceptive Trade Practices Act ("IUDTPA"), *815 ILCS 510/2*. ***HN46***[] Illinois does not recognize a free-ranging **[*488]** private right of action to enforce statutory duties; rather, the existence of such a claim depends on the particular statute. See *Fisher v. Lexington Health Care, Inc., 188 Ill. 2d 455, 722 N.E.2d 1115, 1117-18, 243 Ill. Dec. 46 (Ill. 1999)* (setting forth factors used by Illinois courts to determine when a private right of action should be implied in a statute). The Illinois Plaintiffs' decision to label this claim as one for "breach[]" of "statutory obligation" is difficult to understand given that both the ICFA and IUDTPA expressly authorize civil suits by private parties. See *815 ILCS 505/10a* (allowing "[a]ny person who suffers actual damage" as a result of a violation of the ICFA to sue damages); *815 ILCS 510/3* (allowing "[a] person likely to be damages by a deceptive trade practice" to sue for an injunction). ***HN47***[] As a general matter, when a law expressly provides for a cause of action, courts will not imply one in order to expand the legislature's chosen remedial scheme. Cf. *In re D.W., 214 Ill. 2d 289, 827 N.W.2d 466, 479, 292 Ill. Dec. 937 (Ill. 2005)* (noting that "where the legislature has expressly provided a private right of action in a specific section of a statute, the legislature did not intend to imply private rights of action to enforce other sections of the same statute"); *Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 720, 87 S. Ct. 1404, 18 L. Ed. 2d 475 (1967)* ("When a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, **[*489]** other remedies should not readily be implied."); *Baptist Health v. Murphy, 2010 Ark. 358, 373 S.W.2d 269, 288 (Ark. 2010)* ("Where there is a statute enacted by the General Assembly that purports to give plaintiffs a private cause of action, the remedy is limited to what the statute expressly provides.").

HN48[] The elements of an ICFA claim are: (1) a deceptive or unfair act or practice by the defendant; (2) made during a course of conduct involving trade or commerce; (3) made with the intent that the plaintiff rely on the deceptive or unfair practice; (4) causation; and (5) damages. See *Avery v. State Farm Mutual Auto. Ins. Co., 216 Ill. 2d 100, 835 N.E.2d 801, 850, 296 Ill. Dec. 448 (Ill. 2005)*; *Rob Siegel v. Shell Oil Co., 612 F.3d 932, 934 (7th Cir. 2010)* (citing *Robinson v. Toyota Motor Credit Corp., 201 Ill. 2d 403, 775 N.E.2d 951, 960, 266 Ill. Dec. 879 (Ill. 2002))*. The ICFA proscribes two kinds of practices: those that are "unfair," and those that are "deceptive." A plaintiff may state a claim under the ICFA's "unfair" prong without alleging that the conduct is deceptive. *Id. at 935* (citing *Saunders v. Michigan Avenue Nat'l Bank, 278 Ill. App. 3d 307, 662 N.E.2d 602, 608, 214 Ill. Dec. 1036 (1996))*. The IUDTPA, by contrast, only outlaws "deceptive" practices, that is, practices that "create[] a likelihood of confusion or misunderstanding." *815 ILCS 510/2(a)*.

The Illinois Plaintiffs have failed to state a claim under ICFA's "deceptive" prong or under IUDTPA because they have failed to allege that Defendants engaged in any deceptive act or practice. The conduct that forms the basis for this claim—namely, "fail[ing] to provide ... necessary ... repairs" through refusing **[*490]** to pay for "procedures" necessary "to return a vehicle to its pre-accident condition," requiring shops to use used or recycled products, and requiring shops to purchase parts "of unknown manufacturer, reliability, and/or quality"—is not "deceptive" in any relevant sense. In their response, Plaintiffs belatedly refer to paragraphs in their complaint that allege steering, but these allegations should have at least been referenced in the allegations under this particular count.

To the extent the Illinois Plaintiffs intended to assert an ICFA "unfair" practice claim, it must be dismissed for improper group pleading. Plaintiffs have not pled facts raising a plausible inference that Defendants conspired with each other or acted in concert, and absent such allegations, liability for ICFA violations must be established on an individualized basis. If they choose to raise a count based on the ICFA or IUDTPA in an amended complaint, then to avoid unnecessary confusion the Illinois Plaintiffs should identify the statute they are suing under.

J. State Laws Banning Unfair Trade Practices and Unfair Competition

1. California Unfair Competition Law

The California Plaintiffs have brought a claim under **[*491]** their state's Unfair Competition Law ("UCL").[36] As its name suggests, ***HN49***[] the law proscribes "unfair competition," which is defined as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." *Cal. Bus. & Prof. Code § 17200*. The California Plaintiffs identify the following practices which they allege are unfair or unlawful under the UCL: the DRP surveys, the suppression of labor rates, suppression of repair and material costs, steering, and "making an end-run around the 1963 Consent Decree." (Case No. 6:14-cv-6010, Doc. 1, ¶ 123).

HN50[] The UCL allows any "person who has suffered injury in fact and has lost money or property as a result of ... unfair competition," to bring a civil action against the person or persons engaged in the unfair competition. Id. *§§ 17203*, *17204*. A court may enjoin violations of the UCL and order restitution. Id. *§ 17203*; *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 63 P.3d 937, 947-48, 131 Cal. Rptr. 2d 29 (Cal. 2003)*. But, the UCL "is not an all-purpose substitute for a tort or contract action," and does not allow a plaintiff to recover monetary damages. *Cortez v. Purolator Air Filtration Products Co., 23 Cal. 4th 163, 96 Cal. Rptr. 2d 518, 999 P.2d 706, 712 (Cal. 2000)*.

HN51[] Under the UCL, statutory unfair competition may take one of three forms: **[*492]** unlawful, unfair, or fraudulent. See *Zhang, 304 P.3d at 174*. The California Plaintiffs do not allege that Defendants' conduct was fraudulent within the meaning of the UCL (see Case No. 6:14-cv-6010, Doc. 1, ¶ 124 (alleging that "Defendants' acts or practices are unlawful and unfair")). Accordingly, I will limit my discussion to the unlawful and unfair prongs.

HN52[] "By proscribing 'any unlawful' business act or practice, the UCL 'borrows' rules set out in other laws and makes violations of those rules independently actionable." *Id. at 167* (quoting *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527, 561 (Cal. 1999))*. "An unlawful act is one 'forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made.'" *In re Pomona Valley Medical Group, Inc., 476 F.3d 665, 674 (9th Cir. 2007)* (quoting *Saunders v. Superior Court, 27 Cal App 4th 832, 838, 33 Cal. Rptr. 2d 438 (Cal. App. 1994))*. As a general matter, a UCL claim may be based on a violation of a law that itself provides no private right of action. See, e.g., *Rose v. Bank of America, N.A., 57 Cal. 4th 390, 159 Cal. Rptr. 3d 693, 304 P.3d 181 (Cal. 2013)* (violation of federal Truth in Savings Act); *Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 17 Cal. 4th 553, 71 Cal. Rptr. 2d 731, 950 P.2d 1086 (Cal. 1998)* (violation of state criminal law), superseded by statute on other grounds as stated in, *Arias v. Superior Court, 46 Cal. 4th 969, 95 Cal. Rptr. 3d 588, 209 P.3d 923 (Cal. 2009)*. However, in Zhang, a majority of the California Supreme Court held that UCL claims may not "rest exclusively on" violations of the California Unfair Insurance Practices Act ("UIPA"), *Cal. Ins. Code. § 790 et seq. 304 P.3d at 176*.

Although the California Plaintiffs allege that Defendants engaged **[*493]** in "unlawful" practices, they do not—either in their complaint or their response to the motions to dismiss—tether their UCL claim to any particular law Defendants allegedly violated.[37] The alleged Sherman Act violations cannot support an "unlawful"-act-or-practice UCL claim because the California Plaintiffs failed to adequately plead that any Defendant violated the Sherman Act. And, the California UIPA, which Plaintiffs cite elsewhere in their memorandum, cannot alone furnish the basis for a UCL claim. *Zhang, 304 P.3d at 176*. Therefore, I find that the California Plaintiffs have failed to adequately plead that Defendants engaged in an "unlawful act or practice" within the meaning of the UCL.

HN53[] Even if an act or practice is not prohibited by another statute, it may still qualify as "unfair competition" under the "unfair" or "fraudulent" prongs of the UCL. *Cel-Tech, 973 P.2d at 540*. "In permitting the restraining of all 'unfair' business practices," the UCL "undeniably **[*494]** establishes only a wide standard to guide the courts of equity." *Barquis v. Merchants Collective Ass'n, 7 Cal. 3d 94, 101 Cal. Rptr. 745, 496 P.2d 817, 830 (Cal. 1972)*. "[G]iven the creative nature of the scheming mind, the Legislature evidently concluded that a less inclusive standard

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[36] Count IV in Case No. 6:14-cv-6010.

[37] While a Plaintiff are not required to "'set out a legal theory for [their] claim for relief,'" *Johnson v. City of Shelby, Miss., 135 S. Ct. 346, 347, 190 L. Ed. 2d 309 (2014)* (quoting 5 Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 1219), they cannot hide the ball indefinitely and expect the Court to search for an unspecified statute the Defendants violated.

would not be adequate." Id. While the scope of this provision "is sweeping, it is not unlimited," and "[c]ourts may not simply impose their own notions of the day as to what is fair or unfair." *Cel-Tech, 973 P.3d at 541*. In Cel-Tech, the California Supreme Court articulated a standard for "unfairness" under the UCL:

> ***HN54***[] When a plaintiff who claims to have suffered injury from a direct competitor's "unfair" act or practice invokes *section 17200*, the word "unfair" in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

Id. at 544. The Cel-Tech court said in a footnote that this test was limited to the context of UCL actions brought "by competitors alleging anticompetitive practices." *Id. at 544 n. 12*. In Zhang, the court observed that "[t]he standard for determining what business acts or practices are 'unfair' in consumer actions under the UCL is currently unsettled." **[*495]** *Id. at 174 n. 9*; see also *In re Adobe Systems, Inc. Privacy Litig., 66 F. Supp. 3d 1197, 2014 WL 4379916, at *17 (N.D. Cal. 2014)* (noting that definition of "unfair" is "in flux" in California courts and identifying two tests for whether conduct is "unfair" in consumer UCL actions).

The California Plaintiffs are not "consumers" or "competitors" of the Defendant insurance companies; rather, they are businesses in one industry (automotive repair) alleging harm caused by anticompetitive practices in another industry (insurance). This makes it even less clear what test the Court should apply to determine whether a practice is unfair. Eventually, the Court may reach this issue. For now, I find that the California Plaintiffs' UCL claim must be dismissed based on their use of group pleading, and because they have failed to allege the existence of any agreement or conspiracy or common scheme that would provide some connection between the conduct of the different Defendants. Therefore, like their tortious interference claims, the California Plaintiffs' collective allegations in their UCL count are insufficient to survive a motion to dismiss.

2. Oregon Unfair Trade Practices Act

The Oregon Plaintiff alleges that Defendants violated the Oregon Unfair Trade Practices Act ("OUTPA") "by making false and disparaging **[*496]** comments to their insureds about Plaintiff's services."[38] This count must be dismissed because of Plaintiff's improper reliance on group pleading. As with the tortious interference claims, the Oregon Plaintiff attributes wrongdoing collectively to every defendant. And, as noted above, see supra Parts III.A, III.F.3, III.J.1, such collective allegations are insufficient to survive a motion to dismiss.

Defendants argue that this claim should be dismissed with prejudice because the Oregon Plaintiff is not a consumer of Defendants' products and therefore does not have "standing" to bring a claim under OUTPA. The GEICO Defendants ask for a fee award, on the grounds that Plaintiff lacked an objectively reasonable basis for bringing this claim (Case No. 6:14-cv-6014, Doc. 121 at 25). ***HN55***[] The statute does not expressly limit private claims to consumers, and no Oregon court has addressed whether a plaintiff must be a consumer to have standing under OUTPA. *CollegeNet, Inc. v. Embark.Com, Inc., 230 F. Supp. 2d 1167, 1172 (D. Or. 2001)*. However, the United States District Court for the District of Oregon has held in a number of cases that only "consumers" have standing under OUTPA. See, e.g., *Benson Tower Condominium Owners Ass'n v. Victaulic, 22 F. Supp. 3d 1126, 1136 (D. Or. 2014)*; *Volm v. Legacy Health Systems, 237 F. Supp. 2d 1166, 1175 (D. Or. 2002)*; *CollegeNet, 230 F. Supp. 2d at 1174*; *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 17 F. Supp. 2d 1170, 1180 (D. Or. 1998)*. Most of these cases have **[*497]** construed the word "person" in OUTPA's civil remedy provision, *ORS § 646.638(1)* to mean "consumer." See, e.g., *Benson Tower, 22 F. Supp. 3d at 1135-36*; *CollegeNet, 230 F. Supp. 2d at 1172-75.*

I am not persuaded by the reasoning in these decisions for interpreting "person" to mean "consumer." ***HN56***[] "In interpreting a statute, the court's task is to discern the intent of the legislature." *Portland General Electric Co. v. Bureau of Labor & Indus. ("PGE"), 317 Ore. 606, 859 P.2d 1143, 1145 (Or. 1993)* (citing *ORS § 174.020*), superseded in part by statute as recognized in, *State v. Gaines, 346 Ore. 160, 206 P.3d 1042 (Or. 2009)*. In doing so, the court must apply the three-step process outlined in PGE, as modified in Gaines. See *Gaines, 206 P.3d at*

[38] The "Fourth Claim for Relief" in Case No. 6:14-cv-6014.

1050-51. Because the issue of standing under OUTPA is not necessary to resolve the motions to dismiss, I will not undertake a full-blown PGE-Gaines analysis in this report and recommendations. However, I will note several concerns I have with interpreting "person" to mean "consumer" in § 646.638(1), which lead me to recommend against dismissing this claim with prejudice.

First, when the legislature uses the same term throughout a statute, this "indicates that the term has the same meaning throughout the statute." *Atkinson v. Board of Parole & Post-Prison Supervision, 341 Ore. 382, 143 P.3d 538, 541 (Or. 2006)*. Under the interpretation of § 646.638(1) adopted in CollegeNet, the word "person" means two different things *in the same sentence*. OUTPA's civil remedies provision allows "a person" to sue "another **[*498]** person" for injuries to property caused by unfair trade practices, but no court has or ever would construe OUTPA to permit only suits by "a" consumer against "another" consumer.

Second, the laundry list of unfair trade practices identified in the statute includes unfair practices that harm business as much as or more than consumers. Unsolicited telephone calls and faxes, for example, inflict injury on businesses in the same manner as they do consumers. Cf. *ORS § 646.608(1)(ff)*, *(hh)—(jj)*. The most recent addition to the list of unfair trade practices—a ban on asserting bad faith infringement claims—almost exclusively harms businesses. *ORS § 646.608(1)(vvv)*; Or. Laws, ch. 19 § 2 (2014). A narrow, atextual construction of the word "person" as used in § 646.638(1) would seem to thwart the Oregon legislature's intent in adding these provisions to the unfair trade practices law.

Finally, ***HN57***[] the Oregon Supreme Court has cautioned against adopting narrowing constructions of statutorily defined terms, including the very term at issue here, based on conclusions about the statute's purpose drawn from legislative history. See *Hamilton v. Paynter, 342 Ore. 48, 149 P.3d 131 (2006)* (refusing to construe the word "person," as used in *ORS § 12.155*, to mean "insurer," given the general statutory definition of "person" in *ORS § 174.100(5)* as including **[*499]** "individuals, corporations, associations, firms, partnerships, limited liability companies and joint stock companies," unless "the context or a specifically applicable definition requires otherwise").

At the very least, whether a "person" must be a "consumer" to have standing under OUTPA is a much closer question than some of the case law suggests. And there certainly is no need to "mak[e] [an] unnecessary Erie 'guess[],'" *Keener v. Convergys Corp., 312 F.3d 1236, 1241 (11th Cir. 2002)*, before the Oregon Plaintiff has plausibly pled a "non-consumer" UTPA claim, assuming such a claim exists under Oregon law. Accordingly, I will not recommend dismissal with prejudice of Plaintiff's OUTPA claim for lack of standing. GEICO's request for attorney's fees should be denied because, as explained above, Plaintiff's reading of the statute is plausible (indeed, it may well be correct), and neither the Oregon Supreme Court nor the Oregon Court of Appeals has rejected that reading. Cf. *Mantia v. Hanson, 190 Ore. App. 412, 79 P.3d 404, 415 (Or. App. 2003)* (denying fee award under *§ 20.105* where Court of Appeals "had not conclusively determined" a key issue and that question "was unsettled and manifestly subject to reasonable dispute").

3. Washington Consumer Protection Law

The Washington Plaintiffs make a claim under the Washington Consumer Protection **[*500]** Act ("CPA"), WRC 19.86 et seq., alleging that Defendants engaged in unfair or deceptive acts or practices in violation of that statute.[39] ***HN58***[] *WRC 19.86.020* declares unlawful all "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." "Any person who is injured in his or her business or property by a violation of *WRC 19.86.020* ... may bring a civil action" for an injunction or damages. *WRC 19.86.090*. "[T]o prevail in a private CPA action ... a plaintiff must establish five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) causation." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 719 P.2d 531, 533 (Wash. 1986)*.

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[39] The fifth unnumbered count in Case No. 6:14-cv-6015.

HN59[] A plaintiff may establish the first two elements of a CPA claim in one of two ways: first, by showing that "(1) [the] act or practice ... has a capacity to deceive a substantial portion of the public [and] (2) has occurred in the conduct of any trade or commerce," or second, by showing that the defendant engaged in an act that the Washington legislature has defined to be a per se unfair trade practice. Hangman Ridge, 719 P.2d at 535-36. The Washington **[*501]** Plaintiffs allege that Defendants engaged in per se unfair and deceptive acts enumerated in the § 284-30-390 of the Washington Administrative Code, including

> (1) Failing to make a good faith effort to communicate with the repair facility chosen by the claimant.
> (2) Arbitrarily denying a claimant's estimate for repairs ... (b) If the insurer pays less than the amount of the estimate from the claimant's chosen repair facility, the insurer must fully disclose the reason or reasons it paid less than the claimant's estimate, and must thoroughly document the circumstances in its claim file.
> (4) Failing to prepare or accept an estimate provided by the claimant that will restore the loss vehicle to its condition prior to the loss.
> (6) Failing to consider any additional loss related damage the repair facility discovers during the repairs to the loss vehicle.

(Case No. 6:14-cv-6015, Doc. 1, ¶ 6.20). The Washington Plaintiffs aver that "Defendants' conduct alleged herein violates these regulations defining conduct that is per se unfair or deceptive violates [sic] the Consumer Protection Act." (Id. ¶ 6.21). Plaintiffs also assert that "Defendants' conduct alleged herein was unfair and deceptive and violative of the Consumer Protection Act." (Id. ¶ **[*502]** 6.22).

The Washington Plaintiffs' CPA claim fails for at least two reasons. First, the use of group pleading renders the claim insufficient. HN60[] As with tortious interference, liability under the CPA for the sort of conduct proscribed in § 284-30-390 of the Washington Administrative Code must be established on an individualized basis. Federal courts in Washington have dismissed CPA claims that improperly relied on group pleading, see, e.g., Stafford v. Sunset Mortgage, Inc., No. C12-1877MJP, 2013 U.S. Dist. LEXIS 61807, 2013 WL 1855743, at *3 (W.D. Wash. Apr. 29, 2013), and I recommend this Court do so here.

The Washington complaint is also "a model 'shotgun' pleading of the sort [the Eleventh Circuit] has been roundly, repeatedly, and consistently condemning for years, long before this lawsuit was filed." Davis v. Coca-Cola Bottling Co., 516 F.3d 955, 979 (11th Cir. 2008). In most (although not all) counts, Plaintiffs re-allege the preceding paragraphs, including those of the previously-stated counts, without specifying what allegations relate to what claims. While courts and opponents confronted with a shotgun pleading can usually discern which factual allegations relate to which counts, doing so requires the expenditure of time and effort that could be avoided by the filing of a properly framed pleading. The Washington CPA claim is remarkably opaque, even for a shotgun pleading. **[*503]**

It alleges, without offering any further detail, that "Defendants' conduct alleged herein was unfair and deceptive and violative of the Consumer Protection Act." (Case No. 6:14-cv-6015, Doc. 1, ¶ 6.22). Exactly what "conduct alleged herein" violates the CPA, the reader is left to wonder. Is it State Farm's refusal to "disclose any of the methods" it uses to conduct its survey and establish a "market rate"? (Case No. 6:14-cv-6015, Doc. 1, ¶ 5.17). Is it one or more unspecified Defendant's insistence on using "used and/or recycled parts" in repairs? (Id., ¶ 5.40). Does it refer to Defendants telling customers whether or not a shop is on a "preferred provider list"? (Id., ¶ 5.54). Or is it something else?

It is not the Court's job to search the complaint for facts that might support a particular claim for relief. "Judges are not like pigs, hunting for truffles buried in [complaints]." United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991). Nor, for that matter, is opposing counsel expected to sift through factual allegations like a prospector panning for gold. The Eleventh Circuit has made clear that HN61[] district courts can and should require a litigant who has filed an improper shotgun pleading to replead. United States ex rel. Atkins v. McInteer, 470 F.3d 1350, 1354 n. 6 (11th Cir. 2006). Therefore, I recommend the Court dismiss **[*504]** Plaintiffs' Washington CPA claim.

IV. Conclusion

Upon consideration of the foregoing, I respectfully recommend:

1. That all Defendants' motions to dismiss in the Pending Cases be **granted in part** and **denied in part**;

2. That the complaints in the Pending Cases be **dismissed**;

3. That the dismissals be without prejudice, except for Plaintiffs' claims for "Quasi-Estoppel," "Estoppel/Quasi-Estoppel," and "Equitable Estoppel."

4. That Plaintiffs be afforded 21 days in which to amend their complaints.

Specific written objections to this report and recommendations may be filed in accordance with *28 U.S.C. § 636*, and *M.D. Fla. R. 6.02*, within fourteen (14) days after service of this report and recommendations. Failure to file timely objections shall bar the party from a de novo determination by a district judge and from attacking factual findings on appeal.

RESPECTFULLY RECOMMENDED at Orlando, Florida on June 3, 2015.

/s/ Thomas B. Smith

THOMAS B. SMITH

United States Magistrate Judge

Marshall v. ESPN Inc.

United States District Court for the Middle District of Tennessee, Nashville Division

June 4, 2015, Decided; June 4, 2015, Filed

No. 3:14-01945

Reporter
111 F. Supp. 3d 815 *; 2015 U.S. Dist. LEXIS 72494 **; 114 U.S.P.Q.2D (BNA) 1968 ***; 2015-1 Trade Cas. (CCH) P79,196; 43 Media L. Rep. 1877; 2015 WL 3537053

JAVON MARSHALL, STEVEN CLARKE, CHRIS CONNER, PATRICK MILLER, BYRON MOORE, CHAZ MOORE, SEAN PARKER, ERIC SAMUELS, MARLON WALLS, and ROD WILKS, individually and on behalf of all others similarly situated, Plaintiffs, v. ESPN INC.; CBS BROADCASTING, INC., NATIONAL BROADCASTING COMPANY INC.; ABC, INC.; FOX, INC.; IMG COLLEGE, LLC; ATLANTIC COAST CONFERENCE; BIG TEN CONFERENCE; BIG 12 CONFERENCE; PACIFIC-12 CONFERENCE; SOUTHEASTERN CONFERENCE; CONFERENCE USA; OHIO VALLEY CONFERENCE; BIG EAST CONFERENCE; IMG WORLDWIDE, INC.; IMG COLLEGE, LLC; BIG TEN NETWORK SERVICES, LLC; CBS COLLEGIATE SPORTS PROPERTIES, INC.; JMI SPORTS LLC; TELESOUTH COMMUNICATIONS, INC., T3 MEDIA, INC.; ESPN INC. D/B/A SEC NETWORK; SOUTHEASTERN CONFERENCE D/B/A SEC NETWORK; ESPN INC. D/B/A LONGHORN NETWORK; IMG COLLEGE, LLC D/B/A LONGHORN NETWORK; LEARFIELD SPORTS LLC; and WILLIAM MORRIS ENDEAVORS, LLC, Defendants.

Subsequent History: Counsel Corrected June 8, 2015.

Affirmed by *Marshall v. ESPN, 668 Fed. Appx. 155, 2016 U.S. App. LEXIS 15292 (6th Cir. Tenn., Aug. 17, 2016)*

Prior History: *Marshall v. Espn Inc., 2015 U.S. Dist. LEXIS 197525 (M.D. Tenn., Feb. 5, 2015)*

Core Terms

broadcast, athletes, sports, student athlete, Licensing, likenesses, Plaintiffs', football, images, players, right of publicity, advertising, rights, antitrust, amateurism, games, Network, common law, Defendants', basketball, fundamental rights, television, endorsement, played, motion to dismiss, conspiracy, products, alleges, courts, basketball game

LexisNexis® Headnotes

Torts > Intentional Torts > Invasion of Privacy > Appropriation

HN1[] **Invasion of Privacy, Appropriation**

Tennessee's common law acknowledges a property right in the use of one's name, photograph or likeness. In addition to the right of publicity under the common law, Tennessee provides statutory protection to that right. The Tennessee Legislature codified the right of publicity in 1984 when it enacted the Tennessee Personal Rights Protection Act (TPRPA). The TPRPA was intended to create an inheritable property right for those people who use their names or likenesses in a commercial manner, such as an entertainer or sports figure — someone who uses his or her name for endorsement purposes.

Torts > Intentional Torts > Invasion of Privacy > Appropriation

HN2[] **Invasion of Privacy, Appropriation**

At least two courts in Tennessee have indicated that the statutory and common law rights to publicity are co-extensive. Coextensive means extending over the same space or time; corresponding exactly in extent.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Choice of Law

HN3[] **Federal & State Interrelationships, Choice of Law**

The Tennessee Supreme Court has stated that when there is a conflict between the common law and a statute, the provisions of the statute must prevail.

Torts > Intentional Torts > Intentional Infliction of Emotional Distress

HN4[] **Intentional Torts, Intentional Infliction of Emotional Distress**

There is no known Tennessee authority for the proposition that participants in sporting events have a right to publicity under the common law. This is unsurprising since it appears virtually all courts in jurisdictions that have decided the matter under their respective laws have held to the contrary for a variety of reasons.

Torts > Intentional Torts > Invasion of Privacy > Appropriation

HN5[] **Invasion of Privacy, Appropriation**

The Tennessee Personal Rights Protection Act (TPRPA) speaks in terms of the use of an individual's name, photograph, or likeness for purposes of advertising products, merchandise goods or services. The TPRPA also specifically states that it is deemed a fair use and no violation of an individual's rights shall be found, for purposes of this part, if the use of a name, photograph, or likeness is in connection with any news, public affairs, or sports broadcast or account. *Tenn. Code Ann. § 47-25-1107(a)*. Thus, the TPRPA clearly confers no right of publicity in sports broadcast, or with respect to any advertisement if the advertisement is in connection with such a broadcast.

Constitutional Law > Substantive Due Process > Scope

HN6[] **Constitutional Law, Substantive Due Process**

Tenn. Const. art. I, § 8 provides that no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land, with "law of the land" being synonymous with "due process of law" under the *Fifth* and *Fourteenth Amendments to the United States Constitution*. Accordingly, unless a fundamental right is implicated, a statute comports with substantive due process if it bears a reasonable relation to a proper legislative purpose and is neither arbitrary nor discriminatory.

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

***HN7*[ ] Judicial Review, Standards of Review**

The Tennessee Constitution, like that of the United States, guarantees all citizens the equal protection of the law, meaning that all persons similarly circumstanced shall be treated alike. With regard to equal protection challenges, the Tennessee Supreme Court has stated: this Court has adopted an analytical framework similar to that used by the United States Supreme Court in analyzing equal protection challenges. Under this framework, one of three standards of scrutiny applies, depending upon the nature of the right asserted or the class of persons affected: (1) strict scrutiny; (2) heightened scrutiny; or (3) reduced scrutiny, applying the rational basis test. Strict scrutiny applies when the classification at issue: (1) operates to the peculiar disadvantage of a suspect class; or (2) interferes with the exercise of a fundamental right.

Constitutional Law > Bill of Rights > Fundamental Rights

***HN8*[ ] Bill of Rights, Fundamental Rights**

Fundamental rights are rights deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. As can be expected, the list of liberty interests and fundamental rights is short, and the Supreme Court has expressed very little interest in expanding it. In addition to the specific freedoms protected by the *Bill of Rights*, fundamental rights include such thing as the right to marry; have children (and direct their education and upbringing); to marital privacy; to use contraception; to bodily integrity, and to an abortion. The ability to profit from a right of publicity simply does not rise to the level of a fundamental right.

Constitutional Law > Bill of Rights > Fundamental Rights > General Overview

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

***HN9*[ ] Bill of Rights, Fundamental Rights**

In the absence of the deprivation of a fundamental right or intentional discrimination against a suspect class, a statute is entitled to rational basis review which is exceedingly deferential. Under rational basis review, a law is upheld so long as it is rationally related to a legitimate government purpose. There is a strong presumption of constitutionality and the regulation will be upheld so long as its goal is permissible and the means by which it is designed to achieve that goal are rational. This standard is highly deferential; courts hold statutes unconstitutional under this standard of review only in rare or exceptional circumstances. Under rational basis scrutiny, government action amounts to a constitutional violation only if it is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the government's actions were irrational. Finally, under rational basis review, the government has no obligation to produce evidence to sustain the rationality of its action; its choice is presumptively valid and may be based on rational speculation unsupported by evidence or empirical data. Moreover, those seeking to invalidate a statute using rational basis review must negative every conceivable basis that might support it.

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

Torts > Intentional Torts > Invasion of Privacy > Appropriation

HN10[] **Judicial Review, Standards of Review**

The Tennessee Personal Rights Protection Act (TPRPA), *Tenn. Code Ann. § 47-25-1107*, passes rational basis review if for no other reason than it is related to the legitimate goal of avoiding unreasonable impediments to the broadcasting of important matters of public interest, including sporting events.

Antitrust & Trade Law > Sherman Act > Claims

HN11[] **Sherman Act, Claims**

Under the *Sherman Act*, every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is declared to be illegal. *15 U.S.C.S. § 1*. For a plaintiff to successfully bring an antitrust claim under *Section 1 of the Sherman Act*, the plaintiff must establish that the defendant's actions constituted an unreasonable restraint of trade which caused the plaintiff to experience an antitrust injury.

Antitrust & Trade Law > Sherman Act > Claims

HN12[] **Sherman Act, Claims**

An antitrust claim under *Section 1 of the Sherman Act* will survive a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss if it alleges facts sufficient to raise a plausible inference of an unlawful agreement to restrain trade. To survive a motion to dismiss, these allegations must be specific enough to establish the relevant "who, what, where, when, how or why." To plead unlawful agreement, a plaintiff may allege either an explicit agreement to restrain trade, or sufficient circumstantial evidence tending to exclude the possibility of independent conduct.

Antitrust & Trade Law > Sherman Act > Claims

HN13[] **Sherman Act, Claims**

The United States Court of Appeals for the Sixth Circuit has addressed whether an NCAA eligibility rule should be deemed commercial for purposes of an antitrust challenge. In Bassett, a former college coach brought a complaint which alleged, among other things, that the NCAA's enforcement of its recruiting and improper inducement rules violated the *Sherman Act*. Finding no violation, the Sixth Circuit noted that, for the *Sherman Act* to apply, the challenged action must be commercial in nature. The appropriate inquiry is whether the rule itself is commercial, not whether the entity promulgating the rule is commercial.

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

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

HN14[] **Standing, Requirements**

To have standing to pursue any claim, an aggrieved party must suffer an injury-in-fact. A plaintiff suffers an injury in fact when his legally protected interest has been invaded. Moreover, because protecting competition is the sine qua non of the antitrust laws, a private antitrust plaintiff, in addition to having to show injury-in-fact and proximate cause, must allege, and eventually prove, antitrust injury. Antitrust injury is an injury of the type the antitrust laws were intended to prevent and one that flows from that which makes defendants' acts unlawful.

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

HN15[] **Standing, Sherman Act**

The antitrust injury doctrine is designed to ensure that the injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. The Supreme Court has further explained the requirement as ensuring that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place, and, more specifically, it ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior. The Sixth Circuit, it is fair to say, has been reasonably aggressive in using the antitrust injury doctrine to bar recovery where the asserted injury, although linked to an alleged violation of the antitrust laws, flows directly from conduct that is not itself an antitrust violation.

Trademark Law > Subject Matter of Trademarks > Particular Subject Matter > Right of Publicity

HN16[] **Particular Subject Matter, Right of Publicity**

The *Lanham Act*, *15 U.S.C.S. § 1125(a)*, is constitutional because it only regulates commercial speech, which is entitled to reduced protections under the *First Amendment*. Commercial speech is generally speech that does no more than propose a commercial transaction. Broadcasting sporting events does not propose a commercial transaction. Rather, it depicts a real event and distributes desired speech (sports programming) to the public, and, thus, it is not commercial speech for purposes of *First Amendment* jurisprudence.

Trademark Law > Subject Matter of Trademarks > Particular Subject Matter > Right of Publicity

HN17[] **Particular Subject Matter, Right of Publicity**

False endorsement occurs when a celebrity's identity is connected with a product or service in such a way that consumers are likely to be misled about the celebrity's sponsorship or approval of the product or service.

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

HN18[] **Motions to Dismiss, Failure to State Claim**

In the absence of a motion to amend, defendants are entitled to a review of the complaint as filed pursuant to *Fed. R. Civ. P. 12(b)(6)*; plaintiffs are not entitled to an advisory opinion from the court informing them of the deficiencies of the complaint and then an opportunity to cure those deficiencies.

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Judges: KEVIN H. SHARP, UNITED STATES DISTRICT JUDGE.

Opinion by: KEVIN H. SHARP

Opinion

[*820] **[***1971]** **MEMORANDUM**

This is a putative class action brought by current and former Student Athletes who played National Collegiate Athletic Association ("NCAA") football (at the Football Bowl Subdivision "FBS" level) or Division I college basketball. Named as Defendants are **[**6]** a host of conferences, networks, and licensors who allegedly profited from the broadcast and use of those Student Athletes' names, likenesses and images without permission. Pending before the Court are Motions to Dismiss (Docket Nos. 214, 218 & 226) filed on behalf of all Defendants. The Court heard oral arguments on those Motions on April 13, 2015, and, for the reasons that follow, will grant the Motions.

I. Background

Plaintiffs are eight former college football players (three each from Vanderbilt University and the University of Tennessee, and one each from the University of Washington and the University of Tennessee, Chattanooga) and two former college basketball players (one each from Tennessee State University and the University of Maryland Eastern Shore).

Defendants are more than two dozen separate entities that fall into three camps. The assorted athletic conferences, specifically the Atlantic Coast Conference, Big East Conference, Inc., Big 12 Conference, The Big Ten Conference, Inc., Conference USA, Ohio Valley Conference, Pac-12 Conference, and Southeastern Conference (collectively, the "Conference Defendants"), manage athletic competition among teams and sell the rights to **[**7]** broadcast **[*821]** conference games. The networks, specifically, ESPN Inc., CBS Broadcasting Inc., NBCUniversal Media, LLC, ABC, Inc., Fox Broadcasting Company, Big Ten Network, LLC, SEC Network, and Longhorn Network (the "Network Defendants")[1] purchase media content, including college sports from content owners, or produce it internally, and then telecast that content to television viewers. The licensing agencies, specifically, Outfront Media Sports, Inc. (f/k/a CBS Collegiate Sports Properties, Inc.), IMG Worldwide, LLC, IMG College, LLC, William Morris

[1] The Network Defendants are collectively referred to in the Complaint as the "Broadcast Defendants."

Endeavor Entertainment, LLC, JMI Sports LLC, Learfield Sports LLC, T3 Media, Inc., and TeleSouth Communications, Inc. (collectively, the "Licensing Defendants"), offer brand development and management and act as a conduit in licensing college teams' intellectual property.

Plaintiffs have filed a 194-paragraph, 39-page Complaint, the essence of which is that they "and other similarly situated current and former FBS football and NCAA Division I basketball Student Athletes . . . have been foreclosed from the market for the licensing, use, and sale **[**8]** of their names, images, and likenesses[.]" (Docket No. 1, Complaint ¶ 4). The Complaint alleges:

> 5. Defendants' collective action of excluding Student Athletes from the marketplace of their own names, images, and likenesses has caused the unlawful result of fixing the amount that current and former Student Athletes are paid for the licensing and sale of their names, images, and likeness at zero or, at most, their "cost of attendance."[2]
>
> 6. Defendants' use of Student Athletes' names, images, and likenesses is unauthorized **[***1972]** because Student Athletes have not legally assigned their publicity rights to Defendants, the NCAA, or third parties acting on behalf of the NCAA.
>
> * * *
>
> 8. Broadcast Defendants have conspired to fix the amount Student Athletes are paid for the licensing, use, and sale of their names, images, and likenesses at zero or, at most, a portion of the cost of attendance, by colluding with the NCAA and Conference Defendants. Broadcast Defendants, to their own commercial advantage, refuse to negotiate or enter into contracts with Student Athletes. In so doing, Broadcast Defendants have adopted and implemented the restrictive bylaws and rules of the NCAA and Conference Defendants.
>
> 9. **[**9]** Licensing Defendants have conspired to fix the amount Student Athletes are paid for the licensing, use, and sale of their names, images, and likenesses at zero or, at most, a portion of the cost of attendance, by colluding with the NCAA and Conference Defendants. Licensing Defendants refuse to negotiate or enter into contracts with Student Athletes. In so doing, Licensing Defendants have adopted and implemented the restrictive rules and bylaws of the NCAA and Conference Defendants.
>
> 10. The conspiracy between and among the Broadcast Defendants, Licensing Defendants, Conference Defendants and the NCAA has created a marketplace resembling a plantation type arrangement where Defendants financially benefit in the collective amount of billions of dollars, while Student Athletes, the driving force of college sports, **[*822]** receive nothing more than their cost of attendance. This conspiracy has created an anticompetitive marketplace in which all Defendants commercially exploit the substantial value of each Student Athletes' images.

(Id. ¶¶ 5-6 & 8-10, internal parenthetical omitted).

Though the NCAA is alleged to be a part of the conspiracy, it not named as a Defendant in this action. Nevertheless, Plaintiffs' tacitly concede that any discussion of the alleged unlawfulness must acknowledge its existence and the role it plays in college sports.

According to the Complaint, the NCAA was founded in 1906[3] and "is an unincorporated association consisting of more than 1,200 colleges, universities, and athletic conferences" in the United States and "serves as the governing body of its member schools and athletic conferences." (Id. ¶ 76). The fundamental purpose of the NCAA is to:

> maintain intercollegiate athletics as an integral part of the education program and the athlete as an integral part of the educational program and the athlete as a part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.

(Id. ¶ 97).

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[2] "Cost of attendance" is defined in the Complaint as the total cost of attending college, including tuition, fees, room, **[**10]** board, books and supplies, transportation, and miscellaneous expenses.

[3] Originally, the NCAA was known as the Athletic Association of the United States.

In accordance with NCAA rules, intercollegiate sports are limited to participation of "amateur" athletes:

> Student-athletes shall be amateurs in **[**11]** intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from commercial exploitation by professional and commercial enterprises.

(Id. ¶ 95). A Student Athlete may lose his or her amateur status if he or she:

> a. Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport;
>
> b. Accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation;
>
> c. Signs a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received;
>
> d. Receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based on athletics skill or participation, except as permitted by NCAA rules and regulations;
>
> e. Competes on any professional athletics team [under the governing Bylaw], even if no pay or remuneration for expenses was **[***1973]** received, except as permitted [by the governing **[**12]** Bylaw];
>
> f. After initial full-time collegiate enrollment, enters into a professional draft; or
>
> g. Enters into an agreement with an agent.

(Id. ¶ 99).

In order to participate in NCAA sports, Student Athletes are required to sign a "Form 08-3a," that "allows the NCAA to use the Student Athlete's name or picture to 'generally promote' NCAA championships or other NCAA events, activities or programs." (Id. ¶ 132). Plaintiffs allege that "Student Athletes desiring to extend their athletic careers beyond high school are left with no comparable alternative to accepting a scholarship from an FBS football or Division I basketball school," because **[*823]** "[b]oth the National Football League ('NFL') and the National Basketball Association ('NBA') prohibit high school players from entering their leagues directly after high school." (Id. ¶ 137).[4] As a consequence, in order to play at a competitive level, Student Athletes have little or no choice but to accept a scholarship[5] and sign Form 08-3a, making the Form "a contract of adhesion and unenforceable." (Id. ¶ 139).

Plaintiffs claim that the NCAA and Defendants have "multi-billion dollar agreements," yet "the Student Athlete, receives nothing or, at most, the cost of attendance." (Id. ¶ 114). The restrictive NCAA and Conference rule which "even go as far as to place quotas on the number of meals a Student Athlete may eat," allegedly "have deprived Student Athletes from realizing the commercial value of their images." (Id. ¶ 115). That is, while the NCAA "purports to protect Student Athletes from commercial exploitation, [it] has conspired with Defendants to create an anticompetitive market where Student Athletes are powerless to realize the commercial value of their names, images and likenesses." (Id. ¶ 128 **[**14]**).

Plaintiffs contend that the NCAA and Defendants have benefitted enormously from the status quo, all to the detriment of Student Athletes. Just by way of examples, Plaintiffs claim:

- A basketball scholarship at the University of Kentucky is worth approximately $12,000 per year, yet the basketball team consisting of no more than 13 scholarship players, generated approximately $23 million dollars in revenue in 2012.

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[4] "To be eligible for the NFL draft, a player must be at least 3 years removed from high school. To be eligible for the NBA draft, a player must be at least **[**13]** 1 year removed from high school." (Id.).

[5] Even with a scholarship, Plaintiffs assert that "college athletes can be left to pay sports-related medical bills," may be required "to pay thousands of dollars in out-of- pocket educational related expenses," and can lose the scholarship for any reason. (Id. ¶ 116). They also assert that "[t]he room and board provisions in full scholarship leave 85% of players living on campus and 86% of players living off campus living below the federal poverty line." (Id. ¶ 118).

‣ Approximately 50% of NCAA football and men's basketball players are left without a college degree.

‣ According to a study, the average FBS football student athlete has a fair market value of $456,612 "above and beyond" the value of their scholarship, and the average men's basketball player has a fair market value of $1.06 million over four years, not including his scholarship.

(Id. ¶¶ 115, 127-128).

Plaintiffs' Complaint contains Seven Causes of Action. The first two Causes, against all Defendants, allege a statutory violation of the right of publicity under *Tenn. Code Ann. § 47-25- 1105* (First Cause) and a violation of the right to publicity under Tennessee common law (Second Cause); the Third Cause, also against all Defendants, alleges a civil conspiracy; the Fourth Cause, again against all **[**15]** Defendants, alleges a violation of *Section 1* of the Sherman Antitrust Act; the Fifth Cause, against only the Licensing and Network Defendants, alleges false endorsement in violation of *Section 43(a) the Lanham Act*; and the Sixth Cause, against all Defendants, alleges unjust enrichment; and the Seventh Cause seeks an accounting as to all Defendants.

II. Application of Law

Defendants' Motions to Dismiss seek dismissal of all of Plaintiffs' claims.[6] The **[*824]** standards governing such Motions are well known, and it suffices simply to note that this Court's review is governed primarily by *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, **[***1974]** and the Supreme Court's application of that Rule in *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009)*, and *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

A. Right of Publicity — First And Second Causes of Action

"The right of publicity is, somewhat paradoxically, an outgrowth of the right of privacy." *ETW Corp. v. Jireh Pub., Inc., 332 F.3d 915, 928 (6th Cir. 2003)*. It has been formally acknowledged to be a part of Tennessee's common law:

> "[T]he recognition of individual property rights is deeply embedded in our jurisprudence. These rights are recognized in *Article I, Section 8 of the Tennessee Constitution* and have been called "absolute" by the Tennessee Supreme Court. . . . In its broadest **[**16]** sense, property includes all rights that have value. It embodies all the interests a person has in land and chattels that are capable of being possessed and controlled to the exclusion of others. Chattels include intangible personal property such as choses in action or other enforceable rights of possession. . . . Tennessee's common law thus embodies an expansive view of property. Unquestionably, a celebrity's right of publicity has value. It can be possessed and used. It can be assigned, and it can be the subject of a contract.

State ex rel Elvis Presley v. Crowell, 733 S.W.2d 89, 96-97 (Tenn. Ct. App. 1987). That is, ***HN1***[] Tennessee's common law acknowledges a "property right in the use of one's name, photograph or likeness." *Polygram Records, Inc. v. Legacy Ent. Grp., LLC, 205 S.W.3d 439, 445 (Tenn. Ct. App. 2006)*.

In addition to the right of publicity under the common law, Tennessee provides statutory protection to that right. "The Tennessee Legislature codified the right of publicity in 1984 when it enacted the Tennessee Personal Rights Protection Act ('TPRPA')." *Gauck v. Karamian, 805 F. Supp.2d 495, 500 (W.D. Tenn. 2011)*. The TPRPA "was intended to 'create an inheritable property right for those people who use their names or likenesses in a commercial manner, such as an entertainer or sports figure — someone who uses his or her name for endorsement purposes.'"

[6] Many of the arguments overlap. For ease of reference, the Court will at times simply refer to the arguments collectively, as if raised by all of the Defendants.

Wells v. Chattanooga Bakery, Inc., 448 S.W.3d 381, 390 (Tenn. Ct. App. 2014) (quoting Apple Corps Ltd. v. A.D.P.R., Inc., 843 F. Supp. 342, 348 (M.D. Tenn. 1993)).

Defendants argue that the TPRPA **[**17]** supplants whatever right to publicity that may exist under the common law. For two reasons, this Court agrees.

First, **HN2**[] at least two courts in Tennessee have indicated that the statutory and common law rights to publicity are "co-extensive." Judge Trauger so stated in Moore v. Weinstein Co., LLC, 2012 U.S. Dist. LEXIS 72929, 2012 WL 1884758, at *30 (M.D. Tenn. May 23, 2012), as did Judge McCalla in Gauck, 805 F. Supp.2d at 500 n.5. While Plaintiffs point out that "[n]either Gauck nor Moore defines the term 'coextensive,'" (Docket No. 257 at 5), "'[c]oextensive' means 'extending over the same space or time; corresponding exactly in extent.'" Paselk v. Texas, 2013 U.S. Dist. LEXIS 167995, 2013 WL 6187005, at *6 (E.D. Tex. Nov. 26, 2013) (quoting THE NEW OXFORD AMERICAN DICTIONARY 331 (2001)); see also, Chotkowski v. State, 240 Conn. 246, 690 A.2d 368, 385 (Conn. 1997) (quoting Webster's Third New International Dictionary for the proposition that "'[c]oextensive' is defined as 'having the same scope or boundaries'").

Second, Plaintiffs cite no case from any court in Tennessee that recognizes a right **[*825]** to publicity in sports broadcasts. Even if they could point to such a case, **HN3**[] the Tennessee Supreme Court has stated that "'[w]hen there is a conflict between the common law and a statute, the provision[s] of the statute must prevail.'" House v. Edmondson, 245 S.W.3d 372, 380 n.7 (Tenn. 2008) (quoting Lavin v. Jordon, 16 S.W.3d 362, 368 (Tenn. 2000)).

It is no answer, as Plaintiffs argue, that (1) "at least seven years earlier than the enactment of the TPRPA," courts recognized the existence of a common law right to publicity; (2) "where a common **[**18]** law tort has been recognized by courts prior to the enactment of a companion statute, 'the Legislature is presumed aware of this prior recognition'"; (3) "'where the remedies subsequently provided by the [Act] are not expressly stated to be exclusive, then the statutory remedies must be considered cumulative'"; and (4) "the TPRPA states that the remedies it provides 'are cumulative and shall be in addition to any others provided by law.'" (Docket No. 257 at 5-6, quoting, Guy v. Mut. of Omaha Ins. Co., 79 S.W.3d 528, 536 (Tenn. 2002) & Tenn. Code Ann. § 47-25-1106(e)). The very **[***1975]** case on which Plaintiffs rely prefaces its remarks by indicating that the "primary task in construing a statute is to give effect to the intent and purpose of the General Assembly 'without unduly restricting or expanding a statute's coverage beyond its intended scope.'" Guy, 79 S.W.3d at 536 (citation omitted). Furthermore, State *ex rel.* Presley, on which Plaintiffs rely for the proposition that the common law right to publicity existed years before enactment of the TPRPA , acknowledged that "[w]hile Tennessee's courts are capable of defining the parameters of the right of publicity on a case by case basis, the General Assembly also has the prerogative to define the scope of this right [and] undertook to do so in 1984 when it enacted" **[**19]** the TPRPA, 733 S.W.2d at 99.[7] In exercising that prerogative, the General Assembly specifically defined the right of publicity as it relates to sports broadcast (as discussed in more detail below), something which apparently had not been addressed by the courts in this state before.

Even if Tennessee's common law and statutory rights to publicity are not coextensive as that term is commonly understood, and even if the General Assembly did not effectively delimit the law regarding the right to publicity of sports broadcast, the first two Causes of Action in Plaintiff's Complaint are bound to be dismissed. This is because Plaintiffs' allegations do not set forth a plausible claim for relief, either under the common **[**20]** law or the TPRPA.

As noted, Plaintiffs' cite **HN4**[] no Tennessee authority for the proposition that participants in sporting events have a right to publicity under the common law. This is unsurprising since it appears virtually all courts in jurisdictions that

[7] The Court in State *ex rel.* Presley also stated that nothing in the TPRPA "should be construed to limit vested rights of publicity that were in existence prior to the effective date of the act" because "[t]o do so would be contrary to Article I, Section 20 of the Tennessee Constitution." Id. However, it is likely that, when the statute was enacted, none of the Plaintiffs were yet born, and most certainly not college athletes, since all Plaintiffs are alleged to have played either college football or college basketball between the 2008 and 2013 seasons.

have decided the matter under their respective laws have held to the contrary for a variety of reasons. See, e.g., *Dryer v. Nat'l Football League, 55 F. Supp. 3d 1181, 1195-1200 (D. Minn. 2014)* (holding that (1) NFL's use of video footage of players in games was entitled to *First Amendment* protection, outweighing players' rights to publicity; (2) programs fell within "newsworthiness" exception under various state's right of **[*826]** publicity laws, and (3) plaintiffs' "play in the NFL was and continues to be the subject of public interest"); *Nat'l Football League v. Alley, Inc., 624 F. Supp. 6, 10 (S.D. Fla. 1983)* (no common law violation of right to publicity where use of "player's professional personalities has not been shown to be an advertising use," and no violation of statutory rights where players' consented and "individual's name and likeness" did not "directly promote[] a commercial product or service"); *Gionfriddo v. Major League Baseball, 94 Cal. App. 4th 400, 114 Cal. Rptr.2d 307, 313 & 315 (Cal. App. 2001)* ("common law right does not provide relief for every publication of a person's name or likeness," and where defendant "is simply making historical facts available to the public through game programs, **[**21]** Web sites and video clips . . . the recitation and discussion of factual data concerning the athletic performance of these plaintiffs commands a substantial public interest, and, therefore, is a form of expression due substantial constitutional protection").

The sole exception to this line of authority appears to be *In re NCAA Student Athlete Name and Likeness Litig., 37 F. Supp.3d 1126 (N.D. Cal. 2014)*, which Plaintiffs cite for the proposition that "[r]ecent precedent specifically affirms that collegiate athletes have recognizable right of publicity related to sports broadcasts." (Docket No. 257 at 8). The only value that case has for present purposes, however, is that there *might* be a right of publicity under Minnesota law for sports broadcast, itself a dubious proposition given a more recent interpretation of that state's caselaw.

In re NCAA Student-Athlete involved 23 current and former student athletes who played at the Division I level beginning in 1953. The sole issue presented in that opinion[8] was whether the NCAA violated federal ***antitrust law*** by conspiring to restrain competition **[***1976]** in the market for the commercial use of the players' names, images and likeness. In addressing that issue, the court found it necessary to "discuss the scope of student-athletes' publicity rights" **[**22]** in the context of "whether those rights could, absent the challenged restraint, give rise to a market for group licensing," but pointedly repeated that "[t]he court does not analyze the viability of Right-of-Publicity Plaintiffs' claims which remain stayed[.]" *Id. at 1140 n. 6*. Nevertheless, the court noted that "the NCAA has not shown that each of the named Plaintiffs is, in fact, domiciled in a state that refuses to recognize an athlete's right of publicity in live broadcasts of sporting events," that two of the named plaintiffs "are domiciled in Minnesota," and that "recent case law suggests that athletes may bring such claims under Minnesota law to recover for the unauthorized use of their names and images in at least certain kinds of broadcast footage." *Id. at 1146*, citing *Dryer v. Nat'l Football League, 689 F. Supp. 2d 1113, 1123 (D. Minn. 2013)*.

The court's statements in In re NCAA Student **[**23]** Athlete about the right to publicity in sports broadcasts are clearly *dicta*. Moreover, Plaintiffs' right of publicity claims here are based exclusively on Tennessee law, and Defendants argue (and Plaintiffs do not dispute) that the plaintiffs in In re NCAA Student Athlete conceded **[*827]** that Tennessee recognizes no right of publicity in sports broadcasts. Additionally, the Dryer court issued a subsequent opinion in which it held that plaintiffs did not establish that the NFL's use of video footage in television productions violated their publicity rights under Minnesota law, nor, for that matter under New York, New Jersey, California, or Texas law. *Dryer, 55 F. Supp.3d at 1195-1200*.[9] Thus, the decision in In re Student Athlete is of no

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[8] That same court, after a bench trial, found that certain "NCAA rules unreasonably restrain trade in the market for certain educational and athletic opportunities offered by NCAA Division I schools," and that "[t]he procompetitive justifications that the NCAA offers do not justify this restraint and could be achieved through less restrictive means." *O'Bannon v. NCAA, 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014)*. Again, the NCAA is not a Defendant in this action.

[9] The Court notes that while this opinion was in its final draft, the Eighth Circuit addressed the approval of a settlement for players who remained a part of the class action in Dryer. In so doing, the court noted that "[t]he district court carefully and thoughtfully considered the strength of the plaintiffs' case and all of the potential **[**24]** risks they would face by continuing to litigate." *Marshall v. NFL, 787 F.3d 502, 2015 U.S. App. LEXIS 8373, 2015 WL 2402344, at *11 (8th Cir. 2015)*. It noted that the three plaintiffs "who opted out of the settlement and proceeded to the merits of their claims had their claims entirely dismissed by

real help to Plaintiffs in establishing an individual participant's right of publicity in a sports broadcast under any state's laws, let alone under Tennessee law.

Plaintiffs' statutory claim fares no better. In general, the TPRPA provides:

> Any person who knowingly uses or infringes upon the use of another individual's name, photograph, or likeness[10] in any medium, in any manner directed to any person other than such individual, as an item of commerce for purposes of advertising products, merchandise, goods, or services . . . without such individual's prior consent, or, in the case of a minor, the prior consent of such minor's parent or legal guardian . . . shall be liable to a civil action.

Tenn.Code Ann. § 47-25-1105(a) (footnote added).

Tellingly, ***HN5***[] the TPRPA speaks in terms of the use of an individual's name, photograph, or likeness "for purposes of advertising products, merchandise goods or services." Id.; see *Clark v. Viacom Intern., Inc., 2014 U.S. Dist. LEXIS 67145, 2014 WL 1934028, at *15-16 (M.D. Tenn. May 13, 2014)* (citation omitted) (stating that "'[o]nly the use of an individual's identity in advertising infringes on the persona,'" and finding plaintiff right of publicity claim failed where he "fail[ed] to allege that defendants' "statements used his name in connection with any advertisement"); *Apple Corps, 843 F. Supp. at 347* (the "Tennessee legislature . . . has narrowed the common law prohibition, proscribing only the unauthorized use of another's name or likeness in advertising"). The Act also specifically states that "[i]t is deemed a fair use and no violation of an individual's rights shall be found, for purposes of this part, if the use of a name, photograph, or likeness is in connection with any news, public affairs, or sports broadcast or account." *Tenn. Code Ann. § 47-25-1107(a)*. Thus, the TPRPA clearly confers no right of publicity in sports broadcast, or with respect to any advertisement **[***1977]** if the advertisement is in connection with such a broadcast.

At the hearing on the Motions to Dismiss, Plaintiffs' **[**26]** counsel argued that the sports broadcast defense under the TPRPA "does not immunize defendants from liability here because they are using Plaintiffs' images during broadcasts to advertise products that are completely unrelated **[*828]** to sports broadcast[s]." (Transcript, Docket No. 280 at 42). However, they do not plead specific facts which show that any of their names, images, or likenesses have been used in any advertisement, nor do they specify which Defendant(s) created and placed the advertisement, or in what medium it was placed. See *Moore, 2012 U.S. Dist. LEXIS 72929, 2012 WL 1884758, at *30* (citation omitted) ("The TPRPA is 'narrowly drawn' to have a particular scope, 'proscribing only the unauthorized use of another's name or likeness in advertising'"); *Gauck, 805 F. Supp.2d at 502* (plaintiffs must "demonstrate[] a causal connection between the defendants' use of their persona and a direct, non-incidental benefit to the defendants from that use); *McKee v. Meltech, Inc., 2011 U.S. Dist. LEXIS 49612, 2011 WL 1770461, at * 12 (W.D. Tenn. May 9, 2011)* (complaint failed where nothing suggested that defendant's used plaintiff's "likeness for advertising or endorsement purposes").

Thus far, the Court has concluded that the statutory and common law right to publicity are co-extensive under Tennessee law, that the common law in Tennessee does not recognize a individual participant's right **[**27]** to publicity in sports broadcasts, and that, in any event, the TPRPA circumscribes whatever rights may exist under the common law insofar as sports broadcast are concerned. Nevertheless, a couple of further points need to be addressed in order to give full consideration to Plaintiffs' right to publicity arguments.

Plaintiffs rely on *Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 97 S. Ct. 2849, 53 L. Ed. 2d 965 (1977)* and *Wisconsin Interscholastic Athl. Ass'n v. Gannett Co., Inc., 658 F.3d 614 (7th Cir. 2011)* to support their right of

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the district court," and that "the district court rejected every single one of the plaintiffs' claims under every state law and under every single theory and defense." Id. While the merits of the claims were not before the Eighth Circuit, that court observed the "district court's order is nevertheless strong evidence that it meant what it said in its order approving the settlement regarding the likelihood of success on the merits." Id.

[10] "Likeness" **[**25]** is defined in the Act as "the use of an image of an individual for commercial purposes." *Tenn. Code Ann. § 47-25-1102(3)*.

publicity claims, and to defend against any contention that the *First Amendment* bars such claims in the context of sports broadcasts. They argue that, like the plaintiff in Zacchini, they do "'not seek to enjoin the broadcast of [their] performance but simply want[] to be paid for it[.]'" (Docket No. 257 at 2, citation omitted). The key to those cases, Plaintiffs insist, is the distinction drawn between reporting about sports events, as opposed to broadcasting entire sporting event, with the former being protected as newsworthy and of public interest, and the latter not.

There is no doubt that Zacchini and Wisconsin Interscholastic draw the distinction made by Plaintiffs in this case, and the court in In re NCAA Student-Athlete relied on that distinction in holding that "the *First Amendment* does **[**28]** not guarantee media organization an unlimited right to broadcast entire college football and basketball games." *In re NCAA Student-Athlete, 37 F. Supp.3d at 1142*. But, stating that the *First Amendment* does not guarantee unlimited broadcast rights does not mean that it correspondingly establishes a right to publicity by the athletic participants when entire games are broadcast. Moreover, just as with all cases, Zacchini and Wisconsin Interscholastic must be read in context and, when so read, are inapposite.

Hugo Zacchini was a "human cannonball" who performed the feat of being shot from a cannon into a net 200 feet away. In the summer of 1972, he performed his act at a county fair in Ohio and, over his protest, a local news reporter filmed the entire 15-second performance, which was then broadcast on the local eleven o'clock news. Mr. Zacchini brought an "action for damages, alleging that he is 'engaged in the entertainment business,'" and asserted that defendant "'showed and commercialized the film of his act without his consent,' and that such conduct was an 'unlawful appropriation of [his] professional property.'" *433 U.S. at 564*.

Unlike the situation here, Mr. Zacchini was not only a performer, he was also the **[*829]** producer of his one-man show and, as a consequence, **[**29]** "Ohio's decision to protect [his] right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public." *Id. at 576*. The Supreme Court went on to observe that "[t]his same consideration underlies the patent and copyright laws long enforced by this Court," laws that "were 'intended definitely to grant valuable, enforceable rights' in order to afford greater encouragement to the production of works of benefit to the public." *Id. at 576-77*. It is a mistake, the Court believes, to read **[***1978]** Zacchini as supporting a right of publicity by anyone who performs in an event produced by someone else.

Wisconsin Interscholastic involved a high school athletic association's challenge to the streaming of a tournament game by news organizations in violation of exclusive licensing agreements entered into between the association (which sponsored the tournaments) and a video production company. On its face that case does not aid Plaintiffs because the Seventh Circuit affirmed the association's right to enter into exclusive contracts for broadcasting **[**30]** entire games, noting that "tournament games are a performance product of [the association] which it has a right to control." *658 F.3d at 616*. True, the court stated that "[t]he distinction between coverage or reporting on the one hand, and broadcast of an 'entire' act on the other hand, was central to Zacchini," but the court also observed that Zacchini stands for a second proposition: "Zacchini makes clear that the producer of entertainment is entitled to charge a fee in exchange for consent to broadcast; the *First Amendment* does not give the media the right to appropriate, without consent or remuneration, the products of others." *Id. at 624*.

Here, Plaintiffs are the players in broadcast football and basketball games. The networks are the producers and the games are their products.

In their reply brief, Plaintiffs assert that they, "and the majority of Student Athletes are African American," and argue that "the sports broadcast exception, if applied . . . would adversely impact a suspect class disproportionately." (Docket No. 257 at 8). Plaintiffs continue:

> Since the TPRPA's sports broadcast exception serves to limit fundamental rights protected under the Tennessee Constitution, it is subject to strict scrutiny under state law. **[**31]** . . . Further, the exception creates a separate classification of persons with a right to publicity. Where the classification at issue "(1) operates to the peculiar disadvantage of a suspect class; or (2) interferes with the exercise of a fundamental right," strict scrutiny applies."

(*Id. at 9*, citation omitted).

If for no other reasons, Plaintiffs' constitutional challenge is subject to dismissal because no facts are alleged in the Complaint to support such a claim, nor is any such cause of action asserted. Moreover, Plaintiffs have not shown compliance with the notice requirements *Rule 5.1 of the Federal Rules of Civil Procedure* for a constitutional challenge to a state statue. Regardless, Plaintiffs' constitutional claim fails on the merits.

HN6[] *Article I, section 8 of the Tennessee Constitution* provides "[t]hat no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land," *Tenn. Const. art. I, § 8*, with "law of the land" being synonymous with "due process of law" under the *Fifth* and *Fourteenth Amendments to the United States Constitution*. **[*830]** *Mansell v. Bridgestone Firestone No. Am. Tire, LLC, 417 S.W.3d 393, 407 (Tenn. 2013)*. "Accordingly, unless a fundamental right is implicated, a statute comports with substantive due process if it bears 'a reasonable relation to a proper legislative **[**32]** purpose' and is 'neither arbitrary nor discriminatory.'" *Gallaher v. Elam, 104 S.W.3d 455, 463 (Tenn. 2003)*.

In addition, ***HN7***[] the Tennessee Constitution, like that of the United States, guarantees all citizens the equal protection of the law, meaning that "'all persons similarly circumstanced shall be treated alike.'" *Newton v. Cox, 878 S.W.2d 105, 109 (Tenn. 1994)* (quoting *Tenn. Small School Sys. v. McWherter, 851 S.W.2d 139, 153 (Tenn. 1993))*. With regard to equal protection challenges, the Tennessee Supreme Court has stated:

> this Court has adopted an analytical framework similar to that used by the United States Supreme Court in analyzing equal protection challenges. . . . Under this framework, one of three standards of scrutiny applies, depending upon the nature of the right asserted or the class of persons affected: (1) strict scrutiny; (2) heightened scrutiny; or (3) reduced scrutiny, applying the rational basis test. . . . Strict scrutiny applies when the classification at issue: (1) operates to the peculiar disadvantage of a suspect class; or (2) interferes with the exercise of a fundamental right.

Gallaher, 104 S.W.3d at 463.

Whether grounded in the *due process clause* or the *equal protection clause*, Plaintiffs' assertion that the TPRPA is subject to strict scrutiny fails because they have not adequately argued, let alone pled, that the statute operates **[***1979]** to the peculiar disadvantage of a suspect class or that it interferes **[**33]** with a fundamental right.

It is difficult to perceive how a facially neutral statute that creates exemptions for news, public affairs and sports broadcasts singles out a specific class, and Plaintiffs do not suggest how that could be so. Even within the world of sports, the statute does not target specific types of broadcasts such as football or basketball, or even just athletes as opposed to the countless others whose name and images might appear in such broadcasts. Yet to prevail on an equal a claim, Plaintiffs would have to "prove the existence of a racially discriminatory purpose behind the statute," *Wilson v. Collins, 517 F.3d 421, 432 (6th Cir. 2008)*, something which Plaintiffs do not even allege.

Nor have Plaintiffs alleged that the TPRPA impacts a fundamental right. ***HN8***[] Fundamental rights are rights "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg, 521 U.S. 702, 720-21, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997)* (citations and quotations omitted). As can be expected, "[t]he list of liberty interests and fundamental rights 'is short, and the Supreme Court has expressed very little interest in expanding it.'" *EJS Props., LLC v. City of Toledo, 698 F.3d 845, 860 (6th Cir. 2012)* (quoting *Seal v. Morgan, 229 F.3d 567, 574-75 (6th Cir. 2000))*. "In addition to the specific freedoms protected by the **[**34]** *Bill of Rights*," fundamental rights include such thing as the right to marry; have children (and direct their education and upbringing); to marital privacy; to use contraception; to bodily integrity, and to an abortion. *Glucksberg, 521 U.S. at 720*.

The ability to profit from a right of publicity simply does not rise to the level of a fundamental right. While Plaintiffs cite cases for the proposition that fundamental rights "include the right to privacy," (Docket No. 257 at 7), as the

[*831] Network Defendants correctly observe, an "athlete who takes the field before 100,000 fans at Neyland Stadium can hardly claim that a broadcast of the game threatens any constitutionally protected 'privacy right.'" (Docket No. 269 at 7).

HN9[] In the absence of the deprivation of a fundamental right or intentional discrimination against a suspect class, a statute is entitled to rational basis review which is exceedingly deferential. The Sixth Circuit has explained:

> Under rational basis review, a law is upheld so long as it is rationally related to a legitimate government purpose. There is a strong presumption of constitutionality and the regulation will be upheld so long as its goal is permissible and the means by which it is designed to achieve that goal **[**35]** are rational. . . . . "This standard is highly deferential; courts hold statutes unconstitutional under this standard of review only in rare or exceptional circumstances." . . . "Under rational basis scrutiny, government action amounts to a constitutional violation only if it is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the government's actions were irrational." . . . . Finally, under rational basis review, the government "has no obligation to produce evidence to sustain the rationality of its action; its choice is presumptively valid and 'may be based on rational speculation unsupported by evidence or empirical data.'"

Liberty Coins, LLC v. Goodman, 748 F.3d 682, 693-94 (6th Cir. 2014) (internal citations omitted). Moreover, "[t]hose seeking to invalidate a statute using rational basis review must 'negative every conceivable basis that might support it.'" *Craigmiles v. Craig, 312 F.3d 220, 224 (6th Cir. 2002)* (quoting *Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364, 93 S. Ct. 1001, 35 L. Ed. 2d 351 (1973)*). *HN10*[] The TPRPA passes that review if for no other reason than it is related to the legitimate goal of avoiding unreasonable impediments to the broadcasting of important matters of public interest, including sporting events.

Finally, the Court notes that the parties advance numerous authorities to support their respective positions **[**36]** that *Section 301(a)* of the Copyright Act either does, or does not, preempt Plaintiffs' right of publicity claims. In light of this Court's conclusion that Plaintiffs fail to state a claim under either Tennessee's common law or the TPRPA, the Court declines to consider the matter. See *Casias v. Wal-Mart Stores, Inc., 695 F.3d 428, 437 n.1 (6th Cir. 2012)* (declining to address whether federal law preempted state statute where plaintiff failed to state a claim under the statute); *Andretti v. Borla Performance Indus., Inc., 426 F.3d 824, 829 (6th Cir. 2005)* (refusing to address copyright preemption and **[***1980]** standing arguments where plaintiff could not establish damages).

B. *Section One of the Sherman Act* — Fourth Cause of Action

HN11[] Under the *Sherman Act*, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal." *15 U.S.C. § 1*. "For a plaintiff to successfully bring an antitrust claim under *Section 1* of the Sherman Act, the plaintiff must establish that the defendant's actions constituted an unreasonable restraint of trade which caused the plaintiff to experience an antitrust injury." *In re Se. Milk Antitrust Litig., 739 F. 3d 262, 270 (6th Cir. 2014)*. Plaintiffs have failed to adequately allege either element.

HN12[] "A Section One complaint will survive a *Rule 12(b)(6)* motion to dismiss if it alleges facts sufficient to raise a plausible inference of an unlawful agreement to restrain **[**37]** trade." *Erie Cnty. v. Morton **[*832]** Salt, Inc., 702 F.3d 860, 869 (6th Cir. 2012)*. "To survive a motion to dismiss, these allegations must be specific enough to establish the relevant "who, what, where, when, how or why." *Carrier Corp. v. Outokumpu Oyj, 673 F.3d 430, 445 (6th Cir. 2012)*. "To plead unlawful agreement, a plaintiff may allege either an explicit agreement to restrain trade, or 'sufficient circumstantial evidence tending to exclude the possibility of independent conduct.'" *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., 648 F.3d 452, 457 (6th Cir. 2011)*.

In the Complaint, Plaintiffs attack the NCAA amateurism rules, describing them as anticompetitive agreements. Beginning in the introductory paragraph, the Complaint alleges that "[t]he defendants — broadcasters, athletic conferences and licensing entities — have conspired with each other and the NCAA to promulgate, enforce, adopt, implement and/or exploit rules that are inherently anticompetitive in forbidding Student Athletes from competing in the marketplace for the value of their rights of publicity." (Docket No. 1, Complaint Intro. Para.). This theme underlies the entire Complaint, and is carried over to the "Background of the Anticompetitive Restraints" section, in which Plaintiffs allege, among other things, that "[s]ince its inception, the NCAA has gradually evolved into an environment that exploits its member athletes, all in the name of amateurism." **[**38]** (*Id. at ¶ 94*).

The Conference Defendants are alleged to "jointly enforce this clear demarcation between Student Athletes and professional athletes by permitting only 'amateur' Student Athletes to participate in intercollegiate sports," and have not only approved the NCAA's rules, but have mandated that its members follow those rules. (*Id. ¶¶ 98*, 102-103). The claim against the Network Defendants is more attenuated, with the allegation being those Defendants have entered into lucrative contracts with the NCAA and Conference Defendants which "effectively adopt and implement" the restrictive rules and bylaws of the NCAA. (*Id. ¶¶ 105, 112*). The claim against the Licensing Defendants is thinner still, alleging that "[t]he agreements between the Licensing Defendants and NCAA member institutions purportedly encompass the commercial value of Student Athletes' rights of publicity, yet Licensing Defendants refuse to negotiate or enter into agreements with Student Athletes to obtain such rights." (*Id. ¶ 123*).

By necessarily linking their antitrust claims to the NCAA amateurism rules and attacking those rules, Plaintiffs are faced with a fundamental problem, notwithstanding that the NCAA is not a Defendant **[**39]** in this action. Their attack runs counter to a line of cases which have addressed the amateurism rules in a variety of circumstances, including *NCAA v. Board of Regents, 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*, decided more than thirty years ago.

Board of Regents involved an antitrust challenge to an NCAA plan to limit the number of football games Division I schools were allowed to televise each season in order to "reduce, insofar as possible, the adverse effects of live television upon football game attendance." *Id. at 94*. Applying the rule of reason (as opposed to the *per se* rule) for antitrust challenges, the Supreme Court found that the plan violated *Section One of the Sherman Act* because it constituted illegal price fixing and established unlawful horizontal market restraints.

However, in arriving at its conclusion, the Supreme Court stated that "the role of the NCAA must be to preserve a tradition that might otherwise die." *Id. at 120*. The Court also made a couple of salient observations:

> **[*833]** What the NCAA and its member institutions market in this case is competition itself — contests between competing institutions. **[***1981]** Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be **[**40]** marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete. Moreover, the NCAA seeks to market a particular brand of football—college football. The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice — not only **[**41]** the choices available to sports fans but also those available to athletes — and hence can be viewed as procompetitive.

Id. at 101-02. The Court also wrote:

> The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the *Sherman Act*.

Id. at 119.

Here, of course, Plaintiffs were subject to the NCAA's eligibility rules, and in Smith v. NCAA, 139 F.3d 180, 189 (3rd Cir. 1998), the Third Circuit observed that the Supreme Court in Board of Regents "did not comment directly on whether the Sherman Act" would apply to those rules. Nevertheless, after noting that no court of appeals had expressly addressed the issue but numerous lower courts had, the Third Circuit "agree[d] with th[o]se court that the eligibility rules are not related to the NCAA's commercial or business activities," and, as a consequence, held that "the Sherman Act does not apply to the NCAA's promulgation of eligibility requirements." Id. at 185-86.

Smith is not controlling and, as Plaintiffs argue, the language in Board of Regents **[**42]** about amateurism and players not being paid may well be *dicta*. Still, that language cannot be blithely ignored.

To the contrary, Board of Regents has recently been read to mean that "most [NCAA] regulations will be 'a justifiable means of fostering competition among amateur athletic teams,' and are therefore procompetitive." Agnew v. NCAA, 683 F.3d 328, 341 (7th Cir. 2012) (quoting Bd. of Regents, 468 U.S. at 117). It also has been read as giving courts "a license to find certain NCAA bylaws that 'fit into the same mold' as those discussed in Board of Regents to be procompetitive 'in the twinkling of an eye,' — that is, at the motion-to-dismiss stage." Id. (quoting Bd. of Regents, 468 U.S. at 110 n.39). "Accordingly, when an NCAA bylaw is clearly meant to help maintain the 'revered tradition of amateurism in college **[*834]** sports' or the 'preservation of the student-athlete in higher education,' the bylaw will be presumed procompetitive, since [a court] must give the NCAA 'ample latitude to play that role.'" Id. at 342-34 (quoting Bd. of Regents, 468 U.S. at 120).

Like Smith, Agnew is not controlling, but ***HN13***[] the Sixth Circuit, too, has addressed whether an NCAA eligibility rule should be deemed commercial for purposes of an antitrust challenge. In Bassett v. NCAA, 528 F.3d 426 (6th Cir. 2008), a former college coach brought a complaint which alleged, among other things, that the NCAA's enforcement **[**43]** of its recruiting and improper inducement rules violated the Sherman Act. Finding no violation, the Sixth Circuit noted that, for the Sherman Act to apply, the challenged action must be commercial in nature, and that cases like Smith draw the distinction between rules which provide a commercial advantage and those that seek to ensure fair competition in college sports.

The "appropriate inquiry is 'whether the rule itself is commercial, not whether the entity promulgating the rule is commercial.'" Id. at 433 (quoting Worldwide Basketball & Sport Tours, Inc. v. NCAA, 388 F.3d 955, 958 ***[***1982]*** (6th Cir. 2004)). Finding that the complaint lacked "the critical commercial activity component required to permit application of the Sherman Act," the court affirmed dismissal, writing:

> Similar to the eligibility rules in Smith, NCAA's rules on recruiting student athletes, specifically those rules prohibiting improper inducements and academic fraud, are all explicitly non-commercial. In fact, those rules are anti-commercial and designed to promote and ensure competitiveness amongst NCAA member schools. Violation of the applicable NCAA rules gives the violator a decided competitive advantage in recruiting and retaining highly prized student athletes. It also violates the spirit of amateur athletics **[**44]** by providing remuneration to athletes in exchange for their commitments to play for the violator's football program. . . .

Id. at 433; see also, Gaines v. NCAA, 746 F. Supp. 738, 744 (M.D. Tenn. 1990) ("The overriding purpose of the eligibility rules . . . is not to provide the NCAA with commercial advantage, but rather the opposite extreme — to prevent commercializing influences from destroying the unique 'product' of NCAA college football").

The same conclusion must be reached here. Right or wrong, under NCAA rules, other than the requirement that an athlete be a student, there can be no more basic eligibility rule for amateurism than that the athlete not be paid for playing his or her sport.

Notwithstanding the allegations in the Complaint, Plaintiffs argue in their response brief to the Licensing Defendants' Motion to Dismiss that "the amateurism rules that preclude Student Athlete Compensation are not the restraint at issue." (Docket No. 259 at 1). Rather, "the restraints at issue include, but are not limited to, the multi-million dollar broadcast contract and multi-media agreements that purport to transfer the right to use the [names and likeness] of Student Athletes." Id. Their attempt to distance themselves from a fundamental, underlying **[**45]** premise of their case only trades one problem for another.

HN14[] To have standing to pursue any claim, an aggrieved party must suffer an injury-in-fact. "A plaintiff suffers an 'injury in fact' when his legally protected interest has been invaded[.]" *Kiser v. Reitz, 765 F.3d 601, 607 (6th Cir. 2014)*. Here, Plaintiffs claim injuries because of their exclusion from a broadcasting marketplace in which they do not (or did not) get paid. However, the Court has concluded that, as **[*835]** a matter of law, Plaintiffs do not have a right to publicity in sports broadcasts. Because Plaintiffs do not have a right to publicity under Tennessee law — the very basis of their claim that they have a right to be paid for appearing in television broadcasts of games and in advertisements for such broadcasts — they cannot plead any antitrust injury.[11] And, they cannot have been injured by a purported conspiracy to deny them the ability to sell non-existent rights. See *Square D Co. v. Niagara Frontier Tariff Bur., Inc., 476 U.S. 409, 416, 106 S. Ct. 1922, 90 L. Ed. 2d 413 (1986)* ("Injury implies violation of a legal right.").

Moreover, "[b]ecause protecting competition is the *sine qua non* of the antitrust laws," *Care Heating & Cooling, Inc. v. Am. Std., Inc., 427 F.3d 1008, 1014-15 (6th Cir. 2005)*, "[a] private antitrust plaintiff, in addition to having to show injury-in-fact and proximate cause, must allege, and eventually prove, 'antitrust injury.'" *In re Cardizem CD Antitrust Litig., 332 F.3d 896, 909 (6th Cir. 2003)*. Antitrust injury is an "injury of the type the antitrust laws were intended to prevent" and one "that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*.

HN15[] "[T]he antitrust injury doctrine is designed to ensure that 'the injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.'" *In re Cardizem, 332 F.3d at 909* (quoting *Brunswick Corp., 429 U.S. at 489 (1977))*. "'The Supreme Court has further explained the requirement as ensur[ing] that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the **[**47]** antitrust laws in the first place,' and, more specifically, **[***1983]** it 'ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior.'" Id. (quoting *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342-343, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990))*. "The Sixth Circuit, it is fair to say, has been reasonably aggressive in using the antitrust injury doctrine to bar recovery where the asserted injury, although linked to an alleged violation of the antitrust laws, flows directly from conduct that is not itself an antitrust violation." *Ky. Speedway LLC v. National Ass'n of Stock Car Auto Racing, 588 F.3d 908, 920 (6th Cir. 2009)*; *Valley Prods., Inc. v. Landmark, 128 F.3d 398, 403 (6th Cir. 1997))*.

Undoubtedly, there is stiff competition among the conferences to secure air time for games, among the networks to broadcast those games, and among the licensors to market college games, and Plaintiffs' allegations suggests as much. Maybe a market where players get paid would result in more competition, or at least vastly different competition. However, Plaintiffs fail to show how Defendants' behavior (most particularly that of Network and Broadcast Defendants), in complying with NCAA rules, can be said to be the cause of reduced competition and any concomitant antitrust injury. See *In re* ***[*836]*** *Canadian Import Antitrust Litig., 470 F.3d 785, 792 (8th Cir. 2006)* (antitrust complaint properly dismissed where plaintiffs alleged they were injured by increased prices for **[**48]** prescription drugs because they were unable to import less expensive drugs from Canadian pharmacies, but prohibition was based upon regulatory scheme of the government, not the conduct of the defendants).

Accordingly, Plaintiffs' antitrust claim under *Section One of the Sherman Act* must be dismissed.

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[11] Plaintiffs argue that the Conference Defendants are mistaken when they assert that the absence of an enforceable right of publicity under Tennessee law is fatal to Plaintiffs' antitrust claim. Plaintiffs' point out that "the proposed Class includes Student **[**46]** Athletes from every state," and assert that "[t]he anticompetitive restraint at issue is national in character — the anticompetitive effects of which are palpable in every state in the country." (Docket No. 258 at 6). That may be so, but the only right of publicity pled is under Tennessee law. It is not this Court's duty to scour or canvass the law of every jurisdiction in order to determine whether Plaintiffs have stated a viable claim.

C. False Endorsement Under the *Lanham Act* — Fifth Cause of Action

For their Fifth Cause of Action, Plaintiffs bring a false endorsement claim against the Network and Licensing Defendants. Specifically, they claim:

> 178. Broadcast and Licensing Defendants have used, and continue to use, thousands of Class Members' names, images, and likenesses in connection with their advertisements for nationally televised airings of FBS football and NCAA Division I basketball games, for the explicit purpose of promoting the airings, increasing their brand awareness, and driving revenue to the Broadcast and Licensing Defendants.
> 179. Broadcast and Licensing Defendants have used, and continue to use, thousands of Class Members' names, images, and likenesses in the nationally televised airings of FBS football and NCAA Division I basketball games.
>
> 180. The names, images, and likenesses of many Class Members that **[**49]** Broadcast and Licensing Defendants use to promote their products are highly recognizable to consumers deciding whether to watch or order the Broadcast and Licensing Defendants' broadcasts of FBS football and Division I basketball games. FBS football and Division I basketball players also wear uniforms, and numbers, making them easily identifiable to consumers.
> 181. Broadcast and Licensing Defendants' use of Class Members' images in advertisements and nationally televised airings of FBS football and Division I basketball games has caused actual confusion among members of the public as to Class Members' support and endorsement of Defendants' broadcasts.
>
> 182. The use of Class Members' images in Broadcast and Licensing Defendants' advertisements and televised airings constitutes a false endorsement in violation of Plaintiffs; and Class Members' rights under *§ 43(a)* of the Lanham Act, *15 U.S.C. § 1125(a)*.

(Docket No. 1, Complaint ¶¶ 178-182).

Section 43(a)(1)(A) of the Lanham Act states:

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term name, symbol, or device, or any combination thereof . . . ,
> which-
>
> (A) is likely to cause confusion, or to cause mistake, or to **[**50]** deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person . . .
>
> **[***1984]** shall be liable in a civil action by any person who believes that her or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a). For two reasons, neither of which need be discussed in great detail given the ground that has already been plowed, Plaintiffs' *Lanham Act* claim must be dismissed.

First, ***HN16***[] "[t]he *Lanham Act* is constitutional because it only regulates commercial speech, which is entitled to reduced protections under the *First Amendment*." **[*837]** *Taubman Co. v. Webfeats, 319 F.3d 770, 774 (6th Cir. 2003)* (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 563, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980))*. "Commercial speech" is generally "speech that does no more than propose a commercial transaction[.]" *United States v. United Foods, 533 U.S. 405, 409, 121 S. Ct. 2334, 150 L. Ed. 2d 438 (2001)*.

Broadcasting sporting events does not "propose a commercial transaction." Rather, it depicts a real event and distributes desired speech (sports programming) to the public, and, thus, it is not "commercial speech" for purposes of *First Amendment* jurisprudence. See, *Dryer, 55 F. Supp.3d at 1184-87* (clips of game footage are protected by the *First Amendment* because they are noncommercial speech and convey factual information about football games).

Second, Plaintiffs fail to adequately allege likelihood of confusion, **[**51]** which is "the controlling issue" for the ordinary "false endorsement claim[.]" *ETW Corp. v. Jireh Pub., Inc., 332 F.3d 915, 925 (6th Cir. 2003)*. ***HN17***[] "False endorsement occurs when a celebrity's identity is connected with a product or service in such a way that consumers are likely to be misled about the celebrity's sponsorship or approval of the product or service." *Id. at 925-26*.

Plaintiffs' Complaint centers on the broadcast of sporting events, specifically, the airing of college football and basketball games. They merely allege that they played in games that were shown on television, and that advertisements appeared in the broadcast of the games. They plead no specific facts indicating when any of their images were used and, if so, by whom.

At the hearing on the Motions to Dismiss, Plaintiffs' counsel played a video clip from a St. John University versus San Diego State University tournament basketball game. The clip captured a player preparing to shoot a free-throw, while an advertisement for an upcoming television program appeared on the bottom of screen.

None of the present Plaintiffs are alleged to have played ball at either university. Regardless, it is simply implausible to conclude that the shooter or those along the key were in anyway endorsing the upcoming **[**52]** program, any more than Tennessee Titans players, their opponents, or spectators endorse Louisiana-Pacific building products (or, indeed, any of the host of other products displayed on the scoreboard) when games are played at LP field, even though such advertisements may be captured in the background during the game.

The broadcasts Plaintiffs complain about show football players or basketball players playing their sport. There is no confusion about what they are doing. Accordingly, their *Lanham Act* claim is subject to dismissal.

D. Civil Conspiracy, Unjust Enrichment & Accounting - Third, Sixth and Seventh Causes of Action

In light of the foregoing conclusions, all of Plaintiffs' remaining claims must be dismissed. Their civil conspiracy claim is linked to their right to publicity, *Sherman Act*, and *Lanham Act* claims, none of which survive; their unjust enrichment claims is based upon the alleged "unlawful agreements, contracts, combinations, and conspiracy"; and their request for accounting seeks an accounting to the extent that Defendants' unlawfully "misappropriated" their names, likenesses, and images.

III. Conclusion

College basketball and football, particularly at the Division I and **[**53]** FBS levels, is big business. Of that there can be little **[*838]** doubt. Many believe that "amateur" when applied to college athletes today is a misnomer — an artificial label and anathema, placed on players, like Plaintiffs, whose efforts on the court and field lead to untold riches for others, such as Defendants. Cogent arguments have been raised that it is time Student Athletes share in the bounty, above and beyond any scholarships they may receive.

In this case, however, the Court is not called upon to address the larger picture of whether, as a matter of recognition, equity or **[***1985]** fundamental fairness, Student Athletes should receive "pay for play." Nor is it the Court's task to pass on the wisdom of the NCAA's eligibility rules that bar compensation, or whether those rules capture reality, given the present nature and environment of college sports. The Court expresses no opinion on those issues.

Rather, the Court's sole task is to determine whether present Plaintiffs have alleged sufficient facts or stated a viable claim that they are entitled to monetary compensation because they play in televised games. The Court finds that Plaintiffs have not done so under any of the theories that they set forth. **[**54]** Accordingly, the Motions to

Dismiss filed by the Network Defendants, the Conference Defendants, and the Licensing Defendants will be granted. Said dismissal will be with prejudice.[12]

An appropriate Order will be entered.

/s/ Kevin H. Sharp

KEVIN H. SHARP

UNITED STATES DISTRICT JUDGE

ORDER

For the reasons set forth in the accompanying Memorandum, the Motions to Dismiss filed by the Conference Defendants (Docket No. 214), the Licensing Defendants (Docket No. 218), and the Network Defendants (Docket No. 220) are hereby GRANTED and this case is hereby DISMISSED WITH PREJUDICE. The Motions to Dismiss for Lack of Jurisdiction (Docket Nos. 226 & 231) are hereby DENIED AS MOOT.

The Clerk of the Court shall **[**55]** enter a final judgment in accordance with *Rule 58 of the Federal Rules of Civil Procedure*.

It is SO ORDERED.

/s/ Kevin H. Sharp

KEVIN H. SHARP

UNITED STATES DISTRICT JUDGE

End of Document

[12] In their moving papers, Defendants repeatedly request that dismissal of the claims be with prejudice. ***HN18***[] In the absence of a Motion to Amend, defendants are "'entitled to a review of the complaint as filed pursuant to *Rule 12(b)(6)*'"; plaintiffs are "'not entitled to an advisory opinion from the Court informing them of the deficiencies of the complaint and then an opportunity to cure those deficiencies.'" *La. Sch. Bd. Emps' Ret. Sys. v. Ernst & Young, LLP, 622 F.3d 471, 478 (6th Cir. 2010)* (quoting *Begala v. PNC Bank, Ohio, Nat. Ass'n, 214 F.3d 776, 784 (6th Cir. 2000))*. Notwithstanding Defendants' request, Plaintiffs have not moved to amend to cure any deficiencies.

Papadopoulos v. United States Gov't

United States District Court for the Eastern District of New York

June 8, 2015, Decided; June 8, 2015, Filed

15 Civ. 2836 (BMC)

Reporter
2015 U.S. Dist. LEXIS 74279 *; 2015 WL 3605405

GREGORY PAPADOPOULOS, Plaintiff, - against - THE US GOVERNMENT (FBI, SDNY, EDNY, US ATTORNEY FOR THE SDNY and US TRUSTEES); IAN GAZES; ALFONSO FANJUL; JOSE FANJUL; RAY ZEMON; THE TOWN OF PALM BEACH; MICHAEL MUKASEY; ISTA MANAGEMENT; JUDGE PRESCA; JUDGE FAILLA; JUDGE RAMOS; JUDGE GROSSMAN; JUDGE IRIZARRY; THE STATE OF NEW YORK; and THE STATE AND CITY OF NEW YORK, Defendants.

Prior History: *Palos v. Mineeva, 2011 U.S. Dist. LEXIS 157219 (S.D.N.Y., Feb. 8, 2011)*

Core Terms

allegations, cases, frivolous, qui tam, sua sponte, asserts, pro se, complaints, conspiracy, injunction, courts, district court, quotation

Counsel: **[*1]** Gregory Papadopoulos, Plaintiff, Pro se, Astoria, NY.

Judges: Brian M. Cogan, United States District Judge.

Opinion by: Brian M. Cogan

Opinion

MEMORANDUM AND ORDER

COGAN, District Judge.

Plaintiff *pro se*, who paid the requisite filing fee for this action, is suing defendants under numerous federal statutes. His submission consists of three documents: (1) a complaint; (2) a "Memorandum of Law and Discussion in Support of the Complaint;" and (3) a "Suplamental [*sic*] Qui Tam complaint." For the reasons discussed below, the complaint is dismissed as frivolous, and plaintiff is directed to show cause why he should not be barred from filing future frivolous complaints related to these allegations without leave of the Court.

BACKGROUND

I. The Complaint

The Complaint purports to assert jurisdiction under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), the Federal Tort Claims Act ("FTCA"), *42 U.S.C. §§ 1981-89*, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)*, "Antitrust," and "Civil Conspiracy." However, not a single one of these claims is alleged with particularity. Plaintiff asserts that the "Fanjul Organized Crime Family" has conspired with the Federal Bureau of Investigation ("FBI") in a variety of nefarious misdeeds, including the destruction of plaintiff's financial firm, **[*2]** Revcon; the assassinations of President John F. Kennedy and Robert Kennedy; "entrapp[ing] President Clinton with Monica Lewinski hoping to impeach the President"; fixing the 2000 presidential election; "destroy[ing] the lives of some 300 Palm Beach residents [who] . . . ended up in, divorce, bankruptcy and some in suicide"; and causing the downfall of "Madoff" (presumably Bernard Madoff), MF Global, Lehman Brothers, and other financial institutions. Plaintiff alleges that the Town of Palm Beach and its police department harassed him and other residents, as "RICO enterprises promoting the interest of the Fanjul Organized Crime Family."

Plaintiff further alleges that "there is a tangible pattern of some 60 federal and state cases that I was involved be assigned to judges formerly in criminal justice and friends of high level FBI officials or Judges from the Caribbean that the Fanjul Brothers could secretively bribe offshore" [*sic*]. As a result, he alleges that multiple cases have been decided against him, including bankruptcy filings, creditor cases, and civil rights actions in the United States District Court for the Southern District of New York. Plaintiff alleges that the assigned judges are "biased or corrupt" **[*3]** and selected "for the benefit of the FBI and the Fanjul Crime Family." He asserts that his prior filings in this district assigned to the Honorable Dora L. Irizarry were also the result of "prejudicial judicial assignments" because Judge Irizarry was a former prosecutor and criminal court judge and a "native of Puerto Rico." "Naturally all [of plaintiff's] cases were dismissed as frivolous." In filing the instant case, plaintiff asserts: "The unknown Judge that this case might be assigned, with prior connections to the DOJ, Criminal Justice, Enforcement or the Caribbean is also preemptively named as a Defendant."

The Complaint further alleges that the State and City of New York "have clearly rigged their courts for the benefit of the FBI and the Fanjul Crime Family and the Town of Palm Beach." According to the Complaint, plaintiff's Family Court actions were improperly decided because his ex-wife was awarded custody of his son and given "150% of a $15 million marital estate." Plaintiff states that his state court cases against the FBI and other entities and individuals were "instantly dismissed," including his claims of "vicious injuries inflicted by NYPD during an arrest," whereas **[*4]** he was found liable in cases brought by his creditors and was prosecuted on criminal charges. His efforts to have records at a mental institution sealed in another case were denied. In a criminal case brought against plaintiff in state court, he alleges that one of the presiding judges ordered his incarceration and detention in a psychiatric center. "Two months after closure of this case Judge Amaker purchased a $1 million mansion . . . putting down a hefty $500,000 which she could not possibly have saved being a 9 year Bronx Assistant DA."

Plaintiff seeks damages against New York City and New York State "for arresting me, prosecuting me, imprisoning me, detaining me in a mental institution, inflicting cruel and unusual punishment and even shoving syringes in me . . . all because I was exercising my constitutional right to free speech." He states that the statute under which he was arrested, Aggravated Harassment in the Second Degree, was later rendered unconstitutional. The complaint does not include details, including the date or location, of any specific incident.

Plaintiff asserts that he was forced to live near former United States Attorney General Michael Mukasey, and that this **[*5]** proximity allowed "FBI agents and Fanjul thugs working togother, with Mukasey's and ISTA [Management]'s permission and cooperation . . . [to] easily come to my floor, enter my apartment and inflict injuries." He alleges that he was drugged, causing him to injure his femur; that his apartment "was infested with mosquitoes carrying an antibiotic resistant virus" that left numerous scars; and that Mukasey threw a party at which "someone closely resembling Judge Preska" attended. That individual pointed towards plaintiff's apartment.

Plaintiff seeks to recover $5 billion, "which is what my net worth would have reasonably been today had defendants not conspired to deprive me of my constitutional rights." It seeks an additional "trembled [*sic*] damages of $10 billion pursuant to RICO," "[u]nspecified damages," punitive damages, interest, costs, and "reasonable attorney fees." Plaintiff also seeks "to vacate every decision rendered by any Judge named as a defendant in this conspiracy."

Finally, he requests injunctions, one seeking the removal of named and unnamed judges from his cases, and another "restraining the FBI and the Fanjul Borthers from directly or indirectly interfering in my life."

II. "Memorandum [*6] of Law and Discussion in Support of the Complaint"

The second document plaintiff submitted states, "This Memorandum of Law and discussion are offered for the purpose of preventing errors by the Court in dismissing [] this case as frivolous." It describes plaintiff's court cases in West Palm Beach, the S.D.N.Y., and the E.D.N.Y., as well as the allegedly corrupt and biased judges who presided over his cases. It also mentions his arrest, prosecution, and detention, but does not provide any details. Plaintiff acknowledges potential concerns about *res judicata* and judicial immunity, but asserts that "Antitrust and Civil Conspiracy" and "RICO claims for the period 2011-2015 remain entirely un-adjudicated and cannot be dismissed as res judicata."

As a basis for federal jurisdiction, plaintiff asserts the FTCA, RICO, and "***Antitrust" law***, based on his claims that "the FBI/FCF badmouthed my son in every private school" near Palm Beach, destroyed his finance firm, forced him to live next door to Michael Mukasey, and prevented him from hiring a civil rights attorney and CPA. The Memorandum also raises "Qui Tam Claims" and asserts that "a judge can not dismiss Qui Tam Claims for 60 days to enable **[*7]** notified interested Government parties to take over the case or join."

The Memorandum includes three exhibits: (1) a Federal Claim form alleging, "Life Systematically Destroyed by the FBI for profit;" (2) a New York City Notice of Claim form; and (3) an email from Phyllis Ann Good, describing her own claims against the Fanjuls.

III. "Suplamental [*sic*] Qui Tam Complaint"

In the third document, plaintiff purports to bring a *qui tam* action pursuant to *31 U.S.C. §§ 3729-3733*, which plaintiff describes as the "Whistleblowers Act." In it, plaintiff asserts that the "Whistleblowers Act" permits him to bring this action on behalf of the United States, that the complaint must be filed under seal for 60 days, and that it cannot be *sua sponte* dismissed during that time period. Plaintiff states that he seeks to recover funds "on behalf of the bankruptcy estates of Lehman, MF Global, Refco, Madoff Securities, Papadopoulos, the US Trustees and SIPC." He seeks recovery of "an estimated amount in excess of $40+ billion."

The document repeats the allegations about the Fanjul brothers' past crimes and corruption and their conspiracy with the FBI. It also includes new material about "Plaintiff's personal experiences," "the Madoff **[*8]** incident," and other failed financial institutions alleged to have been brought down by "FBI/FCF."

IV. Prior Litigation:

Plaintiff is a prolific filer of lawsuits — "filing or defending" approximately 60, by his own estimation. In addition to the multiple cases he describes in the Florida and New York courts, he has filed at least 13 civil actions in the S.D.N.Y., and 3 prior actions in this district.[1] By Order dated February 8, 2011, plaintiff was barred from filing further

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[1] His S.D.N.Y. cases include Fair Credit Reporting Act claims, *Papadopoulos v. Tenet Good Samaritan Inc., 08 Civ. 989 (DLC), 2008 U.S. Dist. LEXIS 76866* (bill collection action removed by Papadopoulos to federal court, where it was dismissed for lack of personal jurisdiction), bankruptcy appeals, *In Re: Gregory Papadopoulos, et al., No. 14 Civ. 3713 (KPF), 2014 U.S. Dist. LEXIS 111599*; In Re: Gregory Papadopoulos, No. 14 mc 148 (ER); *In Re: Gregory Papadopoulos; No. 14 Civ. 4750 (ER), 2015 U.S. Dist. LEXIS 27168*; **[*9]** In Re: Gregory Papadopoulos, No. 15 Civ. 1642 (PGG), Social Security cases, *Papadopoulos v. Comm'r of Soc. Sec., No. 10 Civ. 7980 (RWS), 2011 U.S. Dist. LEXIS 126804*; *Papadopoulos v. Comm'r of Soc. Sec., No. 13 Civ. 3163 (RWS), 2014 U.S. Dist. LEXIS 67586*, and civil rights actions, *Papadopoulos v. United States Gov't, et al., No. 08 Civ. 11256 (RMB), 2010 U.S. Dist. LEXIS 81018, 2010 WL 3155037 (Aug. 9, 2010)* (granting defendants' motions to dismiss plaintiff's civil rights claims against the Palm Beach Police and the FBI); *Papadopoulos v. Mineeva, et al., No. 10 Civ. 4882, 2011*

actions in the S.D.N.Y. without prior permission from the court. *Papadopoulos v. Mineeva, et al., No. 10 Civ. 4882, 2011 U.S. Dist. LEXIS 157219 (S.D.N.Y. Feb. 8, 2011)*. Although that case was filed *in forma pauperis*, the filing injunction neither relied on *28 U.S.C. § 1915(e)* nor limited the ban to cases seeking IFP status.

Plaintiff filed three prior cases in this district. In **[*10]** *Papadopoulos v. Amaker, et al., No. 12 Civ. 3608 (DLI), 2013 U.S. Dist. LEXIS 89796*, he sued the judge presiding over his 2011 state court criminal prosecution (and other defendants) regarding the proceeding and his detention in the Manhattan Psychiatric Center. It also included references to his Family Court proceedings and the alleged conspiracies involving the FBI and "Palm Beach Mafia" that are the subject of the instant complaint. Judge Irizarry granted defendants' motions to dismiss and warned plaintiff that the future filing of non-meritorious complaints could result in the issuance of a filing injunction.

While that case was pending, plaintiff filed two additional actions, *Papadopoulos v. Obama, et al., No. 13 Civ. 0810 (DLI), 2013 U.S. Dist. LEXIS 55093*, and *Papadopoulos v. Fanjul, et al., No. 13 Civ. 2456 (DLI), 2013 U.S. Dist. LEXIS 86622*. Judge Irizarry found that these cases advanced "frivolous and fantastic allegations of the purported conspiracy between the Palm Beach Mafia and various members and branches of government." *Papadopoulos v. Amaker, et al., No. 12 Civ. 3608, 2013 U.S. Dist. LEXIS 89796, 2013 WL 3226757, at *5 (E.D.N.Y. Jun. 25, 2013)*. Thus, she dismissed both cases *sua sponte* and warned plaintiff that further frivolous litigation could result in issuance of a filing injunction. See, e.g., *Papadopoulos v. Fanjul, No. 13 Civ. 2456, 2013 U.S. Dist. LEXIS 86622, 2013 WL 3149455, at *2 (E.D.N.Y. Jun. 19, 2013)*.

DISCUSSION

I. Dismissal of the Complaint

The Court is mindful that "[a] document filed *pro* ***[*11]*** *se* is to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007)* (internal quotation marks and citations omitted). If a liberal reading of the complaint "gives any indication that a valid claim might be stated," the Court must grant leave to amend the complaint. See *Cuoco v. Moritsugu, 222 F.3d 99, 112 (2d Cir. 2000)*. Moreover, at the pleading stage of the proceeding, the Court must assume the truth of "all well-pleaded, nonconclusory factual allegations" in the complaint. *Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 123 (2d Cir. 2010)* (citing *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949-50, 173 L. Ed. 2d 868 (2009)*. A complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 1960, 167 L. Ed. 2d 929 (2007)*. Although "detailed factual allegations" are not required, "[a] pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." *Ashcroft, 556 U.S. at 678, 129 S. Ct. at 1949* (internal quotation marks and citations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555, 127 S. Ct. at 1965*.

Regardless of whether a plaintiff has paid the filing fee, a district court has the inherent power to dismiss a case, *sua sponte*, if it determines that the action is frivolous or the court lacks jurisdiction over the matter. *Fitzgerald v. First East Seventh St. Tenants Corp., 221 F.3d 362, 363-64 (2d Cir. 2000)*; *Fed. R. Civ. P. 12(h)(3)*. An **[*12]** action is "frivolous" when either: (1) "the factual contentions are clearly baseless, such as when allegations are the product of delusion or fantasy"; or (2) "the claim is based on an indisputably meritless legal theory." *Livingston v.*

U.S. Dist. LEXIS 157219 (S.D.N.Y. Feb. 8, 2011) (barring plaintiff from filing further actions in the court without prior permission and noting June 23, 2010 Order dismissing the case as frivolous and duplicative); Papadopoulos v. City of New York, et al., No. 10 Civ. 9454 (GBD) (dismissed in light of the February 8, 2011 filing injunction); *Papadopoulos v. Obama, et al., No. 12 Civ. 8736 (LAP), 2012 U.S. Dist. LEXIS 190430* (same); and Papadopoulos v. The Clerk of the Court for the SDNY, No. 13 Civ. 724 (LAP) (request for leave to file dismissed as meritless). In addition to the publicly available cases, plaintiff makes a reference to "Papadopoulos v. Gazes et al 13-1506 for similar claims prior to 2013." That case is filed under seal.

Adirondack Beverage Co., 141 F.3d 434, 437 (2d Cir. 1998) (internal quotation marks and citation omitted). "[A] finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them." *Denton v. Hernandez, 504 U.S. 25, 33, 112 S. Ct. 1728, 1733, 118 L. Ed. 2d 340 (1992)*. "A court may dismiss a claim as 'factually frivolous' if the sufficiently well-pleaded facts are 'clearly baseless'—that is, if they are 'fanciful,' 'fantastic,' or 'delusional.'" *Gallop v. Cheney, 642 F.3d 364, 368 (2d Cir. 2011)* (quoting *Denton, 504 U.S. at 32-33, 112 S. Ct. at 1733*).

In this case, plaintiff's submissions allege a vast conspiracy between a few Florida individuals and various government officials at all levels in events ranging from the assassination of President Kennedy, to the collapse of global financial entities, to the manipulation of plaintiff's divorce and bankruptcy cases, to the interference with plaintiff's ability to find an apartment or hire a CPA or attorney. These allegations "rise to the level of the irrational or the wholly incredible." *Denton, 504 U.S. at 33, 112 S. Ct. at 1733*. Plaintiff's three **[*13]** prior cases in this district alleged similar fantastic claims and were dismissed. Since the instant complaint is devoid of any basis in law or fact, this action is also dismissed as frivolous without leave to amend, as any such amendment would be futile. See *Cuoco, 222 F. 3d at 112*.

II. No Basis for *Qui Tam* Action

Plaintiff also purports to bring his claims as a *qui tam* complaint pursuant to the "Whistleblowers Act." The False Claims Act ("FCA"), *31 U.S.C. § 3729 et seq.*, provides for liability when any person "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." *31 U.S.C. § 3729(a)(1)*. The *qui tam* provisions of the FCA allow a private individual, known as a relator, to "bring a civil action for a violation of *section 3729* for the person and for the United States Government . . . in the name of the Government." *31 U.S.C. § 3730(b)(1)*. "The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." *31 U.S.C. § 3730(b)(2)*. During this 60-day period, the United States may elect to intervene in the action or allow the relator to proceed on behalf of the United States, or move to dismiss the action. *31 U.S.C. §§ 3730(b)(4)* and *(c)(2)(A)*.

A *qui tam* action under the FCA is brought "on behalf of and in **[*14]** the name of the government" while the "government remains the real party in interest." *U.S. ex rel Kreindler & Kreindler v. United Technologies Corp., 985 F.2d 1148, 1154 (2d Cir. 1993)*. The *qui tam* relator acts in a representative capacity and not on his own behalf. *Pro se* litigants can only act on their own behalf and not for the benefit of any other party or interest. See *Iannaccone v. Law, 142 F.3d 553, 558 (2d Cir. 1998)*. Accordingly, a *qui tam* relator cannot proceed *pro se*. See *United States ex rel. Mergent Servs. v. Flaherty, 540 F.3d 89, 93 (2d Cir. 2008)*.

Plaintiff argues that his proposed *qui tam* suit cannot be *sua sponte* dismissed until 60 days have elapsed and the United States government has decided whether to intervene. He is mistaken. One provision of the FCA provides that an action brought under the FCA "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." *31 U.S.C. § 3730(b)(1)*. However, *Rule 12(h)(3) of the Federal Rules of Civil Procedure* establishes the general rule: "Whenever it appears by suggestion of the parties *or otherwise* that the court lacks jurisdiction of the subject matter, the court *shall* dismiss the action." *Fed.R.Civ.P. 12(h)(3)* (emphasis added). In this case, plaintiff cannot proceed *pro se* under the FCA; thus the Court lacks jurisdiction over his claims. See *U.S. ex rel. Rafael Manuel Pantoja v. Citigroup, Inc., et al., No. 12 Civ. 4964, 2013 U.S. Dist. LEXIS 15548, 2013 WL 444030 (E.D.N.Y. Feb. 5, 2013)* (dismissing action *sua sponte* because *pro se* plaintiff cannot proceed as a relator in a *qui tam* case); see also *Ananiev v. Freitas, 37 F. Supp. 3d 297, 307 (D.D.C. 2014)* (dismissing *sua sponte* ***[*15]*** where "[t]he plaintiff's FCA claims . . . fail to state a claim upon which relief may be granted because he is impermissibly attempting to proceed *ex relatione* without counsel.").

Plaintiff *pro* se may not proceed as a relator in a *qui* tam action. Therefore, because the Court lacks subject matter jurisdiction in this case, plaintiff's proposed claims under the FCA are dismissed *sua sponte*.

III. Proposed Filing Injunction

The federal courts have limited resources. Frequent frivolous filings work to diminish the ability of the courts to manage their dockets for the efficient administration of justice. "The district courts have the power and the obligation to protect the public and the efficient administration of justice from individuals who have a history of litigation entailing vexation, harassment and needless expense to other parties and an unnecessary burden on the courts and their supporting personnel." *Lau v. Meddaugh, 229 F.3d 121, 123 (2d Cir. 2000)* (internal quotation marks omitted). "If a litigant has a history of filing vexatious, harassing or duplicative lawsuits, courts may impose sanctions, including restrictions on future access to the judicial system." *Hong Mai Sa v. Doe, 406 F.3d 155, 158 (2d Cir. 2005)* (internal quotations and citations omitted). "The unequivocal rule in this **[*16]** circuit is that the district court may not impose a filing injunction on a litigant *sua sponte* without providing the litigant with notice and an opportunity to be heard." *Moates v. Barkley, 147 F.3d 207, 208 (2d Cir. 1998)*.

Plaintiff is already on notice. He is already barred from filing future actions in the United States District Court for the Southern District of New York without prior permission. *Papadopoulos v. Mineeva, 10 Civ. 4882, 2011 U.S. Dist. LEXIS 157219 (S.D.N.Y. Feb. 8, 2011)*. In this district, he has thrice been warned that further filing of non-meritorious complaints may result in limitations on his ability to file future complaints. The instant complaint raises the same fantastic allegations that were previously asserted and dismissed in prior cases in this district and in the S.D.N.Y. The Court finds that plaintiff's frequent frivolous filings detract from the legitimate cases before it. Accordingly, plaintiff is directed to show cause, by written affirmation, within 20 days of the date of this Memorandum and Order, why the Court should not bar the acceptance for filing of any future frivolous complaints related to these allegations without leave of the Court. If plaintiff fails to show cause within the time allotted, he shall be barred **[*17]** from filing any future frivolous complaints related to these allegations without leave of the Court.

CONCLUSION

For the reasons set forth above, this action is dismissed as frivolous. Plaintiff is directed to show cause by written affirmation, within 20 days of the date of this Memorandum and Order, why he should not be barred from filing future frivolous complaints related to these allegations without leave of the Court. Although plaintiff paid the filing fee to bring this action, the Court certifies pursuant to *28 U.S.C. § 1915(a)(3)* that any *in forma pauperis* appeal from this order would not be taken in good faith. *Coppedge v. United States, 369 U.S. 438, 444-45, 82 S. Ct. 917, 920-21, 8 L. Ed. 2d 21 (1962)*.

SO ORDERED.

/s/ Brian M. Cogan

U.S.D.J.

Dated: Brooklyn, New York

June 8, 2015

Eastman v. Quest Diagnostics Inc.

United States District Court for the Northern District of California

June 9, 2015, Decided; June 9, 2015, Filed

Case No. 15-cv-00415-WHO

Reporter

108 F. Supp. 3d 827 *; 2015 U.S. Dist. LEXIS 74612 **; 2015-1 Trade Cas. (CCH) P79,212

COLLEEN EASTMAN, et al., Plaintiffs, v. QUEST DIAGNOSTICS INCORPORATED, Defendant.

Subsequent History: Motion denied by *Eastman v. Quest Diagnostics Inc., 2015 U.S. Dist. LEXIS 81421 (N.D. Cal., June 22, 2015)*

Motion granted by, Dismissed without prejudice by *Eastman v. Quest Diagnostics Inc., 2015 U.S. Dist. LEXIS 159563 (N.D. Cal., Nov. 25, 2015)*

Request denied by *Eastman v. Quest Diagnostics, Inc., 2016 U.S. Dist. LEXIS 1282 (N.D. Cal., Jan. 6, 2016)*

Dismissed by *Eastman v. Quest Diagnostics Inc., 2016 U.S. Dist. LEXIS 56266 (N.D. Cal., Apr. 26, 2016)*

Core Terms

prices, out-patient, competitors, billing, monopolization, relevant market, diagnostic testing, allegations, plaintiffs', practices, health plan, Laboratories, testing, routine, leave to amend, antitrust, monopoly, substantial share, above-competitive, foreclosed, medical provider, acquisition, below-cost, pleaded, anticompetitive, exclusionary, Diagnostics, discounts, motion to dismiss, market share

LexisNexis® Headnotes

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

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

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

A motion to dismiss should be granted under *Fed. R. Civ. P. 12(b)(6)* where the pleadings fail to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*. The court must accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party, drawing all reasonable inferences from those facts in the nonmoving party's favor. A complaint may be dismissed if it does not allege enough facts to state a claim to relief that is plausible on its face. A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. However, a complaint does not suffice if it tenders naked assertions devoid of further factual enhancement, and the court need not assume the truth of legal conclusions merely because they are cast in the form of factual allegations. If a motion to dismiss is granted, a court should normally grant leave to amend unless it determines that the pleading could not possibly be cured by allegations of other facts.

Antitrust & Trade Law > Sherman Act

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

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

The analysis under California's ***antitrust law*** mirrors the analysis under federal law because the Cartwright Act, *Cal. Bus. & Prof. Code § 16700*, was modeled after the Sherman Act.

Antitrust & Trade Law > Sherman Act > Claims

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

HN3[] **Sherman Act, Claims**

The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. To violate the second element, a defendant must use its monopoly power to foreclose competition, to gain a competitive advantage, or to destroy a competitor.

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

Antitrust & Trade Law > Sherman Act > Claims

HN4[] **Actual Monopolization, Anticompetitive & Predatory Practices**

To be actionable under § 2 of the Sherman Act, a monopolist's conduct must have an anticompetitive effect. That is, it must harm the competitive process and thereby harm consumers. In contrast, harm to one or more competitors will not suffice. Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws.

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

Antitrust & Trade Law > Sherman Act > Claims

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

HN5[] **Actual Monopolization, Anticompetitive & Predatory Practices**

To be actionable under § 2 of the Sherman Act, a monopolist's conduct must foreclose competition in a substantial share of the line of commerce affected. Establishing that a substantial share of the relevant market is foreclosed is necessary because, for the monopolist's conduct to adversely affect competition, the opportunities for other traders to enter into or remain in that market must be significantly limited. To determine substantiality in a given case, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein.

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

HN6[] **Deceptive & Unfair Trade Practices, State Regulation**

To plead a claim under the California Unfair Practices Act, *Cal. Bus. & Prof. Code §§ 17043*, *17044*, the plaintiff must allege defendant's sales price, its cost in the product and its cost of doing business. To satisfy the pleading requirements of *§ 17043*, the plaintiff must allege defendant's sales price, its cost in the product and its cost of doing business.

Counsel: [1]** For Colleen Eastman, Christi Cruz, Carmen Mendez, Plaintiffs: Robert Stephen Berry, LEAD ATTORNEY, Berry Law PLLC, Washington, DC; Colleen Duffy-Smith, Morgan Duffy-Smith & Tidalgo, LLP, San Jose, CA; J. Ross Wallin, PRO HAC VICE, Grais and Ellsworth LLP, New York, NY; Silvia Noemi Ostrower, PRO HAC VICE, Grais and Ellsworth LLP, New York, NY.

For Quest Diagnostics Incorporated, Defendant: Allison Winifred Reimann, Richard Raskin, PRO HAC VICE, Ryan M. Sandrock, Sidley Austin LLP, Chicago, IL.

Judges: WILLIAM H. ORRICK, United States District Judge.

Opinion by: WILLIAM H. ORRICK

Opinion

[*829] ORDER GRANTING MOTION TO DISMISS WITH LEAVE TO AMEND

Re: Dkt. No. 20

INTRODUCTION

Plaintiffs seek to assert antitrust and related state-law claims against defendant **[*830]** Quest Diagnostics Incorporated for its alleged monopoly pricing for routine diagnostic testing services. Plaintiffs' claims fail because they have not sufficiently alleged that they were injured by Quest's anticompetitive practices or that Quest's conduct foreclosed competition in a substantial share of the relevant market. Plaintiffs' complaint is DISMISSED WITH LEAVE TO AMEND.

BACKGROUND

Plaintiffs Colleen Eastman, Christi Cruz, and Carmen Mendez are individuals who have paid **[**2]** for out-patient routine diagnostic testing services by Quest. Compl. ¶¶ 33-35 [Dkt. No. 1]. Their payments to Quest were "as a result of" or "to fulfill" their "co-payment and deductible obligations." *Id.* They allege that Quest was able to charge above-competitive prices for its diagnostic testing services as a result of its exclusionary anti-competitive practices, including eliminating competitors and colluding with major health plans to limit competition in the diagnostic testing services market. *Id.* ¶¶ 115-117.

Plaintiffs allege four causes of action against Quest: (i) monopolization in violation of Section 2 of the Sherman Act; (ii) violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200; (iii) violation of California's Unfair Practices Act, Cal. Bus. & Prof. Code §§ 17043, 17044; and (iv) monopolization in violation of California's Cartwright Act, Bus. & Prof. Code § 16700.

LEGAL STANDARD

HN1[] A motion to dismiss should be granted under Federal Rule of Civil Procedure 12(b)(6) where the pleadings fail to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The court must "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party," Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008), drawing all "reasonable inferences" from those facts in the nonmoving party's favor, **[**3]** Knievel v. ESPN, 393 F.3d 1068, 1080 (9th Cir. 2005). A complaint may be dismissed if it does not allege "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). However, "a complaint [does not] suffice if it tenders naked assertions devoid of further factual enhancement," *id.* (quotation marks and brackets omitted), and the court need not "assume the truth of legal conclusions merely because they are cast in the form of factual allegations," W. Min. Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). If a motion to dismiss is granted, a court should normally grant leave to amend unless it determines that the pleading could not possibly be cured by allegations of other facts. Cook, Perkiss & Liehe v. N. Cal. Collection Serv., Inc., 911 F.2d 242, 247 (9th Cir.1990).

DISCUSSION

Quest moves to dismiss the complaint, arguing that (i) plaintiffs lack Article III and statutory standing because they do not allege that Quest's conduct had any impact on the amount they paid for Quest's services; (ii) the monopolization claims fail because plaintiffs do not plead facts necessary to show that Quest's conduct injured competition; (iii) plaintiffs do not plead Quest's pricing and costs necessary to sustain **[**4]** the Unfair Practices Act claim; and (iv) the Unfair Competition Law claim is derivative of the other claims. I heard **[*831]** oral argument on May 13, 2015 and now address each argument in turn.

I. STANDING

A. Article III and statutory standing

Quest argues that plaintiffs lack Article III and statutory standing because plaintiffs do not allege that their co-payments or deductibles are higher because of Quest's conduct or would be lower if their testing had been referred to a competitor of Quest. Plaintiffs respond that the purchase of products affected by an anti-competitive overcharge is sufficient to establish standing and that they have satisfied this showing because they allege that "they were injured by the monopoly overcharges that they paid for routine diagnostic testing performed by Quest." Dkt. No. 25 at 19.

Plaintiffs cite to paragraphs 1 and 115-117 of their complaint. *Id.* Those paragraphs state, in their entirety:

> 1. This is a class action under the Sherman Act and related state laws on behalf of health plans and out-patients to recover monopoly overcharges that they have paid directly to Quest Diagnostics Incorporated for routine diagnostic testing.
>
> 115. As a result of its long-term **[**5]** and persistent pattern of kickbacks, exclusionary contracting with aligned health insurers, and acquisitions to advance its overall scheme to monopolize, Quest has injured, and

> continues to injure, competition in the relevant market for plan/out-patient billing. The injury to competition is manifest in at least three ways: above-competitive prices, inferior quality of testing, and reduction in choice among providers of routine diagnostic testing.
> 116. There is ample evidence that Quest has controlled prices in the relevant market in Northern California since at least 2011.
> 117. Quest is a rational monopolist. It often substantially discounts its prices in the physician billing market to well below cost to get pull-through business in the relevant plan/out-patient billing market; therefore, it must add a monopoly premium for pull-through testing to compensate for its below-cost prices. The fact that it has been able to charge such premiums for over a decade is strong evidence of its control over pricing in the relevant market for plan/out-patient billing.

Paragraphs 1 and 115-117 do not allege that plaintiffs made any payments to Quest, what portion of their co-payment or deductible obligations **[**6]** relate to testing performed by Quest, or that any payments were higher as a result of Quest's anticompetitive conduct. Plaintiffs allege elsewhere that they made payments to Quest "as a result of" or "to fulfill" their "co-payment and deductible obligations," Compl. ¶¶ 33-35, but they do not identify their health plans, whether they are covered by an HMO, PPO, or indemnity plan, or the amount they paid to Quest.

At oral argument, counsel for plaintiffs argued that plaintiffs sufficiently alleged antitrust injury because paragraph 115 alleges that "[t]he injury to competition is manifest in . . . above-competitive prices." But merely alleging that Quest charged above-competitive prices, without alleging facts demonstrating that plaintiffs were injured as a result of Quest's anticompetitive conduct, is insufficient. As plaintiffs have pleaded no facts from which I can conclude that they have been injured, they lack both Article III and statutory standing. *See, e.g.,* *Gerlinger v. Amazon.com, Inc., 526 F.3d 1253, 1254 (9th Cir. 2008)* ("the plaintiff **[*832]** lacks standing because he did not show that he ever purchased an item for a higher price than he would have paid had there been no marketing agreement and thus has suffered no injury-in-fact"); *Spindler v. Johnson & Johnson Corp., No. 10-cv-01414 JSW, 2011 U.S. Dist. LEXIS 158559, 2011 WL 12557884, at *4 (N.D. Cal. Aug. 1, 2011)* **[**7]** (dismissing antitrust claims where plaintiffs identified how much they paid alleged conspirators for medications, but did not allege that their co-payments increased as a result of the alleged anti-competitive conduct).

The cases cited by plaintiffs are inapposite. *Perez v. State Farm Mut. Auto. Ins. Co., 319 F. App'x 615 (9th Cir. 2009)* is an unpublished memorandum disposition and is not precedential. In any event, it did not involve alleged harm based on co-payments or deductibles. Rather, the plaintiffs in *Perez* alleged that the defendant automobile insurers conspired to "artificially inflate[] premiums." *Id. at 617*. There is no such allegation here. *Giuliano v. SanDisk Corp.* also involved alleged products purchased from defendant at above-competitive prices and is likewise inapposite. *10-cv-02787 SBA, 2014 U.S. Dist. LEXIS 132163, 2014 WL 4685012, at *3 (N.D. Cal. Sept. 19, 2014)* ("Ritz has alleged that it purchased tens of millions of dollars of flash memory products from SanDisk, and that, due to SanDisk's monopolization of the relevant market for flash memory products, Ritz paid above-competitive prices for such products").

Because plaintiffs have not sufficiently alleged that they were injured as a result of Quest's conduct, they lack standing and their claims are DISMISSED WITH LEAVE TO AMEND.

B. Standing on behalf [8] of health plans**

Plaintiffs seek to represent a class of "out-patients *or health plans* residing in Northern California who have paid Quest directly for routine diagnostic testing on or after January 29, 2011 under plan/out-patient billing arrangements." Compl. ¶ 40 (emphasis added). Quest argues that the named plaintiffs, who are individuals who allegedly received diagnostic testing from Quest, lack standing to represent health plans.

Plaintiffs contend that they have standing to assert claims on behalf of health plans because "both the out-patients and the plans that are members of the class are harmed in exactly the same way. Both pay Quest directly and both are subject to Quest's overcharging." Dkt. No. 25 at 21. In support, plaintiffs cite my statement in *Ang v. Bimbo Bakeries USA, Inc.*, that:

> The Ninth Circuit, consistent with *Gratz*, has cautioned courts that when addressing standing in the context of a class action, in 'determining what constitutes the same type of relief or the same kind of injury, we must be careful not to employ too narrow or technical an approach. Rather, we must examine the questions realistically: we must reject the temptation to parse too finely, and consider **[**9]** instead the context of the inquiry.'

*No. 13-cv-01196-WHO, 2014 U.S. Dist. LEXIS 34443, 2014 WL 1024182, at *4 (N.D. Cal. March 13, 2014)* (citing *Armstrong v. Davis, 275 F.3d 849, 867 (9th Cir. 2001))*.

Ang was a food mislabeling case and is inapposite. There I held that class representatives had standing to assert claims on behalf of class members who purchased substantially similar products that were mislabeled in the same way because the alleged injury was identical. *Ang, 2014 U.S. Dist. LEXIS 34443, 2014 WL 1024182, at *8* ("The injury allegedly suffered by the plaintiffs is identical to the injury suffered by consumers who purchased the other type of bread."). Unlike *Ang*, the complaint here does not **[*833]** allege facts from which I can conclude that the alleged injuries suffered by the named plaintiffs and health-plans are identical. Any injury to health plans would depend on the pricing agreements the health plans have with Quest and how those prices have been affected by the challenged conduct. Given the different nature of the relationship between individual patients and Quest on one hand and between health plans and Quest on the other, plaintiffs' conclusory statement that the injuries are identical is insufficient to confer standing for health plans.

II. MONOPOLIZATION CLAIMS[1]

Plaintiffs allege that Quest competes in two relevant product markets for the sale of routine diagnostic testing in Northern California: (i) the plan/out-patient market and (ii) the physician billing market. Compl. ¶¶ 3-4. In the plan/out-patient market, routine diagnostic testing is billed directly to health plans or out-patients. The plan or the out-patient typically pays Quest directly for testing, on a test-by-test basis ("fee-for-service testing"). In many instances, the bills are paid jointly by the plan and the out-patient (through deductibles or other plan terms). In contrast, in the physician billing market, Quest bills medical providers directly for routine diagnostic testing.

Plaintiffs allege that Quest has monopolized and "substantially foreclosed competition" in the plan/out-patient market through three exclusionary practices:

> (1) it has paid kickbacks to medical providers (in the form of dramatically below-cost **[**11]** billings) in the relevant market for physician billing to induce them to refer all other routine diagnostic testing done in the relevant market for plan/out-patient billing to Quest exclusively regardless of Quest's pricing or its testing quality[2];
> (2) it has colluded with two major private health insurers [Blue Shield of California and Aetna] to suppress its competition in the relevant market for plan/out-patient billing; and
> (3) it has acquired its competitors for plan/out-patient billing in order to eliminate their competition. As a result of these exclusionary practices, since at least 2011, Quest has been able to charge above-competitive prices to members of the Class while providing inferior quality service.

Compl. ¶ 20; *see also id.* ¶¶ 30, 70, 130, 148.

The three alleged exclusionary practices by Quest were previously considered in this district in *Rheumatology Diagnostics Lab., Inc. v. Aetna, Inc.*, No. 12-cv-05847, a separate matter brought by various medical **[**12]**

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[1] I analyze plaintiffs' monopolization claims under the Sherman Act and California's Cartwright Act (first **[**10]** and fourth causes of action) jointly under federal law because the Cartwright Act mirrors the Sherman Act. *See Cnty of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001)* (***HN2***[] "The analysis under California's ***antitrust law*** mirrors the analysis under federal law because the Cartwright Act was modeled after the Sherman Act.").

[2] Plaintiffs do not allege that Quest has monopolized the physician billing market itself. Rather, it alleges that Quest leveraged its position in the physician billing market to foreclose competition in the plan/out-patient market.

diagnostic laboratories against Quest and other defendants which included monopolization claims similar to those at issue here. Judge Tigar granted the defendants' motion to dismiss with leave to amend in *Rheumatology Diagnostics Lab., Inc. v. Aetna, Inc., No. 12-cv-05847-JST, 2013 U.S. Dist. LEXIS 89208, 2013 WL 3242245 (N.D. Cal. June 25, 2013)* ("*Rheumatology I*"). The matter was **[*834]** subsequently transferred to me. In *Rheumatology Diagnostics Lab., Inc. v. Aetna, Inc., No. 12-cv-05847-WHO, 2013 U.S. Dist. LEXIS 151128, 2013 WL 5694452 (N.D. Cal. Oct. 18, 2013)* ("*Rheumatology II*"), I granted the defendants' motion to dismiss the monopolization claims in the first amended complaint with leave to amend, finding that the plaintiffs did not sufficiently allege that the practices foreclosed competition. The plaintiffs did not allege monopolization claims in their second amended complaint. *See Rheumatology Diagnostics Lab., Inc. v. Aetna, Inc.*, No. 12-cv-05847, Dkt. No. 122-3 (N.D. Cal. November 18, 2013) (second amended complaint).

Plaintiffs argue that Quest's three alleged exclusionary practices are actionable if their "combined effect is to foreclose a 'substantial share of the relevant market.'" Dkt. No. 25 at 10-11 (citing *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 328, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961))*. That is true, but the three alleged exclusionary practices cannot sustain plaintiffs' monopolization claims here **[**13]** for the same reasons they failed in *Rheumatology Diagnostics:* plaintiffs have not sufficiently pleaded that the alleged practices, whether independently or in combination, caused antitrust injury or foreclosed competition in a substantial share of the relevant market, the plan/out-patient market in Northern California.[3]

A. Law regarding Sherman Act § 2 claims

HN3[] "The offense of monopoly under *§ 2* of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* (citation omitted).

To violate the second element, a defendant must use its monopoly power "to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *Id. at 482-83* (citation omitted). Accordingly, ***HN4***[] to be actionable under *section 2*, a monopolist's **[**14]** conduct "must have an 'anticompetitive effect.' That is, it must harm the competitive *process* and thereby harm consumers. In contrast, harm to one or more *competitors* will not suffice." *United States v. Microsoft Corp., 253 F.3d 34, 58, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (emphasis in original) (citations omitted); *see also Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)* ("Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws....").

In addition, ***HN5***[] to be actionable under *section 2*, a monopolist's conduct must "foreclose competition in a substantial share of the line of commerce affected." *Kolon Indus. Inc. v. E.I. DuPont de Nemours & Co., 748 F.3d 160, 175 (4th Cir.) cert. denied, 135 S. Ct. 437, 190 L. Ed. 2d 352 (2014)* (quoting *Tampa Elec, 365 U.S. at 328*). Establishing that a substantial share of the relevant market is foreclosed is necessary because, for the monopolist's conduct to adversely affect competition, "the opportunities for other traders to enter into or remain in that market must be significantly **[*835]** limited." *Id.* (quoting *Tampa Elec., 365 U.S. at 328*). The Supreme Court has explained that:

> To determine substantiality in a given case, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant **[**15]** market area,

[3] Because I determine that plaintiffs have not sufficiently pleaded foreclosure or antitrust injury in the relevant market and, separately, lack standing as discussed above, I do not address whether plaintiffs have sufficiently alleged monopoly power in a relevant product market.

and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein.

Tampa Elec., 365 U.S. at 329.

B. Kickbacks to medical providers

Plaintiffs allege that Quest has discounted its pricing on testing that is billed to medical providers to as much as 50% or more below cost in exchange for commitments by the medical providers to refer all additional testing done under plan/out-patient billing to Quest exclusively. Compl. ¶ 21. According to plaintiffs, these discounts effectively function as kickbacks to the medical providers, in exchange for which the providers refer all of their routine diagnostic testing in the plan/out-patient market to Quest, regardless of whether Quest can provide the lowest cost or highest quality testing. *Id.* ¶ 22. Plaintiffs refer to sales realized through this referral process as "pull-through sales." *Id.* They allege that this practice allows Quest to build market share and charge monopoly prices in the plan/out-patient market. *Id.* ¶ 23.

Judge Tigar rejected monopolization claims based on the same allegations in *Rheumatology I* for lack of antitrust injury. He explained that the plaintiffs had not shown how the **[**16]** alleged below-cost pricing to medical providers allowed Quest to raise prices above competitive levels in the plan/out-patient market. *Rheumatology I, 2013 U.S. Dist. LEXIS 89208, [WL] at *14* ("there is no allegation that Quest is able to raise prices on its [plan/out-patient market] business, and the effect of the alleged arrangement on "loss-leader" services would be to keep prices low"). I subsequently rejected the same allegations in the first amended complaint. *Rheumatology II, 2013 U.S. Dist. LEXIS 151128, [WL] at *15* ("the FAC fails to allege that such business is priced above a competitive level, or that Quest's alleged scheme will lead to its raising the prices of laboratory diagnostic services above supra-competitive levels. Without these allegations, the plaintiffs cannot support their causes of action for monopolization.").

As in *Rheumatology*, Quest's alleged discounts to medical providers do not show antitrust injury. Plaintiffs allege that the discounts allow Quest to charge "monopoly prices" or "above-competitive prices" on its plan/out-patient business, but they have not alleged what Quest's prices are or how they compare to competitive prices. *See, e.g.*, Compl. ¶¶ 23, 31, 58. Rather, they assert that Quest "*must* add a monopoly premium for pull-through testing to compensate for **[**17]** its below-cost prices." Compl. ¶ 117 (emphasis added). This allegation is conclusory and speculative and does not satisfy the requirement to plead plausible claims. *See, e.g.,* Intellectual Ventures I LLC v. Capital One Fin. Corp., 2013 U.S. Dist. LEXIS 177836, 2013 WL 6682981, at *6 (E.D. Va. Dec. 18, 2013) (dismissing monopolization counterclaim where counter-plaintiff "provide[d] nothing other than conclusory allegations that IV has demanded and received 'supracompetitive prices'"). In the absence of antitrust injury, the alleged discounts provided by Quest are presumably pro-competitive and not actionable under the antitrust laws. *Cf.* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) ("cutting prices in order to increase business often is the very essence of competition").

[*836] C. Collusion with Aetna and Blue Shield to suppress competition

Plaintiffs allege that Quest "has paid large sums" to Blue Shield of California and Aetna, Inc., the third and fourth largest private health insurers in Northern California, "to induce them to exclude competitors of Quest from their networks, which has made it impossible or very difficult for these other laboratories to compete with Quest." Compl. ¶¶ 24-25. Specifically, they assert that Quest induced Aetna to kick 400 of Quest's competitors out of the Aetna network nationwide, including two competitors that were located in Northern California: **[**18]** Hunter Laboratories and Western Health Sciences Medical Laboratory. *Id.* ¶¶ 25, 88. Similarly, they contend that Quest gave Blue Shield a 10% discount in exchange for Blue Shield's agreement to kick two of Quest's competitors, Westcliff Medical Laboratories and Hunter Laboratories, out of the Blue Shield network in Northern California. *Id.* ¶¶ 25, 101. They state that Aetna and Blue Shield cooperate with Quest to "crack the whip" over physicians to coerce them not to refer plan/out-patient business to Quest's competitors and that "physicians face retaliation if they refuse to cooperate, including threats to terminate their plan contracts." *Id.* ¶ 27.

I considered the same allegations in *Rheumatology II*. They were insufficient to sustain plaintiffs' monopolization claims because the plaintiffs "d[id] not say how Quest has grown or maintained its market position or how competition generally has fared relative to Quest" as a result of those alleged agreements.[4] *Rheumatology II, 2013 U.S. Dist. LEXIS 151128, [WL] at *15*; *see also* *Rheumatology Diagnostics I, 2013 U.S. Dist. LEXIS 89208, [WL] at *11* (rejecting same allegations because plaintiffs did not allege that Quest obtained its market share because of the alleged agreements or specify how the agreements affected competition generally).

The same is true here. Plaintiffs have not alleged sufficient facts from which I can conclude that Quest's alleged agreements with Aetna and Blue Shield foreclosed competition in a substantial share of the plan/out-patient market in Northern California. The two agreements, in combination, allegedly resulted in the elimination of three of Quest's competitors in Northern California: Hunter Laboratories, Western Health Sciences Medical Laboratory, and Westcliff Medical Laboratories. But without allegations regarding those competitors' prior market **[**20]** shares or the number or lack of other competitors, plaintiffs have at most alleged harm to those competitors, not to competition. *See* *Rheumatology II, 2013 U.S. Dist. LEXIS 151128, [WL] at *12* ("It may very well be that Hunter, Westcliff, and SPA constitute a 'substantial share' of the relevant market or markets, but with only what the plaintiffs present, the Court cannot tell. All that can be said is that three of Quest's alleged competitors were injured, but the antitrust laws are meant to protect competition, not competitors.").

Although plaintiffs allege that Blue Shield and Aetna are "the third and fourth largest private health insurers in Northern California," Compl. ¶ 25, they do not address the circumstances of other health **[*837]** insurers in the relevant market, including two which are apparently larger than Blue Shield and Aetna. Plaintiffs cannot rely on Quest's arrangements with Blue Shield and Aetna to establish foreclosure of a substantial share of the plan/out-patient market in Northern California without accounting for other players which significantly impact competition in the market. *See, e.g.,* *Tampa Elec., 365 U.S. at 329* (discussing various factors necessary to determine substantiality of foreclosure); *cf.* *Microsoft, 253 F.3d at 69* ("Because an exclusive deal affecting a small fraction **[**21]** of a market clearly cannot have the requisite harmful effect upon competition, the requirement of a significant degree of foreclosure serves a useful screening function.").

D. Quest's acquisition of competitors in the plan/out-patient market

Plaintiffs allege that Quest was the second largest provider of diagnostic testing in Northern California in 2003 when it acquired its largest competitor, Unilab Corporation. Compl. ¶ 28. According to plaintiffs, "the acquisition of Unilab allowed Quest to increase its market share from 17% to 53% [in the plan/out-patient and physician billing markets combined], making it by far the largest competitor in the market." *Id.* ¶ 29. They allege that Quest increased its share of the combined by approximately another 3% in 2013 by acquiring the out-patient testing laboratories of Dignity Health. *Id.* ¶ 114.

As plaintiffs acknowledge, Quest's acquisition of Unilab Corporation was cleared by the FTC after certain divestitures by Quest. *Id.* ¶ 112. The FTC noted in its analysis of the consent decree approving the acquisition that "after the divestiture, competition in the market for providing Laboratory Services to physician groups in Northern California will **[**22]** remain virtually unchanged by the proposed acquisition." *See* Compl. ¶ 112 n.1 (citing *FTC*

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[4] *Rheumatology II* involved the same **[**19]** agreements with Aetna and Blue Shield that plaintiffs allege here. *See* *Rheumatology II, 2013 U.S. Dist. LEXIS 151128, [WL] at *5* (plaintiffs alleged that "Aetna, which insures approximately nine percent of the United States population, conspired with Quest to eliminate or exclude 400 regional laboratories from Aetna's provider network in exchange for discounts. Hunter and PBP have been denied in-network status with Aetna . . . ."), and *2013 U.S. Dist. LEXIS 151128, [WL] at *6* (plaintiffs alleged that "Quest threatened not to renew its contract with BSC [Blue Shield of California] unless BSC agreed not to renew its contracts with Westcliff and Hunter; to further induce BSC, Quest offered a 10 percent discount that 'forced' BSC to accept.").

Analysis of Quest Consent Decree, File No. 021 0140, Docket No. C-4074)[5]. Plaintiffs' allegations do not raise any doubt about that conclusion.

The acquisition of Dignity Health only increased Quest's market share by a relatively insubstantial 3%. A similar allegation did not save the complaint in *Rheumatology. See Rheumatology II, 2013 U.S. Dist. LEXIS 151128, [WL] at *5*; *see also Tampa Elec., 365 U.S. at 333, 335* (summarily dismissing *section 2* claim where conduct affected less than 1% of the market). Further, the asserted market share figures relate to the *combined* plan/out-patient and physician billing markets. Plaintiffs' monopolization claims relate to the allegedly *separate* plan/out-patient market. Accordingly, their allegations do not establish foreclosure of substantial share of the relevant market.

For the reasons stated, plaintiffs' monopolization claims under *section 2* of the Sherman Act and California's Cartwright Act are DISMISSED WITH LEAVE TO AMEND.

III. UNFAIR PRACTICES ACT

Plaintiffs allege that Quest violated California's Unfair Practices Act ("UPA"), *Cal. Bus. & Prof. Code §§ 17043*, *17044* because it sold testing services in the physician billing market below cost or as a loss leader[6] in **[**23]** order to injure class member **[*838]** and suppress competition in the plan/out-patient market. Compl. ¶¶ 143-44. Quest contends that this claim fails because the UPA protects competitors, not consumers. Quest also asserts that even if a UPA claim were actionable by consumers, plaintiffs here cannot prove injury resulting from Quest's alleged below-cost pricing (because plaintiffs benefit from Quest's alleged below-cost services).[7] Quest further argues that the UPA claim fails because plaintiffs have not alleged any of Quest's prices, the costs of any of its services, or its costs of doing business. In opposition, plaintiffs argue that the UPA is not limited to competitors and that they have plausibly pleaded injury because Quest's below-cost services destroy competition.

HN6[] To plead a UPA claim, "the plaintiff must allege defendant's sales price, its cost in the product and its cost of doing business." *Rheumatology I, 2013 U.S. Dist. LEXIS 89208, [WL] at *15*; *see also G.H.I.I. v. MTS, Inc., 147 Cal. App. 3d 256, 275, 195 Cal. Rptr. 211 (Ct. App. 1983)* ("to satisfy the pleading requirements of *section 17043*, the plaintiff must allege defendant's sales price, its cost in the product and its cost of doing business"). Plaintiffs have not pleaded Quest's prices or costs, nor did plaintiffs provide any authority in their opposition brief indicating that this is not required. Their allegations are insufficient to state a UPA claim. *See, e.g., Rheumatology I, 2013 U.S. Dist. LEXIS 89208, [WL] at *16* (dismissing UPA claim where "the Complaint makes no attempt to allege Quest's sales prices, costs, or cost of doing business. Instead, it merely alleges that Quest's capitated rate contracts are provided at 'below cost'").

In addition, plaintiffs have not pleaded actionable injury. Even assuming that injury to consumers (as opposed to injury to competitors) is actionable under the UPA, plaintiffs have not alleged injury here. As noted above, plaintiffs' allegation that Quest's below-cost pricing in the physician billing market led to above-competitive pricing or reduced competition in the plan/out-patient market is purely speculative and cannot sustain plaintiffs' claims. **[**25]** Plaintiffs' UPA cause of action is DISMISSED WITH LEAVE TO AMEND.[8]

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[5] The FTC's analysis is available at *https://www.ftc.gov/sites/default/files/documents/cases/2003/02/ftc.gov-questanalysis.htm*

[6] Loss leader means "any article or product sold at less than cost: (a) Where the purpose is to induce, promote or encourage the purchase of other merchandise; or (b) Where the effect is a tendency or capacity to mislead or deceive purchasers or prospective purchasers; or (c) Where the effect is to divert trade from or otherwise injure competitors." *Cal. Bus. & Prof. Code § 17030*.

[7] Quest argues that plaintiffs may at most seek injunctive relief under the UPA. **[**24]**

[8] Given the deficiencies in the UPA claim, as currently pleaded, I do not at this point address whether injury to consumers is actionable under the UPA.

IV. UNFAIR COMPETITION LAW

Plaintiffs allege that Quest has violated the "unfair" and "illegal" prongs of California's Unfair Competition Law ("UCL"), *Cal. Bus. & Prof. Code § 17200*. These claims are derivative of plaintiffs' monopolization and UPA claims and fail for the same reasons as those claims. *See* Compl. ¶¶ 137-40. The UCL cause of action is DISMISSED WITH LEAVE TO AMEND.

CONCLUSION

Quest's motion to dismiss is GRANTED. Dkt. No. 20. Plaintiffs' complaint, including all four causes of action, is DISMISSED WITH LEAVE TO AMEND. Any amended complaint shall be filed within 20 days of this order,

IT IS SO ORDERED.

Dated: June 9, 2015

/s/ William H. Orrick

WILLIAM H. ORRICK

United States District Judge

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Star Disc. Pharm., Inc. v. Medimpact Healthcare Sys.

United States Court of Appeals for the Eleventh Circuit

June 11, 2015, Decided

No. 14-14581

Reporter

614 Fed. Appx. 988 *; 2015 U.S. App. LEXIS 9765 **; 2015-1 Trade Cas. (CCH) P79,200; 2015 WL 3622109

STAR DISCOUNT PHARMACY, INC., an Alabama Corporation, PROPST DISCOUNT DRUGS, INC., an Alabama Corporation, et al., Plaintiffs-Appellants, versus MEDIMPACT HEALTHCARE SYSTEMS, INC., a California Corporation, MICHAEL STRUHS, an individual, et al., Defendants-Appellees.

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

Prior History: **[**1]** Appeal from the United States District Court for the Northern District of Alabama. D.C. Docket No. 5:11-cv-02206-AKK.

Star Disc. Pharm., Inc. v. MedImpact Healthcare Sys., 2014 U.S. Dist. LEXIS 126606 (N.D. Ala., Sept. 10, 2014)

Core Terms

district court, pharmacies, plaintiffs', monopsony, providers, network, reimbursement rate, purchaser, join, percent, oral argument, no evidence, reply brief, Defendants', conclusory, negotiate, compete, reasons, adduce, summary judgment record, summary judgment, direct evidence, adverse effect, legal argument, monopoly power, lower price, monopolization, prerequisite, ninety-five, speculation

LexisNexis® Headnotes

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

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

HN1[] **Entitlement as Matter of Law, Appropriateness**

Neither a district court nor an appellate court has an obligation to parse the summary judgment record to search out facts or evidence not brought to the court's attention.

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

HN2[] **Actual Monopolization, Monopoly Power**

The ability of a single purchaser to negotiate a lower sales price does not, by itself, constitute monopsony power.

Counsel: For STAR DISCOUNT PHARMACY, INC., an Alabama Corporation, PROPST DISCOUNT DRUGS, INC., an Alabama Corporation, C & H PHARMACY, INC., an Alabama Corporation, DARDEN HERITAGE, an Individual, Plaintiffs - Appellants: David Balto, The Law Offices of David A. Balto, Washington, DC; Jeffrey Glenn Blackwell, Sterl A. Watson Jr., Hornsby Watson Hornsby & Blackwell, Huntsville, AL; William B. Tatum, Tatum Wilson, PC, Huntsville, AL.

For MEDIMPACT HEALTHCARE SYSTEMS, INC., a California Corporation, MICHAEL STRUHS, an Individual, NICOLE ADAMS, an Individual, Defendants - Appellees: Harlan Irby Prater IV, James Walter Gibson, Stephen Jackson Rowe, Lightfoot Franklin & White, LLC, Birmingham, AL; Blake J. Brownshadel, C. Michael Moore, Adam H. Pierson, Richard Salgado, Dentons US LLP - TX, Dallas, TX.

For The Center For Medicine in The Public Interest And Consumer Action, Amicus Curiae: Richard Paul Rouco, Quinn Connor Weaver Davies & Rouco, LLP, Birmingham, AL.

For Southwest Pharmacy Solutions, Amicus Curiae: Mark Allen Yurachek, The Law Offices of Mark Allen Yurachek & Associates, **[**2]** LLC, Atlanta, GA.

Judges: Before TJOFLAT, ANDERSON, and SENTELLE,[*] Circuit Judges.

Opinion

[*989] PER CURIAM:

We have had the benefit of oral argument, and have carefully reviewed the briefs and the relevant parts of the record. We affirm the district court's grant of summary judgment dismissing plaintiffs' monopolization claim pursuant to *Section 2* of the Sherman Act, *15 U.S.C. §2*.[1] We conclude that the judgment of the district court should be affirmed for the numerous reasons fully explored at oral argument, some of which are discussed also herein.

Initially, we cannot disagree with the district court, which concluded that plaintiffs had failed to adduce genuine issues of material fact with respect to the crucial prerequisite of harm to competition in general, as opposed to harm to a particular competitor. In the district court, the only even arguably specific evidence **[**3]** of harm to competition in general was belatedly submitted to the district court in the form of a report by Dr. Simpson. The report was submitted after all the briefing was completed in the district court. Moreover, the plaintiffs indicated that Dr. Simpson's report was unnecessary. Doc. No. 132 at 3 ("Plaintiffs sought to supplement their response for a limited purpose. Namely, to address issues unraised by Defendants and unnecessary to Defendants' summary judgment motion but for which the Court may have additional questions and which further elaborate on Defendants' plan and its impact."). Thus, with no guidance at all to the district court with respect to the significance of any aspect of the report, the district court concluded that plaintiffs had adduced no evidence of harm to competition among pharmacy providers, either in Dr. Simpson's report or elsewhere in the **[*990]** record. We cannot conclude that the district court erred. *HN1*[] "Neither the district court nor this Court has an obligation to parse the summary judgment record to search out facts or evidence not brought to the court's attention." *Atlanta Gas Light Co. v. UGI Utilities, 463 F.3d 1201, 1208 n.11 (11th Cir. 2006)*. Moreover, even on appeal, plaintiffs have pointed to insufficient evidence of harm to competition **[**4]** generally. Even if we consider the evidence provided by Dr. Simpson, plaintiffs' initial brief points to only three ways that Dr. Simpson indicated there was harm to competition. First, Dr.

[*] Honorable David Bryan Sentelle, United States Circuit Judge for the District of Columbia Circuit, sitting by designation.

[1] The district court remanded several of plaintiffs' state law claims. The plaintiffs' other claims that the district court rejected on the merits have been expressly abandoned by plaintiffs, leaving only plaintiffs' *Section 2* monopolization claim before us.

Simpson indicated that an excluded pharmacy can no longer compete for the business of the defendants' enrollees. However, the summary judgment record indicates that only plaintiffs' pharmacies have declined to join defendant's network of providers, virtually all others having eventually joined. Thus, this indication of harm is harm only to a single competitor (i.e., plaintiffs) and not harm to competition in general amongst pharmacies.

Second, plaintiff points to Dr. Simpson's opinion that the defendant's lower reimbursement rate reduces the profit that a pharmacy obtains from serving an additional customer, which profit incentivizes pharmacies to provide better point-of-sale services. We agree with the district court that this is merely unsupported speculation.

Finally, plaintiffs point to Dr. Simpson's opinion that lower reimbursement rates and reduced profit can jeopardize a pharmacy's long-term viability and diminish the ability of pharmacies to expand. We conclude that this too is mere speculation. **[**5]** Indeed, the record would seem to be to the contrary. There is virtually no evidence of pharmacies closing because of defendant's reimbursement rates, notwithstanding the fact that there are a significant number of pharmacies which have agreed to the reimbursement rates and joined the defendant's network of providers.

Thus, we agree with the ground upon which the district court granted summary judgment. We proceed below to mention other grounds which would, separately and independently, provide a basis for affirming the judgment of the district court. One such ground is that plaintiffs' initial brief on appeal contains only conclusory assertions with respect to the prerequisites for proving a monopolization claim.

Plaintiffs' initial brief on appeal asserts only in conclusory fashion that defendants possessed monopoly power (or because this case involves the market power of a purchaser, monopsony power). This crucial element is asserted only in a few conclusory sentences, with no factual support provided. Even plaintiffs' reply brief suggests that plaintiffs demonstrated monopsony power only by adducing direct evidence of actual anti-competitive effects, coupled with their legal argument **[**6]** that monopoly power can be demonstrated by actual, sustained adverse effects on competition even in the absence of an elaborate market analysis. We can assume arguendo, without deciding, plaintiffs' legal argument. However, plaintiffs' reply brief has pointed to no evidence of actual, sustained adverse effects on competition. The only such "direct evidence" of monopsony power to which the reply brief points is the fact that defendant was able to negotiate a lower price (a lower reimbursement rate) with the pharmacies which did join its network of providers. However, plaintiffs cite no case, and our research has uncovered no case, which holds that a single purchaser's ability to negotiate a lower price with a number of sellers does, by itself, demonstrate monopsony power. Indeed, common sense and common experience make it clear that ***HN2***[] the ability of a single purchaser to negotiate a lower sales price does not, by itself, constitute monopsony **[*991]** power. Moreover, it is clear that the instant defendant does not have monopsony power. It controls a mere five percent of the purchases in the market. The plaintiffs, and all other pharmacies which are not in defendant's network of providers, have **[**7]** the remaining ninety-five percent of the available purchases in the market, and plaintiffs are free to join networks of providers competing with the defendant. Thus, plaintiffs can compete not only for that ninety-five percent, but also, through other networks' competition with defendant, plaintiffs can compete even for the five percent of purchasers represented by the defendant. This lack of monopsony power is a sufficient ground in and of itself to affirm the judgment of the district court.

III.

For the foregoing reasons,[2] and for other reasons fully explored at oral argument, the judgment of the district court is AFFIRMED.

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[2] We need not address plaintiffs' argument that defendant's actions violate two Alabama statutes. Even if plaintiffs were correct in that regard, a violation of a state statute does not indicate a violation of federal ***antitrust law***. *Spanish Broad. Sys. v. Clear Channel, 376 F.3d 1065, 1076, 1076 n.8 (11th Cir. 2004)*.

Killian Pest Control, Inc. v. HomeTeam Pest Def., Inc.

United States District Court for the Northern District of California

June 16, 2015, Decided; June 16, 2015, Filed

Case No. 14-cv-05239-VC

Reporter
2015 U.S. Dist. LEXIS 78001 *; 2015-2 Trade Cas. (CCH) P79,426; 2015 WL 3766754

KILLIAN PEST CONTROL, INC., Plaintiff, v. HOMETEAM PEST DEFENSE, INC., et al., Defendants.

Subsequent History: Related proceeding at *Garnica v. HomeTeam Pest Def., Inc., 2015 U.S. Dist. LEXIS 78013 (N.D. Cal., June 16, 2015)*

Claim dismissed by, Motion denied by, in part *Killian Pest Control, Inc. v. Hometeam Pest Def., Inc., 2015 U.S. Dist. LEXIS 192648 (N.D. Cal., Dec. 21, 2015)*

Core Terms

tube-in-the-wall, installation, geographic, alleges, motion to dismiss, relevant market, amended complaint, pest control, customers, complaint alleges, Sherman Act, nationwide, markets, antitrust claim, leave to amend, federal claim, no details, computing, discovery, planning, swimwear, website, cloud, vague

Counsel: **[*1]** For Killian Pest Control, Inc., a California Corporation, Plaintiff: Alexander Russell Wheeler, R. Rex Parris, LEAD ATTORNEYS, Naomi C Pontious, Patricia Kay Oliver, R. Rex Parris Law Firm, Lancaster, CA; David S. Casey, Jr., Gayle Meryl Blatt, Tracey Michele Pardo, LEAD ATTORNEYS, Casey Gerry Schenk Francavilla Blatt and Penfield LLP, San Diego, CA; Don Howarth, Jessica Lynne Rankin, Suzelle Moss Smith, LEAD ATTORNEYS, Howarth and Smith, Los Angeles, CA.

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Judges: VINCE CHHABRIA, United States District Judge.

Opinion by: VINCE CHHABRIA

Opinion

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Re: Dkt. No. 29

The motion to dismiss the First Amended Complaint is granted with leave to amend.

"In order to state a valid claim under the Sherman Act, a plaintiff must allege that the defendant has market power within a 'relevant market.' That is, the plaintiff must allege both that a 'relevant market' exists and that the defendant has power within that market." *Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1044 (9th Cir. 2008)*. The "relevant market" **[*2]** has two components, "a relevant product market and a relevant geographic market." *Sidibe v. Sutter Health, 4 F. Supp. 3d 1160, 1174 (N.D. Cal. 2013)*. "The process of defining the relevant market is a factual inquiry for the jury." *High Tech. Careers v. San Jose Mercury News, 996 F.2d 987, 990 (9th Cir. 1993)*. However, "a complaint may be dismissed under *Rule 12(b)(6)* if the complaint's 'relevant market' definition is facially unsustainable." *Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1045 (9th Cir. 2008)*.

Killian has adequately pled relevant product markets—the markets for installation and servicing of tube-in-the-wall pest control systems. HomeTeam contends that the product market must include other forms of pest control, but "in some instances one brand of a product can constitute a separate market," *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 482, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*, and it's reasonable to infer from the allegations in the complaint that tube-in-the-wall pest control systems are quite distinct, such that they form a separate market from the market for other forms of pest control. *See, e.g., RealPage, Inc. v. Yardi Sys., Inc., 852 F. Supp. 2d 1215, 1225 (C.D. Cal. 2012)* (allegation that particular cloud computing services were distinct from "generic" cloud computing services); *TYR Sport Inc. v. Warnaco Swimwear Inc., 679 F. Supp. 2d 1120, 1129 (C.D. Cal. 2009)* (allegation that "high-end competitive swimwear" was distinct from other types of swimwear).

Killian has not, however, adequately defined the relevant geographic market. The complaint alleges that HomeTeam installs tube-in-the-wall systems in a number of states across **[*3]** the nation, "including the states of California, Arizona, Florida, Georgia, Maryland, Missouri, Nevada, New Mexico, North Carolina, South Carolina, Tennessee, Texas, Virginia, and West Virginia." But the complaint provides no details about whether customers in states other than the ones listed—or even whether customers throughout each of the listed states—"can practicably turn" to HomeTeam for installation of tube-in-the-wall systems. *See Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*.

The complaint further alleges that HomeTeam's website is "available nationwide," but obviously the mere fact that people all over the country (and presumably the world) can access HomeTeam's website has no bearing on where HomeTeam's system is actually available to customers. And the complaint alleges that "HomeTeam engages in national planning of the installation of tube-in-the-wall systems," but without a better understanding of where the systems are actually available, an allegation of national planning is not enough. *Compare United States v. Grinnell Corp., 384 U.S. 563, 575, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*.

Overall, Killian's "definition of the relevant geographic market [for installation of tube-in-the-wall systems] is vague and conclusory." *See Orchard Supply Hardware LLC v. Home Depot USA, Inc., 939 F. Supp. 2d 1002, 1010 (N.D. Cal. 2013)*.

Similarly, in describing the geographic market for servicing tube-in-the-wall **[*4]** systems, the complaint alleges that "HomeTeam[] services tube-in-the-wall systems nationwide, including at least the states of California, Arizona, Florida, Georgia, Maryland, Missouri, Nevada, New Mexico, North Carolina, South Carolina, Tennessee, Texas, Virginia, and West Virginia." It also alleges that HomeTeam's "customers are located in every state in which HomeTeam operates, including California, Arizona, Florida, Georgia, Maryland, Missouri, Nevada, New Mexico, North Carolina, South Carolina, Tennessee, Texas, Virginia, and West Virginia." These allegations are vague, but they seem to work against Killian by implicitly acknowledging that HomeTeam does not in fact operate throughout the United States. Thus, the complaint does not plead sufficient facts to plausibly allege that HomeTeam's "area of effective competition" in the tube-in-the-wall servicing market is nationwide.

The FAC alternatively alleges "geographic markets for the servicing of tube-in-the-wall systems . . . correspond[ing] to the areas of service for the individual offices providers [*sic*] of such servicing." But the complaint doesn't say anything specific about the "areas of service" for "individual offices." And it provides **[*5]** no details about the competitive structure—the alternative sources of supply or lack thereof—in these individual local markets. "Information about the reach of th[ese] market[s] is not exclusively within the Defendants' possession. Plaintiff should plead the geographic range of the relevant market[s] with greater specificity." *Orchard Supply, 939 F. Supp. 2d at 1010 (N.D. Cal. 2013)*.

Because the federal claims must be dismissed for failure to adequately plead the relevant geographic market, the Court does not reach HomeTeam's remaining objections to the federal claims (except for HomeTeam's arguments pertaining to the product market, which have been rejected). However, the hearing on the motion to dismiss, as well as HomeTeam's briefs, have put Killian on notice of other potential defects, and the Court assumes that the next version of the complaint will represent Killian's best and last shot to state a claim. In addition, because it is highly likely Killian can state an antitrust claim with respect to the market for servicing tube-in-the-wall systems, and because this case has already languished for quite some time, discovery may proceed on Killian's claims relating to the servicing market immediately upon the filing of an amended complaint. The discovery stay **[*6]** remains in place, however, for Killian's claims relating to the installation market.

Killian's state-law antitrust claims are dismissed for the same reasons as his Sherman Act claims. *See* *Cnty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001)* ("The analysis under California's ***antitrust law*** mirrors the analysis under federal law because the Cartwright Act was modeled after the Sherman Act." (citation omitted)).

Killian's claims under California's Unfair Practices Act are also dismissed. The First Amended Complaint alleges that HomeTeam charges builders $75 to install the tube-in-the-wall system, and alleges that this price is below HomeTeam's cost. But this is not enough to state a claim. "To satisfy the requirements of *section 17043*, a plaintiff must allege, in other than conclusionary terms, the defendant's sales price, costs in the product, and cost of doing business." *Fisherman's Wharf Bay Cruise Corp. v. Superior Court, 114 Cal. App. 4th 309, 7 Cal. Rptr. 3d 628, 639 (Ct. App. 2003)*.

Finally, Killian acknowledges that his claims under California's Unfair Competition Law rise and fall with the success of his other claims. *See* Docket No. 32, p. 13. Because the Court grants HomeTeam's motion to dismiss each of these other claims, Killian's UCL claim is likewise dismissed.

Accordingly, HomeTeam's motion to dismiss is granted with respect to each claim, with leave to **[*7]** amend. Any amended complaint must be filed within 21 days of the date of this order, or the dismissal shall be with prejudice.

IT IS SO ORDERED.

Dated: June 16, 2015

/s/ Vince Chhabria

VINCE CHHABRIA

United States District Judge

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Kissing Camels Surgery Ctr., LLC v. Centura Health Corp.

United States District Court for the District of Colorado

June 16, 2015, Decided; June 16, 2015, Filed

Civil Action No. 12-cv-3012-WJM-NYW

Reporter

111 F. Supp. 3d 1180 *; 2015 U.S. Dist. LEXIS 77797 **; 2015-1 Trade Cas. (CCH) P79,197

KISSING CAMELS SURGERY CENTER, LLC, CHERRY CREEK SURGERY CENTER, LLC, ARAPAHOE SURGERY CENTER, LLC, and HAMPDEN SURGERY CENTER, LLC, Plaintiffs, v. CENTURA HEALTH CORPORATION, COLORADO AMBULATORY SURGERY CENTER ASSOCIATION, INC., ROCKY MOUNTAIN HOSPITAL AND MEDICAL SERVICE, INC., d/b/a ANTHEM BLUE CROSS AND BLUE SHIELD OF COLORADO, UNITEDHEALTHCARE OF COLORADO, INC., and AETNA, INC., Defendants.

Prior History: *Kissing Camels Surgery Ctr., LLC v. HCA Inc., 2013 U.S. Dist. LEXIS 10997 (D. Colo., Jan. 25, 2013)*

Core Terms

Insurers, allegations, conspiracy, patients, surgery center, termination, e-mail, ambulatory, network, motion to dismiss, facilities, referrals, take action, antitrust, conspire, meetings, letters, out-of-network, conscious, contracts, provider, surgery, joined

LexisNexis® Headnotes

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

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

Under *Fed. R. Civ. P. 12(b)(6)*, a defendant may move to dismiss a claim in a complaint for failure to state a claim upon which relief can be granted. In evaluating such a motion, a court must assume the truth of the plaintiff's well-pleaded factual allegations and view them in the light most favorable to the plaintiff. In ruling on such a motion, the dispositive inquiry is whether the complaint contains enough facts to state a claim to relief that is plausible on its face. Granting a motion to dismiss is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice. Thus, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope

HN2[] **Sherman Act, Claims**

Section 1 of the Sherman Act, *15 U.S.C.S. § 1*, prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations. *§ 1*. Notably, *§ 1* prohibits only concerted, multilateral action. Because *§ 1* does not prohibit all unreasonable restraints of trade but only restraints effected by a contract, combination, or conspiracy, the crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express. Accordingly, at the pleading stage, stating a *§ 1* claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made, and to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. Such an agreement is established by evidence that the conspiring parties had a conscious commitment to a common scheme designed to achieve an unlawful objective. If the complaint does not directly allege an agreement but instead makes only allegations of parallel conduct in order to make a *§ 1* claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action. That is, the complaint must contain allegations plausibly suggesting (not merely consistent with) agreement.

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

HN3[] **Motions to Dismiss, Failure to State Claim**

On a motion to dismiss, the law requires only a complaint with enough factual matter (taken as true) to suggest that an agreement was made, and to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.

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Judges: William J. Martínez, United States District Judge.

Opinion by: William J. Martínez

Opinion

[*1182] ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS

Plaintiffs Kissing Camels Surgery Center, LLC ("Kissing Camels"), Cherry Creek Surgery Center, LLC ("Cherry Creek"), Arapahoe Surgery Center, LLC ("Arapahoe"), **[**2]** and Hampden Surgery Center, LLC ("Hampden") (collectively "Plaintiffs") bring this antitrust action alleging violations of the *Sherman Act*, *15 U.S.C. §§ 1 et seq.*, and the Colorado Antitrust Act, *Colo. Rev. Stat. §§ 6-4-101 et seq.* (Sec. Am. Compl. ("SAC") (ECF No. 213) at 56-62.) Before the Court are four Motions to Dismiss (collectively "Motions"), filed by Defendants Rocky Mountain Hospital and Medical Service, Inc., d/b/a Anthem Blue Cross and Blue Shield of Colorado ("Anthem"), UnitedHealthCare of Colorado, Inc. ("United"), Aetna, Inc. ("Aetna") (collectively the "Insurer Defendants" or "Insurers"), and Colorado Ambulatory Surgery Center Association, Inc. ("CASCA").[1] (ECF Nos. 259, 260, 261, 264.) For the reasons set forth below, the Motions are denied.

I. LEGAL STANDARD

HN1[] Under *Federal Rule of Civil Procedure 12(b)(6)*, a defendant may move to dismiss a claim in a complaint for "failure to state a claim upon which relief can be granted." In evaluating such a motion, a court must "assume the truth of the plaintiff's well-pleaded factual **[**3]** allegations and view them in the light most favorable to the plaintiff." *Ridge at Red Hawk, LLC v. Schneider, 493 F.3d 1174, 1177 (10th Cir. 2007)*. In ruling on such a motion, the dispositive inquiry is "whether the complaint contains 'enough facts to state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. Granting a motion to dismiss "is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." *Dias v. City & Cnty. of Denver, 567 F.3d 1169, 1178 (10th Cir. 2009)* (quotation marks omitted). "Thus, 'a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.'" *Id.* (quoting *Twombly, 550 U.S. at 556*).

II. BACKGROUND

Plaintiffs are four ambulatory surgery centers ("ASCs") performing outpatient surgical procedures and treatments in a non-hospital environment. (SAC ¶¶ 1, 19.) Plaintiff Kissing Camels provides services in the area of Colorado Springs, Colorado, and the other three Plaintiffs provide services in the Denver, Colorado metropolitan area. (*Id. ¶¶ 6-9*.)

Defendant Centura Health Corporation ("Centura") owns a system of hospitals and surgery centers in both Denver and Colorado Springs, which compete with Plaintiffs to provide **[**4]** ambulatory surgery services in both geographic areas. (*Id. ¶¶ 10*, 36-39.) Former defendant Audubon is an ASC which is a joint venture between Centura and several local physicians, and Centura holds more than 40% ownership of **[*1183]** Audubon. (*Id. ¶¶ 38, 123*.) Audubon competes with Plaintiff Kissing Camels to provide ambulatory surgery services in the Colorado Springs area. (*Id. ¶ 40*.) Former defendant HCA, Inc. owns former defendant HCA-HealthONE LLC ("HCA"), which operates a system of hospitals and surgery centers in Metro Denver that compete with Plaintiffs Cherry Creek, Arapahoe, and Hampden to provide ambulatory surgery services. (*Id. ¶¶ 27-28*.)

Defendant CASCA is a trade association purporting to represent the interests of ASCs, to which Centura and HCA both provide substantial financial support. (*Id. ¶¶ 45, 83*.) At least two HCA employees sit on CASCA's Board of Directors, and six Board members are employed by companies with contractual relationships with Centura, including one, Brent Ashby, who is the Administrator of Audubon and another of Centura's joint venture ASCs. (*Id. ¶¶ 46, 53*.) Plaintiffs allege that CASCA worked directly with the Colorado Association of Health Plans ("CAHP"), **[**5]** an association of insurers whose Board of Directors includes executives from United and Anthem, to assist in formulating the alleged conspiracy. (*Id. ¶¶ 46, 53, 101*.) Defendants Anthem, United, and Aetna are health insurance companies doing business in Colorado. (*Id. ¶¶ 13-15*.)

Plaintiffs Arapahoe and Kissing Camels began doing business in 2010. (*Id. ¶ 28*.) Plaintiffs allege that, beginning that year, Centura and HCA conspired to reduce competition for ambulatory surgery services by not doing business with Plaintiffs, and by using their market power to pressure physicians and insurers with whom HCA and Centura have relationships not to do business with Plaintiffs. (*Id. ¶¶ 47-50*.) CASCA allegedly joined the conspiracy at the

[1] A fifth pending Motion to Dismiss was filed by Audubon Ambulatory Surgery Center, LLC ("Audubon"). (ECF No. 266.) As Plaintiffs have since stipulated to dismiss Audubon as a Defendant (ECF No. 290), Audubon's Motion is denied as moot.

behest of HCA and Centura, holding strategy meetings at which the conspiracy was formed and meeting separately with CAHP and various Insurers to coordinate action against Plaintiffs. (*Id.* ¶¶ *59, 75*, 90-93, 99-102, 125.) Despite the fact that Plaintiffs were CASCA members, CASCA acted in secret and excluded Plaintiffs from meetings at which the conspiratorial objectives were discussed. (*Id.* ¶¶ *95, 133*.)

A non-hospital ASC is required to have transfer agreements with **[**6]** hospitals to ensure that a patient requiring emergency hospitalization receives rapid and adequate care. (*Id.* ¶ *66*.) HCA and Centura have both refused to sign transfer agreements between their hospitals and Plaintiffs' facilities, despite the predicted benefit to the hospital of increased patient flow. (*Id.* ¶¶ *66-67*.) In December 2010, a Centura-owned hospital canceled a planned patient transfer agreement with Plaintiff Kissing Camels, and in February 2012, a HCA hospital refused to sign a transfer agreement with Cherry Creek. (*Id.*)

Plaintiffs' allegations make reference to specific pieces of evidence, principally emails and meeting notes, in which Defendants discussed strategies to lessen the competitive threat posed by Plaintiffs. (*See id.* ¶¶ 42, 51-55, 59-62, 70, 77-78, 80, 91-95, 99-102, 124.)

Spearheaded by CASCA and CAHP, a conference call meeting to discuss actions against Plaintiffs was held on May 18, 2012, which was attended by representatives from Aetna, Anthem, United, and other insurance companies, as well as CASCA Board members. (*Id.* ¶¶ *94-95*.) A follow-up meeting, which was scheduled in order for the "right" Insurer personnel to attend, was held on August 29, 2012, and **[**7]** was attended by CASCA Board members, including Mr. Ashby of Audubon, and executives from Anthem, United, and Aetna (by phone), as well as other insurance companies. (*Id.* ¶¶ *95-97*.) Based on notes taken by a CAHP representative, **[*1184]** Plaintiffs allege that the meeting participants agreed to follow a strategy of "stop[ping] the flow of dollars" from the Insurers to Plaintiffs. (*Id.* ¶¶ *98-99*.) Subsequent e-mails between CASCA and CAHP indicate that both parties would work to take indirect action against Plaintiffs through governmental agencies, CASCA, and insurer actions against physicians referring patients to Plaintiffs. (*Id.* ¶ *100*.)

At the request of Centura and HCA, and pursuant to the agreement among the alleged co-conspirators, CASCA's Executive Director sent a letter to the Colorado Department of Regulatory Agencies ("DORA") alleging that Plaintiffs violated state law prohibiting them from waiving or discounting insurance copayments and deductibles and asking DORA to take legal action against Plaintiffs. (*Id.* ¶ *103*.) DORA took no action against Plaintiffs based on this letter, and noted that no complaints had been received by the Colorado Medical Board for unlawful billing practices. (*Id.*) Plaintiffs **[**8]** allege that their billing practices did not violate state law, and that these claims were mere pretext for Defendants' conspiratorial actions. (*Id.* ¶ *128*.)

Plaintiffs allege that, starting in 2010, Centura and Audubon asked the Insurers to penalize physicians referring business to Plaintiffs. (*Id.* ¶¶ *118, 124*.) The Insurers were compelled to comply because they needed Centura's and HCA's hospitals in their provider networks. (*Id.*) The Insurers renewed their efforts to take action against Plaintiffs as a result of the agreements reached at the May 18, 2012 conference call and August 29, 2012 meeting. (*Id.* ¶ *104*.)

Mr. Ashby of Audubon notified United in 2010 of Kissing Camels' opening and raised concerns regarding its billing practices. (*Id.* ¶ *123*.) United conducted an investigation which concluded that such concerns were unfounded and that its network contracts with physicians permitted out-of-network referrals to Kissing Camels, but nevertheless agreed to take action against physicians referring patients to Plaintiffs. (*Id.*) In 2011, United threatened Dr. Steven Topper of Colorado Hand Center with termination for breach of his network contract based on his referral of patients to Kissing **[**9]** Camels, and terminated his contract by letter on December 16, 2011. (*Id.* ¶ *72*.) On August 31, 2012, two days after the CASCA/CAHP meeting, United terminated another facility, Metro Denver Pain Management, purportedly "for cause" due to its regular use of Plaintiff Arapahoe's facility. (*Id.* ¶ *106*.) United also threatened primary care physicians with termination from its network because they referred patients to specialists that used Plaintiffs' facilities. (*Id.* ¶¶ *72-23*.) Plaintiffs assert, based on e-mail evidence, that United's threatening letters were strategically targeted at physicians referring patients to Kissing Camels. (*Id.* ¶¶ *57, 70*.)

Beginning in at least October 2011, Anthem contacted physicians who were using Plaintiffs' facilities, and sent letters threatening network termination for purportedly inappropriate referrals. (*Id. ¶ 75*.) Anthem employees met with CASCA and HCA regarding strategies for such actions against Plaintiffs. (*Id. ¶ 75*.) Plaintiffs allege that, based on e-mails sent by senior Anthem employees, Anthem coordinated its actions with HCA, CASCA, and CAHP. (*Id. ¶¶ 77-78*.) On August 31, 2012, two days after the CASCA/CAHP meeting, Anthem sent a threatening letter **[**10]** to Colorado Orthopaedic Consultants regarding referrals to Plaintiffs, and a week later it sent similar letters to Colorado Hand Center and Interwest Rehabilitation. (*Id. ¶¶ 109-10*.)

Beginning in at least May 2012, Aetna threatened physicians with termination **[*1185]** from its provider network based on their referrals to Plaintiffs, and threatened to post information on its provider website that those physicians were referring patients to out-of-network providers, which would increase costs for patients. (*Id. ¶ 80*.) Aetna also sent certified letters terminating physicians for out-of-network referrals to Plaintiffs' facilities within a few days of the August 29, 2012 CASCA/CAHP meeting. (*Id. ¶ 112*.)

Plaintiffs allege that the justifications the Insurers provided for their threatening letters to physicians—namely, breaches of network contracts and unlawful billing practices—were pretexts for the anti-competitive goal of driving Plaintiffs out of business. (*Id. ¶ 128*.) Indeed, Plaintiffs allege, Audubon and other ASCs had the same billing practices as Plaintiffs. (*Id. ¶ 131*.)

On November 15, 2012, Plaintiffs filed a Complaint against HCA, Centura, CASCA, and Kaiser Foundation Health Plan of Colorado, **[**11]** bringing claims under the *Sherman Act* and the Colorado Antitrust Act. (ECF No. 1.) Plaintiffs filed their FAC on April 3, 2013, adding claims against Arapahoe, Anthem, United, and Aetna. (ECF No. 70.) Plaintiffs subsequently stipulated to dismiss their claims against Kaiser (ECF No. 140) and HCA (ECF No. 175).

On February 13, 2014, the Court granted Motions to Dismiss filed by CASCA, Aetna, Anthem, United, and Audubon ("Dismissal Order"), based largely on Plaintiffs' failure to plead sufficient facts establishing the predicate agreement for their conspiracy claims. (ECF No. 177.) Plaintiffs then moved to amend their complaint to restate their claims against the dismissed parties, and the Court permitted the amendment. (ECF Nos. 179, 212, 242.) The SAC was thus accepted as filed. (ECF No. 213.)

On September 30, 2014, Centura filed a Motion for Summary Judgment, which remains pending. (ECF No. 228.) The instant Motions to Dismiss, as well as a similar motion by Audubon, were filed on December 17, 2014. (ECF Nos. 259, 260, 261, 264, 266.) Plaintiffs filed an Omnibus Response (ECF No. 283), and Anthem, Aetna, CASCA, and United filed Replies (ECF Nos. 284, 285, 287, 288). Plaintiffs subsequently **[**12]** stipulated to dismiss Audubon from this action (ECF No. 290), rendering moot its Motion to Dismiss (ECF No. 266). The other four Motions are fully briefed and ripe for disposition.

III. ANALYSIS

CASCA and the Insurers each move for dismissal of Plaintiffs' claim under *§ 1 of the Sherman Act* (Count I), and the analogous state claim pursuant to *Colorado Revised Statutes § 6-4-104* (Count IV), the only claims asserted against them. (ECF Nos. 259, 260, 261, 264; *see* SAC ¶¶ 134-38, 149-53.) As federal ***antitrust law*** principles control both the federal and state antitrust claims, the Court will consider the two challenged claims together. *See Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango, 582 F.3d 1216, 1220 n.1 (10th Cir. 2009)*.

Plaintiffs' claims under *§ 1 of the Sherman Act* allege that Defendants conspired to put Plaintiffs out of business, which unreasonably restrained trade in the Denver and Colorado Springs markets for ambulatory surgery services and damaged Plaintiffs. (SAC ¶¶ 134-38, 149-53.) ***HN2***[] *Section 1 of the Sherman Act* prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . . ." *15 U.S.C. § 1*. Notably, *§ 1* prohibits only concerted, multilateral action. *See Bell v. Fur Breeders Agric. Coop., 348 F.3d 1224, 1232 (10th Cir. 2003)*. "Because *§ 1 of the Sherman Act* does not

[*1186] prohibit all unreasonable **[**13]** restraints of trade but only restraints effected by a contract, combination, or conspiracy, the crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express." *Twombly, 550 U.S. at 553* (internal citations and brackets omitted). Accordingly, at the pleading stage, stating a *§ 1* claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. . . [and] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id. at 556*. Such an agreement is established by evidence that the conspiring parties "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*.

If the complaint does not directly allege an agreement but instead makes only "allegations of parallel conduct . . . in order to make a *§ 1* claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Twombly, 550 U.S. at 557*. That is, the complaint must contain "allegations plausibly suggesting (not merely consistent with) agreement." *Id.*

1. CASCA

CASCA's Motion argues that Plaintiffs have failed to allege sufficient **[**14]** facts to establish that it was a member of a conspiracy to put Plaintiffs out of business. (ECF No. 262 at 8-14.) CASCA further argues that its letter petitioning DORA to take action against Plaintiffs is protected by the *First Amendment* and the *Noerr-Pennington* doctrine, and that its alleged coordination of negative statements to the press is protected commercial speech. (*Id.* at 7-8, 14-15.)

In the Dismissal Order, the Court found that Plaintiffs' allegations in the FAC that CASCA provided a venue at which the conspiracy was formed were insufficient to state a claim that CASCA itself was a co-conspirator. (ECF No. 177 at 13.) Ultimately, the Court found that "Plaintiffs' allegations suggest that CASCA provided passive facilitation of the conspiracy, not that it agreed to participate, tacitly or expressly," and noted that "Plaintiffs apparently concede that CASCA was a tool of the conspiracy, rather than a co-conspirator . . . ." (*Id.* at 14.)

As to CASCA's actions in petitioning DORA to take action against Plaintiffs, the Court held in the Dismissal Order that "the Supreme Court's decisions in *[Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)]* and [*United Mine Workers of America v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)]* establish that no *Sherman Act* liability arises from 'a concerted effort to influence public officials, regardless of [anticompetitive] **[**15]** intent or purpose.'" (ECF No. 177 at 13-14 (quoting *Pennington, 381 U.S. at 670*).) CASCA reasserts its argument in the instant Motion, but Plaintiffs fail to respond to CASCA's *Noerr-Pennington* or *First Amendment* arguments in their Response. (*See* ECF No. 283.) On the same basis as that asserted in the Dismissal Order, the Court concludes that the allegations of government petition and speech to the press cannot support a claim for a *§ 1* conspiracy.

However, Plaintiffs' SAC now includes direct allegations that CASCA was a co-conspirator, not a mere tool of the conspiracy. (*See* SAC ¶¶ 3, 59, 75, 90-93, 99-102, 125.) Through Centura's and **[*1187]** HCA's joint venture partners' membership on CASCA's Board of Directors, Plaintiffs allege that Centura and HCA dominate CASCA and it thereby represents their interests to Plaintiffs' detriment. (*Id. ¶¶ 39*, 45-46.) Plaintiffs allege that CASCA worked with CAHP to develop a strategy among the Insurer Defendants and to execute that strategy against Plaintiffs. (*Id. ¶¶ 46, 51*.) In support of these allegations, Plaintiffs also assert that in July 2012, HCA's CEO sent an e-mail in response to an HCA employee's e-mail confirmation that one of the Plaintiffs' facilities had recently opened, which stated, **[**16]** "TIME TO CALL IN THE DOGS!!!!!," and "can we discuss Round 2 with the payer [insurer] community—off-line not on email?" (*Id. ¶ 61*.) A follow-up e-mail between HCA executives included the statements, "Can we add more pressure to the payers to stop the proliferation of the out-of-network [Plaintiff] ASCs? Their letters aren't working." (*Id.*) This latter e-mail was copied to an HCA representative on CASCA's Board. (*Id.*) Plaintiffs allege meetings between Insurers and CASCA in furtherance of this strategy, culminating in the October 29, 2012 CASCA/CAHP meeting at which a plan was established for the Insurers to "stop the flow of dollars" to Plaintiffs. (*Id. ¶¶ 75, 78, 91*.)

The Court finds these allegations sufficient to plausibly allege that CASCA was a participant in the alleged conspiracy. While CASCA contends that one Board member's receipt of HCA's e-mail insufficiently implicates it in HCA's attempts to involve the Insurers in taking action against Plaintiffs (ECF No. 262 at 13), the Court finds that this allegation supports Plaintiffs' contention that CASCA coordinated meetings the following month on behalf of HCA in order to instigate action by the Insurers. These allegations also **[**17]** support Plaintiffs' assertion in the SAC that CASCA joined the conspiracy as an active participant, and was not merely a venue at which the conspiracy was formed. (*See* SAC ¶ 125.) Plaintiffs further allege a motive for CASCA's conspiratorial participation, namely that its Board members—which operate competing ASCs—feared competition from Plaintiffs, and note that CASCA hid its actions from Plaintiffs and never attempted to get Plaintiffs to change their allegedly unlawful conduct directly. *(Id.* ¶¶ 93, 125, 133.)

CASCA's Motion emphasizes certain of Plaintiffs' allegations, noting that each of them could just as easily have been innocent. However, ***HN3***[] on a motion to dismiss, the law requires only "a complaint with enough factual matter (taken as true) to suggest that an agreement was made. . . [and] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Twombly, 550 U.S. at 556*. The Court finds that Plaintiffs' SAC meets this standard. CASCA's Motion is therefore denied.

2. Insurer Defendants

The Motions filed by Aetna, Anthem, and United each argue that Plaintiffs' allegations are insufficient to establish an agreement to conspire against Plaintiffs. (ECF Nos. 259, 260, 264.) **[**18]**

In the Dismissal Order, the Court held that Plaintiff's First Amended Complaint ("FAC") contained insufficient allegations of conspiracy against the Insurer Defendants. (ECF No. 177 at 16-20.) Specifically, the Court noted as follows:

> Plaintiffs' allegations of the specific actions each Insurer Defendant took against physicians and health care providers using Plaintiffs' facilities are numerous and detailed. However, with regard to an agreement to conspire, these allegations fall short. Although Plaintiffs allege that Centura and HCA requested that the Insurers perform these **[*1188]** kinds of actions in furtherance of the conspiracy, Plaintiffs do not directly allege that the Insurers made such an agreement, nor do they allege facts directly evidencing the Insurers' agreement with Centura and HCA. Instead, Plaintiffs' allegations only indirectly support an inference of such an agreement, pleading parallel acts by each Insurer against physicians that were using Plaintiffs' facilities.

(*Id.* at 18.) While Plaintiffs had not explicitly alleged an agreement, the Court noted that Plaintiffs could still state a *§ 1* claim through allegations of "conscious parallel conduct" that "raise[] a suggestion of a preceding **[**19]** agreement." *Twombly, 550 U.S. at 557*. However, such allegations are insufficient if they establish "merely parallel conduct *that could just as well be independent action*." *Id.* (emphasis added). The Court concluded that Plaintiffs' allegations failed on this front as well, noting that Plaintiffs had alleged plausible legitimate, independent reasons for the Insurers' actions.

> Plaintiffs' allegations of the Insurers' parallel conduct, which targeted physicians using Plaintiffs' facilities and caused indirect injury to Plaintiffs, are insufficient to reasonably suggest that the parallel conduct was the result of an agreement and not the result of independent factors. . . . [T]he FAC sets forth no facts supporting the inference of pretext, nor does the FAC clearly assert pretext. Instead, Plaintiffs ask the Court to reasonably infer that the Insurers, under pressure from powerful hospitals and in the face of allegations that Plaintiffs were violating state law, did not terminate these physicians' network contracts because their out-of-network referrals breached those contracts, but instead terminated them because the Insurers had previously agreed with the hospitals to conspire to put Plaintiffs out of business. While **[**20]** such an inference is possible, Plaintiffs' FAC does not "raise[] a suggestion of a preceding agreement" or otherwise make it plausible. *Twombly, 550 U.S. at 557*. Plaintiffs' allegations with respect to the Insurers do not suggest that they made "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto, 465 U.S. at 764*. Instead, the Court finds that the Insurers' parallel conduct could just as well be independent action. *See* *Twombly, 550 U.S. at 557*.

(*Id.* at 18-20.) Consequently, the Court dismissed Plaintiffs' claims against the Insurers. (*Id.*)

The Insurers' Motions now argue that Plaintiffs' SAC contains the same deficiencies as the FAC, and that Plaintiffs' new allegations fail to support a conspiracy. (ECF Nos. 259, 260, 261, 264.) These arguments ignore the simple basis for the Court's decision in the Dismissal Order: Plaintiffs' FAC did not explicitly allege that the Insurer Defendants *agreed* with Centura and HCA to take action against Plaintiffs, nor did it explicitly assert that the Insurers' reasons for their actions were pretextual. (*See* ECF No. 177 at 18-20.) In contrast, Plaintiffs' SAC now contains explicit allegations of agreement, and goes further by alleging the existence of evidence supporting those allegations. (**[**21]** *See, e.g.*, SAC ¶¶ 42, 51-55, 59-62, 70, 77-78, 80, 91-95, 99-102, 124.)

In particular, the Court finds compelling Plaintiffs' allegations regarding the alleged October 29, 2012 meeting, including an attendee's notes evidencing the establishment of a strategy by the participating Insurers to prevent Plaintiffs from obtaining patients, and the actions taken by each of the Insurer Defendants within a matter of days after that meeting in accordance with the agreement. These allegations support the SAC's direct assertion **[*1189]** that the Insurers entered into an agreement to take action against Plaintiffs, and thus suggest that the Insurers "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto, 465 U.S. at 764*. Furthermore, the temporal proximity of the October 29, 2012 meeting and subsesquent Insurers' actions against physicians for their referrals to Plaintiffs "tends to exclude the possibility that . . . [they] were acting independently." *Id.* The Court consequently rejects Aetna's argument that its participation in a trade association meeting is necessarily innocent, as Plaintiffs have alleged that the participants explicitly agreed on a strategy for the Insurers to take actions **[**22]** against Plaintiffs at that meeting, that such actions were taken within days afterward, and that CASCA organizers purposefully excluded Plaintiffs from those meetings. (*See* ECF No. 264 at 7-9; SAC ¶¶ 95-100, 112.)

The Court finds that Plaintiffs have directly alleged a conspiracy and supported it with plausible factual allegations. As a result, the Court need not consider the Insurers' arguments relating to allegations that merely establish "conscious parallel conduct," namely that Plaintiffs have failed to exclude other plausible explanations for their actions. *See* *Twombly, 550 U.S. at 557*. While these arguments might well be persuasive before a jury, they need not be preemptively defeated by a plaintiff directly alleging an anticompetitive agreement in a well-pled complaint, as all such allegations are taken as true on a motion to dismiss.[2] *See* *id. at 570*. Accordingly, the Insurers' Motions are denied on this basis.

United's Motion raises a second argument, namely that an antitrust claim does not lie against a party alleged to have joined an unlawful boycott where the party had no rational motive to join the boycott. (ECF No. 260 at 13 (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587-88, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986))*.) This argument is easily rejected. Plaintiff's SAC explicitly alleges that the Insurers entered the conspiracy at the behest of Centura and HCA because those hospitals possessed great market power and were essential to the Insurers' networks. (*See* SAC ¶¶ 123, 128.) As to United in particular, Plaintiffs allege that Centura threatened to terminate its contract, and notes that despite United's independent investigation that Plaintiffs were not causing breaches of physician contracts, it nonetheless took action against Plaintiffs. (*Id. ¶ 123*.) Faced with threats of losing valuable customers, the Court finds that the Insurers **[**24]** had a plausible, rational motive to join the alleged conspiracy. Accordingly, the Court denies the Motions on that basis.

IV. CONCLUSION

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[2] For example, Aetna's Motion argues that two e-mails on which Plaintiffs' SAC relies contain evidence that Aetna attempted to bring Plaintiffs into its provider network, which contradicts Plaintiffs' allegations that Aetna sought to put Plaintiffs out of business. (ECF No. 264 at 9-13.) While Aetna correctly **[**23]** notes that a document referred to in a complaint may be considered on a motion to dismiss, the Court finds that the evidence contained therein does not make Plaintiffs' claims implausible, and instead raises a dispute of fact more appropriate for resolution by a jury. Therefore, the Court will not dismiss Plaintiffs' claims on this basis.

For the reasons set forth above, the Court ORDERS as follows:

1. The Motions to Dismiss filed by Defendants Rocky Mountain Hospital and Medical Service, Inc, d/b/a Anthem Blue Cross and Blue Shield of Colorado (ECF No. 259), UnitedHealthCare of Colorado, Inc. (ECF **[*1190]** No. 260), Colorado Ambulatory Surgery Center Association, Inc. (ECF No. 261), and Aetna, Inc. (ECF No. 264) are DENIED; and

2. The Motion to Dismiss filed by Audubon Ambulatory Surgery Center, LLC (ECF No. 266) is DENIED AS MOOT.

Dated this 16th day of June, 2015.

BY THE COURT:

/s/ William J. Martínez

William J. Martínez

United States District Judge

Dial Corp. v. News Corp.

United States District Court for the Southern District of New York

June 18, 2015, Decided; June 18, 2015, Filed

13cv6802

Reporter

314 F.R.D. 108 *; 2015 U.S. Dist. LEXIS 79686 **; 2015-1 Trade Cas. (CCH) P79,214

DIAL CORPORATION, et al., Plaintiffs, -against- NEWS CORPORATION, et al., Defendants.

Subsequent History: Modified by, Motion granted by *Dial Corp. v. News Corp., 2016 U.S. Dist. LEXIS 22831 (S.D.N.Y., Feb. 9, 2016)*

Prior History: *Dial Corp. v. News Corp., 2015 U.S. Dist. LEXIS 79608 (S.D.N.Y., May 19, 2015)*

Core Terms

damages, prices, Plaintiffs', class certification, retailers, predominance, class-wide, firms, contracts, monopoly, network, exclusionary, benchmark, putative class member, regression, class member, competitor, antitrust, certification, customers, Rebuttal, in-store, argues, margin, calculations, promotions, questions, individual damage, variables, benefits

Counsel: **[**1]** For Dial Corporation, H. J. Heinz Company, H. J. Heinz Company LP, Plaintiffs: Justin M. Presant, Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, DC; Robert S. Berry, Berry Law PLLC, Washington, DC.

For Foster Poultry Farms, Plaintiff: Robert S. Berry, Berry Law PLLC, Washington, DC.

For News Corporation, News America Incorporated, News America Marketing FSI, Incorporated, News America Marketing In-Store Services, L. L. C., Defendants: David F. DuMouchel, Butzel Long (Detroit), Detroit, MI; Joseph E. Richotte, BUTZEL LONG, P.C., Bloomfield Hills, MI.

Judges: WILLIAM H. PAULEY III, UNITED STATES DISTRICT JUDGE.

Opinion by: WILLIAM H. PAULEY III

Opinion

[*111] MEMORANDUM & ORDER

WILLIAM H. PAULEY III, District Judge:

Plaintiffs The Dial Corporation, Henkel Consumer Goods Inc., H.J. Heinz Company, H.J. Heinz Company, L.P., Foster Poultry Farms, Smithfield Foods, Inc., HP Hood LLC, BEF Foods, Inc., and Spectrum Brands, Inc. (collectively, "Plaintiffs") are consumer packaged goods firms ("CPGs"). They allege that Defendants News Corporation, News America Inc., News America Marketing FSI L.L.C., and News America Marketing In-Store Services L.L.C. (collectively, "News Corp.") maintain a monopoly in the market for **[**2]** in-store promotion ("ISP") services, and extract artificially high prices from their customers. Plaintiffs move to certify a class of CPGs that have "directly purchased in-store promotions from News [Corp.] at any time on or after April 5, 2008[.]" For the following reasons, Plaintiffs' motion for class certification under *Rule 23(b)(3)* is granted.

BACKGROUND

News Corp. serves as a middleman in the ISP market between CPGs on the one hand, and groceries, drug stores, and other mass retailers on the other. Plaintiffs purchase a wide variety of ISPs, including print and electronic signage, end-of-aisle displays, shelf-mounted displays, freezer displays, and floor signage from News Corp. Those ISPs allow Plaintiffs to promote their products inside retail stores. (Fourth Amended Complaint (hereinafter, "FAC") ¶ 54.) ISPs are a key component of Plaintiffs' marketing because they reach consumers at the point of purchase, unlike other promotional tools, such as media advertising, which occur outside of the store.

News Corp. entered the ISP business in 1996 and gained a significant foothold by purchasing Heritage Media for $1.3 billion dollars the following year. Thereafter, News Corp. acquired FLOORgraphics, **[**3]** Inc. along with its retail network. News Corp. later settled a lawsuit with another competitor, Insignia, and etched a deal to distribute Insignia's services through News Corp.'s retail network. (FAC ¶ 61.) Currently, News Corp. controls approximately 80% of the ISP market and is defending against monopolization claims by its only remaining competitor, Valassis, in the Eastern District of Michigan.

[*112] News Corp.'s network of 52,500 retail stores is the only "one-stop shop" for nationwide access to a wide variety of ISPs. (FAC ¶ 57.) Access to retailers is essential to News Corp.'s success. Plaintiffs allege that to maintain its monopoly and erect barriers to competitive entry, News Corp. enters into long-term contracts with retailers for exclusive access to their stores. For example, if News Corp. provides at-shelf coupon dispensers for a retailer, News Corp.'s agreement prohibits that retailer from contracting with others to place at-shelf coupon dispensers elsewhere in the store. News Corp. also enters into exclusive, long-term contracts with CPGs to advertise their products. For example, News Corp. offers a specific "tactic" (i.e., shelf coupons) for a fixed period of time to only one **[**4]** CPG for a particular product category (i.e., cereal).

Plaintiffs allege that News Corp. maintains its monopoly by using these long-term, exclusive contracts with retailers and CPGs. (FAC ¶¶ 10-17, 74-85, 108-15.) Plaintiffs also allege that News Corp. engages in additional anti-competitive conduct by: hacking into computerized customer lists and marketing materials of its competitor, FLOORgraphics; staggering the terms of exclusive contracts; enforcing shelf exclusivity; using cash guarantees to derail competitor contracts; defacing competitor advertisements; and disparaging competitors' compliance rates and their financial viability. (FAC ¶¶ 86-104.)

In addition to ISPs, Plaintiffs purchase free-standing-insert coupons ("FSIs") from News Corp. for placement in newspapers nationwide. (FAC ¶ 66.) Plaintiffs allege that News Corp. also maintains market power in the FSI product market through similar long-term, exclusive contracts. (FAC ¶ 120.)

DISCUSSION

I. Class Certification

Plaintiffs' definition of the proposed class has morphed since they filed their Fourth Amended Complaint. Back then, Plaintiffs defined two separate classes: (1) the "News In-Store Class"; and (2) the "News FSI Class." **[**5]** More recently, in their class certification motion, they abandoned the "News FSI Class," and defined the "News In-Store Class" as follows:

> Persons residing in the United States who have directly purchased in-store promotions from News Corp. at any time on or after April 5, 2008, and have not purchased these services under News Corp. contracts with mandatory arbitration clauses.

(ECF No. 141.) But that definition seems overbroad given the focus of the parties' arguments on the certification motion. The issue presented is whether the proposed class plaintiffs are representative of CPGs. And in their reply papers, Plaintiffs offer a further refinement of the proposed class definition to exclude "retail purchasers of ISP." For the purposes of the following discussion, this Court defines the proposed class as follows:

> Non-retailer consumer packaged goods firms residing in the United States which have directly purchased in-store promotions from News Corp. at any time on or after April 5, 2008, and were not subject to mandatory arbitration clauses.

a. Requirements of *Rule 23(a)*

A party seeking class certification must first show that the proposed class meets the requirements of *Federal Rule of Civil Procedure 23(a)*, which "requires that a **[**6]** proposed class action (1) be sufficiently numerous, (2) involve questions of law or fact common to the class, (3) involve class plaintiffs whose claims are typical of the class, and (4) involve a class representative or representatives who adequately represent the interests of the class." *Myers v. Hertz Corp., 624 F.3d 537, 547 (2d Cir. 2010)*. "The party must also satisfy through evidentiary proof at least one of the provisions of *Rule 23(b)*." *Comcast v. Behrend, 133 S. Ct. 1426, 1432, 185 L. Ed. 2d 515 (2013)*. Here, Plaintiffs rely on *Rule 23(b)(3)*, which "requires the party seeking certification to show that 'questions of law or fact common to class members predominate over any questions affecting only individual members' and that class treatment would be superior to individual litigation." *Myers, 624 F.3d at 547* (quoting *Fed. R. Civ. P. 23(b)(3)*).

[*113] *Rule 23* "does not set forth a mere pleading standard." *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011)*. Rather, "[t]he party seeking class certification must affirmatively demonstrate compliance with the Rule, and a district court may only certify a class if it is satisfied, after a rigorous analysis, that the requirements of *Rule 23* are met." *In re Am. Int'l Grp., Inc. Sec. Litig., 689 F.3d 229, 237-38 (2d Cir. 2012)*. Plaintiffs must show compliance with *Rule 23*'s requirements by a preponderance of the evidence. *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc., 546 F.3d 196, 202 (2d Cir. 2008)*.

i. Numerosity

Numerosity is presumed when a class consists of forty or more members. See *Consol. Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995)*. News Corp. does not contest numerosity.

ii. Commonality **[**7]**

A party seeking certification must show "there are questions of law or fact common to the class." *Fed. R. Civ. P. 23(a)(2)*. "That language is easy to misread, since '[a]ny competently crafted class complaint literally raises common 'questions.'" *Wal-Mart, 131 S. Ct. at 2551* (quoting Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. Law Rev. 97, 131-32 (2009)). However, class claims "must depend upon a common contention . . . capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart, 131 S. Ct. at 2551*. "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Wal-Mart, 131 S. Ct. at 2551* (emphasis in original) (quoting Nagareda, *supra, at 132*).

Because "the predominance criterion is far more demanding" than the commonality requirement, when plaintiffs move for certification of a class pursuant to *Rule 23(b)(3)*, "*Rule 23(a)(2)*'s 'commonality' requirement is subsumed under, or superseded by, the more stringent *Rule 23(b)(3)* requirement" of predominance. **[**8]** *Amchem Prods, Inc. v. Windsor, 521 U.S. 591, 609, 624, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*.

Here, there are several questions common to the class and capable of resolution through common proof, including: (1) News Corp.'s liability under the Sherman Act and the Clayton Act; (2) the definitions of the relevant geographic and product markets; and (3) News Corp.'s market power in the relevant market. And the majority of News Corp.'s alleged predatory conduct involves its dealings with competitors and retailers, not the putative class members. This suggests that resolution is capable through common proof for the class. Plaintiffs have met the requirements of

Rule 23(a)(2). Cf. *Wal-Mart, 131 S. Ct. at 2556* ("We quite agree that for purposes for *Rule 23(a)(2)*, even a single common question will do[.]") (internal quotations and citations omitted).

iii. Typicality

Typicality "requires that the claims of the class representative[] be typical of those of the class, and 'is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability.'" *Marisol A. v. Giuliani, 126 F.3d 372, 376 (2d Cir. 1997)* (quoting *In re Drexel Burnham Lambert Grp., Inc., 960 F.2d 285, 291 (2d Cir. 1992))*. "The commonality and typicality requirements tend to merge into one another." *Marisol, 126 F.3d at 376*. "Since the claims only need to share the same essential characteristics, and need not be identical, the typicality **[**9]** requirement is not highly demanding." *Bolanos v. Norwegian Cruise Lines Ltd., 212 F.R.D. 144, 155 (S.D.N.Y. 2002)*. "When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective **[*114]** of minor variations in the fact patterns underlying individual claims." *Robidoux v. Celani, 987 F.2d 931, 936-37 (2d Cir. 1993)*.

News Corp. asserts that Plaintiffs are not representative of the class. Specifically, BEF Foods and Spectrum did not purchase ISPs over the last several years. Other Plaintiffs differ in whether they purchase ISPs across the entire News Corp. network. For instance, HP Hood focuses its marketing in New England, while Foster Farms markets to West Coast retailers. And Dial's spending on ISPs fluctuates rather dramatically. Accordingly, News Corp. argues that these Plaintiffs cannot be typical of a nationwide class of ISP purchasers.

However, Plaintiffs demonstrate that all class representatives made some ISP purchases during the damages period. Differences in amounts or characteristics of the class representatives' purchases do not defeat typicality. See *In re Sumitomo Copper Litig., 182 F.R.D. 85, 92 (S.D.N.Y. 1998)* ("[T]he simple fact that Class members may have purchased and sold copper futures at different times, for different purposes" does **[**10]** not defeat typicality).

iv. Adequacy

"Adequacy 'entails inquiry as to whether: 1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation.'" *In re Flag Telecom Holdings, Ltd. Sec. Litig., 574 F.3d 29, 35 (2d Cir. 2009)* (quoting *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp., 222 F.3d 52, 60 (2d Cir. 2000))*. "The fact that plaintiffs' claims are typical of the class is strong evidence that their interests are not antagonistic to those of the class." *Damassia v. Duane Reade, Inc., 250 F.R.D. 152, 158 (S.D.N.Y. 2008)*. News Corp. does not contest adequacy,

b. Requirements of *Rule 23(b)*

i. Predominance

News Corp. contends that Plaintiffs do not meet *Rule 23(b)(3)*'s predominance requirement. *Rule 23(b)(3)* is an "'adventuresome innovation' . . . framed for situations 'in which class-action treatment is not as clearly called for.'" *Wal-Mart, 131 S. Ct. at 2558* (quoting *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614-15, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997))*. "Class-wide issues predominate if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Moore v. PaineWebber, Inc., 306 F.3d 1247, 1252 (2d Cir. 2002)*. Courts are required "to take a 'close look' at whether common questions predominate over individual ones." *Comcast, 133 S. Ct. at 1432* (quoting *Amchem, 521 U.S. at 615*).

To certify a class in an antitrust action, Plaintiffs must demonstrate that **[**11]** the elements of their underlying claims can be proven by common evidence. Those elements include: "(1) a violation of ***antitrust law***; (2) injury and causation; and (3) damages[.]" *Cordes & Co. Fin Servs. v. A.G. Edwards & Sons, 502 F.3d 91, 105 (2d Cir. 2007)* (quotations omitted). Each element is analyzed in turn.

a. Violation of Antitrust Laws

The issues relevant to proving a violation of the antitrust laws in this case include the geographic market definition, the product market definition, News Corp.'s monopoly power, the extent of News Corp.'s exclusionary conduct, and causation. These liability issues can be proven through class-wide, common evidence because they focus on News Corp.'s conduct, not on the actions of putative class members. See *In re Flonase Antitrust Litig., 284 F.R.D. 207, 219 (E.D. Pa. 2012)*. Indeed, if each class member pursued its claims individually, the class member would have to prove the same antitrust violations using the same documents, witnesses, and other evidence. A violation of the antitrust laws is capable of common proof.

b. Antitrust Injury

To satisfy the *Rule 23(b)(3)* predominance requirement, Plaintiffs must demonstrate **[*115]** that class-wide injury or "impact" is capable of proof at trial through evidence that is common to the class rather than individual to its members. See *Comcast, 133 S. Ct. at 1430*. Plaintiffs attempt to show that **[**12]** common, class-wide proof exists that all putative class members paid more than they would have in the but-for world. Because each putative class member negotiated with News Corp. sales staff and purchased one or more of 12 different ISP products for placement in one or more of 52,500 retail stores, News Corp. contends that the substantial variation in News Corp.'s ISP prices across customers precludes class-wide proof. While Plaintiffs acknowledge that prices may differ, they counter that those prices depend, predominantly, on common and observable factors, and all CPGs would face lower prices in the but-for world.

1. Plaintiffs' Model

To support their argument, Plaintiffs rely on Dr. MacKie-Mason, Dean of the School of Information at the University of Michigan. Dr. MacKie-Mason's analysis employs a regression model that correlates News Corp.'s transaction prices to product attributes, contract attributes, and product costs—such as regional coverage, time period, placement frequency—to determine class-wide impact. (MacKie-Mason Report at 74, 79.) Dr. MacKie-Mason's model uses transaction data provided by News Corp. that tracks third party ISP sales from 2000 through 2014. (MacKie-Mason **[**13]** Report at 75.) His regression analysis concludes that 72% of the price variation in News Corp.'s transaction data can be explained using only common attributes. (MacKie-Mason Report at 79.) According to Plaintiffs, although the highest actual price paid by a putative class member was $90, and the lowest was $4, prices are largely determined by common, observable characteristics of the products, the quantities purchased, and the geographic market. (MacKie-Mason Rebuttal at 18-19.)

Plaintiffs also advance documentary evidence and deposition testimony to support their statistical showing that antitrust injury is capable of common proof. For example, until at least 2011, News Corp. used rate cards that refer to attributes such as tactic, cycle, sales category, trade class, geography, and store count, to provide a matrix of ISP prices. (MacKie-Mason Report at 74; MacKie-Mason Rebuttal at 20-21.) Rate cards were the starting point for negotiations to help customers understand ISP price differences. News Corp.'s commitment letters also tracked the same characteristics that were factored into rate cards. (MacKie-Mason Rebuttal at 21.)

News Corp. counters with an expert report by Dr. Jerry Hausman, Professor of Economics at Massachusetts Institute of Technology. Unsurprisingly, **[**14]** Dr. Hausman's statistical analysis is at odds with that of Dr. MacKie-Mason. Dr. Hausman insists that common factors explain only a "small fraction in the variation in ISP prices" and that Dr. MacKie-Mason's regression analysis suffers from "omitted variable bias" because Dr. MacKie-Mason failed to include customer-specific variables. (Hausman Report at 61.) Thus, Dr. Hausman contends that Dr. MacKie Mason's methodology causes him to overstate that portion of the ISP price variation explained by common attributes. (Hausman Report at 58, 61.) Performing an eponymous "Hausman specification test" to account for the bias, and "correcting" Dr. MacKie-Mason's regression analysis, Dr. Hausman's results suggest that customer-specific factors account for 76% of ISP prices and "common attributes explain a lot less than what Dr. MacKie-Mason thought." (Hausman Report at 62; Hausman Dep. Tr. at 85.)

Courts may not shy away from a "battle of the experts" at the class certification stage. See, e.g., *In re Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 255, 406 U.S. App. D.C. 371 (D.C. Cir. 2013)* (noting that *Rule 23* requires courts to take a "hard look at the soundness of statistical models that purport to show predominance[.]"). To support class certification, Plaintiffs must advance a workable methodology **[**15]** to demonstrate that antitrust injury can be proven on a class-wide basis. See *In re Currency Conversion Fee Antitrust Litigation, 224 F.R.D. 555, 565 (S.D.N.Y. 2004)*; *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 256 F.R.D. 82, 100 (D. Conn. 2009)* ("The real **[*116]** question . . . is whether the plaintiffs have established a workable multiple regression equation, not whether plaintiffs' model actually works[.]"); see also *In re Elec. Books Antitrust Litig., No. 11 MD 2293 (DLC), 2014 U.S. Dist. LEXIS 42537, 2014 WL 1282293, at *14 (S.D.N.Y. Mar. 28, 2014)* (accepting a regression analysis which explained "90% of the variance" among pricing).

The differences between the parties' regression analyses raise some alarms. But courts may consider regression models if they include variables accounting for the major factors. See *In re Urethane Antitrust Litig., 768 F.3d 1245, 1260-61 (10th Cir. 2014)*; see also *Koger v. Reno, 98 F.3d 631, 637, 321 U.S. App. D.C. 182 (D.C. Cir. 1996)* ("[C]ourts have taken the view that a defendant cannot undermine a regression analysis simply by pointing to variables not taken into account that might conceivably have pulled the analysis's sting."); cf. *Bazemore v. Friday, 478 U.S. 385, 400, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986)* ("Normally, failure to include variables will affect the analysis' probativeness, not its admissibility."). It appears that Dr. MacKie-Mason's model takes account of the significant variables affecting price. Indeed, Dr. Hausman acknowledges that Dr. MacKie-Mason's model includes important product variables including volume and number of stores. (See Hausman Dep. Tr. at 94-95.)

When measured against Dr. Hausman's critique, **[**16]** Dr. MacKie-Mason's regression analysis may be of diminished probative value. See *Bazemore, 478 U.S. at 400*. Nevertheless, Plaintiffs' model suggests that pricing is capable of proof on a class-wide basis when combined with the deposition testimony, and documentary evidence such as the rate cards and commitment letters.[1] Although prices may differ on an individual level in both the actual and but-for worlds, Plaintiffs' evidence suggests that prices are systematic and, thus antitrust injury is measurable with common proof.

2. Applicability of Comcast

Seizing on the Supreme Court's holding in *Comcast v. Behrend, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)*, News Corp. argues that Plaintiffs' motion fails to satisfy *Rule 23(b)(3)*'s predominance requirement. In *Comcast*, plaintiffs alleged that Comcast's acquisition of competitor cable television providers in sixteen counties clustered around Philadelphia violated the Sherman Act. In support **[**17]** of their claims, the Comcast plaintiffs offered four theories of antitrust injury or impact, i.e., four explanations for Comcast's ability to charge higher prices. The district judge concluded that only one theory was susceptible to class-wide proof: Comcast's clustering around Philadelphia reduced competition from "overbuilders," that is, competitors who build competing cable networks where incumbent cable providers already exist.[2] *Comcast, 133 S. Ct. at 1430-31*.

Writing for the majority, Justice Scalia held that the plaintiffs' expert opinion could not withstand the "rigorous analysis" necessary for the *Rule 23(b)(3)* predominance test because plaintiffs were entitled only to damages on a single theory of injury. *Comcast, 133 S. Ct. at 1433*. Because the damages model proposed by plaintiffs' expert was not based solely on the "overbuilder" theory of injury certified by the **[**18]** district court, *Comcast, 133 S. Ct. at 1433-34*, the Supreme Court concluded that "*Rule 23(b)(3)* cannot authorize treating [cable] subscribers within the Philadelphia cluster as members of a single class." *Comcast, 133 S. Ct. at 1435*. But Justices Ginsburg and Breyer in a vigorous dissent cautioned that "[t]his Court's ruling is good for this day and case only." *Comcast, 133 S. Ct. at 1437* (Ginsburg & **[*117]** Breyer, dissenting). And the Second Circuit read Comcast narrowly in *Roach v. T.L.*

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[1] News Corp. relies on the reasoning in Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Group L.P, to support its argument that Plaintiffs have not shown common proof of antitrust impact. *247 F.R.D. 156 (C.D. Cal. 2007)*. Unlike Dr. MacKie-Mason, the experts in *Allied* made no statistical showing that the prices paid by the putative class members were determinable by common factors.

[2] The other three theories of injury were that Comcast's clustering: (1) permitted it to withhold local sports programming from satellite competitors, thereby reducing competitor market penetration; (2) "reduced the level of 'benchmark' competition on which cable customers rely to compare [provider] prices"; and (3) "increased Comcast's bargaining power relative to content providers." *Comcast, 133 S. Ct. at 1430-31*.

Cannon Corp., 778 F.3d 401 (2d Cir. 2015). There, the Court of Appeals maintained that class certification need not hinge on a class-wide damages model to meet Rule 23(b)(3):

> Comcast, then did not hold that a class cannot be certified under Rule 23(b)(3) simply because damages cannot be measured on a classwide basis . . . . The Court did not hold that the proponents of class certification must rely upon a classwide damages model to demonstrate predominance.

Roach v. T.L. Cannon Corp., 778 F.3d 401, 407 (2d Cir. 2015); see also Sykes v. Mel S. Flarris and Assocs. LLC, 780 F.3d 70, 87-88 (2d Cir. 2015).

News Corp. argues that Dr. MacKie-Mason's regression model fails for the same reason as the plaintiffs' model in Comcast. Plaintiffs set forth at least nine categories of News Corp.'s allegedly exclusionary conduct in the Complaint. (See FAC ¶¶ 10-17, 74-85, 86-104, 108-15.) The "primary anticompetitive conduct alleged" by Plaintiffs is the "exclusion of News [Corp.'s] competitors from access to an essential input," i.e., **[**19]** News Corp.'s exclusionary contracts with retailers. (See MacKie-Mason Report at 72.) In his rebuttal report, Dr. MacKie-Mason acknowledges that "News [Corp.] acquired its monopoly in in-store promotions through the cumulative effect of a number of exclusionary acts[.]"[3] (MacKie-Mason Rebuttal at 5.) And as a result of these activities, News Corp. overcharged its customers. Dr. MacKie-Mason's model assumes that in a but-for world of competitive pricing, none of those exclusionary strategies would exist. (MacKie-Mason Tr. at 158:3-159:4.)

News Corp. points out that Dr. MacKie-Mason's model does not attempt to isolate the effects of any one (or more) of the nine categories of News Corp.'s exclusionary conduct **[**20]** in its damages model. This, News Corp. argues, is the model's fatal flaw, since under Comcast, damages must be tethered to plaintiffs' theory, or theories, of liability. See Comcast, 133 S. Ct. at 1433. As in Comcast, News Corp. argues that Dr. MacKie-Mason's model cannot disaggregate or distinguish injuries attributable to the nine theories that Plaintiffs assert are appropriate for class treatment (the primary theory being News Corps. exclusionary contracts with retailers).

However, News Corp. does not contend that only one of the nine theories of liability had an impact on prices. Cf. Behrend v. Comcast Corp., 264 F.R.D. 150, 166 (E.D. Pa. 2010) aff'd, 655 F.3d 182 (3d Cir. 2011) rev'd, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013) (noting that Comcast argued that the other three theories of liability, i.e., the rejected theories, had no impact on prices.) In fact, Plaintiffs argue the opposite—that News Corp. acquired its monopoly in ISPs through the "cumulative effect" of a number of related exclusionary acts, including News Corp.'s exclusive contracts with retailers, the terms of those contracts, and use of cash guarantees. (MacKie-Mason Rebuttal at 5.) Based on the evidence presented, this Court declines to reject any of the exclusionary acts as incapable of common proof. To establish that News Corp. committed any (or all) of these exclusionary acts will require **[**21]** Plaintiffs to put forth the same evidence for all members of the class. Indeed, these exclusionary acts were allegedly committed by News Corp. in its interactions with retailers and competitors, and are thus capable of common proof.

In Comcast, the Supreme Court noted that if all four types of anticompetitive injury had been approved for certification by the district court, the plaintiffs' damages methodology "might have been sound, and might have produced commonality of damages." Comcast, 133 S. Ct. at 1434. Because this Court declines to reject any of the theories of anticompetitive injury set forth in the Complaint, **[*118]** Plaintiffs' damages model is consistent with Comcast.

c. Damages

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[3] Aside from News Corp.'s contracts with retailers and CPGs, Plaintiffs also allege that News Corp. engages in additional anti-competitive conduct by hacking into computerized customer lists and marketing materials of its competitor, FLOORgraphics; staggering the terms of exclusive contracts; enforcing shelf exclusivity; using cash guarantees to derail competitor contracts; disparaging competitors' compliance rates; defacing competitor advertisements; and disparaging competitor financial viability. (FAC ¶¶ 86-104.)

Plaintiffs must also show that the damages resulting from the antitrust injury are measurable on a class-wide basis through use of common methodology. *Comcast, 133 S. Ct. at 1430*. It used to clearly be the case that individual damages determinations would not defeat class certification. See *Seijas v. Republic of Arg., 606 F.3d 53, 58 (2d Cir. 2010)*. But, as discussed above, in Comcast, the Supreme Court decertified a class where the plaintiffs' damages model "[fell] far short of establishing that damages are capable of measurement on a classwide basis." *133 S. Ct. at 1433*. After Comcast, courts in this District and elsewhere have struggled **[**22]** with whether the predominance requirement can ever be met if individual damages calculations are required.

Several courts found that Comcast requires class-wide damages determinations as a prerequisite to class certification. See *Jacob v. Duane Reade, Inc., 293 F.R.D. 578, 583-84 (S.D.N.Y. 2013)* (discussing cases and granting partial class certification). But, barring class actions where individual damages determinations are necessary would have been a dramatic shift in the law. Indeed, before Comcast, "[r]ecognition that individual damages calculations do not preclude class certification under *Rule 23(b)(3)* [was] well nigh universal." *Comcast, 133 S. Ct. at 1437* (Ginsburg & Breyer, dissenting). And even after Comcast, the Second Circuit held that individual damage determinations will not necessarily defeat class certification under *Rule 23(b)(3)*. *Roach, 778 F.3d at 407*; see also *Sykes, 780 F.3d at 87-88*.

1. Plaintiffs' Model

Dr. MacKie-Mason employs a "benchmarking" or "yardstick" technique to calculate overcharges and antitrust damages, which he argues are capable of determination through common proof. The "yardstick" method for calculating damages is an accepted means of measuring damages in an antitrust action. See, e.g., *In re NASDAQ Market-Makers Antitrust Litigation, 169 F.R.D. 493, 521 (S.D.N.Y. 1996)*. Dr. MacKie-Mason's model accounts for variations in the News Corp. promotions purchased by individual CPGs, including whether the transaction **[**23]** was a list price or the product of a separate negotiation, the class of CPG customer, and the method of purchase. His analysis identifies benchmark competitive margins for firms similar to News Corp. in terms of capitalization and other factors. Averaging these competitive margins, he estimates how News Corp.'s monopoly pricing would have shifted downward if News Corp. had earned a competitive margin instead of a monopoly margin, with a concomitant savings for the CPGs. (MacKie-Mason Report at 82-85.)

Specifically, Dr. MacKie-Mason calculates News Corp.'s monopoly profit margin for its in-store promotions. (MacKie-Mason Report at 80-82.) He then identifies benchmark firms by surveying the companies likely to be as profitable as News Corp. in a market unaffected by monopolization. Dr. MacKie-Mason chose the benchmarks based on their capital intensity, rate of growth, size and the competitiveness of the market. (MacKie-Mason Report at 82-85.) Next, he used the average of these benchmark margins for each year in the damages period to estimate declines in News Corp.'s monopoly pricing. Dr. MacKie-Mason estimates that if News Corp. earned the competitive benchmark margin, prices would have **[**24]** declined by 40%. For the years 2008-2013, he estimates that News Corp. monopoly overcharges would vary from 31% and 43%. (MacKie-Mason Report at 85.) Dr. MacKie-Mason then proposes to apply that monopoly overcharge to prices paid by individual putative class members to calculate individual damages.

News Corp. contends that the benchmark firms Dr. MacKie-Mason chose are not similar to News Corp. in significant ways, including product, firm, and market comparability. News Corp. also disputes Dr. MacKie-Mason's use of the average benchmark firms' profit margin, as opposed to margins at the high or low end of the spectrum.

However, Dr. MacKie-Mason's selection of benchmark firms is appropriate given the limitations inherent in this case. Because **[*119]** News Corp. has allegedly maintained a monopoly in the market for ISPs since at least 2000, creating a benchmark using News Corp.'s prices during a time of "robust competition" is not feasible. (MacKie-Mason Rebuttal at 29.) And as Plaintiffs point out, the selection of perfectly comparable benchmark firms aside from News Corp. is impossible where News Corp.'s alleged monopoly prevents comparable firms from operating within its market. Indeed, the twenty benchmark firms selected **[**25]** by Dr. MacKie-Mason were not chosen arbitrarily: he chose the firms based on their capital intensity, growth, and size. (See MacKie-Mason Rebuttal at 29-31.)

Plaintiffs' damages model is sufficient to show that damages are measurable through use of a common methodology. Although characterized as a dispute over the feasibility of Plaintiffs' damages model, News Corp. essentially argues that Plaintiffs' model does not prove what they claim it proves—class-wide damages. See *In re EPDM Antitrust Litig., 256 F.R.D. at 100* ("In essence, the defendants are asking the court to determine which regression model is most accurate, which is ultimately a merits decision.") (emphasis in original). To the extent that Dr. Hausman proposes an alternative damages model using different methodology and different benchmark firms, he is free to do so at the merits stage.

2. Benefits to Putative Class Members

News Corp. maintains that class certification under *Rule 23(b)(3)* is inappropriate because increased competition in the market for ISPs may actually harm certain putative class members, while benefitting others, in varying degrees. Dr. Hausman characterizes the ISP industry as "two-sided . . . with network effects." (Hausman Report at 32.) The industry is "two-sided" because ISP providers compete **[**26]** by negotiating with retailers on one hand, and CPGs on the other. The industry has "network effects" because CPGs may place more value on a larger network. As a result, "enhanced competition for retailer space will, other things equal, reduce the value of that space to CPGs and raise third-party ISP providers' costs." (Hausman Report at 30-31.) News Corp.'s network may be less valuable to CPGs because it is smaller, and the "reduction in value will be larger for CPGs who place a higher value on the ability to use a large, national network." (Hausman Report at 31.) The existence of these "network effects" are contested by Plaintiffs. (MacKie-Mason Rebuttal at 5-9.) And, as Plaintiffs point out, News Corp.'s former CEO has previously testified that such network effects may not "necessarily" exist. (See Briody Decl. Ex. 25.)

News Corp. also argues that the steep discounts on ISPs offered to buyers when bundled with FSI would not exist in the but-for world. (See FAC ¶¶ 122-26.) For some members of the putative class, those discounts may be greater than the overcharges calculated by Dr. MacKie-Mason. Indeed, according to News Corp., nearly 20% of its customers receive ISP discounts in the actual world that are greater than the **[**27]** alleged overcharges. This fact alone, News Corp. contends, is fatal to a showing of predominance. Plaintiffs disagree and argue that discounts on bundled offerings would exist to some extent in the but-for world. (MacKie-Mason Rebuttal at 10.)

Finally, News Corp. argues that putative class members may benefit from News Corp.'s network in other ways such as lower transaction costs due to the convenience of buying from a single supplier, rather than multiple suppliers, the ability to schedule placements of ISPs in advance, and category exclusivity. (Hausman Report at 49-51.) Plaintiffs dispute the existence of these benefits.

News Corp.'s suggestion that any alleged anticompetitive conduct benefits class members in varying degrees presents a nettlesome and unsettled question of law. Compare *Kohen v. Pacific Inv. Management Co. LLC, 571 F.3d 672, 677 (7th Cir. 2009)* ("[A] class will often include persons who have not been injured by the defendant's conduct[.]") with *In re Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 252, 406 U.S. App. D.C. 371 (D.C. Cir. 2013)* (vacating a district court's certification of a class where plaintiffs could not prove "through common evidence, that all class members were in fact injured"). On June 8, 2015, the Supreme Court granted certiorari **[*120]** in Tyson Foods, Inc. v. Bouaphakeo to address whether a class may be certified or maintained under *Rule 23(b)(3)* when the class **[**28]** consists of uninjured class members. In Tyson, the Eighth Circuit affirmed a lower court's certification of a class of employees, at least 212 of whom were uninjured because they did not work any unpaid overtime. See Tyson Foods, Inc. v. Bouaphakeo, 14 Civ. 1146, 2015 WL 1285369 (8th Cir. March 19, 2015). A decision by the Supreme Court may provide some guidance through the predominance thicket.

In this case, the existence of "network effects," bundled discounts, and other ancillary benefits are questions of fact subject to common proof at trial. These benefits may affect the amount of damages incurred by certain putative class members, not necessarily whether they were injured. But even assuming News Corp.'s theory that discounts and benefits negate injury, the fact that some putative class members may be uninjured does not automatically defeat predominance. See *In re Currency Conversion Fee Antitrust Litigation, 264 F.R.D. 100, 117 (S.D.N.Y. 2010)*; see also *In re Elec. Books Antitrust Litig., No. 11 MD 2293 (DLC), 2014 U.S. Dist. LEXIS 42537, 2014 WL 1282293, at *22 (S.D.N.Y. Mar. 28, 2014)* (rejecting the notion that a plaintiff must prove that all class members were in fact injured at the class certification stage). Damages calculations may require individual determinations.

ii. Whether Predominance is Satisfied

The predominance inquiry requires a "qualitative assessment" of the relative importance of issues in a case. *Butler v. Sears, Roebuck and Co., 727 F.3d 796, 801 (7th Cir. 2013)*. "The mere existence **[**29]** of individual issues will not be sufficient to defeat certification. Rather, the balance must tip such that these individual issues predominate." *Sykes v. Mel S. Flarris and Assocs. LLC, 780 F.3d 70, 87 (2d Cir. 2015)*. "An issue 'central to the validity of each one of the claims' in a class action, if it can be resolved 'in one stroke,' can justify class treatment." *Butler, 727 F.3d at 801* (quoting *Wal-Mart, 131 S. Ct. at 2551*).

These important questions, at least, are common: (1) whether News Corp. violated the antitrust laws; (2) whether, assuming Plaintiffs paid supra-competitive prices, that payment was caused by News Corp.'s pattern of exclusionary conduct stemming from, inter alia, exclusionary contracts with retailers, staggering the terms of those contracts, and cash guarantees; and (3) whether the injury suffered by Plaintiffs is an antitrust injury. News Corp. disputes that it is a monopolist (see Dec. 12, 2014 Tr. at 20), and Plaintiffs will need to proffer complex expert testimony to prove their theories. Additionally, the definitions of the relevant geographic and product markets are also questions common to the class.

This Court recognizes that even if News Corp. is liable under the antitrust laws, individual issues may exist as to damages. However, proving damages pales in comparison to the **[**30]** central questions regarding liability, which are susceptible to common proof. As the Second Circuit has acknowledged, individual damages determinations do not defeat class certification. See *Roach, 778 F.3d at 407*; *Sykes, 780 F.3d at 88* ("Comcast did not rewrite the standards governing individualized damage considerations: it is still clear that individualized monetary claims belong in *Rule 23(b)(3)*.") (citations omitted). *Comcast* requires Plaintiffs to show that their damages stem from News Corp.'s actions that created the legal liability. See *Sykes, 780 F. 3d at 88*. Plaintiffs make that showing here.

To the extent that individual issues arise, they can be addressed as this litigation unfolds. See *In re Visa Check/MasterMoney Antitrust Litigation, 280 F.3d 124, 141 (2d Cir. 2001)*, overruled on other grounds by *In re IPO, 471 F.3d 24 (2d Cir. 2006)* (listing possible "management tools" available to a district court to address individualized damages issues). With looming issues regarding damages, a liability-only class, or the creation of subclasses, may be the most efficient vehicle to move this action forward. See *Butler v. Sears, Roebuck and Co., 727 F.3d 796, 799-802 (7th Cir. 2013)* (noting that "the district judge might decide to create subclasses" but "this possibility [is] not an obstacle to certification of a single mold class at the **[*121]** outset"). Dr. Hausman suggests that the putative class members who purchased ISP from News Corp. can be divided **[**31]** into one of three categories: (1) customers who purchase ISP from News Corp. and do not purchase FSI from News Corp. or Valassis; (2) customers who purchase ISP and FSI from News Corp. under a "right of first refusal" or share contract; and (3) customers who purchase ISP from News Corp. but purchase FSI from Valassis under a "right of first refusal" or share contract. (Hausman Report at 43-44.) While this may offer a template for a later stage in this litigation, predominance under *Rule 23(b)(3)* is satisfied for purposes of this class certification motion.

iii. Superiority

In determining whether "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy," a court must consider:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3).

Here, there is little interest in class members bringing their own actions. In most **[**32]** cases, a class member's potential recovery would be outweighed by the costs of litigation. Class relief is superior where, as here, class-wide litigation of common issues will reduce litigation costs and promote judicial efficiency. Cf. *In re IndyMac Mortgage-Backed Sec. Litig., 286 F.R.D. 226, 243 (S.D.N.Y. 2012)*. Accordingly, the superiority requirement is met.

c. Certification Under *Rule 23(b)(2)*

Plaintiffs also seek to certify an injunctive relief class under *Rule 23(b)(2)*. But they do so in passing. They raise this point in a single footnote in their opening brief and one paragraph in their reply brief. Those perfunctory references are insufficient to present this issue for serious consideration at this time. *In re Global Crossing, Ltd. Sec. Litig., 471 F. Supp. 2d 338, 351 n.13 (S.D.N.Y. 2006)*.

II. Appointment of Class Counsel

Finally, Plaintiffs ask this Court to appoint five law firms as class counsel, without offering any justification as to why appointing five firms is appropriate under *Rule 23(g)*. (See Briody Decl. Exs. 13, 19-22.) While this Court appreciates the desire of counsel to represent their respective clients, class certification is intended to streamline proceedings and introduce efficiencies into case management. This Court is not convinced that those objectives will be furthered with five law firms representing the class. See *In re Crude Oil Commodity Futures Litig., 11 Civ. 3600, 2012 U.S. Dist. LEXIS 23084, 2012 WL 569195, at *2 (S.D.N.Y. Feb. 14, 2012)* **[**33]** ("[T]his Court must balance the[] desire to create a 'dream team' against the competing considerations of efficiency and economy."); see also Manual for Complex Litig., § 10.221 (4th ed. 2004). Accordingly, counsel are directed to confer to decide who among them will act as lead Plaintiffs' counsel. Plaintiffs should propose no more than two law firms to serve as co-lead counsel. Failing an agreement among Plaintiffs' counsel, this Court will entertain applications for appointment of lead counsel.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for class certification under *Rule 23(b)(3)* is granted. This Court certifies a class of:

> Non-retailer consumer packaged goods firms residing in the United States which have directly purchased in-store promotions from News Corp. at any time on or after April 5, 2008, and were not subject to mandatory arbitration clauses.

Counsel for Plaintiffs are directed to confer regarding the appointment of lead counsel and advise this Court of any agreement they reach consistent with this Memorandum & Order by June 26, 2015. The Clerk of Court is directed to terminate the motion pending at ECF No. 141.

Dated: June 18, 2015

New York, New York

SO ORDERED:

/s/ **[**34]** William H. Pauley

WILLIAM H. PAULEY III

U.S.D.J.

End of Document

[Surf City Steel, Inc. v. Int'l Longshore & Warehouse Union](#)

United States District Court for the Central District of California

June 18, 2015, Decided; June 18, 2015, Filed

CV 14-05604 BRO (SSx)

Reporter

123 F. Supp. 3d 1219 *; 2015 U.S. Dist. LEXIS 97466 **; 2015-1 Trade Cas. (CCH) P79,216

SURF CITY STEEL, INC. ET AL. v. INTERNATIONAL LONGSHORE AND WAREHOUSE UNION ET AL.

Subsequent History: Affirmed by *Surf City Steel, Inc. v. Int'l Longshore & Warehouse Union, 780 Fed. Appx. 467, 2019 U.S. App. LEXIS 20083, 2019 WL 2897512 (9th Cir. Cal., July 5, 2019)*

Prior History: *Surf City Steel, Inc. v. Int'l Longshore & Warehouse Union, 2014 U.S. Dist. LEXIS 119480 (C.D. Cal., Aug. 26, 2014)*

Core Terms

Plaintiffs', relevant market, antitrust, cranes, ports, signatories, exemption, Defendants', damages, collective bargaining, allegations, employees, monopoly, contractors, factors, motion to dismiss, alleged injury, nonstatutory, bargaining, mandatory, parties, anti trust law, modification, arbitration, affiliate, injuries, projects, lack standing, perform work, conclusory

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Collective Bargaining & Labor Relations > Labor & Employment Law > Collective Bargaining & Labor Relations

Labor & Employment Law > Employment Relationships

HN1[ ] **Labor & Employment, Collective Bargaining & Labor Relations**

See *29 U.S.C.S. § 152(2)*.

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

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

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

Under *Fed. R. Civ. P. 8(a)*, a complaint must contain a short and plain statement of the claim showing that the plaintiff is entitled to relief. *Fed. R. Civ. P. 8(a)*. If a complaint fails to do this, the defendant may move to dismiss it under *Fed. R. Civ. P. 12(b)(6)*. *Fed. R. Civ. P. 12(b)(6)*. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim that is plausible on its face. A claim is plausible on its face when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Factual allegations must be enough to raise a right to relief above the speculative level. Thus, there must be more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility that the plaintiff is entitled to relief.

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

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

HN3[] **Amendment of Pleadings, Leave of Court**

Where a district court grants a motion to dismiss, it should provide leave to amend unless it is clear that the complaint could not be saved by any amendment. Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment. But leave to amend is properly denied if amendment would be futile.

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > Union Violations

HN4[] **Unfair Labor Practices, Union Violations**

Section 303 of the Labor Management Relations Act, *29 U.S.C.S. § 187*, provides a judicial forum to pursue damages resulting from certain unfair labor practices committed by a union.

Civil Procedure > Preliminary Considerations > Justiciability > Standing

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > Union Violations

HN5[] **Justiciability, Standing**

The requirement under § 303 of the Labor Management Relations Act (LMRA), *29 U.S.C.S. § 187*, that an injury occurs "by reason of" an LMRA *§ 8(b)(4)*, *29 U.S.C.S. § 158(b)(4)*, violation imposes standing limitations. To determine whether § 303 standing exists, courts are to look to: (1) the nexus between the injury and the statutory violation; and (2) the relationship between the injury alleged and the forms of injury that Congress sought to prevent or remedy by enacting the statute. And to determine the relationship between the injury and the statutory violation, courts examine whether the plaintiff was within the target area of the defendant's illegal practices and was not only hit, but also aimed at.

Civil Procedure > Preliminary Considerations > Justiciability > Standing

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > Union Violations

HN6[] **Justiciability, Standing**

Employees of an enterprise injured by a union's violation of *§ 8(b)(4)(D)* of the Labor Management Relations Act (LMRA), *29 U.S.C.S. § 158(b)(4)(D)*, do not have standing under § 303 of the LMRA, *29 U.S.C.S. § 187*, to maintain a suit for damages against the offending union.

Civil Procedure > Preliminary Considerations > Justiciability > Standing

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > Union Violations

***HN7*[]** **Justiciability, Standing**

When a case involves plaintiffs who are unions rather than employees who are members of a union, the analysis of standing under § 303 of the Labor Management Relations Act (LMRA), *29 U.S.C.S. § 187* remains the same. The union plaintiffs must demonstrate that there is a nexus between the injury and the statutory violation, and that the relationship between the injury alleged is one of the forms of injury that Congress sought to prevent or remedy by enacting the statute. A decrease in union dues is not a necessary and integral aspect of an LRMA violation under *29 U.S.C.S. § 158(b)(4)*.

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > Union Violations

***HN8*[]** **Unfair Labor Practices, Union Violations**

Section 8(b)(4)(ii)(A) of the Labor Management Relations Act (LRMA), *29 U.S.C.S. § 158(b)(4)(ii)(A)*, prohibits a union from forcing or requiring an employer to enter into a "hot cargo" agreement prohibited by *§ 8(e)*, *29 U.S.C.S. § 158(e)*. An example of such an agreement is a "union signatory" clause, which prohibits the employer from subcontracting with all employers who are not union signatories. To state an LMRA claim, plaintiffs must therefore adequately allege that the defendants have violated *§ 8(b)(4)* by enforcing an agreement that is prohibited under *§ 8(e)*, and that they consequently suffered damages as a result.

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration

Labor & Employment Law > ... > Unfair Labor Practices > Union Violations > Secondary Activities

***HN9*[]** **Collective Bargaining & Labor Relations, Labor Arbitration**

In rare cases, a union can commit a predicate unfair labor practice through its conduct in an arbitration proceeding. In such cases, the violation of *§ 8(b)(4)* of the Labor Management Relations Act, *29 U.S.C.S. § 158(b)(4)*, occurs the moment the union pursues arbitration with an unlawful secondary motive. In this context, labor agreements are considered either "primary" or "secondary," the former being permissible while the latter are not. For purposes of determining whether an agreement is primary or secondary, the touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-à-vis its own employees—that is, whether the agreement's object is to benefit the employees of the bargaining unit represented by the union rather than to apply pressure to a neutral employer in order to require it to accede to union objectives.

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

HN10[] **Standing, Sherman Act**

Unions will often lack antitrust standing because it is often not clear whether a union's interests would be served by enhanced competition in the market. As a general matter, a union's primary goal is to enhance the earnings and improve the working conditions of its membership; that goal is not necessarily served, and indeed may actually be harmed, by uninhibited competition among employers striving to reduce costs in order to obtain a competitive advantage over their rivals. Set against this background, a union, in its capacity as bargaining representative, will frequently not be part of the class the Sherman Act was designed to protect, especially in disputes with employers with whom it bargains. Nevertheless, in each case a union's alleged injury must be analyzed to determine whether it is of the type that the antitrust statute was intended to forestall.

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

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

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

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

HN11[] **Standing, Requirements**

"Antitrust standing" is a distinct inquiry from that of constitutional standing. Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action. This determination of antitrust standing requires an evaluation of the plaintiff's harm, the alleged wrongdoing by the defendant, and the relationship between them.

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

HN12[] **Standing, Requirements**

The Supreme Court has identified a number of factors that courts are to apply when evaluating whether an antitrust plaintiff has standing. These factors include: (1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages.

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

HN13[] **Standing, Requirements**

The first antitrust standing factor addresses whether the plaintiffs' alleged injury is the result of anti-competitive behavior that ***antitrust law*** was intended to forestall—that is, whether it was the result of anti-competitive behavior. The requirement that the alleged injury be related to anti-competitive behavior requires, as a corollary, that the injured party be a participant in the same market as the alleged malefactors. A plaintiff who is neither a competitor nor a consumer in the relevant market does not suffer "antitrust injury."

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

HN14[] **Standing, Requirements**

The second factor to determine antitrust standing considers the directness of the alleged injury. When analyzing this factor, the chain of causation between the injury and the alleged restraint in the market should lead directly to the immediate victims of any alleged antitrust violation. Generally, employees have been denied standing where their injuries were merely derivative of that of the employer.

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

HN15[] **Standing, Requirements**

Victims who suffer indirect injuries have antitrust standing when the harm was clearly foreseeable and when there can be no question but that the loss was precisely the type of loss that the claimed violations would be likely to cause.

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

HN16[] **Standing, Requirements**

For purposes of determining antitrust standing, two factors have been identified by the Supreme Court as indicating the speculative nature of a damage claim: (1) the indirectness of the alleged injury, and (2) that the alleged effects may have been produced by independent factors.

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

HN17[] **Standing, Requirements**

The final factor for determining antitrust standing is the risk of duplicative discovery. The risk to be avoided under this factor is that potential plaintiffs may be in a position to assert conflicting claims to a common fund, thereby creating the danger of multiple liability for the fund.

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

HN18[] **Standing, Requirements**

For purposes of determining antitrust standing, the exception recognized in Ostrofe II is limited to those cases in which a dismissed employee is an essential participant in an antitrust scheme, the dismissal is a necessary means to accomplish the scheme, and the employee has the greatest incentive to challenge the antitrust violation.

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

HN19[] **Defenses, Demurrers & Objections, Motions to Dismiss**

Whether a case can be dismissed on the pleadings depends on what the pleadings say. A plaintiff may plead herself out of court. If the pleadings establish facts compelling a decision one way, that is as good as if depositions and other expensively obtained evidence on summary judgment establishes the identical facts. The court may not consider evidence or factual matter not presented in the pleadings or judicially noticed documents.

Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions

HN20[] **Labor, Nonstatutory Exemptions**

To determine whether the nonstatutory labor antitrust exemption applies, the U.S. Court of Appeals for the Ninth Circuit has adopted the U.S. Court of Appeals for the Eighth Circuit's test from Mackey v. National Football League. Under that test, the parties to an agreement restraining trade are exempt from antitrust liability only if (1) the restraint primarily affects the parties to the agreement and no one else, (2) the agreement concerns wages, hours, or conditions of employment that are mandatory subjects of collective bargaining, and (3) the agreement is produced from bona fide, arm's-length collective bargaining. To obtain dismissal of the plaintiffs' antitrust claims, the defendants must demonstrate that the factual allegations in the complaint establish each of these factors. The U.S. District Court for the Central District of California has rejected an attempt to impose the additional requirement that the provisions in question must address the labor relationship between an employer and its employees. The three-part test from Mackey was designed to be applicable to different types of cases.

Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions

HN21[] **Labor, Nonstatutory Exemptions**

To determine whether the nonstatutory labor antitrust exemption applies, a court must consider whether the matter is peculiarly suitable for resolution within the collective bargaining framework and amenable to the collective bargaining process.

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

HN22[] **Collective Bargaining & Labor Relations, Bargaining Subjects**

Work assignments are mandatory subjects of collective bargaining, even if the employer is assigning work outside of the collective bargaining unit.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Affirmative Defenses

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

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

HN23[] **Defenses, Demurrers & Objections, Affirmative Defenses**

Plaintiffs are not required to plead on the subject of an anticipated affirmative defense. When an affirmative defense is obvious on the face of a complaint, however, a defendant can raise that defense in a motion to dismiss.

Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions

Civil Procedure > Pleading & Practice > Pleadings > Complaints

Evidence > Judicial Notice

HN24[] **Labor, Nonstatutory Exemptions**

To determine that the nonstatutory labor antitrust exemption applies at the pleading stage, it must be clear either from the allegations in the complaint or from judicially noticed facts that all three elements of the Mackey test are satisfied.

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

Civil Procedure > Appeals > Appellate Jurisdiction > Lower Court Jurisdiction

HN25[] **Appellate Jurisdiction, Interlocutory Orders**

A district court retains jurisdiction over an interlocutory order—and thus may reconsider, rescind, or modify such an order—until a court of appeals grants a party permission to appeal.

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

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

HN26[] **Attempts to Monopolize, Elements**

The Sherman Act prohibits monopolies and attempts to form monopolies. *15 U.S.C.S. § 2* provides that every person who shall monopolize, or attempt to monopolize, or conspire with any other persons, to monopolize any part of the trade or commerce commits a felony. To prevail on a claim of attempted monopoly, plaintiffs must establish (1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed at accomplishing that purpose; (3) a dangerous probability of achieving monopoly power; and (4) causal antitrust injury. This fourth element requires that the plaintiffs only be compensated for injuries that the antitrust laws were intended to protect.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

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

HN27[] **Judges, Discretionary Powers**

A district court's discretion to deny leave to amend is particularly broad where the plaintiff has previously amended the complaint.

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

Attorneys Present for Defendants: Not Present.

Judges: BEVERLY REID O'CONNELL, United States District Judge.

Opinion by: BEVERLY REID O'CONNELL

Opinion

[*1223] CIVIL MINUTES — GENERAL

Proceedings: (IN CHAMBERS)

ORDER RE: MOTION TO DISMISS [48]

I. INTRODUCTION

Pending before the Court is Defendants' motion to dismiss Plaintiffs' Second Amended Complaint ("SAC") pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. (Dkt. No. 48.) After consideration of the papers filed in support of and in opposition to the instant motion, the Court deems this matter appropriate for decision without **[*1224]** oral argument of counsel. *See* *Fed. R. Civ. P. 78*; *C.D. Cal. L.R. 7-15*. For the following reasons, Defendants' motion is **GRANTED in part** and **DENIED in part**.

II. BACKGROUND

A. The Parties

Plaintiffs are comprised of two primary groups. First, Plaintiffs Surf City Steel, Inc. and Sarens USA, Inc. (collectively, the "Employer Plaintiffs") are each California corporations that constitute "employers" within the meaning of *29 U.S.C. § 152(2)*.[1] (SAC ¶¶ 5-6.) Plaintiffs allege that the Employer Plaintiffs each perform work within the relevant market area described in the SAC and performed relevant work within that market area. (SAC ¶ 7.) Second, Plaintiffs International Association of Bridge, Structural, **[**2]** Ornamental and Reinforcing Iron Workers ("Iron Workers"), International Association Local 378, International Association Local 377, International Association Local 433, International Associations Local 29, and International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers Local 86 (collectively, the "Union Plaintiffs") are labor unions whose members perform relevant work. (SAC ¶¶ 8-13.)

Defendants are also labor unions that "conduct[] activities as a labor organization" in the relevant market area as defined in the SAC. (SAC ¶¶ 14-18.) The named Defendants in this action include International Longshore Warehouse Union ("ILWU"), ILWU Local 10, ILWU Local 8, ILWU Local 19, **[**3]** and ILWU Local 13. (SAC ¶¶ 14-18.)

B. The Relevant Market Area and Relevant Work

As defined in the SAC, the "relevant market area" consists of "those port facilities on the West Coast of the United States within the States of California, Oregon and Washington, including the Long Beach, California Port Facility;

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[1] *Section 152(2)* states: ***HN1***[] "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

the Los Angeles, California Port Facility; the Oakland, California Port Facility; the San Francisco Port Facility; the Portland, Oregon Port Facility; and the Seattle/Tacoma, Washington Port Facility." (SAC ¶ 19.)

The SAC also defines the "relevant work" as: "the labor and services necessary for the non-operational structural maintenance and structural modification of cranes and movement of cranes and all other work in connection therewith; and the jacking, erection and modification of new cranes and of existing cranes and movement of new cranes and existing cranes in connection therewith. This includes the relocation of such cranes when such relocation or movement involves either the installation of new cranes or the jacking, erecting, and modification of existing cranes, including the removal, wrecking and dismantling of such cranes and rubber gantry cranes." (SAC ¶ 20.)

C. Factual [4] Background**

Plaintiffs allege that Defendants have acted in concert with various port managers who conduct business in the relevant market area to monopolize the relevant work market and exclude Plaintiffs from conducting business in the relevant work market area. (SAC ¶ 27.) According to Plaintiffs, in 2008 Defendants entered into **[*1225]** an agreement with the port managers—known as the Pacific Coast Longshore Contract Document ("PCLCD")—which covers the relevant work involving ports along the West Coast, including in Long Beach, Los Angeles, Oakland, Oregon, and Washington State. (SAC ¶ 38.) Plaintiffs allege that the purpose and intent of the PCLCD is to eliminate the competition that Defendants would face from Plaintiffs in the relevant market. (SAC ¶ 45.) Plaintiffs further allege that the agreement is not designed to preserve work that Defendants have historically performed, but instead for Defendants to monopolize labor in the relevant market to control the price of labor. (SAC ¶¶ 41-58.) Plaintiffs claim that the PCLCD has no pro-competitive justification. (SAC ¶ 59.)

Additionally, the PCLCD includes a mandatory grievance and arbitration process, by which Defendants have enforced the **[**5]** agreement against Plaintiffs. (SAC ¶ 39.) The SAC asserts that the PCLCD's arbitration mechanism effectively prohibits Plaintiffs—who are not signatories to the PCLCD—from bidding on projects and performing work that they have traditionally performed in the relevant market area. (SAC ¶¶ 60-68.) In support of these allegations, Plaintiffs provide a number of factual examples in which Plaintiffs were precluded from bidding or working on certain projects in the relevant market area because they were not ILWU contractors. (*See* SAC ¶¶ 69-89.)

D. Procedural History

As a result of these allegations, Plaintiff Iron Workers sent ILWU a letter in June 2014 in which Iron Workers accused Defendants of violating federal antitrust laws. (SAC ¶ 68.) When ILWU did not respond, Plaintiffs filed their Complaint on July 18, 2014. (Dkt. No. 1.) On October 9, 2014, Defendants filed a motion to dismiss the Complaint, (Dkt. No. 27), which the Court granted on January 20, 2015 with leave to amend, (Dkt. No. 40). Plaintiffs then filed a First Amended Complaint on February 9, 2015. (Dkt. No. 41.) On February 23, 2015, Defendants filed a motion to dismiss the First Amended Complaint, (Dkt. No. 42), which the Court **[**6]** granted on April 6, 2015, again with leave to amend, (Dkt. No. 46).

Plaintiffs then filed the SAC on April 20, 2015. (Dkt. No. 47.) In the SAC, Plaintiffs allege three causes of action for: (1) violation of sections 1 and 2 of the Sherman Act, (SAC ¶¶ 90-130); (2) breach of contract, (SAC ¶¶ 131-42); and (3) violation of section 303 of the Labor-Management Relations Act ("LMRA"), *29 U.S.C. § 187*, (SAC ¶¶ 143-62). Defendants then brought the instant motion to dismiss the SAC on May 4, 2015. (Dkt. No. 48.) Plaintiffs opposed this motion on May 21, 2015, (Dkt. No. 50), and Defendants replied on June 8, 2015, (Dkt. No. 51).

III. LEGAL STANDARD

HN2[] Under *Rule 8(a)*, a complaint must contain a "short and plain statement of the claim showing that the [plaintiff] is entitled to relief." *Fed. R. Civ. P. 8(a)*. If a complaint fails to do this, the defendant may move to dismiss it under *Rule 12(b)(6)*. *Fed. R. Civ. P. 12(b)(6)*. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Factual allegations must be enough **[**7]** to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Thus, there must be "more **[*1226]** than a sheer possibility that a defendant has acted unlawfully." *Iqbal, 556 U.S. at 678*. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility'" that the plaintiff is entitled to relief. *Id.*

HN3[] Where a district court grants a motion to dismiss, it should provide leave to amend unless it is clear that the complaint could not be saved by any amendment. *Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008)* ("Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment."). But leave to amend "is properly denied . . . if amendment would be futile." *Carrico v. City & Cnty. of S.F., 656 F.3d 1002, 1008 (9th Cir. 2011)*.

IV. DISCUSSION

As in the previous two motions to dismiss, Defendants seek dismissal of each of Plaintiffs' claims for (1) violation of section 303 of the LMRA; (2) violations of federal ***antitrust law***; and (3) breach of contract. The Court will discuss each claim in turn.

A. Section 303 of LMRA

HN4[] Section 303 of the LMRA "provides a judicial forum to pursue damages resulting from certain unfair labor practices committed by a union." *Am. President Lines, Ltd. v. Int'l Longshore & Warehouse Union, Alaska Longshore Div., Unit 60, 721 F.3d 1147, 1149 (9th Cir. 2013)*. Plaintiffs allege that Defendants have committed unfair labor practices because their conduct **[**8]** violates section 8(b)(4) of the LMRA, *29 U.S.C. § 158(b)(4)*. (SAC ¶ 143.) Defendants make two arguments in favor of dismissing Plaintiffs' LMRA claims. First, Defendants argue that the Union Plaintiffs lack standing to assert such a claim. Second, Defendants contend that Plaintiffs have failed to allege a "secondary objective" as required by section 303 of the LMRA.

1. The Union Plaintiffs Lack Standing

The Ninth Circuit has held that *HN5*[] "Section 303's requirement that an injury occurs 'by reason of' a Section 8(b)(4) violation 'imposes standing limitations.'" *Am. President Lines, 721 F.3d at 1153* (quoting *Fulton v. Plumbers & Steamfitters, 695 F.2d 402, 405 (9th Cir. 1982))*. To determine whether section 303 standing exists, courts are to look to: "(1) the nexus between the injury and the statutory violation; and (2) the relationship between the injury alleged and the forms of injury that Congress sought to prevent or remedy by enacting the statute." *Id.* And to determine the relationship between the injury and the statutory violation, courts "examine whether the plaintiff 'was within the target area of the defendant's illegal practices and was not only hit, but also aimed at.'" *Id.* (quoting *Fulton, 695 F.2d at 406*).

In their SAC, Plaintiffs allege that the Union Plaintiffs have standing to pursue their LMRA claims because the Union Plaintiffs suffered the injury of lost union members and thus lost dues resulting from their **[**9]** members' decision to withdraw and join Defendants. (SAC ¶¶ 107(c), 159(c); *see also* Opp'n at 2, 5 & n.2.) Defendants, however, argue that the Ninth Circuit's holding in *Fulton* forecloses the Union Plaintiffs from having standing under section

303, regardless if they express their injury in terms of their members' interests or their ability to acquire member dues. (Mot. at 4.)

In *Fulton,* the Ninth Circuit held that ***HN6***[] "employees of an enterprise injured by a union's violation of *section 8(b)(4)(D) of the LMRA* [do not] have standing under section 303 of the LMRA to maintain a suit for damages against the offending union." **[*1227]** *695 F.2d at 405, 407-08*. In doing so, the court noted that the "principal object of [defendant] unions' illegal activities was to pressure the site employer to reassign work from the members of the [plaintiffs' union] to members of the [defendant's] unions," which caused the site employer to "respond[] by suspending operation and temporarily laying off workers." *Id. at 407*. The court found that "[t]his consequence was not a 'necessary and integral' aspect of the section 8(b)(4)(D) violation," and therefore that "[t]he injury alleged [was] too remote from the alleged violation to warrant section 303 standing." *Id.; accord Prater v. United Mine Workers of Am., Dists. 20 & 23, 793 F.2d 1201, 1206 (11th Cir. 1986)* (applying *Fulton* to determine **[**10]** that employees lack standing to sue under section 303); *Starks v. Perloff Bros., 760 F.2d 52, 53 (3d Cir. 1985)* (finding that plaintiffs—warehousemen who were members of defendant union—lacked standing to sue defendant under section 303); *Schrader v. Sheet Metal Workers Int'l Ass'n Local Union No. 20, 656 F. Supp. 1487, 1498 (N.D. Ind. 1987)* ("Courts have held in a variety of factual situations . . . that employees may not sue for damages pursuant to § 303 arising out of secondary activity.").[2]

HN7[] While this case involves plaintiffs who are unions rather than employees who are *members* of a union, the analysis remains the same. The Union Plaintiffs must demonstrate that there is a "nexus between the injury and the statutory violation," and that the "relationship between the injury alleged" is **[**11]** one of the "forms of injury that Congress sought to prevent or remedy by enacting the statute." *Am. President Lines, 721 F.3d at 1153* (quoting *Fulton, 695 F.2d at 405*). Here, however, the injury alleged in the SAC is even more remote from the alleged violation of section 303 than that described in the initial Complaint. In their original Complaint, Plaintiffs alleged that Defendants' conduct had caused signatories to the PCLCD to "cease or refrain from doing business with Plaintiff employers and others who are signatory to an agreement with Plaintiff Unions," (Compl. ¶ 93), which consequently prevented members of the Union Plaintiffs from working. In their First Amended Complaint and in the SAC, Plaintiffs have added another layer to the causal chain, claiming that because the union members are not working, they are leaving the unions, which in turn causes the Union Plaintiffs to suffer a decrease in the union dues that they collect. (*See* SAC ¶¶ 107(c), 159(c).) But a decrease in union dues is not a "necessary and integral aspect" of the alleged LRMA violation, *Fulton, 695 F.2d at 407*, and thus Plaintiffs' allegation does not form a sufficient nexus between the injury and statutory violation. *Id. at 405*. The Court therefore concludes that the Union Plaintiffs lack standing to pursue **[**12]** their LMRA claims.

2. Secondary Objective

Defendants also argue that all Plaintiffs' LMRA claims should be dismissed because they fail to state a viable **[*1228]** claim in the SAC. Plaintiffs' LMRA claim is predicated upon a violation of ***HN8***[] *section 8(b)(4)(ii)(A) of the LMRA*, which prohibits a union from "forc[ing] or requir[ing] an employer to enter into a 'hot cargo' agreement prohibited by *Section 8(e)*." *Am. President Lines, 721 F.3d at 1153*. An example of such an agreement is a "union signatory" clause, "which prohibits the employer from subcontracting with all employers who are not union signatories." *Id.; accord N.L.R.B. v. Hotel & Rest. Emps. & Bartenders' Union Local 531, 623 F.2d 61, 67 (9th Cir. 1980)* ("[I]t is well settled that union signatory clauses violate *section 8(e)*."). To state an LMRA claim, Plaintiffs must

[2] The District of Columbia Circuit persuasively explained the reasons for limiting standing pursuant to section 303: "The practical reasons justifying the view that section 303 imposes significant standing requirements are quite simple. Absent such requirements, 'unlimited liability under § 303 might produce financial disaster for unions and inhibit the exercise of the right to strike.' In light of these considerations, it has been clear to the courts that 'the imposition of unlimited liability under section 303 would tend to subvert our national labor policy.'" *Charvet v. Int'l Longshoremen's Ass'n, AFL-CIO, 736 F.2d 1572, 1575, 237 U.S. App. D.C. 207 (D.C. Cir. 1984)* (internal citations and modifications omitted) (quoting *W.J. Milner & Co. v. Int'l Bhd. of Elec. Workers, Local 349, 476 F.2d 8, 12 (5th Cir. 1973)*; *Fulton, 695 F.2d at 408*).

therefore adequately allege that Defendants have violated section 8(b)(4) by enforcing an agreement that is prohibited under *section 8(e)*, and that they consequently suffered damages as a result. *Am. President Lines, 721 F.3d at 1157*.

Plaintiffs state in the SAC that Defendants have, pursuant to the PCLCD, conspired with port managers to prohibit them from doing business with contractors who are not signatories to the PCLCD, thus precluding the Employer Plaintiffs from bidding on certain projects. (*See, e.g.*, SAC ¶¶ 27, 38, 39, 45-51.) Plaintiffs contend that Defendants carried out this conspiracy by including a "cease doing business" provision **[**13]** in violation of *section 8(e) of the LMRA*, which they have enforced through a grievance and arbitration process. (Opp'n at 14.) As in their previous complaints, Plaintiffs cite the following language from the PCLCD as evidence of a "cease doing business" provision:

> Section 1.7. This contract document shall apply to the maintenance and repair of containers of any kind and of chassis, and the movement incidental to such maintenance and repair.
>
> Section 1.71. This contract document shall apply to the maintenance and repair of all stevedore cargo handling equipment.
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> Section. 1.72. It is agreed that the jurisdiction of the ILWU shall apply to the maintenance and repair of all present and forthcoming stevedore cargo handling equipment in accordance with Sections 1.7 and 1.71 . . . .

(SAC ¶ 38.) Yet Plaintiffs do not demonstrate how these sections actually constitute a "cease doing business" provision. Instead, Plaintiffs again rely on conclusory allegations to support this position, stating, for example: "These provisions have been interpreted and enforced by the Defendants, through grievance and arbitration procedures to require that the relevant work performed in the relevant market area must be assigned to the Defendants and to contractors who only employ ILWU members." **[**14]** (SAC ¶ 39.)

The Ninth Circuit has noted that, ***HN9***[] "[i]n rare cases, [a] union can commit a predicate unfair labor practice through its conduct in an arbitration proceeding." *Am. President Lines, 721 F.3d at 1149*. In such cases, "[t]he Section 8(b)(4) violation occurs the moment the union pursues arbitration with an unlawful secondary motive." *Id. at 1155*. In this context, labor agreements are considered either "primary" or "secondary," the former being permissible while the latter are not. *See N.L.R.B. v. Int'l Longshoremen's Ass'n, AFL-CIO, 473 U.S. 61, 78-79, 105 S. Ct. 3045, 87 L. Ed. 2d 47 (1985)*. For purposes of determining whether an agreement is primary or secondary, "[t]he touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-à-vis [its] own employees," *Nat'l Woodwork Mfrs. Ass'n v. N.L.R.B., 386 U.S. 612, 645, 87 S. Ct. 1250, 18 L. Ed. 2d 357 (1967)*—that is, whether the agreement's "object . . . is to benefit the employees of the bargaining **[*1229]** unit represented by the union" rather than to apply pressure to a "[neutral] employer in order to require [it] to accede to union objectives." *A. Duie Pyle, Inc. v. N.L.R.B., 383 F.2d 772, 776 (3d Cir. 1967)*; *accord Peabody Holding Co. v. United Mine Workers of Am., Int'l Union, 41 F. Supp. 3d 494, 2014 WL 4258087, at *9 (E.D. Va. 2014)*.

Here, Plaintiffs allege that the purpose of Defendants' grievance and arbitration mechanism "is to eliminate competition which Defendants would face from Plaintiff unions and their affiliated contractors," and that the agreement **[**15]** is "an effort to restrain trade and monopolize the relevant work by prohibiting non-ILWU signatory contractors and unions from bidding the relevant work." (SAC ¶¶ 44-45.) These bare assertions of a secondary purpose are conclusory. Plaintiffs do not allege any *facts* from which the Court could infer that the purpose of these arbitration proceedings was to pressure contractors not to allow Plaintiffs (or other non-ILWU signatories) to work or bid on their projects. Without any specific factual allegations from which the Court could infer that Defendants actually instituted such a "cease doing business provision," Plaintiffs have failed to adequately plead a violation of *section 8(e) of the LMRA*. Accordingly, the Court finds that Plaintiffs have again failed to state a claim under the LMRA.

B. Antitrust

Defendants seek to dismiss Plaintiffs' antitrust claims on three grounds. First, Defendants claim that the Union Plaintiffs lack standing to assert an antitrust claim. Second, Defendants contend that their alleged conduct is exempt from ***antitrust law***. And third, Defendants argue that Plaintiffs have failed to state a claim for attempted monopoly.

1. The Union Plaintiffs Lack Standing

To begin, Defendants assert that the Union Plaintiffs **[**16]** lack standing to pursue an antitrust claim.[3] Indeed, the Supreme Court has observed that ***HN10***[] unions will often lack antitrust standing because it is often not clear whether a union's interests would be served by enhanced competition in the market:

> As a general matter, a union's primary goal is to enhance the earnings and improve the working conditions of its membership; that goal is not necessarily served, and indeed may actually be harmed, by uninhibited competition among employers striving to reduce costs in order to obtain a competitive advantage over their rivals. . . . Set against this background, a union, in its capacity as bargaining representative, will frequently not be part of the class the Sherman Act was designed to protect, especially in disputes with employers with whom it bargains.

Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpetners, 459 U.S. 519, 539-40, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983) [hereinafter *AGC*]. Nevertheless, the Court held that, "[i]n each case [a union's] alleged injury must be analyzed to determine whether it is of the type that the antitrust statute was intended to forestall." *Id.*

[*1230] In *AGC*, ***HN12***[] the Supreme Court identified a number of factors that courts are to apply when evaluating whether an antitrust plaintiff has standing. These factors include: "(1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051, 1054 (9th Cir. 1999)*.[4] The Court will address each of these factors in light of Plaintiffs' amendments to the First Amended Complaint.

a. The Nature of the Union Plaintiffs' Alleged Antitrust Injury

HN13[] The first factor addresses whether the Union Plaintiffs' alleged injury is the result of anti-competitive behavior **[**18]** "that ***antitrust law*** was intended to forestall"—that is, whether it was the result of anti-competitive behavior. *Eagle, 812 F.2d at 540*. "The requirement that the alleged injury be related to anti-competitive behavior requires, as a corollary, that the injured party be a participant in the same market as the alleged malefactors." *Id.* A plaintiff "who is 'neither a competitor nor a consumer' in the relevant market does not suffer 'antitrust injury.'" *Vinci v. Waste Mgmt., Inc., 80 F.3d 1372, 1376 (9th Cir. 1996)* (quoting *In re Ins. Antitrust Litig., 938 F.2d 919, 926 (9th Cir. 1991))*. In their SAC, Plaintiffs define the relevant market as including the "labor and services necessary for the non-operational structural maintenance and structural modification of cranes and movement of cranes and all other

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[3] ***HN11***[] "Antitrust standing" is a distinct inquiry from that of constitutional standing. *See Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 535 n.31, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. "Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury **[**17]** in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action." *Id.* "This determination of antitrust standing requires an evaluation of the plaintiff's harm, the alleged wrongdoing by the defendant, and the relationship between them." *Bubar v. Ampco Foods, Inc., 752 F.2d 445, 448-49 (9th Cir. 1985)*.

[4] The Ninth Circuit has summarized the *AGC* factors in various ways, but the analysis remains the same in each case. *See, e.g., R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 890 F.2d 139, 146 (9th Cir. 1989)*; *Sacramento Valley, Chapter of the Nat'l Elec. Contractors Ass'n v. Int'l Bhd. of Elec. Workers, Local 340, 888 F.2d 604, 605 (9th Cir. 1989)*; *Eagle v. Star—Kist Foods, Inc., 812 F.2d 538, 540 (9th Cir. 1987)*.

work in connection therewith; and the jacking, erection and modification of new cranes and of existing cranes and movement of new cranes and existing cranes in connection therewith." (SAC ¶ 20.)

This Court previously held that the Union Plaintiffs are neither consumers nor competitors in the market of construction, maintenance, and structural modification of cranes and movement of cranes, and that, consequently, the Union Plaintiffs were not in competition in the market in which the alleged antitrust violation occurred. (Dkt. No. 40 **[**19]** at 12-13.) Nevertheless, Plaintiffs argue that they compete with Defendants "to supply the labor used by the contractors who perform the relevant work." (Opp'n at 8 (citing SAC ¶¶ 22, 38-43).) As this sentence implicitly concedes, however, it is the laborers they supply—*i.e.*, the employees whom the Union Plaintiffs represent—who perform the relevant work and who thus are the competitors in the market. *See Eagle, 812 F.2d at 541* ("The vessel owners are requisite 'sellers' in the relevant market, not the crewmembers or the union. Thus, the class members have not alleged the type of injury antitrust laws were intended to forestall, because the alleged anticompetitive conduct was directed at the vessel owners, not the crewmembers or the union.").[5] The Union Plaintiffs' participation in the relevant market is thus derivative of **[*1231]** the work performed by the laborers whom they represent.[6]

Alternatively, Plaintiffs argue that the labor and services markets are separate, but that they are so inextricably intertwined that the Union Plaintiffs' injuries were suffered as participants in the relevant market. (Opp'n at 8-9.) In support of this position, Plaintiffs cite to *In re Lithium Ion Batteries Antitrust Litigation, No. 13-MD-2420 YGR, 2014 U.S. Dist. LEXIS 141358, 2014 WL 4955377, at *12 (N.D. Cal. Oct. 2, 2014)*, as an example of markets that are so inextricably linked that an antitrust violation in one is sufficient to find an antitrust injury in the other. As Defendants argue, however, the Union Plaintiffs are not competitors or consumers in either the labor or services markets. Rather, the Employer Plaintiffs provide the services in the relevant market, and their employees provide the labor. As collective bargaining **[**21]** agents, the Union Plaintiffs participate in these markets only derivatively based on their representation of the direct participants. That is insufficient to confer antitrust standing. *See Eagle, 812 F.2d at 541*. Thus, this factor weighs against finding antitrust standing.

b. The Directness of the Alleged Injury

HN14[] The second factor to determine antitrust standing considers the directness of the alleged injury. When analyzing this factor, "[t]he chain of causation between the injury and the alleged restraint in the market should lead directly to the 'immediate victims' of any alleged antitrust violation. Generally, employees have been denied standing where their injuries were merely derivative of that of the employer." *Id.* Plaintiffs argue that the alleged injury was direct because the Union Plaintiffs were the intended target of Defendants' wrongful conduct. (Opp'n at 10-11.)

The Court has already held that the economic injury of lost revenue from union dues is derivative of the alleged injury suffered by the union members. (Dkt. No. 40 at 13-14; 46 at 12.) As the Court explained, any economic injury suffered by the Union Plaintiffs must be a result of the dues paid to them by their members, which presumably decrease **[**22]** when their members are prevented from bidding or working on certain projects. (Dkt. No. 40 at 13.) Nevertheless, Plaintiffs rely on *Blue Shield of Virginia v. McCready, 457 U.S. 465, 479 (1982), 102 S. Ct. 2540, 73 L. Ed. 2d 149*—as they did in opposing Defendants' previous motion to dismiss—for the proposition that unintended victims with indirect injuries may still have antitrust standing, and that, consequently, intended victims would

[5] To the extent that *Connecticut Ironworkers Employers Association v. New England Regional Council of Carpenters, No. 3:10CV165 SRU, 2012 U.S. Dist. LEXIS 37523, 2012 WL 951793, at *14 (D. Conn. Mar. 20, 2012)*, suggests otherwise, the Court respectfully declines to follow this holding in light of the Ninth Circuit's holding in *Eagle.*

[6] Were Plaintiffs to define the relevant market as, for example, that of labor union **[**20]** membership dues, the result may be different, as the Union Plaintiffs' only alleged injury is a reduction of such dues as a result of their members terminating their membership and joining Defendants' unions. (*See, e.g.*, SAC ¶ 159(c).) It is thus plausible to conclude that the Union Plaintiffs are competing with Defendants for union membership dues, but it is not reasonable to conclude that they compete in the relevant market as defined in the SAC.

necessarily have antitrust standing. In McCready, the Supreme Court held that **HN15**[] victims who suffer indirect injuries have antitrust standing when the harm was "clearly foreseeable" and when "there can be no question but that the loss was precisely 'the **[*1232]** type of loss that the claimed violations . . . would be likely to cause.'" *Id.* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*. The plaintiff in *McCready* was a consumer in the relevant market who was injured by the defendants' acts to restrain competition in that market. *See AGC, 459 U.S. at 538* (discussing *McCready*).

Here, the Union Plaintiffs offer no facts to support the position that the alleged injury was "clearly foreseeable" or "the type of loss that the claimed violations . . . would be likely to cause." *McCready, 457 U.S. at 479*. Instead, Plaintiffs provide only the conclusory statement that the Union Plaintiffs were the target of Defendants' unlawful conduct and therefore **[**23]** have standing. (Opp'n at 10.) That is insufficient. *See Lucas v. Bechtel Corp., 800 F.2d 839, 846 n.9 (9th Cir. 1986)* (rejecting similar argument). As a result, the Court finds that the Union Plaintiffs are not consumers within the relevant market and therefore are not the parties who would likely suffer from the claimed violation. The Union Plaintiffs fail to provide facts to demonstrate a direct injury, and thus the second factor weighs against antitrust standing.

c. The Speculative Measure of the Damages

As in its previous orders, the Court will consider the third factor—whether the measure of damages is speculative—and the fifth factor—the complexity in apportioning damages—together. (*See* Dkt. Nos. 40, 46.) **HN16**[] "Two factors have been identified by the Supreme Court as indicating the speculative nature of a damage claim: (1) the indirectness of the alleged injury, and (2) that the alleged effects may have been produced by independent factors." *Eagle, 812 F.2d at 542*. In the context of a union's indirect injuries in an antitrust case, distinguishing the Union Plaintiffs' injuries from those of its members can prove troublesome. *See Sacramento Valley, 888 F.2d at 609*.

The Union Plaintiffs claim that the measure of their damages is simple because the damages only include lost revenue from the lost member **[**24]** dues of employers who left the Union Plaintiffs for Defendants. (Opp'n at 11-12.) Yet Plaintiffs ignore that this injury is indirect, which necessarily raises the issue of additional independent factors in the analysis of damages. *See Eagle, 812 F.2d at 542*; *Sacramento Valley, 888 F.2d at 609* ("[T]he alleged 'loss of work opportunities' could be the result, at least in part, of a wide variety of independent factors having nothing to do with the alleged conspiracy."). Therefore, Plaintiffs' assertion that the measure of damages will be "easy" is conclusory and unsupported. Moreover, as the Court explained in its prior orders, the Union Plaintiffs' injury is derivative of its members' inability to bid for work or obtain work in the relevant market area. (Dkt. No. 40 at 14; 46 at 13.) Consequently, the Union Plaintiffs' injury must be calculated by determining an undefined share of their members' losses. Simply referring to this determination as "easy" does not cure the deficiencies that the Court has identified in the Union Plaintiffs' pleadings. Accordingly, these factors both weigh against finding antitrust standing because permitting the Union Plaintiffs to proceed on their antitrust claim could cause "problems of identifying damages and apportioning **[**25]** them among directly victimized contractors and subcontractors and indirectly affected employees and union entities." *AGC, 459 U.S. at 545*.

d. The Risk of Duplicative Discovery

HN17[] The final factor is the risk of duplicative discovery. "The risk to be avoided under this factor is that potential plaintiffs may be in a 'position to assert conflicting claims to a common fund . . . thereby creating the danger of multiple liability for the fund.'" *Eagle, 812 F.2d at 542* (modification in original) (quoting *AGC, 459 U.S. at 544*). Plaintiffs again rely on the assertion that calculating the Union Plaintiffs' damages will be "simple" and based on the decrease in union members paying dues to the Union Plaintiffs. Plaintiffs are asking this Court to measure "damages and apportion[] them among directly victimized contractors **[*1233]** and subcontractors and indirectly affected . . . union entities." *AGC, 459 U.S. at 545*. Yet such a task would require the Court to determine "the extent to which the affected employees absorbed their losses and continued to pay union dues" to the Union Plaintiffs, and these employees could potentially still be linked to damages affecting the Employer Plaintiffs. *Id.* As a result, the

Union Plaintiffs' damages result from the injuries allegedly sustained by their **[**26]** members, and allowing both the affected union members *and* the unions themselves to sue would create the potential for multiple liability. *See id. at 544*. ("[P]otential plaintiffs at each level in the distribution chain would be in a position to assert conflicting claims to a common fund, . . . thereby creating the danger of multiple liability for the fund and prejudice to absent plaintiffs."). Accordingly, this factor also weighs against antitrust standing.

As discussed above, all five factors identified by the Supreme Court in *AGC* weigh against finding that the Union Plaintiffs have antitrust standing. As a result, the Union Plaintiffs' antitrust claims are hereby **DISMISSED**.[7]

2. The Nonstatutory Labor Exemption

Defendants next argue that the conduct alleged in **[**27]** the SAC is exempt from ***antitrust law*** under the nonstatutory labor exemption. (Mot. at 14.) Plaintiffs contend that consideration of the nonstatutory exemption is inappropriate at this stage of the proceedings on the basis that it is an affirmative defense. (Opp'n at 18-19.) As the Court explained in its prior orders, however, ***HN19***[] "[w]hether the case can be dismissed on the pleadings depends on what the pleadings say. '[A] plaintiff may plead herself out of court.' If the pleadings establish facts compelling a decision one way, that is as good as if depositions and other expensively obtained evidence on summary judgment establishes the identical facts." *Weisbuch v. Cnty. of L.A., 119 F.3d 778, 783 n.1 (9th Cir. 1997)* (second modification in original) (citation omitted) (quoting *Warzon v. Drew, 60 F.3d 1234, 1239 (7th Cir. 1995))*. While the Court may not consider evidence or factual matter not presented in the pleadings or the judicially noticed documents, the Court can determine whether Defendants' conduct, as alleged by Plaintiffs, is exempt under the nonstatutory labor exemption. *See Int'l Longshore & Warehouse Union v. ICTSI Or., Inc., 15 F. Supp. 3d 1075, 1090-95 (D. Or. 2014)* [hereinafter *ICTSI*] (finding defendant union's conduct to be exempt under nonstatutory labor exemption on motion to dismiss). The only possible "agreement in restraint of trade" that Plaintiffs identify in the SAC is the PCLCD, **[**28]** so it is that agreement that the Court will consider in determining whether Defendants' conduct is exempt.

Defendants argue that the PCLCD's provisions requiring its signatories to assign projects to ILWU labor are covered by the nonstatutory labor exemption. ***HN20***[] To determine whether the nonstatutory labor exemption applies, the Ninth Circuit has adopted the Eighth Circuit's test from *Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976)*. *See Phoenix Elec. Co. v. Nat'l Elec. Contractors Ass'n, 81 F.3d 858, 861 (9th Cir. 1996)*. "Under that test, the parties to an agreement restraining trade are exempt from **[*1234]** antitrust liability only if (1) the restraint primarily affects the parties to the agreement and no one else, (2) the agreement concerns wages, hours, or conditions of employment that are mandatory subjects of collective bargaining, and (3) the agreement is produced from bona fide, arm's-length collective bargaining." *Phoenix Elec. Co., 81 F.3d at 861*. To obtain dismissal of Plaintiffs' antitrust claims, Defendants must demonstrate that the factual allegations in the SAC establish *each* of these factors.[8]

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[7] The Court finds Plaintiffs' reliance on *Ostrofe v. H.S. Crocker Co., 740 F.2d 739, 746 (9th Cir. 1984)* [hereinafter *Ostrofe II*], to be inapposite. Since its holding in *Ostrofe II*, the Ninth Circuit has made clear that ***HN18***[] "[t]he exception recognized in *Ostrofe II* is limited to those cases in which a dismissed employee is an 'essential participant' in an antitrust scheme, the dismissal is a 'necessary means' to accomplish the scheme, and the employee has the greatest incentive to challenge the antitrust violation." *Vinci, 80 F.3d at 1376*.

[8] Plaintiffs claim that there are actually five elements to this test "when these cases are considered in context," but they do not adequately explain what the additional elements should be. (*See* Opp'n at 20.) Moreover, the Court has already rejected Plaintiffs' **[**29]** attempt to impose the additional requirement that "the provisions in question must address the labor relationship between an employer and its employees," (Opp'n at 20). (*See* Dkt. No. 46 at 15.) And as the Court explained in its prior order, the three-part test from *Mackey* was designed to be applicable to different types of cases. *See Phoenix Elec. Co., 81 F.3d at 861*; *Mackey, 543 F.2d at 613-14* ("Although the cases giving rise to the nonstatutory exemption are factually dissimilar from the present case, certain principles can be deduced from those decisions governing the proper accommodation of the competing labor and antitrust interests involved here.").

a. The PCLCD Primarily Affects Only the Parties to the PCLCD

First, the Court considers whether the PCLCD "primarily affects" only the parties to the agreement.[9] The copy of the PCLCD of which the Court has previously taken judicial notice makes clear that the parties are Defendant ILWU and the Pacific Maritime Association ("PMA"). Moreover, the very same agreement was the subject of the court's analysis in *ICTSI*, in which the court described the agreement as a "collective bargaining agreement covering commercial ports along the West Coast, which governs the terms and conditions of employment **[**30]** of all Longshore workers." *15 F. Supp. 3d at 1086*.

Defendants argue that the PCLCD does not affect other parties who are not signatories to the agreement. As the Court concluded in its prior order, the terms of the PCLCD support Defendants' position. (Dkt. No. 46 at 16.) The PCLCD does not on its face impose any obligations on third parties who are not signatories to the agreement.[10] Yet Plaintiffs allege that they are primarily affected because they can no longer compete for the relevant work in the relevant market, while Defendants are not primarily affected because they are not required to change any of their practices based on the agreement. (Opp'n at 21.)

In support of their position, however, Plaintiffs merely provide conclusory allegations that they are the ones primarily affected by the PCLCD. (Opp'n at 21-22; *see, e.g.*, SAC ¶ 117 ("The Plaintiff unions and contractors are primarily affected by these provisions in that the work which otherwise would be awarded to and performed by the Plaintiff contractors and Plaintiff unions must be awarded to the **[*1235]** Defendants.").) Yet Plaintiffs provide no facts (other than a general description of the parties' historic practices prior to the year in which the PCLCD was enacted, (*see* SAC ¶¶ 29-39)) to suggest that the PCLCD imposes its terms on any third party, relying instead on this conclusory statement that the PCLCD had a primary effect on a third party. In absence of such factual allegations, and in light of the PCLCD's plain language imposing obligations only on the signatories to the agreement, the Court concludes that Plaintiffs are not primarily affected by the PCLCD.

b. The PCLCD Concerns Mandatory Subjects of Collective Bargaining

Second, the Court considers **[**32]** whether the PCLCD concerns "mandatory subjects of collective bargaining." Plaintiffs contend that the subcontracting provision at issue in the PCLCD—which requires PCLCD signatories to use ILWU labor in relevant work projects—is not a mandatory subject of collective bargaining because work assignment through subcontracting is not necessarily a mandatory subject. (Opp'n at 22 (citing *Fibreboard Paper Prods. v. N.L.R.B., 379 U.S. 203, 85 S. Ct. 398, 13 L. Ed. 2d 233 (1964)*; *N.L.R.B. v. Wehr Constructors, 159 F.3d 946, 953 (6th Cir. 1998)*; *AMCAR Div., ACF Indus., Inc. v. N.L.R.B., 596 F.2d 1344, 1348 (8th Cir. 1979))*.) Pursuant to the authorities cited by Plaintiffs, ***HN21***[] the Court must consider whether the matter is "peculiarly suitable for resolution within the collective bargaining framework" and "amenab[le] . . . to the collective bargaining process." *Fibreboard, 379 U.S. at 211*.

As the Court explained in its prior order, (Dkt. No. 46 at 17), the relevant provisions of the PCLCD define the work at issue and assign that work to ILWU members, (*see* Dkt. No. 28 at 21). In fact, this Court has already found that the PCLCD's subcontracting clause constitutes a work assignment. (*See* Dkt. No. 40 at 18-19) And the caselaw is clear that ***HN22***[] "[w]ork assignments are mandatory subjects of collective bargaining, even if the employer is

[9] The Court has already taken judicial notice of the PCLCD and Article XX of the American Federation of Labor-Congress of International Organizations ("AFL-CIO") Constitution in its first order granting Defendants' motion to dismiss. (Dkt. No. 40.)

[10] While the factual findings of the court in *ICTSI* are not binding on this case, the Court notes that the court interpreted the PCLCD as primarily affecting only the ILWU and PMA—the parties to the agreement. *See* *ICTSI, 15 F. Supp. 3d at 1093* ("The requirement that ILWU workers be assigned the work, however, is only binding on PMA members, who are parties to the collective bargaining agreement."); *id. at 1093 n.8* ("Here, the alleged agreement is **[**31]** the PCLCD, and it does not impose the requirement that ILWU-represented workers be assigned reefer work on any nonsignatory party.").

assigning work outside of the collective bargaining unit." *ICTSI, 15 F. Supp. 3d at 1094*.[11] Plaintiffs do not allege any other subject covered by the PCLCD that is not a **[**33]** mandatory subject of collectively bargaining. Accordingly, the Court finds that the second factor of the *Mackey* test is satisfied as well.

c. Arm's-Length Collective Bargaining

Third, the Court examines whether the PCLCD was the product of bona fide, arm's-length collective bargaining. Unlike in the initial Complaint, which was silent on this issue, Plaintiffs now claim that the PCLCD was *not* the result of bona fide arms-length bargaining. (*See* SAC ¶ 125.) While these statements are largely conclusory, ***HN23***[] Plaintiffs are "not required **[*1236]** to plead on the subject of an anticipated affirmative **[**34]** defense." *United States v. McGee, 993 F.2d 184, 187 (9th Cir. 1993)*; *accord Rivera v. Peri & Sons Farms, Inc., 735 F.3d 892, 902 (9th Cir. 2013)* ("[P]laintiffs ordinarily need not plead on the subject of an anticipated affirmative defense. When an affirmative defense is obvious on the face of a complaint, however, a defendant can raise that defense in a motion to dismiss." (internal citation and quotation marks omitted)). As explained above, ***HN24***[] to determine that the nonstatutory labor exemption applies at this stage, it must be clear either from the allegations in the complaint or from judicially noticed facts that all three elements of the *Mackey* test are satisfied. *See Weisbuch, 119 F.3d at 783 n.1*. And it is not clear from either the text of the PCLCD or the SAC that the PCLCD is the product of arm's-length collective bargaining. *Cf. ICTSI, 15 F. Supp. 3d at 1094* (finding this element satisfied with respect to the PCLCD on a motion to dismiss because plaintiffs did not challenge this element in their complaint and because the complaint conceded that, "[f]or many years, the ILWU and PMA have negotiated successful collective bargaining agreements").

Accordingly, while it is clear from the allegations in the complaint and judicially noticed facts both that the PCLCD primarily affects only the parties to the agreement and that the PCLCD concerns a mandatory subject of collective bargaining, **[**35]** the Court finds that it is unclear whether the PCLCD is the result of bona fide, arm's-length collective bargaining. Because Defendants must establish that all three of the *Mackey* factors are satisfied for the nonstatutory exemption to apply, the Court declines to find that the nonstatutory exemption applies at this stage.[12] Nevertheless, should discovery reveal that the PCLCD was the result of arm's-length collective bargaining, Defendants may raise this issue on a motion for summary judgment.

3. Attempted Monopoly

Next, Defendants also argue that Plaintiffs' claims of Defendants' attempted monopoly in the relevant market are deficient. (Mot. at 18-20.) ***HN26***[] The Sherman Act prohibits monopolies and attempts to form monopolies. *15 U.S.C. § 2* ("Every person who shall monopolize, or attempt to monopolize, or conspire with any other persons, to

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[11] *Accord N.L.R.B. v. Solutia, Inc., 699 F.3d 50, 70 (1st Cir. 2012)* (stating that "'jurisdictional' clauses that define the assignment of work to union members . . . address[] a mandatory subject of bargaining"); *McKenzie Eng'g Co. v. N.L.R.B., 303 F.3d 902, 908 (8th Cir. 2002)* (observing that "assignment of work to union members" was "a mandatory subject of collective bargaining"); *Local 58, Int'l Bhd. of Elec. Workers, AFL-CIO v. Se. Mich. Chapter, Nat'l Elec. Contractors Ass'n, Inc., 43 F.3d 1026, 1032 (6th Cir. 1995)* (noting that "work assignment" and "jurisdiction" are "two mandatory subjects of bargaining"); *Chem. Leaman Tank Lines, Inc. v. Cent. Conference of Teamsters Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., No. 93 C 51, 1993 U.S. Dist. LEXIS 8295, 1993 WL 214119, at *5 (N.D. Ill. June 17, 1993)* ("It is well settled that clauses concerning the assignment of work to union members are mandatory subjects of bargaining . . . ."); *Antelope Valley Press, 311 N.L.R.B. 459, 460 (1993)* ("The assignment of work affects terms and conditions of employment, and therefore is a mandatory bargaining subject . . . .").

[12] To the extent this ruling is inconsistent with the Court's analysis in a previous order, the Court hereby reconsiders its prior holding. *See City of L.A., Harbor Div. v. Santa Monica Baykeeper, 254 F.3d 882, 886 (9th Cir. 2001)* (***HN25***[] "A district court . . . retains jurisdiction over an interlocutory order—and thus may reconsider, rescind, or modify such an order—until a court of appeals grants a party permission to appeal.").

monopolize any part of the trade **[**36]** or commerce . . . [commits a felony]."). To prevail on a claim of attempted monopoly, Plaintiffs must establish "(1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed at accomplishing that purpose; (3) a dangerous probability of achieving 'monopoly power'; and (4) causal antitrust injury." *Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995)* (quoting *McGlinchy v. Shell Chem. Co., 845 F.2d 802, 811 (9th Cir. 1988))*. This fourth element requires that plaintiffs only be compensated for "injuries that the antitrust laws were intended to protect." *Id.*

Defendants argue primarily that Plaintiffs have failed to state a claim for monopoly or attempted monopoly because their allegations in the SAC are insufficient and because the PCLCD operates pursuant to federal labor policy. (*See* Mot. at 18-20.) In the SAC, Plaintiffs allege that Defendants, through operation **[*1237]** of the PCLCD, have attempted to monopolize the relevant work in the relevant market area. (*See, e.g.*, SAC ¶¶ 44, 51, 58, 90, 104, 106, 108, 116, 121.) Although Defendants argue that Plaintiffs' claim is "subject to dismissal" because the SAC contains insufficient facts to support such a claim for attempted monopoly, Defendants do not specifically identify the alleged deficiencies. Accordingly, **[**37]** it remains unclear whether Plaintiffs have stated a viable claim for attempted monopoly. Defendants' motion is therefore **DENIED** as to Plaintiffs' claim for attempted monopoly at this stage.

C. Breach of Contract

Finally, Defendants address Plaintiffs' breach of contract claim by Iron Workers, in which Plaintiffs allege that ILWU breached Article XX of the AFL-CIO Constitution. It is undisputed that Iron Workers is affiliated with the AFL-CIO and that the ILWU *was* party to the AFL-CIO Constitution until September 2013 when they withdrew. (SAC ¶¶ 131, 140.) Iron Workers now claims that the ILWU breached section 3 of Article XX of the AFL-CIO Constitution, which states: "Each affiliate shall respect the established work relationship of every other affiliate . . . . No affiliate shall by agreement or collusion with any employer or by the exercise of economic pressure, seek to obtain work for its members as to which an established work relationship exists with any other affiliate except with the consent of such affiliate." (SAC ¶ 133.)

Defendants argue that the SAC once again fails to state a claim for breach of the AFL-CIO Constitution. By its terms, Article XX prohibits signatories to the Constitution from interfering with the "established **[**38]** work relationship" of other signatories, which is deemed to exist with regard to any work that is "customarily performed at a particular plant or worksite." (SAC ¶ 133.) According to Defendants, the SAC fails to state a breach of this provision because Plaintiffs have failed to allege facts from which the Court may infer the existence of any "established work relationship" with which Defendants interfered within the meaning of Article XX.

In dismissing this cause of action in Plaintiffs' initial Complaint for failure to state a claim, the Court observed that while "[t]he Complaint [wa]s replete with allegations that Plaintiffs historically performed *this type of work*," Plaintiffs had failed to "allege that they customarily performed it at the sites in question so as to demonstrate the 'established work relationship' that Article XX seeks to protect." (Dkt. No. 40 at 23.) Plaintiffs then alleged in the First Amended Complaint that "[t]he International Association and its members have customarily performed the relevant work at the port facilities described in the relevant market area set forth." (First Am. Compl. ¶ 116.) Again finding Plaintiffs' allegations inadequate, the Court noted that the mere **[**39]** addition of the word "customarily," unsupported by additional facts, does not demonstrate that Plaintiffs actually customarily performed work at the sites in questions so as to demonstrate the "established work relationship" that Article XX seeks to protect.

Plaintiffs have now amended their complaint again, in which they allege that: "For at least twenty (20) years prior to 2008, the relevant work was exclusively performed by the International Association at the ports in the relevant market area. Neither the Longshoremen, nor any other non-Iron Worker union or affiliate of the AFL-CIO performed this work at these ports." (SAC ¶ 135.) Plaintiffs further allege that, "[a]t each of these ports, the International Association performed at least ten (10) projects, and in some cases, more than one hundred (100) projects consisting **[*1238]** of relevant work prior to 2008." (SAC ¶ 136.) As Defendants argue, however, alleging that a plaintiff has a history of performing work "at the *ports* in the relevant market area" is not equivalent to alleging a history of performing work "at a particular plant or work site" located within those ports. Accordingly, these amendments fail to cure the deficiencies in Plaintiffs' **[**40]** breach of contract claim identified by the Court in its prior orders.

V. CONCLUSION

For the foregoing reasons, Defendants' motion is **GRANTED in part** and **DENIED in part**. Plaintiffs' first cause of action is **DISMISSED** as it relates to the Union Plaintiffs for lack of standing, and Plaintiffs' second and third causes of action are **DISMISSED** as to all Plaintiffs for failure to state a claim. This is the third time that the Court has dismissed Plaintiffs' first cause of action with respect to the Union Plaintiffs and Plaintiffs' second and third causes of action with respect to all Plaintiffs. (*See* Dkt. Nos. 40, 46.) Accordingly, Plaintiffs' second and third claims are hereby **DISMISSED with prejudice**, as is Plaintiffs' first cause of action with respect to the Union Plaintiffs. *See* *Desaigoudar v. Meyercord, 223 F.3d 1020, 1026 (9th Cir. 2000)* (***HN27***[ ] "The district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint." (quoting *Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990))*). Defendants' motion is **DENIED** as it relates to Plaintiffs' first cause of action brought by the Employer Plaintiffs.

The hearing set for June 22, 2015 is **VACATED**.

IT IS SO ORDERED.

End of Document

Kimble v. Marvel Entm't, LLC

Supreme Court of the United States

March 31, 2015, Argued; June 22, 2015, Decided

No. 13-720

Reporter

576 U.S. 446 *; 135 S. Ct. 2401 **; 192 L. Ed. 2d 463 ***; 2015 U.S. LEXIS 4067 ****; 114 U.S.P.Q.2D (BNA) 1941; 83 U.S.L.W. 4531; 25 Fla. L. Weekly Fed. S 405

STEPHEN KIMBLE, et al., Petitioners v. MARVEL ENTERTAINMENT, LLC, SUCCESSOR TO MARVEL ENTERPRISES, INC.

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Kimble v. Marvel Enters., 727 F.3d 856, 2013 U.S. App. LEXIS 14354 (9th Cir. Ariz., 2013)

Disposition: *727 F. 3d 856*, affirmed.

Core Terms

patent, royalties, stare decisis, parties, post-expiration, expires, invention, decisions, antitrust, licensee, licensing, license agreement, patent law, innovation, overrule, courts, monopoly, reasons, patent holder, anticompetitive, expectations, post-patent, royalty payment, contracts, patentee, effects, cases, terms, statutory interpretation, per se rule

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Ownership > Conveyances > Royalties

HN1[] **Conveyances, Royalties**

A patent holder cannot charge royalties for the use of his invention after its patent term has expired.

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Patent Law > Infringement Actions > Exclusive Rights > Limitations

HN2[] **Infringement Actions, Exclusive Rights**

Patents endow their holders with certain superpowers, but only for a limited time. In crafting the patent laws, Congress struck a balance between fostering innovation and ensuring public access to discoveries. While a patent lasts, the patentee possesses exclusive rights to the patented article—rights he may sell or license for royalty payments if he so chooses. *35 U.S.C.S. §154(a)(1)*. But a patent typically expires 20 years from the day the application for it was filed. *§ 154(a)(2)*. And when the patent expires, the patentee's prerogatives expire too, and the right to make or use the article, free from all restriction, passes to the public.

Governments > Courts > Judicial Precedent

HN3[] **Courts, Judicial Precedent**

Overruling precedent is never a small matter. Stare decisis—in English, the idea that today's court should stand by yesterday's decisions—is a foundation stone of the rule of law. Application of that doctrine, although not an inexorable command, is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. It also reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation.

Governments > Courts > Judicial Precedent

HN4[] **Courts, Judicial Precedent**

Respecting stare decisis means sticking to some wrong decisions. The doctrine rests on the idea that it is usually more important that the applicable rule of law be settled than that it be settled right. Indeed, stare decisis has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up. Accordingly, an argument that the U.S. Supreme Court got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent. Or otherwise said, it is not alone sufficient that the Court would decide a case differently now than the Court did then. To reverse course, the Court requires as well what the Court has termed a special justification—over and above the belief that the precedent was wrongly decided.

Governments > Courts > Judicial Precedent

HN5[] **Courts, Judicial Precedent**

Stare decisis carries enhanced force when a decision interprets a statute. Then, unlike in a constitutional case, critics of a U.S. Supreme Court ruling can take their objections across the street, and Congress can correct any mistake it sees. That is true regardless whether the Court's decision focused only on statutory text or also relied on the policies and purposes animating the law. Indeed, the Court applies statutory stare decisis even when a decision has announced a judicially created doctrine designed to implement a federal statute. All of the Court's interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change. Absent special justification, they are balls tossed into Congress's court, for acceptance or not as that branch elects.

Governments > Courts > Judicial Precedent

HN6[] **Courts, Judicial Precedent**

In the contexts of cases involving property and contract rights, considerations favoring stare decisis are at their acme. That is because parties are especially likely to rely on such precedents when ordering their affairs.

Governments > Courts > Judicial Precedent

HN7[] Courts, Judicial Precedent

When the U.S. Supreme Court reverses its statutory interpretations, the Court most often points to subsequent legal developments—either the growth of judicial doctrine or further action taken by Congress—that have removed the basis for a decision.

Governments > Courts > Judicial Precedent

HN8[] Courts, Judicial Precedent

What the U.S. Supreme Court can decide, the Court can undecide. But stare decisis teaches that the Court should exercise that authority sparingly.

Lawyers' Edition Display

Decision

[*463]** Patentee receiving royalties for sales made after patent expired held not warranted since policy favored unrestricted use of expired patents and stare decisis favored settled law.

Summary

Overview: HOLDINGS: [1]-Overruling a long-standing precedential decision which held that a patentee could not continue to receive royalties after expiration of the patent was not warranted since the doctrine of stare decisis favored settled law, the precedent did not preclude business arrangements other than royalties, there was a broad policy favoring unrestricted use of patents after their expiration, overruling the precedent could threaten other precedents, and the precedent was simple and workable; [2]-Whether the precedent relied on an economic misjudgment concerning the competitive effects of post-expiration royalties and tended to suppress technological innovation were matters within the realm of Congress to provide any required remedy.

Outcome: Judgment affirmed. 6-3 Decision; 1 Dissent.

Headnotes

PATENTS §239 > ROYALTIES -- EXPIRATION OF PATENT > Headnote:
LEdHN[1][] [1]

A patent holder cannot charge royalties for the use of his invention after its patent term has expired. (Kagan, J., joined by Scalia, Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

[*464]**

PATENTS §15 PATENTS §232 > EXPIRATION OF PATENT -- RIGHT TO MAKE OR USE > Headnote:
LEdHN[2][] [2]

Patents endow their holders with certain superpowers, but only for a limited time. In crafting the patent laws, Congress struck a balance between fostering innovation and ensuring public access to discoveries. While a patent lasts, the patentee possesses exclusive rights to the patented article--rights he may sell or license for royalty payments if he so chooses. *35 U.S.C.S. § 154(a)(1)*. But a patent typically expires 20 years from the day the application for it was filed. *§ 154(a)(2)*. And when the patent expires, the patentee's prerogatives expire too, and the right to make or use the article, free from all restriction, passes to the public. (Kagan, J., joined by Scalia, Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

COURTS §766 > STARE DECISIS -- ADHERENCE TO FORMER DECISION > Headnote:
LEdHN[3][] [3]

Overruling precedent is never a small matter. Stare decisis--in English, the idea that today's court should stand by yesterday's decisions--is a foundation stone of the rule of law. Application of that doctrine, although not an inexorable command, is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. It also reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation. (Kagan, J., joined by Scalia, Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

COURTS §775 > STARE DECISIS -- DEPARTURE > Headnote:
LEdHN[4][] [4]

Respecting stare decisis means sticking to some wrong decisions. The doctrine rests on the idea that it is usually more important that the applicable rule of law be settled than that it be settled right. Indeed, stare decisis has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up. Accordingly, an argument that the U.S. Supreme Court got something wrong--even a good argument to that effect--cannot by itself justify scrapping settled precedent. Or otherwise said, it is not alone sufficient that the Court would decide a case differently now than the Court did then. To reverse course, the Court requires as well what the Court has termed a special justification--over and above the belief that the precedent was wrongly decided. (Kagan, J., joined by Scalia, Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

COURTS §775.5 > STARE DECISIS -- INTERPRETATION -- STATUTE > Headnote:
LEdHN[5][] [5]

Stare decisis carries enhanced force when a decision interprets a statute. Then, unlike in a constitutional case, critics of a U.S. Supreme Court ruling can take their objections across the street, and Congress can correct any mistake it sees. That is true regardless whether the Court's decision focused only on statutory text or also relied on the policies and purposes animating the law. Indeed, the Court applies statutory stare decisis even when a decision has announced a judicially created doctrine designed to implement a federal statute. All of the Court's interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change. Absent special justification, they are balls tossed into Congress's court, for acceptance or not as that branch elects. (Kagan, J., joined by Scalia, Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

[*465]**

COURTS §779 COURTS §780 > STARE DECISIS -- PROPERTY AND CONTRACT RIGHTS > Headnote:
LEdHN[6][] [6]

In the contexts of cases involving property and contract rights, considerations favoring stare decisis are at their acme. That is because parties are especially likely to rely on such precedents when ordering their affairs. (Kagan, J., joined by Scalia, Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

COURTS §775.5 > STATUTORY INTERPRETATION -- REVERSAL > Headnote:
LEdHN[7][] [7]

When the U.S. Supreme Court reverses its statutory interpretations, the Court most often points to subsequent legal developments--either the growth of judicial doctrine or further action taken by Congress--that have removed the basis for a decision. (Kagan, J., joined by Scalia, Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

COURTS §766 > STARE DECISIS > Headnote:
LEdHN[8][] [8]

What the U.S. Supreme Court can decide, the Court can undecide. But stare decisis teaches that the Court should exercise that authority sparingly. (Kagan, J., joined by Scalia, Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

Syllabus

[2403]** **[*446]** **[1942]** Respondent Marvel Entertainment's corporate predecessor agreed to purchase petitioner Stephen Kimble's patent for a Spider-Man toy in exchange for a lump sum plus a 3% royalty on future sales. The agreement set no end date for royalties. As the patent neared the end of its statutory 20-year term, Marvel discovered *Brulotte v. Thys Co., 379 U.S. 29, 85 S. Ct. 176, 13 L. Ed. 2d 99*, in which this Court held that a patentee cannot continue to receive royalties for sales made after his patent expires. Marvel **[***466]** then sought a declaratory judgment in federal district court confirming that it could stop paying Kimble royalties. The district court granted relief, and the Ninth Circuit affirmed. Kimble now asks this Court to overrule *Brulotte*.

Held: Stare decisis requires this Court to adhere to *Brulotte*. *Pp. ___ - ___, 192 L. Ed. 2d, at 469-478*.

(a) A patent typically expires 20 years from its application date. *35 U.S. C. §154(a)(2)*. At that point, the unrestricted right to make or use the article passes to the public. See *Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 230, 84 S. Ct. 784, 11 L. Ed. 2d 661, 1964 Dec. Comm'r Pat. 425*. This Court has carefully guarded the significance of that expiration date, declining to enforce laws and contracts that restrict free public access to formerly patented, as well as unpatentable, inventions. See, **[****2]** *e.g., id., at 230-233, 84 S. Ct. 784, 11 L. Ed. 2d 661*; *Scott Paper Co. v. Marcalus Mfg. Co., 326 U.S. 249, 255-256, 66 S. Ct. 101, 90 L. Ed. 47, 1946 Dec. Comm'r Pat. 616*

[2404]** *Brulotte* applied that principle to a patent licensing agreement that provided for the payment of royalties accruing after the patent's expiration. 379 U.S., at 30, 85 S. Ct. 176, 13 L. Ed. 2d 99. The Court held that the post-patent royalty provision was "unlawful *per se*," id., at 30, 32, 85 S. Ct. 176, 13 L. Ed. 2d 99, because it continued "the patent monopoly beyond the [patent] period," id., at 33, 85 S. Ct. 176, 13 L. Ed. 2d 99, and, in so doing, conflicted with patent law's policy of establishing a "post-expiration . . . public domain," *ibid.*

The *Brulotte* rule may prevent some parties from entering into deals they desire, but parties can often find ways to achieve similar outcomes. For example, *Brulotte* leaves parties free to defer payments for pre-expiration use of a patent, tie royalties to non-patent rights, or make non-royalty-based business arrangements. Contending that such alternatives are not enough, Kimble asks this Court to abandon *Brulotte*'s **[*447]** bright-line rule in favor of a case-by-case approach based on ***antitrust law***'s "rule of reason." Pp. ___ - ___, 192 L. Ed. 2d, at 469-471.

(b) The doctrine of *stare decisis* provides that today's Court should stand by yesterday's decisions. Application of that doctrine, though "not an inexorable command," is the "preferred course." Payne v. Tennessee, 501 U.S. 808, 828, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720. Overruling a case always requires "special justification"--over **[****3]** and above the belief "that the precedent was wrongly decided." Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266, 134 S. Ct. 2398, 189 L. Ed. 2d 339 at 349. Where, as here, the precedent interprets a statute, *stare decisis* carries enhanced force, since critics are free to take their objections to Congress. See *e.g.,* Patterson v. McLean Credit Union, 491 U.S. 164, 172-173, 109 S. Ct. 2363, 105 L. Ed. 2d 132. Congress, moreover, has spurned multiple opportunities to reverse *Brulotte*, see Watson v. United States, 552 U.S. 74, 82-83, 128 S. Ct. 579, 169 L. Ed. 2d 472, and has even rebuffed bills that would have replaced *Brulotte*'s *per se* rule with the standard Kimble urges. In addition, *Brulotte* implicates property and contract law, two contexts in which considerations favoring *stare decisis* are "at their acme," Payne, 501 U.S., at 828, 111 S. Ct. 2597, 115 L. Ed. 2d 720, because parties are especially likely to rely on such precedents when ordering their affairs.

[*467]** Given those good reasons for adhering to *stare decisis* in this case, this Court would need a very strong justification for overruling *Brulotte*. But traditional justifications for abandoning *stare decisis* do not help Kimble here. First, *Brulotte's* doctrinal underpinnings have not eroded over time. The patent statute at issue in *Brulotte* is essentially unchanged. And the precedent on which the *Brulotte* Court primarily relied, like other decisions enforcing a patent's cut-off date, remains good law. Indeed, *Brulotte*'s close relation **[****4]** to a whole web of precedents means that overruling it could threaten others. Second, nothing about *Brulotte* has proved unworkable. See Patterson, 491 U.S., at 173, 109 S. Ct. 2363, 105 L. Ed. 2d 132. To the contrary, the decision itself is simple to apply- **[1943]** -particularly as compared to Kimble's proposed alternative, which can produce high litigation costs and unpredictable results. Pp. ___ - ___, 192 L. Ed. 2d, at 471-474.

(c) Neither of the justifications Kimble offers gives cause to overrule *Brulotte.* Pp. ___ - ___, 192 L. Ed. 2d, at 474-478.

(1) Kimble first argues that *Brulotte* hinged on an economic error--*i.e.,* an assumption that post-expiration royalties are always anticompetitive. This Court sees no error in Kimble's economic analysis. But even assuming Kimble is right that *Brulotte* relied on an economic misjudgment, Congress is the right entity to fix it. The patent laws are not like the Sherman **[**2405]** Act, which gives courts exceptional authority to shape the law and reconsider precedent based on better economic analysis. Moreover, Kimble's argument is based not on evolving economic **[*448]** theory but rather on a claim that the *Brulotte* Court simply made the wrong call. That claim fails to clear *stare decisis*'s high bar. In any event, *Brulotte* did not even turn on the notion that post-patent royalties harm competition. **[****5]** Instead, the *Brulotte* Court simply applied the categorical principle that all patent-related benefits must end when the patent term expires. Kimble's real complaint may go to the merits of that principle as a policy matter. But Congress, not this Court, gets to make patent policy. Pp. ___ - ___, 192 L. Ed. 2d, at 474-477.

(2) Kimble also argues that *Brulotte* suppresses technological innovation and harms the national economy by preventing parties from reaching agreements to commercialize patents. This Court cannot tell whether that is true. *Brulotte* leaves parties free to enter alternative arrangements that may suffice to accomplish parties' payment deferral and risk-spreading goals. And neither Kimble nor his *amici* offer any empirical evidence connecting *Brulotte*

to decreased innovation. In any event, claims about a statutory precedent's consequences for innovation are “more appropriately addressed to Congress.” *Halliburton, 573 U.S., at 277, 134 S. Ct. 2398, 189 L. Ed. 2d at 356*. *Pp. ___ - ___, 192 L. Ed. 2d, at 477-478*.

727 F. 3d 856, affirmed.

Counsel: Roman Melnik argued the cause for petitioners.

Malcolm L. Stewart argued the cause for the United States, as amicus curiae, by special leave of court.

Thomas G. Saunders argued the cause for respondent.

Judges: Kagan, J., delivered the opinion of the Court, in which Scalia, Kennedy, Ginsburg, Breyer, and Sotomayor, JJ., joined. Alito, J., filed a dissenting opinion, in which Roberts, C. J., and Thomas, J., joined, *post*, ___.

Opinion by: KAGAN

Opinion

[*468] [*449]** Justice **Kagan** delivered the opinion of the Court.

In *Brulotte v. Thys Co., 379 U.S. 29, 85 S. Ct. 176, 13 L. Ed. 2d 99 (1964)*, this Court held that **[****6]** ***HN1***[] ***LEdHN[1]***[] [1] a patent holder cannot charge royalties for the use of his invention after its patent term has expired. The sole question presented here is whether we should overrule *Brulotte*. Adhering to principles of *stare decisis*, we decline to do so. Critics of the *Brulotte* rule must seek relief not from this Court but from Congress.

I

In 1990, petitioner Stephen Kimble obtained a patent on a toy that allows children (and young-at-heart adults) to role-play as “a spider person” by shooting webs—really, pressurized foam string—“from the palm of [the] hand.” U.S. Patent No. 5,072,856, Abstract (filed May 25, **[**2406]** 1990). [1] Respondent Marvel Entertainment, LLC (Marvel) makes and markets products featuring Spider-Man, among other comic-book characters. Seeking to sell or license his patent, Kimble **[*450]** met with the president of Marvel’s corporate predecessor to discuss his idea for web-slinging fun. Soon afterward, but without remunerating Kimble, that company began marketing the “Web Blaster”—a toy that, like Kimble’s patented invention, enables would-be action heroes to mimic Spider-Man through the use of a polyester glove and a canister of foam.

Kimble sued Marvel in 1997 alleging, among other things, patent infringement. The parties ultimately settled that litigation. Their agreement provided that Marvel would purchase Kimble’s patent in exchange for a lump sum (of about a half-million dollars) and a 3% royalty on Marvel’s future sales of the Web Blaster and similar products. The parties set no end date for royalties, apparently contemplating that they would continue for as long as kids want to imitate Spider-Man (by doing whatever a spider can).

And then Marvel stumbled across *Brulotte*, the case at the heart of this dispute. In negotiating the settlement, neither side was aware of *Brulotte*. But Marvel must have been pleased to learn of it. *Brulotte* had read the patent laws to prevent a patentee from receiving royalties for sales made after his patent’s expiration. See *379 U.S., at 32, 85 S. Ct. 176, 13 L. Ed. 2d 99*. So the decision’s effect **[1944]** was to sunset the settlement’s royalty clause. [2] On

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[1] Petitioner Robert Grabb later acquired an interest in the patent. For simplicity, we **[****7]** refer only to Kimble.

making that discovery, Marvel sought a declaratory judgment in federal district court confirming that the company could cease paying royalties come 2010—the end of Kimble's patent term. The court approved that relief, holding that *Brulotte* made "the royalty provision **[****8]** . . . unenforceable after the expiration of the Kimble patent." *692 F. Supp. 2d 1156, 1161 (Ariz. 2010)*. The Court of Appeals for the Ninth Circuit affirmed, though making clear that it **[*451]** was none too happy about doing so. "[T]he *Brulotte* rule," the court complained, **[***469]** "is counterintuitive and its rationale is arguably unconvincing." *727 F. 3d 856, 857 (2013)*.

We granted certiorari, *574 U.S. 1058, 135 S. Ct. 781, 190 L. Ed. 2d 649 (2014)*, to decide whether, as some courts and commentators have suggested, we should overrule *Brulotte*. [3] For reasons of *stare decisis*, we demur.

II

HN2[] ***LEdHN[2]***[] [2] Patents endow their holders with certain superpowers, but only for a limited time. In crafting the patent laws, Congress struck a balance between fostering innovation and ensuring public access to **[**2407]** discoveries. While a patent lasts, the patentee possesses exclusive rights to the patented article—rights he may sell or license for royalty payments if he so chooses. See *35 U.S.C. §154(a)(1)*. But a patent typically expires 20 years from the day the application for it was filed. See *§154(a)(2)*. And when the patent expires, the patentee's prerogatives expire too, and the right to make or use the article, free from all restriction, passes to the public. See *Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 230, 84 S. Ct. 784, 11 L. Ed. 2d 661, 1964 Dec. Comm'r Pat. 425 (1964)*.

This Court has carefully guarded that cut-off date, just as it has the patent laws' subject-matter limits: In case after case, the Court has construed those laws to preclude measures that restrict free access to formerly patented, as well as unpatentable, inventions. In one line of cases, we have **[*452]** struck down state statutes with that consequence. See, *e.g.*, *id., at 230-233, 84 S. Ct. 784, 11 L. Ed. 2d 661, 1964 Dec. Comm'r Pat. 425*; *Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 152, 167-168, 109 S. Ct. 971, 103 L. Ed. 2d 118 (1989)*; *Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, 237-238, 84 S. Ct. 779, 11 L. Ed. 2d 669, 1964 Dec. Comm'r Pat. 421 (1964)*. By virtue of federal law, we reasoned, "an article on which the patent has expired," **[****10]** like an unpatentable article, "is in the public domain and may be made and sold by whoever chooses to do so." *Sears, 376 U.S., at 231, 84 S. Ct. 784, 11 L. Ed. 2d 661, 1964 Dec. Comm'r Pat. 425*. In a related line of decisions, we have deemed unenforceable private contract provisions limiting free use of such inventions. In *Scott Paper Co. v. Marcalus Mfg. Co., 326 U.S. 249, 66 S. Ct. 101, 90 L. Ed. 47, 1946 Dec. Comm'r Pat. 616 (1945)*, for example, we determined that a manufacturer could not agree to refrain from challenging a patent's validity. Allowing even a single company to restrict its use of an expired or invalid patent, we explained, "would deprive . . . the consuming public of the advantage to be derived" from free exploitation of the discovery. *Id., at 256, 66 S. Ct. 101, 90 L. Ed. 47, 1946 Dec. Comm'r Pat. 616*. And to permit such a result, whether or not authorized "by express contract," would impermissibly undermine the patent laws. *Id., at 255-256, 66 S. Ct. 101, 90 L. Ed. 47, 1946 Dec. Comm'r Pat. 616*; see also, *e.g.*, *Edward Katzinger Co. v. Chicago Metallic Mfg. Co., 329 U.S. 394, 400-401, 67 S. Ct. 416, 91 L. Ed. 374 (1947)* (ruling that *Scott Paper* applies to licensees); *Lear, Inc. v. Adkins, 395 U.S. 653, 668-675, 89 S. Ct. 1902, 23 L. Ed. 2d 610 (1969)* **[***470]** (refusing to enforce a contract requiring a licensee to pay royalties while contesting a patent's validity).

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[2] In *Brulotte,* the patent holder retained ownership of the patent while licensing customers to use the patented article in exchange for royalty payments. See *379 U.S., at 29-30, 85 S. Ct. 176, 13 L. Ed. 2d 99*. By contrast, Kimble sold his whole patent to obtain royalties. But no one here disputes that *Brulotte* covers a transaction structured in that alternative way.

[3] See, *e.g.,* *Scheiber v. Dolby Labs., Inc., 293 F. 3d 1014, 1017-1018 (CA7 2002)* (Posner, J.) (*Brulotte* has been "severely, and as it seems to us, with all due respect, justly criticized . . . . However, we have no authority to overrule a Supreme Court decision no matter how dubious its reasoning strikes us, or even how out of touch with the Supreme Court's current thinking the decision seems"); Ayres & Klemperer, Limiting Patentees' Market Power Without Reducing Innovation Incentives: The Perverse **[****9]** Benefits of Uncertainty and Non-Injunctive Remedies, *97 Mich. L. Rev. 985, 1027 (1999)* ("Our analysis . . . suggests that *Brulotte* should be overruled").

Brulotte was brewed in the same barrel. There, an inventor licensed his patented hop-picking machine to farmers in exchange for royalties from hop crops harvested both before and after his patents' expiration dates. The Court (by an 8-1 vote) held the agreement unenforceable—"unlawful *per se*"—to the extent it provided **[****11]** for the payment of royalties "accru[ing] after the last of the patents incorporated into the machines had expired." *379 U.S., at 30, 32, 85 S. Ct. 176, 13 L. Ed. 2d 99*. To arrive at that conclusion, the Court began with the statutory provision **[1945]** setting the length of a patent term. See *id., at 30, 85 S. Ct. 176, 13 L. Ed. 2d 99* (quoting the then-current version of *§154*). Emphasizing that a **[*453]** patented invention "become[s] public property once [that term] expires," the Court then quoted from *Scott Paper*: Any attempt to limit a licensee's post-expiration use of the invention, "whatever the legal device employed, runs counter to the policy and purpose of the patent laws." *379 U.S., at 31, 85 S. Ct. 176, 13 L. Ed. 2d 99* (quoting *326 U.S., at 256, 66 S. Ct. 101, 90 L. Ed. 47, 1946 Dec. Comm'r Pat. 616*). In the *Brulotte* Court's view, contracts to pay royalties for such use continue "the patent monopoly beyond the [patent] period," even though only as to the licensee affected. *379 U.S., at 33, 85 S. Ct. 176, 13 L. Ed. 2d 99*. And in so doing, those agreements conflict with patent law's policy of establishing a **[**2408]** "post-expiration . . . public domain" in which every person can make free use of a formerly patented product. *Ibid.*

The *Brulotte* rule, like others making contract provisions unenforceable, prevents some parties from entering into deals they desire. As compared to lump-sum fees, royalty plans both draw out payments over time and tie those payments, in each month **[****12]** or year covered, to a product's commercial success. And sometimes, for some parties, the longer the arrangement lasts, the better—not just up to but beyond a patent term's end. A more extended payment period, coupled (as it presumably would be) with a lower rate, may bring the price the patent holder seeks within the range of a cash-strapped licensee. (Anyone who has bought a product on installment can relate.) See Brief for Memorial Sloan Kettering Cancer Center et al. as *Amici Curiae* 17. Or such an extended term may better allocate the risks and rewards associated with commercializing inventions—most notably, when years of development work stand between licensing a patent and bringing a product to market. See, *e.g.,* 3 R. Milgrim & E. Bensen, Milgrim on Licensing §18.05, p. 18-9 (2013). As to either goal, *Brulotte* may pose an obstacle.

Yet parties can often find ways around *Brulotte*, enabling them to achieve those same ends. To start, *Brulotte* allows a licensee to defer payments for pre-expiration use of a patent into the post-expiration period; all the decision bars are **[*454]** royalties for using an invention after it has moved into the public domain. See *379 U.S., at 31, 85 S. Ct. 176, 13 L. Ed. 2d 99*; *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 136, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*. A licensee could agree, for example, to pay the licensor **[****13]** a sum equal to 10% of sales during the 20-year patent term, but to amortize that amount over 40 years. That arrangement would at least bring down early outlays, even if it would not do everything the parties might want to allocate risk over a long **[***471]** timeframe. And parties have still more options when a licensing agreement covers either multiple patents or additional non-patent rights. Under *Brulotte*, royalties may run until the latest-running patent covered in the parties' agreement expires. See *379 U.S., at 30, 85 S. Ct. 176, 13 L. Ed. 2d 99*. Too, post-expiration royalties are allowable so long as tied to a non-patent right—even when closely related to a patent. See, *e.g.,* 3 Milgrim on Licensing §18.07, at 18-16 to 18-17. That means, for example, that a license involving both a patent and a trade secret can set a 5% royalty during the patent period (as compensation for the two combined) and a 4% royalty afterward (as payment for the trade secret alone). Finally and most broadly, *Brulotte* poses no bar to business arrangements other than royalties—all kinds of joint ventures, for example—that enable parties to share the risks and rewards of commercializing an invention.

Contending that such alternatives are not enough, Kimble asks us to abandon *Brulotte* in **[****14]** favor of "flexible, case-by-case analysis" of post-expiration royalty clauses "under the rule of reason." Brief for Petitioners 45. Used in ***antitrust law***, the rule of reason requires courts to evaluate a practice's effect on competition by "taking into account a variety of factors, including specific information about the relevant business, its condition before and after the [practice] was imposed, and the [practice's] history, nature, and effect." *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. Of primary importance in this context, Kimble posits, is whether a patent holder has power in the relevant market and so might be **[*455]** able to curtail competition. See Brief for Petitioners **[**2409]** 47-48; *Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28, 44, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)* ("[A] patent does not necessarily confer market power"). Resolving that issue, Kimble notes, entails "a full-fledged economic inquiry into the definition of the market, barriers to entry, and the like." Brief for

Petitioners 48 (quoting 1 H. Hovenkamp, M. Janis, M. Lemley, & C. Leslie, IP and Antitrust §3.2e, p. 3-12.1 (2d ed., Supp. 2014) (Hovenkamp)).

[1946] III

HN3[] ***LEdHN[3]***[] [3] Overruling precedent is never a small matter. *Stare decisis*—in English, the idea that today's Court should stand by yesterday's decisions—is "a foundation stone of the rule of law." *Michigan v. Bay Mills Indian Community, 572 U.S. 782, 798, 134 S. Ct. 2024, 188 L. Ed. 2d 1071, 1089 (2014)*. Application of **[****15]** that doctrine, although "not an inexorable command," is the "preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee, 501 U.S. 808, 827-828, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)*. It also reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation.

HN4[] ***LEdHN[4]***[] [4] Respecting *stare decisis* means sticking to some wrong decisions. The doctrine rests on the idea, as Justice Brandeis famously wrote, that it is usually "more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406, 52 S. Ct. 443, 76 L. Ed. 815, 1932 C.B. 265, 1932-1 C.B. 265 (1932)* (dissenting opinion). Indeed, **[***472]** *stare decisis* has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up. Accordingly, an argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent. Or otherwise said, it is not alone sufficient that we would decide a case differently now than we did then. To reverse course, we require as well **[*456]** what we have termed a "special justification"—over and above the belief **[****16]** "that the precedent was wrongly decided." *Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266, 134 S. Ct. 2398, 189 L. Ed. 2d 339, 349 (2014)*.

HN5[] ***LEdHN[5]***[] [5] What is more, *stare decisis* carries enhanced force when a decision, like *Brulotte*, interprets a statute. Then, unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees. See, *e.g., Patterson v. McLean Credit Union, 491 U.S. 164, 172-173, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989)*. That is true, contrary to the dissent's view, see *post, at ___ - ___, 192 L. Ed. 2d, at 481-482* (opinion of Alito, J.), regardless whether our decision focused only on statutory text or also relied, as *Brulotte* did, on the policies and purposes animating the law. See, *e.g., Bilski v. Kappos, 561 U.S. 593, 601-602, 130 S. Ct. 3218, 177 L. Ed. 2d 792 (2010)*. Indeed, we apply statutory *stare decisis* even when a decision has announced a "judicially created doctrine" designed to implement a federal statute. *Halliburton, 573 U.S., at 274, 134 S. Ct. 2398, 189 L. Ed. 2d at 354*). All our interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change. Absent special justification, they are balls tossed into Congress's court, for acceptance or not as that branch elects.

And Congress has spurned multiple opportunities to reverse *Brulotte*—openings as frequent and clear as this Court ever sees. **[**2410]** *Brulotte* has governed licensing agreements for more than half a century. See *Watson v. United States, 552 U.S. 74, 82-83, 128 S. Ct. 579, 169 L. Ed. 2d 472 (2007)* (stating **[****17]** that "long congressional acquiescence," there totaling just 14 years, "enhance[s] even the usual precedential force we accord to our interpretations of statutes" (internal quotation marks omitted)). During that time, Congress has repeatedly amended the patent laws, including the specific provision (*35 U.S.C. §154*) on which *Brulotte* rested. See, *e.g.*, Uruguay Round Agreements Act, §532(a), 108 Stat. 4983 (1994) (increasing the length of the patent term); Act of Nov. 19, 1988, §201, 102 Stat. 4676 **[*457]** (limiting patent-misuse claims). *Brulotte* survived every such change. Indeed, Congress has rebuffed bills that would have replaced *Brulotte*'s *per se* rule with the same antitrust-style analysis Kimble now urges. See, *e.g.,* S. 1200, 100th Cong., 1st Sess., Tit. II (1987) (providing that no patent owner would be guilty of "illegal extension of the patent right by reason of his or her licensing practices . . . unless such practices . . . violate the antitrust laws"); S. 438, 100th Cong., 2d Sess., §201(3) (1988) (same). Congress's continual reworking of the patent laws—but never of the *Brulotte* rule—further supports leaving the decision in place.

Nor yet are we done, for the subject matter of *Brulotte* adds to the case for adhering to precedent. *Brulotte* lies at **[***473]** the intersection **[****18]** of two areas of law: property (patents) and contracts (licensing agreements). ***HN6***[] ***LEdHN[6]***[] [6] And we have often recognized that in just those contexts—"cases involving property and contract rights"—considerations favoring *stare decisis* are "at their acme." *E.g., Payne, 501 U.S., at 828, 111 S. Ct. 2597, 115 L. Ed. 2d 720*; *Khan, 522 U.S., at 20, 118 S. Ct. 275, 139 L. Ed. 2d 199*. That is because parties are especially likely to rely on such precedents when ordering their affairs. To be sure, Marvel and Kimble disagree about **[1947]** whether *Brulotte* has actually generated reliance. Marvel says yes: Some parties, it claims, do not specify an end date for royalties in their licensing agreements, instead relying on *Brulotte* as a default rule. Brief for Respondent 32-33; see 1 D. Epstein, Eckstrom's Licensing in Foreign and Domestic Operations §3.13, p. 3-13, and n. 2 (2014) (noting that it is not "necessary to specify the term . . . of the license" when a decision like *Brulotte* limits it "by law"). Overturning *Brulotte* would thus upset expectations, most so when long-dormant licenses for long-expired patents spring back to life. Not true, says Kimble: Unfair surprise is unlikely, because no "meaningful number of [such] license agreements . . . actually exist." Reply Brief 18. To be honest, we do not know (nor, we suspect, do Marvel **[****19]** and Kimble). But even uncertainty on this score cuts in Marvel's direction. So long as we see a reasonable **[*458]** possibility that parties have structured their business transactions in light of *Brulotte*, we have one more reason to let it stand.

As against this superpowered form of *stare decisis*, we would need a superspecial justification to warrant reversing *Brulotte*. But the kinds of reasons we have most often held sufficient in the past do not help Kimble here. If anything, they reinforce our unwillingness to do what he asks.

First, *Brulotte*'s statutory and doctrinal underpinnings have not eroded over time. ***HN7***[] ***LEdHN[7]***[] [7] When we reverse our statutory interpretations, we most often point to subsequent legal developments—"either the growth of judicial doctrine or further action taken by Congress"—that have removed the basis for a decision. *Patterson, 491 U.S., at 173, 109 S. Ct. 2363, 105 L. Ed. 2d 132* (calling this "the primary reason" for overruling statutory precedent). But the core feature of the patent laws on which *Brulotte* relied remains just the same: *Section 154* now, as then, draws **[**2411]** a sharp line cutting off patent rights after a set number of years. And this Court has continued to draw from that legislative choice a broad policy favoring unrestricted use of an invention **[****20]** after its patent's expiration. See *supra, at ____ - ____, 192 L. Ed. 2d, at 469-470*. *Scott Paper*—the decision on which *Brulotte* primarily relied—remains good law. So too do this Court's other decisions refusing to enforce either state laws or private contracts constraining individuals' free use of formerly patented (or unpatentable) discoveries. See *supra, at ____ - ____, 192 L. Ed. 2d, at 469-470*. *Brulotte*, then, is not the kind of doctrinal dinosaur or legal last-man-standing for which we sometimes depart from *stare decisis*. Cf., *e.g., Alleyne v. United States, 570 U.S. 99, 119-121, 133 S. Ct. 2151, 186 L. Ed. 2d 314, 330 (2013)* (Sotomayor, J., concurring). To the contrary, the decision's close relation to a whole web of precedents means that reversing it could threaten others. If *Brulotte* is outdated, **[***474]** then (for example) is *Scott Paper* too? We would prefer not to unsettle stable law. [4]

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[4] The only legal erosion to which Kimble gestures is a change in the treatment of patent tying agreements—*i.e.,* contracts conditioning a licensee's right to use a patent on the purchase of an unpatented product. See Brief for Petitioners 43. When *Brulotte* was decided, those agreements counted as *per se* antitrust violations and patent misuse; now, they are unlawful only if the patent holder wields power in the relevant market. See Act of Nov. 19, 1988, §201, 102 Stat. 4676 (adding the market **[****21]** power requirement in the patent-misuse context); *Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28, 41-43, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)* (relying on that legislative change to overrule antitrust decisions about tying and to adopt the same standard). But it is far from clear that the old rule of tying was among *Brulotte*'s legal underpinnings. *Brulotte* briefly analogized post-expiration royalty agreements to tying arrangements, but only after relating the statutory and caselaw basis for its holding and "conclud[ing]" that post-patent royalties are "unlawful *per se*." *379 U.S., at 32, 85 S. Ct. 176, 13 L. Ed. 2d 99*. And even if that analogy played some real role in *Brulotte*, the development of tying law would not undercut the decision—rather the opposite. Congress took the lead in changing the treatment of tying agreements and, in doing so, conspicuously left *Brulotte* in place. Indeed, Congress declined to enact bills that would have modified not only tying doctrine but also *Brulotte*. See *supra, at ___, 192 L. Ed. 2d, at 472* (citing S. 1200, 100th Cong., 1st Sess. (1987), and S. 438, 100th Cong., 2d Sess. (1988)). That choice suggests congressional acquiescence in *Brulotte*, and so further supports adhering to *stare decisis*.

[*459] And second, nothing about *Brulotte* has proved unworkable. See, *e.g., Patterson, 491 U.S., at 173, 109 S. Ct. 2363, 105 L. Ed. 2d 132* (identifying unworkability as another "traditional justification" **[****22]** for overruling precedent). The decision is simplicity itself to apply. A court need only ask whether a licensing agreement provides royalties for post-expiration use of a patent. If not, no problem; if so, no dice. *Brulotte*'s ease of use appears in still sharper relief when compared to Kimble's proposed alternative. Recall that he wants courts to employ ***antitrust law***'s rule of reason to identify and invalidate those post-expiration royalty clauses with anti-competitive consequences. See *supra, at ___ - ___, 192 L. Ed. 2d, at 471*. But whatever its merits may be for deciding antitrust claims, that "elaborate inquiry" produces **[1948]** notoriously high litigation costs and unpredictable results. *Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 343, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*. For that reason, trading in *Brulotte* for the rule of reason would make the law less, not more, workable than it is now. Once again, then, the case for sticking with long-settled precedent grows stronger: Even the most **[*460]** usual reasons for abandoning *stare decisis* cut the other way here.

IV

Lacking recourse to those traditional justifications for overruling a prior decision, **[**2412]** Kimble offers two different ones. He claims first that *Brulotte* rests on a mistaken view of the competitive effects of post-expiration royalties. He contends next that **[****23]** *Brulotte* suppresses technological innovation and so harms the nation's economy. (The dissent offers versions of those same arguments. See *post, at ___ - ___, 192 L. Ed. 2d, at 478-480*.) We consider the two claims in turn, but our answers to both are much the same: Kimble's reasoning may give Congress cause to upset *Brulotte*, but does not warrant this Court's doing so.

A

According to Kimble, we should overrule *Brulotte* because it hinged on an error about economics: It assumed that post-patent royalty "arrangements **[***475]** are invariably anticompetitive." Brief for Petitioners 37. That is not true, Kimble notes; indeed, such agreements more often increase than inhibit competition, both before and after the patent expires. See *id., at 36-40, 85 S. Ct. 176, 13 L. Ed. 2d 99*. As noted earlier, a longer payment period will typically go hand-in-hand with a lower royalty rate. See *supra, at ___, n. 3, 192 L. Ed. 2d, at 470*. During the patent term, those reduced rates may lead to lower consumer prices, making the patented technology more competitive with alternatives; too, the lesser rates may enable more companies to afford a license, fostering competition among the patent's own users. See Brief for Petitioners 38. And after the patent's expiration, Kimble continues, further benefits follow: Absent high barriers **[****24]** to entry (a material caveat, as even he would agree, see Tr. of Oral Arg. 12-13, 23), the licensee's continuing obligation to pay royalties encourages new companies to begin making the product, figuring that they can quickly attract customers by undercutting the licensee on price. See Brief for Petitioners 38-39. In light of those realities, Kimble **[*461]** concludes, "the *Brulotte per se* rule makes little sense." *Id.,* at 11.

We do not join issue with Kimble's economics—only with what follows from it. A broad scholarly consensus supports Kimble's view of the competitive effects of post-expiration royalties, and we see no error in that shared analysis. See *id.,* at 13-18 (citing numerous treatises and articles critiquing *Brulotte*). Still, we must decide what that means for *Brulotte*. Kimble, of course, says it means the decision must go. Positing that *Brulotte* turned on the belief that post-expiration royalties are always anticompetitive, he invokes decisions in which this Court abandoned antitrust precedents premised on similarly shaky economic reasoning. See Brief for Petitioners 55-56 (citing, *e.g.*, *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*; *Illinois Tool Works, 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26*). But to agree with Kimble's conclusion, we must resolve two questions in his favor. First, even assuming **[****25]** Kimble accurately characterizes *Brulotte*'s basis, does the decision's economic mistake suffice to overcome *stare decisis*? Second and more fundamentally, was *Brulotte* actually founded, as Kimble contends, on an analysis of competitive effects?

If *Brulotte* were an antitrust rather than a patent case, we might answer both questions as Kimble would like. This Court has viewed *stare decisis* as having less-than-usual force in cases involving the Sherman Act. See, *e.g., Khan, 522 U.S., at 20-21, 118 S. Ct. 275, 139 L. Ed. 2d 199*. Congress, we have explained, intended that law's reference to "restraint of trade" to have "changing content," and authorized courts to oversee the term's "dynamic potential." *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 731-732, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*. We have therefore felt relatively free to revise our **[**2413]** legal analysis as economic understanding evolves and (just as Kimble notes) to reverse antitrust precedents that misperceived a practice's competitive consequences. See *Leegin, 551 U.S., at 899-900, 127 S. Ct. 2705, 168 L. Ed. 2d 623*. Moreover, because the question in those cases was **[*462]** whether the challenged activity restrained trade, the Court's rulings necessarily turned on its understanding of economics. See *Business Electronics **[***476]** Corp., 485 U.S., at 731, 108 S. Ct. 1515, 99 L. Ed. 2d 808*. Accordingly, to overturn the decisions in light of sounder economic reasoning was to take them "on [their] own terms." *Halliburton, 573 U.S., at 271, 134 S. Ct. 2398, 189 L. Ed. 2d at 352*.

[1949] But *Brulotte* is a patent rather **[****26]** than an antitrust case, and our answers to both questions instead go against Kimble. To begin, even assuming that *Brulotte* relied on an economic misjudgment, Congress is the right entity to fix it. By contrast with the Sherman Act, the patent laws do not turn over exceptional law-shaping authority to the courts. Accordingly, statutory *stare decisis*—in which this Court interprets and Congress decides whether to amend—retains its usual strong force. See *supra, at ___, 192 L. Ed. 2d, at 472*. And as we have shown, that doctrine does not ordinarily bend to "wrong on the merits"-type arguments; it instead assumes Congress will correct whatever mistakes we commit. See *supra, at ___ - ___, 192 L. Ed. 2d, at 471-472*. Nor does Kimble offer any reason to think his own "the Court erred" claim is special. Indeed, he does not even point to anything that has changed since *Brulotte*—no new empirical studies or advances in economic theory. Cf., *e.g.*, *Halliburton, 573 U.S., at 270-274, 134 S. Ct. 2398, 189 L. Ed. 2d at 352* (considering, though finding insufficient, recent economic research). On his argument, the *Brulotte* Court knew all it needed to know to determine that post-patent royalties are not usually anticompetitive; it just made the wrong call. See Brief for Petitioners 36-40. That claim, even if itself dead-right, fails to **[****27]** clear *stare decisis*'s high bar.

And in any event, *Brulotte* did not hinge on the mistake Kimble identifies. Although some of its language invoked economic concepts, see n. 4, *supra*, the Court did not rely on the notion that post-patent royalties harm competition. Nor is that surprising. The patent laws—unlike the Sherman Act—do not aim to maximize competition (to a large extent, the opposite). And the patent term—unlike the "restraint **[*463]** of trade" standard—provides an all-encompassing bright-line rule, rather than calling for practice-specific analysis. So in deciding whether post-expiration royalties comport with patent law, *Brulotte* did not undertake to assess that practice's likely competitive effects. Instead, it applied a categorical principle that all patents, and all benefits from them, must end when their terms expire. See *Brulotte, 379 U.S., at 30-32, 85 S. Ct. 176, 13 L. Ed. 2d 99*; *supra, at ___ - ___, 192 L. Ed. 2d, at 469-470*. Or more specifically put, the Court held, as it had in *Scott Paper*, that Congress had made a judgment: that the day after a patent lapses, the formerly protected invention must be available to all for free. And further: that post-expiration restraints on even a single licensee's access to the invention clash with that principle. See *Brulotte, 379 U.S., at 31-32, 85 S. Ct. 176, 13 L. Ed. 2d 99* (a licensee's **[****28]** obligation to pay post-patent royalties conflicts with the "free market visualized for the post-expiration period" and so "runs counter to the policy and purpose of the patent laws" (quoting *Scott Paper, 326 U.S., at 256, 66 S. Ct. 101, 90 L. Ed. 47, 1946 Dec. Comm'r Pat. 616*)). That patent (not antitrust) policy gave rise to the Court's conclusion that post-patent royalty contracts are unenforceable—utterly "regardless of a demonstrable effect on competition." 1 Hovenkamp §3.2d, at 3-10.

[*477] [**2414]** Kimble's real complaint may go to the merits of such a patent policy—what he terms its "formalis[m]," its "rigid[ity]", and its detachment from "economic reality." Brief for Petitioners 27-28. But that is just a different version of the argument that *Brulotte* is wrong. And it is, if anything, a version less capable than the last of trumping statutory *stare decisis*. For the choice of what patent policy should be lies first and foremost with Congress. So if Kimble thinks patent law's insistence on unrestricted access to formerly patented inventions leaves too little room for pro-competitive post-expiration royalties, then Congress, not this Court, is his proper audience.

B

Kimble also seeks support from the wellspring of all patent policy: the goal of promoting innovation. *Brulotte*, he **[*464]** contends, "discourages **[****29]** technological innovation and does significant damage to the American economy." Brief for Petitioners 29. Recall that would-be licensors and licensees may benefit from post-patent royalty arrangements because they allow for a longer payment period and a more precise allocation of risk. See *supra, at ___, 192 L. Ed. 2d, at 470*. If the parties' ideal licensing agreement is barred, Kimble reasons, they may reach no agreement at all. See Brief for Petitioners 32. And that possibility may discourage invention in the first instance. The bottom line, Kimble concludes, is that some "breakthrough technologies will never see the light of day." *Id., at 33, 85 S. Ct. 176, 13 L. Ed. 2d 99*.

Maybe. Or, then again, maybe not. While we recognize that post-patent royalties are sometimes not anticompetitive, we just cannot say whether barring them imposes any meaningful drag on innovation. As we have explained, *Brulotte* leaves open various ways—involving both licensing and other business arrangements—to accomplish payment deferral **[1950]** and risk-spreading alike. See *supra, at ___, 192 L. Ed. 2d, at 471*. Those alternatives may not offer the parties the precise set of benefits and obligations they would prefer. But they might still suffice to bring patent holders and product developers together and ensure **[****30]** that inventions get to the public. Neither Kimble nor his *amici* have offered any empirical evidence connecting *Brulotte* to decreased innovation; they essentially ask us to take their word for the problem. And the United States, which acts as both a licensor and a licensee of patented inventions while also implementing patent policy, vigorously disputes that *Brulotte* has caused any "significant real-world economic harm." Brief for United States as *Amicus Curiae* 30. Truth be told, if forced to decide that issue, we would not know where or how to start.

Which is one good reason why that is not our job. Claims that a statutory precedent has "serious and harmful consequences" for innovation are (to repeat this opinion's refrain) "more appropriately addressed to Congress." *Halliburton,* ***[*465]*** *573 U.S., at 277, 134 S. Ct. 2398, 189 L. Ed. 2d at 356*. That branch, far more than this one, has the capacity to assess Kimble's charge that *Brulotte* suppresses technological progress. And if it concludes that *Brulotte* works such harm, Congress has the prerogative to determine the exact right response—choosing the policy fix, among many conceivable ones, that will optimally serve the public interest. As we have noted, Congress legislates actively with respect to patents, **[****31]** considering concerns **[***478]** of just the kind Kimble raises. See *supra, at ___, 192 L. Ed. 2d, at 472*. In adhering to our precedent as against such complaints, we promote the rule-of-law values to which courts must attend while leaving matters of public policy to Congress.

[2415]** V

HN8[] ***LEdHN[8]***[] [8]What we can decide, we can undecide. But *stare decisis* teaches that we should exercise that authority sparingly. Cf. S. Lee & S. Ditko, Amazing Fantasy No. 15: Spider-Man!, p. 13 (1962) ("[I]n this world, with great power there must also come—great responsibility"). Finding many reasons for staying the *stare decisis* course and no "special justification" for departing from it, we decline Kimble's invitation to overrule *Brulotte*.

For the reasons stated, the judgment of the Court of Appeals is affirmed.

It is so ordered.

Dissent by: ALITO

Dissent

Justice **Alito**, with whom The Chief Justice and Justice **Thomas** join, dissenting.

The Court employs *stare decisis*, normally a tool of restraint, to reaffirm a clear case of judicial overreach. Our decision in *Brulotte v. Thys Co., 379 U.S. 29, 85 S. Ct. 176, 13 L. Ed. 2d 99 (1964)*, held that parties cannot enter into a patent licensing agreement that provides for royalty payments to continue after the term of the patent expires. That decision was not based on anything that can plausibly be regarded as an interpretation **[****32]** of the terms of the Patent Act. It was based instead on an **[*466]** economic theory—and one that has been debunked. The decision interferes with the ability of parties to negotiate licensing agreements that reflect the true value of a patent, and it disrupts contractual expectations. *Stare decisis* does not require us to retain this baseless and damaging precedent.

I

A

The Patent Act provides that a patent grants certain exclusive rights to the patentee and "his heirs or assigns" for a term of 20 years. *35 U.S.C. §§154(a)(1)* and *(2)*. The Act says nothing whatsoever about post-expiration royalties. In *Brulotte*, however, the Court held that such royalties are *per se* unlawful. The Court made little pretense of finding support for this holding in the language of the Act. Instead, the Court reasoned that allowing post-expiration royalties would subject "the free market visualized for the post-expiration period . . . to monopoly influences that have no proper place there." *379 U.S., at 32-33, 85 S. Ct. 176, 13 L. Ed. 2d 99*. Invoking antitrust concepts, the decision suggested that such arrangements are "an effort to enlarge the monopoly of the patent by t[y]ing the sale or use of the patented article to the purchase or use of unpatented ones." *Id., at 33, 85 S. Ct. 176, 13 L. Ed. 2d 99*.

Whatever the merits of this economic **[****33]** argument, it does not represent a serious attempt to interpret the Patent Act. A licensing agreement that provides for the payment of royalties after a patent's term expires does not enlarge the patentee's monopoly or extend the term of the patent. It simply gives the licensor a **[***479]** contractual right. Thus, nothing in the text of the Act **[1951]** even arguably forbids licensing agreements that provide for post-expiration royalties.

Brulotte was thus a bald act of policymaking. It was not simply a case of incorrect statutory interpretation. It was not really statutory interpretation at all.

B

[*467] Not only was *Brulotte* based on policymaking, it was based on a policy that is difficult to defend. Indeed, in the intervening 50 years, its reasoning has been soundly refuted. See, *e.g.,* 10 P. Areeda & H. Hovenkamp, ***Antitrust Law***: An Analysis of Antitrust Principles and Their Application ¶1782c.3, pp. 554-556 (3d ed. 2011); See & Caprio, The Trouble with *Brulotte*: **[**2416]** The Patent Royalty Term and Patent Monopoly Extension, 1990 Utah L. Rev. 813, 846-851; *Scheiber v. Dolby Labs., Inc., 293 F. 3d 1014, 1017 (CA7 2002)*; Brief for Petitioners 23-25, and n. 11 (collecting sources); *ante, at ___, n. 3, 192 L. Ed. 2d, at 469*.

Brulotte misperceived the purpose and effect of post-expiration royalties. The decision rested on the view that **[****34]** post-expiration royalties extend the patent term by means of an anticompetitive tying arrangement. As the Court understood such an arrangement, the patent holder leverages its monopoly power during the patent term to require payments after the term ends, when the invention would otherwise be available for free public use. But agreements to pay licensing fees after a patent expires do not "enlarge the monopoly of the patent." *379 U.S., at 33, 85 S. Ct. 176, 13 L. Ed. 2d 99*. Instead, "[o]nce the patent term expires, the power to exclude is gone," and all that is left "is a problem about optimal contract design." Easterbrook, Contract and Copyright, *42 Hous. L. Rev. 953, 955 (2005)*.

The economics are simple: Extending a royalty term allows the parties to spread the licensing fees over a longer period of time, which naturally has the effect of reducing the fees during the patent term. See *ante, at ___, 192 L. Ed. 2d, at 470*. Restricting royalty payments to the patent term, as *Brulotte* requires, compresses payment into a shorter period of higher fees. The Patent Act does not prefer one approach over the other.

There are, however, good reasons why parties sometimes prefer post-expiration royalties over upfront fees, and why **[*468]** such arrangements have pro-competitive effects. Patent holders and licensees **[****35]** are often unsure whether a patented idea will yield significant economic value, and it often takes years to monetize an innovation. In those circumstances, deferred royalty agreements are economically efficient. They encourage innovators, like universities, hospitals, and other institutions, to invest in research that might not yield marketable products until decades down the line. See Brief for Memorial Sloan Kettering Cancer Center et al. as *Amici Curiae* 8-12. And they allow producers to hedge their bets and develop more products by spreading licensing fees over longer periods. See *ibid*. By prohibiting these arrangements, *Brulotte* erects an obstacle to efficient patent use. In patent law and other areas, we have abandoned *per se* rules with similarly disruptive effects. See, *e.g.*, *Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)*; *Leegin Creative Leather Products,* **[***480]** *Inc. v. PSKS, Inc., 551 U.S. 877, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*.

The majority downplays this harm by insisting that "parties can often find ways around *Brulotte*." *Ante, at ___, 192 L. Ed. 2d, at 470*. But the need to avoid *Brulotte* is an economic inefficiency in itself. Parties are not always aware of the prohibition—as this case amply demonstrates. And the suggested alternatives do not provide the same benefits as post-expiration royalty agreements. For instance, although an agreement to amortize **[****36]** payments for sales during the patent term would "bring down early outlays," the Court admits that such an agreement might not reflect the parties' risk preferences. *Ante, at ___, 192 L. Ed. 2d, at 470*. Moreover, such an arrangement would not necessarily yield the same amount of total royalties, particularly for an invention or a medical breakthrough that takes decades to develop into a marketable product. The sort of agreements that *Brulotte* prohibits would allow licensees to spread their costs, while *also* allowing patent holders to capitalize on slow-developing inventions.

[2417]** C

[*469] On top of that, *Brulotte* most often functions to upset the parties' expectations.

This case illustrates the point. No one disputes that, when "negotiating the settlement, neither side was aware of *Brulotte*." *Ante, at ___, 192 L. Ed. 2d, at 468*. Without knowledge of our *per se* rule, the parties agreed that Marvel would pay 3% in royalties on all of its future sales involving the Web Blaster and similar products. If the parties had been aware of *Brulotte*, they might have agreed to higher payments during the patent term. Instead, both sides expected the **[1952]** royalty payments to continue until Marvel stopped selling toys that fit the terms of the agreement. But that is **[****37]** not what happened. When Marvel discovered *Brulotte*, it used that decision to nullify a key part of the agreement. The parties' contractual expectations were shattered, and petitioners' rights were extinguished.

The Court's suggestion that some parties have come to rely on *Brulotte* is fanciful. The Court believes that there is a "reasonable possibility that parties have structured their business transactions in light of *Brulotte*." *Ante, at ___, 192 L. Ed. 2d, at 473*. Its only support for this conclusion is Marvel's self-serving and unsupported assertion that some contracts might not specify an end date for royalties because the parties expect *Brulotte* to supply the default rule. To its credit, the Court stops short of endorsing this unlikely prediction, saying only that "uncertainty on this score cuts in Marvel's direction." *Ante, at ___, 192 L. Ed. 2d, at 473*.

But there is no real uncertainty. "[W]e do not know" if Marvel's assertion is correct because Marvel has provided no evidence to support it. *Ibid.* And there are reasons to believe that, if parties actually relied on *Brulotte* to supply a default rule, courts would enforce the contracts as the parties expected. See, *e.g.,* 27 R. Lord, Williston on Contracts §70:124 (4th ed. 2003). What we **[****38]** know for sure, however, is **[*470]** that *Brulotte* has upended the parties' expectations here and in many other cases. See, *e.g., Scheiber, 293 F. 3d, at 1016*; *Boggild v. Kenner Products, 853 F. 2d 465, 466-467 (CA6 1988)*; *Pitney Bowes, Inc. v. Mestre, 701 F. 2d 1365, 1367, 1373 (CA11 1983)*. **[***481]** These confirmed problems with retaining *Brulotte* clearly outweigh Marvel's hypothetical fears.

II

In the end, *Brulotte*'s only virtue is that we decided it. But that does not render it invincible. *Stare decisis* is important to the rule of law, but so are correct judicial decisions. Adherence to prior decisions "'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Pearson v. Callahan, 555 U.S. 223, 233, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)* (quoting *Payne v. Tennessee, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)*). But *stare decisis* is not an "inexorable command." *Id.*; *Washington v. W. C. Dawson & Co., 264 U.S. 219, 238, 44 S. Ct. 302, 68 L. Ed. 646 (1924)* (Brandeis, J., dissenting). "Revisiting precedent is particularly appropriate where, as here, a departure would not upset expectations, the precedent consists of a judge-made rule

. . ., and experience has pointed up the precedent's shortcomings." Pearson, supra, at 233, 129 S. Ct. 808, 172 L. Ed. 2d 565.

Our traditional approach to *stare decisis* does not require us to retain *Brulotte*'s *per se* rule. *Brulotte*'s holding had no basis in the law. Its reasoning has been thoroughly disproved. It poses economic barriers that stifle **[****39]** innovation. And it unsettles contractual expectations.

[2418]** It is not decisive that Congress could have altered *Brulotte*'s rule. In general, we are especially reluctant to overturn decisions interpreting statutes because those decisions can be undone by Congress. See, *e.g.,* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139, 128 S. Ct. 750, 169 L. Ed. 2d 591 (2008); Patterson v. McLean Credit Union, 491 U.S. 164, 172-173, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989). The Court calls this a "superpowered form of *stare decisis*" **[*471]** that renders statutory interpretation decisions nearly impervious to challenge. Ante, at ___, n. 3, 192 L. Ed. 2d, at 473. I think this goes a bit too far.

As an initial matter, we do not give super-duper protection to decisions that do not actually interpret a statute. When a precedent is based on a judge-made rule and is not grounded in anything that Congress has enacted, we cannot "properly place on the shoulders of Congress" the entire burden of correcting "the Court's own error." Girouard v. United States, 328 U.S. 61, 69-70, 66 S. Ct. 826, 90 L. Ed. 1084 (1946). On the contrary, we have recognized that it is appropriate for us to correct rules of this sort. See, *e.g.,* Leegin, supra, at 899-900, 127 S. Ct. 2705, 168 L. Ed. 2d 623; State Oil Co. v. Khan, 522 U.S. 3, 20-21, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997).

The Court says that it might agree if *Brulotte* were an antitrust precedent because *stare decisis* has "less-than-usual force in cases involving the Sherman Act." Ante, at ___, 192 L. Ed. 2d, at 475. But this distinction is unwarranted. We have been more willing to reexamine antitrust precedents because they have attributes **[****40]** of common-law decisions. I see no reason why the same approach should not apply where the precedent at issue, while purporting to apply a statute, is actually based on policy concerns. Indeed, we should be even more willing to reconsider such a precedent **[***482]** because the role implicitly assigned to the federal courts under the Sherman Act has no parallel in Patent Act cases.

[1953] Even taking the Court on its own terms, *Brulotte* was an antitrust decision masquerading as a patent case. The Court was principally concerned with patentees improperly leveraging their monopoly power. See 379 U.S., at 32-33, 85 S. Ct. 176, 13 L. Ed. 2d 99. And it expressly characterized post-expiration royalties as anti-competitive tying arrangements. See id., at 33, 85 S. Ct. 176, 13 L. Ed. 2d 99. It makes no sense to afford greater *stare decisis* protection to *Brulotte*'s thinly veiled antitrust reasoning than to our Sherman Act decisions.

The Court also places too much weight on Congress' failure to overturn *Brulotte*. We have long cautioned that "[i]t **[*472]** is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." Girouard, supra, at 69, 66 S. Ct. 826, 90 L. Ed. 1084. Even where Congress has considered, but not adopted, legislation that would abrogate a judicial ruling, it cannot be inferred that Congress' **[****41]** failure to act shows that it approves the ruling. See Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A., 511 U.S. 164, 187, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994). "'[S]everal equally tenable inferences may be drawn from such inaction.'" *Ibid*. (quoting Pension Benefit Guaranty Corporation v. LTV Corp., 496 U.S. 633, 650, 110 S. Ct. 2668, 110 L. Ed. 2d 579 (1990)).

Passing legislation is no easy task. A federal statute must withstand the "finely wrought" procedure of bicameralism and presentment. INS v. Chadha, 462 U.S. 919, 951, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983); Clinton v. City of New York, 524 U.S. 417, 440, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998); see U. S. Const., Art. I, §7. Within that onerous process, there are additional practical hurdles. A law must be taken up for discussion and not passed over in favor of more pressing matters, **[**2419]** and Senate rules require 60 votes to end debate on most legislation. And even if the House and Senate agree on a general policy, the details of the measure usually must be hammered out in a conference committee and repassed by both Houses.

* * *

A proper understanding of our doctrine of *stare decisis* does not prevent us from reexamining *Brulotte.* Even the Court does not defend the decision on the merits. I would reconsider and overrule our obvious mistake. For these reasons, I respectfully dissent.

References

35 U.S.C.S. § 154(a)

3 Milgrim on Licensing §§18.05, 18.07 (Matthew Bender)

L Ed Digest, Patents § 239

L Ed Index, Royalties

Supreme Court's views as to precedential weight of Supreme Court memorandum decision affirming lower federal court judgment on appeal or summarily dismissing appeal from state court. *139 L. Ed. 2d 979*.

Otsuka Pharm. Co. v. Torrent Pharms. Ltd.

United States District Court for the District of New Jersey

June 22, 2015, Decided; June 22, 2015, Filed

Civil Action No. 14-1078 (JBS/KMW)

Reporter

118 F. Supp. 3d 646 *; 2015 U.S. Dist. LEXIS 80370 **; 2015-1 Trade Cas. (CCH) P79,218

OTSUKA PHARMACEUTICAL CO., LTD., Plaintiff, v. TORRENT PHARMACEUTICALS LIMITED, INC., TORRENT PHARMA INC., and HETERO LABS LIMITED, Defendants.

Core Terms

Counterclaim, antitrust, allegations, patent misuse, aripiprazole, infringement, immunity, anticompetitive, bifurcate, patent, motion to dismiss, patent infringement, baseless, anti trust law, competitor, monopoly, sham, FDA, antitrust violation, generic, initiated, Monopolization, constitutes, alleged injury, non-infringement, Pharmaceutical, discovery, purposes, reasons, tablets

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Judges: HONORABLE JEROME B. SIMANDLE, Chief United States District Judge.

Opinion by: JEROME B. SIMANDLE

Opinion

[*649] SIMANDLE, Chief Judge:

I. INTRODUCTION

This patent infringement action, one of twenty-five related actions under the Hatch-Waxman Act, *35 U.S.C. §§ 271*, *281*, generally concerns Plaintiff Otsuka Pharmaceutical Co, Ltd.'s (hereinafter, "Otsuka") position that Torrent Pharmaceuticals Limited, Inc.'s, Torrent Pharma Inc.'s, and Hetero Labs Limited's (hereinafter, "Torrent") proposed generic aripiprazole product infringes one or more claims of two of the various patents covering Otsuka's Abilify® aripiprazole product, U.S. Patent Nos. 8,017,615 ("the '615 patent") and 8,580,796 ("the '796 patent").

Otsuka now moves to dismiss Torrent's **[**2]** Fifth and Sixth Counterclaims for "Unlawful Monopolization" and for "Patent Misuse" (hereinafter, the "Counterclaims") pursuant to *Federal Rule of Civil Procedure 12(b)(6)* and, in the alternative, to bifurcate and stay Torrent's Counterclaims pending resolution of the primary patent infringement issues pursuant to *Federal Rule of Civil Procedure 42(b)*. [Docket Item 43.]

Otsuka argues, in particular, that Torrent's antitrust Counterclaim must be dismissed, because Torrent has not alleged, nor will Torrent ever suffer, the "anticompetitive injury" required for antitrust standing, and because Torrent's "cursory conclusions" fail to plausibly overcome Otsuka's *Noerr-Pennington* immunity. (Otsuka's Reply at 2-5; Otsuka's Br. at 5-11.) Ostuka similarly asserts that Torrent's patent misuse Counterclaim must be dismissed, because its allegation of baseless infringement fails as a matter of law to state a cognizable claim for patent misuse. (See Otsuka's Reply at 5-6; Otsuka's Br. at 11-12.) In the alternative, Otsuka requests that the Court follow the "'standard practice'" of bifurcating for trial the patent issues raised in this litigation from the antitrust and/or patent misuse issues. (Otsuka's Br. at 13 (citations omitted).)

Torrent, however, submits that its antitrust **[**3]** Counterclaim demonstrates the "real and immediate" risk of injury required for purposes of antitrust standing, because absent "this bad faith litigation," Torrent would have an "unencumbered path to launch its ANDA product." (Torrent's Opp'n at 4-5.) With regard to Otsuka's claim of *Noerr-Pennington* immunity, Torrent similarly asserts that its antitrust Counterclaim sets forth sufficient factual matter to demonstrate that this litigation constitutes a sham, because Otsuka initiated suit despite Torrent's detailed non-infringement statement and despite the fact that Torrent's abbreviated new drug application (hereinafter, "ANDA") is non-infringing on its face. (Id. at 3-7.) Finally, Torrent submits that dismissal of its Counterclaims would, at this early stage of discovery, be inappropriate to the extent undeveloped factual issues remain concerning whether Otsuka's conduct constitutes patent misuse and/or an antitrust violation. (Id. at 8-9.)

[*650] The principal issues before the Court are whether the allegations of Torrent's Counterclaims suffice to confer antitrust standing, to overcome Otsuka's *Noerr-Pennington* immunity, and to state a plausible claim for patent misuse.

For the reasons that **[**4]** follow, Otsuka's motion will be granted in part and denied in part.

II. BACKGROUND

A. Factual and Procedural Background[1]

Otsuka, a pharmaceutical company primarily organized and existing under the laws of Japan, holds New Drug Application (hereinafter, "NDA") No. 21-436, approved by the Food and Drug Administration (hereinafter, the "FDA"), for aripiprazole tablets, which Otsuka markets under the trade name Abilify®. (Am. Compl. at ¶¶ 1, 17-18, 25-30.)

In connection with Abilify's® listing in the Orange Book, the FDA's book of drug products approved under the Food, Drug, and Cosmetic Act (hereinafter, the "Orange Book"), *21 U.S.C. § 355(j)*, Otsuka identifies the '615 patent and the '796 patent, both of which Otsuka owns by virtue of assignment. (Id. at ¶¶ 14, 17, 26, 29.) The listing, in particular, discloses Abilify®'s active ingredient as "aripiprazole," the dosage form as a "tablet" or "oral," and the strengths as 2 mg, 5 mg, 10 mg, 15 mg, 20 mg, and 30 mg. (Counterclaim at ¶ 13 (quotation marks omitted).)

In late 2013, Torrent filed ANDA No. 20-1519 with the FDA, seeking approval to **[**5]** market generic 2 mg, 5 mg, 10 mg, 15 mg, 20 mg, and 30 mg aripiprazole tablets in the United States, prior to the expiration of the '615 and the '796 patents. (See Countercl. at ¶ 14.) Torrent's ANDA filing included a "paragraph IV certification" pursuant to *21 U.S.C. § 355(j)(2)(A)(vii)(IV)*, in which Torrent set forth its assertion that the Abilify® patents would not be infringed by the commercial manufacture, use, or sale of Torrent's generic product. (See id.)

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[1] For purposes of the pending motion, the Court accepts as true the facts set forth in Torrent's Answer and Counterclaims. [Docket Items 19 & 26.]

On January 4, 2014, Torrent mailed notice of its ANDA certification to Otsuka, and provided "a detailed statement of the factual and legal bases of Torrent's ANDA certifications for the '615 and '796 patents," i.e., a detailed explanation of the bases for Torrent's position that its generic aripiprazole tablets would "not infringe any valid or enforceable claim of the Orange Book-listed '615 and '796 patents." (Id. at ¶ 15.) In order to substantiate its non-infringement position, Torrent then provided the relevant portions of its ANDA on February 20, 2014. (Id. at ¶ 16.)

Otsuka filed an initial and Amended Complaint in this District, alleging that Torrent's proposed generic product "will, if approved and marketed," infringe at least one claim of the '615 and '796 patents. (Am. Compl. at ¶¶ 22-23, 33-34.) On October 22, **[**6]** 2014, Torrent filed an Answer to Otsuka's Amended Complaint and, as a relevant here, asserted Counterclaims for "Unlawful Monopolization in Violation of the Sherman Act: Sham Litigation" and for a "Declaratory Judgment of Unenforceability of the '615 and '796 Patents for Patent Misuse." (Countercl. at ¶¶ 34-62.)

Torrent's "Unlawful Monopolization" Counterclaim alleges, in particular, that Otsuka "has the power to control prices and/or exclude competition in, or prevent entry into" the aripiprazole market, and claims that Otsuka has wielded that power **[*651]** "to monopolize" the market. (Id. at ¶¶ 42-45.) Indeed, Torrent alleges that Otsuka "has engaged in an overall predatory scheme to monopolize the [aripiprazole market] through, but not limited to, initiating objectively baseless and sham judicial proceedings designed" to "entrench and enhance [Otsuka's] monopolistic position in the [aripiprazole] market and to stifle and eliminate competition and competitors with no economic, market or competitive benefit." (Id. at ¶¶ 45, 47.) Torrent, accordingly, alleges that Otsuka initiated this "sham" and "bad faith" litigation against it not upon a genuine belief that Torrent's ANDA products would infringe the '615 and **[**7]** '796 Patents, but "for an improper purpose, and as a means of directly interfering with and harming Torrent's business and in order to forestall, frustrate and prevent competition by Torrent," in violation of the Sherman and Clayton Acts, *15 U.S.C. §§ 2*, *15*, and *26*.[2] (Id. at ¶¶ 48-51.) Moreover, as a result of this "exclusionary" and "anticompetitive" conduct, Torrent has purportedly "suffered, and will continue to suffer," significant injury, "including lost profits and business opportunities." (Id. at ¶¶ 57-58.)

Torrent's patent misuse Counterclaim largely reiterates the allegations of its antitrust Counterclaim, and specifically alleges that Otsuka filed this action without "any good faith factual basis" to support its infringement positions against Torrent, and "for the purpose of delay[ing] Torrent's entry" into the aripiprazole market **[**8]** by "burden[ing] Torrent with litigation costs and making baseless accusations of infringement." (Id. at ¶¶ 60-62.)

The pending motion followed.

III. STANDARD OF REVIEW

Under *Federal Rule of Civil Procedure 12(b)(6)*, the court must generally accept as true the factual allegations of the defendant's counterclaims, and construe all "reasonable inferences" in the light most favorable to the defendant. *Revell v. Port Auth. Of N.Y., N.J., 598 F.3d 128, 134 (3d Cir. 2010)*; see also *Fleisher v. Standard Ins. Co., 679 F.3d 116, 120 (3d Cir. 2012)* (same). However, "[a] pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action" fails to suffice. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. Rather, the factual allegations must be facially sufficient to demonstrate a "plausible" right to relief, by pleading factual content sufficient for the Court "to draw the reasonable inference that the [plaintiff] is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*); see also *Umland v. Planco Fin. Servs., 542 F.3d 59, 64 (3d Cir. 2008)*.

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[2] As relevant here, *section 2* of the Sherman Act makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States." *15 U.S.C. § 2*. In that respect, the Sherman Act seeks to protect the public from the failures of the market and "conduct which unfairly tends to destroy competition itself." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*.

In evaluating whether a counterclaim meets this pleading standard, the Court strips away conclusory statements and reviews instead the "well-pled factual allegations, assume[s] their veracity, and then determine[s] whether" the allegations demonstrate a plausible "entitlement to relief." *Iqbal, 556 U.S. at 678* (internal quotation marks omitted).

IV. DISCUSSION

As stated above, Otsuka moves to dismiss Torrent's antitrust Counterclaim for **[*652]** lack of standing and **[**9]** on immunity grounds, and moves to dismiss Torrent's patent misuse Counterclaim for failure to state a plausible claim for relief. The Court will address each issue in turn.

A. Torrent has Alleged Sufficient Facts to Demonstrate Antitrust Standing

Article III constitutional standing, a principle moored in the notion "that the judiciary's power only extends to cases or controversies," constitutes a threshold requirement in all actions in federal court. *Ethypharm S.A. France v. Abbott Labs., 707 F.3d 223, 232 (3d Cir. 2013)* (citing *U.S. Const. art. III, § 2*; *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992))*. The principles of constitutional standing are, however, "'augmented'" by prudential considerations aimed at preserving the effective enforcement of the antitrust laws. Id. (quoting *City of Pittsburgh v. W. Penn Power Co., 147 F.3d 256, 264 (3d Cir. 1998))*. Indeed, the Supreme Court has specifically recognized that "Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 535, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* (citation omitted).

As a result, a party suing under federal antitrust laws, as here,[3] must meet the prudential requirement of "'antitrust standing.'"[4] *Ethypharm S.A. France, 707 F.3d at 232* (citation omitted). In Associated Gen. Contractors of Cal., Inc., the Supreme Court articulated the considerations relevant to whether a complainant possesses antitrust **[**10]** standing, which the Court of Appeals for the Third Circuit subsequently organized into the following multifactor test:

> (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

Ethypharm S.A. France, 707 F.3d at 232-33 (citing *In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1165-66 (3d Cir. 1993))* (hereinafter, the "AGC factors"). Of these factors, the second, antitrust injury, constitutes the "'necessary but insufficient condition of antitrust standing.'" Id. (citation omitted). Thus, in the absence of a plausible allegation of antitrust injury, the only factor challenged by Otsuka in this instance, the Court need not address the remaining AGC factors.

Therefore, the Court notes that, in order to plead an antitrust injury, the party **[*653]** must allege facts showing (1) that it suffered an injury of the type the antitrust laws seek to prevent, e.g., anticompetitive behavior, and (2) that the

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[3] *Section 4* of the Clayton Act provides the statutory authority for a private antitrust cause of action, and **[**11]** specifically states that, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may maintain a "private action for treble damages." *15 U.S.C. § 15*.

[4] Unlike Article III standing, lack of antitrust standing does not deprive a court of subject matter jurisdiction. *Ethypharm S.A. France, 707 F.3d at 232* (citation omitted). Rather, it bars "a plaintiff from recovering under the antitrust laws." Id. (citation omitted)).

injury resulted from the adversary's unlawful or anti-competitive acts. See In re Niaspan Antitrust Litig., 42 F. Supp. 3d 735, 753 (E.D. Pa. 2014) (quoting In re K-Dur Antitrust Litig., 338 F. Supp. 2d 517, 534 (D.N.J. 2004)). The federal antitrust laws, however, foster "'the protection of competition not competitors.'" Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57, 76-77 (3d Cir. 2010); see also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977) (citation omitted) (noting that Congress enacted the antitrust laws "for 'the protection of competition, not competitors'"). As a result, the pleaded facts must show "that 'the challenged action has had an actual adverse effect on competition as a whole in the relevant market,'" rather than just an adverse effect on the particular competitor.[5] Irish v. Ferguson, 970 F. Supp. 2d 317, 365 (M.D. Pa. 2013) (citations **[**12]** omitted); see also Eichorn v. AT&T Corp., 248 F.3d 131, 140 (3d Cir. 2001) (noting that an antitrust injury does not lie unless the allegedly anticompetitive conduct "has a wider impact on the [overall] competitive market"). Moreover the alleged injuries must, as with all types of standing, be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" City of L.A. v. Lyons, 461 U.S. 95, 102, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983); see also Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 321 (3d Cir. 2007) ("The prospective harm to competition must not ... be speculative.")

In seeking to dismiss Torrent's federal antitrust claim, Otsuka asserts that Torrent cannot be heard to claim that the pendency of this litigation has caused Torrent to suffer any antitrust or anticompetitive injury, because Torrent "voluntarily chose[] not to surmount the legal and regulatory" hurdles to its market entry until **[**13]** after the April 2015 expiration of the primary compound patent for Abilify, U.S. Patent No. 5,006,528 (hereinafter, the "'528 Patent"), and because Torrent's allegations of delayed market entry lack the immediacy required for purposes of antitrust standing. (Otsuka's Br. at 5-7; Otsuka's Reply at 2-4.) The Court, however, finds Otsuka's position without merit.

Critically, the hallmark for evaluating the plausibility of an allegation of antitrust injury is, as stated above, that the actions alleged to be anticompetitive when viewed "as a whole" bear consequence for the overall market, rather than only for an individual competitor. TransWeb, LLC v. 3M Innovative Props. Co., No. 10-4413, 2011 U.S. Dist. LEXIS 59095, 2011 WL 2181189, at *18 (D.N.J. June 1, 2011)

Distilled to its essence, Torrent's Counterclaim alleges that Otsuka has initiated meritless infringement actions in order to "stifle and eliminate competition and competitors," to exclude or prevent competitors' entry into the aripiprazole market, and to maintain its exclusive monopoly over the aripiprazole market. (Countercl. at ¶¶ 34-58.) The Counterclaim **[*654]** further alleges that, as result of Otsuka's purportedly "exclusionary, anticompetitive and unlawful activities," Otsuka has been able to maintain its aripiprazole monopoly to the detriment of competition and consumers **[**14]** and has, in particular, hampered Torrent's ability to enter and compete, resulting in "lost profits and business opportunities." (Id. at ¶¶ 54, 57-58.)

In these respects, Torrent's Counterclaim plausibly alleges the elements of an antitrust injury, namely, an injury of the type protected by the antitrust laws, and that the injury derived, at least in part, from anti-competitive acts. Indeed, the pursuit of litigation that forestalls entry into the generic market, as alleged here, constitutes "anti-competitive behavior" of the type the antitrust laws seek to prevent. AstraZeneca AB v. Glenmark Generics Ltd., No. 14-665, 2014 U.S. Dist. LEXIS 151215, 2014 WL 5366050, at *1 (D. Del. Oct. 9, 2014); see also Angelico v. Lehigh Valley Hosp., Inc., 184 F.3d 268, 275 n.1 (3d Cir. 1999) (noting that, "protecting a competitor's ability to compete" clearly rests within "the interest of competition"). Moreover, Torrent has specifically alleged that Otsuka's pursuit of "objectively baseless and sham judicial proceedings" has adversely affected competition in the overall aripiprazole market by encumbering the path of generic entry and effectively extending Otsuka's long-held monopoly.[6] See Rochester Drug Co-op., Inc. v. Braintree Labs., *712 F. Supp. 2d 308, 316 (D. Del. 2010)* (finding

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[5] In that respect, the antitrust injury requirement helps ensure that the claimed harm "'corresponds to the rationale for finding a violation of the antitrust laws in the first place,'" e.g., anticompetitive behavior, and prevents a party from basing a suit upon "'losses that stem [only] from competition.'" W. Penn Allegheny Health Sys., Inc., 627 F.3d at 101 (citations omitted); see also Eichorn v. AT&T Corp., 248 F.3d 131, 140 (3d Cir. 2001) (noting that an antitrust injury does not lie unless the allegedly anticompetitive conduct "has a wider impact on the [overall] competitive market").

similar allegations sufficient). Therefore, the Court rejects Otsuka's position that Torrent has failed to plead a cognizable antitrust injury.

Nor does the Court find that these alleged injuries constitute conjectural possibilities, rather than the real and immediate injury required for purposes of antitrust standing. See *Broadcom Corp., 501 F.3d at 321*. Indeed, even if Torrent "voluntarily" declined to mount any legal challenge to Otsuka's aripiprazole monopoly until after the expiration of the '528 Patent in **[**17]** April 2015, the exclusivity associated with the '528 Patent has since passed, and **[*655]** therefore interposes no present barrier to Torrent's entry into the aripiprazole market as Otsuka's active competitor. Nor does the status of Torrent's FDA approval render the alleged injury any less imminent, because the FDA's own records reflect that Torrent obtained final FDA approval for its ANDA product on April 28, 2015.[7] See Press Release, FDA, FDA approves first generic Abilify to treat mental illnesses (Apr. 28, 2015), available at, *http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm444* 862.htm. As a result, the pendency of this litigation constitutes the only encumbrance to Torrent's free ability to enter the aripiprazole market, rendering the alleged injuries both real and immediate.[8]

Moreover, even if Torrent's Counterclaim relies, at least in part, upon some ultimate facts, such as that Otsuka's actions evince a "specific intent to restrain competition," (id. at ¶ 45), Torrent need not "'plead detailed evidentiary matter in order to survive a motion to dismiss.'"[9] *In re Niaspan Antitrust Litig., 42 F. Supp. 3d at 756* (citations omitted). Rather, the inquiry for purposes of the pending motion to dismiss turns upon the plausibility of the allegations, not upon whether Torrent has "alleged sufficient facts to 'compel' the inference" that Otsuka committed

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[6] The Court notes, as a matter of public record, that Otsuka **[**15]** has initiated litigation against every ANDA filer. See Otsuka Pharm. Co., Ltd. v. Alembic Global Holding SA, Civil Action No. 14-2982 (JBS/KMW); Otsuka Pharm. Co., Ltd. v. Zydus Pham. USA Inc., Civil Action No. 14-3168 (JBS/KMW); Otsuka Pharm. Co., Ltd. v. Aurobindo Pharma Ltd., Civil Action No. 14-3306 (JBS/KMW); Otsuka Pharm. Co., Ltd. v. Intas Pharm. Ltd., Civil Action No. 14-3996 (JBS/KMW); Otsuka Pharm. Co., Ltd. v. Zydus Pham. USA Inc., Civil Action No. 14-3168 (JBS/KMW); Otsuka Pharm. Co., Ltd. v. Sun Pharm. Indus., Ltd., Civil Action No. 14-4307 (JBS/KMW); Otsuka Pharm. Co., Ltd. v. Mylan Inc., Civil Action No. 14-4508 (JBS/KMW); Otsuka Pharm. Co., Ltd. v. Torrent Pharm., Inc., Civil Action No. 14-4671 (JBS/KMW); Otsuka Pharm. Co., Ltd. v. Zhejiang Huahai Pharm. Co., Civil Action No. 14-5537 (JBS/KMW); Otsuka Pharm. Co., Ltd. v. Ajanta Pharm. Ltd., Civil Action No. 14-5876 (JBS/KMW); Otsuka Pharm. Co., Ltd. v. Teva Pharm. USA, Inc., Civil Action No. 14-5878 (JBS/KMW); Otsuka Pharm. Co., Ltd. v. Intas Pharm. Ltd., Civil Action No. 14-6158 (JBS/KMW); Otsuka Pharm. Co., Ltd. v. Sun Pharm. Indus., Ltd., Civil Action No. 14-6397 (JBS/KMW); Otsuka Pharm. Co., Ltd. v. Teva Pharm. **[**16]** USA, Inc., Civil Action No. 14-6398 (JBS/KMW); Otsuka Pharm. Co., Ltd. v. Aurobindo Pharma Ltd., Civil Action No. 14-6890 (JBS/KMW); Otsuka Pharm. Co., Ltd. v. Lupin Ltd., Civil Action No. 14-7105 (JBS/KMW); Otsuka Pharm. Co., Ltd. v. Actavis Elizabeth LLC, Civil Action No. 14-7106 (JBS/KMW); Otsuka Pharm. Co., Ltd. v. Zydus Pham. USA Inc., Civil Action No. 14-7252 (JBS/KMW); Otsuka Pharm. Co., Ltd. v. Alembic Pharm., Ltd., Civil Action No. 14-7405 (JBS/KMW); Otsuka Pharm. Co., Ltd. v. Apotex Corp., Civil Action No. 14-8074 (JBS/KMW); Otsuka Pharm. Co., Ltd. v. Hetero Drugs, Ltd., Civil Action No. 15-161 (JBS/KMW); Otsuka Pharm. Co., Ltd. v. Amneal Pharm. Co, Ltd., Civil Action No. 15-1585 (JBS/KMW); Otsuka Pharm. Co., Ltd. v. Sandoz Inc., Civil Action No. 15-1716 (JBS/KMW); Otsuka Pharm. Co., Ltd. v. Indoco Remedies Ltd., Civil Action No. 15-1967 (JBS/KMW).

[7] In deciding the pending motion to dismiss, the Court "may take judicial notice of public records [or documents] of the FDA" relating to the aripiprazole products at issue in this litigation. *Kaiser v. Depuy Spine, Inc., 944 F. Supp. 2d 1187, 1192 n.2 (M.D. Fla. 2013)* (citation omitted); see also ***Rollins v. St. Jude Med., 583 F. Supp. 2d 790, 805 (W.D. La. 2008)*** (citation omitted) (same).

[8] For that reason, the Court rejects Otsuka's reliance upon Ethypharm S.A. France. Indeed, in Ethypharm S.A. France, the Court of Appeals for the Third Circuit found the plaintiff could not "be considered a competitor for purposes of antitrust **[**18]** injury," because "legal barriers particular to the pharmaceutical market" precluded the plaintiff's from marketing a competing product. *707 F.3d at 236*. Here, however, the legal barriers that once plagued Torrent's ability to enter the aripiprazole market, namely, expiration of the '528 Patent and final FDA approval, no longer present any impediment. Therefore, in the absence of this litigation, Torrent could immediately become, without reticence, Otsuka's lawful competitor.

[9] Nor are direct factual allegations of Torrent's chances of litigation success required; "inferential allegations" can suffice. See *In re Niaspan Antitrust Litig., 42 F. Supp. 3d at 757 n.18* (citations omitted)

the alleged violations. Id. Here, Torrent's allegations, accepted as true, support an inference that Torrent has suffered an ***antitrust law*** injury flowing from Otsuka's allegedly anticompetitive conduct. (See generally Countercl.) **[**19]** These allegations therefore suffice at the pleading stage to state a plausible claim for relief, particularly given the fact that the existence of antitrust injury "involves complex questions of fact," often ill-suited for resolution upon a "motion[] to dismiss." *Schuylkill Energy Res., Inc. v. Pa. Power & Light Co., 113 F.3d 405, 417 (3d Cir. 1997)* (citing *Brader v. Allegheny Gen. Hosp., 64 F.3d 869, 876 (3d Cir. 1995)* (collecting cases)); see also *In re Niaspan Antitrust Litig., 42 F. Supp. 3d at 757 n.19* (collecting cases that have declined to resolve the existence of antitrust injury through motions to dismiss).

For all of these reasons, the Court rejects Otsuka's argument that Torrent's antitrust Counterclaim should be dismissed for lack of antitrust standing, and turns to Otsuka's position that *Noerr-Pennington* immunity bars the Counterclaim.

B. Torrent Alleges Sufficient Facts to Plausibly Overcome Otsuka's *Noerr-Pennington* Immunity

Under the *Noerr-Pennington* doctrine, a patent owner's initiation of patent **[*656]** infringement litigation receives presumptive immunity from attack under the antitrust laws. See generally *Eastern R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*; *United Mine Workers of Am. v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*; see also *Rochester Drug Co-op., Inc., 712 F. Supp. 2d at 316* (considering *Noerr-Pennington* immunity in the patent infringement context). Parties who file "sham litigation" **[**20]** are, however, excepted from the benefit of immunity under *Noerr-Pennington. Prof'l Real Estate Investors v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60-61, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)*. An allegation of sham litigation consists of two elements: first, "the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." Id. (internal quotations and citations omitted). Second, "the baseless lawsuit [must] conceal[] an attempt to interfere directly with the business relationships of a competitor," rather than reflect a legitimate effort to obtain judicial review. Id.

In seeking the dismissal of Torrent's antitrust Counterclaim, Otsuka argues that Torrent pleads little more than "bare labels and legal conclusions," by claiming that Otsuka initiated "objectively baseless and sham judicial proceedings," "baselessly and improperly wielded the '615 and '796 Patents," and that the pending litigation qualifies as "both objective and subjectively baseless." (Otsuka's Br at 8-10 (citation omitted).) Those allegations, standing alone, do indeed constitute conclusory allegations of the type routinely found insufficient to overcome *Noerr-Pennington* immunity under the federal pleading standards. Nevertheless, Torrent's Counterclaim includes more detailed factual matter.

Indeed, **[**21]** in addition to the allegations cited by Otsuka, Torrent specifically alleges that it provided a "detailed statement of the factual and legal bases" for its position on the non-infringement of Torrent's ANDA, and that it subsequently provided the confirming "portions" of Torrent's ANDA. (Countercl. at ¶¶ 15-16.) Torrent therefore alleges that the infringement claims asserted by Otsuka in this litigation lack an objectively reasonable basis, because "[n]o reasonable litigant could expect to secure favorable relief against Torrent upon the merits under the '615 and '796 patents." (Id. at ¶¶ 45, 47, 49-50.) Moreover, because Otsuka "initiated litigation" despite Torrent's allegedly dispositive evidence of noninfringement, Torrent submits that Otsuka filed this action "in bad faith, for an improper purpose, and as a means of directly interfering with," forestalling, frustrating, and preventing competition by Torrent, and not in order to "obtain an adjudication of a valid claim." (Id. at ¶¶ 46, 49.)

These allegations, accepted as true for purposes of this *Rule 12(b)(6)* motion, plausibly allege facts sufficient to overcome Otsuka's presumptive antitrust immunity under the *Noerr-Pennington* doctrine.[10] See, e.g., *Abraxis*

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[10] Torrent's submission of Paragraph IV certification under *21 U.S.C. § 355(j)(2)(A)(vii)* compels no different result. Indeed, in its Paragraph IV certification, Torrent specifically certified that the Torrent aripiprazole tablets would "not infringe any valid claim of the '615 and '796 patents." (Countercl. at ¶ 15.) In that respect, even though Torrent's certification provided the technical act of constructive infringement necessary to initiate an action under *35 U.S.C. § 271(e)(2)(A)*, nothing in a paragraph IV certification

*Bioscience, Inc. [*657] v. Navinta LLC, No. 07-1251, 2008 U.S. Dist. LEXIS 63598, 2008 WL 2967034, at *7 (D.N.J. July 31, 2008)* (finding the **[**22]** defendant's limited allegations sufficient to overcome *Noerr-Pennington* immunity in connection with a motion to dismiss); *Knoll Pharm. Co. Inc. v. Teva Pharm. USA, Inc., No. 01-1646, 2001 U.S. Dist. LEXIS 12999, 2001 WL 1001117, at * 4 (N.D. Ill. Aug. 24, 2001)* (finding the objectively baseless prong met where the defendant in an infringement action alleged that, before the plaintiff filed suit, the defendant sent a detailed letter providing the bases for the defendant's position on invalidity); *In re Cardizem CD Antitrust Litig., 105 F. Supp. 2d 618, 643-44 (E.D. Mich. 2000)* (denying motion to dismiss antitrust claim on *Noerr-Pennington* grounds where the claimant alleged that the plaintiff prosecuted the infringement action solely as a basis for litigation to delay and exclude the claimant from the market).

Moreover, even assuming the allegations proved insufficient, the inquiry into whether Otsuka maintains in this action "objectively and subjectively baseless" infringement claims turns upon issues of reasonableness and intent—issues which are premature to consider upon the present record. Indeed, resolution of these inherently factual issues requires consideration of whether Otsuka undertook a reasonable investigation in advance of pursuing **[**24]** its infringement claims, whether Otsuka undertook this action for an improper and anticompetitive purpose, and whether a reasonable litigant could have realistically expected success on the merits at the time of filing. All of these determinations require inquiry into issues of fact, which cannot be resolved in the context of a motion to dismiss, and prior to discovery. See *S3 Graphics Co., Ltd. v. ATI Techs. ULC, No. 11-1298, 2014 U.S. Dist. LEXIS 16928, 2014 WL 573358, at *3* (finding resolution of *Noerr-Pennington* immunity "not proper before discovery"); *Shionogi Pharma, Inc. v. Mylan, Inc., No. 10-1077, 2011 U.S. Dist. LEXIS 98547, 2011 WL 3860680, at *6 (D. Del. Aug. 31, 2011)* (declining to resolve the application of *Noerr-Pennington* immunity upon a motion to dismiss); *Hoffman-La Roche Inc. v Genpharm Inc., 50 F. Supp. 2d 367, 380 (D.N.J. 1999)* ("Reasonableness is a question of fact, and the Court cannot make such factual determinations on a factual controversy roiled by a motion to dismiss.")

For all of these reasons, the Court rejects Otsuka's argument that Torrent's Counterclaim should be dismissed on *Noerr-Pennington* immunity. If, however, Torrent fails to meet its burden of proof as to "sham" litigation" upon litigation of the patent infringement claims[11] and upon discovery as to Torrent's Counterclaims, Otsuka may renew its claim of *Noerr-Pennington* immunity. Moreover, even if Torrent ultimately overcomes *Noerr-Pennington* immunity, in order to **[*658]** succeed on its Counterclaim, **[**25]** Torrent must still establish a substantive antitrust violation. See *Organon Inc. v. Mylan Pharms., Inc., 293 F. Supp. 2d 453, 461 (D.N.J. 2003)* (citation omitted).

The Court next addresses whether Torrent states a plausible Counterclaim for patent misuse

C. Torrent Fails to Allege a Plausible Claim of Patent Misuse

Several decades-worth of Supreme Court jurisprudence makes clear that the defense of patent misuse must be based upon allegations that the patentee "extend [ed] the term of his [patent] monopoly beyond that granted by law." *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 136, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*; see also *Blonder-Tongue Lab. v. University of Illinois Found., 402 U.S. 313, 343-44, 91 S. Ct. 1434, 28 L. Ed. 2d*

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necessarily compels the institution of an infringement suit. Indeed, it is commonplace for NDA owners not to file suit after analyzing the contents **[**23]** of an ANDA filer's notice and certification, and the case law cited by Otsuka provides little support for its position that the filing of a paragraph IV certification renders this litigation per se reasonable. Critically, in Celgene, the Court considered the factual and legal basis of the litigation in the context of a request for sanctions under *Federal Rule of Civil Procedure 11*, not in connection with a *Noerr-Pennington* analysis. See *2008 U.S. Dist. LEXIS 55700, 2008 WL 2856469, at *3*. In *AstraZeneca AB v. Mylan Labs., Inc., 2010 U.S. Dist. LEXIS 50049, 2010 WL 2079722, at *4 (S.D.N.Y. May 19, 2010)*, a case that relied upon Celgene, then addressed the defendant's antitrust counterclaims and *Noerr-Pennington* immunity, following "a 42-day bench trial" on the allegations of the plaintiff's claims and based, at least in part, upon the public records associated with that lengthy bench trial. *2010 U.S. Dist. LEXIS 50049, [WL] at *4*. No such record has been developed in this instance.

[11] The Court will, as stated below, bifurcate and stay Torrent's antitrust Counterclaim, pending resolution of the patent infringement issues.

788 (1971) (generally describing the public's "paramount interest" in restraining patent monopolies to "their legitimate scope"); Transparent-Wrap Mach. Corp. v. Stokes & Smith Co., 329 U.S. 637, 643-44, 67 S. Ct. 610, 91 L. Ed. 563, 1948 Dec. Comm'r Pat. 662 (1947) ("a patentee [is limited] to the monopoly found within the four corners of the grant" and may not use that monopoly power "to acquire a monopoly not embraced in the patent").

In applying the Supreme Court's long line of patent misuse decisions, the Court of Appeals for the Federal Circuit has further stated that a claim of patent misuse requires an allegation that the patent owner "'impermissibly broaden[ed] the physical or temporal scope' of the patent grant with an anticompetitive **[**26]** effect."[12] Princo Corp. v. Int'l Trade Comm'n, 616 F.3d 1318, 1328 (Fed. Cir. 2010) (quoting Windsurfing Int'l, Inc. v. AMF, Inc., 782 F.2d 995, 1001 (Fed. Cir. 1986). District courts throughout this Circuit have, in turn, uniformly enforced the requirement that a plausible claim for patent misuse include an allegation of a patentee's attempt to impermissibly broaden the physical or temporal scope of the disputed patent. See, e.g., Micron Tech., Inc. v. Rambus Inc., 917 F. Supp. 2d 300, 320 n.19 (D. Del. 2013); Altana Pharma AG v. Teva Pharms. USA, Inc., No. 04-2355, 2012 U.S. Dist. LEXIS 79166, 2012 WL 2068611 (D.N.J. June 7, 2012); Cordance Corp. v. Amazon.com, Inc., 727 F. Supp. 2d 310, 333-34 (D. Del. July 23, 2010); In re Gabapentin Patent Litig., 648 F. Supp. 2d 641, 652 (D.N.J. 2009).

Here, the Court need not belabor Torrent's Sixth Counterclaim for patent misuse, which alleges, in its entirety, that:

> 59. Torrent restates and realleges each of the foregoing paragraphs as if fully set forth herein.
>
> 60. [Otsuka] does not have any good faith factual basis to allege that the products described in the Torrent **[**27]** ANDA infringe any claim of the '615 and '796 patents, and nevertheless filed and are continuing to maintain this lawsuit.
>
> 61. [Otsuka] filed this action without regard for the merits of its infringement claims and instead did so for the purpose **[*659]** of delay Torrent's entry in into the marketplace for aripiprazole tablets by, inter alia, burdening Torrent with litigation costs and making baseless accusations of infringement.
> 62. The claims of the '615 and '796 patents are unenforceable as a result of Plaintiff's patent misuse, including [Otsuka's] bad faith assertion of the '615 and '796 patents against Torrent.

(Countercl. at ¶¶ 59-62.) As is evident from even a cursory review of Torrent's pleading, Torrent's Counterclaim hinges upon Otsuka's allegedly bad faith conduct in pursuing its "baseless" patent infringement action against Torrent. Torrent, however, has failed to plead any allegation that Otsuka has impermissibly broadened the physical or temporal scope of the '615 and '796 patents with an anticompetitive effect. Indeed, Torrent's responsive pleading, in its entirety, contains no allegation concerning any improper expansion of the physical or temporal breadth of the disputed patents. Torrent's Counterclaim therefore lacks an essential allegation, **[**28]** and fails to state a plausible claim for relief as a matter of law. Torrent's patent misuse Counterclaim will, accordingly, be dismissed. Nevertheless, because it remains conceivable that Torrent could plausibly allege this additional requirement, this dismissal will be without prejudice and the Court will grant Torrent leave to file a motion to amend to attempt to assert a counterclaim for patent misuse within fourteen (14) days. Any proposed amended counterclaim must be consistent with this Opinion's directives and findings.

The Court last addresses Otsuka's request to bifurcate and stay.

D. Torrent's Antitrust Counterclaim Will be Bifurcated and Stayed

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[12] Torrent attempts to sidestep this elemental requirement, but provides no support for its position that a claim of patent misuse can survive without an allegation of an impermissibly broadened patent. Nor does Torrent's sole citation to Altana Pharma AG v. Teva Pharms. USA, Inc., No. 04-2355, 2012 U.S. Dist. LEXIS 79166, 2012 WL 2068611 (D.N.J. June 7, 2012), compel any contrary result. Indeed, in Altana, the defendants specifically alleged that the plaintiff engaged in patent misuse by amending certain license agreements to treat the disputed patent as if it remained "in force for an additional six months past the expiration date." 2012 U.S. Dist. LEXIS 79166, [WL] at *2. Torrent has proffered no similar allegation in this instance.

To the extent Torrent's Counterclaims survive Otsuka's motion to dismiss, as the antitrust Counterclaim has, the parties uniformly assert that the Court should bifurcate and stay the Counterclaim pending resolution of the patent infringement issues. (See Otsuka's Br. at 13; Torrent's Opp'n at 1 (noting Torrent's "accordance with Otsuka's request" to bifurcate and stay); Otsuka's Reply at 6.)

Federal Rule of Civil Procedure 42(b) provides, in relevant part, that the Court may "order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party **[**29]** claims," in order to encourage "convenience, to avoid prejudice, or to expedite and economize." *Fed. R. Civ. P. 42(b)*. In determining whether to bifurcate under *Rule 42(b)*, courts possess broad discretion. See *Barr Lab., Inc. v. Abbott Lab., 978 F.2d 98, 115 (3d Cir. 1992)* (citing *Idzojtic v. Pa. R.R. Co., 456 F.2d 1228, 1230 (3d Cir. 1972))*. Nevertheless, in order to properly exercise that discretion, courts must carefully balance "considerations of convenience, avoidance of prejudice, and efficiency," and must preserve the litigant's constitutional right to a jury. See *Celgene Corp. v. Barr Labs., Inc., No. 07-286, 2008 U.S. Dist. LEXIS 47639, 2008 WL 2447354, *1 (D.N.J. June 13, 2008)*; *Fed. R. Civ. P. 42(b)* ("When ordering a separate trial, the court must preserve any federal right to a jury trial.").

Considering the various factors presented in this action, and the parties' agreement, the Court finds the bifurcation and stay of Torrent's antitrust Counterclaim warranted. Critically, resolution of the patent infringement issues may render Torrent's antitrust Counterclaim moot, thereby serving the interests of judicial economy. Bifurcation of antitrust Counterclaim and patent infringement claims further enhances "the parties' right to jury trial by making the issues the jury must consider less complex." *Warner Lambert Co. v. Purepac Pharm. Co., Nos. 98-2749,* ***[*660]*** *99-5948, 00-2053, 2000 U.S. Dist. LEXIS 22559, 2000 WL 34213890, *11 (D.N.J. Dec. 22, 2000)* (internal quotation marks omitted). In that respect, the Court will follow the practice of separating for trial patent issues and antitrust issues. *In re Innotron Diagnostics, 800 F.2d 1077, 1084 (Fed. Cir. 1986)* (affirming the severance **[**30]** of patent and antitrust claims as in the interests of judicial economy); see also *Eurand Inc. v. Mylan Pharms., Inc., No. 08-889, 2009 U.S. Dist. LEXIS 92542, 2009 WL 3172197, at *2 (D. Del. Oct. 1, 2009)* (granting motion to sever and stay antitrust and patent misuse counterclaims and affirmative defenses from the patent infringement action); See *Abraxis Bioscience, Inc., 2008 U.S. Dist. LEXIS 63598, 2008 WL 2967034, at *8* (denying a motion to dismiss, but granting an alternative request to bifurcate and stay antitrust counterclaims).

For all of these reasons, the Court will bifurcate Torrent's antitrust Counterclaim, and will stay discovery with respect to this Counterclaim pending resolution of the patent infringement issues.

V. CONCLUSION

For the reasons stated above, Otsuka's motion will be denied with respect to Torrent's antitrust Counterclaim, and granted with respect to Torrent's patent misuse Counterclaim, with leave to amend. Torrent's antitrust Counterclaim will, however, be bifurcated and stayed pending resolution of the patent infringement issues. An accompanying Order will be entered.

June 22, 2015

Date

/s/ Jerome B. SimandleJerome B. Simandle

JEROME B. SIMANDLEJEROME B. SIMANDLE

Chief U.S. District Judge

ORDER

This matter comes before the Court by way of Plaintiff Otsuka Pharmaceutical Co., Ltd.'s (hereinafter, "Otsuka") motion to dismiss Defendants Torrent Pharmaceuticals **[**31]** Limited, Inc.'s and Torrent Pharma Inc.'s (collectively, "Torrent") Counterclaims for unlawful monopolization in violation of the Sherman Act, *15 U.S.C. § 2*, and the Clayton Act, *15 U.S.C. §§ 15* and *26*, and for patent misuse [see Docket Item 43]; and the Court having considered the parties' submissions; and for the reasons explained in the Opinion of today's date; and for good cause shown;

IT IS this 22nd day of June, 2015, hereby

ORDERED that Otsuka's motion to dismiss [Docket Item 43] shall be, and hereby is, **DENIED** to the extent it requests the dismissal of Torrent's Fifth Counterclaim for antitrust violations, **GRANTED** to the extent it seeks the dismissal of Torrent's Sixth Counterclaim for patent misuse, and **GRANTED** to the extent it requests that the Fifth Counterclaim for antitrust violations be bifurcated and stayed; and it is further

ORDERED that Torrent's Fifth Counterclaim for antitrust violations shall be, and hereby is, **BIFURCATED** and **STAYED**, pending further Order of the Court; and it is further

ORDERED that Torrent's Sixth Counterclaim for patent misuse shall be, and hereby is, **DISMISSED WITHOUT PREJUDICE**, with leave to file a motion to amend to attempt to assert a counterclaim for patent misuse within **[**32]** **fourteen (14) days** of entry of this Order, consistent with the accompanying Opinion.

/s/ Jerome B. SimandleJerome B. Simandle

JEROME B. SIMANDLEJEROME B. SIMANDLE

Chief U.S. District Judge

FTC v. Sysco Corp.

United States District Court for the District of Columbia

June 23, 2015, Decided

Civil No. 1:15-cv-00256 (APM)

Reporter
113 F. Supp. 3d 1 *; 2015 U.S. Dist. LEXIS 83482 **; 2015-1 Trade Cas. (CCH) P79,221

Federal Trade Commission, et al., Plaintiffs, v. Sysco Corporation, et al., Defendants.

Prior History: FTC v. Sysco Corp., 83 F. Supp. 3d 1, 2015 U.S. Dist. LEXIS 30302 (D.D.C., Mar. 12, 2015)

Core Terms

customers, broadline, merger, distributors, REDACTED, percent, distribution center, foodservice, competitor, sales, food, products, regional, market share, Defendants', calculations, local market, markets, restaurant, prices, geographic, largest, switch, merged, compete, estimate, purchases, combined, bidding, effects

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > Claims

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

Mergers & Acquisitions Law > Antitrust > Remedies

HN1[] **Clayton Act, Claims**

Section 7 of the Clayton Act prohibits mergers or acquisitions the effect of which may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce or in any activity affecting commerce in any section of the country. 15 U.S.C.S. § 18. When the Federal Trade Commission (FTC) has reason to believe that a corporation is violating, or is about to violate, § 7 of the Clayton Act, it may seek a preliminary injunction under § 13(b) of the FTC Act to prevent a merger pending the FTC's administrative adjudication of the merger's legality. Section 13(b) provides for the grant of a preliminary injunction where such action would be in the public interest—as determined by a weighing of the equities and a consideration of the FTC's likelihood of success on the merits.

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Mergers & Acquisitions Law > Antitrust > Remedies

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN2[] Remedies, Injunctions

The Section 13(b) of the Federal Trade Commission Act standard for preliminary injunctions differs from the familiar equity standard applied in other contexts. Congress intended this standard to depart from what it regarded as the then-traditional equity standard, which it characterized as requiring the plaintiff to show: (1) irreparable damage, (2) probability of success on the merits and (3) a balance of equities favoring the plaintiff. Congress determined that the traditional standard was not appropriate for the implementation of a federal statute by an independent regulatory agency where the standards of the public interest measure the propriety and the need for injunctive relief.

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Mergers & Acquisitions Law > Antitrust > Remedies

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN3[] Remedies, Injunctions

Under Section 13(b) of the Federal Trade Commission Act's "public interest" standard, the Federal Trade Commission is not required to establish that the proposed merger would in fact violate § 7 of the Clayton Act. Rather, to demonstrate the likelihood of success on the merits, the government need only show that there is a reasonable probability that the challenged transaction will substantially impair competition.

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Antitrust > Remedies

HN4[] Remedies, Injunctions

A trial court evaluating a demand for injunctive relief must measure the probability that, after an administrative hearing on the merits, the Federal Trade Commission (FTC) will succeed in proving that the effect of the proposed merger may be substantially to lessen competition, or to tend to create a monopoly in violation of § 7 of the Clayton Act. The FTC satisfies this standard if it has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals. This standard reflects Congress' use of the words "may be substantially to lessen competition" in § 7, as Congress' concern was with probabilities, not certainties of decreased competition.

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Mergers & Acquisitions Law > Antitrust > Remedies

HN5[] **Remedies, Injunctions**

Though more relaxed than the traditional equity injunction standard, § 13(b) of the Federal Trade Commission Act's public interest standard nevertheless demands rigorous proof to block a proposed merger or acquisition. The issuance of a preliminary injunction prior to a full trial on the merits is an extraordinary and drastic remedy. That is because the issuance of a preliminary injunction blocking an acquisition or merger may prevent the transaction from ever being consummated. Given the stakes, the FTC's burden is not insubstantial. A showing of a fair or tenable chance of success on the merits will not suffice for injunctive relief.

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

Evidence > Burdens of Proof > Burden Shifting

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Evidence > Inferences & Presumptions > Presumptions

Mergers & Acquisitions Law > Antitrust > Remedies

HN6[] **Remedies, Injunctions**

Under the Baker Hughes framework, the Federal Trade Commission (FTC) bears the initial burden of showing that a merger would lead to undue concentration in the market for a particular product in a particular geographic area. Such a showing establishes a presumption that the merger will substantially lessen competition. The burden then shifts to the defendant to rebut the presumption by offering proof that the market-share statistics give an inaccurate account of the merger's probable effects on competition in the relevant market. The more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully. A defendant can make the required showing by affirmatively showing why a given transaction is unlikely to substantially lessen competition, or by discrediting the data underlying the initial presumption in the government's favor. If the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times. A failure of proof in any respect will mean the transaction should not be enjoined. The court must also weigh the equities, but if the FTC is unable to demonstrate a likelihood of success, the equities alone cannot justify an injunction.

Antitrust & Trade Law > Clayton Act > Claims

Mergers & Acquisitions Law > Antitrust > Market Definition

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

HN7[] **Clayton Act, Claims**

Merger analysis starts with defining the relevant market. The relevant market has two component parts. First, the "relevant product market" identifies the product and services with which the defendants' products compete. Second, the "relevant geographic market" identifies the geographic area in which the defendant competes in marketing its products or service. Defining the relevant market is critical in an antitrust case because the legality of the proposed merger in question almost always depends upon the market power of the parties involved.

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

Mergers & Acquisitions Law > Antitrust > Market Definition

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

The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. Stated another way, a product market includes all goods that are reasonable substitutes, even though the products themselves are not entirely the same.

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

Mergers & Acquisitions Law > Antitrust > Market Definition

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

In the context of defining a product market, whether goods are "reasonable substitutes" depends on two factors: functional interchangeability and cross-elasticity of demand. "Functional interchangeability" refers to whether buyers view similar products as substitutes. Whether there are other products available to consumers which are similar in character or use to the products in question may be termed functional interchangeability. If consumers can substitute the use of one for the other, then the products in question will be deemed "functionally interchangeable." Courts will generally include functionally interchangeable products in the same product market unless factors other than use indicate that they are not actually part of the same market.

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

Mergers & Acquisitions Law > Antitrust > Market Definition

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

In the context of defining a product market, as for cross-elasticity of demand, there the question turns in part on price. If an increase in the price for product A causes a substantial number of customers to switch to product B, the products compete in the same market. Price is not, however, the only variable in determining the cross-elasticity of demand between products. Cross-elasticity of demand also depends on the ease and speed with which customers can substitute the product and the desirability of doing so. Thus, substitution based on a reduction in price will not correlate to a high cross-elasticity of demand unless the switch can be accomplished without the consumer incurring undue expense or inconvenience.

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

Mergers & Acquisitions Law > Antitrust > Market Definition

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

Three established principles maybe critical to defining the relevant product market in a case. The first is that the "product" that comprises the market need not be a discrete good for sale. There is no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities.

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

Mergers & Acquisitions Law > Antitrust > Market Definition

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

Three established principles maybe critical to defining the relevant product market in a case. In the second, the mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes. That is because market definition hinges on whether consumers view the products as "reasonable substitutes." So, for example, fruit can be bought from both a grocery store and a fruit stand, but no one would reasonably assert that buying all of one's groceries from a fruit stand is a reasonable substitute for buying from a grocery store.

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

Mergers & Acquisitions Law > Antitrust > Market Definition

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

Three established principles maybe critical to defining the relevant product market in a case. In the third, market definition is guided by the "narrowest market" principle. That is, a relevant market cannot meaningfully encompass an infinite range of products. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn. The analysis begins by examining the most narrowly-defined product or group of products sold by the merging firms to ascertain if the evidence and data support the conclusion that this product or group of products constitutes a relevant market. If not, the analysis shifts to the next broadest product grouping to test whether that is a relevant market. This process continues until a relevant market is identified.

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

Mergers & Acquisitions Law > Antitrust > Market Definition

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN14[ ] **Relevant Market, Product Market Definition**

Courts look to two main types of evidence in defining the relevant product market: the "practical indicia" set forth by the U.S. Supreme Court and testimony from experts in the field of economics. The boundaries of a product market may be determined by examining such practical indicia as industry or public recognition, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. These indicia seem to be evidentiary proxies for direct proof of substitutability. Courts have relied on the Brown Shoe factors in a number of cases to define the relevant product market.

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

Mergers & Acquisitions Law > Antitrust > Market Definition

HN15[] **Relevant Market, Product Market Definition**

The mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes.

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

Mergers & Acquisitions Law > Antitrust > Market Definition

HN16[] **Relevant Market, Product Market Definition**

One of the primary methods used by economists to determine a product market is called the "hypothetical monopolist test." This test asks whether a hypothetical monopolist who has control over a set of substitutable products could profitably raise prices on those products. If so, the products may comprise the relevant product market. The theory behind the test is straightforward. If enough consumers are able to substitute away from the hypothetical monopolist's product to another product and thereby make a price increase unprofitable, then the relevant market cannot include only the monopolist's product and must also include the substitute goods. On the other hand, if the hypothetical monopolist could profitably raise price by a small amount, even with the loss of some customers, then economists consider the monopolist's product to constitute the relevant market.

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

Mergers & Acquisitions Law > Antitrust > Market Definition

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

The hypothetical monopolist test requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products likely would impose at least a small but significant and non-transitory increase in price (SSNIP) on at least one product in the market, including at least one product sold by one of the merging firms. The SSNIP is intended to represent a small but significant increase in the prices charged by firms in the candidate market and is typically assumed to be five percent of the price paid by customers for the products or services to which the merging firms contribute value.

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

Mergers & Acquisitions Law > Antitrust > Market Definition

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

The purpose of an "aggregate diversion analysis" is to determine the amount of sales that a hypothetical monopolist of broadline distribution could lose before a price increase becomes unprofitable.

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

Mergers & Acquisitions Law > Antitrust > Market Definition

HN19[] **Relevant Market, Product Market Definition**

Aggregate diversion analysis has three basic steps. The first is to determine the threshold aggregate diversion ratio, which is the percentage of customers that would need to stay within the broadline market to make a price increase profitable. This is strictly a mathematical step, with the aggregate diversion ratio a function of the subject product's gross margin. The gross margin is defined as the price of selling one additional product minus the cost of selling the additional product. The second step is to determine the actual aggregate diversion—that is, the actual percentage of customers of a single broadliner that would switch to another broadliner after a price increase. Since these lost sales are recaptured within the proposed market, they are not lost to the hypothetical monopolist. The final step is to compare the two: if the actual aggregate diversion is greater than the threshold ratio, then the hypothetical monopolist could profitably raise prices and the candidate market is the relevant product market. In other words, if the percentage of customers of a single broadliner who would switch to another broadliner in response to a price increase is greater than the percentage of customers needed to stay within the market to make a price increase profitable, then the relevant product market is properly defined as broadline distribution.

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

Mergers & Acquisitions Law > Antitrust > Market Definition

HN20[] **Relevant Market, Product Market Definition**

Determination of the relevant market in the end is a matter of business reality—of how the market is perceived by those who strive for profit in it.

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

Evidence > ... > Testimony > Expert Witnesses > General Overview

Mergers & Acquisitions Law > Antitrust > Remedies

HN21[] **Remedies, Injunctions**

Although courts certainly must evaluate the evidence in § 13(b) of the Federal Trade Commission Act proceedings and may safely reject expert testimony they find unsupported, they trench on the Federal Trade Commission's role when they choose between plausible, well-supported expert studies.

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

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

Mergers & Acquisitions Law > Antitrust > Market Definition

Mergers & Acquisitions Law > Merger Guidelines

HN22[] **Relevant Market, Product Market Definition**

The U.S. Dep't of Justice & FTC, Horizontal Merger Guidelines (Merger Guidelines) are not binding, but courts have looked to them for guidance in merger cases. Section 4.1.4 of the Merger Guidelines provides that if a hypothetical monopolist could profitably target a subset of customers for price increases, the agencies may identify relevant markets defined around those targeted customers, to whom a hypothetical monopolist would profitably and separately impose at least a small but significant and non-transitory increase in price. Merger Guidelines § 4.1.4. Markets to serve targeted customers are also known as price discrimination markets. Successful price discrimination means that the disfavored geographic or product class is insulated from the favored class and, if the discrimination is of sufficient magnitude, should be counted as a separate relevant market. The concern underlying price discrimination markets is that certain types of captured or dedicated customers could be targeted for monopolist pricing even if a price increase for all customers would not be profitable. Merger Guidelines § 3.

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

Mergers & Acquisitions Law > Antitrust > Market Definition

HN23[] **Relevant Market, Product Market Definition**

When determining the relevant product market, courts often pay close attention to the defendants' ordinary course of business documents.

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

Mergers & Acquisitions Law > Antitrust > Market Definition

HN24[] **Relevant Market, Product Market Definition**

Centralized station security services operated on a national level is a relevant product market.

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

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

Mergers & Acquisitions Law > Antitrust > Market Definition

Mergers & Acquisitions Law > Merger Guidelines

HN25[] **Relevant Market, Product Market Definition**

As the U.S. Dep't of Justice & FTC, Horizontal Merger Guidelines (Merger Guidelines) state, markets for targeted customers may exist when prices are individually negotiated and suppliers have information about customers that would allow a hypothetical monopolist to identify customers that are likely to pay a higher price for the relevant product. Merger Guidelines § 4.1.4.

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

Mergers & Acquisitions Law > Antitrust > Market Definition

HN26[] Relevant Market, Geographic Market Definition

The U.S. Supreme Court has stated that, for § 7 of the Clayton Act, the relevant geographic market is the area in which the goods or services at issue are marketed to a significant degree by the acquired firm. Stated differently, the proper question to be asked is where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate. Like the product market, the geographic market must correspond to the commercial realities of the industry and be economically significant. The U.S. Supreme Court has recognized that an element of fuzziness would seem inherent in any attempt to delineate the relevant geographical market, and therefore such markets need not—indeed cannot—be defined with scientific precision. That said, the relevant geographic market must be sufficiently defined so that the court understands in which part of the country competition is threatened.

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

Evidence > Inferences & Presumptions > Presumptions

Mergers & Acquisitions Law > Antitrust > Remedies

HN27[] Remedies, Injunctions

The government must show that a merger would produce a firm controlling an undue percentage share of the relevant market, and would result in a significant increase in the concentration of firms in that market. Such a showing establishes a presumption that the merger will substantially lessen competition. The Federal Trade Commission (FTC) can establish its prima facie case by showing that the merger will result in an increase in market concentration above certain levels. Market concentration is a function of the number of firms in a market and their respective market shares.

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

Mergers & Acquisitions Law > Antitrust > Remedies

Mergers & Acquisitions Law > Merger Guidelines

HN28[] Remedies, Injunctions

A common tool used to measure changes in market concentration is the Herfindahl-Hirschmann Index (HHI). U.S. Dep't of Justice & FTC, Horizontal Merger Guidelines (Merger Guidelines) § 5.3. Hal figures are calculated by summing the squares of the individual firms' market shares, a calculation that gives proportionately greater weight to the larger market shares. Merger Guidelines § 5.3. Sufficiently large ME figures establish the Federal Trade Commission's prima facie case that a merger is anti-competitive. The Merger Guidelines, which provide a useful illustration of the application of BM, state that a market with an HHI above 2,500 is considered "highly concentrated"; a market with an HHI between 1,500 and 2,500 is considered "moderately concentrated"; and a market with an HHI below 1,500 is considered "unconcentrated," Merger Guidelines § 5.3. Furthermore, a merger that results in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power. Merger Guidelines § 5.3. An increase in HHI by 510 points creates, by a wide margin, a presumption that the merger will lessen competition.

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

Mergers & Acquisitions Law > Antitrust > Market Definition

HN29[ ] **Market Definition, Relevant Market**

A reliable, reasonable, close approximation of relevant market share data is sufficient.

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

Mergers & Acquisitions Law > Antitrust > Remedies

HN30[ ] **Remedies, Injunctions**

Courts have recognized that a merger that eliminates head-to-head competition between close competitors can result in a substantial lessening of competition. In such circumstances, a merger is likely to have unilateral anticompetitive effect if the acquiring firm will have the incentive to raise prices or reduce quality after the acquisition, independent of competitive responses from other firms. Unilateral anticompetitive effects can arise in a host of different settings. On the other hand, even if the merging parties had large market shares, if they were not particularly close competitors, then the market shares might overstate the extent to which the merger would harm competition. The merging parties need not be the top two firms to cause unilateral effects.

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

Mergers & Acquisitions Law > Antitrust > Remedies

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

HN31[ ] **Remedies, Injunctions**

Where the Federal Trade Commission (FTC) has established a presumption that a proposed merger will substantially lessen competition, defendants may rebut that presumption by showing that the traditional economic theories of the competitive effects of market concentration are not an accurate indicator of the merger's probable effect on competition or that the procompetitive effects of the merger are likely to outweigh any potential anticompetitive effects. The more compelling the FTC's prima facie case, the more evidence the defendant must present to rebut the presumption successfully. A defendant can make the required showing by affirmatively showing why a given transaction is unlikely to substantially lessen competition, or by discrediting the data underlying the initial presumption in the government's favor.

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Mergers & Acquisitions Law > Antitrust > Remedies

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > General Overview

HN32[ ] **Clayton Act, Remedies**

Aside from the U.S. Supreme Court's guidance that the relief in an antitrust case must be effective to redress the violations and to restore competition, there is a lack of clear precedent providing an analytical framework for addressing the effectiveness of a divestiture that has been proposed to remedy an otherwise anticompetitive merger.

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Mergers & Acquisitions Law > Antitrust > Remedies

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > General Overview

HN33[] **Clayton Act, Remedies**

The 2004 U.S. Department of Justice's Policy Guide to Merger Remedies provides that restoring competition requires replacing the competitive intensity lost as a result of the merger rather than focusing narrowly on returning to premerger HHI levels. Antitrust Div., U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies 5 (Oct. 2004) (2004 Policy Guide). A more recent U.S. Department of Justice Policy Guide provides: The touchstone principle for the Division in analyzing remedies is that a successful merger remedy must effectively preserve competition in the relevant market. Antitrust Div., U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies 1 (June 2011) (2011 Policy Guide). Both the 2004 Policy Guide and the 2011 Policy Guide add that an effective divestiture should address: Whatever obstacles (for example, lack of a distribution system or necessary know-how) lead to the conclusion that a competitor, absent the divestiture, would not be able to discipline a merger-generated increase in market power. That is, the divestiture assets must be substantial enough to enable the purchaser to maintain the premerger level of competition, and should be sufficiently comprehensive that the purchaser will use them in the relevant market and be unlikely to liquidate or redeploy them. 2004 Policy Guide at 9; 2011 Policy Guide at 8.

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Mergers & Acquisitions Law > Antitrust > Remedies

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > General Overview

HN34[] **Clayton Act, Remedies**

In order to be accepted, curative divestitures must be made to a willing, independent competitor capable of effective production. It can be a "problem" to allow continuing relationships between the seller and buyer of divested assets after divestiture, such as a supply arrangement or technical assistance requirement, which may increase the buyer's vulnerability to the seller's behavior.

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Mergers & Acquisitions Law > Merger Guidelines

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > General Overview

Mergers & Acquisitions Law > Antitrust > Remedies

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

HN35[] Clayton Act, Remedies

If a court finds that there exists ease of entry into the relevant product market, that finding can be sufficient to offset the government's prima facie case of anti-competitiveness. The prospect of entry into the relevant market will alleviate concerns about adverse competitive effects only if such entry will deter or counteract any competitive effects of concern so the merger will not substantially harm customers. U.S. Dep't of Justice & FTC, Horizontal Merger Guidelines § 9. Ease of entry must be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern.

Antitrust & Trade Law > Clayton Act > Defenses

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Merger Guidelines

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

HN36[] Clayton Act, Defenses

Although the U.S. Supreme Court has never recognized the "efficiencies" defense in a § 7 of the Clayton Act case, the D.C. Court of Appeals as well as the U.S. Dep't of Justice & FTC, Horizontal Merger Guidelines recognize that, in some instances, efficiencies resulting from the merger may be considered in rebutting the government's prima facie case. Where the court finds high market concentration levels, defendants must present proof of extraordinary efficiencies to rebut the government's prima facie case. Even if evidence of efficiencies alone is insufficient to rebut the government's prima facie case, such evidence may nevertheless be relevant to the competitive effects analysis of the market required to determine whether the proposed transaction will substantially lessen competition.

Antitrust & Trade Law > Clayton Act > Defenses

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Evidence > Burdens of Proof > Allocation

HN37[] Clayton Act, Defenses

In the context of an "efficiencies" defense in a § 7 of the Clayton Act case, the court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those efficiencies represent more than mere speculation and promises about post-merger behavior. Specifically, the court must determine whether the efficiencies are "merger specific"—meaning they represent a type of cost saving that could not be achieved without the merger—and "verifiable"—meaning the estimate of the predicted saving must be reasonably verifiable by an independent party. Defendants bear the burden of demonstrating that their claimed efficiencies are merger specific, which requires demonstrating that the efficiencies cannot be achieved by either company alone. And, defendants must also demonstrate that their claimed efficiencies would benefit customers.

Antitrust & Trade Law > Clayton Act > Defenses

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

HN38[] Clayton Act, Defenses

The critical question raised by the efficiencies defense in a § 7 of the Clayton Act case is whether the projected savings from the merger are enough to overcome the evidence showing that possibly greater benefits can be achieved by the public through existing, continued competition.

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

Mergers & Acquisitions Law > Antitrust > Remedies

HN39[] **Remedies, Injunctions**

Section 13(b) of the Federal Trade Commission Act's "public interest" standard requires the court to weigh the public and private equities of enjoining the merge.

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

Mergers & Acquisitions Law > Antitrust > Remedies

HN40[] **Remedies, Injunctions**

Section 13(b) of the Federal Trade Commission Act embodies Congressional recognition of the fact that divestiture is an inadequate and unsatisfactory remedy in a merger case.

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Judges: Amit P. Mehta, United States District Judge.

Opinion by: Amit P. Mehta

Opinion

[*13] **MEMORANDUM OPINION**

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[*14] INTRODUCTION

Americans eat outside of their homes with incredible frequency. The U.S. Department of Commerce, for instance, recently reported, for the first time since it began tracking such data, that Americans spent more money per month at restaurants and bars than in grocery stores.[1] Of course, Americans eat out at many other places, too—sports arenas, school and workplace cafeterias, hotels and resorts, hospitals, and nursing homes, just to name a few. The foodservice distribution industry supplies food and related products to all of these locations. Foodservice distribution is big business. In 2013, the market grew to $231 billion. By some estimates, there are over 16,000 companies that compete in the foodservice distribution marketplace.

[*15] The two largest foodservice distribution companies in the country are Defendants Sysco Corporation ("Sysco") and US Foods, Inc. ("USF"). Both are primarily "broadline" foodservice distributors. As the name implies, a broadline foodservice distributor sells and delivers a "broad" array of food and related products to just about anywhere food is consumed outside the home. In 2013, Sysco's broadline sales were over $[TEXT REDACTED BY THE COURT] a billion and USF's were over $[TEXT REDACTED BY THE COURT] a billion.

In December 2013, Sysco and USF announced that they had entered into an agreement to merge the companies. Fourteen months later, in February 2015, Sysco and USF announced that they intended to divest 11 USF distribution facilities to the third largest broadline foodservice distributor, Performance Food Group, Inc., if the merger received regulatory approval.

On February 20, 2015, the Federal Trade Commission ("FTC") and a group of states filed suit in this court seeking an injunction to prevent the proposed merger. Specifically, under *Section 13(b) of the Federal Trade Commission Act*, the FTC asked this court to halt the proposed **[**7]** merger until the FTC completes an administrative hearing—scheduled to begin on July 21, 2015—to determine whether the proposed combination would violate *Section 7 of the Clayton Act.*

The precise question presented by this case is whether the court should enjoin Sysco and USF from merging until the proposed combination is reviewed by an FTC Administrative Law Judge. The real-world impact of the case, however, is more consequential. Sysco and USF have announced that they will not proceed with the merger if the court grants the requested injunction.

The proceedings in this case have been extraordinary. The FTC investigated the proposed merger for more than a year before filing suit. Then, within a two-month period, the parties worked tirelessly to exchange millions of

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[1] Michelle Jamrisko, *Americans' Spending on Dining Out Just Overtook Grocery Sales for the **[**6]** First Time Ever*, Bloomberg Business (Apr. 14, 2015), *http://www.btoomberg.com/news/articles/2015-04-14/americans-spending-on-dining-out* just-overtook-grocery-sales-for-the-first-time-ever .

documents, depose dozens of witnesses, and secure over a hundred declarations. The court heard live testimony for eight days in early May 2015. Counsel for the parties have done all of this work while exhibiting the highest degree of skill and professionalism.

Congress passed the Clayton Act to enable the federal government to halt mergers in their incipiency that likely would result in high market concentrations. Congress was especially **[**8]** concerned with large combinations that would impact everyday consumers across the country. The court has considered all of the evidence in this case and has reached the following conclusion: The proposed merger of the country's first and second largest broadline foodservice distributors is likely to cause the type of industry concentration that Congress sought to curb at the outset before it harmed competition. The court finds that the FTC has met its burden under *Section 13(b) of the Federal Trade Commission Act* of showing that the requested injunction is in the public interest. The court, therefore, grants the FTC's motion for preliminary injunctive relief.

BACKGROUND

I. THE FOODSERVICE DISTRIBUTION INDUSTRY

A. Overview

Defendants operate in a $231 billion foodservice distribution industry, where over 16,000 companies battle daily to sell food and related products to restaurants, resorts, hotels, hospitals, schools, company cafeterias, and so on—everywhere food is served outside the home. Hr'g Tr. 1324; DX-00329 at 17. The types of customers served by the foodservice distribution industry come in all shapes and sizes. They **[*16]** range from independent restaurants, to well-known quick-service and casual **[**9]** dining chains (*e.g.*, Five Guys, Subway, and Applebee's), to hospitality procurement companies and hotel chains (*e.g.*, Avendra, Hilton Supply Management, and Starwood Hotels and Resorts), to government agencies (*e.g.*, the U.S. Department of Veterans Affairs), to foodservice management companies (*e.g.*, Aramark, Sodexo, and Compass Group), to healthcare group purchasing organizations (*e.g.*, Premier, Novation, and Navigator).

The industry recognizes four general categories of foodservice distribution companies: (i) broadline distributors, (ii) systems distributors, (iii) specialty distributors, and (iv) cash-and-carry and club stores. Customers commonly purchase from foodservice distributors in one or more of these different categories, or "channels," mixing and matching to suit their needs. For example, customers may purchase products directly from a broadline distributor; they may contract with a brand-named food manufacturer (*e.g.*, Tyson Foods for chicken or Kellogg's for cereal) and use a broadline or systems distributor for warehousing and delivery; they may use specialty distributors for select items such as produce or seafood; or they may make their purchases at a cash-and-carry **[**10]** or club store (*e.g.*, Restaurant Depot or Costco).

Understanding these different channels of distribution and the different customers they serve is central to the antitrust analysis that this case demands. The court, therefore, describes below the sellers and buyers of foodservice distribution in the United States.

B. Channels of Foodservice Distribution

1. Broadline Distributors

Broadline distribution is characterized by several key features, including: (i) product breadth and depth; (ii) availability of private-label products; (iii) frequent and flexible delivery, including next-day service; and (iv) "value-added" services, such as menu and nutrition planning.

Broadline distributors offer thousands of distinct items for sale—known as "stock keeping units" ("SKUs") for inventory management purposes—in a wide array of product categories, including canned and dry goods, dairy, meat, poultry, produce, seafood, frozen foods, beverages, and even janitorial supplies such as chemicals, cleaning equipment, and paper goods. Broadliners also sell "private label" goods, which are akin to "Trader Joe's" or "Safeway" brand products found in those grocery stores. "Private label" products are often comparable **[**11]** in quality to their name-brand counterparts, but are cheaper in price. Because they are able to offer such a diverse array of products, broadline distributors market themselves to customers as a "one-stop shop," by virtue of their ability to supply most—if not all—food and related products needed by their customers. Customers value the breadth of product offerings and the opportunity to aggregate a substantial portion of their purchases with one distributor, allowing them to save costs. They also appreciate broadliners' high level of customer service, which usually includes next-day and emergency deliveries. Focusing heavily on individualized customer service, broadline distributors employ much larger salesforces than the other channels.

Broadline distributors come in different sizes. The largest, by any measure, are Sysco and USF. In 2013, Sysco and USF made $[TEXT REDACTED BY THE COURT] billion and $[TEXT REDACTED BY THE COURT] billion in broadline sales, respectively. PX09350-236, Table 44. The next largest broadliner made less than $6 billion. *Id.* **[*17]** Sysco and USF are also the only two broadliners with true nationwide service capability. Sysco and USF have 72 and 61 distribution centers, **[**12]** respectively—each with more than twice the number of distribution centers operated by the next-largest broadliners. Because of their nationwide footprint, Sysco and USF are often referred to as "national" broadliners. Combined, Defendants employ over 14,000 sales representatives. No other broadliner employs more than 1,600. Defendants together operate over 13,000 trucks. The next largest broadliners have just over 1,600.

The next tier of companies are "regional broadliners," so called because their distribution capabilities are concentrated in discrete regions of the United States. The largest regional broadliner, Performance Food Group ("PFG"), is the country's third-largest broadliner in terms of sales. PFG operates 24 broadline distribution facilities, mainly in the eastern and southern parts of the country and, in 2013, earned $6 billion in broadline revenue. The next five largest regional broadline distributors, in order of 2013 revenues, are: (i) Gordon Food Service, which has 10 distribution centers mainly in the Midwest, Florida, and Texas; (ii) Reinhart Foodservice, which has 24 distribution centers, primarily in the East and Midwest; (iii) Ben E. Keith Company, which has seven **[**13]** distribution centers in Texas and bordering states; (iv) Food Services of America, which has 10 distribution centers, concentrated in the Northwest; and (v) Shamrock Foods, which has four distribution centers in the Southwest and southern California. These regional broadliners had 2013 revenues ranging from approximately $[TEXT REDACTED BY THE COURT] billion to $[TEXT REDACTED BY THE COURT] billion.

The last tier of broadliners have five or fewer distribution centers and 2013 revenues of less than $1.1 billion. Many of these operate in a single locality or region, like Shetakis Wholesalers, which has one distribution center in Las Vegas, Nevada.

Regional broadline distributors have formed consortiums to compete for customers with multi-regional distribution needs. The largest consortium is Distribution Market Advantage ("DMA"). DMA is a supply chain sales and marketing cooperative owned by nine independent regional distributors, which are also its members, including Gordon Food Service, Ben E. Keith, and Reinhart Foodservice. DMA does not own any trucks or distribution facilities; rather, its purpose is to coordinate the bidding, contracting, and operational processes of its members **[**14]** to meet the needs of large customers that require a distributor with extensive geographic coverage. Another consortium is Multi-Unit Group ("MUG"), an alliance of 19 broadline distributors who are part of UniPro Foodservice, a larger consortium that includes distributors in different channels. As explained later, these regional consortia have had mixed results in competing for large, geographically dispersed customers.

2. Systems Distributors

Systems distributors, also referred to as "custom" or "customized" distributors, primarily serve fast food, quick service, fast casual, and casual chain restaurants (*e.g.*, Burger King, Wendy's, and Applebee's), which have fixed or limited menus. Unlike broadliners, systems distributors do not carry a large, diverse number of SKUs. Rather, their inventory profile is a small number of proprietary SKUs, which are manufactured specifically for the customer. For instance, the systems distributor for Wendy's carries and delivers the food products needed for Wendy's' menu and does not make those products available to others. As a result, systems distributors typically provide only warehousing and **[*18]** transport services. They do not offer private label products **[**15]** or value-added services such as menu planning, and they have very small salesforces, if any. Systems distributors make large, limited-SKU deliveries on a fixed, limited schedule, and typically do not offer next-day or emergency deliveries.

Some foodservice distribution companies operate both systems and broadline divisions. For instance, Sysco operates SYGMA, a systems distribution division. SYGMA is run by a different set of executives and, for the most part, operated out of separate distribution centers. PFG offers systems distribution through PFG Customized, which is run separately from its broadline division.

3. Specialty Distributors

Specialty distributors offer a limited and focused grouping of products within one or more product categories—typically fresh produce, meat, seafood, dairy or baked goods. Other specialty distributors focus on a specific type of cuisine, such as Italian fare. Many customers, especially independent restaurants, use specialty distributors to supplement their purchases from broadline distributors because the specialty distributor offers higher quality or fresher products than the broadline distributor or provides unique products that the broadline distributor **[**16]** does not carry, such as products from local farmers. Both in terms of number of SKUs and geographic coverage, specialty distributors are typically smaller than broadline distributors.

To compete with specialty distributors, some broadliners operate specialty divisions. Sysco, for instance, operates several specialty divisions separately from its broadline division. So, too, does PFG, which operates Roma, a specialty division for Italian food products.

4. Cash-and-Carry and Club Stores

Cash-and-carry stores offer a "self-service" model of food distribution, in which customers make purchases at the store and transport the purchased goods themselves. Club stores like Costco and Sam's Club also fall within this distribution channel. With limited exceptions, cash-and-carry stores do not deliver. They also offer fewer products than broadline distributors. For example, the largest cash-and-carry store, Restaurant Depot, only carries up to [TEXT REDACTED BY THE COURT] SKUs. Additionally, cash-and-carry stores do not have sales personnel dedicated to individual customers. Because of these features, the prices offered by cash-and-carry stores are significantly lower than those offered by broadliners. **[**17]** The typical cash-and-carry customer is an independent restaurant that either does not meet broadline distributors' minimum purchase requirements or needs to supplement its broadline deliveries.

C. Foodservice Distribution Customers

Foodservice distribution customers are a heterogeneous group. The largest customers, such as group purchasing organizations and foodservice management companies, buy hundreds of millions of dollars of product a year, whereas a single independent restaurant buys a small fraction of that amount. Some customers choose to buy from a single line of distribution; others mix distribution channels. Some customers demand fixed pricing, whereas others buy based on daily market rates. Generally speaking, however, customers can be grouped into several categories.

1. Group Purchasing Organizations

Group purchasing organizations, or GPOs, are entities that, through the collective buying power of their members, obtain lower prices for foodservice products. **[*19]** GPOs negotiate direct contracts with food manufacturers and thereby secure lower prices than a member could individually.

GPOs do not have their own distribution capabilities. Rather, they contract with broadline distributors **[**18]** for warehousing, delivery, and operational services. When a member purchases a GPO-contracted good, the member pays the broadliner on a "cost-plus" basis: it pays for the "cost" of the product based on the GPO's contract with the manufacturer, "plus" the distributor's markup, which is negotiated between the GPO and distributor. GPOs also contract with broadliners to allow their members to purchase products from broadline distributors (rather than from manufacturers), in which case they pay the broadline distributor both the distribution margin (markup) and the cost for the product set by the distributor. GPO members also buy from specialty distributors.

GPOs are prominent in the healthcare and hospitality industries. The largest healthcare GPOs include Premier, Novation, and Navigator. One of the largest hospitality GPOs is Avendra. These companies annually spend hundreds of millions of dollars on broadline distribution.

2. Foodservice Management Companies

Foodservice management companies operate cafeterias or other dining facilities at educational institutions, sports venues, and workplaces. Like GPOs, foodservice management companies negotiate contracts with food manufacturers and rely **[**19]** on broadliners for storage and delivery; they also purchase directly from broadliners and specialty distributors. Sodexo, Compass Group, and Aramark are among the country's largest foodservice management companies. Those three companies each spend approximately $[TEXT REDACTED BY THE COURT] billion annually on broadline distribution.

3. Hospitality Chains

Hospitality chains are also large purchasers. Hilton Hotels, for example, uses a system similar to a GPO. It has a subsidiary, Hilton Supply Management LLC, which negotiates contracts on behalf of over 4,000 members to obtain food and related items at a discounted price. Other hospitality companies, such as Hyatt Hotels, purchase most of their foodservice products through Avendra, the largest hospitality GPO. Starwood Hotels and Interstate Hotels & Resorts, on the other hand, directly manage food procurement and distribution contracts for their properties. Regardless of the food purchasing model, hospitality chains also buy food directly from broadliners and rely on them for their storage and delivery needs. These companies spend hundreds of millions of dollars annually on broadline distribution. Individual hotels and resorts also buy **[**20]** directly from specialty distributors, as needed.

4. Restaurant Chains

Restaurant chains come in many sizes with a wide variety of characteristics. This customer category includes nationwide fast food or quick service restaurants such as Burger King and Subway, each with thousands of locations in all regions of the country. It also includes regional fast casual restaurant chains such as Culver's (primarily in the Midwest) and Zaxby's (primarily in the Southeast), as well as nationwide sit-down restaurant chains, such as Applebee's and Cheesecake Factory. The channel of distribution a chain restaurant uses depends, in part, on the number of locations and menu variety. The greater the number of locations and the fewer the menu items, the more amenable the chain restaurant is to systems distribution.

[*20] *5. Government Agencies*

Some government agencies, notably the Defense Logistics Agency and the U.S. Department of Veterans Affairs, are large buyers of broadline distribution services. Those agencies, for instance, spend hundreds of millions of dollars each year on broadline foodservice.

6. "Street" Customers

Customers with only one location, or a handful of locations, are referred to in the industry **[**21]** as "street," "local," or "independent" customers. Examples of this type of customer include independent restaurants and resorts. Unlike the types of customers identified above, street customers usually do not have written contracts with broadliners; instead, they negotiate prices on a weekly or other short term basis. They also tend to diversify their purchases among multiple distribution channels. Indeed, according to a study conducted by an industry trade group, the International Foodservice Distributors Association, the typical independent customer uses up to twelve different supply sources. DX-00293 at 29.

II. CASE HISTORY

A. Sysco and USF

Defendant Sysco is a publicly-traded corporation headquartered in Houston, Texas. As the largest North American foodservice distributor, Sysco distributes food to approximately 425,000 customers in the United States, generating sales of about $46.5 billion in fiscal year 2014. Compl. for TRO and Prelim. Inj. Pursuant to *Section 13(b) of the FTC Act*, ECF No. 3 at ¶ 24 [hereinafter Compl.]. Sysco's business is divided into three divisions: (i) Broadline (81 percent of revenue); (ii) SYGMA, which provides systems distribution (13 percent of revenue); and (iii) "Other," which provides, among other things, **[**22]** specialty produce distribution (6 percent of revenue). *Id.* ¶ 25. Sysco's broadline division operates out of 72 distribution centers located across the United States. *Id.*

Defendant US Foods, Inc., is a privately-held corporation based in Rosemont, Illinois, and is a wholly owned subsidiary of Defendant USF Holding Corp. USF is controlled by the investment funds of Clayton, Dubilier & Rice, Inc., and KKR & Co., L.P. The second-largest foodservice distributor in the United States, USF operates 61 broadline distribution centers across the country and serves over 200,000 customers nationwide. *Id.* ¶ 27. In fiscal year 2013, USF generated approximately $22 billion in revenue. *Id.*

B. History of the Merger

On December 8, 2013, Sysco and USF signed a definitive merger agreement, whereby Sysco agreed to acquire all shares of USF for $500 million in cash and $3 billion in newly issued Sysco equity. Sysco also agreed to assume $4.7 billion in USF's existing debt, for a total transaction value of $8.2 billion. The merger agreement expires on September 8, 2015.

After announcing the merger, Defendants filed a notification regarding the merger as required by the Hart-Scott-Rodino Antitrust Improvements **[**23]** Act, *15 U.S.C. § 18a*. As a result of this filing, the FTC commenced an investigation to determine the effects of the proposed combination. The FTC is an administrative agency of the United States federal government that derives its authority from the Federal Trade Commission Act ("FTC Act"), *15 U.S.C. §§ 41 et seq.* Among other duties, the FTC is vested with authority and responsibility for enforcing Section 7 of the Clayton Act, *15 U.S.C. § 18*, and Section 5 of the FTC Act, *15 U.S.C. § 45*.

[*21] During the FTC's investigation, and with the hope of gaining regulatory approval, on February 2, 2015, Sysco and USF announced an asset purchase agreement with regional broadline distributor Performance Food Group, Inc. ("PFG"), to sell 11 of USF's 61 distribution centers to PFG, contingent upon the successful completion of the merger. The 11 USF distribution centers—intended to increase PFG's geographic footprint—are, for the most part, located within the western half of the country, where PFG at present has only one distribution center. Currently, the 11 distribution centers account for approximately $4.5 billion in broadline sales. PX09250-011. The parties also executed a Transition Services Agreement. Under the two agreements, PFG would acquire all assets and employees at the **[**24]** 11 distribution centers, all customers under those contracts (assuming the customers consent), and the right to use USF private label products at those facilities for up to three years.

C. History of these Proceedings

On February 19, 2015, the Commissioners of the FTC voted 3-2 to authorize the filing of an administrative complaint in the FTC's Article I court to block the proposed merger, based on a finding that there was reason to believe that the merger would violate Section 7 of the Clayton Act, *15 U.S.C. § 18*, and Section 5 of the FTC Act, *15 U.S.C. § 45*. Trial before an Administrative Law Judge is scheduled to begin on July 21, 2015.

Also, on February 19, 2015, the Commission authorized the FTC staff to seek a preliminary injunction in federal court under S*ection 13(b) of the FTC Act* in order to prevent Defendants from completing the merger. The FTC filed this action on February 20, 2015, seeking a temporary restraining order ("TRO") and preliminary injunction to maintain the status quo until the conclusion of the administrative trial. The FTC is joined in this action by the District of Columbia and the following states: California, Illinois, Iowa, Maryland, Minnesota, Nebraska, North Carolina, Ohio, Tennessee, Pennsylvania, and Virginia (collectively, the "Plaintiff **[**25]** States"). By and through their respective Attorneys General, the Plaintiff States have joined with the FTC in this action pursuant to Section 16 of the Clayton Act, *15 U.S.C. § 26*, in their sovereign or quasi-sovereign capacities as *parens patriae* on behalf of the citizens, general welfare, and economy of each of their states.

On February 24, 2015, Defendants stipulated to a TRO, agreeing not to merge until three calendar days after this court rules on the FTC's Motion for Preliminary Injunction. The court entered the stipulated TRO on February 27, 2015. Defendants have since represented that they will abandon the transaction if this court grants the preliminary injunction.

On March 4, 2015, the court scheduled a preliminary injunction hearing to start on May 5, 2015. The parties' counsel accomplished an extraordinary amount of work in the two months leading up to the evidentiary hearing. They exchanged approximately 14.8 million documents and took 72 depositions. Moreover, in addition to the more than 90 industry participant declarations that accompanied the FTC's motion for preliminary injunction, Defendants obtained 65 new declarations or counter declarations, while the FTC obtained an additional 25 new **[**26]** or counter declarations. During the eight-day evidentiary hearing, the court heard testimony from 20 witnesses, either live or via video deposition. The parties submitted a total of 185 declarations into evidence, as well as over 3,500 exhibits and excerpts of **[*22]** over 70 depositions. The court heard closing arguments on May 28, 2015.

LEGAL STANDARD

I. SECTION 7 OF THE CLAYTON ACT

HN1[] Section 7 of the Clayton Act prohibits mergers or acquisitions "the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly" in "any line of commerce or in any activity affecting commerce in any section of the country." *15 U.S.C. § 18*. When the FTC has "reason to believe that a corporation is violating, or is about to violate, Section 7 of the Clayton Act," it may seek a preliminary injunction under *Section 13(b) of the FTC Act* to "prevent a merger pending the Commission's administrative adjudication of the merger's legality." *FTC v. Staples, Inc., 970 F. Supp. 1066, 1070 (D.D.C. 1997)* (citing *15 U.S.C. § 53(b)*). "Section 13(b) provides for the grant of a preliminary injunction where such action would be in the public interest—as determined by a weighing of the equities and a consideration of the Commission's likelihood of success on the merits." *FTC v. H.J. Heinz Co., 246 F.3d 708, 714, 345 U.S. App. D.C. 364 (D.C. Cir. 2001)* (citing *15 U.S.C. § 53(b)*).

II. SECTION 13(B) STANDARD FOR PRELIMINARY INJUNCTIONS

HN2[] The Section 13(b) standard for preliminary injunctions differs from the familiar equity standard applied **[**27]** in other contexts. As the Court of Appeals explained in *Heinz*: "Congress intended this standard to depart from what it regarded as the then-traditional equity standard, which it characterized as requiring the plaintiff to show: (1) irreparable damage, (2) probability of success on the merits and (3) a balance of equities favoring the plaintiff." 246 F.3d at 714 (internal citation omitted). The court continued: "Congress determined that the traditional standard was not 'appropriate for the implementation of a Federal statute by an independent regulatory agency where the standards of the public interest measure the propriety and the need for injunctive relief.' *Id.* (quoting H.R. Rep. No. 93-624 at 31 (1971)); *see also* FTC v. Exxon Corp., 636 F.2d 1336, 1343, 205 U.S. App. D.C. 208 (D.C. Cir. 1980) ("In enacting [Section 13(b)], Congress further demonstrated its concern that injunctive relief be broadly available to the FTC by incorporating a unique 'public interest' standard in 15 U.S.C. [§] 53(b), rather than the more stringent, traditional 'equity' standard for injunctive relief ").

HN3[] Under Section 13(b)'s "public interest" standard, "[t]he FTC is not required to *establish* that the proposed merger would in fact violate section 7 of the Clayton Act." Heinz, 246 F.3d at 714. Rather, to demonstrate the likelihood of success on the merits, "the government need only **[**28]** show that there is a reasonable probability that the challenged transaction will substantially impair competition." Staples, 970 F. Supp. at 1072 (citation omitted) (internal quotation marks omitted).

HN4[] A trial court evaluating a demand for injunctive relief therefore must "measure the probability that, after an administrative hearing on the merits, the Commission will succeed in proving that the effect of the [proposed] merger 'may be substantially to lessen competition, or to tend to create a monopoly' in violation of section 7 of the Clayton Act.'" Heinz, 246 F.3d at 714 (quoting 15 U.S.C. § 18). The FTC satisfies this standard if it "has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." Id. at 714-15 **[*23]** (citations omitted) (internal quotation marks omitted). This standard reflects Congress' use of the words "*may* be substantially to lessen competition" in Section 7, as Congress' concern "was with probabilities, not certainties" of decreased competition. Id. at 713 (citing Brown Shoe Co. v. United States, 370 U.S. 294, 323, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)) (other citations omitted).

HN5[] Though more relaxed than the traditional equity injunction standard, Section 13(b)'s public interest standard **[**29]** nevertheless demands rigorous proof to block a proposed merger or acquisition. "[T]he issuance of a preliminary injunction prior to a full trial on the merits is an extraordinary and drastic remedy." Exxon, 636 F.2d at 1343 (citations omitted) (internal quotation marks omitted). That is because "the issuance of a preliminary injunction blocking an acquisition or merger may prevent the transaction from ever being consummated." *Id.* "Given the stakes, the FTC's burden is not insubstantial . . . ." FTC v. Arch Coal, 329 F. Supp. 2d 109, 123 (D.D.C. 2004), *case dismissed*, No. 04-5291, 2004 U.S. App. LEXIS 19405, 2004 WL 2066879 (D.C. Cir. Sept. 15, 2004). "[A] showing of a fair or tenable chance of success on the merits will not suffice for injunctive relief." *Id.* (citation omitted) (internal quotation marks omitted).

III. *BAKER HUGHES* BURDEN-SHIFTING FRAMEWORK

In United States v. Baker Hughes, Inc., 908 F.2d 981, 982-83, 285 U.S. App. D.C. 222 (D.C. Cir. 1990), the Court of Appeals established a burden-shifting framework for evaluating the FTC's likelihood of success on the merits. *See* Heinz, 246 F.3d at 715 (applying *Baker Hughes* "to the preliminary injunctive relief stage"). HN6[] Under the *Baker Hughes* framework, the FTC bears the initial burden of showing that the merger would lead to "undue concentration in the market for a particular product in a particular geographic area." Baker Hughes, 908 F.2d at 982; *see also* Heinz, 246 F.3d at 715 (quoting United States v. Phila. Nat'l Bank, 374 U.S. 321, 363, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963)) ("[T]he government must show that the merger would produce 'a firm controlling **[**30]** an undue percentage share of the relevant market, and [would] result[ ] in a significant increase in the concentration of firms in that market."). Such a showing establishes a "presumption" that the merger will substantially lessen competition. Baker Hughes, 908 F.2d at 982.

The burden then shifts to the defendant to rebut the presumption by offering proof that "the market-share statistics [give] an inaccurate account of the [merger's] probable effects on competition in the relevant market." Heinz, 246 F.3d at 715 (quoting United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 120, 95 S. Ct. 2099, 45 L. Ed. 2d 41 (1975)) (internal quotation marks omitted); *see also* Baker Hughes, 908 F.2d at 991 ("[A] defendant seeking to rebut a presumption of anticompetitive effect must show that the prima facie case inaccurately predicts the relevant transaction's probable effect on future competition."). "The more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully." Baker Hughes, 908 F.2d at 991. "A defendant can make the required showing by affirmatively showing why a given transaction is unlikely to substantially lessen competition, or by discrediting the data underlying the initial presumption in the government's favor." *Id.*

"If the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effect **[**31]** shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times." Id. at 983. "[A] failure **[*24]** of proof in any respect will mean the transaction should not be enjoined." Arch Coal, 329 F. Supp. 2d at 116. The court must also weigh the equities, but if the FTC is unable to demonstrate a likelihood of success, the equities alone cannot justify an injunction. *Id.*

DISCUSSION

I. THE RELEVANT MARKET

HN7[] Merger analysis starts with defining the relevant market. United States v. Marine Bancorp., 418 U.S. 602, 618, 94 S. Ct. 2856, 41 L. Ed. 2d 978 (1974) (Market definition is "'a necessary predicate' to deciding whether a merger contravenes the Clayton Act.") (quoting United States v. E.I. Du Pont De Nemours & Co., 353 U.S. 586, 593, 77 S. Ct. 872, 1 L. Ed. 2d 1057 (1957)); *see also* FTC v. Swedish Match, 131 F. Supp. 2d 151, 156 (D.D.C. 2000). The relevant market has two component parts. "First, the 'relevant product market' identifies the product and services with which the defendants' products compete. Second, the `relevant geographic market' identifies the geographic area in which the defendant competes in marketing its products or service." Arch Coal, Inc., 329 F. Supp. 2d at 119; *see also* FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26, 37 (D.D.C. 2009) (same). "Defining the relevant market is critical in an antitrust case because the legality of the proposed merger[ ] in question almost always depends upon the market power of the parties involved." FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 45 (D.D.C. 1998).

Market definition has been the parties' primary battlefield in this case. According to **[**32]** the FTC, the relevant product market is broadline foodservice distribution. Compl. ¶ 40. Because broadline distribution is defined by a number of distinct attributes—such as a vast array of product offerings, private label offerings, next-day delivery, and value-added services—the FTC contends that the other modes of distribution are not reasonable substitutes for broadline distribution and thus must be excluded from the product market.

The FTC further contends that, within the product market for broadline distribution, there is another product market for foodservice distribution sold to "national" customers. *Id.* ¶ 44. These customers, the FTC asserts, are distinct from "local" or "street" customers in multiple respects. National customers have a nationwide or multi-regional footprint and, because of that footprint, typically contract with a broadliner that has geographically dispersed distribution centers; they usually make purchases under a single contract that offers price, product, and service consistency across all facilities; and they award contracts through a request for proposal or bilateral negotiations. National customers include, among others, GPOs, foodservice management **[**33]** companies, hospitality chains, and national chain restaurants. By contrast, the FTC says, the typical "local" or "street" customer is an independent restaurant, which does not require multiple, geographically dispersed distribution centers; purchases in smaller quantities; and ordinarily does not have a contract with its foodservice distributor(s) as it negotiates purchases on a weekly or other short-term basis. The FTC contends that for national customers the geographic market is nationwide. For local customers, it argues that the geographic market is localized near Defendants' distribution centers.

Defendants counter that the foodservice distribution market cannot be sliced and diced as advocated by the FTC. According to Defendants, the relevant market is the entire $231 billion foodservice distribution industry, consisting not only of broadline food distributors, but also specialty **[*25]** distributors, systems distributors, and cash-and-carry stores. All of these modes of distribution, Defendants argue, compete for foodservice distribution customer spending. Based on this market definition, Defendants assert that together, they make up approximately 25 percent of total foodservice distribution **[**34]** sales. They also dispute that there is a product market for "national customers," asserting that such a market has been created by the FTC out of whole cloth to artificially inflate Defendants' market shares. According to the FTC, Defendants combined have, at least, a 59 percent share of the national customer product market.

A. Broadline Distribution as a Relevant Product Market

1. Legal Principles Affecting the Definition of the Relevant Product Market

The Supreme Court in *Brown Shoe* set forth the general rule for defining a product market: ***HN8***[] "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe, 370 U.S. at 325*. Stated another way, a product market includes all goods that are reasonable substitutes, even though the products themselves are not entirely the same. *Cardinal Health, 12 F. Supp. 2d at 46*; *Staples, Inc., 970 F. Supp. at 1074* (stating the question as "whether two products can be used for the same purpose, and if so, whether and to what extent purchasers are willing to substitute one for the other").

HN9[] Whether goods are "reasonable substitutes" depends on two factors: functional interchangeability and cross-elasticity of demand. "Functional **[**35]** interchangeability" refers to whether buyers view similar products as substitutes. *See id.* ("Whether there are other products available to consumers which are similar in character or use to the products in question may be termed 'functional interchangeability. "If consumers can substitute the use of one for the other, then the products in question will be deemed 'functionally interchangeable.'" *Arch Coal, 329 F. Supp. 2d at 119*; *see also* *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 393, 76 S. Ct. 994, 100 L. Ed. 1264 (1956))* ("Determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another."). "Courts will generally include functionally interchangeable products in the same product market unless factors *other than* use indicate that they are not actually part of the same market." *Arch Coal, 329 F. Supp. 2d at 119*.

HN10[] As for cross-elasticity of demand, there the question turns in part on price. *E.I. Du Pont De Nemours, 351 U.S. at 400* ("An element for consideration as to cross-elasticity of demand between products is the responsiveness of the sales of one product to price changes of the other."). If an increase in the price for product A causes a substantial number of customers to switch to product B, the products compete in the same market. **[**36]** *See id.* ("If a slight decrease in the price of cellophane causes a considerable number of customers of other flexible wrappings to switch to cellophane, it would be an indication . . . that the products compete in the same market."); *Arch Coal, 329 F. Supp. 2d at 120*. Price is not, however, the only variable in determining the cross-elasticity of demand between products. Cross-elasticity of demand also depends on the "ease and speed with which customers can substitute [the product] and **[*26]** the desirability of doing so." *FTC v. Whole Foods Market, Inc., 548 F.3d 1028, 1037 (D.C. Cir. 2008)* (Brown, J.). Thus, substitution based on a reduction in price will not correlate to a high cross-elasticity of demand unless the switch can be accomplished without the consumer incurring undue expense or inconvenience. *See* *Phila. Nat'l Bank, 374 U.S. at 358* (observing that "[t]he factor of inconvenience localizes banking competition as effectively as high transportation costs in other industries").

HN11[] Three other established principles are critical to defining the relevant product market in this case. The first is that the "product" that comprises the market need not be a discrete good for sale. As the Supreme Court has made clear: "We see no barrier to combining in a single market a number of different products or services where that combination **[**37]** reflects commercial realities." *United States v. Grinnell Corp., 384 U.S. 563, 572, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*; *Phila. Nat'l Bank, 374 U.S. at 356* (citation omitted) (finding that "the cluster of products . . . and services . . . denoted by the term 'commercial banking'. . . composes a distinct line of commerce"). Thus, what is relevant for consideration here is not any particular food item sold or delivered by Defendants, but the full panoply of products and services offered by them that customers recognize as "breadline distribution."

HN12[] Second, "the mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes." *Staples, 970 F. Supp. at 1075*; *Cardinal Health, 12 F. Supp. 2d at 47* (same). That is because market definition hinges on whether consumers view the products as "reasonable substitutes." *Cardinal Health, 12 F. Supp. 2d at 46*. So, for example, fruit can be bought from both a grocery store and a fruit stand, but no one would reasonably assert that buying all of one's groceries from a fruit stand is a reasonable substitute for buying from a grocery store. *See Whole Foods, 548 F.3d at 1040 (Brown, J.)* ("The fact that a customer might buy a stick of gum at a supermarket or at a convenience store does not mean there is no definable groceries market."). Thus, as applicable here, the fact that buyers may cross-shop between **[**38]** modes of food distribution does not necessarily make them part of the same market for the purpose of merger analysis.

HN13[] Third, market definition is guided by the "narrowest market" principle. *Arch Coal, 329 F. Supp. 2d at 120*. That is, "a relevant market cannot meaningfully encompass [an] infinite range [of products]. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn." *Times-Picayune Publ'g Co. v. United States, 345 U. S. 594, 612, 73 S. Ct. 872, 97 L. Ed. 1277 n.31 (1953)*. Judge Bates in *Arch Coal* succinctly described the "narrowest market" principle in practice as follows:

> The analysis begins by examining the most narrowly-defined product or group of products sold by the merging firms to ascertain if the evidence and data support the conclusion that this product or group of products constitutes a relevant market. If not, the analysis shifts to the next broadest product grouping to test whether that is a relevant market. This process continues until a relevant market is identified.

Arch Coal, 329 F. Supp. 2d at 120; *see also* *United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 58-60 (D.D.C. 2011)* (explaining "the principle that the relevant product **[*27]** market should ordinarily be defined as the smallest product market that will satisfy the hypothetical monopolist test").

The critical question here, therefore, is whether **[**39]** broadline food distribution qualifies as the relevant product market, or whether the product market should be expanded to include other modes of distribution.

2. The Brown Shoe "Practical Indicia"

HN14[] Courts look to two main types of evidence in defining the relevant product market: the "practical indicia" set forth by the Supreme Court in *Brown Shoe* and testimony from experts in the field of economics. The court turns first to the *Brown Shoe* factors.

According to *Brown Shoe*, "[t]he boundaries of [a product market] may be determined by examining such practical indicia as industry or public recognition . . . , the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe, 370 U.S. at 325*. "These indicia seem to be evidentiary proxies for direct proof of substitutability." *Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 218, 253 U.S. App. D.C. 142 (D.C. Cir. 1986)*; *H&R Block, 833 F. Supp. 2d at 51*. Courts have relied on the *Brown Shoe* factors in a number of cases to define the relevant product market.[2] *See, e.g.*, Staples, 970 F. Supp. at 1075-80; Cardinal Health, 12 F. Supp. 2d at 46-48; Swedish Match, 131 F. Supp. 2d at 159-64; CCC Holdings, 605 F. Supp. 2d at 39-44; H&R Block, 833 F. Supp. 2d at 51-60.

The court finds that the *Brown Shoe* factors support the FTC's position that broadline foodservice distribution is the relevant product market for evaluating the proposed merger. As discussed below, an analysis of those factors demonstrates that other modes of foodservice distribution are not functionally interchangeable with broadline foodservice distribution,

a. Product breadth and diversity

The most distinguishing feature of broadline distribution is its product breadth and diversity. Broadliners stock thousands of SKUs across every major food and food-related category in their distribution centers. *See* Staples, 970 F. Supp. at 1078 (comparing SKU selections among different sales outlets). The average Sysco or USF distribution center carries over [TEXT REDACTED BY THE COURT] SKUs. Regional broadliners carry fewer SKUs than Defendants, but still maintain between 6,000 to 19,000 SKUs in their distribution centers. PX093 50-215, Table 22. Broadliners also offer "private label" products, which are a broadliner's branded products. Sysco has over [TEXT REDACTED BY THE COURT] private-label SKUs, and USF has over **[**41]** [TEXT REDACTED BY THE COURT]. PX09350-219, Table 32. This product breadth and diversity enables broadliners to serve a wide variety of customers and to be a one-stop shop, if the customer wishes. As USF's Executive Vice President of Strategy David Schreibman testified at the FTC's Investigational Hearing: "[W]e have such a broad selection of SKUs because that is a key consideration of our customer base, you have to have what they want." Investig'l Hr'g Tr., PX00590-006 at 24.

The other distribution channels pale in comparison to broadline in terms of product **[*28]** breadth and diversity. Systems distributors carry a limited number of SKUs—usually only a few thousand—in their distribution centers. PX09350-215, Table 22. These SKUs are ordinarily proprietary in nature and used only by the customers for which they were developed, meaning that systems products are not readily sellable to other customers. Specialty distributors also carry a limited number of SKUs, usually for niche products—such as fresh produce, meat, seafood, dairy, or bakery items—which tend to complement broadline offerings. As Sysco's CEO William DeLaney explained: "We own [specialty] to create great traction with our customers,... **[**42]** we felt we had some gaps in our [broadline] product offerings, whether it was special produce, special cut steaks. . . ." Investig'l Hr'g Tr., PX00580-010 at 38. Cash-and-carry stores likewise do not have the same breadth and diversity of products as broadline distributors. One of the largest cash-and-carry stores, Restaurant Depot, carries [TEXT REDACTED BY THE COURT] SKUs. USF's CHEF'STORE carries less than 4,000. PX09350-216, Table 26. A number of customer declarants stated that cash-and-carry store products tended to be less uniform and inferior in quality to products carried by broadliners.

b. Distinct facilities and operations

No one entering a systems, specialty, or cash-and-carry outlet would mistake it for a broadline distribution facility. *See* Staples, 970 F. Supp. at 1079 ("No one entering a Wal-Mart would mistake it for an office superstore .... You certainly know an office superstore when you see one."). Broadline distribution centers are massive. The average size of a Sysco distribution center is over 380,000 square feet; for USF, it is over 270,000 square feet. Some regional distributors also have distribution centers ranging from 200,000 to 400,000 square feet. PX09350-215, Table 25. Non-broadline **[**43]** facilities are generally smaller in size and cannot readily be converted into a broadline facility or accommodate broadline customers.

Broadline facilities also have large salesforces attached to them. Broadline facilities typically have dozens of sales representatives, while systems distributors have few sales representatives at their facilities. PX09350-215, Table 23. Cash-and-carry stores generally do not have dedicated account representatives at all. Because the model of

[2] The Brown Shoe practical indicia may indeed be "old school," as Sysco's counsel asserted at oral argument, Closing Arg. Hr'g Tr. 44, and its analytical framework relegated "to the jurisprudential sidelines," **[**40]** *see* ***Whole Foods, 548 F.3d at 1059*** (Kavanaugh, J., dissenting). But Brown Shoe remains the law, and this court cannot ignore its dictates.

distribution is self-service, cash-and-carry sales representatives do not learn the individualized needs of their customers in a systematic manner.

Additional proof that broadline foodservice distribution is a separate product market comes from the corporate structure of large foodservice distributors. Major foodservice distributors offer distribution in other channels besides broadline, but they run those businesses separately from their broadline businesses. *See, e.g.,* H&R Block, 833 F. Supp. 2d at 56 (observing that digital do-it-yourself tax preparation was a distinct product market from assisted tax preparation because H&R Block ran them as "separate business units"). Sysco runs its systems distribution business, SYGMA, as a separate division. **[**44]** So, too, does PFG, which runs a systems business known as PFG Customized. Sysco also runs separate specialty divisions, such as Fresh Point, a fresh produce supplier. So, too, does PFG, which has its own specialty division, Roma, which supplies Italian restaurants and pizza parlors. And USF runs a separate cash-and-carry operation, CHEF'STORE. This type of corporate structuring shows that those who run and manage foodservice companies view broadline as distinct from other modes of distribution,

[*29] e. Delivery

Timely and reliable delivery is critical in the food distribution industry. Unless customers can get the food they want when they need it, their businesses are at risk of losing clients and money. Broadliners have the capacity—due in large part to their extensive fleet of service vehicles, PX09350-217, Table 29—to offer frequent and flexible delivery schedules to meet customer needs, including next-day delivery. Ample evidence shows that, for a wide array of broadline customers—from large GPOs to individually-owned restaurants—next-day delivery is crucial to meeting their needs.

Neither systems distributors nor cash-and-carry stores offer the same degree of frequency and flexibility **[**45]** of delivery as broadliners.[3] Systems distributors tend to make large, limited-SKU deliveries on a fixed schedule. Also, systems fleets, on average, travel longer distances than broadline fleets to make deliveries. Carry-and-carry stores, for the most part, do not deliver. Rather, their primary model is self-service—that is, the customer transports the merchandise on her own. Some cash-and-carry outlets do offer delivery options. Costco, for example, offers limited-mileage delivery from some of its stores, and Restaurant Depot leases refrigerated trucks to its best customers. But those programs are quite limited and cannot substitute for the comprehensive and flexible delivery networks offered by broadliners to all of their customers.

d. Customer service and value-added services

Another distinguishing feature of broadline distributors **[**46]** is their high degree of customer service and value-added service offerings. For example, broadliners offer menu and nutritional- meal planning services to, among others, healthcare, hospitality, and restaurant customers. They also offer value-added services at their distribution facilities, such as food safety training and new product updates. Other modes of delivery do not generally offer comparable value-added services.

e. Distinct customers

Due in large part to the breadth of their product and service offerings, broadliners are capable of serving a wide range of customers, including classes of customers that the other channels cannot reach. Systems is a more efficient and cost-effective mode of distribution for fast food and quick service restaurants. Specialty distributors can provide higher quality and fresher products in certain categories, but have limited product offerings and charge higher prices than broadliners. Cash-and-carry stores are less expensive and more accessible for buyers such as independent restaurants, but their lack of delivery service makes them unsuitable for the large majority of foodservice customers.

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[3] There was little evidence presented about the delivery capabilities of specialty distributors, aside from the fact that they have a limited geographic range of delivery. *See* PX00427-002 (Sodexo declarant indicating that specialty distributors covered a limited geographic range); PX00594-012 at 45 (MedAssets stating the same); PX00407-002 (Amerinet stating the same).

These other channels, therefore, simply cannot and do not **[**47]** serve as wide an array of customers as broadliners do. The largest broadline customers, such as GPOs, foodservice management companies, and hospitality providers, cannot use systems or cash-and-carry for their needs. They purchase only modest quantities of product from specialty distributors. Even most independent restaurants cannot use cash-and-carry stores as a reasonable substitute **[*30]** for their broadliner, even though such stores offer lower prices.

f. Distinct pricing

Broadliners generally compete only against other broadliners on pricing. PFG's President and CEO, George Holm, who has over 37 years of industry experience, testified that systems and specialty distributors do not significantly affect the pricing and services that PFG offers to its customers. Hr'gTr. 575-76,643. And, although broadliners recognize that cash-and-carry stores provide lower prices, the record does not show broadliners benchmarking their prices against cash- and-carry stores or lowering prices to compete with them. To the contrary, as USF's Executive Vice President of Strategy David Schreibman succinctly stated in an email comparing pricing between USF as a broadliner and its own cash-and-carry division, CHEF'STORE: **[**48]** "In the store, we will be competitive with [TEXT REDACTED BY THE COURT] on a similar cost model. On the truck, we will be competitive with broadline distributors on a similar cost model." PX03114-003.

g. Industry or public recognition

Overwhelmingly, the evidence shows that players in the foodservice distribution industry—both its suppliers and customers—recognize broadline, systems, specialty, and cash- and-carry to be distinct modes of distribution. *See* Rothery Storage, 792 F.2d at 219 n.4 ("The 'industry or public recognition of the submarket as a separate economic' unit matters because we assume that economic actors usually have accurate perceptions of economic realities."). The court received both live and out-of-court sworn testimony from Defendants' executives; executives from other broadline distributors; officers of non-broadline companies; and customers, large and small. They uniformly observed that these modes of distribution are distinct in the variety of ways described above. In short, the industry widely recognizes that broadline distributors offer a unique cluster of products and services that is not functionally interchangeable with other modes of distribution.

h, Defendants' response to Brown Shoe "practical **[**49]** indicia"

Defendants do not, for the most part, contest the above-described distinctions between broadline and other channels of distribution. Instead, Defendants contend that defining the relevant market to include only broadliners "misunderstands consumer behavior." Memo of Defs. Sysco Corp., USF Holding Corp. and US Foods, Inc., in Opp'n to Pis.' Mot. for A Prelim. Inj., ECF No. 130 at 19 [hereinafter Defs.' Opp'n Br.]. They argue "customers simultaneously can, and routinely do, choose to patronize competitors of all stripes offering fungible goods through different but overlapping distribution channels." *Id.* What matters, Defendants claim, is that non- broadliners are able to constrain a broadliner's pricing by competing for customers who are able to move their entire purchasing, or portions of their purchasing, between channels. *Id.* at 19 ("Whether a substitute channel is a 'comprehensive' substitute is irrelevant to that question."). Defendants offer as one compelling example the burger chain Five Guys, which recently reallocated over $300 million in annual business from USF to a collection of regional broadliners and systems distributors.

Defendants are indisputably correct that customers **[**50]** buy across channels, especially independent restaurants. They are also unquestionably correct that some customers, particularly quick service and fast food restaurant chains, are capable of moving large segments of business from broadline to systems. But the fact that Defendants sometimes compete against other channels of distribution in the larger marketplace **[*31]** does not mean that those alternative channels belong in the relevant product market for purposes of merger analysis. *See* Staples, 970 F. Supp. at 1075 (***HN15***[] "[T]he mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes."); *see also* Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law****: An Analysis of Antitrust Principles and Their Application* ¶ 565b (4th ed. 2014) ("[I]t would be improper to group complementary goods into the same relevant market just because they occasionally substitute for one another. Substitution must be effective to hold the primary good to a price near its costs[.]").

Two key decisions from this jurisdiction, *Whole Foods* and *Staples*, support this conclusion. In *Whole Foods*, the question was whether there existed a product market **[**51]** for premium natural and organic supermarkets ("PNOS") separate from ordinary supermarkets. The Court of Appeals' ultimate decision was fractured—each judge issued a separate opinion, leaving no controlling opinion from the Court. Two judges, however, concluded that PNOS is a separate product market from ordinary supermarkets, even though there was evidence that customers "cross-shopp[ed]" between the two. *548 F.3d at 1040 (Brown, J.)*; *id*. ("But the fact that PNOS and ordinary supermarkets 'are direct competitors in some submarkets ... is not the end of the inquiry.'") (quoting *United States v. Conn. Nat. Bank, 418 U.S. 656, 664 n.3, 94 S. Ct. 2788, 41 L. Ed. 2d 1016 (1974))*; *id. at 1048 (Tatel, J.)* ("That Whole Foods and Wild Oats have attracted many customers away from conventional grocery stores by offering extensive selections of natural and organic products thus tells us nothing about whether [they] should be treated as operating in the same market as conventional groceiy stores."). Both judges agreed that just because customers were able to buy some categories of groceiy products from both outlets—similar to how broadline customers are able to purchase some products from other modes of distribution—did not mean that PNOS was in the same product market as grocery stores. *See id. at 1040 (Brown, J.)* (citing testimony that "Whole Foods competes actively with **[**52]** conventional supermarkets for dry groceries sales, even though it ignores their prices for high-quality perishables"); *id. at 1049 (Tatel, J.)* ("As Judge Brown's opinion explains, this suggests that any competition between Whole Foods and conventional retailers may be limited to a narrow range of products that play a minor role in Whole Food's profitability.").

The court in *Staples* held much the same. There, the question was whether consumable office supplies sold by office superstores constituted a separate product market from office supplies sold elsewhere. *See Staples, Inc., 970 F. Supp. at 1073*. The court acknowledged that no matter who sells them, office supply products—to some extent, like food products—are "undeniably the same." *Id. at 1075*. The court nevertheless held that the sale of office supplies through superstores constituted the relevant product market. "[T]he unique combination of size, selection, depth and breadth of inventory offered by the superstores distinguishes them from other retailers." *Id. at 1079*. Those words apply with equal force to broadline distributors relative to other food distribution channels. *See also Cardinal Health, 12 F. Supp. 2d at 47* (concluding that the wholesale drug industry "provide[s] customers with an efficient way to obtain prescription drugs through centralized warehousing, **[**53]** delivery, and billing services that enable the customers to avoid carrying **[*32]** large inventories, dealing with large number of vendors, and negotiating numerous transactions").

Defendants have not convincingly distinguished *Whole Foods* or *Staples.*[4] Instead, they urge the court to look to *United States v. Sungard Data Sys., Inc., 172 F. Supp. 2d 172 (D.D.C 2001)*, as an analogous case. There, the question was whether different types of disaster recovery services for computer data comprised the same product market. *Id. at 183*. The court rejected the government's product market definition as limited only to shared hotsite services because "the government's market contains an extremely heterogeneous group of customers," *id. at 182*, who "are simply too varied and too dissimilar to support any generalizations," *id. at 193*. Here, it is unquestionably true that foodservice distribution customers are incredibly varied in their needs, buying habits, and price sensitivities. But *Sungard* differs in one critical respect. The court there observed that "the striking heterogeneity of the market, particularly as reflected by the *conflicting evidence relating to customer perceptions and practices*," undercut the government's market definition. *Id. at 182-83* (emphasis added). Here, that simply is not the case.

[4] In neither their opposition to the FTC's motion for preliminary injunction nor their proposed findings of fact and conclusions of law do Defendants attempt to distinguish *Whole Foods* or *Staples*. At oral argument, Defendants distinguished *Staples* based on the fact that in *Staples* the FTC had pricing data to show that prices were lower in markets where both merging firms were present. Closing Arg. Hr'g Tr. at 38-40. Defendants also sought to distinguish *Whole Foods* on the facts, arguing that in *Whole Foods* the defendants could not show that in the event of a price increase consumers of PNOS could go to a standard grocery store. *Id.* at 40-41. But the court finds these efforts **[**55]** to distinguish *Staples* and *Whole Foods* unconvincing. It is true that there was stronger pricing data in *Staples*, but pricing data alone did not lead to the court's conclusion. The factual similarities between this case and *Staples*, particularly the *Brown Shoe* practical indicia, are otherwise strong. As for *Whole Foods*, it is even more factually analogous to this case than is *Staples*. If anything, the proof that other channels of distribution are not reasonable substitutes for broadline is more compelling in this case than the evidence in *Whole Foods* that ordinary grocery stores are not a reasonable substitute for PNOS.

Though the customers **[**54]** may be varied, the court has little doubt that the industry, from the perspective of both sellers and buyers, perceives broadline to be a separate mode of food distribution. Witnesses of all stripes had little trouble distinguishing among the different channels of distribution, and Defendants offered no evidence of any industry confusion among them. Those facts make this case fundamentally different from *Sungard. See id. at 183* ("Customer responses were also often vague and confused" and product definitions were "consistently unclear.").

Defendants also argue that the FTC's definition of broadline as the relevant market improperly excludes other modes based on "a small number of customers' subjective preferences for broadline distribution." Defs.' Opp'n Br. at 17 (footnote omitted). But the evidence, as it relates to broadline versus other distribution channels, is hardly selective. Defendants' own executives acknowledged the fundamental differences between broadline and other modes of distribution.[5] So, too, did **[*33]** executives of regional broadliners, such as PFG,[6] Shamrock,[7] Reinhart Foodservice,[8] and Shetakis **[**56]** [9]; consortiums, such as UniProl[10]; systems distributors, such as Maines[11]; and cash-and-carry stores, such as Restaurant Depot.[12] Likewise, customers of every size recognized the differences between broadline and the other food distribution modes. In short, this is not the kind of case in which the testimonial evidence failed to demonstrate a consensus among the industry's players regarding the boundaries of the product market.

3. Expert Testimony

Having concluded that the *Brown Shoe* "practical indicia" support a product market for broadline foodservice distribution, the court turns next to the second type of evidence that courts consider in product market definition: expert testimony in the field of economics.***HN16***[] One of the primary methods used by economists to determine a product market is called the "hypothetical monopolist test." This test asks whether a hypothetical monopolist who has control over a set of substitutable products could profitably raise prices on those products. If so, the products may **[**58]** comprise the relevant product market. *See H&R Block, 833 F. Supp. 2d at 51-52*. The theory behind the test is straightforward. If enough consumers are able to substitute away from the hypothetical monopolist's product to another product and thereby make a price increase unprofitable, then the relevant market cannot include only the monopolist's product and must also include the substitute goods. On the other hand, if the hypothetical monopolist could profitably raise price by a small amount, even with the loss of some customers, then economists consider the monopolist's product to constitute the relevant market.

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[5] *See, e.g.*, DX-00319 at 32-36 (Sysco's CEO, William DeLaney, explained that systems is a "tailored, customized approach to certain types of customers" and the "model is not to serve GPO customers"); Hr'g Tr. 1369-70 (DeLaney stated that, compared to cash-and-carry, broadline is a "value package" that includes delivery services and menu consulting); Hr'g Tr. 1452 (David Schreibman of USF stated that "specialty distributors compete by having a broader array of products within their expertise" that "broadliner[s] may not have in [their] portfolio"); Investigat'l Hr'g Tr., PX00580-008-010 at 32-39 (DeLaney explained that broadline and specialty are "two different businesses," whereas broadline distribution includes "a full range of products"); Investigat'l Hr'g Tr., PX00584-060 at 239-40 **[**57]** (Louis Nasir, the Pacific Market President for Sysco, maintained that cash-and-carry stores "don't have the same selection" of products and "also don't have consistent inventory" compared with broadliners); Investigat'l Hr'g Tr., PX00590-011 at 42 (Schreibman stated that he was not aware of a cash-and-carry store that delivers).

[6] *See* PX00429-002-007; Hr'g Tr. 571-73.

[7] DX-00285 at 115-16, 164-66.

[8] DX-00295 at 16-17, 22.

[9] PX00414-001.

[10] DX-00260 at 139.

[11] DX-00264 at 64, 141; PX00424-001 (Maines is predominantly systems, but [TEXT REDACTED BY THE COURT] percent of 2013 revenues were from broadline sales).

[12] DX-00314 at 146-47.

The hypothetical monopolist test, which courts have applied, is set forth in the U.S. Department of Justice and FTC's Horizontal Merger Guidelines. *See* U.S. Dep't of Justice & FTC Horizontal Merger Guidelines § 4.1.1 (2010) [hereinafter Merger Guidelines]; *H&R Block, 833 F. Supp. 2d at 51-52*; *CCC Holdings, 605 F. Supp. 2d at 40*; *Arch Coal, 329 F. Supp. 2d at 120 & n.7*. As stated in the Merger Guidelines:

> ***HN17***[] [T]he test requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products . . . likely would impose at least a small but significant and non-transitory increase in price ("SSNIP") on at least one product in the market, including at least one product sold by one of the merging firms.

[*34] Merger Guidelines **[**59]** § 4.1.1. The SSNIP "is intended to represent a 'small but significant' increase in the prices charged by firms in the candidate market" and is typically assumed to be "five percent of the price paid by customers for the products or services to which the merging firms contribute value." Merger Guidelines § 4.1.2.

As applied to this case, the hypothetical monopolist test asks: If there was only one broadline food distributor, could it profitably raise price by five percent, or would that price increase result in a substantial number of customers moving enough of their spend to other modes of distribution—systems, specialty, or cash-and-carry—such that the price increase would be unprofitable? If the price increase would be profitable, then the relevant product market is broadline distribution; if unprofitable, it means that the relevant market must include at least one other channel of distribution. Each side presented expert testimony from economists who performed the hypothetical monopolist test but who came to different results.

a. Dr. Mark Israel

For its expert economic evidence, the FTC presented the testimony of Dr. Mark Israel, who received a doctorate in economics from Stanford University and **[**60]** now serves as Executive Vice President at Compass Lexecon, a consulting firm. Dr. Israel's testimony served two primary functions. First, he acted as a *de facto* summary witness, synthesizing the mass of testimonial and documentary evidence gathered by the FTC. Dr. Israel's summary of that evidence parallels the discussion in the above sub-sections, so the court does not revisit it here. Second, Dr. Israel conducted a SSNIP test, using what is known as ***HN18***[] an "aggregate diversion analysis." Its purpose is to determine the amount of sales that a hypothetical monopolist of broadline distribution could lose before a price increase becomes unprofitable. *See* *Swedish Match, 131 F. Supp. 2d at 160* (describing the related methodology of "critical loss analysis"); *H&R Block, 833 F. Supp. 2d at 63* (same). A detailed recitation of Dr. Israel's aggregate diversion analysis is necessary because Defendants challenge the basic elements of his work.

HN19[] Aggregate diversion analysis has three basic steps. The first is to determine the threshold aggregate diversion ratio, which is the percentage of customers that would need to stay within the broadline market to make a price increase profitable. *See* *H&R Block, 833 F. Supp. 2d at 63*. This is strictly a mathematical step, with the aggregate diversion ratio a function **[**61]** of the subject product's gross margin. The gross margin is defined as the price of selling one additional product minus the cost of selling the additional product.[13] The second step is to determine the *actual* aggregate diversion—that is, the actual percentage of customers of a single broadliner that would switch to another broadliner after a price increase. "Since these lost sales are recaptured within the proposed market, they are not lost to the hypothetical monopolist." *Id.* As will be seen, this step involved an analysis of Defendants' actual sales data. The final step is to compare the two: if the actual aggregate diversion is greater than the threshold ratio, then the hypothetical monopolist could profitably raise prices and the candidate market is the relevant product market. *See id.* In other words, as applied here, if the percentage of customers of a single broadliner who would switch to another broadliner (as opposed to another mode of **[*35]** distribution) in response to a price increase is greater than the percentage of customers needed to stay within the market to make a price increase profitable, then the relevant product market is properly defined as broadline distribution.

[13] Gross **[**62]** margin is calculated as follows: (Revenue-Cost of Goods Sold)/Revenue.

At step one of his aggregate diversion analysis, Dr. Israel assumed a gross margin of 10 percent, a figure lower than the gross margin contained in the parties' financial reporting.[14] A 10 percent gross margin, according to Dr. Israel, yields a 50 percent threshold aggregate diversion ratio based on a formula devised by two economists, Michael Katz and Carl Shapiro.[15]

Next, Dr. Israel calculated the actual aggregate diversion based on three different data sets. He constructed the first two data sets from national and regional requests for proposals ("RFPs") and "bidding" summary **[**63]** information and documents produced by each Defendant to the FTC. Based on this information, Dr. Israel built a database for each company that tracked, for each bidding opportunity, the incumbent distributor, the winning distributor, and the competing bidders. PX09350-104. Based on Sysco's RFP/bidding data, he found that, when Sysco lost a bid, [over 70%] of the time (based on potential revenue from sales opportunities) it was to another broadliner; the remaining losses were to another mode of distribution. PX09350-056. Based on USF's RFP/bidding data, the percentage was even higher—USF lost to other broadliner [over 70%] of the time. *Id.*

Dr. Israel constructed his third data set from USF's "Linc" database. Linc is a customer relations management tool that USF local sales representatives used until recently to track sales opportunities. The Linc database contains fields that sales representatives can complete to describe a sales opportunity, including a "main competition" field. Dr. Israel assumed that, if USF did not win an opportunity, it was won by the identified "main competitor." The Linc database contained hundreds of thousands of observations, about a third of which included information **[**64]** on the "main competitor." Based on this data, Dr. Israel concluded that [over 70%] of the local sales opportunities lost by USF (again, based on potential revenue of those sales opportunities) were lost to other broadliners. PX09350-056.

At the third step, Dr. Israel compared the aggregate diversion ratio of 50 percent to the actual diversion percentages derived from the three data sets. He concluded that, because each of the three actual diversion percentages was higher than the 50 percent threshold aggregate diversion ratio, broadline distribution was the relevant product market. In other words, Dr. Israel found that only 50 percent of broadline customers would need to remain within the broadline market to make a price increase profitable, while according to three different data sets, the actual percentage of customers who would remain within the broadline market (by switching to another broadliner) was greater than 50 percent. Therefore, Dr. Israel's calculations indicated that broadline distribution was the relevant product market.

[*36] b. Defendants' experts

Defendants mounted an aggressive challenge to Dr. Israel's work through their own expert witnesses. Defendants first presented Dr. **[**65]** Jerry Hausman, a professor of economics at Massachusetts Institute of Technology. Dr. Hausman testified, in short, that Dr. Israel's aggregate diversion analysis was wrong because (i) he used the wrong gross margin and (ii) he used the wrong mathematical formula to calculate the threshold aggregate diversion ratio. According to Dr. Hausman, Dr. Israel excluded certain variable costs from his gross margin. The actual gross margin was not 10 percent, according to Dr. Hausman, but between [TEXT REDACTED BY THE COURT] percent and [TEXT REDACTED BY THE COURT] percent. Also, Dr. Hausman testified that the aggregate diversion formula Dr. Israel used was incorrect and led to an overly narrow market definition.[16] Using the proper margins and the

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[14] Dr. Israel testified that the parties' reported gross margins are between 15 and 20 percent, but to be conservative he used a 10 percent margin. Hr'g Tr. 1004-05.

[15] The Katz-Shapiro formula that Dr. Israel used is L = X/(X + M), where L is the aggregate diversion ratio, or "critical loss," X is the price increase, and M is the margin. PX09350-055 at n.134. For his aggregate diversion analysis, Dr. Israel used a 10 percent price increase and a 10 percent margin, for a resulting critical loss of 50 percent, *i.e.*, .50 = .10/(.10 + .10). Hr'g Tr. 1004-07.

[16] According to Dr. Hausman, the correct formula is L = X/M, where L is the aggregate diversion ratio, or "critical loss," **[**66]** X is the price increase, and M is the margin. Dr. Hausman testified that this is the more appropriate formula in an asymmetric

correct formula, Dr. Hausman opined, the aggregate diversion ratio is not 50 percent, but rather over 100 percent, which is an impossibility (*i.e.*, more than 100 percent of customers cannot switch in response to a price increase). Thus, he concluded, the relevant product market is not broadline, but all channels of food distribution.

While Dr. Hausman challenged Dr. Israel's calculation of the threshold aggregate diversion ratio, Defendants' other expert, Dr. Timothy Bresnahan, a professor of economics at Stanford University, critiqued Dr. Israel's use of the RFP/bidding and Linc data sets to calculate the actual aggregate diversion. Regarding the RFP/bidding data, Dr. Bresnahan described the data as contrived and unreliable—a point that Defendants consistently articulated to the FTC during the investigation phase. Dr. Bresnahan explained that the companies do not keep comprehensive RFP or bidding data in the ordinary course of business and that the information Dr. Israel relied upon **[**67]** was pulled together at the insistence of the FTC, in part based on employees' unreliable notes and memories. As for the Linc data, it too was flawed, Dr. Bresnahan suggested, because it is a prospective sales database, not an actual transactions database in which USF sales personnel were accurately recording wins and losses. Moreover, neither the RFP/bidding data nor the Linc data describes whether Sysco or USF lost a customer for a price-based reason or some reason having nothing to do with price.

c. The court's finding as to the expert testimony

Having weighed the competing expert testimonies and considered them in light of the evidentiary record as a whole, the court finds Dr. Israel's aggregate diversion analysis and conclusion to be more persuasive than that advanced by Defendants' expert, Dr. Hausman.[17] Dr. Israel's **[*37]** reliance on the RFP/bidding and Linc data sets for calculating the aggregate diversion is problematic for the reasons Defendants have identified and, for those reasons, the court hesitates to rely on Dr. Israel's precise aggregate diversion percentages. But, when evaluated against the record as a whole, Dr. Israel's conclusions are more consistent with the business realities **[**68]** of the food distribution market than Dr. Hausman's. *See* Cardinal Health, 12 F. Supp. 2d at 46 (stating that "the ***HN20***[] determination of the relevant market in the end is 'a matter of business reality—[ ] of how the market is perceived by those who strive for profit in it.'" (alteration in original) (quoting *FTC v. Coca-Cola Co., 641 F. Supp. 1128, 1132 (D.D.C. 1986)*, *vacated as moot*, *829 F.2d 191, 264 U.S. App. D.C. 406 (D.C. Cir. 1987)*); *Arch Coal, 329 F. Supp. 2d at 116* ("[A]ntitrust theory and speculation cannot trump facts[.]"); *H&R Block, 833 F. Supp. 2d at 65* (bearing in mind the shortcomings of the expert's analysis and treating the analysis as "another data point" in determining the relevant market, rather than as conclusive).

The court finds Dr. Hausman's conclusion—that the actual aggregate diversion ratio is greater than 100 percent—inconsistent with business reality. On cross-examination, Dr. Hausman admitted that his conclusion meant that a hypothetical monopolist who had control over ***[**69]*** *every single broadline distributor* in the country could *not* profitably impose a SSNIP on customers, because enough customers would switch to other channels of distribution. Hr'g Tr. 2003-04. Yet many industry leaders testified either that other channels of distribution did not constrain the prices charged by broadliners or that other channels were not substitutes for broadline distribution. For instance, PFG's President and CEO, George Holm, testified that systems and specialty distributors do not significantly affect the pricing and services that PFG's broadline division offers to its customers. Hr'g Tr. 575-76. He also testified that systems and specialty distributors were not substitutes for broadliners. Hr'g Tr. 573. Such evidence from industry leaders,[18] which the court credits, contradicts Dr. Hausman's conclusion that a hypothetical monopolist of broadline

market, like food distribution, which involves suppliers and customers with different costs, different types of customers, and a different mix of products. Hr'g Tr. 1960-64; DFF at 285-86 (citing to DX-05028 at 11). The formula used by Dr. Israel, on the other hand, is more appropriate in a symmetric market, that is, a market marked by homogeneity among suppliers and customers. Hr'g Tr. 1960, 1965-66; DX-05028 at 10-11.

[17] In finding Dr. Israel's conclusion more persuasive than that advanced by Defendants' expert, the court might be doing more than it is required to do. As Judge Tatel stated in *Whole Foods*: ***HN21***[] "Although courts certainly must evaluate the evidence in *section 13(b)* proceedings and may safely reject expert testimony they find unsupported, they trench on the FTC's role when they choose between plausible, well-supported expert studies." ***Whole Foods, 548 F.3d at 1048 (Tatel, J.)***.

[18] *See also* PX00429-004-007 (George Holm, President and CEO of PFG, explaining that systems, specialty, and cash-and-carry distributors are not substitutes for customers needing broadline distribution); DX-00285 at **[**70]** 125-26 (John Roussel,

services would not be able to impose a SSNIP because enough customers would switch to other channels of distribution.

4. Conclusion as to the Broadline Product Market

In conclusion, based on the vast record of evidence the parties have presented, the court finds that the FTC has carried its burden of demonstrating that broadline distribution is the relevant product market.

B. National Broadline Distribution as a Relevant Product Market

The FTC asserts that, within the broader product market for broadline distribution, there is a narrower but distinct product market for "broadline foodservice distribution services sold to National Customers." Compl. ¶ 44. According to the FTC, "[d]ue to [their] geographic dispersion, **[*38]** National Customers typically contract with a broadline foodservice distributor that has distribution centers proximate to all (or virtually all) of their locations." *Id.* ¶ 42.

> National Customers typically contract with a broadliner that **[**71]** can provide—across all of their locations—product consistency and availability, efficient contract management and administration (e.g., centralized ordering and reporting, a single point of contact, and consistent pricing across all locations), volume discounts from purchasing, and the ability to expand geographically with the same broadline foodservice distributor.

Id. National customers include healthcare GPOs; foodservice management companies; and large hotel and restaurant chains. *Id.* ¶ 41. The FTC contends that Sysco and USF "are the only two single-firm broadline distributors with national geographic reach and, as such, are best positioned to serve National Customers." *Id.* ¶ 63.

Defendants vigorously dispute that there is such a thing as a "National Customer." They contend that a product market built around so-called national customers is "contrived," Defs.' Opp'n Br. at 16, and that the FTC's distinction between national and local customers is "factually and economically meaningless," *id.* at 13. They counter that the national-local distinction is not, as the FTC claims, built on differentiating customer characteristics, but is improperly based on an administrative distinction as to whether **[**72]** the customer prefers to be managed at the corporate level (making it a "national" customer) or at the local distribution center (making it a "local" customer). *Id.* at 12-15. The so-called national customer category, they also argue, is improperly based on a "few core customers who say they prefer the merging parties." *Id.* at 13. In addition, Defendants assert that Dr. Israel did not perform a SSNIP test to assess the existence of a national customer market. *Id.* at 12.

1. Legal Basis for Defining Relevant Product Market Based on Customer Type

Before turning to the evidence, the court first considers the legal basis for defining a product market based on a type of customer. Neither side comprehensively addressed this issue. Admittedly, defining a *product* market based on a type of *customer* seems incongruous. After all, one ordinarily thinks of a customer as purchasing a product in the market, and not as the product market itself. But, in this case, according to the FTC, the national customer and broadline product converge to define a market for broadline products sold to national customers. Broadline distributors must offer a particular kind of "product"—a cluster of goods and services that can be delivered across a **[**73]** broad geographic area—to compete for national customers. In that sense, the customer's requirements operate to define the product offering itself.

The clearest articulation of this approach to product market definition comes from the Merger Guidelines. ***HN22***[] The Merger Guidelines are not binding, but the Court of Appeals and other courts have looked to them for guidance

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COO of Shamrock Foods, stating that it's "not possible" or "practical" for a broadline customer to use a systems distributor); DX-00260 at 139 (Bob Stewart, interim CEO of Unipro, explaining that a broadline customer cannot easily switch to a systems distributor and a broadline customer's needs are different than a systems customer's needs).

in previous merger cases. *See, e.g., Heinz, 246 F.3d at 716 n.9*; *H&R Block, 833 F. Supp. 2d at 52 n.10*. Section 4.1.4 of the Merger Guidelines provides that "[i]f a hypothetical monopolist could profitably target a subset of customers for price increases, the Agencies may identify relevant markets defined around those targeted customers, to whom a hypothetical monopolist would profitably and separately impose at least a SSNIP." Merger Guidelines **[*39]** § 4.1.4. Markets to serve targeted customers are also known as "price discrimination markets." *Id.* Professors Areeda and Hovenkamp have endorsed market definition of this kind, as well: "Successful price discrimination means that the disfavored geographic or product class is insulated from the favored class and, if the discrimination is of sufficient magnitude, should be counted as a separate relevant market." 2B Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law**: **[**74]** An Analysis of Antitrust Principles and Their Application* ¶ 534d (3d ed. 2007). The concern underlying price discrimination markets is that certain types of captured or dedicated customers could be targeted for monopolist pricing even if a price increase for all customers would not be profitable. *See* Merger Guidelines § 3; Areeda & Hovenkamp 3d ed., *supra*, ¶ 533d ("[S]ellers may be able to discriminate against buyers who have fewer alternatives or for whom the product performs a more valuable function[.]").

Defining a market around a targeted customer, as the FTC urges here, is not free from controversy, as the different opinions in *Whole Foods* demonstrate.[19] Relying on an earlier version of the Merger Guidelines that recognized price discrimination against "targeted buyers," Judge Brown explained that "core consumers"—in that case, those committed to premium and natural organic supermarkets—"can, in appropriate circumstances, be worthy of antitrust protection." *Whole Foods, 548 F.3d at 1037 (Brown, J.)* (citing DOJ and FTC, 1992 Horizontal Merger Guidelines § 1.12, 57 Fed. Reg. 41,552, 41,555 (1992)). Judge Brown went on to say:

> In particular, when one or a few firms differentiate themselves by offering a particular package of goods or services, it is quite possible for there to be a central **[**75]** group of customers for whom "only [that package] will do." . . . Such customers may be captive to the sole supplier, which can then, by means of price discrimination, extract monopoly profits from them while competing for the business of marginal customers.

Whole Foods, 548 F.3d at 1038 (Brown, J.) (quoting *Grinnell, 384 U.S. at 574*) (alteration in original).

Judge Kavanaugh, in dissent, rejected defining a market around a "core customer." *Whole Foods, 548 F.3d at 1062* (Kavanaugh, J., dissenting). According to Judge Kavanaugh, "there is no support in the law for that singular focus on the core customer. Indeed, if that approach took root, it would have serious repercussions because virtually *every* merger involves some core customers who would stick with the company regardless of a significant price increase."[20] *Id.* The relevant question for market definition, according to Judge Kavanaugh, is not whether a die-hard **[*40]** group of core customers would be impacted by a substantial **[**76]** price increase, but whether the merged company "could increase prices by five percent or more without losing so many marginal customers as to make the price increase unprofitable." *Id.*

2. Evidence Supporting a National Broadline Product Market

Ultimately, the court here need not resolve the *Whole Foods* disagreement over defining a market around a "core" customer. That is because the ordinary factors that courts consider in defining a market—the *Brown Shoe* practical

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[19] The FTC cites to the "distinct customers" factor in *Brown Shoe* as support for defining a market around a targeted customer. However, *Brown Shoe* only listed "distinct customers" as one of many factors for courts to consider in defining a market. *Brown Shoe, 370 U.S. at 325*. It did not endorse defining a market around a group of targeted customers.

[20] The Merger Guidelines do not, for instance, set forth how a court is to distinguish a "targeted" group of customers from customers in general. This gives rise to the question of what limiting principles or factors a court should apply in defining a price discrimination market. Absent limitations, price discrimination against a single customer might be used to justify blocking a merger. This is not a mere theoretical possibility. According to the Merger Guidelines, "Off prices are negotiated individually with customers, the hypothetical monopolist test may suggest relevant markets that are *as narrow as individual customers*." Merger Guidelines § 4.1.4 (emphasis added).

indicia and the Merger Guidelines' SSNIP test—support a finding **[**77]** that broadline distribution to national customers is a relevant product market. *See, e.g.*, Areeda & Hovenkamp 3d ed., *supra*, ¶ 533d ("If the defendant *can* profit by charging pharmacies a price significantly over its cost, then the pharmacy sales are a relevant market[.]").

a. Industry and public recognition

Among the most compelling evidence supporting a product market for national customers is the fact that regional broadliners have formed cooperatives, such as DMA and MUG, to compete for customers with a geographically dispersed footprint. Regional distributors, because of their limited footprints, do not have the capacity to serve customers with multi-regional needs across all of their locations. Only Sysco and USF have that capacity. These cooperatives were formed specifically to compete against Sysco and USF, by enabling regional competitors to combine to provide nationwide or multi-regional delivery and, importantly, to offer a single point of contact for the customer. Dan Cox, the President and CEO of DMA, explained that DMA was formed in 1988 as a competitive response to Sysco's merger with another company, Continental. *See* PX00565-051 at 202. He explained that "[w]hen that industry **[**78]** event took place, it was the first time that there was truly a national platform for foodservice distribution." *Id.* Put simply, business ventures like DMA would not exist if there were not a separate market for customers who have national or multi-regional distribution needs. *See* Rothery Storage, 792 F.2d at 218 n.4 (stating that courts must "assume that economic actors usually have accurate perceptions of economic realities").

Equally compelling evidence of the national-local distinction comes from a report done by the management consulting firm, McKinsey & Co., whom Sysco hired to assist with merger integration. After closely analyzing the two companies' operations, McKinsey prepared a presentation in July 2014, titled "National, Intermediate, and Field Coverage Models." The presentation observed that "Sysco and US Foods have different approaches to *grouping customers* and determining service models. . . . Both companies effectively operate two service models with distinct capabilities to serve *two types of customers*." PX09010-002 (emphasis added). The presentation described "National Customers" as those who "use complex contracts with margin schedules, make online purchases of proprietary products, require auditing **[**79]** support, and coordinate across multiple markets." *Id.* By contrast, "Field Customers" were those who "make weekly purchases through in-person consultations, receive specialist support tailored to independent restaurants, require minimal auditing support, and operate in 1 or few markets." *Id.* McKinsey further observed that national customers' "requirements" included "[s]et margin schedule contract[s]"; "[e]fficient ordering across multiple locations"; "Marge number[s] of deviated, proprietary and close-coded **[*41]** products"; "[r]egulatory and audit support"; "[i]n-depth reporting"; and "[c]onsistency of service, pricing and products across multiple [m]arkets." PX09010-004. Field customers' "requirements," on the other hand, included the "[a]bility to make decisions each week along with consultation"; "[a]ccess to national, commodity, and some proprietary products"; "[f]ull business, culinary, and product support for independent businesses"; and "minimal" "[c]oordination across geographies." *Id.* McKinsey ultimately recommended that the companies recognize and build a new service model around a third kind of customer—an "Intermediate" customer—who would be identifiable based on five variables: (i) national contract/no contract; (ii) nature of industry; (iii) number of markets; (iv) number of regions; **[**80]** and (v) size of annual sales. PX09010-007. The McKinsey presentation identified as "conclusively" national those customers who operate in three or more markets or two or more regions. *Id.*

McKinsey is not the only industry analyst or expert to acknowledge that national customers form a market distinct from local buyers. Cleveland Research Company, an investment research firm, produced an analyst report on Sysco after the merger's announcement and recognized that Sysco and USF serve a distinct group of national customers. One of the report's conclusions was that "Sysco/USF will [be] able to keep most of their larger contracted and *national account customers* for the near- and medium-term due to national scale and existing contracts . . . . Based on our research, most national operators prefer to deal with one distributor because it is more efficient and less expensive than dealing with several regional players." PX09332-006 (emphasis added).

The industry's trade group, the International Food Distributors Association ("IFDA"), also recognizes a distinction between national and local customers. IFDA produces a Quarterly Operations survey that reports separate sales figures for "national" **[**81]** and "street" accounts. PX00570-004 at 78. IFDA's President, Mark Allen, explained that

IFDA distinguishes between the two because "the dynamics between the two [types of] businesses might be a little bit different. The operating metrics might be a little bit different." *Id.* at 80.

Defendants' ordinary course documents also recognize the national-local distinction and tout their strategic advantage as to the former. *See* *H&R Block, 833 F. Supp. 2d at 52* (***HN23***[] "When determining the relevant product market, courts often pay close attention to the defendants' ordinary course of business documents."). A Sysco "Investor Day" presentation from 2010 distinguishes the company's "Contract Sales (Broadline)" from "Street Sales," PX03101-010, and separates its "Key Competitors - National," from regional competitors, PX03101-020. Similarly, a presentation entitled "Board of Directors Strategy Sessions," dated July 2010, distinguishes between Sysco's market size for "corporate contracts"—defined to include "major foodservice management (FSM) sales, major group purchasing organization (GPO) sales, and major chain sales (non FSM or GPO)"—and "Street" business. PX01008-006.

USF has similar documents. An internal USF presentation, titled "Business **[**82]** Overview," describes "[USF's] Customers" as falling into three categories: (i) "Street: Independent restaurants or small local chains"; (ii) "National Accounts: Contracted customers located across the country," including acute and long-term healthcare facilities, hotels and the hospitality industry, **[*42]** schools, and U.S. military and government agencies; and (iii) "National Chain Restaurants: Fast food and quick-serve establishments." PX03122-004. *See also* PX03034-006 (similarly categorizing the company's customers). A USF "Investor Presentation" from November 2012 describes USF as the "2nd" largest national broadline distributor," PX03000-006, and touts its "[a]bility to leverage our national scale to cost effectively service customers nationally," PX03000-014. Further, it distinguishes between "National Scale," where "US Foods is the second-largest broadline foodservice distributor in the U.S.," and "Local Scale," where "US Foods is estimated #1 or #2 position in [TEXT REDACTED BY THE COURT] of served markets," PX03000-014. *See also* PX03007-007 (internal document in which KKR & Co., one of USF's private equity owners, distinguishes between "Street and National Account customer segments").

Other **[**83]** key players in the industry also recognize that national customers are different. For instance, the President and CEO of PFG, George Holm, agreed that "Sysco and US Foods are the only two distributors for broadline with the capability to serve national broadline customers with locations dispersed throughout the United States," including foodservice management companies, GPOs, large healthcare systems, and certain restaurant chains. Hr'g Tr. 596. Representatives of DMA and Reinhart likewise referred to national customers as those that are geographically dispersed and need a single point of contact. *See* PX00412-002-003; PX00415-004.

b. Distinct customer needs

There is ample record evidence that national customers' needs differ from those of local customers. The McKinsey analysis described above concisely summarized those distinctions. PX09010-004.

For starters, national customers, because of their dispersed geographic presence, often require a broadliner to meet their foodservice needs in more than one region. As a result, the number of distribution centers in a broadliner's network is often an important factor for such customers. In sharp contrast, according to Sysco, "all, or almost all," **[**84]** of its "local contract customers" are served by only one distribution center. PX01400-001.

The Defendants' ordinary course documents highlighted their comprehensive distribution networks as a competitive advantage for serving national customers. *See, e.g.*, PX03000-014 (USF presentation touting its "[a]bility to leverage our national scale to cost effectively service customers nationally"); PX00247-001-002 (USF email communication to [TEXT REDACTED BY THE COURT] describing the "US Foods Value Proposition" as including "Privately held National Distribution footprint company"; "Single IT operating platform nationally"; and a "Single Point of Contact"); PX01062-005 (Sysco presentation to Aramark highlighting that Sysco's "national footprint, strong service approach and our breadth of product offerings is what differentiates us from our competition"). As USF's David Schreibman acknowledged during the evidentiary hearing, "US Foods['] leading national market position is due to US Foods['] geographic presence that includes 62 distribution centers across the United States." Hr'g Tr. 1520-21. He also acknowledged that Sysco was the only company with greater scale than USF. *Id.* at 1522.

In addition to multi-regional **[**85]** distribution capabilities, national customers generally demand a set margin contract that applies across multiple locations. As PFG's George Holm testified, a single contract enables customers to simplify contract administration and to reduce administrative **[*43]** costs. *Id.* at 600-02. Additionally, national customers often use RFPs and/or bilateral negotiations to award broadline foodservice distribution contracts. *Id.* at 1595-97. In sharp contrast, pricing for local or "street" customers, according to Sysco, "[is] ultimately the result of individual negotiations between the customer and [broadliner]" and "can vary on a weekly and even daily basis." PX06057-032.

National customers also seek a single technology platform for handling their purchases. Consolidating purchasing through a single ordering platform creates efficiencies and cost savings, particularly as it relates to managing direct contracts with manufacturers and administering price changes. The importance of this feature is evidenced by DMA's development of a single ordering platform that enables customers to purchase from its members. Indeed, DMA promotes its technology platform as superior to Sysco's and USF's. PX00565-006 at 23-24. If national customers **[**86]** had not demanded such a feature, DMA would not have developed it.

Finally, product consistency is a factor for some national customers, particularly for those who wish to purchase private label products. *See* PX09010-004 (McKinsey report identifying as a "Customer requirement[]" for "National" customers "consistency of service, pricing, and products across multiple Markets"). Large customers can achieve a high degree of product consistency through direct contracting with product manufacturers or by purchasing proprietary brands stocked by Defendants. DX-01359 at 73 (Dr. Bresnahan report observing that "one way customers that value consistency achieve it is through direct negotiation with manufacturers to create propriety products" and that "[c]ustomers can also rely on national brands to ensure consistency"). However, because private label goods offer a strong value benefit, if a national customer wishes to purchase such goods and have them available across all of its locations, it can do so most efficiently through a broadliner with national geographic scope. *See* Hr'g Tr. 600 (George Holm of PFG stating that one reason national customers prefer to contract with Sysco or USF is that "[w]here they have **[**87]** a preference for a private brand, [ ] it is the same product [across] their system").

c. Defendants' Operations

Both Sysco and USF operate dedicated sales groups from their national headquarters that are responsible for negotiating and managing contracts with customers who use multiple distribution centers. *See* *Grinnell, 384 U.S. at 572-74* (holding that ***HN24***[] centralized station security services operated on a national level is a relevant product market). Sysco refers to these customers as "corporate multi-unit customers," or CMUs. USF refers to them as "national sales customers." According to USF's Senior Vice President for National Sales, Tom Lynch, each national customer in his group has a single USF representative who is responsible for that customer. The largest customers are assigned a full-time dedicated employee to manage the account. PX00517-014-015 at 56-58.

d. SSNIP Test

Contraiy to what Defendants contend, Dr. Israel did perform a SSNIP test to determine whether there is a separate product market for national customers. That SSNIP test was performed as an element of the SSNIP test that Dr. Israel used to assess whether broadline distribution was a relevant product market. As Dr. Israel testified, he applied **[**88]** to national customers the same 10 percent gross margin that he used to calculate the aggregate diversion ratio for all customers. Hr'g Tr. 1005 (stating that he used a 10 percent **[*44]** gross margin "to both local and national customers"). He derived the actual diversion for national customers based on the RFP/bidding data provided by the defendant companies. *Id.* at 1009 (describing the "RFP/bidding data" as "really national [customer] data"). Using the same methods discussed above, Dr. Israel calculated the actual diversion for Sysco's national customers to be [over 70%] and the actual diversion for USF's national customers to be [over 70%]. In other words, over [70%] of the time (based on potential revenue from sales opportunities), when Sysco or USF lost a bid opportunity for a national customer, it was to another broadliner. Because these percentages were greater than the aggregate diversion ratio of 50 percent, Dr. Israel concluded that broadline service to national customers was a relevant market. In other words, Dr. Israel found that only 50 percent of national broadline customers would need to remain within the broadline market to make a price increase profitable, while the actual percentage **[**89]** of national customers who would remain within the broadline market (by switching to another broadliner) was greater than 50 percent. Dr. Israel's calculations, therefore, indicated that broadline distribution to national customers was the relevant product market.

The court already has expressed its reservations about relying on the RFP/bidding data to precisely calculate the aggregate diversion ratio. But, as before, the court finds that the ultimate conclusion of the SSNIP test—that broadline foodservice to national customers is a relevant product market—is supported by the weight of the evidence. Numerous national customer witnesses testified that other channels of distribution were not adequate substitutes for broadline distribution.[21] Although Defendants have shown that some national customers who were served by broadliners are now served by systems or systems-like distributors—most notably, Subway and Five Guys—those are the exceptions. Subway and Five Guys, because of their limited menus, are more amenable to substituting to a systems model. The same simply cannot be said of other large national customers, like GPOs, foodservice management companies, and hospitality chains, which **[**90]** rely heavily on broadliners.

e. Defendants' arguments against a national customer market

Asserting that there **[**91]** is no separate product market for national broadline customers, Defendants first argue that the national-local distinction is "arbitrary" because it is based on nothing more than customer preference about account management. Defendants' executives testified that Sysco's CMU customers and USF's national customers are so designated, not because of any particular characteristic or group of characteristics, but purely because the customer prefers to have its **[*45]** account managed by the headquarters sales team, instead of by its local distribution center. The FTC's and Dr. Israel's reliance on the companies' administrative designation, Defendants argue, leads to arbitrary classifications. For example, some of Defendants' customers who use a small number of distribution centers are counted by the FTC as "national" customers. As Dr. Hausman demonstrated, 37 percent of Sysco's CMU customers use five or fewer distribution centers and 55 percent use ten or fewer. And, for USF, 51 percent of their national customers use five or fewer distribution centers and 67 percent use ten or fewer. Hr'g Tr. 1976. Additionally, similarly situated customers—in terms of size, number of distribution centers, revenues, **[**92]** etc.—are sometimes treated differently. One customer may be identified as national and another as local, simply because one prefers to be managed from headquarters and the other from the local distribution center.

Defendants are correct that their "national" customer lists are over-inclusive—not every customer on those lists has multi-regional distribution needs. And they are also correct that the FTC could have more accurately defined a class of "national" customers by testing each candidate national customer against specific "national" criteria, such as the number of distribution centers used. But, ultimately, for the purpose of defining a product market, the court finds that the parties'"national" customer designation is a useful proxy for customers requiring geographically dispersed distribution and attendant services.

As the graphic below prepared by Dr. Israel shows, if the merger were to occur, a significant proportion of the combined company's national customer revenues would come from customers who use a large number of distribution centers. PX09375-077, Figure 3. National customers using more than 35 distribution centers would account for [TEXT REDACTED BY THE COURT] percent **[**93]** of a merged Sysco-USF's revenue; national customers using more than 24 distribution centers would account for [TEXT REDACTED BY THE COURT] percent of revenue; and national customers using at least 10 distribution centers would account for [TEXT REDACTED BY THE COURT] percent of revenue. Those figures demonstrate that Defendants' national-customer designations capture those key customers (based on revenues) who use a large number of distribution centers. The "national"

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[21] *See* Hr'g Tr. 143-145 (Christine Szrom, fact witness for U.S. Department of Veteran Affairs, explaining that she is not familiar with systems distribution and could "absolutely not" use a cash-and-carry distributors); Hr'g Tr. 214-17 (James Thompson, Head of Procurement for Interstate Hotels and Resorts, stating that "it would be very difficult if not impossible" to operate Interstate's foodservice distribution without a broadliner and that specialty is not a substitute for broadline distribution); PX[TEXT REDACTED BY THE COURT]-002 (Joan Ralph, Group Vice President at Premier, Inc., saying that "[e]ven if we choose one day to contract with systems distributors, specialty distributors, or cash and carry stores, each would be as additional, distinct service for our members who may need a quick, last-minute item or two; none could replace or serve as a substitute for broadline distribution services"); PX[TEXT REDACTED BY THE COURT]-002 ([TEXT REDACTED BY THE COURT], noting that [TEXT REDACTED BY THE COURT] cannot contract with a systems distributor or use other forms of distribution).

designation includes, among others, the largest GPOs, like Premier, Novation, and MedAssets, each of whom uses over [TEXT REDACTED BY THE COURT] distribution centers; the largest foodservice management companies, like Sodexo, Aramark, and Compass, each of whom uses more than [TEXT REDACTED BY THE COURT] distribution centers; the largest hotel management company, Hilton, which uses [TEXT REDACTED BY THE COURT] distribution centers; and the second largest government customer, the U.S. Department of Veterans Affairs, which uses [TEXT REDACTED BY THE COURT] distribution centers (the largest is the U.S. Department of Defense, which uses [TEXT REDACTED BY THE COURT] distribution centers). PX09375-076, Table 5. Thus, for these **[**94]** customers, the label "national" is not merely administrative; it accurately reflects this high revenue-generating group's actual needs. The fact that some smaller customers are included among the Defendants'"national" designations does not mean that the designation lacks evidentiary value for defining a market for national customers.

[redacted]

Next, Defendants assert that defining a price discrimination market around national customers is untenable because the FTC **[*46]** failed to show that so-called national customers shared any objectively observable characteristics that would enable the combined company to price discriminate against that group. *See* Merger Guidelines § 3 (stating that "differential pricing" is an essential element of price discrimination, which "may involve" offering different pricing to different types of customers "based on observable characteristics"). In other words, they argue that this grouping of customers is so heterogeneous that there is no common, identifiable characteristic that could serve as a proxy for determining which customers in the broadline market have inelastic demand.

Defendants are undoubtedly correct that, even among their largest customers, there is great variety **[**95]** in the customers' servicing needs and requirements. But price discrimination can occur even when customers do not have common observable characteristics. ***HN25***[] As the Merger Guidelines state, markets for targeted customers may exist "when prices are individually negotiated and suppliers have information about customers that would allow a hypothetical monopolist to identify customers that are likely to pay a higher price for the relevant product." Merger Guidelines § 4.1.4; *see also* Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 Antitrust L.J. 49, 93 (2010) (observing that, in markets for intermediate goods and services, "prices typically are negotiated and price discrimination is common").

Here, the evidence is clear that Defendants engage in individual negotiations with their national customers and possess substantial information about them. Indeed, the fact that Defendants employ substantially more sales representatives than other broadliners, PX09350-218, Table 30, and assign full-time dedicated employees to some of their largest customers is indicative of the "know-your-customer" philosophies of both firms. Defendants, therefore, already have substantial customer information that **[**96]** would allow them to predict which of their customers have inelastic demand and which do not. Price discrimination can occur in such a marketplace, even if the targeted customers do not share specific identifiable traits.

Finally, Defendants contend that a product market of targeted national customers does not comport with business realities. This argument has two main elements. First, they assert that, contrary to what the FTC contends, Compl. ¶¶ 5, 42, national customers do not require a broadline foodservice distributor that is national in scope. Rather, they argue, even at current prices, many large customers spread their distribution needs over multiple regional suppliers. For instance, Defendants cite GPOs, like [TEXT REDACTED BY THE COURT], [TEXT REDACTED BY THE COURT], Amerinet, and large government agencies, like the Defense Logistics Agency, as using a regional contracting approach. Defs.' Opp'n Br. at 15. They also refer to one of the largest foodservice management companies, Sodexo. which splits its distribution into [TEXT REDACTED BY THE COURT] regions. *Id.* And, then there is Subway and Five Guys, two large chain restaurants that have regionalized and purchase from multiple **[**97]** suppliers. *Id.* at 15-16. Because these types of customers can regionalize or credibly threaten to regionalize. Defendants argue, the merged company would not be able to discriminate against them on price.

But Defendants' argument founders when faced with the actual purchasing habits of the industry's largest customers. The evidence shows that the bulk of the bloodline purchasing done by most geographically dispersed broadline customers is still done through Sysco and USF. Of Avendra's members' broadline spend, [TEXT REDACTED BY THE COURT] **[*47]** percent is with Sysco and USF. Pl.'s Corrected Proposed Findings of Fact and Conclusions of Law, ECF No. 173 at 114 [hereinafter PFF]. Members of other GPOs similarly purchase a large percentage of their goods from Sysco and USF. The total broadline spend of Premier,[22] Novation, MedAssets, and HPSI members with Sysco and USF is, respectively, [TEXT REDACTED BY THE COURT] percent, [TEXT REDACTED BY THE COURT] percent, [TEXT REDACTED BY THE COURT] percent, and [TEXT REDACTED BY THE COURT] percent. *Id.* at 113-15; FTC Closing Arg. Slides at 35. Large foodservice management companies similarly make the bulk of their broadline purchases from Sysco and UST'. Sodexo, Aramark, Compass and Centerplate, respectively, **[**98]** spend [TEXT REDACTED BY THE COURT] percent. [TEXT REDACTED BY THE COURT] percent, [TEXT REDACTED BY THE COURT] percent, and [TEXT REDACTED BY THE COURT] percent of their broadline foodservice distribution dollars with Sysco and USF. PFF at 113-16; FTC Closing Arg. Slides at 35. The story is similar for large hospitality customers. Two of the largest, Hilton and Interstate, allocate [TEXT REDACTED BY THE COURT] percent and [TEXT REDACTED BY THE COURT] percent of their broadline spend, respectively, to the two companies. PFF at 114, 116; FTC Closing Arg. Slides at 35. Even the Defense Logistics Agency, which contracts regionally, dedicates [TEXT REDACTED BY THE COURT] percent of its broadline spend to Sysco and USF. PFF at 116; FTC Closing Arg. Slides at 35.

The court infers from this evidence that geographically dispersed customers view Sysco and USF as having significant comparative advantages over regional distributors, particularly because of their far-reaching distribution networks. Though some customers have spread their business over multiple broadliners, a significant portion (as measured by total revenues) have not. Indeed, PFG's George Holm observed that the "*clear trend* ***[**99]*** amongst national broadline customers is to move toward a single nationwide provider." Hr'g Tr. 598 (emphasis added); PX09081-002 (letter from PFG's counsel to FTC, dated November 14, 2014, stating the same). *See [Brown Shoe, 370 U.S. at 332]* (footnote omitted) ("Another important factor to consider is the trend toward concentration in the industry."). Mr. Holm further admitted that either Sysco or USF essentially wins every RFP issued by a national customer. Hr'g Tr. 598-99. And PFG acknowledged by letter to the FTC that, even as the country's third-largest broadliner, "PFG has difficulty competing for national broadline accounts because it does not have a nationwide footprint of broadline distribution centers." PX09081-001. Other large regional broadliners have said the same about their own businesses models.[23] Defendants' contention—that a product market defined around national customers

[22] As to Premier, the person responsible for its foodservice program, Joan Ralph, testified that [FOOTNOTE REDACTED BY THE COURT]. Hr'g Tr. 474; PX00475-001-0002.

does not comport with business reality because such customers have regionalized or can regionalize—is thus belied by the record evidence.

Second, Defendants argue that margin data shows that, as a merged entity, they would not be able to price discriminate against national customers. Dr. Hausman demonstrated that Defendants' margin on sales to customers who use fewer distribution centers is actually *higher* than their margin on sales to those who use more. DX-01355 at 58-61. Defendants contend **[*48]** that under the FTC's theory, they presently have a duopoly as to national customers, yet they do not earn duopoly profits on that customer class. Defendants thus maintain that, just as they cannot today price discriminate to earn duopoly profits, they would not be able to price discriminate after the merger to earn monopoly profits.

Defendants' argument, however, is unconvincing. Defendants' present inability to earn duopoly profits on national customers is probably because large customers can keep prices down by leveraging the defendant companies against one another. As the Cleveland Research Company observed: "Based on our research, **we believe both Sysco and US Foods have priced each other down competing for larger national/regional [**101] contract accounts** over the last several years." PX09332-004. The ability of large buyers to keep prices down, functioning as what is known in antitrust literature as "power buyers," *see* *Cardinal Health, 12 F. Supp. 2d at 58-59*; Merger Guidelines § 8, depends on the alternatives these large buyers have available to them, *see* Shapiro, *supra*, at 95; Areeda & Hovenkamp 3d ed., *supra*, ¶ 943a. If a merger reduces alternatives, the power buyers' ability to constrain price and avoid price discrimination can be correspondingly diminished. *See* Merger Guidelines § 8 ("Normally, a merger that eliminates a supplier whose presence contributed significantly to a buyer's negotiating leverage will harm that buyer."). Thus, the fact that Defendants are currently unable to price discriminate against national customers does not mean that they would be unable to do so as a merged firm.

C. Product Market Summary

Having considered and weighed the parties' arguments and evidence, the court concludes that the FTC has carried its burden of showing that, for purposes of merger analysis, (i) broadline foodservice distribution is a relevant product market, and (ii) broadline foodservice distribution to national customers is also a relevant product market.

D. Relevant Geographic [**102] Market

The court now turns to the second part of defining the relevant market, which involves determining the relevant geographic market. ***HN26***[] The Supreme Court has stated that, for *Section 7 of the Clayton Act*, the relevant geographic market is "the area in which the goods or services at issue are marketed to a significant degree by the acquired firm." *Marine Bancorp., 418 U.S. at 620-21*. Stated differently, "[t]he proper question to be asked. . . [is] where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." *Phila. Nat. Bank, 374 U.S. at 357*; *see also* *Cardinal Health, 12 F. Supp. 2d at 49* (citation omitted) (internal quotation marks omitted) (stating that the relevant geographic market is "the area to which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition"). Like the product market, the geographic market must "correspond to the commercial realities of the industry and be economically significant." *Brown Shoe, 370 U.S. at 336-37* (footnote omitted) (internal quotation marks omitted). The Supreme Court has recognized that an "element of 'fuzziness would seem inherent in any attempt to delineate the relevant geographical market," and therefore "such markets need not—indeed cannot—be defined with scientific **[**103]** precision." *Conn. Nat. Bank, 418 U.S. at 669* (quoting *Phila. Nat'l Bank, 374 U.S. at 360 n.37*). That said, the **[*49]** relevant geographic market "must be sufficiently defined so that the [c]ourt understands in which part of the country competition is threatened." *Cardinal Health, 12 F. Supp. 2d at 49*.

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[23] *See, e.g.*, PX00415-004 (Reinhart); PX00416-003 (Merchants); PX00434-003-004 (Labatt); PX00438-002-003 (Cash-Wa); PX00443-005 (Ben E. Keith); PX00449-003 (Jacmar); PX00451-005 (Services Group **[**100]** of America); PX00458-004 (Nicholas & Co.); PX00460-002-003 (Shamrock); PX00529-047-048 at 188-89 (Gordon).

The FTC contends that there are two relevant geographic markets in this case. For national broadline customers, the relevant geographic market is nationwide. For local broadline customers, the relevant geographic markets are localized around Defendants' distribution centers.

With regard to national customers, for essentially the same reasons that the FTC asserts that there is a product market for broadline distribution to national customers, the FTC asserts that the geographic market for those customers is nationwide. The FTC relies on the fact that Defendants plan on a national level and have "national account" teams dedicated to national customers; their contractual pricing and service terms with national customers apply across regions; and their competition for national customers is largely other broadliners with nationwide coverage.

As for local customers, as discussed in more detail below, the FTC's local geographic markets were constructed by Dr. Israel and are premised **[**104]** on customers' proximity to Defendants' distribution centers. The basic idea is that, for local customers, distance to a distribution center is a key service factor and, for Defendants, distance traveled from a distribution center to make deliveries is a critical cost component. The FTC alleges that the merger threatens to harm competition in 32 local geographic markets where Sysco and USF together currently have dominant market shares. Compl. ¶ 60.

Defendants dispute that there is a nationwide geographic market for the same reasons that they contend that there is no national customer product market. As for the local geographic markets, Defendants aggressively challenge the methodology that Dr. Israel used in defining local markets. Their primary criticism is that the geographic areas are drawn so narrowly that they exclude actual competition from the relevant market. This results, they contend, in local market concentrations that artificially inflate Defendants' market shares.

1. National Market

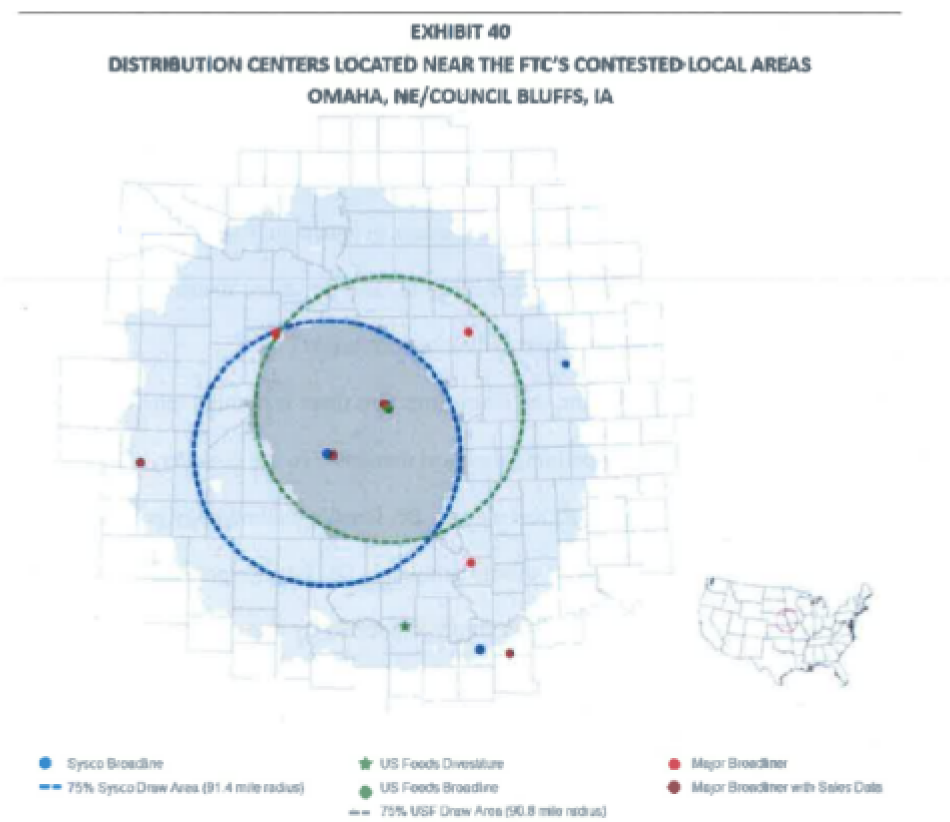
Although the physical act of delivering food products occurs locally, for national customers the relevant geographic area for competitive alternatives is nationwide, primarily because of their **[**105]** geographically dispersed footprint. Defendants compete within this market by touting their nationwide distribution capabilities to these customers; bidding against other broadliners with multi-regional capabilities (which is to say, against each other and the regional cooperatives); coordinating the marketing, negotiating, and managing of these customers through their "national account" teams; and entering with these customers into a single contract whose terms, including pricing, apply across regions. For these reasons, the court finds that the relevant geographic market for broadline foodservice to national customers is nationwide. *See* *Grinnell, 384 U.S. at 575-76* (finding a national geographic market where central station services "operated on a national level," and there was "national planning," a nationwide schedule of prices, and nationwide contracting for multi-state businesses); *Cardinal Health, 12 F. Supp. 2d at 50* (finding a national geographic market where evidence showed that "GPOs negotiate contracts with several wholesalers, making the same prices available throughout the country to all of their members—local, regional, or national").

[*50] *2. Local Markets*

Defining the local geographic market presents a far greater challenge. Not surprisingly, **[**106]** there is no industry standard for delineating the area that makes up a local geographic market for broadline distribution. Each local market has its own unique attributes. Customer composition and concentration differs across markets; so does the demand for products, with SKU variations reflecting local tastes and palettes. Average driving distances for foodservice distributors vary depending on the density of the area, with longer hauls more common in rural parts of the country and shorter trips more prevalent in urban areas. And, of course, the competitors vary from market to market.

The FTC tasked Dr. Israel with defining the local geographic markets. He constructed them as follows. In his first step, Dr. Israel drew circles around the location of each Sysco and USF distribution center. To determine the size of each circle, Dr. Israel used a radius, referred to as the "draw distance," that, on average, captured 75 percent of the distribution center's sales to local customers. The length of each distribution center's 75 percent draw radius differed. For example, the 75 percent draw distance around Sysco's Billings, Montana, facility was 262 miles, whereas the 75 percent draw distance **[**107]** around Sysco's Jersey City, New Jersey, facility was only 24 miles. PX09350-221-224, Table 38. What that means is Sysco drives over 200 miles further to capture 75 percent of its local sales in Billings than it does in Jersey City. That disparity makes sense, as more populated areas correspond to higher customer concentrations and shorter delivery distances.

In his second step, Dr. Israel identified each company's local customers that fell within an area of intersection between the draw circle around the Sysco distribution center and the draw circle around the USF distribution center. This area of intersection was termed the "overlap area." These "overlap customers," according to Dr. Israel, were the customers most likely to suffer harm from the merger, because these were the customers who would be left with one less alternative supplier after the merger. Exhibit 40 from Dr. Bresnahan's report, which is reproduced below, shows Dr. Israel's methodology in the Omaha, Nebraska, area. The blue-dotted circle corresponds to Sysco's 75 percent draw area, and the green-dotted circle corresponds to USF's. The dark gray area corresponds to the "overlap customers." DX-01359, Ex. 40.



[*51]

In his third **[**108]** step, Dr. Israel identified the broadline distributors who could compete for the customers in the overlap area. To do this, Dr. Israel drew circles around each overlap customer using the 75 percent draw radius. This created a larger circle that moved the outer boundaries of the overlap area by the same radius as the 75 percent draw area, which is represented by the light gray area in Exhibit 40 above. According to Dr. Israel's analysis, the light gray area is the area to which customers can practically turn for alternative sources of broadline distribution. All of the competitors located within the light gray area were factored into Dr. Israel's local market share computations.

Defendants attack Dr. Israel's "circle drawing exercise" as "arbitrary" and not reflective of industry realities. Defs.' Opp'n Br. at 27. Specifically, they assert that Dr. Israel's methodology is flawed because it assumes that competitors will drive no greater distance than Sysco's or USF's 75 percent draw radius to serve customers.

Defendants point to competitor declarations and testimony showing that in many of the 32 local markets in which the FTC claims Defendants have a dominant market share, competitors **[**109]** are willing to, and do, drive distances greater than the 75 percent draw radius to compete for and deliver to customers.

Notwithstanding this criticism, the court finds that there is nothing inherently "arbitrary" about Dr. Israel's methodology in defining the local markets. To the contrary, given the absence of an industry standard for defining a local market, Dr. Israel's methodology provides a practical approach and solution to an otherwise thorny problem. Dr. Israel's premise in defining these markets—that driving distance matters—is amply supported by the record and common sense. Customers who are farther away from a distribution center cost more to service. Longer distances **[*52]** correspond to, among other things, higher gas usage, more labor hours, and increased wear and tear on trucks. Given that the geographic market need not be defined by "metes and bounds," *Conn. Nat'l Bank, 418 U.S. at 669* (citation omitted) (internal quotation marks omitted), Dr. Israel's 75 percent draw methodology identifies "the area of competitive overlap, [where] the effect of the merger on competition will be direct and immediate," *Phila. Nat'l Bank, 374 U.S. at 357*. *See also* *Conn. Nat'l Bank, 418 U.S. at 670 n.9* (remanding to the district court to define the local market and observing that the "federal bank **[**110]** regulatory agencies define a bank's service area as the geographic area from which the bank derives 75% of its deposits"). The court therefore concludes that the relevant local geographic markets are the areas of overlap resulting from Dr. Israel's 75 percent draw methodology.

Ultimately, what really troubles Defendants about Dr. Israel's "circle drawing exercise" is not the resulting geographic areas, but what those areas mean for calculating Defendants' local market shares. The court considers those arguments in the next section.

II. THE PROBABLE EFFECTS ON COMPETITION

Having concluded that the FTC has carried its burden of establishing a relevant market—both a nationwide market for broadline foodservice to national customers and various local markets for broadline foodservice to local customers—the court turns next to "the likely effects of the proposed [merger] on competition within [those] market[s]." *Swedish Match, 131 F. Supp. 2d at 166*. As the Court of Appeals explained in *Heinz*, ***HN27***[] the government "must show that the merger would produce 'a firm controlling an undue percentage share of the relevant market, and [would] result[ ] in a significant increase in the concentration of firms in that market.'" *246 F.3d at 715* (quoting *Phila. Nat'l Bank, 374 U.S. at 363*). "Such a showing **[**111]** establishes a 'presumption' that the merger will substantially lessen competition." *Id.* (citation omitted).

The Court of Appeals has held that the FTC can establish its *prima facie* case by showing that the merger will result in an increase in market concentration above certain levels. *Id.* "Market concentration is a function of the number of firms in a market and their respective market shares." *Arch Coal, 329 F. Supp. 2d at 123*. ***HN28***[] A common tool used to measure changes in market concentration is the Herfindahl-Hirschmann Index (111-11). *Heinz, 246 F.3d at 716*; *see also* Merger Guidelines § 5.3. Hal figures are "calculated by summing the squares of the individual firms' market shares," a calculation that "gives proportionately greater weight to the larger market shares." Merger Guidelines § 5.3. "Sufficiently large ME figures establish the FTC's prima facie case that a merger is anti-competitive." *Heinz, 246 F.3d at 716*. The Merger Guidelines, which provide "a useful illustration of the application of BM," *FTC v. PPG Indus., Inc., 798 F.2d 1500, 1503 n.4, 255 U.S. App. D.C. 69 (D.C. Cir. 1986)*, state that a market with an HHI above 2,500 is considered "highly concentrated"; a market with an HHI between 1,500 and 2,500 is considered "moderately concentrated"; and a market with an HHI below 1,500 is considered "unconcentrated," Merger Guidelines § 5.3. Furthermore, **[**112]** a merger that results in "highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power." *Id.* In *Heinz*, the Court of Appeals recognized that an increase in **[*53]** HHI by 510 points "creates, by a wide margin, a presumption that the merger will lessen competition." *246 F.3d at 716*.

A. Concentration in the National Broadline Customer Market

I. Dr. Israel's National Broadline Customer Market Shares Calculations

In some cases the merging parties' market shares and post-merger HEM are seemingly uncontroversial. *See, e.g., Staples, 970 F. Supp. at 1081-82*; *H&R Block, 833 F. Supp. 2d at 71-72*. Not so here. Because there are no industry-recognized market shares for national broadline customers, the FTC tasked Dr. Israel with calculating the market shares and the HEM. Not surprisingly, Defendants vigorously contested his methodology and conclusions.

Dr. Israel calculated Defendants' national customer shares as follows. As his first step, he identified Defendants' individual sales to national broadline customers, *i.e.*, the numerator for the market share calculation. Those sales figures came directly from the parties' "national" customer designations: for Sysco, its sales to CMU customers, and for USF, its **[**113]** sales to national customers.

Next, Dr. Israel determined the total sales by all broadline distributors to national customers, *i.e.*, the denominator for the national share calculation. Again, because there is no industry-recognized figure for such sales, Dr. Israel estimated them. He did so in two ways. First, he aggregated the national sales of the three principal competitors for national customers—Sysco, USF, and DMA—and added in another share equal to DMA's. This total comprised the denominator for his "baseline" shares calculation. PX093 50-074. The addition of another DMA-sized share to the denominator was premised on his observation from the RFP/bidding data that the size of sales to national customers by all broadliners other than Sysco, USF, and DMA was about the same as DMA's.

Dr. Israel also used a second method to calculate the total sales to national customers. He aggregated the national sales reported by the largest 16 broadliners, including DMA and MUG, in response to the FTC's civil investigative demands. This data is referred to as CID data. Dr. Israel ran several "sensitivities" on this sum, adding in sales to account for variations in CID responses (e.g., some distributors **[**114]** did not segregate "national" from total sales). Dr. Israel also aggregated the national sales of Sysco, USF, DMA, and MUG, plus an estimate of national sales for all other responding distributors based on the assumption that each distributor's national-local sales ratio was the same as Defendants' ratio. Dr. Israel's various approaches yielded a total national broadline sales estimate of $28 to $30 billion. Hr'g Tr. 1177-78; *see also* PX09060-006 (PFG business plan estimating the size of the national customer market to be approximately $20 billion).

As his last step, Dr. Israel adjusted his market shares to account for the divestiture to PFG. The chart below reflects Dr. Israel's post-merger, post-divestiture market share and ?HI calculations. For his "baseline" calculation, Dr. Israel determined that the parties' post-merger national broadline customer market share would be 71 percent with an ?? increase of nearly 2,000 points. His ?ID data-based calculations, shown as (i) through (vi) in the chart, also yielded high post-merger shares and significantly increased HHIs. Dr. Israel's most conservative approach, in which he assumed that the top 16 broadliners had national to local sales **[**115]** ratios that were equal to Defendants' ratio **[*54]** of such shares—(iv) in the chart below—resulted in a post-merger market share of 59 percent and an ?? increase of 1,500 points. PX09350-186, Table 18.

Table 18

Shares of Sales to National Breadline Customers, After Accounting for the Proposed Divestiture

	Post-Divestitue Shares
	Combilled Share
Baseline	71%
(i) National	68%
(ii) National + Imputed National	65%
(iii) National + Regional	66%
(iv) Nationals + Systems	62%
(v) National + Regional + Systems	61%
(vi) Parties' Ratio of National	59%

	Post-Divestiture HHI's	
	HHI	HHI
Baseline	5.119	1.966
(i) National	4.935	1.953
(ii) National + Imputed National	4.549	1.799
(iii) National + Regional	4.614	1.822
(iv) Nationals + Systems	4.217	1.643
(v) National + Regional + Systems	4.087	1.590
(vi) Parties' Ratio of National	3.809	1.500

2. Defendants' Arguments

Defendants raise a host of objections to the reliability of Dr. Israel's methodology and calculations. They contend that his use of their "national" sales in the numerator was arbitraiy because, as discussed above, not all of Defendants'"national" sales are to customers with a multiregional footprint. The inclusion of those sales, they contend, overstated Defendants' national market share. They **[**116]** also argue that Dr. Israel's numerator included some sales to systems-like customers, such as to Five Guys, but his denominator excluded competitors' systems sales. This asymmetry, they assert, also resulted in an overstatement of Defendants' share. They further contend that the denominator used in Dr. Israel's "baseline" calculation is unreliable because it relies on the flawed RFP/bidding data set. And, finally, they argue that the denominator in the ?ID data calculation excludes over $30 billion in sales—though the source of this number is unclear.[24] They contend that these errors in developing the numerator resulted in biased market share calculations.

None of these arguments ultimately persuade the court that Dr. Israel's methodology or his market shares and HHI calculations are unreliable. The FTC need not present market shares and ?HI estimates with the precision of a NASA scientist. The "closest available approximation" often will **[**117]** do. *PPG, 798 F.2d at 1505* (citation omitted); *see also* *H&R Block, 833 F. Supp. 2d at 72* (stating that ***HN29***[] a "reliable, reasonable, close approximation of relevant market share data is sufficient"). Indeed, in *PPG*, the FTC presented, and the Court of Appeals accepted, share calculations for "every market the evidence suggests is remotely possible," which "yield[ed] results of similar magnitudes in market concentration." *798 F.2d at 1506*. Similarly, Dr. Israel ran multiple variants of his market shares and concentration analysis, using two different data sets and modifying one of these data sets, the CID data, in six different ways. Most convincing to the court was Dr. Israel's final method of calculating shares using the CID data, which assumed that all 16 of the top broadliners had the same national-local sales ratio as Defendants did. That approach yielded a **[*55]** low-end market share of 59 percent and an ?HI increase of 1,500 points—almost three times the 510 points that the Court of Appeals in *Heinz* found created a presumption of harm by a "wide margin." *246 F.3d at 716*. This variation almost certainly *underestimated* Defendants' market shares, as smaller broadliners are unlikely to have a ratio of national-local sales comparable to Defendants' ratio.

Another reason Defendants' arguments **[**118]** do not sway the court is that other evidence in the record supports Dr. Israel's calculations. As discussed above, the largest customers for broadline distribution in the country—healthcare GPOs, foodservice management companies, hospitality companies, and large government agencies—make the vast majority of their broadline purchases from Defendants. These customers individually spend hundreds of millions of dollars (or more) on broadline distribution—totaling approximately half of the national broadline market (based on Dr. Israel's calculation of a total market of $28 to $30 billion). *See* FTC Closing Arg. Slides at 35. If the largest customers are presently spending between 60 to 100 percent of their total food budget with Defendants, *id.*, then Dr. Israel's low-bound, post-merger combined market share of 59 percent is consistent with market realities.

[24] "Dr. Israel acknowledged that he left out $30 billion in systems distribution in the "sensitivity analysis purporting to account for systems sales." Defs.' Proposed Findings of Fact and Conclusions of Law, ECF No. 171 at 263 (citing Hr'gTr. 1259-60).

In addition, the only independent market share analysis of the broadline industry identified by the parties corroborates Dr. Israel's conclusions. The foodservice industry research firm Technomic collected 2014 sales data from the country's 43 largest broadliners. DX02016. Taken together, Technomic estimated total broadline sales to be $125 billion. Of that total, **[**119]** Sysco accounted for $35.7 billion and USF $23 billion, for a combined sum of $58.7 billion—nearly 47 percent of U.S. sales. *See id.; see also* PX09045-015 (PFG presentation to FTC stating that "[t]he two largest broadliners (Sysco and US Foods) accounted for 51% of all broadline sales in 2010," based on a study by Hale Group, "Focus on Foodservice Distribution," dated April 11, 2013); PX09045-014 (PFG presentation to FTC highlighting a 2011 Technomic study showing that Sysco and USF had a combined market share of 58 percent among the top 10 broadline food distributors).

Technomic's 47 percent combined market share estimate for *total broadline* sales is consistent with Dr. Israel's low-end, post-divestiture estimate of 59 percent for *national broadline* sales. The Technomic data did not segregate national and local broadline customers. However, because the largest customers buy disproportionately from Sysco and USF, it stands to reason that the companies' combined market share for national customers would be greater than 47 percent, as Dr. Israel found. Even a combined market share of 47 percent (admittedly, a pre-divestiture number) can give rise to a presumption of harm. *See* *Phila. Nat'l Bank, 374 U.S. at 364* ("Without attempting **[**120]** to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat").

3. The Court's Finding as to National Broadline Customer Market Shares

The court thus finds that the FTC has shown, through Dr. Israel's testimony and other evidence, that a merger of Sysco and USF will result in a significant increase in market concentration in the market for national broadline customers. The FTC therefore has established a rebuttable presumption that the merger will substantially lessen competition in the market for national broadline distribution.

[*56] B. Concentration in the Local Markets

1. Dr. Israel's Local Broadline Customer Market Shares Calculations

In addition to the market for national customers, the FTC also contends that the merged firm would create highly concentrated local markets for broadline foodservice distribution. To be precise, the FTC asserts that, in 32 different local markets, the merger between Sysco and USF would result in dramatic increases in HHIs, thereby substantially lessening the competition in those markets. Compl. ¶ 60, App. A. The FTC also maintains that the divestiture to PFG will not resolve **[**121]** Defendants' post-merger local market dominance.

As with the market for national customers, there is no industry study of local market shares. *See* PX09045-019 ("PFG is not aware of any systematic industry market share data."). The FTC again relied on Dr. Israel for those numbers. His starting point for calculating local share percentages was his 75 percent draw area methodology for defining the local geographic markets. *See* PX09350-058. As already discussed, Dr. Israel first identified the 75 percent overlap area in each local market and then identified the competitors that could serve those customers by drawing a circle with a radius equal to the 75 percent draw distance around each overlap customer. Next, to calculate the overall local market shares, Dr. Israel calculated a customer-specific market share. That is, for each customer in the overlap area, he calculated the market shares for the competitors who were located within the customer's 75 percent draw distance radius. Dr. Israel then aggregated each of these customer-specific shares to the local level, using weighted averages across all overlap customers. The consequence of this methodology was that, the greater the competitor's **[**122]** distance from the center of the overlap area, the less weight that competitor would receive in the overall local market share calculations. Stated differently, because these distant competitors' market shares would only come into the calculation due to customers on the borders of the overlap area, those competitors' shares would be smaller than the shares of competitors whose distribution centers were closer to the middle of the overlap area—namely, Sysco and USF.

When calculating market shares, Dr. Israel used three different metrics: (i) square footage of distribution centers; (ii) local broadline sales; and (iii) number of sales representatives. Dr. Israel used the first and third variables as proxies for revenues and as a way to confirm the market share calculations that were based on the second variable, sales revenues. To calculate shares based on revenues, Dr. Israel used the Defendants' sales data for the numerator. For the denominator, he used the sales numbers, where available, for local broadliners. For those local competitors for whom he did not have actual sales data, he estimated the sales revenue based on the size of the distribution center. PX09350-134 at n.410. Based **[**123]** on those metrics, in local markets with the 20 highest increases in pre-divestiture HHIs, Defendants' combined market shares ranged from 100 percent in San Diego, California, to over 65 percent in multiple markets. The HHT increases in each of top 20 markets were over 2,000 points. PX09350-135-137.

Dr. Israel also calculated post-divestiture market concentrations and HHI increases. According to the table below, in Memphis, Tennessee; Omaha, Nebraska; Sacramento, California; and Charleston, South Carolina, the post-divestiture combined markets shares remain above 80 **[*57]** percent with HHI increases in excess of 4,100, 1,400, 2,900, and 2,900 points, respectively. PX09350-213, Table 21. In seven other local markets, Dr. Israel calculated the post-divestiture combined market shares to be between 57 percent and 76 percent, with HHI increases in each case in excess of 1,500 points. *Id.*

Table 21

Examples of Areas with Large Change in HHI despite Divestitures

CBSA	**Post-Merger Combined Share**	**Delta HHI**
Omaha-Council Bluffs. NE-LA	90.3%	1.410
Sacramento--Roseville--Arden-Arcade. CA	88.6%	2.974
Durham-Chapel Hill. NC	75.4%	2.807
Charleston-North Charleston. SC	80.2%	2.947
Birmingham-Hoover. AL	57.5%	1.542
Jackson, MS	66.0% **[**124]**	2.155
Memphis, TN-MS-AR	93.8%	4.123
Columbia, SC	72.8%	2.315
Raleigh, NC	71.3%	2.188
Lynchburg, VA	63.3%	1.588
Rochester, NY	63.7%	1.574

2. Defendants' Arguments

Defendants attack Dr. Israel's local market share calculations in much the same way they did his national market share calculations--by contesting his methodology and inputs. Defendants assert that Dr. Israel's methodology was premised on the unreliable assumption that no competitor would drive a greater distance than Sysco or USF currently does to provide broadline services. In other words, they criticize Dr. Israel's use of the same draw radius to identify the relevant local competition as he did to identify the overlap area. As a result, they argue, Dr. Israel's local market share calculations excluded sales from broadliners who travel greater distances and thereby overstated Defendants' combined market shares.

To demonstrate this point, Dr. Bresnahan presented an analysis of the Omaha, Nebraska market. He testified that, according to Dr. Israel's analysis, Defendants had combined sales in Omaha of $95 million and a combined market share of 90 percent. According to Dr. Bresnahan, Dr. Israel's methodology did not factor in at least $[TEXT **[**125]** REDACTED BY THE COURT] million in sales by another local distributor, Cash-Wa, whose distribution facility is 129 miles west of Omaha—farther out than the 91-mile 75 percent draw radius that Dr. Israel had used for the area.

Dr. Bresnahan based his conclusion on sales data per zip code produced by Cash-Wa, which Dr. Israel had not considered in his analysis. According to Dr. Bresnahan, the zip code data showed that in 2013, Cash-Wa made sales to customers in zip codes within the 75 percent overlap area—at least $[TEXT REDACTED BY THE COURT] million worth—which Dr. Israel did not account for because of his driving distance assumption. Had these Cash-Wa sales been taken into account, Defendants' combined market shares and increase in HHIs would have been lower. As illustrated by his Omaha study, Dr. Bresnahan concluded that Dr. Israel's local market share methodology produced unreliable results.

Dr. Bresnahan's Omaha study convincingly demonstrated that Dr. Israel's 75 percent draw area methodology resulted in underreported competitor sales in the **[*58]** Omaha market. But what it did not show convincingly was by *how much*. Dr. Bresnahan's initial expert report stated that Cash-Wa's sales in the **[**126]** overlap area were over $[TEXT REDACTED BY THE COURT] million. DX01359-139. At the evidentiary hearing, however, he said that Cash-Wa's sales into that area were "at least $[TEXT REDACTED BY THE COURT] million," DX-05029 at 42, and he did not explain why that number differed from his report.[25] More fundamentally, Dr. Bresnahan's reliance on zip code data had its limits. As Dr. Bresnahan conceded, the zip code data did not differentiate between local and national customers or broadline and systems customers. Hr'g Tr. 2186. Dr. Israel explained that he did not use the zip code data for that very reason, as well as the additional reason that he did not have zip code data for all local market competitors. In addition, Cash-Wa does substantial business selling tobacco products; however, the zip code data does not segregate those sales. *Id.* As a result, although the court agrees with Defendants that Dr. Israel's methodology excluded some local broadline sales in Omaha, the court cannot reliably determine the extent of the underestimation. And, notably, even if Dr. Bresnahan's $[TEXT REDACTED BY THE COURT] million figure consisted entirely of local broadline sales, Defendants would still have **[**127]** a high combined local market share of [TEXT REDACTED BY THE COURT] percent ($95 million/$[TEXT REDACTED BY THE COURT] million + $95 million) = [TEXT REDACTED BY THE COURT] percent).

Ultimately, the court finds that Dr. Israel's specific local market calculations is informative, but not conclusive evidence, of the merger's potential harm to local broadline customers. As the Omaha study showed, because Dr. Israel's 75 percent draw methodology excluded some competitor sales and because each local market has nuances that cannot be captured by his methodology, the court cannot rely conclusively on Dr. Israel's precise local share calculations as a measure of competitive harm.

The court, however, finds variations on Dr. **[**128]** Israel's 75 percent draw methodology to provide persuasive evidence of the merger's impact on local markets. Dr. Israel did more than calculate local share percentages based on 75 percent draw areas. He also used a 90 percent draw area and a weighted 95 percent draw area. Those increased draw areas captured some of the competitor sales that the 75 percent draw area excluded.[26] Dr. Israel then aggregated the local market share figures across all overlap customers in all markets, using distribution center square footage, adjusted revenues, and number of sales representatives to estimate market share. PX09350-137-139. As shown in the table below,[27] these alternative approaches— **[*59]** designated as variations (i) and (ii)—demonstrate that for half of the customers in overlap areas, Defendants would have a post-merger combined local market share of more than 50 percent and the HHI would increase at least 1,300 points. PX09350-139, Table 7. A

[25] The court infers that the sales figure was reduced, in part, to estimate only Cash-Wa's *broadline* sales, as opposed to all sales. But that reason, if correct, was not made clear on the record. Additionally, in his report, Dr. Bresnahan reported over $[TEXT REDACTED BY THE COURT] million in sales by another broadliner, Reinhart. However, he made no mention of Reinhart's sales in his testimony. That may be because Reinhart reported that [TEXT REDACTED BY THE COURT]. PX09034-019.

[26] In a third variant, Dr. Israel went beyond the overlap areas and performed market calculations that took into account all local broadline customers, regardless of whether they fell into the overlap area. Dr. Israel also used a fourth variant—though not entirely clear from his report—in which he appears to have re-run his 75 percent draw methodology using all of Defendants' broadline customers in the overlap area, not just local broadline customers. PX09350-137-138.

[27] These figures are pre-divestiture share calculations. But the local market share percentages and HHI increases are so high that, even taking into account the divestiture, when aggregated across numerous markets, these figures are unlikely to decrease enough to change the overall picture. *See* PX09375-103-104.

quarter of the overlap customers would face even greater market concentrations: Defendants post-merger would have at least 68 percent in combined local market share and the HHI would increase by at least 2,000 points. And, 10 percent of the overlap customers would **[**129]** face a combined market share north of 74 percent and an HHI increase of greater than 2,500 points. The picture that clearly emerges from these numbers is that, in many areas across the country, USF and Sysco already control a substantial share of the market for local broadline distribution. A merger between the two would lead to a significant increase in market concentration in many areas.

Table 7

Summary Statistics for [130] Local Market Shares under Alternative Methodologies**

	Combined Share		
	Median	**75th Petile**	**90th Petile**
Square footage shares			
Baseline	59.8%	71.8%	81.5%
(i) 90% distribution distance	58.3%	68.3%	75.3%
(ii) Continuous distribution distance	55.7%	68.3%	82.6%
(iii) All local CBSA customers *	58.9%	70.4%	80.8%
Adjusted revenue shares **	60.9%	70.6%	78.3%
Baseline	62.6%	74.7%	86.0%
(i) 90% distribution distance	57.2%	71.6%	79.2%
(ii) Continuous distribution distance	54.6%	70.6%	83.3%
(iii) All local CBSA customers	59.8%	74.6%	85.7%
(iv) All overlap CBSA customers *	66.7%	80.2%	86.1%
Sale representative shares			
Baseline	62.5%	70.S%	80.8%
(i) 90% distribution distance	58.0%	68.0%	74.8%
(ii) Continuous distribution distance	52.7%	70.5%	86.5%
(iii) All local CBSA customers	61.1%	70.4%	80,3%
(iv) All overlap CBSA customers *	61.6%	69.8%	79,4%

	Δ HHI		
	Median	**75th Petile**	**09th Petile**
Square footage shares			
Baseline	1.763	2.375	3.169
(i) 90% distribution distance	1.557	2.149	2.621
(ii) Continuous distribution distance	1.369	2.013	2.765
(iii) All local CBSA customers *	1.603	2.364	3.081
Adjusted revenue shares **	1.854	2.420	2.775
Baseline	1.574	2.778	5.094
(i) 90% distribution distance	1.471	2.342	20886
(ii) Continuous distribution distance	1.208	i.849	3.000
(iii) All local CBSA customers **[**131]**	1.327	2.614	2.974
(iv) All overlap CBSA customers *	1.962	2.886	3.598
Sale representative shares			
Baseline	1.854	2.406	3.152
(i) 90% distribution distance	1.594	2.217	2.531
(ii) Continuous distribution distance	1.545	2.039	2.655
(iii) All local CBSA customers	1.595	2.308	3.099
(iv) All overlap CBSA customers *	1.777	2.306	2.749

* Includes all customers.

** For variation (iv) unadjusted revenues are used.

Defendants' combined strength in local markets is corroborated by documents compiled during the Defendants' ordinary course of business. For example, in an Investor Presentation, dated November 2012, USF represented that it "estimated [having the] #1 or #2 position in [TEXT REDACTED BY THE COURT] of served markets." PX03000-014. Mr. Schreibman's investigational hearing testimony confirmed the present-day accuracy of that statement. Investigat'l Hr'g Tr., PX00515-017 at 65. He also confirmed that, in many of those markets, Sysco occupied the number one or two market position. *Id.*

Another USF document, a strategy document created in 2011, shows USF and Sysco with sizeable "market penetrations" in many local markets. PX03073-023-030. Mr. Schreibman testified that "market penetration" was different from "market **[**132]** share," as the former reflected the percentage of customers that purchased even $1 of product, whereas the latter reflected percentages of overall sales volumes. Hr'g Tr. 1508-09. But even if "market penetration" and "market share" have different **[*60]** definitions, both concepts are a measure of market strength, and the "market penetration" percentages show USF and Sysco to be first and second in numerous markets. Indeed, the very same strategy document lists 54 separate markets and identifies Sysco as a competitor in each of them. Of those 54 markets, USF estimated that Sysco had the number one position in [TEXT REDACTED BY THE COURT] markets and that, within those [TEXT REDACTED BY THE COURT] markets, USF was number two in [TEXT REDACTED BY THE COURT]. USF also estimated that it was number one in [TEXT REDACTED BY THE COURT] markets, with Sysco ranked number two in those same [TEXT REDACTED BY THE COURT] markets. And, in [TEXT REDACTED BY THE COURT] markets, USF viewed itself as tied for number one with Sysco. Thus, of the [TEXT REDACTED BY THE COURT] local markets, USF viewed Sysco or USF as the leading broadliner in [TEXT REDACTED BY THE COURT] and as the number two broadliner (or tied **[**133]** for first) in [TEXT REDACTED BY THE COURT]. This internal assessment clearly supports Dr. Israel's local market share calculations.

Defendants offer a different ordinary course document to rebut Dr. Israel's market share calculations. In 2013, relying on a sizeable third-party sales database of 335,000 independent restaurants, USF calculated its share of sales to independent restaurants in 53 local markets. That study showed USF with market shares much lower than that shown by Dr. Israel's calculations, ranging from a high of [TEXT REDACTED BY THE COURT] percent in Columbia, South Carolina, to a low of [TEXT REDACTED BY THE COURT] percent in the "Northwest." DX-00397-002.

But Defendants' reliance on the independent restaurant study as an indicator of local market shares is problematic for several reasons. First, there is no evidence that the underlying database differentiated between purchases from broadline distributors and purchases from other channels of distribution. The evidence has shown that, among foodservice customers, independent restaurants are among the most likely to buy from other channels, such as specialty and cash-and-carry. In other words, unless broadline sales are **[**134]** segregated from the rest—which the restaurant study appears not to have done—the resulting market share estimate will underestimate USF's actual share of only broadline purchases. A market share calculation that uses at its numerator purchases from *all channels* cannot be relied upon to determine USF's *broadline* market shares.

Second, no evidence was presented showing that the buying habits of independent restaurants is representative of other local broadline customers. Thus, by focusing only on independent restaurant purchasing, the data set does not provide an accurate picture of local market shares.

Third, the independent restaurant study's results conflict with other documents. For instance, USF's 2011 strategy document describes the company as having a "[s]olid #[TEXT REDACTED BY THE COURT]" position in "Reno/Sacramento," PX03073-019, but the restaurant study finds a less than 10 percent share in Reno, DX-00397-002. Similarly, the strategy document describes USF as having the "#[TEXT REDACTED BY THE COURT] position" in St. Louis, PX03073-018, but the restaurant study reported only a 13.3 percent share in the "Missouri Group," DX-00397-002.

Finally, Dr. Israel's conclusions are corroborated **[**135]** by PFG's analysis of the local markets. In January 2014, PFG made a presentation to the FTC in which it addressed the state of competition in various local markets. PFG, at the time, was represented by antitrust counsel, Kirkland & Ellis. Because there was no comprehensive industry data for local market shares, PFG "estimated local broadline market shares based upon [distribution center] square footage, which PFG uses to gauge **[*61]** competitor strength in the ordinary course of business"—one of the very methods that Dr. Israel used for calculating market shares. PX09045-019. PFG observed that, "[w]hile not perfect, we believe this approach produces *directionally correct results* and can be useful in flagging areas that merit closer consideration." *Id.* (emphasis added). PFG's analysis showed that in six major markets—New York, Philadelphia, Detroit, Denver, Las Vegas, and Los Angeles—a combined Sysco-USF, based on distribution center square footage, would control between 45 percent (New York City) to 80 percent (Las Vegas) of those local broadline markets. PX09045-020. PFG also calculated that a merger in those markets would result in HHI increases ranging from 1,000 points (New York City) to 3,100 **[**136]** points (Las Vegas). *Id.* Consistent with Dr. Israel's market shares and HHI calculations, PFG concluded that the "[p]reliminary findings indicate significant concentration in many local markets." *Id.*

3. The Court's Finding as to Local Broadline Customer Market Shares

The court thus finds, based on Dr. Israel's testimony and other evidence, that the FTC has shown that a merged Sysco-USF will significantly increase concentrations in local markets for broadline distribution. The FTC therefore has made its *prima facie* case and established a rebuttable presumption that the merger will lessen competition in the local markets.

C. **Additional Evidence of Competitive Harm**

The FTC did not rely solely on increased HHIs to establish that Defendants' proposed merger would cause competitive harm. *See* *Baker Hughes, 908 F.2d at 992* ("The Herfindahl- Hirschman Index cannot guarantee litigation victories."). It offered additional evidence to strengthen its *prima facie* case, to which the court now turns.

1. Unilateral Effects—National Customer Market

The FTC advanced a "unilateral effects" theory to argue that the merger would harm competition in both the national and local broadline distribution markets. In this section, the court considers the evidence **[**137]** of unilateral effects in the national customer market and subsequently turns to the evidence regarding local customer markets.

HN30[] Courts have recognized that a merger that eliminates head-to-head competition between close competitors can result in a substantial lessening of competition. *See* *Heinz, 246 F.3d at 717-19* (holding that elimination of competition between second- and third-largest jarred baby food manufacturers would weaken competition); *Swedish Match, 131 F. Supp. 2d at 169* (finding a likelihood of unilateral price increase where merger would eliminate one of Swedish Match's "primary direct competitors"); *Staples, 970 F. Supp. at 1083* (finding anticompetitive effects where the "merger would eliminate significant head-to-head competition between the two lowest cost and lowest priced firms in the .. . market."); *see also* Merger Guidelines § 6 ("The elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition."). In such circumstances, a merger "is likely to have unilateral anticompetitive effect if the acquiring firm will have the incentive to raise prices or reduce quality after the acquisition, independent of competitive responses from other firms." *H&R Block, 833 F. Supp. 2d at 81*.

Unilateral anticompetitive effects can arise **[**138]** in a host of different settings. *See* ***[*62]*** *generally* Merger Guidelines § 6. Here, the FTC's case for unilateral effects rests on the fact that the broadline distribution industry is marked by negotiations between buyers and sellers. In such a market, "buyers commonly negotiate with more than one seller, and may play sellers off against one another." *Id.* § 6.2. If two competitors merge, buyers will be prevented from playing the sellers off one another in negotiations. *See id*. This elimination of competition "can significantly enhance the ability and incentive of the merged entity to obtain a result more favorable to it, and less favorable to the buyer, than the merging firms would have offered separately absent the merger." *Id.*

On the other hand, even if the merging parties had large market shares, if they were not particularly close competitors, then the market shares might overstate the extent to which the merger would harm competition. Although the merging parties need not be the top two firms to cause unilateral effects, *see, e.g.,* Heinz, 246 F.3d at 717-19; H&R Block, 833 F. Supp. 2d at 83-84, the FTC argues that the potential for unilateral effects here is magnified because Defendants are particularly close competitors and many national customers consider **[**139]** them the top two choices for broadline distribution. *See* Merger Guidelines § 6.2 ("Anticompetitive unilateral effects . . . are likely in proportion to the frequency or probability with which, prior to the merger, one of the merging sellers had been the runner-up when the other won the business.").

The FTC offered various sources of evidence to show that the proposed merger will result in unilateral anticompetitive effects. The evidence includes empirical data collected and analyzed by Dr. Israel, Defendants' ordinary course documents, and testimonial evidence from other market actors.

a. Dr. Israel's RFP/bidding study

To show that Defendants were frequent head-to-head competitors—indeed, each other's closest rivals—Dr. Israel analyzed each company's bidding opportunities for national customers based on the RFP/bidding database that he compiled from the companies' records. The RFP/bidding records that Dr. Israel collected spanned a seven-year period, from 2007 to 2014. PX09375-088. He formed the database not only from the parties' reconstructed RFP data, but also from a host of ordinary course records reflecting bidding opportunities, PX09375-089-091. From this evidence, Dr. Israel concluded: **[**140]** "[I]n competitions for National Broadline Customer business, both USF and Sysco compete with and lose to one another much more than they compete with or lose to any other distributor and, indeed, more than all other distributors combined." PX09375-088. More specifically, based on Sysco's RFP/bidding records, Dr. Israel observed that USF appeared as a competitor for national broadline business twice as often as the next competitor and that, when Sysco lost, it lost to USF two and a half times more often than it lost to the next competitor. Similarly, based on USF's RFP/bidding records, Dr. Israel observed that Sysco appeared as a competitor for national broadline business four times as often as the next competitor and that, when USF lost, it lost to Sysco three and a half times more often than it lost to the next competitor. PX09350-105-109.

Defendants disputed the reliability of Dr. Israel's RFP/bidding data study in two primary ways. First, as already discussed, they forcefully challenged the underlying data set, arguing that neither company keeps ordinary course RFP and bidding records and that Dr. Israel's reliance **[*63]** on these artificially created data sets to calculate an empirical "win-loss" **[**141]** analysis is inherently flawed. As previously explained, the court has found that drawing precise conclusions based on the RFP/bidding data is problematic because of the data's limitations.

Second, to demonstrate that the merger would not create unilateral anticompetitive effects, Defendants offered a "switching study" conducted by Dr. Bresnahan. A switching study, as the name implies, analyzes customers' decision to "switch" their business to other competitors. For his study, Dr. Bresnahan acquired from a company called Aggdata the location information of tens of thousands of restaurant and hotel chain customers that are on either Sysco's or USF's "national customer" roster. He then analyzed Defendants' transaction records by quarter from the first quarter of 2011 to the third quarter of 2013 to determine if either company provided broadline distribution to a specific restaurant or hotel location. If either Defendant provided broadline distribution, he tracked the company's sales to the location and noted if it lost sales to the location during the period. If the company lost sales in a particular quarter, he checked the other defendant company's transaction records to see if it picked **[**142]** up the customer. If it did not, Dr. Bresnahan assumed that some other competitor did.

So, for example, if USF's records showed that a particular Sonic franchise did not purchase from USF in a particular quarter, he would tum to Sysco's records to see if Sysco had picked up the customer; if it did, he counted it as a switch to Sysco; if not, he assumed that the customer purchased from another distributor and counted it as a switch to a competitor other than Sysco. Based on this analysis, Dr. Bresnahan concluded that Sysco and USF are not uniquely close competitors. He found that USF lost business to Sysco 15 percent of the time based on both revenue and number of locations, and that Sysco lost business to USF 57 percent of the time based on revenue and 39 percent of the time based on number of locations. These percentages of switches, Dr. Bresnahan testified, were much lower than what one would have expected to see if Dr. Israel's national market shares were accurate.

For a variety of reasons, the court cannot agree with Dr. Bresnahan's ultimate conclusion—that USF and Sysco are not uniquely close competitors—based on his switching study. First, though the number of observations in Dr. **[**143]** Bresnahan's study were significant, they were limited almost exclusively to restaurant and hotel locations (including, it appears, restaurants served by Sysco's systems division, SYGMA).[28] The observations did not include other types of large national customers, such as GPOs, foodservice management companies, and large government agencies, which, as the evidence showed, spend large percentages of their foodservice distribution budget on Defendants. As Dr. Bresnahan admitted, he does not claim that his switching analysis reflects the buying habits of these national customers. Hr'g Tr. 2180-82.

Second, the time period of Dr. Bresnahan' s study—two-and-a-half years—is shorter than the seven-year time period covered by Dr. Israel's RFP/bidding analysis. Significant switches that might have occurred between Defendants outside the two-and-a-half year period, therefore, were not counted.

[*64] Third, the switching analysis does not capture the full extent of competition between Defendants (or between other competitors, for that matter), because it only tracks switches, not instances where a customer might have **[**144]** played one broadliner off the other to get better pricing. That kind of situation reflects actual competition at least as much as a switch, but such competition is not reflected in the data.

Fourth, unlike an RFP or bid situation, a switch does not necessarily equate to actual competition. A switch might have occurred for any number of reasons having nothing to do with pricing or service (*e.g.*, the customer's sister-in-law went to work for a competitor), but the study treats every switch as a loss for competitive reasons.

Fifth, Dr. Israel's rebuttal report pointed out a number of limitations in Dr. Bresnahan's switching analysis, including the exclusion of certain switches between Defendants and the treatment of actual switches, such as timed phase outs from one Defendant to the other, as non-switches. PX09375-08 I-084. Although Dr. Bresnahan testified that he corrected for these criticisms and that the adjustments did not materially alter his results or conclusion, the need for those adjustments reflects the limitations of drawing firm conclusions from such undifferentiated data.

Finally, Dr. Bresnahan's conclusion that USF and Sysco are not close competitors brings him into conflict **[**145]** with Defendants' other expert, Dr. Hausman. Dr. Bresnahan testified that, although he agrees that Sysco and USF are competitors, he did not think that one was a "particularly strong price constraint" on the other. Hr'g Tr. 2183. Dr. Hausman, on the other hand, unequivocally agreed that "USF is a strong price constraint on Sysco." *Id.* at 2005. He testified Sysco and USF "compete and they compete hard. I'd be the first to agree." *Id.* at 1986; *see id.* at 2037 ("I am not arguing with you that—or disagreeing with you that Sysco and US Foods are important competitive constraints on each other."). Defendants do not explain how Dr. Bresnahan's switching study can be reconciled with Dr. Hausman's unqualified opinion that Defendants mutually constrain each other's prices, which can only mean that they are close competitors; if they were not, the pricing of one would not matter to the other.

In the end, the court finds that Dr. Israel's RFP/bidding analysis is more persuasive than Dr. Bresnahan's switching study. Both empirical studies are imperfect for the reasons already discussed. But Dr. Israel's analysis better captures instances of actual competition across a more representative cross-section of national customers over **[**146]** a longer period of time. Additionally, Dr. Israel's conclusions are corroborated by other evidence in the record, which, as discussed below, indicate that Sysco and USF are close competitors, particularly for large national customers.

b. <u>The parties' ordinary course documents</u>

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[28] The study did include one health care organization, Kaiser Permanente, and one GPO, Amerinet.

The FTC presented ordinary course documents, from both Defendants and third parties, which support Dr. Israel's conclusion that Sysco and USF are particularly close competitors. For example, a 2012 USF presentation, titled "Strategy Refresh," explains that one reason for strategic rethinking is that "[c]ustomers perceive little difference between us and *our main competitor*," identified as Sysco. PX0303 l-003 (emphasis added). The same presentation devotes a section to "Performance v. Sysco" and describes the companies as "[i]ndustry leaders." PX0303 l-010-0l l. Another USF document **[*65]** describes Sysco as USF's "major rival." PX03032-043.

Similarly, a Sysco presentation to its Board of Directors describes USF as its "next largest competitor" and puts forth "recent intelligence" about USF and two other competitors. PX01007-018; PX01007-023. Another Sysco strategy document focusing on the healthcare sector states that "US Foodservice is our **[**147]** strongest competitor for Healthcare GPO dollars." PX01388-004. In addition, there are many specific instances in the record demonstrating fierce competition between Sysco and USF for national customer accounts.[29] These documents indicate that Sysco and USF compete aggressively against one another on price; non-price incentives, such as signing bonuses; service; and other value-added offerings.

Industry analysts also have recognized the close competition between Defendants. For instance, the Cleveland Research Group's January 2014 market report on Sysco noted the Cleveland Research Group's assessment that "both Sysco and US Foods have priced each other down competing for larger national/regional contract accounts over the last several years" and that "the acquisition removes a key price competitor (particularly with larger contract accounts)." PX09332-004.

c. Testimonial evidence

A number of industry actors testified that they view Sysco and USF to be close competitors for national customers. Particularly compelling testimony came from Mark Allen, the head of the foodservice distributors' trade group, IFDA. In his deposition, Mr. Allen **[**148]** agreed that Sysco and USF were "closest competitors" for national accounts, such as GPOs, hospitality, and foodservice management companies. PX00570-012; PX00570-014. He further described Sysco and USF as "powerful competitors" for independent customers, PX00570-l 13, and testified that, in his experience, GPOs, foodservice management companies, and hospitality chains use Sysco and USF to keep each other honest on price and service, PX00570-019. The testimony of the PFG's President and CEO, George Holm, was to the same effect. He testified that in his experience "foodservice management companies, GPOs[,] and certain restaurant groups" have "obtained lower prices by bidding Sysco and US Foods against each other." Hr'g Tr. 651.

d. Conclusion on unilateral effects in the national customer market

The court's finding that Sysco and USF are close competitors in the national customer market is no surprise, given the uncontested facts of this case. Sysco and USF are the country's two largest broadliners by any measure. They have far more distribution centers, SKUs, private label products, sales representatives, and delivery trucks than any other broadline distributor. That they rely on these **[**149]** competitive advantages to compete, and compete aggressively against one another in the market for national customers, is amply born out on this record.

Based on all of the evidence presented, the court finds that, because the proposed merger would eliminate head-to-head competition between the number one and number two competitors in the market for national customers, the merger is likely to lead to unilateral anticompetitive effects in that market. Evidence of probable unilateral effects strengthens the FTC's *prima facie* case that the merger will lessen competition in the national customer market. *See Heinz, 246 F.3d at 717* (footnote omitted) (finding that "the FTC's market concentration **[*66]** statistics are bolstered by the indisputable fact that the merger will eliminate competition between the two merging parties"); *Whole Foods, 548 F.3d at 1043 (Tatel, J.)* (citation omitted) (internal quotation marks omitted) (stating that "there can be little doubt that the acquisition of the second largest firm in the market by the largest firm in the market will tend to harm competition in that market").

[29] *See, e.g.*, PX01066-001-002; PX03064-001; PX01061-001-006.

2. Merger Simulation Model—National Customer Market

To further show that the merger would harm national customers, Dr. Israel ran a merger simulation model to **[**150]** predict the merger's effect. Dr. Israel used an "auction model" to estimate the harm to national customers based on his real-world observation that national customers used RFP processes that "typically involve[d] competitive bids and bilateral negotiations between distributors and foodservice operators" to award business. PX09350-110. Under an auction model, the terms offered by the winning bidder are determined (or at least heavily influenced) by the second-best bidder, because the winning bidder will offer price and service terms that are just good enough to win the business. In theory, if the top two bidders merge, price and service terms will be determined (or at least heavily influenced) by the previously third-best bidder, who in a post-merger world would move into the number two spot. An auction model predicts harm to customers if, as here, the top two bidders merge and the next best bidder is a distant third. The magnitude of the harm is defined as the difference between the values offered by the companies that had been the pre-merger second-and third-place bidders. PX09350-113-114; *see* CCC Holdings, 605 F. Supp. 2d at 69 (describing a similar auction model for predicting a price increase).

Practically speaking, **[**151]** the premise of Dr. Israel's auction model was that, in the pre-merger world, Sysco and USF are national customers' top two choices and, therefore, each company sets the other company's price. But, if they were to merge, the winning bidder's price would only be subject to competitive pressure by a pre-merger third-place bidder, such as PFG or some other distant competitor. If the next best bidder is not a major competitor, and therefore does not play a significant role in affecting prices, national customers will be harmed. An email dated December 12, 2013, summarizing a "USF Senior Teams" webcast addressing the proposed merger, perfectly captures this core premise of Dr. Israel's model. The email identified as one of the "key messages": "The 'distance' between the combined company and the next set of regional players *is huge*. Those regional players will have an even harder time trying to play catch up going forward because they simply won't have the resources that the combined company has to transform the industry." PX00103-002 (emphasis added). The "huge" distance between the merged entity and the rest of the field corresponds to the merger harm that Dr. Israel's model predicts.

To **[**152]** quantify the likely harm to national customers, Dr. Israel performed calculations that used as inputs, among others, his estimates of the parties' national customer market shares and their price-cost margins. PX09350-118. He concluded that, absent significant efficiencies and other mitigating factors, the merger would harm national customers on the order of more than $1.4 billion annually. PX09350-120; PX09350-220. Factoring in the divestiture to PFG and its increased market share, Dr. Israel calculated likely merger harm of more than $900 million annually. PX09350-189; PX09350-237.

[*67] Defendants assert that Dr. Israel's model is flawed for the same reason that they criticize his national market share calculations—both rely on the unreliable RFP/bidding data. Specifically, Defendants argue that, because the merger simulation model relies on the national market share calculations as a critical input, and because those market shares depend on the unreliable RFP/bidding data, Dr. Israel's estimate of likely merger harm is likewise unreliable. As discussed, the court agrees that the RFP/bidding data set is imperfect and its resulting market share calculations are imprecise to some degree. **[**153]** Dr. Israel's most conservative market share analysis, however, did not rely on the RFP/bidding data but rather on the CID data, and provided a reasonable approximation of the parties' share of the national customer market. Dr. Israel ran his merger simulation using that lower-bound market share estimate and still reached the conclusion that, absent significant efficiencies, the merger would likely cause significant harm. PX09350-121 n.363 ("Finally, I tested the robustness of my results to Sysco and USF having lower combined shares. I found that even when I use the lowest (and almost certainly too low) Sysco and USF shares presented in **Table 1**, the required efficiencies predicted by the model still far outweigh the efficiencies claimed by the parties."). The court, therefore, concludes that Dr. Israel's merger simulation model strengthens the FTC's *prima facie* case that the merger will substantially lessen competition in the market for national customers.

3. Unilateral Effects—Local Markets

As it did for the national customer market, the FTC presented empirical, documentary, and testimonial evidence to demonstrate the potential for unilateral effects to harm local markets. That evidence, **[**154]** however, presented a more muddled picture of the potential for unilateral effects than did the evidence for the national customer market.

a. Dr. Israel's empirical analysis

As he did with the national customer market, Dr. Israel looked at Defendants' business records to determine how closely they compete in local markets. The data came from two sources—USF's Linc database and Sysco's request for incentives (RFI) records. The Linc database, as discussed earlier, is a customer relations management tool used by USF sales personnel to manage and store information on existing and prospective customer accounts. RFIs are internal Sysco records that sales personnel were required to submit to regional presidents to obtain approval to offer incentives to customers to either switch to Sysco or stay with the company.

Starting with the Linc database, Dr. Israel observed and analyzed nearly 100,000 business opportunities between January 2011 and June 2014 and divided them into two groups—USF wins and USF losses. When USF won the business, sales personnel identified Sysco as the main competitor 43 percent of the time (and 48 percent of the time measured by revenue); when USF lost the business, USF sales **[**155]** personnel identified Sysco as the main competitor 46 percent of the time (and 68 percent of the time measured by revenue). PX09350-143, Table 11. Whether USF won or lost, sales personnel identified Sysco as the main competitor eight times more frequently than the next most mentioned competitors (PFG and Gordon Food Service). Dr. Israel also segregated the Linc database's mentions of competitors in 20 local markets. That study showed that sales personnel in every market identified Sysco as USF's main competitor by a wide **[*68]** margin, especially when measured by revenues. PX09350-145, Table 14.

The RFI data painted a similar picture from the Sysco perspective. Dr. Israel reviewed 224 Sysco RFIs, covering a three-year period from 2011 to 2014, when Sysco discontinued the practice. In more than 66 percent of the RFIs, Sysco sales personnel identified USF as the reason for the incentive request. No other competitor appeared more than 10 percent of the time. PX09350-146-147.

Defendants attacked Dr. Israel's reliance on the Linc database, as they did when he used it in his aggregate diversion analysis. They asserted that Dr. Israel improperly relied on the Linc database as a win-loss record, when **[**156]** it was never intended as such. USF's Executive Vice President of Strategy, David Schreibman, testified that sales people did not use the database consistently and would sometimes enter competitor information simply to fill in the database; ultimately, USF did not rely on it to identify market competition. Hr'g Tr. 1505-06. Defendants also presented a local switching study performed by Dr. Bresnahan, which used the same switching methodology as described above but applied to local customers. According to Dr. Bresnahan, when local customers switch away from Sysco, they switch to USF only 11 percent of the time; and when they switch away from USF, they switch to Sysco only 15 percent of the time. Hr'g Tr. 2163. In other words, according to Dr. Bresnahan's switching analysis, when local customers switched away from Sysco it was typically to distributors other than USF.[30]

The court finds that the empirical evidence, on balance, shows that Sysco and USF are close competitors for local customers. As the court has already observed, relying on the Linc database to draw firm conclusions is problematic for the reasons raised by Defendants. That said, even recognizing the data's limitations, it so overwhelmingly demonstrated primary competition between Sysco and USF based on a sizeable number of observations (nearly 100,000 entries) that it cannot be wholly disregarded as evidence of close competition. Furthermore, the court found the RFI analysis especially compelling; indeed, Defendants did little to contest it. Although the number of observations was low, the RFI data overwhelmingly showed Sysco seeking incentives to attract or keep local customers in response to USF's efforts far more often than Sysco attempted to respond to any other competitor's efforts.

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[30] Dr. Bresnahan also did another switching study to support his findings. He conducted a study of fresh chicken purchases by customers in San Diego, from which he concluded that customers "turn off and on buying fresh chicken from Sysco" and that most of the time when they "turn off" Sysco they buy from someone other than USF. **[**157]** Hr'g Tr. 2162.

Dr. Bresnahan's switching study provided some counterweight to Dr. Israel's work. Like his national switching analysis, however, it did not account for competition when customers used Sysco and USF as leverage against each other, as many local customers said regularly occurred. The local **[**158]** switching study also relied heavily on chain restaurants and hotels and thus did not factor in the buying habits of other types of local customers, particularly independent restaurants. Therefore, notwithstanding the limits of the data sets relied on by Dr. Israel, the court finds that the empirical evidence supports the conclusion that Sysco and USF are close competitors in local markets.

[*69] b. The parties' ordinary course documents

Two notable ordinary course documents also support the conclusion that Sysco and USF are close competitors for local customers. The first is USF's November 2012 "Investor Presentation," which represented that "US Foods is estimated #1 or #2 position in [TEXT REDACTED BY THE COURT] of served markets." PX03000-014; *see also* PX03118-006. As previously noted, USF's David Schreibman confirmed both the present-day accuracy of that statement and the fact that, in many of those markets, Sysco occupied the number one or two position. DX-00272 at 62, 65. The second is the July 2011 USF acquisitions strategy document, which estimated USF's position in 54 separate markets, apparently based on market penetration rather than market share. USF estimated that either Sysco **[**159]** or USF was the leading broadliner in [TEXT REDACTED BY THE COURT] of those markets and was the number two broadliner (or tied for first) in [TEXT REDACTED BY THE COURT]. *See also* PX03002-009 (Clayton, Dubilier & Rice document, titled "Operating Review," acknowledging that one of Sysco's strengths is "[g]eographic coverage in all the key markets in the U.S. - #1 or #2 in virtually all the markets in which they operate"); PX03004-001 (Clayton, Dublier & Rice memo stating that USF is a "leader in both national and local markets" and that "Sysco [is the] closest competitor with similar business mix"). Sysco's and USF's leading positions in multiple local markets shows that they are close competitors in those markets.

c. Testimonial evidence

The testimonial evidence was more equivocal about the closeness of competition between Defendants. It demonstrated that Sysco and USF are strong competitors for local customers in several markets, but it also showed that other broadliners are competing effectively in many of those areas. The FTC's case featured four local markets: (i) Columbia/Charleston, South Carolina; (ii) Omaha, Nebraska; (iii) Raleigh/Durham, North Carolina; and (iv) Southwest Virginia. For **[**160]** each of those markets, the FTC presented testimonial evidence supporting Defendants' leading market positions. For instance, PFG's George Holm agreed that Sysco and USF were the largest and two most "competitively significant" broadline distributors in Columbia/Charleston, Raleigh/Durham, and Southwest Virginia. Hr'g Tr. 653-57; DX-00276 at 70-72. Mark Allen, IFDA President, agreed with those assessments, calling Defendants the "dominant" or "strongest" competitors in those three markets (and Las Vegas). DX-00294 at 170; *see also* Hr'g Tr. 1800 (testimony from Sysco Mid-Atlantic President Mike Brawner stating that USF is a "strong competitor" in Columbia, Raleigh/Durham). USF's ordinary course materials corroborate those observations, at least in terms of market penetration. PX03118-007-008 (showing USF as a "Strong #[TEXT REDACTED BY THE COURT]," based on market penetration, in Raleigh, Columbia, and Roanoke, with Sysco as number two in those areas, and showing Sysco as the number one broadliner in Omaha with USF a "Distant #[TEXT REDACTED BY THE COURT]").

Yet, when customer-level testimony is considered, the evidence of Defendants' leading market positions and their post-merger ability **[**161]** to increase prices becomes less clear. Both sides deposed and obtained numerous declarations from various customers in these local markets. The customer testimony obtained by the FTC invariably decried the merger's impact on local markets, whereas Defendants' customer witnesses emphasized alternatives in the marketplace and the ability to switch broadliners if the merged company **[*70]** attempted to impose a price increase.[31] Because of these conflicting local market assessments, the court cannot draw firm conclusions about the competitiveness of the local broadline markets from the testimonial evidence.[32]

d. Conclusion on unilateral effects in the local markets

In the final analysis, after considering all of the record evidence on local markets, the court finds that the FTC has shown that unilateral effects are likely to occur in many local markets because the merger will eliminate one of the top competitors in those markets. Though the court finds the evidence of unilateral effects in the local markets **[**164]** to be less convincing than in the national customer market, the evidence nevertheless strengthens the FTC's *prima facie* case of merger harm.

4. Local Event Studies

To further show that the merger would adversely impact local customers, the FTC presented the results of an econometric event study conducted by Dr. Israel. Dr. Israel analyzed Sysco's opening of two distribution centers—one in Long Island, New York, in July 2012, and one in Riverside, California, in June 2013—to determine the impact those openings had on prices paid by USF customers served from a nearby competing facility. Known as an "entry study," Dr. Israel selected the Long Island and Riverside events because they were the only two recent instances in which Sysco had opened a new distribution center in the same market as a USF distribution center. From these event studies, the FTC hoped to show that prices fell **[*71]** when Sysco and USF directly competed and that the merger's elimination of USF as a competitor would have an upward effect on pricing.

Dr. Israel found that Sysco's entry in Long Island resulted in a 1.4 percent decline in USF's prices for customers in the 75 percent overlap area. PX09350-148. He also ran variations **[**165]** of his regression analysis on other groupings—customers within a 50 percent overlap area, customers purchasing more than 100 SKUs, and customers buying private label products—and found that the price decrease on these groupings was even greater. PX09350-148. By contrast, Dr. Israel found a less significant price impact in the Riverside entry study—a negligible price decline of only .06 percent.

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[31] *Compare* PX07020-002 (Champ McGee, owner of Little Pigs Barbeque and FTC-sponsored declarant expressing "serious concerns" about merger's effect on business in the Columbia market), *and* Hr'g Tr. 344 (FTC witness, Gary Hoffman, Vice President and Corporate Executive Chef of Upstream Brewing Company from the Omaha market, expressing concern that the proposed merger would prevent him from playing Defendants off one another), *and* PX00487-005 (FTC-sponsored declarant Jason Smith of 18 Restaurant Group, from the Raleigh/Durham market, expressing concerning about the merger "because it eliminates one **[**162]** of our only two options for broadline distribution services" and rejects other competitors), *and* Hr'g Tr. 544-45 (FTC witness, Daniel Schablein, Controller at Wintergreen Resort from the southwestern Virginia market, stating that Sysco and USF were the only legitimate broadliners for his business), *with* DX-00227 at 2 (Justin Brooks, owner of Frayed Knot Restaurant and Defendants-sponsored declarant, stating "I do not believe that Sysco could raise prices or reduce services on my business" in the Columbia market because of competition from PFG, Merchants, Reinhart, and Gordon Food Service), *and* DX-00191 at 2 (Defendants-sponsored declarant Anthony Fucinaro of Anthony's Steakhouse, from the Omaha market, stating, "If Sysco were to raise prices or lower service levels, I would move my contract to Reinhart, Martin Brothers, and/or Cash-Wa"), *and* DX-00232 at 2 (Defendants-sponsored declarant Patrick Cowden of Tobacco Road Sports Cafe, from the Raleigh/Durham market stating, "If Sysco tried to raise prices or decrease service quality following the merger, I could and would replace them with any of the other bidders in a heartbeat"), *and* DX-00209 at 1 (Defendants-sponsored declaration from **[**163]** George Huger of Southern Inn Restaurant, from the southwestern Virginia market, stating that he would have alternatives, including PFG and Staunton Foods, if he became dissatisfied with Sysco's prices or service after the merger).

[32] The FTC did not present testimony or customer declarations about many of the markets that it claims will be highly concentrated after the merger. That is not, however, fatal to its case. *See* Brown Shoe, 370 U.S. at 339, 341 (rejecting the argument that the government had not proven its case because it did not present evidence "in each line of commerce and each section of the country" and stating that "[t]here is no reason to protract already complex antitrust litigation by detailed analyses of peripheral economic facts, if the basic issues of the case may be determined through study of a fair sample").

Dr. Israel explained that neither of these events were clean entry studies because, in both cases, Sysco already had an existing distribution facility in the area, and thus already was competing against USF. In his opinion, the resulting price effects, therefore, were actually understated. Dr. Israel also found the results of the Long Island event more compelling than the Riverside event for two reasons. First, the Long Island facility was a greater distance away from Sysco's existing facility than the new Riverside facility was from its existing facility. Second, the Long Island facility served more new business than the Riverside facility. For those reasons, he concluded, the Long Island study better approximated a true entry event. Hr'g Tr. 1097-98. Dr. Israel ultimately concluded, based largely **[**166]** on the Long Island study, that the merger's elimination of USF as a competitor would have an upward pricing effect in local markets.

The court does not find Dr. Israel's entry studies to be convincing evidence that the merger will harm local customers. Dr. Israel's efforts to distinguish the Long Island and Riverside events simply do not hold up. Defendants' expert, Dr. Bresnahan, showed that the difference in distance between the Riverside facility and its nearby existing facility, on the one hand, and the Long Island facility and its nearby existing facility, on the other, was a mere 14 miles. He also showed that both new Sysco facilities served a similar fraction of existing Sysco customers. Thus, the two entry events were not as dissimilar as Dr. Israel testified, yet they produced very different results—one showing a significant price decrease, the other showing a negligible one. There may be location-specific reasons for the different results, but the reasons offered by Dr. Israel do not withstand scrutiny and no other evidence explained the difference. The court thus cannot conclude from these seemingly conflicting entry studies that the merger will harm local customers.

The court **[**167]** further notes that the pricing evidence here is far weaker than that found in other merger cases. In *Staples*, for instance, there was "compelling evidence" showing that prices were 13 percent higher in markets where Staples did not have competition from another office superstore. *970 F. Supp. at 1075-76* (pricing study). Similarly, in *Whole Foods*, an entry study showed that Whole Foods dropped its prices by five percent when another organic supermarket opened in the area. *548 F.3d at 1046-47 (Tatel, J.)*. In fairness, the FTC was unable to conduct pricing studies like those done in *Staples* and *Whole Foods* here because Defendants have competing facilities in nearly every local market. But the absence of convincing pricing effects evidence is the weakest aspect of the FTC's case.

5. Summary

In summary, the FTC has bolstered its *prima facie* case with additional proof that **[*72]** the merger would harm competition in both the national and local broadline markets. Although the FTC's case would have been strengthened with more convincing pricing effects evidence, the court nevertheless finds that the FTC has presented a compelling *prima facie* case of anticompetitive effects. *See* *Baker Hughes, 908 F.2d at 991* ("The more compelling the prima facie case, the more evidence the defendant **[**168]** must present to rebut it successfully."). The court now turns to Defendants' rebuttal arguments.

III. DEFENDANTS' REBUTTAL ARGUMENTS

HN31[] The FTC has established a presumption that the proposed merger will substantially lessen competition. Defendants, however, may rebut that presumption by showing that the traditional economic theories of the competitive effects of market concentration are not an accurate indicator of the merger's probable effect on competition or that the procompetitive effects of the merger are likely to outweigh any potential anticompetitive effects. *Heinz, 246 F.3d at 715*. The more "compelling the [FTC's] prima facie case, the more evidence the defendant must present to rebut [the presumption] successfully." *Baker Hughes, 908 F.2d at 991*. "A defendant can make the required showing by affirmatively showing why a given transaction is unlikely to substantially lessen competition, or by discrediting the data underlying the initial presumption in the government's favor." *Id.*

Defendants advance four arguments to support their claim that the food industry will remain competitive after the merger: (i) a post-divestiture PFG will be a strong competitor for customers seeking nationwide distribution; (ii) competition from other broadliners **[**169]** and other distribution channels will continue and grow; (iii) the entry of new competition and the repositioning of existing competitors will keep the industry competitive; and (iv) customers will benefit from efficiencies arising from the merger. The court addresses each of those arguments in turn and finds that, even taken collectively, Defendants cannot overcome the FTC's strong presumption of anticompetitive harm.

A. PFG Divestiture

HN32[] Aside from the Supreme Court's guidance that "[t]he relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition,'" *Ford Motor Co. v. United States, 405 U.S. 562, 573, 92 S. Ct. 1142, 31 L. Ed. 2d 492 (1972)* (footnote omitted) (quoting *United States v. E.I. Du Pont De Nemours & Co., 366 U.S. 316, 326, 81 S. Ct. 1243, 6 L. Ed. 2d 318 (1961))*, there is a lack of clear precedent providing an analytical framework for addressing the effectiveness of a divestiture that has been proposed to remedy an otherwise anticompetitive merger. *Compare* *CCC Holdings, 605 F. Supp. 2d at 56-59* (applying the framework for market entry analysis in assessing the effectiveness of a licensing agreement that would enhance the competitiveness of an existing competitor) *with* *FTC V. Libbey, Inc., 211 F. Supp. 2d 34, 47-48 (D.D.C. 2002)* (finding defendants' proposed "fix" inadequate—without going into market entry analysis—because competitor would face higher costs).

Here, both sides cite to ***HN33***[] the 2004 U.S. Department of Justice's "Policy **[**170]** Guide to Merger Remedies," which provides the following guidance: "Restoring competition requires replacing the *competitive intensity* lost as a result of the merger rather than focusing narrowly on returning to premerger HHI levels." Antitrust Div., U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies 5 (Oct. 2004) [hereinafter 2004 Policy Guide] (emphasis **[*73]** added); *see also* Areeda & Hovenkamp 3d ed., *supra*, ¶ 990d (citing 2004 Policy Guide). A more recent U.S. Department of Justice Policy Guide provides: "The touchstone principle for the Division in analyzing remedies is that a successful merger remedy must effectively preserve competition in the relevant market." Antitrust Div., U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies 1 (June 2011) [hereinafter 2011 Policy Guide] (footnote omitted). Both the 2004 Policy Guide and the 2011 Policy Guide add that an effective divestiture should address:

> [W]hatever obstacles (for example, lack of a distribution system or necessary know-how) lead to the conclusion that a competitor, absent the divestiture, would not be able to discipline a merger-generated increase in market power. That is, the divestiture assets **[**171]** must be substantial enough to enable the purchaser to *maintain the premerger level of competition*, and should be sufficiently comprehensive that the purchaser will use them in the relevant market and be unlikely to liquidate or redeploy them.

2004 Policy Guide at 9 (emphasis added) (footnotes omitted); *see also* 2011 Policy Guide at 8. With these principles in mind, the court analyzes the effect of the proposed divestiture.

1. *Competitive Pressure Exerted by Post-Divestiture PFG*

Defendants argue that the divestiture of 11 "strategically located" USF distribution centers to PFG, coupled with PFG's "aggressive" expansion across the country, will "replace [any] competitive intensity lost as a result of the merger." Defs.' Proposed Findings of Fact and Conclusions of Law, ECF No. 171 at 156 [hereinafter DFF] (alteration in original) (quoting 2004 Merger Guidelines at 5). In addition to the 11 divested distribution centers, PFG's owner, The Blackstone Group, a leading private equity firm, has committed $490 million to develop seven more distribution centers (called "foldouts") and to expand capacity in 16 existing facilities. Hr'g Tr. 724, 767-69; DFF at 155. Defendants also point to the industry acumen **[**172]** and experience of PFG's executives, particularly that of its President and CEO, George Holm, who has over 37 years of experience in the foodservice distribution industry. The court does not doubt Blackstone's financial commitment to PFG or Mr. Holm's leadership capabilities. However, based on the evidence presented, the court is not persuaded that post-merger PFG will be able to step into USF's shoes to maintain—certainly not in the near term—the pre-merger level of competition that characterizes the present marketplace.

PFG's five-year business plan shows that post-merger PFG will not be nearly as competitive as USF is today. In the lucrative market for national customers, the plan projects that PFG will have approximately §[TEXT REDACTED BY THE COURT] billion in national broadline sales by 2019—*less than half* of USF's 2013 national broadline sales of §[TEXT REDACTED BY THE COURT] billion. PX09350-074; PX09060-002; PX09060-004; PX09060-006; PX09253-023. Stated in terms of market share, PFG estimates that it will grow to 20 percent of the national broadline market over five years, with the merged Sysco-USF company having the "remaining share of the national broadline business." PFF at 220; Hr'g **[**173]** Tr. 719, 721-22. That percentage is smaller than USF's share of the national broadline customer market today. PX09350-187 (Dr. Israel's report stating "the best case scenario under the divestiture is the emergence of a significantly smaller competitor than USF even several years into the future"). Defendants are correct that the **[*74]** divestiture does not have to replicate pre-merger HHI levels. However, the fact that PFG only expects to achieve less than *half* of USF's current national customer sales in five years—assuming that its planned expansion efforts are successful—does not demonstrate that PFG will be sufficiently able to "discipline a merger-generated increase in market power." *See* 2011 Policy Guide at 8 (footnote omitted).

The court's concern about PFG's ability to compete effectively in the post-merger world is not limited to sales and market share projections. PFG's short-term effectiveness will depend in large part on its ability to incorporate the 11 formerly-USF-held distribution centers. Even assuming that PFG can do so seamlessly, the new PFG will have only 35 distribution centers—far fewer than the at least 100 distribution centers owned by the combined Sysco/USF. Having **[**174]** only one-third of the merged company's distribution centers will put PFG at a significant disadvantage in competing for national customers. Indeed, as Dr. Israel demonstrated, Defendants' largest national customers use more than 35 distribution centers. Those customers represent [TEXT REDACTED BY THE COURT] percent of Sysco's national broadline revenues, and [TEXT REDACTED BY THE COURT] percent of USF's national broadline revenues. PX09375-075-077, Figure 3. The court is not convinced that these large national customers will consider a post-merger PFG to be as capable of meeting their needs as USF is today.

Defendants counter that "PFG will be able to compete aggressively with its additional distribution centers because the fewer the distribution centers used for a particular customer, the greater the inbound efficiencies." DFF at 161-62. Because of higher volume per warehouse and lower freight costs, Defendants claim, many customers *prefer* to be served out of fewer distribution centers—so having a larger number of distribution centers is not necessarily a competitive advantage. *Id.* at 28, 161-62; Hr'g Tr. 1570-71, 1573-74; DX-00264 at 122-23. For example, to serve Zaxby's, a regional quick serve chain, PFG trucks **[**175]** drive past some of their own distribution centers because the longer drive "proves cheaper for the customer." DFF at 161; Hr'g Tr. 852. PFG can also take advantage of "shuttling," a technique of caravanning multiple trailers on a single truck, to increase efficiencies. DFF at 162; Hr'g Tr. 855-57. Mr. Holm even stated at his deposition that he believed that PFG would be able to serve [TEXT REDACTED BY THE COURT] out of 35 distribution centers more effectively than USF currently does out of [TEXT REDACTED BY THE COURT] DX-00276 at 96.

The court is skeptical of Defendants' claim that, even with far fewer distribution centers, PFG will be on equal competitive footing with the merged firm, especially for national customers. Defendants' own growth belies this fact. Both Sysco and USF have, over time, increased their number of distribution centers, demonstrating that Defendants view more distribution centers to be a competitive advantage. Indeed, when Defendants presently compete for national business, they highlight their nationwide geographic coverage to potential customers. <u>See, e.g.</u>, PX03000-014 (USF presentation touting its "[a]bility to leverage our national scale to cost effectively service customers nationally); **[**176]** PX00247-001-002 (USF email communication to [TEXT REDACTED BY THE COURT] describing the "US Foods Value Proposition" as including a "Privately held National Distribution footprint company"); PX01062-005 (Sysco presentation to [TEXT REDACTED BY THE COURT] highlighting that Sysco's "national footprint, strong service approach and our breadth of product offerings is what differentiates us from our competition"); PX00279-001 (USF email to [TEXT REDACTED BY THE COURT] (a restaurant chain), mentioning "national footprint and scale" as a **[*75]** selling point); PX00281-006 (slide presentation to [TEXT REDACTED BY THE COURT] touting USF's "extensive" distribution network). USF's Executive Vice President of Strategy David Schreibman also testified that USF has the ability to leverage its national scale to cost-effectively service customers, and that USF views its national scale as a significant competitive advantage. Hr'g Tr. 1521-22; *see also* PX03010-001 (internal USF document stating that the "[o]nly 'true' options for both Premier and Novation is either

Sysco or USF[;] [t]he regional players will bid, but not be seriously considered"). Furthermore, there was no evidence presented that Defendants have moved **[**177]** to consolidate their distribution facilities to take advantage of the supposed benefits of having fewer distribution centers.[33]

Notably, not even PFG has always considered the divestiture of only 11 distribution centers to be sufficient for it to compete on a national level. A PFG internal strategy document, dated April 3, 2014, sets forth two "final" proposals for additional distribution centers "necessary to establish a national broadline network." One proposal included options of 16 to 20 distribution centers, and the other included a list of 14 to 15. Hr'g Tr. 669-71 (discussing PX09193). Six months later, in October 2014, after PFG had started negotiations with Sysco about the divestiture, internal PFG communications re-affirmed the need for more than 11 distribution centers. Following Sysco's proposal to sell only seven distribution centers, a PFG board member wrote to George Holm:

> I would still find a way to tell the FTC that we think it takes 13 but that Sysco won't **[**178]** let us look at more than 7 *which will get us nowhere near a national solution*. We need the package size to be bigger to have any chance of winning *and to ever compete nationally*. . . . [We] should proactively educate the FTC why 13 opcos [another word for distribution center] is the *bare mimimum*.

PX09192-001 (emphasis added); *see also* PX00526-036; PX00526-141-142; PX09190. PFG did just that when it met with the FTC, making the case that it needed 13 distribution centers to "compete effectively for national business." PX00526-039 at 153; PX09070 (PFG's presentation to the FTC with a map of 13 USF distribution centers needed by PFG, which included the four metropolitan areas mentioned below). Ultimately, PFG was not able to negotiate the sale of more than 11 distribution centers, with Sysco having made the decision that it "would rather litigate w[ith] the FTC than sell more than 11." PFG felt that it was "prudent to engage on 11 for now to keep the momentum/dialogue going." PX09157-002; PX00526-041 at 163.

Having fewer distribution centers means that PFG will face coverage gaps in the geographic areas where it sought, but did not receive, a distribution center. Those areas include: Cincinnati, **[**179]** Ohio; Omaha, Nebraska; Oklahoma City, Oklahoma; and Los Angeles, California, where PFG received a different, smaller distribution center than it requested. PX00526-039 at 155-56; *see also* PX09070.

Defendants argue that PFG's requests to Sysco for a larger number of distribution centers than they actually received was part of a bargaining strategy. Closing Arg. Hr'g Tr. 115-16. However, PFG's recognition that it needed more than 11 distribution centers to compete **[*76]** nationally is reflected in internal documents that were created months before PFG began negotiating with Sysco. The court credits those internal projections over PFG's current position that an additional 11 distribution centers is enough to compete for national customers. *See* Amicus Br. of PFG, ECF No. 133 at 22-24 (arguing that PFG will be able to compete effectively with 35 distribution centers).

Defendants argue that, with the planned "foldouts," *i.e.*, new distribution facilities located in contiguous geographic markets, PFG will have more than the 13 distribution centers it was seeking, including one in Cincinnati. DX-01706 at 14. However, PFG has never done a foldout, and according to internal estimates, these facilities **[**180]** may not be operational until, at the earliest, several years following the merger.[34] Defendants assert that "PFG will be well-positioned to *bid* on Day One," because even after the bids are submitted, discussions between a customer and a distributor can take up to a year before a contract is finalized, and PFG can continue its foldout efforts in the meantime. DFF at 160 (emphasis added). According to Defendants, if the customer needs service sooner, PFG can provide service via shuttling until the foldout is complete. *Id.* at 161. However, there is substantial evidence showing that customers value having distribution centers close to their locations and that distribution costs increase with driving distance. Thus the court is not persuaded that—even with promises of foldouts and the use of shuttling—a

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[33] Defense counsel at oral argument represented that USF recently had closed two distribution centers, Closing Arg. Hr'g Tr. 113, but counsel for the FTC noted that USF also recently had opened a new distribution center, *id.* at 125-26.

[34] PFG's Senior VP of Operations estimated that PFG's "priority" foldouts in Cincinnati, Ohio, Detroit, Michigan and Buffalo, New York, will not be operational until fiscal year 2018, and Montgomery, Alabama will **[**181]** not be operational until 2017. Hr'g Tr. 735-38.

sufficient number of national customers will view PFG as a viable alternative to the merged entity "on day one" to maintain the intensity that characterizes the present competition between Sysco and USF.

2. Additional Disadvantages Faced by Post-Merger PFG

In addition to its lack of nationwide geographic coverage, the court has other concerns about PFG's ability to compete against the merged entity. Because it will purchase in smaller product volumes than the merged Sysco entity, PFG could face higher product acquisition costs, or cost of goods sold ("COGS"), than its competitor. PX05051-003 (Blackstone Memorandum indicating that "due to its scale, USF has better procurement than PFG and the 11 [distribution centers] will likely spend more to acquire private label products and get less supplier rebate dollars"); PX09350-205 (Dr. Israel's opinion that, even with the divestiture, PFG is unlikely to make up the gap in COGS between itself and the parties today). PFG also will offer substantially fewer SKUs than the merged entity. PFG today sells less than half the total number of SKUs as USF and one third the number of private label SKUs. PX06055-004 (USF offers 350,000 SKUs, of which 30,000 are private label); PX09507-007; PX09507-013 (PFG offers 150,000 SKUs, of which [TEXT REDACTED BY THE COURT] are private label). PFG's fewer SKU offerings **[**182]** will be a competitive disadvantage.

PFG also will face disadvantages in terms of human resources. Defendants point out that, as part of the divestiture package, PFG would acquire over "4,400 USF personnel, including senior executives and personnel with healthcare expertise at the 11 distribution centers, and corporate regional leadership, national sales personnel, merchandising personnel, and others with national sales expertise; [and] a 12 month non-solicit of PFG employees at the 11 distribution centers." DFF at 155 (citing Hr'g Tr. 815-25; DX-06100 at 1). **[*77]** However, even assuming that every USF employee at the 11 distribution centers becomes a PFG employee, PFG will still have fewer than half the sales representatives of either Sysco or USF today and less than one-quarter of the sales representatives of the combined firm. PX09350-181-184, Figure 18. And, PFG will only receive, at most, one-fifth of the national sales employees at USF dedicated to serving national customers. Hr'g Tr. 1528-31 (stating that only about 20 percent of USF's national account team will be made available for PFG to hire).

Moreover, PFG will be at a competitive disadvantage in its ability to offer value-added services. **[**183]** The lucrative healthcare segment is illustrative. George Holm conceded that PFG has had limited success with national healthcare customers. Hr'g Tr. 716-17. Some of that lack of success is due to PFG's limited footprint, but it is also attributable to PFG's lack of expertise in the healthcare segment and its inability to deliver value-added services to those customers. *See, e.g.*, PX00594-025 at 100 (PFG has a very small portion of [TEXT REDACTED BY THE COURT] members' business because PFG lacks acute care expertise); PX00474-001 ("PFG offers a more limited selection of healthcare-specific products than US Foods."). Even if over time PFG can acquire health care expertise, in the short run it will be at a competitive disadvantage as compared to the merged entity.[35] For instance, Joan Ralph, Group Vice President of Premier testified that, even with the healthcare employees PFG acquires through the divestiture. PFG will have significantly less healthcare expertise than USF today. Hr'g Tr. 413: PX09350-211-212. And, as IFDA President Mark Allen testified, Sysco and USF have the best understanding of the healthcare class of trade. DX-00294 at 121. The merger would only enhance that strategic **[**184]** advantage.

3. *Post-Merger PFG as an Independent Competitor*

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[35] PX [TEXT REDACTED BY THE COURT]-002 ([TEXT REDACTED BY THE COURT] stating that USF is able to offer "certain value-added services that are especially important to healthcare facilities"); PX [TEXT REDACTED BY THE COURT]-002 (Joan Ralph of Premier stating, "[i]t is critical to Premier that its members have access to foodservice representation with healthcare expertise who can provide nutritional guidance, menu-planning services, and [TEXT REDACTED BY THE COURT]."); PX [TEXT REDACTED BY THE COURT]-004 ([TEXT REDACTED BY THE COURT] discussing his concern that PFG "may lack the ability to provide the information technology services" like dynamic item ordering [TEXT REDACTED BY THE COURT] currently receives from USE); PX [TEXT REDACTED BY THE COURT]-009 ([TEXT REDACTED BY THE COURT] stating "I do not know whether PEG has the healthcare experience, which [TEXT REDACTED BY THE COURT] highly; values.").

A final factor that cuts against the divestiture as a proposed fix is that PFG will be dependent on the merged entity for years following the transaction.***HN34***[] "In order to be accepted, curative divestitures must be made to ... a willing, *independent* ***[**185]*** competitor capable of effective production ...." *CCC Holdings, 605 F. Supp. 2d at 59* (quoting *White Consol. Indus. v. Whirlpool Corp., 781 F.2d 1224, 1228 (6th Cir. 1986))* (internal quotation marks omitted). As the court observed in *CCC Holdings*, it can be a "problem" to allow "continuing relationships between the seller and buyer of divested assets after divestiture, such as a supply arrangement or technical assistance requirement, which may increase the buyer's vulnerability to the seller's behavior." *Id.* (internal quotation marks omitted). Under the Transition Services Agreement. PFG will have complete access to USF private label products for three years at its 11 new distribution centers, and therefore will be relying on the merged entity to license those products to PFG. *See* DX-06100 at 1; PX09060-005. PFG will also have the right to license USF's database for at least **[*78]** five years, with a continuing option for five more. PFG, therefore, will not be a truly independent competitor.

For the foregoing reasons, the court is not persuaded that the proposed divestiture will remedy the anticompetitive effects of the merger.

B. Existing Competition

1. Regionalization

Defendants assert that existing competition can and will constrain potential price increases or other unilateral effects in the national **[**186]** customer market. Their primary argument is that the ability of national customers to switch or threaten to switch to a network of regional distributors will inhibit anticompetitive behavior by the merged company. *See* Defs.' Opp'n Br. at 40-41. Defendants point to many large national customers who multi-source their foodservice distribution needs, including using various regional broadliners to service individual locations. Defendants cite as examples Amerinet, Sodexo, the Defense Logistics Agency, [TEXT REDACTED BY THE COURT], Subway, and [TEXT REDACTED BY THE COURT], all of whom operate regionally under multiple contracts. *See id.* at 15.

But, for several reasons, the ability to regionalize is not likely to inoculate national customers from potential anticompetitive effects. The decision of many large customers to predominantly use one broadline distributor is not simply a preference, as Defendants would characterize it, but a rational business decision. As already discussed, for the most part, the largest national customers—particularly GPOs, foodservice management companies, and hospitality companies—predominantly rely on Sysco or USF for their broadline distribution needs. The largest customers, **[**187]** generally speaking, make from 61 percent to 100 percent of their broadline purchases from Sysco or USF. *See* FTC Closing Slide 35; PFF at 113-16. Even customers who contract regionally, such as [TEXT REDACTED BY THE COURT] and [TEXT REDACTED BY THE COURT], buy in very high quantities from Defendants.

Regionalization is available today, as it will be after the merger. But market actors are not moving to that model. To the contrary, as PFG's George Holm testified, the "clear trend" among large customers is to move to a single nationwide provider. Hr'g Tr. 597-98. The court can only infer from this trend that regionalization is not a reasonable option for many national customers. Regionalization likely has not taken hold for a variety of reasons. The record shows that when a customer increases its number of distributors, it incurs greater management and supply chain costs, making it far less desirable to switch to a multi-regional model. The court found the deposition testimony of Dan Cox, the President and CEO of DMA, particularly illuminating, given that the reason for DMA's existence is to consolidate the product and service offerings of multiple regional distributors and compete for national customers. **[**188]** Mr. Cox testified that using a sole source broadliner "forms the most efficient supply chain." DX00265 at 44. He explained that "[m]ore products at each delivery reduces our cost to service and therefore reduces their supply chain costs. . . . By aggregating [customers'] spend it makes the delivery system more efficient." *Id.* at 44-45.

A regional arrangement also brings with it the disadvantage of multiple points of contact. As Mr. Cox testified, a single point of contact simplifies communications, which DMA touts as an advantage over multi-sourcing broadline distribution. *Id.* at 14, 46, 68. He also added that a single information technology system is important to national customers, and DMA offers such a platform to attract them. As **[*79]** Mr. Cox explained: "[I]f they come to DMA and deal with five different members, they wouldn't have to learn and understand five different order entry platforms. We have just one platform." *Id.* at 68. A multi-regional approach thus likely would require a customer to develop greater information technology capabilities to manage its foodservice distribution contracts.

Another downside of a multi-regional model is the difficulty in obtaining consistent products—particularly private label products—across a **[**189]** national customer's different locations. Mr. Cox offered the example of [TEXT REDACTED BY THE COURT], with which DMA does over [TEXT REDACTED BY THE COURT] million in business. [TEXT REDACTED BY THE COURT] demands that DMA comply with its product specifications "at a level of 90 percent," *id.* at 74, indicating that even when a large customer uses multiple regional distributors, they impose rigorous demands with regard to product consistency. Product consistency, of course, can be achieved by purchasing from multiple distributors who carry the same brand-named products. But that approach would limit a customer's ability to purchase private label products, which typically offer a better value proposition than branded products.

PFG's George Holm concurred with Dan Cox's assessment of national customers' business needs and why they avoid regionalization. When asked why large national customers contract mainly with either Sysco or USF and why there is a clear trend toward those customers using a single broadliner, Holm offered numerous reasons: the "ability to get SKUs in quickly"; "one place to contact"; "[o]ne IT system"; "[o]ne sales contract"; "[o]ne person to deal with"; "the same product [across] their system"; **[**190]** writing "one check as opposed to several"; "simplified contract administration"; and easier "management of approved item lists and specifications." Hr'g Tr. 600-04. The court thus concludes that the possibility of regionalizing broadline foodservice is not likely to protect national customers from the merger's anticompetitive effects.

2. DMA

Today, the only other competitor with a nationwide footprint is DMA. Defendants claim that DMA is capable of effectively competing against the merged entity because it provides a single point of contact, a single contract with consistent terms across customer locations, and a single ordering platform. DFF at 165-66 (citing DX-00265 at 63-64, 66, 68). The court disagrees.

Defendants acknowledge that DMA is not a one-stop-shop for national customers as Sysco and USF are today. Indeed, Defendants recognize that "larger customers 'look to [DMA's] members regionally . . . rather than DMA as a national solution.'" *Id.* at 164-65 (quoting DX-00265 at 86).

[TEXT REDACTED BY THE COURT] As Dan Cox, the President and CEO of DMA, explained:

> [TEXT REDACTED BY THE COURT]

DX-00265 at 64-65. As a result, [TEXT REDACTED BY THE COURT] *Id.* at 65.

National customers who value private label products, such as **[**191]** GPOs or foodservice management companies, [TEXT REDACTED BY THE COURT] *Id.* at 79-80. [TEXT REDACTED BY THE COURT] *See id.* at 224-26.

And, even if a national customer wanted to switch to DMA, [TEXT REDACTED BY THE COURT] As Mr. Cox explained, [TEXT REDACTED BY THE COURT]" *Id.* at 99. [TEXT REDACTED BY THE COURT] *Id.* at 100, 157. For example, [TEXT REDACTED BY THE COURT] recently considered switching its business to DMA, but decided to stay with Sysco [TEXT REDACTED BY THE COURT]. *Id.* at 227-29. [TEXT REDACTED BY THE COURT], the court does not view DMA as a viable competitor that can constrain a post-merger Sysco.

[*80] *3. Conclusion as to Existing Competition*

Based on the evidence presented, the court is convinced that national customers will be better off in a marketplace that has two strong competitors capable of nationwide broadline distribution than in a marketplace in which there is a single undisputed heavyweight of broadline distribution whose only competitive constraints is a transitioning PFG, DMA, and a collection of regional players.

C. Entry of New Firms and Expansion of Existing Competitors

Defendants argue that the entry of new competitors and the expansion of existing competitors will keep the industry competitive. ***HN35***[] If a court finds that "there exists ease of entry into the relevant product market," that finding "can be sufficient **[**192]** to offset the government's prima facie case of anti-competitiveness." *Cardinal Health, 12 F. Supp. 2d at 55*. "The prospect of entry into the relevant market will alleviate concerns about adverse competitive effects only if such entry will deter or counteract any competitive effects of concern so the merger will not substantially harm customers." Merger Guidelines § 9. Ease of entry must be "*timely, likely*, and *sufficient* in its magnitude, character, and scope to deter or counteract the competitive effects of concern." *Id.* (emphasis added). As with their other rebuttal arguments, Defendants bear the burden of demonstrating the ability of other distributors to "fill the competitive void" that will result from the proposed merger. *See Swedish Match, 131 F. Supp. 2d at 169*. Defendants assert that a lack of technological, legal, and regulatory barriers makes entry into the foodservice distribution industry relatively easy. Yet although all it may take is a "guy and a truck" to become a foodservice distributor, becoming a *broadline* foodservice distributor with the ability to compete for national customers is another thing altogether.

The broadline foodservice distribution industry is extraordinarily capital and labor intensive. It costs roughly $35 million to build **[**193]** a single distribution center. Hr'g Tr. 586. In addition, the distribution center must be stocked with goods. A fleet of expensive, refrigerated trucks is required to deliver the products. People—lots of them—are needed to sell the broadline service, maintain and stock the warehouse, and deliver the products. *See Swedish Match, 131 F. Supp. 2d at 171* (finding high barriers to entry where the evidence showed "substantial sunk costs in plant construction, product development, and marketing" required to compete). And, even if a newcomer were to make the substantial investment to start a broadline distribution company, there is no guarantee that customers will follow. Incumbency is a powerful force in the foodservice distribution industry. *See H&R Block, 833 F. Supp. 2d at 75* (finding that "importance of reputation and brand in driving consumer behavior" limited an existing competitor's ability to expand). Even if it were possible for a new entrant to overcome the incumbent's advantage, it would take years. These high barriers to entry will further entrench the merged company's market power. PX03003-005 (USF lender presentation describing broadline foodservice distribution as having "High barriers to entry for scale players").

Defendants also contend that **[**194]** existing firms have demonstrated the capacity to expand to compete against the merged firm. They highlight the fact that other broadline distributors—including Shamrock, Ben E. Keith, and Reinhart—started out as small businesses serving only limited items to local customers, but were able to grow to regional prominence. They **[*81]** describe examples of competitors that have recently opened new facilities or plan to do so.

But none of these examples overcome the fundamental problem with expansion as a constraint on the merged company—like new entry, successful expansion is extraordinarily capital intensive and demands a long time horizon. Based on their assessment that expansion would not be an economically viable strategy, regional distributors have said that they have no plans to expand or reposition in order to serve national customers. [TEXT REDACTED BY THE COURT], which has [TEXT REDACTED BY THE COURT] distribution centers mostly located in the [TEXT REDACTED BY THE COURT], has told the FTC that such a massive expansion would not be "viable" in the short term, given the "time and cost required." PX[TEXT REDACTED BY THE COURT]-006. Other regional distributors, including [TEXT REDACTED BY **[**195]** THE COURT] have similarly been dissuaded by the time, costs, or risks of expansion. PX[TEXT REDACTED BY THE COURT]-036 at 139-42; PX[TEXT REDACTED BY

THE COURT]-004; PX[TEXT REDACTED BY THE COURT]-003; PX[TEXT REDACTED BY THE COURT]-005-006; PX[TEXT REDACTED BY THE COURT]-048-049.

Companies rarely enter new markets without an existing customer base because the costs and risks are prohibitive. There is a real "chicken-and-egg" problem with such expansion, known in the industry as "greenfield" expansion. Companies will not make the significant capital expenditure of building a new distribution center unless they already have customers to serve, but customers will not commit to a distributor unless it has demonstrated the ability to serve its needs. As a result, expansion in the industry is typically done through "foldouts"—building distribution centers in contiguous geographic areas—so that customers can be served from an existing facility until the new facility is built. But even foldouts take time to succeed. They can take from one to three years to complete, and it can take four to five years for a foldout facility to achieve sales per square foot similar to established broadline facilities. **[**196]** PX00529-042 at 166-68; Hr'g Tr. 837-39; *see also* PX00558-051 at 201-04. Although a foldout strategy may preserve competition in a particular local market, it cannot effectively be used to replace the competition benefitting national customers lost by the merger. The only way in which a regional player could expand sufficiently and quickly enough to compete with the merged company would be through a sizeable acquisition of multiple distribution centers.

In summary, the court finds that, absent a substantial acquisition opportunity, expansion by regional players will not be timely, likely, and of sufficient magnitude to counteract anticompetitive harm. *See* *Cardinal Health, 12 F. Supp. 2d at 58* ("Although the smaller wholesalers may adequately compete and expand to service both the primary and secondary needs of local customers, this Court finds that they would not sufficiently expand to compete with the nationals.").

D. Efficiencies

1. Requirement for Merger-Specific and Verifiable Efficiencies

HN36[] Although the Supreme Court has never recognized the "efficiencies" defense in a Section 7 case, the Court of Appeals as well as the Horizontal Merger Guidelines recognize that, in some instances, efficiencies resulting from the merger may be **[**197]** considered in rebutting the government's *prima facie* case. *Heinz, 246 F.3d at 720* (citations omitted). Where, as in this case, the court finds high market concentration levels, defendants must present "proof of extraordinary efficiencies" to rebut the government's *prima facie* case. *Id.* (citations omitted) (requiring "extraordinary" efficiencies to rebut an increase in HHI of 510 points); *see also* **[*82]** Areeda & Hovenkamp 3d ed., *supra*, ¶ 971f (requiring "extraordinary" efficiencies where the "HHI is well above 1800 and the HHI increase is well above 100"). The court is not aware of any case, and Defendants have cited none, where the merging parties have successfully rebutted the government's *prima facie* case on the strength of the efficiencies. *See* *CCC Holdings, 605 F. Supp. 2d at 72* (stating that "courts have rarely, if ever, denied a preliminary injunction solely based on the likely efficiencies"). Yet even if evidence of efficiencies alone is insufficient to rebut the government's *prima facie* case, such evidence may nevertheless be "relevant to the competitive effects analysis of the market required to determine whether the proposed transaction will substantially lessen competition." *Arch Coal, 329 F. Supp. 2d at 151* (citations omitted).

HN37[] The court must "undertake a rigorous **[**198]** analysis of the kinds of efficiencies being urged by the parties in order to ensure that those 'efficiencies' represent more than mere speculation and promises about post-merger behavior." *Heinz, 246 F.3d at 721*. Specifically, the court must determine whether the efficiencies are "merger specific"—meaning they represent "a type of cost saving that could not be achieved without the merger"—and "verifiable"—meaning "the estimate of the predicted saving must be reasonably verifiable by an independent party." *H&R Block, 833 F. Supp. 2d at 89* (internal quotation marks omitted) (citing Merger Guidelines § 10); *Cardinal Health, 12 F. Supp. 2d at 62* ("In light of the anti-competitive concerns that mergers raise, efficiencies, no matter how great, should not be considered if they could also be accomplished without a merger."). Defendants bear the burden of demonstrating that their claimed efficiencies are merger specific, *H&R Block, 833 F. Supp. 2d at*

90, which requires demonstrating that the efficiencies "cannot be achieved by either company alone," Heinz, 246 F.3d at 722. And, Defendants must also demonstrate that their claimed efficiencies would benefit customers. CCC Holdings, 605 F. Supp. 2d at 74.

Defendants claim that the merger will generate over one billion dollars in annual cost savings and operational synergies and, "[e]ven when discounted substantially for unforeseen **[**199]** integration complications, possible customer loss, and the divestiture, the merged company's efficiencies are expected to generate over $600 million in savings." DFF at 178. Defendants argue that the $600 million efficiencies estimate is "the product of meticulous analysis and planning," which occurred over the course of eight months and involved over 100 employees at McKinsey, an independent consulting firm, and over 170 Sysco and USF employees who are extremely familiar with the business. *Id.* at 179. As Defendants explained, "Sysco, USF, and McKinsey reviewed a back-breaking amount of information from the merging firms, analyzed historical integration data, modeled possible cost-savings opportunities, and built a new organizational structure around the companies' combined customer base, and designed detailed day 1, day 100, and year 1 plans for integration." *Id.* Of the $600 million cost savings identified by McKinsey, Defendants' expert Dr. Hausman identified more than $490 million as merger specific. To rebut Dr. Hausman's opinion on efficiencies, the FTC presented Mr. Rajiv Gokhale of Compass Lexecon as an expert in financial economics. He opined that at least 65 percent of Defendants' efficiencies **[**200]** were not merger specific. PX09351-007.

The court does not question the rigor and scale of the analysis conducted by **[*83]** McKinsey. Nor does the court have any reason to question the accuracy of McKinsey's total annual cost savings estimate. But that is not the issue before the court. The issue is whether Defendants have shown that the projected "merger-specific" cost savings are substantial enough to overcome the presumption of harm arising from the increase in market concentration and other evidence of anticompetitive harm. As to that question, the court is unpersuaded that Defendants' combination would result in $490 million in merger-specific cost savings. Defendants have not shown that that amount, or at least a substantial portion of it, could not be achieved independently of the merger. Nor does it appear that Dr. Hausman conducted any independent analysis of the McKinsey estimate to determine which savings, if any, can be achieved without the merger.

Sysco did not hire McKinsey to identify merger-specific savings for antitrust purposes. Rather, it initially hired McKinsey in the fall of 2013 to determine whether a merged company could achieve enough cost savings to make the combination **[**201]** worthwhile. Hr'g Tr. 1862-63. After McKinsey concluded that the merger would generate sufficient cost savings and Sysco and USF announced the merger, McKinsey began a more in-depth analysis beginning in January 2014 to identify "particular synergies that would arise from the deal." *Id.* at 1864-65. Carter Wood, the McKinsey Director who led the effort, testified that his firm was hired "to estimate what is possible by combining these two companies such that, number one, they would have confidence or not to go ahead with the deal; and two, to create value for the newly integrated company." *Id.* at 1914. McKinsey was not given instructions on identifying merger-specific savings, and Mr. Wood testified that he was not familiar with the term "merger specific." *Id.* at 1904.

Dr. Hausman used McKinsey's projections as his baseline for identifying merger-specific savings. *Id.* at 2053. However, it is not clear what independent analysis Dr. Hausman did to reduce McKinsey's projected savings of $600 million annually to $[TEXT REDACTED BY THE COURT] million in merger-specific savings. In his report, Dr. Hausman explained:

> In my previous academic research I have emphasized the effect of cost saving efficiencies on marginal cost, which can be approximated **[**202]** by average variable cost. Thus I will take a conservative approach to the estimated efficiencies and focus on cost savings from changes in variable costs that arise from the merger and would not occur otherwise.

DX-01355 at 67 (footnote omitted). It is not apparent, however, how Dr. Hausman calculated merger-specific savings using this approach, as neither his testimony nor his report spell out precisely how he went about identifying the amount of variable cost savings to include in his merger-specific estimate.

Table 4a of Dr. Hausman's rebuttal report illustrates the difficulties with verifying his analysis. Dr. Hausman itemized the "run-rate of merger-specific variable cost synergies" into four **[*84]** categories: (i) Merchandising, (ii) Operations, (iii) Sales, and (iv) Corporate. In each of those four categories, Dr. Hausman listed the component parts (in the first column) and the corresponding amounts (in the fourth column) that comprise the category cost savings estimate. Yet for each of these elements, Dr. Hausman relied exclusively on documents created by either McKinsey or Defendants. *See* DX-01353 at Ex. C, 2 n.i. He performed no independent analysis to verify these numbers. *Id.* ("All **[**203]** source material is either Sysco, US Foods, or McKinsey material and I take those materials at face value.").

Table 4a: Estimated Cost Efficiencies			
Adjusted for Divestiture, Customer Loss, and Contingencies			
Category	Run-Rate Synergies	Run-Rate of Variable Cost Synergies	Run-Rate of Merger Specific Variable Cost Synergies
Merchandising Total	[redacted]	[redacted]	[redacted]
Best cost and terms			[redacted]
Reliance terms			[redacted]
Consolidate suppliers			[redacted]
Full category management			[redacted]
Corporate billing			[redacted]
Operations Total	[redacted]	[redacted]	[redacted]
Network Optimization			[redacted]
Driver Efficiency**			[redacted]
Reduce average cost per mile for inbound freight*			[redacted]
Leverage network			[redacted]
Dis-synergy (LE) loss) from consolidation			[redacted]
Indirect Sourcing**			[redacted]
Sales Total	[redacted]	[redacted]	[redacted]
Sales associate headcount			[redacted]
DSM and RSM headcount			[redacted]
Reduce variable opex			[redacted]
Corporate Total	[redacted]	[redacted]	[redacted]
Combined Total:	[redacted]	[redacted]	[redacted]
[redacted]			

[*85] But even taking Dr. Hausman's variable cost savings numbers as presented, the court is not convinced that the full $490 million in projected savings is merger specific. For example, nearly half of the $[TEXT REDACTED BY THE COURT] million in merger-specific savings identified by Dr. Hausman come from the "Merchandising" category, also known as "category management." The $281 million that Dr. Hausman attributed to category management cost savings comes directly from McKinsey's calculations. Category management refers to a process of optimizing a distributor's product assortment by gaining insights into which SKUs its customers value and then optimizing the SKU inventory to match customers' demands and procure those products in the most cost-efficient manner. Hr'g. Tr. 1881. Both companies prior to the merger already were undertaking category management efforts. PX00592-035 at 137-40; PX00592-049 at 193-94.

Although McKinsey Director Mr. Wood testified that McKinsey made an effort to identify only incremental merchandising savings, that is, savings arising only because of the merger, **[**204]** he could not say whether the $281 million included some cost savings that Defendants might have been able to achieve separately. For instance, before the merger, Sysco was undergoing a category management program, called Project Naples, which was due to end in June 2015. However, Project Naples covered only two-thirds of Sysco's product categories; Sysco planned to complete the remaining categories at a later date. Mr. Wood testified that the $281 million figure was in addition to the Project Naples costs savings, but he could not say whether or not that number was in addition to the cost savings that Sysco could achieve through its continued cost savings efforts beyond June 2015.

USF, meanwhile, suspended its category management project after the merger's announcement. At the time the merger was announced, USF had only conducted category management on [TEXT REDACTED BY THE COURT] to [TEXT REDACTED BY THE COURT] categories out of 300. PX00592-035 at 139; PX00592-048-049 at 192-93. Mr. Wood could not say whether the $281 million was in addition to cost savings that USF might have achieved had it continued its category management program. Thus, Dr. Hausman's estimate of $281 million in **[**205]** "merger-specific" savings in Merchandising—a number that, again, relied exclusively on McKinsey's calculations—likely overstates the achievable merger-specific category management savings.

The FTC has pointed to, and Defendants have not rebutted, other ways in which Dr. Hausman's reliance on McKinsey's estimates likely overstated the savings arising from the merger. During the hearing, Mr. Wood acknowledged that part of the sales synergy estimate—which represents savings from combining the salesforces of the two companies—would be achieved by having customers place orders via an e-commerce platform. However, migration to electronic ordering can be achieved by either company independently of the merger. Hr'g Tr. 1904-05. Another savings strategy identified by McKinsey, "maximizing backhaul," refers to having delivery trucks stop by suppliers to reload goods on their way back to the warehouse, in order to save an extra trip to those suppliers. Hr'g Tr. 1894-95. However, backhaul savings can also be achieved independently of the merger. *See* Hr'g Tr. 1905-06.

2. Insufficiency of Estimated Merger-Specific Savings

Even if the court were to credit Dr. Hausman's total estimate of merger-specific **[**206]** efficiencies, the figure would only amount to less than one percent of the **[*86]** merged entity's annual revenue. PX09375-118 (Dr. Israel's rebuttal report stating that Dr. Hausman's original estimate of merger-specific, variable cost efficiencies $[TEXT REDACTED BY THE COURT] of million per year represents only one percent of Sysco and USF's combined annual broadline revenue).[36] Even assuming that 100 percent of the cost savings would be passed on to customers, the savings are unlikely to outweigh the competitive harm to customers. Since the savings are equal to a small percentage of the combined company's total revenue, even a modest increase in price could offset any cost savings generated by the efficiencies. At oral argument, Defendants' response to this concern was that the market would not allow even a slight price increase, as customers would exercise their other options, such as regionalizing. *See* Closing Arg. Hr'g Tr. 117-18. Having found that this merger will result in high national customer and local market concentration levels, the court does not share Defendants' confidence that the market would not tolerate such a price increase. As the court observed in *Cardinal Health*,***HN38***[] "[t]he critical **[**207]** question raised by the efficiencies defense is whether the projected savings from the merger[ ] are enough to overcome the evidence [showing] that possibly greater benefits can be achieved by the public through existing, continued competition." *12 F. Supp. 2d at 63*. Here, Defendants have fallen short of making that showing.

E. Conclusion

Upon consideration of all of the evidence presented, the court concludes that Defendants' rebuttal evidence is not sufficient to overcome the presumption of anticompetitive harm that the FTC was able to establish through evidence of high post-merger market concentrations and other evidence of competitive harm. The court thus concludes that the FTC has met its burden of demonstrating a likelihood of success. That is, the FTC has raised "questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance **[**208]** and ultimately by the Court of Appeals." *Heinz, 246 F.3d at 714-15* (citation omitted) (internal quotation marks omitted).

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[36] In 2013, Sysco and USF's combined broadline revenue was [TEXT REDACTED BY THE COURT] PX09350-216, Table 27. One percent of that sum is greater than Dr. Hausman's merger-specific cost savings estimate of $[TEXT REDACTED BY THE COURT] million.

IV. THE EQUITIES

Although the court has found that the FTC has shown a likelihood of success on the merits and thus created a presumption in favor of injunctive relief, *see* *Swedish Match, 131 F. Supp. 2d at 172*, ***HN39***[] Section 13(b)'s "public interest" standard still requires the court to weigh the public and private equities of enjoining the merge, *Heinz, 246 F.3d. at 726*. Here, the primary public interests to be considered include (i) the public interest in effectively enforcing antitrust laws and (ii) the public interest in ensuring that the FTC has the ability to order effective relief if it succeeds at the merits trial.

The public's interest in enforcing ***antitrust law*** plainly favors enjoining Defendants' proposed merger. *See id.* ("The principle public equity weighing in favor of issuance of preliminary injunctive relief is the public interest in effective enforcement of the antitrust laws."); *Swedish Match, 131 F. Supp. 2d at 173* ("There is a strong public interest in effective enforcement of the antitrust laws that weighs heavily in favor of an injunction in this case.").

[*87] The second public interest factor—preserving the FTC's ability to order effective relief after the administrative hearing—also supports **[**209]** an injunction. As stated by the Court of Appeals, "if the merger were ultimately found to violate the Clayton Act, it would be impossible to recreate pre-merger competition" because the merging parties would have already combined their operations and they would be difficult to separate, even by a subsequent divestiture order. *Id.* ***HN40***[] ("*Section 13(b)* . . . embodies Congressional recognition of the fact that divestiture is an inadequate and unsatisfactory remedy in a merger case."). That problem is amplified here because the proposed merger involves two transactions, not just one: (i) Sysco's merger with USF and (ii) PFG's purchase of USF's distribution centers and other assets. The parties have represented that, absent an injunction, Sysco and USF will merge their operations and divest 11 distribution centers and associated assets—including personnel, IT Systems, and USF private label products—to PFG, which will incorporate those assets into its own operations. As the FTC has pointed out, it would face an especially daunting and potentially impossible task of "unscrambling" the eggs (*i.e.*, returning the merging companies to their pre-merger state) if the ensuing administrative proceedings were to determine **[**210]** that the merger violates *Section 7 of the Clayton Act*. Additionally, it is difficult to conceive how a subsequent divestiture order—which would attempt to restore the parties to their pre-merger state—could be fulfilled without causing significant disruption to the foodservice distribution industry, its customers, and the ultimate consumers—Americans who eat outside the home.

Defendants contend that the public equities weigh against granting the preliminary injunction because the merger will generate substantial efficiencies that will be passed on to customers. They claim that, if the FTC obtains the injunction, Defendants and their customers will be harmed because "Sysco and US Foods will abandon the merger and consumers will be deprived of its benefits." DFF at 186-87 (citing Hr'g Tr. 1516-17). But the court cannot conclude, on this record, that the merger's cost savings will outweigh the potential harm to customers from losing the country's second largest broadline distributor as a competitor for their business. Dr. Israel's merger simulation model predicted that, even taking into account the estimated cost savings, the merger would harm customers. PX09350-114-121, Table 3. Although the court has reservations **[**211]** about some of Dr. Israel's merger simulation model inputs, the court finds that the record as a whole—at the very least—raises substantial questions about whether the merger will harm consumers. Therefore, the public equities here favor granting the preliminary injunction.

The court recognizes the extraordinary amount of time, energy, and money that Sysco, USF, and PFG have devoted to the proposed merger. Their efforts, and the risk that the parties will abandon the merger rather than proceed to an administrative trial on the merits is, however, "at best, a private equity" which cannot overcome the significant public equities weighing in favor of a preliminary injunction. *See* *Heinz, 246 F.3d at 727* (internal quotation marks omitted).

CONCLUSION

In the end, after considering the record in its entirety, the court returns to Judge Tatel's observation in *Whole Foods*: "[T]here can be little doubt that the acquisition of the second largest firm in the market by the largest firm in the market will tend to harm competition in that market." *Whole Foods, 548 F.3d at 1043 (Tatel, J.)* (citation omitted) (internal quotation **[*88]** marks omitted). The court finds that the FTC has carried its burden of showing a "reasonable probability" that a merger of the country's two largest **[**212]** broadline foodservice distributors, Sysco and USF, would harm competition. Defendants' merger is likely to cause unduly high market concentrations in two relevant markets—broadline foodservice distribution to national customers and broadline foodservice distribution to local customers—and eliminate a key competitor in those markets, USF. The evidence offered by Defendants to rebut the FTC's showing of likely harm was unavailing. The equities also favor granting the requested preliminary injunction. The FTC, therefore, has established that it is likely to succeed in proving, after a full administrative hearing, that the effect of Sysco's proposed acquisition of USF "may be substantially to lessen competition, or to tend to create a monopoly" in violation of *Section 7 of the Clayton Act*.

The court thus grants the FTC's Motion for Preliminary Injunction. A separate order accompanies this Memorandum Opinion.

Dated: June 23, 2015

/s/ Amit P. Mehta

Amit P. Mehta

United States District Judge

[EDITOR'S NOTE: The following court-provided text does not appear at this cite in F.Supp.3d.]

[*none] **ORDER**

On June 23, 2015, the court provided the parties under seal the court's Memorandum Opinion, ECF No. 180, and directed them to submit proposed redactions before Thursday, June 25, 2015, at 5 p.m. The court also granted permission **[**213]** to Distribution Market Advantage to propose redactions of its commercially sensitive information contained in the Memorandum Opinion. ECF No. 181.

The court has reviewed all suggested redactions and has accepted them, except as set forth below:

(1) *Passim*—The parties inconsistently proposed redactions relating to amounts in the "millions" or billions." The court has decided to redact numerical values, but will retain the word "million" or "billion" following the numerical value.
(2) Pgs. 36-37, 51-52—The court has replaced Dr. Israel's actual diversion percentages with "over 70%," which is consistent with his testimony in open court. Hr'g Tr. 1010-11.
(3) Pg. 52 n.21—Citation to Joan Ralph's Declaration has not been redacted because she disclosed similar information in open court. Hr'g Tr. 380-87.
(4) Pg. 53—Dr. Jerry Hausman's testimony regarding the number of distribution centers used by USF and Sysco customers has not been redacted because he testified to this information in open court. Hr'g Tr. 1976.

(5) Pg. 57—The names of businesses using regional contracting have not been redacted because these companies were identified in open court. Hr'g Tr. 1075 (Five Guys); Hr'g Tr. 1528 (Subway); **[**214]** Hr'g Tr. 1572 (Sodexo); Hr'g Tr. 2074 (Amerinet).
(6) Pgs. 79, 95—References to the "54 markets" in which USF identified Sysco as a competitor have not been redacted because the information is not competitively sensitive information.
(7) Pg. 93—Information regarding the percentage of time when Sysco employees identified USF as the reason for an incentive request has not been redacted because Dr. Israel testified to this number in open court. Hr'g Tr. 1095.

(8) Pg. 104—The reference to Zaxby's has not been redacted because the restaurant was mentioned in open court. Hr'g Tr. 852-53.
(9) Pg. 108—Reference to the number of private label SKUs offered by USF has not been redacted because the information is available in a public filing available on the Securities and Exchange Commission's website.
(10) Pg. 109 n.35—Citation to Joan Ralph's Supplemental Declaration has not been redacted, except for one phrase, because she disclosed similar information in open court. Hr'g Tr. 380-81.

(11) Pg. 110—The names of businesses using regional contracting have not been redacted because these companies were identified in open court. Hr'g Tr. 1528 (Subway); Hr'g Tr. 1572 (Sodexo); Hr'g Tr. 2074 (Amerinet). **[**215]**
(12) Pg. 122-23—McKinsey's estimate regarding incremental merchandising savings has not been redacted because it was revealed in public testimony. Hr'g Tr. 2325-26.
(13) Pg. 124 n.36—The court has replaced Sysco and USF's actual combined broadline revenue with the phrase "over $50 billion" because that number was testified to in open court. Hr'g Tr. 2362.

A redacted, publicly available version of the court's Memorandum Opinion has been filed with this order. ECF No. 190.

Dated: June 26, 2015

/s/ Amit P. Mehta

Amit P. Mehta

United States District Judge

In re Cast Iron Soil Pipe & Fittings Antitrust Litig.

United States District Court for the Eastern District of Tennessee

June 24, 2015, Decided; June 24, 2015, Filed

No. 1:14-md-2508

Reporter

2015 U.S. Dist. LEXIS 121620 *; 2015 WL 5166014

IN RE: CAST IRON SOIL PIPE AND FITTINGS ANTITRUST LITIGATION

Subsequent History: Later proceeding at *In re Cast Iron Soil Pipe & Fittings Anti-Trust Litig., 2015 U.S. Dist. LEXIS 147449 (E.D. Tenn., Oct. 29, 2015)*

Motion granted by *In re Cast Iron Soil Pipe & Fittings Antitrust Litig., 2015 U.S. Dist. LEXIS 181064 (E.D. Tenn., Dec. 31, 2015)*

Later proceeding at *In re Cast Iron Soil Pipe & Fittings Antitrust Litig., 2015 U.S. Dist. LEXIS 181065 (E.D. Tenn., Dec. 31, 2015)*

Settled by, Dismissed by, Judgment entered by *In re : Cast Iron Soil Pipe & Fittings Antitrust Litig., 2017 U.S. Dist. LEXIS 97491 (E.D. Tenn., May 26, 2017)*

Prior History: *In re Cast Iron Soil Pipe & Fittings Antitrust Litig., 999 F. Supp. 2d 1368, 2014 U.S. Dist. LEXIS 21710 (J.P.M.L., Feb. 18, 2014)*

Core Terms

Purchaser, Consumer, Pipe, Indirect, Defendants', Plaintiffs', conspiracy, allegations, unjust enrichment, commerce, prices, motion to dismiss, Consolidated, antitrust, amended complaint, courts, consumer protection, class action, acquisition, unfair, class certification, price-fixing, cases, customers, manufactured, parties, cause of action, Motions, reside, antitrust statute

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Judges: HARRY S. MATTICE, JR., UNITED STATES DISTRICT JUDGE.

Opinion by: HARRY S. MATTICE, JR.

Opinion

ORDER

Before the Court is Defendant McWane, Inc.'s Motion to Dismiss Direct Purchaser Plaintiffs' Consolidated Amended Complaint (Doc. 178), Motion to Dismiss Indirect Purchaser Plaintiffs' Consolidated Amended Complaint (Doc.

176), and Motion to Dismiss Consumer Plaintiffs' Consolidated Amended Complaint (Doc. 177); Defendant Charlotte Pipe's Motion to Dismiss Direct Purchaser Plaintiffs' Consolidated Amended Complaint (Doc. 181), Motion to Dismiss Indirect Purchaser Plaintiffs' Consolidated Amended Complaint (Doc. 182), and Motion to Dismiss Consumer Plaintiffs' Consolidated Amended Complaint (Doc. 183); Defendants' Motion to Strike Indirect Purchaser Plaintiffs' Class Action Allegations (Doc. 151) and Motion to Strike Consumer Plaintiffs' Class Action Allegations (Doc. 154); and Defendant Cast Iron Soil Pipe Institute's Motions for Joinder (Docs. 162, 163, 185, 191).

I. BACKGROUND[1]

Cast iron soil pipe ("CISP") is manufactured predominantly from cast iron and is primarily used in residential, commercial, industrial, and government buildings for sanitary and storm drain, waste, and vent piping applications. (Doc. 122 at 7; Doc. 124 at 7; Doc. 121 at 13). It replaced wooden systems and has been used in the United States since the beginning of the Nineteenth Century. (Doc. 122 at 7; Doc. 121 at 13). CISP is standardized and must meet the requirements of the American Society for Testing and Materials. (Doc. 122 at 11; Doc. 124 at 10; Doc. 121 at 17). CISP is a versatile product and it can be installed above flooring, below flooring, and underground. (Doc. 122 at 7; Doc. 124 at 13; Doc. 121 at 14). The most frequent purchasers of CISP are plumbing wholesalers, although it is also purchased by end users such as construction companies, plumbers and developers. (Doc. 122 at 10; Doc. 124 at 14; Doc. 121 at 16).

Plastic or polymer pipes are not a functional substitute **[*10]** for CISP because (1) CISP is more effective at reducing plumbing noise; (2) cast iron has a high degree of strength and resistance to tree roots, penetration by rodents, and failure because of ground shifts; (3) cast iron expands and contracts far less than other materials; and (4) CISP is non-combustible and will not burn if there is a building fire. (Doc. 122 at 12; Doc. 124 at 11; Doc. 121 at 18). State, municipal, and local codes often require the use of CISP rather than plastic piping for certain types of construction. (Doc. 122 at 7; Doc. 124 at 11; Doc. 121 at 14, 18).

There are three producers of CISP in the United States: Defendant Charlotte Pipe, Defendant AB&I Foundry ("AB&I"), and Defendant Tyler Pipe Company ("Tyler Pipe").[2] (Doc. 122 at 11; Doc. 124 at 9; Doc. 121 at 2, 16). The Court will refer to McWane and its divisions collectively as "McWane". (Doc. 122 at 11; Doc. 124 at 9). Defendant Randolph Holding Company, LLC is a wholly-owned subsidiary of Charlotte Pipe, and the Court will refer to Charlotte Pipe and its subsidiaries collectively as "Charlotte Pipe." (Doc. 124 at 6). Together, McWane and Charlotte Pipe account for 90 percent of the market for CISP. (Doc. 122 **[*11]** at 11; Doc. 124 at 7; Doc. 121 at 2, 16). To enter the CISP market, a producer would need to build or acquire a foundry and the specialty manufacturing tools to produce CISP and develop a distribution network and relationships with plumbing distributors and consumers. (Doc. 122 at 11; Doc. 124 at 10; Doc. 121 at 17).

In 1949, the Cast Iron Soil Pipe Institute ("CISPI") was organized by CISP manufacturers and consisted of 24 CISP manufacturers. (Doc. 122 at 12; Doc. 124 at 6; Doc. 121 at 9). CISPI has its headquarters in Hixson, Tennessee. (Doc. 121 at 11). As of August 2014, CISPI consists solely of Defendants of McWane and Charlotte Pipe and their entities. (Doc. 122 at 12-13; Doc. 124 at 7, 12; Doc. 121 at 9). Charlotte Pipe and McWane are CISPI's sole funders. (Doc. 122 at 13; Doc. 121 at 9). Executives of McWane and Charlotte Pipe attend CISPI events together at least twice a year. (Doc. 122 at 13; Doc. 124 at 6, 12; Doc. 121 at 11).

There are three groups of plaintiffs in this multidistrict litigation: (1) Direct Purchasers of CISP; (2) Indirect Purchasers of CISP **[*12]** for resale; and (3) Consumer Purchasers of CISP.

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[1] In large part, the allegations stated within the Consolidated **[*9]** Amended Complaints share similar facts. Thus, the Court has combined the background section for the Motions, and it will differentiate between the Consolidated Amended Complaints only when necessary to its analysis.

[2] Defendants AB&I, Tyler Pipe, AB&I Service Center, Tyler Coupling, and Tyler Pipe Penn are divisions of Defendant McWane.

The Direct Purchasers consist of A&S Liquidating, Inc., Aaron & Co., Hi Line Supply Company, Ltd., and Red River Supply, Inc. ("Direct Purchaser Plaintiffs" or "Direct Purchasers"). A&S Liquidating, Inc. is a corporation located in Grand Blanc, Michigan that purchased CISP manufactured by at least one of the Defendants. (Doc. 122 at 4). Aaron & Co. is a corporation located in Piscataway, New Jersey that purchased CISP manufactured by at least one of the Defendants. (Doc. 122 at 4). Hi Line Supply Company, Ltd. is a corporation located in Peoria, Illinois that purchased CISP manufactured by at least one of the Defendants. (Doc. 122 at 5). Red River Supply, Inc. is a corporation located in Shreveport, Louisiana that purchased CISP manufactured by at least one of the Defendants. (Doc. 122 at 5).

The Indirect Purchasers consist of Craig Mechanical, Inc. and Keith McNeill Plumbing Contractor, Inc. ("Indirect Purchaser Plaintiffs" or "Indirect Purchasers"). Craig Mechanical, Inc. is a plumbing contractor located in Riverside, California, that performs commercial and industrial plumbing projects and purchased CISP manufactured by at least one **[*13]** of the Defendants. (Doc. 124 at 4-5). Keith McNeill Plumbing Contractor, Inc. is a plumbing contractor located in Tallahassee, Florida, that purchased CISP manufactured by at least one of the Defendants. (Doc. 124 at 5).

The Consumer Purchasers consist of Jerry Adkins and Rena Lundmark ("Consumer Plaintiffs" or "Consumer Purchasers"). Jerry Adkins is an Arkansas resident who purchased CISP from one or more of the Defendants for his personal use. (Doc. 121 at 6). Rena Lundmark is an Arkansas resident who purchased CISP from one or more of the Defendants for her personal use. (Doc. 121 at 6).

Plaintiffs allege that McWane and Charlotte Pipe have been fixing prices of CISP since at least January 1, 2006 through December 31, 2013. (Doc. 122 at 14; Doc. 124 at 14; Doc. 121 at 20). In 2005 or 2006, an employee of Charlotte Pipe's cast iron foundry in North Carolina learned from Charlotte Pipe's Senior Vice President of the Cast Iron Division, Marshall Coble, that McWane and Charlotte Pipe were fixing prices of CISP. (Doc. 122 at 14; Doc. 124 at 15; Doc. 121 at 20). Coble stated that Charlotte Pipe and McWane were meeting at the bi-annual trade association meeting that summer or fall to agree **[*14]** on pricing for CISP. (Doc. 122 at 14; Doc. 121 at 20).

McWane and Charlotte Pipe often announced identical price increases at close intervals after a trade association meeting. In early September 2010, Charlotte Pipe and AB&I announced a future price increase of 7.5%, which would take effect on January 1, 2011. (Doc. 122 at 14; Doc. 124 at 15; Doc. 121 at 21). Additionally, Charlotte Pipe and McWane had identical prices for the years 2006, 2007, 2009, 2010, 2011, 2012, and 2013 for the 3"x 10' No-Hub Pipe, 4" x 10' No-Hub Pipe, 3" No-Hub 1/4 Bend, 4" No-Hub 1/8 Bend, 4" x 3" Wye, 3" x 10' Single Hub Pipe, 4" x 10' Single Hub Pipe, 3" Hub & Spigot 1/4 Bend, and 4" Hub & Spigot 1/8 Bend. (Doc. 122 at 15-17; Doc. 121 at 21-22). These prices have "steadily increased" since January 1, 2006 even though total spending on construction has declined significantly during that time period. (Doc. 122 at 17; Doc. 124 at 19; Doc. 121 at 22). Additionally, the primary cost determinants for CISP such as scrap iron and natural gas have increased at rates "substantially less" than the price increases made by the Defendants. (Doc. 124 at 22; Doc. 121 at 23).

McWane and Charlotte Pipe agreed not to compete **[*15]** for one another's CISP customers. (Doc. 124 at 23; Doc. 121 at 23). Sales representatives at Tyler Pipe were directed to "stay away from Charlotte Pipe's CISP customers" and instead maintain their current market position. (Doc. 122 at 18; Doc. 124 at 23; Doc. 121 at 23).

Star Pipe entered the CISP market in 2007. (Doc. 122 at 18; Doc. 124 at 8; Doc. 121 at 24). Star Pipe sought membership to CISPI, but Defendants did not permit it to join. (Doc. 122 at 19; Doc. 124 at 23; Doc. 121 at 24). To gain market share in the CISP market, Star Pipe priced its CISP lower than the prices of McWane and Charlotte Pipe. (Doc. 122 at 19). On July 14, 2010, Charlotte Pipe executed a confidential Asset Purchase Agreement with Star Pipe, which permitted it to acquire all of Star Pipe's CISP business including its inventory, production equipment, business records, and customer lists for $19 million. (Doc. 122 at 19; Doc. 124 at 23; Doc. 121 at 24). After acquiring Star Pipe's CISP business, it destroyed all of Star Pipe's equipment. (Doc. 124 at 23; Doc. 121 at 24).

Along with the Asset Purchase Agreement, the parties signed a confidential agreement that prohibited Star Pipe and certain of its employees **[*16]** from competing with Charlotte Pipe in North America for six years after the agreement was signed. (Doc. 122 at 19; Doc. 124 at 8; Doc. 121 at 24-25). Star Pipe also agreed to send a letter to its CISP customers letting them know that it was out of the CISP business. (Doc. 122 at 19; Doc. 124 at 24; Doc. 121 at 25). Following Charlotte Pipe's acquisition of Star Pipe's CISP business, CISP prices "rose significantly" in January 2011. (Doc. 122 at 19). In addition to the Star Pipe acquisition, Charlotte Pipe had also purchased other CISP businesses "in recent history." (Doc. 122 at 20; Doc. 124 at 8). These businesses included Matco-Norca in 2009, DWV Casting Company in 2004, and Richmond Foundry, Inc. in 2002. (Doc. 124 at 24).

In 2013, the Federal Trade Commission ("FTC") challenged Charlotte Pipe's acquisition of Star Pipe. (Doc. 122 at 20; Doc. 124 at 24; Doc. 121 at 25). The FTC ultimately entered into a consent agreement with Charlotte Pipe to "address the anticompetitive effects resulting from Charlotte Pipe's 2010 acquisition of the [CISP] business of Star Pipe." (Doc. 122 at 20; Doc. 124 at 24-25; Doc. 121 at 25). The consent agreement provided that, for ten years following the **[*17]** execution of the agreement, Charlotte Pipe must notify the FTC before acquiring other entities engaged in the manufacture or sale of CISP products so that the FTC could "guard against future anticompetitive transactions." (Doc. 124 at 25; Doc. 121 at 25). The agreement also required Charlotte Pipe to inform its customers and the public about the acquisition of Star Pipe and other CISP acquisitions and invalidated the non-compete and confidentiality clauses set forth in the Star Pipe Asset Purchase Agreement. (Doc. 122 at 20; Doc. 124 at 25; Doc. 121 at 25-26).

The FTC's redacted complaint regarding Charlotte Pipe's acquisition of Star Pipe's CISP business was filed on April 2, 2013, which is when Plaintiffs allege they became aware of the existence of the conspiracy. (Doc. 122 at 20-21; Doc. 124 at 27; Doc. 121 at 26). Plaintiffs generally allege that Defendants concealed the existence of their CISP conspiracy by communicating secretly with one another regarding CISP prices, meeting at trade association meetings to discuss and fix CISP prices, justifying price increases based on false reasons, and agreeing with one another not to reveal the nature of their conspiracy. (Doc. 122 at 25; **[*18]** Doc. 124 at 31; Doc. 121 at 27). Plaintiffs submit in their Consolidated Amended Complaints that these actions amount to fraudulent concealment and permit Plaintiffs' claims to be tolled. (Doc. 122 at 25; Doc. 124 at 31; Doc. 121 at 30).

Regarding fraudulent concealment, Plaintiffs allege that Defendants took the following actions to conceal their conspiracy: (1) AB&I falsely informed its customers in March 2008 that its price increase was "simply a cost pass through" because earlier increases were insufficient to cover the rise in scrap iron prices; (2) AB&I falsely informed its customers in November 2009 after a price increase that it had tried to "put off this price increase for as long as [it] could"; (3) Charlotte Pipe falsely informed its customers on September 1, 2010 that price increases were the result of cost increases in raw materials and operating expenses; (4) AB&I falsely informed its customers in September 2010 that it was raising its prices for CISP because of raw material cost increases; (5) Charlotte Pipe announced price increases on September 7, 2011, and falsely attributed them to cost increases in raw materials; and (6) Charlotte Pipe falsely informed customers **[*19]** on September 20, 2011 that price increases were on account of cost increases in raw materials and operating expenses. (Doc. 122 at 23-24; Doc. 124 at 29-30; Doc. 121 at 28-29).

This multidistrict litigation was transferred to the undersigned on February 18, 2014. (Doc. 7). On June 9, 2014, the Court entered the Initial Case Management and Scheduling Order, in which it set forth the timeline for filing consolidated amended complaints and motions to dismiss. (Doc. 89 at 2, 3). Plaintiffs filed their respective Consolidated Amended Complaints on August 11, 2014. (Docs. 121, 122, 124).

Direct Purchaser Plaintiffs are bringing their claims pursuant to *Federal Rules of Civil Procedure 23(a)* and *23(b)(3)* for themselves and a class consisting of:

> All persons or entities that purchased cast iron soil pipe or cast iron soil pipe fittings in the United States directly from any of the Defendants, their subsidiaries, predecessors, or affiliates, from January 1, 2006 through December 31, 2013 (the "Class Period"). Excluded from the Class are Defendants, their parent companies, subsidiaries, predecessors, and affiliates, any co-conspirators, federal and state governmental entities and instrumentalities of federal and state governments.

(Doc. 122 **[*20]** at 26). Direct Purchaser Plaintiffs seek to bring their claims as a class action because (1) the class is numerous and joinder of all members is impracticable; (2) the Direct Purchaser Plaintiffs share the same injury and were damaged by the same Defendants as the class members; (3) Direct Purchaser Plaintiffs will fairly and adequately represent and protect the interests of the class; (4) the counsel for Direct Purchaser Plaintiffs are experienced in this type of litigation; and (5) this action presents common issues of law and fact that predominate over questions that would affect individual members of the class. (Doc. 122 at 27). The common questions of law and fact that Direct Purchaser Plaintiffs identify include: (1) whether Defendants engaged in a conspiracy to fix CISP prices and the duration of that conspiracy; (2) whether the existence of such a conspiracy violated *Section 1 of the Sherman Act*; (3) whether the conspiracy artificially inflated the price of CISP; (4) whether Charlotte Pipe's acquisition of Star Pipe was done in furtherance of the conspiracy; (5) whether Defendants agreed to allocate CISP customers; (6) whether Defendants' conduct caused injury to class members; and **[*21]** (7) the measure and amount of damages incurred by the class. (Doc. 122 at 27).

Direct Purchaser Plaintiffs have identified two claims in their Consolidated Amended Complaint. First, Direct Purchaser Plaintiffs claim that Defendants violated Section 1 of the Sherman Act, *15 U.S.C. § 1*, by conspiring to unreasonably restrict trade by agreeing to fix, raise, maintain, and stabilize the price of CISP in the United States. (Doc. 122 at 28). Second, Direct Purchaser Plaintiffs claim that Defendants violated *Section 7 of the Clayton Act* by substantially lessening competition and creating a monopoly in the CISP market. (Doc. 122 at 29). Direct Purchaser Plaintiffs allege that Defendants violated the Clayton Act by acquiring Star Pipe's CISP business, which caused severe anticompetitive effects in the CISP market. (Doc. 122 at 30).

Indirect Purchaser Plaintiffs are bringing their claims pursuant to *Federal Rules of Civil Procedure 23(a)* and *23(b)(3)* for themselves and a class consisting of:

> All Indirect Purchasers that purchased cast iron soil pipes or cast iron soil pipe fittings indirectly from any of the Defendants, their subsidiaries, predecessors, or affiliates, from January 1, 2006 through December 31, 2013 (the "Class Period") in the following states: Alabama, Arizona, **[*22]** Arkansas, California, District of Columbia, Florida, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin.

(Doc. 124 at 34). Indirect Purchaser Plaintiffs seek to bring their claims as a class action because (1) the class is numerous and joinder of all members is impracticable; (2) the Indirect Purchaser Plaintiffs share the same injury and were damaged by the same Defendants as the class members; (3) Indirect Purchaser Plaintiffs will fairly and adequately represent and protect the interests of the class; (4) the counsel for Indirect Purchaser Plaintiffs are experienced in this type of litigation; and (5) this action presents common issues of law and fact that predominate over questions that would affect individual members of the class. (Doc. 124 at 34-35). The common questions of law and fact that Indirect Purchaser Plaintiffs identify include: (1) whether Defendants engaged in a conspiracy to fix CISP prices and the duration of that conspiracy; (2) whether **[*23]** the existence of such a conspiracy violated state antitrust statutes and state consumer and unfair competition statutes; (3) whether the conspiracy artificially inflated the price of CISP; (4) whether Charlotte Pipe's acquisition of Star Pipe was done in furtherance of the conspiracy; (5) whether Defendants' conduct caused injury to class members; and (6) the measure and amount of damages incurred by the class. (Doc. 124 at 35).

Indirect Purchaser Plaintiffs have identified two claims in their Consolidated Amended Complaint. First, Indirect Purchaser Plaintiffs claim that Defendants have violated the antitrust statutes of the states of Alabama, Arizona, Arkansas, California, the District of Columbia, Hawaii, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin. (Doc. 124 at 38-41). Second, Indirect Purchaser Plaintiffs claim that Defendants have violated state consumer protection and unfair competition statutes in the states of Arizona, Arkansas, California, the District of Columbia, Florida, Hawaii, Kansas, **[*24]** Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, and Rhode Island. (Doc. 124 at 43).

Consumer Plaintiffs are bringing their claims pursuant to *Federal Rules of Civil Procedure 23(a)* and *23(b)(3)* for themselves and a nationwide class consisting of:

> All persons in the United States who purchased products for personal use and not for resale containing, in some form, CISP manufactured by one or more of the Defendants or co-conspirators, or any predecessors, parents, subsidiaries, or affiliates thereof, during the Class Period.
>
> Excluded from the Class are Defendants, their parent companies, subsidiaries, predecessors, and affiliates, any co-conspirators, federal and state governmental entities and instrumentalities of federal and state governments.

(Doc. 121 at 31-32). Alternatively, Consumer Plaintiffs bring this action on behalf of a multistate class consisting of:

> All persons who lived in the Consumer States who purchased products for personal use and not for resale containing, in some form, CISP manufactured by one or more of the Defendants or co-conspirators, or any predecessors, parents, subsidiaries, or affiliates thereof, during the Class Period.

(Doc. 121 at 32). **[*25]** The "Consumer States" are listed in the Consumer Consolidated Amended Complaint as Arizona, Arkansas, California, the District of Columbia, Florida, Hawaii, Illinois, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin. (Doc. 121 at 32 n. 1).

Consumer Plaintiffs seek to bring their claims as a class action because (1) the class is numerous and joinder of all members is impracticable; (2) the Consumer Plaintiffs share the same injury and were damaged by the same Defendants as the class members; (3) the Consumer Plaintiffs will fairly and adequately represent and protect the interests of the class; (4) the counsel for the Consumer Plaintiffs are experienced in this type of litigation; and (5) this action presents common issues of law and fact that predominate over questions that would affect individual members of the class. (Doc. 121 at 32-33). The common questions of law and fact that Consumer Plaintiffs identify include: (1) whether Defendants engaged in a conspiracy **[*26]** to fix CISP prices and the duration of that conspiracy; (2) whether Defendants engaged in unfair, false, deceptive or unconscionable behavior; (3) whether Defendants' conduct artificially inflated the price of CISP; (4) whether Charlotte Pipe's acquisition of Star Pipe was done in furtherance of the conspiracy; (5) whether Defendants agreed to allocate CISP customers; (6) whether Defendants' conduct caused injury to class members; and (7) the measure and amount of damages incurred by the class. (Doc. 121 at 34).

Consumer Plaintiffs have identified five claims in their Consolidated Amended Complaint. First, Consumer Plaintiffs claim that Defendants have violated the Tennessee Trade Practices Act ("TTPA") by entering into a conspiracy which lessened the full and free competition in the market for CISP. (Doc. 121 at 35). Second, Consumer Plaintiffs claim that Defendants have violated the antitrust statutes of the states of Arizona, California, the District of Columbia, Hawaii, Illinois, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, South Dakota, Tennessee, Utah, Vermont, West Virginia, **[*27]** and Wisconsin. (Doc. 121 at 34-54). Third, Consumer Plaintiffs claim that Defendants have violated the state consumer protection statutes of the states of Arkansas, California, the District of Columbia, Florida, Massachusetts, Missouri, Montana, New Mexico, New York, North Carolina, Rhode Island, South Carolina, and Vermont. (Doc. 121 at 55-66). Fourth, Consumer Plaintiffs claim that Defendants have been unjustly enriched under the law of the Consumer States. (Doc. 121 at 66). Fifth, Consumer Plaintiffs claim that Charlotte Pipe's acquisition of Star Pipe violated *Section 7 of the Clayton Act*. (Doc. 121 at 67).

On September 22, 2014, McWane and Charlotte Pipe filed a Motion to Strike the Indirect Purchaser Plaintiffs' Class Action Allegations and a Motion to Strike the Consumer Plaintiffs' Class Action Allegations. (Docs. 151, 154). McWane and Charlotte Pipe each filed motions to dismiss the consolidated amended complaints of each Plaintiffs group. (Docs. 176, 177, 178, 181, 182, 183). CISPI filed motions for joinder regarding these motions. (Docs. 162, 185). On December 19, 2014, the Court held a hearing on these motions. (Doc. 230).

II. MOTIONS TO DISMISS

A. Standard of Law

The Federal Rules **[*28]** of Civil Procedure provide, in relevant part, that all pleadings must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *See Fed. R. Civ. P. 8(a)(2)*. While *Rule 8(a)* does not require plaintiffs to set forth detailed factual allegations, "it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. At a minimum, *Rule 8(a)* requires the plaintiff to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests" — that is, *Rule 8(a)(2)* "requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Bell Atlantic v. Twombly, 550 U.S. 544, 555, 556 n.3, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A motion to dismiss for failure to state a claim pursuant to *Fed. R. Civ. P. 12(b)(6)* is thus not a challenge to the plaintiff's factual allegations, but rather, a "test of the plaintiff's cause of action as stated in the complaint." *Flanory v. Bonn, 604 F.3d 249, 252 (6th Cir. 2010)*.

"[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal, 556 U.S. at 679*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id. at 678* (citing *Twombly, 550 U.S. at 556*). The reviewing court must determine not whether the plaintiff will ultimately prevail, but whether the facts permit the court **[*29]** to infer "more than the mere possibility of misconduct," which is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id. at 679*; *Twombly, 550 U.S. at 570* (holding that a complaint is subject to dismissal where plaintiffs failed to "nudg[e] their claims across the line from conceivable to plausible"). Although the Court must take all of the factual allegations in the complaint as true, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice," and a plaintiff's legal conclusions couched as factual allegations need not be accepted as true. *Iqbal, 556 U.S. at 678*; *see Fritz v. Charter Twp. of Comstock, 592 F.3d 718, 722 (6th Cir. 2010)*. Therefore, to survive a motion to dismiss under *12(b)(6)*, plaintiff's "factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." *Ass'n of Cleveland Fire Fighters v. City of Cleveland, Ohio, 502 F.3d 545, 548 (6th Cir. 2007)* (citing *Twombly, 550 U.S. at 555*).

B. Analysis

In its Motion to Dismiss, Charlotte Pipe moves the Court to dismiss the Plaintiffs' Consolidated Class Action Complaints on the grounds that (1) the Complaints do not establish an agreement sufficient to comply with *Twombly*; (2) Plaintiffs' claims are subject to statutes of limitations because they failed to plead due diligence; **[*30]** (3) the Indirect Purchaser and Consumer Plaintiffs lack Article III standing to invoke laws of states in which they do not reside or were not injured; (4) the Indirect Purchaser and Consumer Plaintiffs' injuries are too remote and attenuated to establish antitrust standing; (5) the Indirect Purchaser and Consumer Plaintiffs fail to address essential elements of the state antitrust claims; (6) the Indirect Purchaser and Consumer Plaintiffs' consumer protection and unfair competition claims must be dismissed for numerous reasons; (7) the Consumer Plaintiffs' unjust enrichment claims fail to allege that the Consumer Plaintiffs conferred any benefit on the Defendants and do not meet particular state pleading requirements; (8) the Direct Purchasers' Clayton Act claim fails because they were not injured by the Star Pipe acquisition; and (9) the Consumer's Clayton Act claim is barred by black letter law. (Doc. 184).

In its Motion to Dismiss, McWane moves the Court to dismiss Plaintiffs' Consolidated Class Action Complaints on the grounds that (1) the Indirect Purchaser Plaintiffs lack standing to assert their claims and thus the Court lacks subject matter jurisdiction over those claims; (2) **[*31]** the Indirect Purchaser Plaintiffs remaining claims should be dismissed for failure to state a claim under California and Florida law; (3) Consumer Plaintiffs cannot pursue a claim under the TTPA; (4) Consumer Plaintiffs lack standing to assert their claims and thus the Court lacks subject matter jurisdiction over those claims; (5) Consumer Plaintiffs have failed to state a claim for relief under Arkansas law; (6) Consumer Plaintiffs cannot maintain an illegal merger claim against McWane as a matter of law; (7) Direct

Purchaser Plaintiffs have not alleged facts to state a plausible conspiracy claim under the Sherman Act; and (8) Direct Purchaser Plaintiffs cannot maintain an illegal merger claim against McWane as a matter of law. (Doc. 179).

In their Motions, Defendants McWane and Charlotte Pipe each submit that they have incorporated each other's briefs and arguments where appropriate. (Doc. 179 at 9; Doc. 184 at 6 n.2). Defendant CISPI has also filed several Motions for Joinder (Docs. 185, 162) and an Amended Motion for Joinder (Doc. 191) wherein it adopts by reference and relies upon the Defendants' Motions to Dismiss and Motions to Strike. In its Amended Motion for Joinder, in addition **[*32]** to adopting and relying on Defendants' Motions, CISPI also argues for dismissal of Plaintiffs' claims. *See* Doc. 191. CISPI's Motions for Joinder (Docs. 185, 162, 191) are hereby **GRANTED** to the extent that they are seeking joinder, and the Court will consider CISPI's arguments for dismissal along with the other Defendants' positions.[3] The Court will turn to each Plaintiffs' Consolidated Amended Complaint and the arguments for dismissal associated with it in turn.

1. Direct Purchaser Plaintiffs

a. Sherman Act Conspiracy Allegations under *Twombly*

In their Motions, Defendants argue that the Direct Purchaser Plaintiffs have failed to state a claim for conspiracy pursuant to the standard required under *Twombly*. Specifically, Charlotte Pipe submits that (1) the Direct Purchaser Plaintiffs fail to allege facts showing any agreement between the Defendants; (2) parallel pricing between the Defendants was the result of the CISP industry being an oligopoly; (3) Direct Purchaser Plaintiffs' allegations regarding the Defendants' trade association membership does not plausibly suggest **[*33]** a conspiracy; (4) Direct Purchaser Plaintiffs' allegations regarding conspiratorial discussions is a conclusory assertion that is not sufficient to "save" their claims; (5) and the United States Supreme Court and the United States Court of Appeals for the Sixth Circuit have "routinely dismissed" complaints with similar allegations. (Doc. 184 at 13-23). McWane also argues that Direct Purchaser Plaintiffs have failed to state a conspiracy under *Section 1 of the Sherman Act* because their Consolidated Amended Complaint does not suggest that there was a conspiracy between McWane and Charlotte Pipe, but rather alleges "conduct that is entirely consistent with independent decision-making." (Doc. 179 at 42). In response, Direct Purchaser Plaintiffs argue that Defendants rely on legal standards governing summary judgment motions rather than motions under *12(b)(6)*, fail to evaluate the conspiracy allegations as a whole, attempt to impose heightened pleading requirements, demand direct evidence of conspiracy despite precedent holding otherwise, ignore allegations that contradict their positions, and seek to have factual inferences drawn in their favor. (Doc. 201 at 20).

Section 1 of the Sherman Act provides in **[*34]** relevant part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. The United States Court of Appeals for the Sixth Circuit has described the essential elements of a Sherman Act claim as "(1) a contract, combination or conspiracy; (2) affecting interstate commerce; (3) which imposes an unreasonable restraint of trade." *White & White, Inc. v. Am. Hosp. Supply Corp., 723 F.2d 495, 504 (6th Cir. 1983)* (citing *Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818, 827 (6th Cir. 1982)* and *Davis-Watkins Co. v. Serv. Merch., 686 F.2d 1190, 1195-96 (6th Cir. 1982))*.

The agreement between the conspiring parties may "ultimately be proven either by direct evidence of communications between the defendants or by circumstantial evidence of conduct that, in the context, negates the likelihood of independent action and raises an inference of coordination." *Erie Cnty., Ohio v. Morton Salt, Inc., 702 F.3d 860, 868 (6th Cir. 2012)*. Evidence of a conspiracy must be evaluated as a whole rather than "dismembering it and viewing its separate parts." *Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)*; *see also* *In re Refrigerant Compressors Antitrust Litig., 795 F. Supp. 2d 647, 661 (E.D. Mich. 2011)* ("this Court concludes that *Twombly* does not support such a dismemberment or carve out approach to assessing the sufficiency of a complaint."); *In re Se. Milk Antitrust Litig., 555 F. Supp. 2d 934, 943 (E.D. Tenn. 2008)*. Once a conspiracy is established, "it is presumed to continue until there is an affirmative

[3] CISPI's Motion for Joinder (Doc. 163) that was based on previously-filed motions to dismiss is hereby **DENIED AS MOOT**.

showing that it has been abandoned." *United States v. Hayter Oil Co. of Greeneville, Tenn., 51 F.3d 1265, 1270-71 (6th Cir. 1995)*.

The United States Supreme Court **[*35]** case *Bell Atlantic v. Twombly* specifically addressed the level of detail in which a plaintiff must plead a claim brought pursuant to *Section 1 of the Sherman Act*. *550 U.S. at 556*. The Court provided that to state a plausible claim for conspiracy, there must be "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* With respect to parallel conduct by competitors, the Court found that "when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Id. at 557*. Thus, although parallel conduct "gets the complaint close to stating a claim," in order to establish plausibility, a plaintiff must provide further "factual enhancement." *Id.* Accordingly, if a plaintiff pleads only parallel conduct allegations without a context demonstrating "a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory." *Id.*

At the outset of this discussion, the Court is cognizant that the issue before it does not fall under a heightened pleading standard and is not presented at the summary judgment **[*36]** stage of this litigation. *See* *In re Auto. Parts Antitrust Litig., 2014 U.S. Dist. LEXIS 120725, 2014 WL 4272784, at *6 (E.D. Mich. Aug. 29, 2014)* ("there is no heightened pleadings requirement for stating an antitrust claim"); *In re Se. Milk Antitrust Litig., 555 F. Supp. 2d at 943* ("These complaints, while not answering all specific questions about 'who, what, when and where,' do put defendants on notice concerning the basic nature of their complaints against the defendants and the grounds upon which their claims exist."). Accordingly, as the Direct Purchaser Plaintiffs discuss in their brief, the Court will analyze Defendants' requested relief under the appropriate *12(b)(6)* standard rather than the legal standard applicable for determining summary judgment. *See* Doc. 201 at 21.

Turning to the merits of Defendants' arguments, the parties appear to agree that parallel pricing, standing alone, is not sufficient to state a claim under *Section 1 of the Sherman Act*. However, in cases such as the instant one, where plaintiffs assert allegations of parallel pricing as well as additional allegations, the United States Court of Appeals for the Sixth Circuit has identified "plus factors" for a district court to consider when evaluating the additional allegations. Specifically, it is important for a district court to consider:

> (1) whether the defendants' actions, if taken **[*37]** independently, would be contrary to their economic self-interest; (2) whether defendants have been uniform in their actions; (3) whether defendants have exchanged or have had the opportunity to exchange information relative to the alleged conspiracy; and (4) whether defendants have a common motive to conspire. Ordinarily, an affirmative answer to the first of these factors will consistently tend to exclude the likelihood of independent conduct.

In re Travel Agent Comm'n Antitrust Litig., 583 F.3d 896, 907 (6th Cir. 2009) (quoting *Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1009 (6th Cir. 1999))*. Considering all of the allegations in the Direct Purchasers Consolidated Amended Complaint, the Court must determine whether the stated facts "plausibly suggest, rather than [are] merely consistent with, an agreement to restrain trade in violation of the Sherman Act." *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc., 648 F.3d 452, 457 (6th Cir. 2011)* (internal quotation omitted).

In their brief, the Direct Purchaser Plaintiffs argue that the following allegations are sufficient to plausibly state a claim for conspiracy under *Section 1 of the Sherman Act*: (1) Charlotte Pipe and McWane engaged in parallel pricing beginning at least as early as 2006 and continuing until 2013; (2) the Defendants used CISPI at least twice a year to communicate and coordinate CISP price fixing, maintain their market share, and exclude foreign competition; **[*38]** (3) Defendants would increase prices shortly after meeting at CISPI; (4) CISPI's Executive Vice President provided weekly reports about bidding and pricing information to Defendants and alerted them when customers were being solicited by foreign manufacturers; (5) Senior Vice President of Charlotte Pipe's Cast Iron Division, Marshall Coble, made statements to employees stating that Charlotte Pipe and McWane were agreeing on pricing; (6) McWane and Charlotte Pipe agreed to limit competition for each other's customers; (7) McWane and Charlotte Pipe raised prices despite a decline in construction spending; and (8) the CISP market in the United States is susceptible to collusion because it has a high degree of concentration, an inelastic demand for CISP, high entry barriers, and homogeneity. (Doc. 201 at 25-36).

Considering the allegations stated within the Direct Purchaser Plaintiffs' Consolidated Amended Complaint, the Court finds Defendants' position that it fails to state a claim to be unconvincing. While it is true that the most concrete allegations lie in Defendants' uniform conduct of years of parallel pricing, the Court finds that there is sufficient factual enhancement elsewhere **[*39]** in the Consolidated Amended Complaint to state a claim under *Section 1 of the Sherman Act*. As the Direct Purchaser Plaintiffs identify, the Defendants had an agreement to limit competition with one another's customers, which is clearly against their economic self-interest. Additionally, the particularized setting of the CISP market—namely that Defendants control 90 percent of the CISP market with there being no comparable substitute for CISP—further supports Direct Purchaser Plaintiffs' claim alleging a conspiracy. Further, not only did Defendants act uniformly and against their economic self-interest, but they also had opportunity to exchange information regarding the price-fixing conspiracy at CISPI, an organization at which they were the only members. If these factors were not enough on their own, Defendant employee Marshall Coble also allegedly confirmed the price-fixing. Based on these factors as well as the other allegations stated in the Direct Purchaser Plaintiffs' Consolidated Amended Complaint, the Court is unable to conclude that Defendants' actions were the result of independent conduct at this stage in the litigation. Rather, the Court finds that Direct Purchaser Plaintiffs have **[*40]** stated a plausible claim under *Section 1 of the Sherman Act*, and Defendants' Motions to Dismiss will be **DENIED** as to this claim.

b. Statutes of Limitations

Defendants next move the Court to dismiss any Direct Purchaser Plaintiff claim for a purchase made prior to the statute of limitations because the Direct Purchaser Plaintiffs have not pled due diligence in their Consolidated Amended Complaint. (Doc. 184 at 26). Direct Purchaser Plaintiffs submit that the statute of limitations must be tolled because their Complaint adequately pleads fraudulent concealment. (Doc. 201 at 38).

The initial Direct Purchaser Plaintiff complaint was filed on October 2, 2013, and the Direct Purchaser Plaintiffs allege that the conspiracy ran from January 1, 2006, through December 31, 2013. However, a plaintiff may only bring a claim arising under the Sherman Act "within four years after the cause of action accrued." *15 U.S.C. § 15b*. Thus, in order for Direct Purchaser Plaintiffs to recover damages for conduct relating back to the beginning of the alleged conspiracy, they rely on the doctrine of fraudulent concealment.

As a general matter, a court should not extend a statute of limitation "by even a single day" absent "compelling equitable **[*41]** circumstances." *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc., 209 F.3d 552, 561 (6th Cir. 2000)*; *see also* *Wood v. Carpenter, 101 U.S. 135, 139, 25 L. Ed. 807 (1879)* ("Statutes of limitation are vital to the welfare of society and are favored in the law."). The doctrine of fraudulent concealment is a "longstanding exception," which permits a court to toll a statute of limitations if a defendant has concealed a cause of action from a plaintiff. *Pinney Dock & Transp. Co. v. Penn Cent. Corp., 838 F.2d 1445, 1465 (6th Cir. 1988)*. In the Sixth Circuit, a Plaintiff alleging fraudulent concealment must establish that "1) defendants concealed the conduct that constitutes the cause of action; 2) defendants' concealment prevented plaintiffs from discovering the cause of action within the limitations period; and 3) until discovery, plaintiffs exercised due diligence in trying to find out about the cause of action." *Egerer v. Woodland Realty, Inc., 556 F.3d 415, 422 (6th Cir. 2009)*. The burden of proving the elements falls on the plaintiff seeking to toll the statute of limitations. *Pinney Dock & Transp. Co., 838 F.2d at 1465*; *see also* *Lutz v. Chesapeake Appalachia, L.L.C., 717 F.3d 459, 475 (6th Cir. 2013)*.

Regarding a defendant's acts of concealment, the Sixth Circuit requires that a defendant engage in "affirmative acts of concealment." *Hamilton Cnty. Bd. of Comm'rs v. Nat'l Football League, 491 F.3d 310, 319 (6th Cir. 2007)*. Thus, fraudulent concealment is "invoked in cases where the defendant takes active steps to prevent the plaintiff from suing in time, such as by hiding evidence or promising not to plead the statute of limitations." *Bridgeport Music, Inc. v. Diamond Time, Ltd., 371 F.3d 883, 891 (6th Cir. 2004)*. Put another way, to meet this element, **[*42]** "mere silence or unwillingness to divulge wrongful activities is not sufficient." *Helmbright v. City of Martins Ferry, Ohio, 61 F.3d 903 (6th Cir. 1995)*.

As for the due diligence element of fraudulent concealment, only "[a]ctions such as would deceive a reasonably diligent plaintiff will toll the statute; but those plaintiffs who delay unreasonably in investigating circumstances that should put them on notice will be foreclosed from filing, once the statute has run." *Campbell v. Upjohn Co., 676*

F.2d 1122, 1128 (6th Cir. 1982). For a plaintiff to establish that he was reasonably diligent in discovering his claim, he must show "that he neither knew nor, in the exercise of due diligence, could reasonably have known of the offense." *In re Polyurethane Foam Antitrust Litig., 799 F. Supp. 2d 777, 802 (N.D. Ohio 2011)* (quoting *Klehr v. A.O. Smith Corp., 521 U.S. 179, 195, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997))*. Whether a plaintiff acted with due diligence depends on "the circumstances, and that reasonableness turns in part on how well the defendant has hidden its wrongdoing." *Venture Global Eng'g, LLC v. Satyam Computer Servs., Ltd., 730 F.3d 580, 588 (6th Cir. 2013)*. Based on this standard, it is possible that doing nothing may be reasonable "where nothing suggests to a reasonable person that wrongdoing is afoot." *Id.*

A plaintiff alleging fraudulent concealment must plead the requisite elements with particularity pursuant to *Federal Rule of Civil Procedure 9(b)*. *Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, 394 (6th Cir. 1975)*. *Rule 9 of the Federal Rules of Civil Procedure* addresses pleading special matters. *Fed. R. Civ. P. 9*. To plead a claim for fraud or mistake under *Rule 9*, "a party must state with particularity the circumstances constituting **[*43]** fraud or mistake. Malice, intent, knowledge and other conditions of a person's mind may be alleged generally." *Fed. R. Civ. P. 9(b)*. Although *Rule 9* heightens the pleading standard for special pleadings, it "does not require a plaintiff to be omniscient, ... [and] the main purpose behind *Rule 9(b)* is to provide notice of a plaintiff's claim to a defendant so that the defendant may be able to prepare an informed responsive pleading." *BAC Home Loans Servicing LP v. Fall Oaks Farm LLC, 848 F. Supp. 2d 818, 827 (S.D. Ohio 2012)* (citing *Coffey v. Foamex, L.P., 2 F.3d 157, 161-62 (6th Cir. 1993)*.

In support of their allegation of fraudulent concealment, Plaintiffs submit that Defendants concealed their actions by giving customers false information regarding why prices were increasing in 2008, 2009, 2010, and 2011. *See* Doc. 201 at 39. Plaintiffs also argue that the secretive and exclusive nature of CISPI permitted Defendants to conspire and communicate with one another regarding the price-fixing conspiracy. *Id.* at 40. Defendants, however, take the position that the parallel pricing activity, which was publically available, was sufficient to put Direct Purchaser Plaintiffs on notice that they may have a cause of action against Defendants. (Doc. 184 at 28).

Turning to the elements of fraudulent concealment, and taking all well-pled allegations of the Consolidated Amended Complaint **[*44]** as true, the Court finds that Defendants did affirmatively act to conceal the alleged price-fixing conspiracy in such a way that a reasonable purchaser would not be put on notice of a cause of action. Although Defendants argue that the evidence of parallel pricing could have arguably put Direct Purchaser Plaintiffs on notice of their cause of action, Direct Purchaser Plaintiffs are able to identify with sufficient specificity several instances of Defendants allegedly misrepresenting their reasons for raising prices. *See* Doc. 122 at 22-23. The Court finds it noteworthy that the reasons Defendants gave for raising prices, such as increased costs of materials, were credible justifications for price increases since CISP price is in part determined by the cost of scrap iron and other metals. As Defendants affirmatively misrepresented these price increases with a veil of credible justifications, the Court finds it unlikely that a reasonable purchaser of CISP would discern that they might have a cause of action against Defendants. Additionally, if Defendants had not concealed their reasons for raising prices in this manner, it is likely that Direct Purchaser Plaintiffs would have discovered **[*45]** their cause of action within the applicable statute of limitations by exercising reasonable diligence. Accordingly, the Court finds that Direct Purchaser Plaintiffs have met their burden of establishing fraudulent concealment, and the statute of limitations will be tolled.

c. Clayton Act Claim

Regarding the Direct Purchaser Plaintiffs' Clayton Act claim, the Defendants take separate positions. Charlotte Pipe argues that the Direct Purchaser Plaintiffs' Clayton Act claim must be dismissed because it does not plausibly allege that they were injured by the Star Pipe acquisition. (Doc. 184 at 48). Specifically, Charlotte Pipe argues that Direct Purchaser Plaintiffs fail to allege that they purchased CISP after the acquisition or that the acquisition caused prices of CISP to increase. (*Id.* at 49). McWane, on the other hand, submits that the Clayton Act claim against McWane should be dismissed because it did not acquire Star Pipe. (Doc. 179 at 43-44).

The Clayton Act is "designed to arrest and prohibit mergers and acquisitions that lessen competition or tend to create a monopoly." *Z Technologies Corp. v. Lubrizol Corp., 753 F.3d 594, 604 (6th Cir. 2014)* (internal quotation omitted). *Section 7 of the Clayton Act* provides in relevant part:

> No person engaged in commerce or in any activity **[*46]** affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

15 U.S.C. § 18. To state a claim under *Section 7*, a plaintiff must allege that: "(1) a person or entity; (2) engages in commerce or an activity affecting commerce; (3) merges with another person also engaged in commerce, and (4) the effect of the merger is to substantially lessen competition or tend to create a monopoly." *HTC Sweden AB v. Innovatech Products & Equip. Co., 2008 U.S. Dist. LEXIS 76690, 2008 WL 4510710, at *14 (E.D. Tenn. Sept. 30, 2008)*. The Sixth Circuit has described *Section 7 of the Clayton Act* as dealing in "probabilities, not certainties" because of Congress's inclusion of the term "may" when discussing the effect of an acquisition. *ProMedica Health Sys., Inc. v. F.T.C., 749 F.3d 559, 564 (6th Cir. 2014)* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 323, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))*; *see* *United States v. Dairy Farmers of Am., Inc., 426 F.3d 850, 858 (6th Cir. 2005)* ("The Supreme Court has explained that Congress used the words may be substantially to lessen competition to indicate that its concern was with probabilities, **[*47]** not certainties.") (internal quotation omitted). Thus, it is not a requirement that "anticompetitive power manifest itself in anticompetitive action before *§ 7* can be called into play." *Dairy Farmers of Am., Inc., 426 F.3d at 858*.

The Court finds Charlotte Pipe's arguments to be unpersuasive. While Charlotte Pipe submits that the Direct Purchaser Plaintiffs have failed to allege that they were injured by the Star Pipe acquisition, this position is directly refuted by the language of the Consolidated Amended Complaint. Specifically, Direct Purchaser Plaintiffs allege that the acquisition of Star Pipe eliminated the downward pressure on CISP prices and resulted in CISP prices rising "significantly" in January 2011. *See* Doc. 122 at 19. Direct Purchaser Plaintiffs have also alleged that they have bought CISP from Charlotte Pipe after the Star Pipe acquisition, which further refutes Charlotte Pipe's arguments. *Id.* at 25. Accordingly, as Defendant has not identified any other reasons why this claim should be dismissed, Charlotte Pipe's Motion to Dismiss will be **DENIED** as to this claim.

As for McWane, Direct Purchaser Plaintiffs clarify in their response brief that they "do not contend that McWane is liable under *Section 7*." (Doc. 201 at 45). Direct Purchaser **[*48]** Plaintiffs also confirmed this at the December 19, 2015 Hearing on the instant Motion. (Doc. 235 at 48) ("We're not making the illegal acquisition claim under *Section 7 of the Clayton Act* against McWane."). Based on Direct Purchaser Plaintiffs' submission, the Court finds that they have expressly abandoned any claim arising under *Section 7 of the Clayton Act* against McWane. Accordingly, McWane's Motion to Dismiss as to that claim will be **GRANTED**, and this claim will be **DISMISSED WITH PREJUDICE**.

2. Indirect Purchaser Plaintiffs and Consumer Plaintiffs

In their Motions, Defendants frequently address the Indirect Purchaser Plaintiffs and Consumer Plaintiffs together as "Downstream Plaintiffs." Additionally, the Indirect Purchaser Plaintiffs and the Consumer Plaintiffs have filed a consolidated response brief. Thus, the Court will discuss the arguments and responses as they are raised, discussing the two plaintiff groups together as "Downstream Plaintiffs" and distinguishing between them when appropriate.

a. Standing Issues

Before the Court turns to the Defendants' arguments regarding the sufficiency of the Downstream Plaintiffs' Complaints, the Court will first address the issues the Defendants raise regarding **[*49]** standing. Article III standing and antitrust standing "are not one and the same, and [a court] not only may—but [it] must—reject claims under *Rule 12(b)(6)* when antitrust standing is missing." *NicSand, Inc. v. 3M Co., 507 F.3d 442, 449 (6th Cir. 2007)*; *see also* *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters ("AGC"), 459 U.S. 519, 535, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* ("the focus of the doctrine of antitrust standing is somewhat different from that of standing as a constitutional doctrine").

In their Motions to Dismiss, Defendants submit that the Downstream Purchasers lack Article III standing and antitrust standing. (Doc. 184 at 29; Doc. 179 at 10). In Response, the Downstream Plaintiffs argue that Defendants' position (1) conflates Article III standing with the requirements for class certification under *Federal Rule of Civil Procedure 23*; (2) is not supported by the Sixth Circuit or by the overwhelming case law from federal courts; and (3) is an issue that is properly deferred until the Court makes a ruling on class certification. (Doc. 202 at 15).

i. Article III Standing

"Article III of the Constitution gives federal courts subject matter jurisdiction over actual cases or controversies, neither of which exists unless a plaintiff establishes his standing to sue." *Murray v. U.S. Dep't of Treasury, 681 F.3d 744, 748 (6th Cir. 2012)*; *see* *Simon v. E. Kentucky Welfare Rights Org., 426 U.S. 26, 37, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976)* ("No principle is more fundamental **[*50]** to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies"). Article III standing is a threshold question in federal cases and concerns whether a plaintiff is the proper party to bring a lawsuit. *Raines v. Byrd, 521 U.S. 811, 818, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997)*.

Article III standing, or "constitutional standing," has three elements. First, a plaintiff must have suffered "an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Kardules v. City of Columbus, 95 F.3d 1335, 1346 (6th Cir. 1996)*. This element is often interpreted as the plaintiff having a "personal stake" in the outcome of the controversy. *Baker v. Carr, 369 U.S. 186, 204, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)*; *Loren v. Blue Cross & Blue Shield of Mich., 505 F.3d 598, 607 (6th Cir. 2007)*. Second, the injury must be "fairly traceable to the challenged action of the defendant." *Cleveland Branch, N.A.A.C.P. v. City of Parma, OH, 263 F.3d 513, 524 (6th Cir. 2001)*. Third, it must be likely rather than speculative that "the injury will be redressed by a favorable decision. *White v. United States, 601 F.3d 545, 551-51 (6th Cir. 2010)* (internal quotation marks omitted).

It is a plaintiff's burden to establish standing. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. Plaintiffs must support each element of standing "in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the **[*51]** litigation." *Fednav, Ltd. v. Chester, 547 F.3d 607, 614 (6th Cir. 2008)*. As this issue is before the Court on a motion to dismiss, the Court must construe the Complaints in the light most favorable to Plaintiffs and accept as true all well-pleaded factual allegations. *Mixon v. Ohio, 193 F.3d 389, 400 (6th Cir. 1999)*.

With regard to Article III standing, Defendants argue that the Indirect Purchasers lack standing because the injury they allege—being forced to pay higher prices for CISP—could have only occurred in the two states where the named Indirect Plaintiffs reside, Florida and California. (Doc. 179 at 11). Thus, for the remaining claims brought under the other 26 state antitrust laws and 17 state consumer protection laws, Defendants argue that the Indirect Purchasers lack standing to pursue these claims because they do not reside in these states, have not alleged that they purchased CISP in these states, and have not alleged that they suffered an injury that can be addressed under the laws of these states. (*Id.* at 12). The Downstream Plaintiffs respond that the named Plaintiffs have met the requisite elements to establish individual standing and that the concerns raised by Defendants are more appropriate addressed when the Court addresses class certification. (Doc. 202 at 17).

In support of **[*52]** their position, the Downstream Purchasers cite the United States Court of Appeals for the Sixth Circuit case *Fallick v. Nationwide Mutual Insurance Company. 162 F.3d 410 (6th Cir. 1998)*. In *Fallick*, the Sixth Circuit highlighted the distinction between a plaintiff's standing under Article III and "the relationship between a potential class representative and absent class members." *Id. at 422*. The Sixth Circuit elaborated on the distinction between these two matters as follows:

> Threshold individual standing is a prerequisite for all actions, including class actions. A potential class representative must demonstrate individual standing vis-[a]-vis the defendant; he cannot acquire such standing merely by virtue of bringing a class action. As this Court has made clear, however, once an individual has alleged a distinct and palpable injury to himself he has standing to challenge a practice even if the injury is of a sort shared by a large class of possible litigants Once his standing has been established, whether a plaintiff will

> be able to represent the putative class, including absent class members, depends solely on whether he is able to meet the additional criteria encompassed in *Rule 23 of the Federal Rules of Civil Procedure*.

Id. at 423 (internal citation and quotation omitted). Certain district courts have followed **[*53]** the line of reasoning set forth in *Fallick* and have concluded that "class certification is logically antecedent [to Article III concerns] where its outcome will affect the Article III standing determination." *In re DDAVP Indirect Purchaser Antitrust Litig., 903 F. Supp. 2d 198, 213 (S.D.N.Y. 2012)* (internal quotation omitted).

Federal courts are split regarding the appropriate procedural juncture for a court to decide Article III standing in a class action case. The cause for this split regarding when standing must be determined was created by the combination of two United States Supreme Court cases: *Ortiz v. Fibreboard Corp., 527 U.S. 815, 831, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)* and *Amchem Products, Inc. v. Windsor, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*. In *Amchem*, a case concerning the legitimacy of a class certification sought to achieve global settlement of asbestos-related claims, the Court found the class certification issues in the case to be dispositive because their resolution was "logically antecedent to the existence of any Article III issues." *521 U.S. at 612*. In *Ortiz*, a global settlement of claims against a manufacturer of asbestos-containing products, the Court concluded that the class certification issues before the Court should be "treated first" because they were "logically antecedent to Article III concerns, and themselves pertain[ed] to statutory standing." *527 U.S. at 831*. The parties have derived the "logically antecedent" language from **[*54]** these cases and have reached differing conclusions as to its meaning.

In considering both parties' positions, the Court notes that the Sixth Circuit has not explicitly determined the meaning of the phrase "logically antecedent" or decided whether a court must consider class certification before standing in the states in which a named plaintiff is not a resident. *See In re Polyurethane Foam Antitrust Litig., 799 F. Supp. 2d at 805*; *In re Packaged Ice Antitrust Litig., 779 F. Supp. 2d 642, 654 (E.D. Mich. 2011)* ("The United States Court of Appeals for the Sixth Circuit has not ruled on the issue. Within this district, courts have issued conflicting opinions on the subject."). Indeed, the fact that the Sixth Circuit has not weighed in on this issue explains the divergent positions of the parties in the instant litigation. Considering the current, unsettled state of the law on this issue, the Court is left to decide which avenue is most appropriate in *this* litigation to resolve Defendants' standing challenges.

Even though the Sixth Circuit has not explicitly ruled on this issue, the Court finds that *Fallick* supports a conclusion that, in instances such as the present matter, issues related to Article III standing are more appropriately resolved *after* a ruling on class certification. Defendants acknowledge, with certain caveats, **[*55]** that the Downstream Plaintiffs could assert claims in their home states, and the relief they are seeking in the states in which they do not reside is sought for absent class members. If the Court were to decide the standing issue at this juncture on the basis that the named plaintiffs do not reside in some of the states under whose laws they bring claims on behalf of the class, it would not be giving due appreciation to the complex nature of Article III standing in class actions and the nuances of class certification. Keeping this in mind, the Court concludes that "the better path is to defer this issue until the class certification stage" when the class itself will be determined. *In re Auto. Parts Antitrust Litig., 2013 U.S. Dist. LEXIS 80338, 2013 WL 2456612, at *11 (E.D. Mich. June 6, 2013)*. Accordingly, Defendants' Motion to Dismiss with respect to this issue will be **DENIED**.

ii. Antitrust Standing

Even if a plaintiff has Article III standing, the Court must also determine "whether the plaintiff is the proper party to bring a private antitrust action." *AGC, 459 U.S. at 535 n.31*. As evidenced by *Twombly*, antitrust standing is a "threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement [a court] must dismiss it as a matter of law—lest the antitrust laws become a treble-damages **[*56]** sword rather than the shield against competition-destroying conduct that Congress meant them to be." *NicSand, Inc., 507 F.3d at 450*. Indeed, the Sixth Circuit has described antitrust standing as "the glue that cements each suit with the purposes of the antitrust laws, and prevents abuses of those laws." *HyPoint Tech., Inc. v. Hewlett-Packard Co., 949 F.2d 874, 877 (6th Cir. 1991)*.

Relying on principles identified in *AGC*, the Sixth Circuit has set forth several factors that a court can consider in determining whether a plaintiff has antitrust standing:

> 1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused; (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market; (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative; (4) the potential for duplicative recovery or complex apportionment of damages; and (5) the existence of more direct victims of the alleged antitrust violation.

Southaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079, 1085 (6th Cir. 1983).

A pivotal case in the development of an indirect purchaser's right to bring a private antitrust action was the United States Supreme Court case *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. In *Illinois Brick*, the Court held that indirect purchasers in **[*57]** an antitrust action could not bring a lawsuit to recover overcharges passed onto them because "the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party injured in his business or property." *Id. at 728* (internal quotation omitted). Following the *Illinois Brick* decision, several states enacted legislation designed to repeal the impact of *Illinois Brick* to permit indirect purchasers to bring claims. *In re Auto. Parts Antitrust Litig., 29 F. Supp. 3d 982, 2014 WL 2993742, at *12 (E.D. Mich. 2014)*. As the Downstream Purchasers in the instant case are bringing their claims under various state statutes (aside from the Consumer's claim under the Sherman Act), the Court will not delve into the intricacies of the *Illinois Brick* repealer statutes. *See California v. ARC Am. Corp., 490 U.S. 93, 103, 109 S. Ct. 1661, 1666, 104 L. Ed. 2d 86 (1989)* ("nothing in *Illinois Brick* suggests that it would be contrary to congressional purposes for States to allow indirect purchasers to recover under their own antitrust laws."). Rather, the issue before the Court is whether to apply the Sixth Circuit factors to the Downstream Plaintiffs' claims even though they are bringing their claims pursuant to state statutes.

In their Motions, Defendants argue that all but four of the state antitrust statutes under which Plaintiffs seek relief require application **[*58]** of the federal antitrust standing principles. (Doc. 184 at 32). In response, Plaintiffs agree that the four states of Arkansas, Minnesota, South Carolina, and Tennessee do not require the application of federal antitrust standing principles and argue that "Defendants have greatly overstated each state's position as to *AGC*" and the application of federal antitrust standing principles. (Doc. 202 at 25). Specifically, Plaintiffs contend that (1) Defendants have ignored "persuasive authority" that undermines the application of *AGC* to antitrust claims brought under Alabama, Arizona, California, Hawaii, Mississippi, and North Carolina statutes; (2) the statutes that Defendants cite for Arizona, District of Columbia, Hawaii, Michigan, Nebraska, Oregon, Rhode Island, South Dakota, Utah, Vermont, and West Virginia only "suggest that state antitrust laws should be harmonized with federal ***antitrust law***"; (3) the cases that Defendants have cited for the District of Columbia, Iowa, Michigan, New York, North Dakota, Vermont, and Wisconsin are inapplicable to the instant matter; (4) the cases that Defendants have cited for the District of Columbia, Iowa, Michigan, New York, North Dakota, Vermont, **[*59]** and Wisconsin involve plaintiffs who were not indirect purchasers and "had a more remote relationship with the defendants"; and (5) courts that have addressed this issue have declined to apply the *AGC* factors. (Doc. 202 at 25-26).[4]

Whether the *AGC* factors should be applied to the Downstream Purchasers' claims is a matter of state law. In considering legal questions controlled by state law, the Court is "bound by the rulings of the state supreme court." *In re Darvocet, Darvon, & Propoxyphene Products Liab. Litig., 756 F.3d 917, 937 (6th Cir. 2014)*. If the state supreme court has not issued a determinative ruling regarding this issue, the Court may also consider "how the court would rule by looking to all available data, including decisions of the states' appellate courts." *Id.* Courts in this Circuit have described this as a two-part process: (1) considering whether the states at issue in an action have explicitly adopted the *AGC* factors; and (2) applying the *AGC* factors to the states that have adopted them. *In re Refrigerant Compressors Antitrust Litig., 2013 U.S. Dist. LEXIS 50737, 2013 WL 1431756, at *9 (E.D. Mich. Apr. 9, 2013)* *motion to certify appeal denied*, *2013 U.S. Dist. LEXIS 109410, 2013 WL 4009023 (E.D. Mich. Aug. 5, 2013)* *and*

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[4] Although Plaintiffs advance many arguments through both the text of their brief and the corresponding footnote, Plaintiffs have not addressed Defendants' argument with respect to the claims brought in Illinois and New Hampshire.

appeal dismissed **[*60]** , 731 F.3d 586 (6th Cir. 2013). The twenty-five states that are at issue here for this determination are Alabama, Arizona, California, Washington D.C., Hawaii, Illinois, Iowa, Kansas, Maine, Michigan, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Utah, Vermont, West Virginia, and Wisconsin. (Doc. 184-4).

Although the Court has considered the parties' positions, as it is deferring ruling on the Article III standing issue, it will also defer ruling on this antitrust standing issue at this juncture. *See* Ross v. Bank of Am., N.A.(USA), 524 F.3d 217, 222 (2d Cir. 2008) ("A court proceeds to an antitrust standing analysis only after Article III standing has been established"); *see also* Static Control Components, Inc. v. Lexmark Int'l, Inc., 697 F.3d 387, 405 (6th Cir. 2012) *aff'd*, 134 S. Ct. 1377, 1388, 188 L. Ed. 2d 392 (2014) ("Antitrust causation is much more limited than Article III standing"); Hyland v. Homeservices of Am., Inc., 2008 U.S. Dist. LEXIS 65250, 2008 WL 4000546, at *3 (W.D. Ky. Aug. 25, 2008) ("Antitrust standing "requires more than the constitutional minimum for the 'case or controversy' that brings jurisdiction to Article III court"). Accordingly, Defendants' Motions with respect to this issue will be **DENIED**.

b. Conspiracy Allegations under *Twombly* and Statute of Limitations Issues

In their Motions, Defendants each argue that the Downstream Plaintiffs have failed to state a claim for conspiracy at the standard required **[*61]** under *Twombly*. Although the Downstream Plaintiffs have not alleged a claim under the Sherman Act and rather identify claims under state law, the arguments against these conspiracy claims address the same issues. Namely, whether the Consolidated Amended Complaints fail to show a price-fixing agreement between the Defendants, whether the allegations they state support a plausible inference that a price-fixing conspiracy existed pursuant to their respective state law claims, and whether the Downstream Plaintiffs adequately plead fraudulent concealment. For the reasons articulated *supra* with respect to the Direct Purchasers, Defendants' Motions to Dismiss will also be **DENIED** on this ground with respect to the Downstream Purchasers.

c. State Antitrust Claims

Defendants next argue that the Downstream Plaintiffs have failed to address the essential elements of their state antitrust claims. (Doc. 184 at 36). In support of their position, Defendants submit that the claims of the Downstream Plaintiffs should be dismissed because: (1) Rhode Island has followed *Illinois Brick* and barred indirect purchaser actions; (2) the District of Columbia, Mississippi, Nevada, New York, North Carolina, South **[*62]** Dakota, Tennessee, West Virginia, and Wisconsin require that a plaintiff plead allegations establishing a sufficient nexus between a defendant's conduct and intrastate commerce and the Downstream Plaintiffs have failed to do so; and (3) Arkansas does not provide a private right of action for price-fixing claims. (Doc. 184 at 36-40).

Rhode Island

In response to Defendants' position regarding Rhode Island, the Downstream Plaintiffs submit that Rhode Island permits indirect purchasers to bring an antitrust claim under Rhode Island General Laws Section 6-36-12(g). Section 6-36-12(g) provides:

> In any action under this section the fact that a person or public body has not dealt directly with the defendant shall not bar or otherwise limit recovery. Provided, however, that the court shall exclude from the amount of monetary relief awarded in the action any amount of monetary relief that duplicates amounts that have been awarded for the same injury. No provision of this chapter shall be construed to limit the standing of any person or public body, whether the person or public body is a direct or indirect purchaser, from bringing suit on his or her own behalf.

R.I. Gen. Laws § 6-36-12(g). In interpreting this statute in 2002, the Supreme Court of Rhode Island held that § 6-36-12 "reserves to **[*63]** the Attorney General as *parens patriae*, the right to sue on behalf of indirect purchasers for monetary damages resulting from a violation of the Antitrust Act" and concluded that individual indirect purchasers could not bring their claims. Siena v. Microsoft Corp., 796 A.2d 461, 465 (R.I. 2002). However, on July 15, 2013, the Rhode Island legislature passed an *Illinois Brick* repealer statute. Since the enactment of this statute, courts have interpreted this statute as applying solely prospectively. *See* In re Aggrenox Antitrust Litig., 94 F. Supp. 3d 224, 2015 U.S. Dist. LEXIS 35634, 2015 WL 1311352, at *21 (D. Conn. Mar. 23, 2015) ("In the absence of evidence of the Rhode Island legislature's intent to the contrary, I conclude that the law applies only prospectively."); *In re Niaspan Antitrust Litig., 42 F. Supp. 3d 735, 759 (E.D. Pa. 2014)* ("the repealer statutes of both states are presumed to apply only prospectively, absent evidence of legislative intent to the contrary"). Accordingly, Defendants' Motion to Dismiss regarding the Indirect Purchasers' claims brought pursuant to Rhode Island's Antitrust Act will be **GRANTED** as to claims alleging overcharges before July 15, 2013.

Arkansas

Defendants also submit that Indirect Purchaser's claim under the Arkansas Unfair Practices Act must be dismissed because "Arkansas does not provide a private right of action for price-fixing claims." (Doc. 184 at 40). In response, the Indirect Purchaser's **[*64]** cite to *Arkansas Code Annotated § 4-75-211*, which provides:

> Any person, firm, private corporation, or municipal or other public corporation, or trade association, may maintain an action to enjoin a continuance of any act or acts in violation of this subchapter and, if injured thereby, for the recovery of damages.

Ark. Code Ann. § 4-75-211(a). Indeed, federal district courts in Arkansas have interpreted this statute as permitting private plaintiffs to bring a cause of action under this subsection of the Arkansas Unfair Practices Act. *See* *Goodner v. Clayton Homes, Inc., 2014 U.S. Dist. LEXIS 133418, 2014 WL 4722748, at *1 (W.D. Ark. Sept. 23, 2014)*; *Coffee.org, Inc. v. Green Mountain Coffee Roasters, Inc., 2012 U.S. Dist. LEXIS 18577, 2012 WL 511485, at *3 (W.D. Ark. Feb. 15, 2012)*.

However, the Indirect Purchasers' argument becomes problematic based on the fact that Arkansas' prohibition on price-fixing is located is a separate subchapter of the Arkansas Unfair Practices Act, in which actions are only permitted by the Attorney General. *See* *Ark. Code Ann. § 4-75-309*; *Ark. Code Ann. § 4-75-310*; *Ark. Code Ann. § 4-75-315* (providing that the Attorney General may bring an action on behalf of injured persons); *In re TFT-LCD (Flat Panel) Antitrust Litig., 599 F. Supp. 2d 1179, 1191 (N.D. Cal. 2009)* ("Defendants contend—and plaintiffs do not disagree—that plaintiffs do not have standing to seek relief under Arkansas ***antitrust law*** because that law only permits predatory pricing claims alleging that items were sold at less than cost and does not create a private right of action for an alleged conspiracy to raise prices.") (internal quotation omitted). Thus, **[*65]** as this subsection of the statute does not provide for a private individual to bring an action and only permits actions by the Attorney General, the Indirect Purchasers' claim must be **DISMISSED**.

Illinois

Defendants next argue that the Consumers' claims under Illinois's antitrust statute must be dismissed because the statute expressly bars indirect purchasers from bringing class actions. (Doc. 184 at 40); *740 Ill. Comp. Stat. 10/7* ("Provided further that no person shall be authorized to maintain a class action in any court of this State for indirect purchasers asserting claims under this Act, with the sole exception of this State's Attorney General"); *In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig., 64 F. Supp. 3d 665, 2014 WL 6792663, at *27 (E.D. Pa. 2014)*. Consumers failed to respond to this argument in their brief. *See generally* Doc. 202. The Court has reviewed the Illinois statute and, finding Defendants' position well-supported and unopposed by the Consumers, will **GRANT** Defendants' Motion to Dismiss with respect to this claim.

Hawaii

With respect to the claims brought under Hawaii's antitrust statute, Defendants argue that a plaintiff must notify the Hawaii Attorney General before bringing a claim under this provision, and that the Downstream Purchasers have failed to comply with this requirement. (Doc. 184 at **[*66]** 40). However, in their Response, Indirect Purchasers submit that they notified the Hawaii Attorney General of their intent to bring their claims on August 15, 2014. (Doc.

202 at 55; Doc. 202-1). As the Indirect Purchasers established that they complied with this requirement, Defendants' Motion to Dismiss will be **DENIED** with respect to the Indirect Purchasers' claim.

It is unclear from the parties' filings whether the Consumer Purchasers have also complied with this requirement. Courts that have reached this issue are split regarding whether a plaintiff's failure to comply with this requirement bars him from proceeding with his unfair competition claims. *In re Aggrenox Antitrust Litig., 2015 U.S. Dist. LEXIS 35634, 2015 WL 1311352, at *22*; *In re Chocolate Confectionary Antitrust Litig., 749 F. Supp. 2d 224, 232 (M.D. Pa. 2010)* ("Under *§ 480-13.3(a)*, any action based upon unfair competition must adhere to the attorney general notification procedures enumerated by statute; the [] plaintiffs' failure to comply with the statutory provision therefore warrants dismissal"); *In re Aftermarket Filters Antitrust Litig., 2009 U.S. Dist. LEXIS 104114, 2009 WL 3754041, at *6 (N.D. Ill. Nov. 5, 2009)* ("the statute does not provide for dismissal of the action for failure to comply, and that dismissal is inconsistent with the remedial purposes of the statute"). Given the parties' limited discussion of this issue, the split of authority regarding whether this is a bar to proceeding with an unfair competition **[*67]** claim, and the remedial nature of Hawaii's antitrust statute, the Court declines to dismiss the Consumer Purchasers' claim under Hawaii's antitrust statute on this ground.

District of Columbia, Mississippi, Nevada, New York, North Carolina, South Dakota, Tennessee, West Virginia, and Wisconsin

Turning to Defendants' next argument for dismissal, Defendants argue that the claims under the laws of the states of the District of Columbia, Mississippi, Nevada, New York, North Carolina, South Dakota, Tennessee, West Virginia, and Wisconsin must be dismissed because the Downstream Plaintiffs fail to allege a connection to the intrastate commerce of the individual states. In response, the Downstream Plaintiffs argue that they have described "a pervasive price-fixing scheme that affected the entire CISP market and impacted commerce nationwide." (Doc. 202 at 52). In addition to reviewing the parties' positions, the Court has examined the laws of the District of Columbia, Mississippi, Nevada, New York, North Carolina, South Dakota, Tennessee, West Virginia, and Wisconsin. *See* *D.C. Code § 28-4502* ("Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce all or **[*68]** any part of which is within the District of Columbia is declared to be illegal."); *Miss. Code. Ann. § 75-21-1*; *Nev. Rev. Stat. Ann. § 598A.060*; *N.Y. Gen. Bus. Law § 340*; *N.C. Gen. Stat. Ann. § 75-1* ("Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal"); *S.D. Codified Laws § 37-1-3.1* ("A contract, combination, or conspiracy between two or more persons in restraint of trade or commerce any part of which is within this state is unlawful."; *Tenn. Code Ann. § 47-25-101*; *W. Va. Code Ann. § 47-18-3* ("Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in this State shall be unlawful"); *Wis. Stat. Ann. § 133.03*. The Court has also reviewed the Downstream Purchasers' allegations regarding their claims brought under these statutes. The Court will first summarize the state of the law in each state before reaching a conclusion regarding whether the Downstream Purchasers have stated a claim under the laws of these states.

Mississippi

District courts that have examined Mississippi's Antitrust Act have construed it "to require allegations of at least some activity or conduct occurring in intrastate commerce or trade." *California v. Infineon Technologies AG, 531 F. Supp. 2d 1124, 1158 (N.D. Cal. 2007)*; *see also* *In re TFT-LCD (Flat Panel) Antitrust Litig., 599 F. Supp. 2d at 1188* ("The Court agrees with defendants that the Mississippi Antitrust Act requires some allegations of intrastate **[*69]** conduct, but finds that plaintiffs have sufficiently alleged such conduct."); *In re Graphics Processing Units Antitrust Litig., 540 F. Supp. 2d 1085, 1099 (N.D. Cal. 2007)*.

District of Columbia

As for the District of Columbia, the case law interpreting this statute is relatively limited. The courts that have interpreted the statute have described it as paralleling *Section 1 of the Sherman Act*. *Atl. Coast Airlines Holdings, Inc. v. Mesa Air Grp., Inc., 295 F. Supp. 2d 75, 87 (D.D.C. 2003)*; *In re Cardizem CD Antitrust Litig., 105 F. Supp. 2d 682, 692 (E.D. Mich. 2000)*; *GTE New Media Servs., Inc. v. Ameritech Corp., 21 F. Supp. 2d 27, 45 (D.D.C. 1998)*. However, a district court in the District of Columbia described the District of Columbia antitrust statute as "not requir[ing] an interstate nexus, but rather a connection within this jurisdiction." *GTE New Media Servs., 21 F. Supp. 2d at 45*.

Nevada

In Nevada, the antitrust statute "prohibits conduct that is part of a conspiracy in restraint of trade in Nevada. " *In re Auto. Parts Antitrust Litig., 50 F. Supp. 3d 869, 889 (E.D. Mich. 2014)*. Courts considering this statute have dismissed claims that have failed "to allege a causal connection between [the plaintiff's] injuries and the conduct prohibited by the laws of those states, which require a showing that such conduct occurred, or whose effect was felt, in-state." *In re Magnesium Oxide Antitrust Litig., 2011 U.S. Dist. LEXIS 121373, 2011 WL 5008090, at *8 (D.N.J. Oct. 20, 2011)*; *see also Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, 737 F. Supp. 2d 380, 397 (E.D. Pa. 2010)* ("Nevada requires only that the plaintiffs show that some part of the prohibited activity caused harm in Nevada, not that the commencement of the sham litigation took place there.").

New York

New York's antitrust statute—the Donnelly Act—is also modeled on the Sherman Act, **[*70]** and courts typically interpret claims brought under the Donnelly Act consistent with claims brought under the Sherman Act. *See In re Aluminum Warehousing Antitrust Litig., 95 F. Supp. 3d 419, 2015 U.S. Dist. LEXIS 38743, 2015 WL 1378946, at *27 (S.D.N.Y. Mar. 26, 2015)*; *TechReserves Inc. v. Delta Controls Inc., 2014 U.S. Dist. LEXIS 47080, 2014 WL 1325914, at *10 (S.D.N.Y. Mar. 31, 2014)*, *appeal dismissed* (Sept. 4, 2014); *Solla v. Aetna Health Plans of New York, Inc., 14 F.Supp.2d 252, 259-60 (1998)*, *aff'd*, *182 F.3d 901 (2d Cir.1999)* ("It is well-established that the Donnelly Act was modeled on the Sherman Act and is generally to be construed in accordance with federal antitrust precedents."). However, unlike the Sherman Act, the Donnelly Act "makes clear that it applies to contracts in restraint of trade relating to the 'conduct of any business, trade or commerce or in the furnishing of any service *in this state* . . . '" *Conergy AG v. MEMC Elec. Materials, Inc., 651 F. Supp. 2d 51, 61 (S.D.N.Y. 2009)* (emphasis original) (quoting *N.Y. Gen. Bus. Law § 340(1)*.

North Carolina

To allege a claim under the North Carolina antitrust statute, a plaintiff must establish that "the injuries [alleged] have a 'substantial in-state effect on North Carolina trade or commerce.'" *In re Flonase Antitrust Litig., 692 F. Supp. 2d 524, 540 (E.D. Pa. 2010)* (quoting *Lawrence v. UMLIC-Five Corp., 2007 NCBC LEXIS 20, 2007 WL 2570256, at *7 (N.C. Super. June 18, 2007)*. Thus, to state a claim under this statute, plaintiffs must allege that at least part of the violation took place in North Carolina. *In re DDAVP Indirect Purchaser Antitrust Litig., 903 F. Supp. 2d at 231*.

South Dakota

South Dakota's antitrust statute provides that a "contract, combination, or conspiracy between two or more persons in restraint of trade or commerce any part of which is within this state is unlawful." *S.D. Codified Laws § 37-1-3.1*. Similar to the other statutes, **[*71]** South Dakota's antitrust statute requires that part of the anticompetitive conduct occur within South Dakota or have an effect within South Dakota. *In re Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d at 581*; *In re Dynamic Random Access Memory (Dram) Antitrust Litig., 516 F. Supp. 2d 1072, 1098*

(N.D. Cal. 2007); In re New Motor Vehicles Canadian Exp. Antitrust Litig., 350 F. Supp. 2d 160, 172 (D. Me. 2004) ("plaintiffs need only allege that a part of the trade or commerce occurred within South Dakota").

Tennessee[5]

As for the TTPA, the Supreme Court of Tennessee has concluded that it "does not contain any language indicating that the legislature intended that the scope of the act be limited to intrastate commerce." Freeman Indus., LLC v. Eastman Chem. Co., 172 S.W.3d 512, 522 (Tenn. 2005). In support of its conclusion, the court noted that if "the legislature intended such a limitation, the legislature simply could have included the limitation in the act." However, in Tennessee, a plaintiff bringing a claim must allege that "the alleged anticompetitive conduct affects Tennessee trade or commerce to a substantial degree." Id. at 523.

West Virginia

A plaintiff seeking to state a claim under the West Virginia Antitrust Act must also allege that the wrongful conduct **[*72]** has produced "in-state effects." In re Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d at 582. Thus, a plaintiff must show that the wrongful conduct occurred in West Virginia or was felt in West Virginia to assert a violation of the West Virginia Antitrust Act. In re Magnesium Oxide Antitrust Litig., 2011 U.S. Dist. LEXIS 121373, 2011 WL 5008090, at *8. A federal district court in West Virginia has even described the ***antitrust law*** as being "directed towards intrastate commerce." Anziulewicz v. Bluefield Cmty. Hosp., Inc., 531 F. Supp. 49, 53 (S.D.W. Va. 1981).

Wisconsin

Under Wisconsin's antitrust act, a plaintiff bringing a claim must allege that:

> (1) actionable conduct, such as the formation of a combination or conspiracy, occurred within this state, even if its effects are felt primarily outside Wisconsin; or (2) the conduct complained of "substantially affects" the people of Wisconsin and has impacts in this state, even if the illegal activity resulting in those impacts occurred predominantly or exclusively outside this state.

Olstad v. Microsoft Corp., 2005 WI 121, 284 Wis. 2d 224, 700 N.W.2d 139, 158 (Wis. 2005); *see also* Sheet Metal Workers Local 441 Health & Welfare, 737 F. Supp. 2d at 402 ("The Wisconsin Supreme Court has expressly ruled that the Act applies to interstate commerce").

Turning to whether the Downstream Purchasers' pleadings are sufficient for this group of states, the Court finds that identifying one state as an example to be informative. Thus, the Court has selected the Downstream **[*73]** Purchasers' allegations with respect to their claims brought in the District of Columbia to serve as an example of the deficiencies within these allegations.

The Consumers, in support of their claim under the District of Columbia antitrust statute, alleged that:

> Defendants' combinations or conspiracies had the following effects (1) CISP price competition was restrained, suppressed, and eliminated throughout the District of Columbia; (2) CISP prices were raised, fixed, maintained, and stabilized at artificially high levels throughout the District of Columbia; (3) Plaintiffs and members of the classes, who resided in the District of Columbia and/or purchased products containing CISP in the District of Columbia, were deprived of free and open competition, in the District of Columbia; and (4) Plaintiffs and members of the classes, who resided in the District of Columbia and/or purchased products containing CISP in

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[5] Mirroring the way the parties have structured their own arguments, this section only applies to the Downstream Purchasers' multi-state class claim under the statute. The Consumer Plaintiffs' first claim for relief under the TTPA will be addressed separately *infra*.

> the District of Columbia, paid supracompetitive, artificially inflated prices in the District of Columbia for products containing CISP.

(Doc. 122 at 42). It is clear that these allegations do not specifically identify certain details relating to the wrongful conduct or identify **[*74]** a connection between the District of Columbia and the wrongful conduct. It also cannot be said the Consumers have made any attempt to meaningfully address intrastate commerce. As such, the Court finds that Consumers have failed to state a claim under the District of Columbia antitrust act.

As for the Indirect Plaintiffs, the only district-specific allegation they have stated regarding the District of Columbia is that "Defendants engaged in a contract, combination, or conspiracy in unreasonable restraint of trade and commerce in violation of *District of Columbia Code Annotated, §§ 28-4501, et seq.*" While the Court is cognizant of the relatively flexible standard it must use to consider claims at this stage in litigation, it is unable to conclude that these allegations are sufficient to state a claim under the District of Columbia antitrust act. The Indirect Plaintiffs have not alleged any facts specific to the District of Columbia and fail to address how Defendants' actions have in any way affected intrastate commerce in the District of Columbia. Similar to the Consumer Plaintiffs, these allegations are not sufficient to establish a connection within the District of Columbia. As the Downstream Purchasers' allegations under the states **[*75]** of Mississippi, Nevada, New York, North Carolina, South Dakota, Tennessee, Wisconsin, and West Virginia are similarly conclusory without addressing any connection between the individual state and the wrongful conduct, these allegations are also insufficient. Accordingly, the Indirect Plaintiffs' and Consumer Plaintiffs' claims under these statutes will be **DISMISSED**.

Defendants next argue that the Indirect Purchasers have failed to state a claim under California ***antitrust law***. (Doc. 179 at 18). Defendants argue that the allegations stated in the Indirect Purchasers' Consolidated Amended Complaint fail to meet the heighted pleading standard under California's Cartwright Act.[6]

The Cartwright Act is the California antitrust statute that "prohibits combinations in unreasonable restraint of trade. *Marsh v. Anesthesia Serv. Med. Grp., Inc., 200 Cal. App. 4th 480, 493, 132 Cal. Rptr. 3d 660 (2011)*. To sufficiently state a claim under the Cartwright Act, a plaintiff must allege "(1) the formation and operation of the conspiracy; (2) illegal acts **[*76]** done pursuant thereto; and (3) damage proximately caused by such acts." *Kolling v. Dow Jones & Co., 137 Cal. App. 3d 709, 718, 187 Cal. Rptr. 797 (Ct. App. 1982)*; *see also* *Asahi Kasei Pharma Corp. v. CoTherix, Inc., 204 Cal. App. 4th 1, 8, 138 Cal. Rptr. 3d 620 (2012)* ("A Cartwright Act violation requires a combination of capital, skill or acts by two or more persons that seeks to achieve an anticompetitive end") (internal quotation omitted). "Cartwright Act claims are properly dismissed 'where the complaint makes conclusory allegations of a combination and does not allege with factual particularity that separate entities maintaining separate and independent interests combined for the purpose to restrain trade.'" *In re Netflix Antitrust Litig., 506 F. Supp. 2d 308, 320 (N.D. Cal. 2007)* (quoting *Freeman v. San Diego Ass'n of Realtors, 77 Cal. App. 4th 171, 189, 91 Cal. Rptr. 2d 534 (1999))*.

Defendants argue that the Indirect Purchasers' claims under the Cartwright Act fail because their Consolidated Amended Complaint consists of conclusory allegations rather than alleging "the required facts necessary to suggest that anyone from McWane conspired with anyone from Charlotte Pipe to fix list prices, multipliers, or rebates for CISP." (Doc. 179 at 20). In response, the Indirect Purchasers argue that they have "provided clear evidence" that Defendants violated the Cartwright Act through the following allegations: (1) Defendants used CISPI to further their conspiracy; (2) Defendants restrained competition for their customers; (3) Defendants **[*77]** eliminated competition by buying and destroying the assets of potential competitors such as Star Pipe; (4) the FTC investigated Defendants' activities; (5) the CISP market is ripe for collusion because of its structural features; (6) Defendants parallel price increased their CISP for unjustified reasons; and (7) the Indirect Purchasers suffered injury based on Defendants' unlawful actions. (Doc. 202 at 41).

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[6] The Court will address Defendants' arguments with respect to Plaintiffs' claims brought under California's Unfair Competition Law and the Florida Deceptive and Unfair Practices Act *infra* with the other consumer protection and unfair competition claims.

Viewing the Indirect Purchasers' allegations in the light most favorable to them, the Court finds that they have sufficiently stated a claim under the Cartwright Act. While Defendants make many compelling points about potential weaknesses in the Indirect Plaintiffs' case, the Court can only evaluate the merits of the claim on the Consolidated Amended Complaint, not on speculation. The allegations identified by the Indirect Plaintiffs are sufficient to establish the elements of a Cartwright Claim at the pleading stage of litigation. Thus, based on the allegations stated in the Consolidated Amended Complaint, the Court concludes that the Indirect Purchasers have stated a claim under the Cartwright Act, and Defendants' Motions to Dismiss will be **DENIED** as to this claim.

d. Consumer Protection **[*78]** and Unfair Competition Claims

Defendants advance several arguments in support of their position that the Downstream Purchasers have failed to state a claim under certain state consumer protection and unfair competition statutes. (Doc. 184 at 40). Specifically, Defendants submit that: (1) Arkansas, Michigan, New Mexico, and Rhode Island bar the Downstream Plaintiffs from asserting claims under their statutes; (2) the District of Columbia, Hawaii, Michigan, Missouri, Montana, Nevada, and Rhode Island do not permit businesses to bring claims under their unfair and deceptive trade practices statutes; (3) California, Montana, New Hampshire, New York, and North Carolina require that a plaintiff bringing a claim under their consumer protection statutes establish a substantial effect on intrastate commerce and the Downstream Plaintiffs have failed to do so; (4) Montana and South Carolina prohibit private plaintiffs from bringing class actions under their state consumer protection statutes; (5) California, Florida, and Michigan only permit plaintiffs to bring class actions under their state consumer protection statutes on behalf of persons residing in or injured in their states; (6) North Carolina **[*79]** has indicated that plaintiffs are only allowed to bring class actions under its state consumer protection statutes on behalf of persons residing in or injured in North Carolina; and (7) Massachusetts requires that a plaintiff provide notice before bringing an action. (Doc. 184 at 41-44). The Court will address each of the Defendants' arguments by state.

As a preliminary matter, the Court notes that the Downstream Plaintiffs have withdrawn their respective claims under the consumer protection statutes of Arizona, Kansas, Mississippi, and Minnesota. (Doc. 202 at 55 n.33). Additionally, Defendants raise issues regarding the claims brought under the state statutes of Nebraska, New York, and Vermont based on antitrust standing principles. As the Court has deferred ruling on this issue, it will not discuss Defendants' arguments related to standing.

Arkansas

With respect to their claims under the Arkansas Deceptive Trade Practices Act ("ADTPA"), the Downstream Plaintiffs claim that courts have liberally construed the act and permitted "price-fixing actions to proceed." (Doc. 202 at 58). The ADTPA prohibits many specific deceptive and unconscionable trade practices, and includes a catch-all provision **[*80]** prohibiting "[e]ngaging in any other unconscionable, false, or deceptive act or practice in business, commerce, or trade." *Ark. Code Ann. § 4-88-107(a)(10)*. A person "who suffers actual damage or injury as a result of an offense or violation" of the ADTPA can recover actual damages and reasonable attorney's fees. *Ark. Code Ann. § 4-88-113*.

The Supreme Court of Arkansas has recognized that "liberal construction of the [A]DTPA is appropriate." *State ex rel. Bryant v. R & A Inv. Co., 336 Ark. 289, 985 S.W.2d 299, 302 (1999)*. Courts that have examined whether the ADTPA extends to price fixing claims in the antitrust context have held that, "even in light of the broad definition of unconscionability adopted by the Arkansas Supreme Court, in absence of authority from Arkansas courts that the ADTPA extends to price-fixing claims, those claims should be dismissed." *In re Lidoderm Antitrust Litig., 103 F. Supp. 3d 1155, 2015 U.S. Dist. LEXIS 58979, 2015 WL 2089223, at *7 (N.D. Cal. May 5, 2015)* (collecting cases); *In re Graphics Processing Units Antitrust Litig., 527 F. Supp. 2d 1011, 1029 (N.D. Cal. 2007)*. However, many courts have also held that the ADTPA encompasses price-fixing claims and permitted plaintiffs' claims to proceed. *In re Auto. Parts Antitrust Litig., 50 F. Supp. 3d 836, 859 (E.D. Mich. 2014)* (collecting cases). Given the state of the law on this issue and the fact that a district court in the Sixth Circuit has permitted these ADTPA price-fixing claims to proceed, the Court is reluctant to dismiss the Downstream Plaintiffs' claims on this basis. Accordingly, Defendants' Motion to Dismiss will be **DENIED** with respect to this **[*81]** claim.

Michigan

Under Michigan's Consumer Protection Act ("MCPA"), "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful[.]" *Mich. Comp. Laws Ann. § 445.903(1)*. As Defendant notes in its brief, the MCPA defines certain acts that fall within these categories, including "[c]harging the consumer a price that is grossly in excess of the price at which similar property or services are sold," but does not explicitly include price fixing. *Mich. Comp. Laws Ann. § 445.903(1)(z)*. The Court has reviewed the parties submissions regarding this state, and notes that the Indirect Purchasers have neither addressed Defendants' argument with respect to Michigan nor cited any authority specific to the state of Michigan. *See* Doc. 202 at 58-59 (arguing that its claims under the states of Arkansas, New Mexico, and Rhode Island should not be dismissed). In the absence of definitive case law to the contrary and the Downstream Plaintiffs' apparent lack of opposition to Defendants' position, the Court agrees that the plain language of the statute does not include price fixing and concludes that the Indirect Purchasers' claims must be **DISMISSED**.

New Mexico

The New Mexico Unfair Practices Act ("NMUPA") prohibits "[u]nfair or deceptive trade practices **[*82]** and unconscionable trade practices in the conduct of any trade or commerce." *N.M. Stat. Ann. § 57-12-3*. Similar to the ADTPA, the provisions of the NMUPA has been construed broadly to facilitate its remedial purpose. *In re Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d at 585*. Courts generally permit plaintiffs to bring price-fixing claims under the NMUPA so long as the "plaintiff alleges a 'gross disparity' between the price paid for a product and the value received." *Id.* (collecting cases). Thus, in order to state a claim for price-fixing under the NMUPA, a plaintiff must "allege that as a result of defendants' alleged price-fixing, there was a gross disparity in the value of products received and the amount that they paid for those products." *In re TFT-LCD (Flat Panel) Antitrust Litig., 586 F. Supp. 2d 1109, 1127 (N.D. Cal. 2008)*. As the Downstream Purchasers have pled that Defendants' actions created artificially high prices for CISP, the Court finds that the Downstream Purchasers' claims have been sufficiently plead under the NMUPA. Accordingly, Defendants' Motion to Dismiss will be **DENIED** as to this claim.

Rhode Island

The Rhode Island Deceptive Trade Practices Act ("RIDTPA") prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." *R.I. Gen. Laws Ann. § 6-13.1-2*. Courts that have examined the RIDTPA have found it to **[*83]** encompass price fixing claims because price fixing is "likely to offend public policy[.]" *In re Dynamic Random Access Memory (DRAM) Antitrust Litig., 536 F. Supp. 2d 1129, 1145 (N.D. Cal. 2008)*; *In re Auto. Parts Antitrust Litig., 50 F. Supp. 3d at 892*. Accordingly, the Court will **DENY** Defendants' Motion with respect to these claims on this ground.

Defendant also argues that Indirect Plaintiffs cannot bring a claim under the RIDTPA because only consumers can bring claims under RIDTPA. Specifically, RIDTPA contains a section that addresses private and class actions, which provides:

> Any person who purchases or leases goods or services primarily for personal, family, or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act, or practice declared unlawful by *§ 6-13.1-2*, may bring an action under the rules of civil procedure in the superior court of the county in which the seller or lessor resides; is found; has his or her principal place of business or is doing business; or in the superior court of the county as is otherwise provided by law, to recover actual damages or two hundred dollars ($200), whichever is greater

R.I. Gen. Laws Ann. § 6-13.1-5.2; *In re TFT-LCD (Flat Panel) Antitrust Litig., 586 F. Supp. 2d at 1130*. As Indirect Purchasers have not purchased CISP for primarily personal purposes, Defendants' Motion to Dismiss will be **[*84]** **GRANTED** as to Indirect Purchaser's claim under the RIDTPA.

District of Columbia

The District of Columbia Consumer Protection and Procedures Act ("DCCPPA") "affords a panoply of strong remedies, including treble damages, punitive damages and attorneys' fees, to consumers who are victimized by unlawful trade practices." *Ford v. Chartone, Inc., 908 A.2d 72, 80-81 (D.C. 2006)*. Courts overseeing multidistrict litigation as well as state courts in the District of Columbia have correctly held that "[t]ransactions along the distribution chain that do not involve the ultimate retail customer are not 'consumer transactions' that the [DCCPPA] seeks to reach. Rather, it is the ultimate retail transaction between the final distributor and the individual member of the consuming public that the [DCCPPA] covers." *Adam A. Weschler & Son, Inc. v. Klank, 561 A.2d 1003, 1005 (D.C. 1989)*; *In re Lidoderm Antitrust Litig., 2015 U.S. Dist. LEXIS 58979, 2015 WL 2089223, at *5*. Thus, the DCCPPA "does not apply to commercial dealings outside the consumer sphere. . . [and] a valid claim for relief under the [DC]CPPA must originate out of a consumer transaction." *In re Refrigerant Compressors Antitrust Litig., 2013 U.S. Dist. LEXIS 50737, 2013 WL 1431756, at *22* (internal quotation omitted). Accordingly, as the Indirect Purchasers are not consumers within the meaning of the DCCPPA, the Indirect Purchasers' claims arising under the DCCPPA will be **DISMISSED**.

Hawaii

Hawaii's unfair competition statute prohibits "[u]nfair methods of competition and **[*85]** unfair or deceptive acts or practices in the conduct of any trade or commerce." *Haw. Rev. Stat. § 480-2*. The statute also provides that "[n]o person other than a consumer, the attorney general or the director of the office of consumer protection may bring an action based upon unfair or deceptive acts or practices declared unlawful by this section" but that "[a]ny person may bring an action based on unfair methods of competition declared unlawful by this section." *Haw. Rev. Stat. § 480-2*. *Haw. Rev. Stat. § 480-2* (West). The term "consumer" is defined as "a natural person who, primarily for personal, family, or household purposes, purchases, attempts to purchase, or is solicited to purchase goods or services or who commits money, property, or services in a personal investment." *Haw. Rev. Stat. § 480-1*. The term "person" is defined as "individuals, corporations, firms, trusts, partnerships, limited partnerships, limited liability partnerships, limited liability limited partnerships, limited liability companies, and incorporated or unincorporated associations, existing under or authorized by the laws of this State, or any other state, or any foreign country." *Haw. Rev. Stat. § 480-1*. Thus, based on Hawaii's unfair competition statute, the Indirect Purchasers will only be able to bring their claim based on grounds **[*86]** of unfair methods of competition. *In re Static Random Access Memory (SRAM) Antitrust Litig., 2010 U.S. Dist. LEXIS 131002, 2010 WL 5094289, at *2 (N.D. Cal. Dec. 8, 2010)* ("However, by its terms, the restriction applies only to claims involving deceptive acts or practices, not unfair competition; no such restriction applies to claims for unfair competition."). Accordingly, to the extent the Indirect Purchasers were seeking to bring a claim based on unfair or deceptive acts or practices under Hawaii's unfair competition statute, that claim will be **DISMISSED**.

Missouri

Missouri's Merchandising Practices Act ("MMPA") prohibits "[t]he act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce." *Mo. Ann. Stat. § 407.020(1)*. Regarding who can bring civil actions, Missouri's consumer protection statute provides:

> Any person who purchases or leases merchandise primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by section 407.020, may bring a private civil action in either the **[*87]** circuit court of the county in which the seller or lessor resides or in which the transaction complained of took place, to recover actual damages.

Mo. Ann. Stat. § 407.025(1).

While the Indirect Plaintiffs argue that the Court should extend this language to include businesses, they have not provided convincing authority that supports their interpretation of the MMPA. *See* In re Auto. Parts Antitrust Litig., 2014 U.S. Dist. LEXIS 90724, 2014 WL 2993753, at *23 ("[plaintiffs] have offered no authority from Missouri to support their expansive interpretation of the statutory language. The Court finds no reason to reach a different conclusion here."). Thus, Defendants' Motion to Dismiss will be **GRANTED** as to this claim, and the Indirect Purchasers' claim under the MMPA will be **DISMISSED**.

Nevada

Turning to the Nevada Deceptive Trade Practices Act ("NDTPA"), and to specifically, the section regarding actions by victims of fraud, the section provides that an action "may be brought by any person who is a victim of consumer fraud." Nev. Rev. Stat. Ann. § 41.600 (defining consumer fraud as including NDTPA sections 598.0915 to 598.0925). Courts have interpreted this language as permitting only natural persons to bring claims under the NDTPA. *See* In re DDAVP Indirect Purchaser Antitrust Litig., 903 F. Supp. 2d at 226; In re Chocolate Confectionary Antitrust Litig., 749 F. Supp. 2d at 234; In re Wellbutrin XL Antitrust Litig., 260 F.R.D. 143, 163 (E.D. Pa. 2009). Accordingly, as the Indirect Purchasers are not natural persons, their claim under this statute will be **DISMISSED [*88]** .

California

California's Unfair Competition Law ("UCL") prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code." Cal. Bus. & Prof. Code § 17200. In interpreting the meaning of the UCL, California courts "have specifically held that California's UCL does not support claims by non-California residents where none of the alleged misconduct or injuries occurred in California." Meridian Project Sys., Inc. v. Hardin Const. Co., LLC, 404 F. Supp. 2d 1214, 1225 (E.D. Cal. 2005). However, courts have found that alleging that overcharges occurred in California establishes this intrastate nexus. In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig., 64 F. Supp. 3d 665, 2014 WL 6792663, at *26; In re Refrigerant Compressors Antitrust Litig., 2013 U.S. Dist. LEXIS 50737, 2013 WL 1431756, at *19 ("these cases would support a request to dismiss claims under the statute by non-California residents who do not allege misconduct or injuries that occurred in California."). As the Indirect Purchasers are located in California and operated their business in California at the time of the alleged injuries, the Court finds this sufficient to establish an intrastate nexus. Accordingly, Defendants' Motion to Dismiss will be **DENIED** as to these claims.[7]

Montana and South Carolina[8]

Montana's Consumer Protection Act ("MCPA") prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Mont. Code Ann. § 30-14-103. The MCPA defines trade or commerce as "the advertising, offering for sale, sale, or distribution of any services, any property, tangible or intangible, real, personal, or mixed, or any other article, commodity, or thing of value, wherever located, and includes any trade or commerce directly or indirectly affecting the people of this state." Mont. Code Ann. § 30-14-

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[7] As the Court has denied Defendants' Motions to Dismiss with respect to Plaintiffs' Cartwright Act **[*89]** claim, Defendants' argument that Plaintiffs' UCL claim should be dismissed because their actions were permissible under California's antitrust laws has effectively been rendered moot. (Doc. 179 at 21).

[8] As the Indirect Purchasers' note in their brief, they have not brought a claim under Montana law and only the Consumers have brought a claim under Montana law. (Doc. 202 at 59 n.37).

102(8). While the MCPA permits a consumer to bring an individual action under the statute, the explicit language of the statute does not permit a consumer to bring a class action. Mont. Code Ann. § 30-14-133(1) ("A consumer who suffers any ascertainable loss of money or property, real or personal, as a result of the use **[*90]** or employment by another person of a method, act, or practice declared unlawful by 30-14-103 may bring an individual but not a class action").[9]

Similar to the MCPA, the South Carolina Unfair Trade Practices Act ("SCUTPA") provides that a person who has suffered "ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages." S.C. Code Ann. § 39-5-140(a). Thus, the question before the Court in regard to the Downstream Purchasers' claims brought under the SCUTPA and MCPA is whether the Downstream Purchasers may bring these claims even though the state statutes provide **[*91]** otherwise.

In the United States Supreme Court case *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393, 401, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010)*, the Supreme Court held that "[r]ule 23 permits all class actions that meet its requirements, and a State cannot limit that permission by structuring one part of its statute to track Rule 23 and enacting another part that imposes additional requirements." Courts that have interpreted *Shady Grove* in this context have concluded that these state prohibitions do not affect the substantive rights of the individuals because "a rule barring class actions does not prevent individuals who would otherwise be members of the class from bringing their own separate suits or joining in a preexisting lawsuit." *See In re Hydroxycut Mktg. & Sales Practices Litig., 299 F.R.D. 648, 654 (S.D. Cal. 2014)*; *In re Auto. Parts Antitrust Litig., 50 F. Supp. 3d at 861* ("Rule 23 applies in federal court unless it "abridge[s], enlarge[s] or modif[ies] any substantive right" under the Rules Enabling Act, 28 U.S.C. § 2072(b).") Thus, the Court concludes that the state prohibitions are procedural in nature. Because these provisions of the MCPA and the SCUTPA regarding class actions are procedural and not substantive in nature, Rule 23 will govern the Downstream Purchasers' claims under the SCUTPA and MCPA, and Defendants Motion to Dismiss on this ground will be **DENIED**.

New Hampshire, New York, and North Carolina

New Hampshire's consumer protection laws make it "unlawful **[*92]** for any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within this state." N.H. Rev. Stat. Ann. § 358-A:2. Courts that have reviewed the issue of the extent to which a plaintiff is require to plead allegations regarding intrastate commerce have frequently "acknowledged that the [consumer protection act] requires the proscribed conduct to occur within the state; merely selling a good in New Hampshire is not enough when the proscribed conduct occurs elsewhere." *In re Lithium Ion Batteries Antitrust Litig., 2014 U.S. Dist. LEXIS 141358, 2014 WL 4955377, at *22 (N.D. Cal. Oct. 2, 2014)*; *In re Refrigerant Compressors Antitrust Litig., 2013 U.S. Dist. LEXIS 50737, 2013 WL 1431756, at *18*; *but see In re Ductile Iron Pipe Fittings (DIPF) Indirect Purchaser Antitrust Litig., 2013 WL 5503308, at *22 (D.N.J. Oct. 2, 2013)*("courts interpreting New Hampshire's consumer protection law disagree as to whether a nationwide scheme in which the plaintiffs pay a higher price in the state is sufficient to satisfy the statute's requirement.").

New York's Consumer Protection Act ("NYCPA") "was enacted to provide consumers with a means of redress for injuries caused by unlawfully deceptive acts and practices." *Goshen v. Mut. Life Ins. Co. of New York, 98 N.Y.2d 314, 774 N.E.2d 1190, 1194, 746 N.Y.S.2d 858 (2002)*. Similar to New Hampshire's consumer protection law, the NYCPA specifically provides that "[d]eceptive acts or practices in the conduct of any business, trade or commerce

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[9] Defendants argue that the Consumer Plaintiffs' claim must be dismissed because they have not established that the wrongful conduct had a substantial effect on intrastate commerce in Montana, but the authority they have provided in support of their position is not conclusive on this issue. *See In re Dynamic Random Access Memory (Dram) Antitrust Litig., 516 F. Supp. 2d at 1103*. Accordingly, Defendants' Motion to Dismiss will be **DENIED** on this ground with respect to the Consumer Plaintiffs' claims brought under the MCPA.

or in the furnishing of any service *in this state* are hereby declared unlawful." N.Y. Gen. Bus. Law § 349(a) (emphasis added); *see* In re Foreign Exch. Benchmark Rates Antitrust Litig., 74 F. Supp. 3d 581, 2015 WL 363894, at *15 (S.D.N.Y. 2015); Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, 263 F.R.D. 205, 214 (E.D. Pa. 2009) **[*93]** ("the claim must be dismissed in this case because the alleged deceptive conduct in this case neither occurred in New York nor was directed at consumers").

The North Carolina Unfair Trade Practices Act ("NCUTPA") prohibits "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." N.C. Gen. Stat. Ann. § 75-1.1(a). North Carolina federal courts have interpreted the NCUTPA as addressing "primarily local concerns." *The In* Porters, S.A. v. Hanes Printables, Inc., 663 F. Supp. 494, 502 (M.D.N.C. 1987) (quoting Am. Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411, 1428 (E.D.N.C. 1986)); Merck & Co. Inc. v. Lyon, 941 F. Supp. 1443, 1463 (M.D.N.C. 1996) ("plaintiffs have failed to allege a substantial effect on any in-state business operations, and therefore that their claim falls outside the reach of the North Carolina Trade Practices Act").

Considering the Downstream Plaintiffs' failure to plead allegations specific to New Hampshire, New York, and North Carolina, the Court once again finds that Plaintiffs have failed to meaningfully address intrastate commerce with respect to these claims. Accordingly, the Downstream Plaintiffs' claims brought under New Hampshire's consumer protection act, the NYCPA, and the NCUTPA will be **DISMISSED**.

Florida

Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA") prohibits "[u]nfair methods of competition, unconscionable acts or practices, and **[*94]** unfair or deceptive acts or practices in the conduct of any trade or commerce." Fla. Stat. Ann. § 501.204(1). While nothing in the language of the statute suggests this limitation, certain Florida courts have concluded that "only in-state consumers can pursue a valid claim under the Unfair Trade Act." Oce Printing Sys. USA, Inc. v. Mailers Data Servs., Inc., 760 So. 2d 1037, 1042 (Fla. Dist. Ct. App. 2000); Coastal Physician Servs. of Broward Cnty., Inc. v. Ortiz, 764 So. 2d 7, 8 (Fla. Dist. Ct. App. 1999). A review of the more recent court decisions regarding this issue reflects that "courts have expanded coverage to claims of out[-]of-state consumers if the offending conduct occurred predominantly or exclusively in Florida." Karhu v. Vital Pharm., Inc., 2013 U.S. Dist. LEXIS 112613, 2013 WL 4047016, at *9 (S.D. Fla. Aug. 9, 2013) (collecting cases); F.T.C. v. Info. Mgmt. Forum, Inc., 2013 U.S. Dist. LEXIS 91229, 2013 WL 3323635, at *6 (M.D. Fla. June 28, 2013). The Court agrees with this latter position, that a claim can be brought by out-of-state residents under the FDUTPA as long as "the offending conduct took place predominantly or entirely in Florida." Karhu, 2013 U.S. Dist. LEXIS 112613, 2013 WL 4047016, at *10. Similar to many of its other claims, the Downstream Plaintiffs have failed to allege state-specific allegations in their Consolidated Amended Complaints. Thus, they fail to establish that their claims occurred predominantly in Florida, and their claims under the FDUTPA will be **DISMISSED**.

Massachusetts

Massachusetts' consumer protection law declares unlawful "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Mass. Gen. Laws Ann. ch. 93A, § 2. Section 9 of **[*95]** this act provides:

> (1) Any person, other than a person entitled to bring action under *section eleven of this chapter*, who has been injured by another person's use or employment of any method, act or practice declared to be unlawful *by section two* or any rule or regulation issued thereunder . . . may bring an action in the superior court, or in the housing court as provided in section three of chapter one hundred and eighty-five C whether by way of original complaint, counterclaim, cross-claim or third party action, for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper.
>
> . . .

> (3) At least thirty days prior to the filing of any such action, a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered, shall be mailed or delivered to any prospective respondent. . . .

Mass. Gen. Laws Ann. ch. 93A, § 9 (emphasis added). Although Defendants claim that the Downstream Plaintiffs have not complied with this provision, the Downstream Plaintiffs submit that they are not required to comply with this provision because they are bringing their claims pursuant to Sections 2 and 11 of the statute, **[*96]** not section 9. *See* Landworks Creations, LLC v. U.S. Fid. & Guar. Co., 2008 U.S. Dist. LEXIS 17688, 2008 WL 660341, at *7 (D. Mass. Feb. 6, 2008) ("Defendant asserts that plaintiff's failure to send a demand letter is a bar to the ch. 93A claim. Such a letter is only a jurisdictional prerequisite to suit under ch. 93A, § 9, not § 11, which governs here") (internal quotation omitted). The Court finds the Downstream Plaintiffs' position to be well taken considering the language of the statute, and thus Defendants' Motion to Dismiss will be **DENIED** as to this claim.

e. Consumer Plaintiffs' Unjust Enrichment Claim

Defendants next argue that the Consumer Plaintiffs' unjust enrichment claims consist of conclusory allegations, justifying dismissal of these claims. (Doc. 184 at 45). Defendants also argue that, even if the Consumer Plaintiffs' had tailored their claims to the specific state laws, they should still be dismissed because they fail to allege that the Consumer Plaintiffs "conferred an identifiable benefit on a Defendant." (*Id.* at 45). In their response to Defendants' Motions to Dismiss, the Consumer Plaintiffs argue that they have adequately pled the unjust enrichment claims because they have alleged that "Defendants benefitted from their illegal price fixing conspiracy and that retaining that benefit would be inequitable." (Doc. **[*97]** 202 at 71).

In their Consolidated Amended Complaint, the Consumer Plaintiffs bring unjust enrichment claims under the laws of the Consumer States and allege that Defendants have been unjustly enriched "by the receipt of, at a minimum, unlawfully inflated prices and unlawful profits on CISP." (Doc. 122 at 67). Courts faced with multi-state unjust enrichment claims have recognized that, "although the particular elements of unjust enrichment vary from jurisdiction to jurisdiction, when stripped to its essence, a claim of unjust enrichment requires [Plaintiffs] to allege sufficient facts to show that Defendants received a benefit and under the circumstances of the case, retention of the benefit would be unjust." In re Auto. Parts Antitrust Litig., 29 F. Supp. 3d 982, 1014 (E.D. Mich. 2014); *In re Flonase Antitrust Litig., 692 F. Supp. 2d at 541* ("almost all states at minimum require plaintiffs to allege that they conferred a benefit or enrichment upon defendant and that it would be inequitable or unjust for defendant to accept and retain the benefit"); In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig., 684 F. Supp. 2d 942, 959 (N.D. Ohio 2009), *as amended* (Nov. 4, 2009) ("Rather than describing the specific conduct of the defendant, the 'unjust, inequitable, or wrongful' element of an unjust enrichment claim speaks to the general circumstances of the parties."). In reviewing the Consumer Plaintiffs' Consolidated **[*98]** Amended Complaint, the Court finds that they have sufficiently pled these elements and therefore declines to dismiss the Consumer Plaintiffs' unjust enrichment claims on the ground that they are conclusory allegations.[10] The Court will now perform a state-by-state analysis regarding the specific states under which Defendants argue that Plaintiffs have failed to state a claim for unjust enrichment.[11]

Arkansas

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[10] Although Defendants argue that the Consumer Plaintiffs should have connected "their alleged overpayment to intermediate CISP sellers . . . through builders, plumbers, contractors, distributors, and the direct purchasers," the Court finds that this level of detail is not required pursuant to Federal Rule of Civil Procedure 8 and Twombly, 550 U.S. at 556.

[11] As the Consumer Plaintiffs note in their Response, Defendants have not raised specific arguments for dismissal with respect to the District of Columbia, Hawaii, Illinois, Iowa, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Oregon, Rhode Island, South Dakota, Vermont, West Virginia, and Wisconsin. (Doc. 202 at 72 n.49). Thus, Defendants' Motion to Dismiss will be **DENIED** as to these claims.

In Arkansas, unjust enrichment is defined as "an equitable doctrine **[*99]** that allows a party to recover for benefits conferred on another. It is restitutionary in nature and focuses on the benefit received." *Ashley Cnty., Ark. v. Pfizer, Inc., 552 F.3d 659, 665 (8th Cir. 2009)*. A party pleading unjust enrichment must not only plead that a party has received "something of value, to which he was not entitled and which he must restore," but also allege that there was "some operative act, intent, or situation to make the enrichment unjust and compensable." *Hatchell v. Wren, 363 Ark. 107, 211 S.W.3d 516, 522 (Ark. 2005)*; *Dews v. Halliburton Indus., Inc., 288 Ark. 532, 708 S.W.2d 67, 69 (Ark. 1986)*. As the Consumer Plaintiffs have failed to plead an operative act, intent, or situation by the Defendants in support of their claim for unjust enrichment under Arkansas law, the Court concludes that this claim will be **DISMISSED**.

California

Many courts have recognized the split in authority regarding whether a plaintiff can bring an individual unjust enrichment claim or whether it can only serve as an equitable remedy. *See In re ConAgra Foods Inc., 908 F. Supp. 2d 1090, 1113 (C.D. Cal. 2012)*. The two cases at the heart of this dispute are *Melchior v. New Line Prods., Inc., 106 Cal. App. 4th 779, 131 Cal. Rptr. 2d 347, 357 (Cal. Ct. App. 2003)*, in which an appellate court in California held that "there is no cause of action in California for unjust enrichment," and *Ghirardo v. Antonioli, 14 Cal. 4th 39, 57 Cal. Rptr. 2d 687, 924 P.2d 996, 1002 (1996)*, in which the California Supreme Court held that a plaintiff was "entitled to seek relief under traditional equitable principles of unjust enrichment." In reconciling these cases and **[*100]** the body of case law that has developed around them, the court in *In re Conagra Foods* held that "a cause of action for unjust enrichment is not cognizable. Rather, unjust enrichment is a theory that permits recovery on other recognized causes of action." *In re ConAgra Foods Inc., 908 F. Supp. 2d at 1114*. The Court finds this to be the proper interpretation of these cases, and thus holds that the Consumer Plaintiffs cannot plead a claim of unjust enrichment under California law. Accordingly, the Consumer Plaintiffs' claim for unjust enrichment in California will be **DISMISSED**.

Florida, Kansas, Maine, Michigan, North Carolina, North Dakota, and Utah

In both of their briefs, the parties have grouped together the states of Florida, Kansas, Maine, Michigan, North Carolina, North Dakota, and Utah. Defendant submits that these seven states "require that a plaintiff confer a direct benefit on the defendant in order to state a claim for unjust enrichment." (Doc. 184 at 47). In response, Consumer Plaintiffs submit that the word "'direct' is intended to refer not to the relationship between the parties, but to a type of benefit that is not 'incidental.'" (Doc. 202 at 72).

For these states, the Court recognizes that there is a split of case law **[*101]** regarding whether a plaintiff can plead unjust enrichment solely through a direct benefit, or if it is possible for a plaintiff to plead unjust enrichment through an indirect benefit. *See In re Auto. Parts Antitrust Litig., 29 F. Supp. 3d at 1020* (denying defendant's argument with respect to claims for unjust enrichment brought in Maine); *In re Processed Egg Products Antitrust Litig., 851 F. Supp. 2d 867, 929 (E.D. Pa. 2012)* (collecting split of Florida, Kansas, North Carolina, Utah cases on this issue and denying defendant's motion to dismiss); *In re Static Random Access Memory (SRAM) Antitrust Litig., 2010 U.S. Dist. LEXIS 131002, 2010 WL 5094289, at *7 (N.D. Cal. Dec. 8, 2010)* ("A claim for unjust enrichment under Michigan law does not require that the plaintiff confer a direct benefit on the defendant."); *In re TFT-LCD (Flat Panel) Antitrust Litig., 599 F. Supp. 2d at 1190* (collecting cases regarding split in North Carolina and Michigan and denying defendant's motion to dismiss). Thus, based on the parties' submissions and the number of courts that have permitted plaintiffs to bring unjust enrichment claims through an indirect benefit, the Court declines to dismiss the Consumer Plaintiffs' claims on this basis.

The outlier of this group of states is North Dakota. The Consumer Plaintiffs have failed to cite any authority supporting their position that a direct benefit is not required while Defendants cite to the North Dakota Supreme Court case, *Apache Corp. v. MDU Res. Grp., Inc., 1999 ND 247, 603 N.W.2d 891 (N.D. 1999)*. In *Apache*, the North Dakota Supreme Court confirmed that "[t]he essential element **[*102]** in recovering under a theory of unjust enrichment is the receipt of a benefit by the defendant from the plaintiff which would be inequitable to retain without paying for its value." *Id. at 895* (quoting *Zuger v. North Dakota Ins. Guar. Ass'n, 494 N.W.2d 135, 138 (N.D. 1992))*. As the Consumer Plaintiffs are unable to allege a direct benefit in support of their unjust enrichment claim in North Dakota, those claims will be **DISMISSED**.

New York

The parties agree that New York permits plaintiffs to bring unjust enrichment claims as long as the relationship between the plaintiff and the defendant is not "too attenuated." *Sperry v. Crompton Corp., 8 N.Y.3d 204, 863 N.E.2d 1012, 1018, 831 N.Y.S.2d 760 (N.Y. 2007)*; *see also* *State ex rel. Spitzer v. Daicel Chem. Indus., Ltd., 42 A.D.3d 301, 840 N.Y.S.2d 8, 12 (N.Y. 2007)*. However, the parties dispute whether the relationship between the Consumer Plaintiffs and the Defendants is sufficient under this standard. The Court has considered the parties' positions and finds that Consumer Plaintiffs have not stated a sufficient relationship with Defendants to meet this standard. Specifically, the connection between the parties and the fact that they had no dealings directly with each other leads the Court to conclude that the relationship does not support a claim for unjust enrichment. *See* *Laydon v. Mizuho Bank, Ltd., 2014 U.S. Dist. LEXIS 46368, 2014 WL 1280464, at *14 (S.D.N.Y. Mar. 28, 2014)*; *Malone & Co. v. Rieder, 19 N.Y.3d 511, 973 N.E.2d 743, 747, 950 N.Y.S.2d 333 (2012)*. Accordingly, the Consumer Plaintiffs unjust enrichment claims brought in New York will be **DISMISSED**.

South Carolina

The elements **[*103]** of a claim for unjust enrichment in South Carolina are: "(1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by defendant of the benefit under conditions that make it inequitable for him to retain it without paying its value." *Ellis v. Smith Grading & Paving, Inc., 294 S.C. 470, 366 S.E.2d 12, 15 (S.C. Ct. App. 1988)*. In their briefs, the parties dispute whether the Consumer Plaintiffs were required to establish that Defendants owed them a duty under South Carolina law. (Doc. 184 at 48; Doc. 202 at 73 n.50).

The courts that have determined that South Carolina requires pleading the existence of a duty have mischaracterized the cases which have discussed this proposition. The case relied on by the Defendants, and which is often cited by other multidistrict litigation courts, is *Pitts v. Jackson Nat. Life Ins. Co., 352 S.C. 319, 574 S.E.2d 502, 512 (S.C. Ct. App. 2002)*. In *Pitts*, a South Carolina appellate court found that a plaintiff "failed to establish any duty to disclose or other cause of action that would allow recovery for unjust enrichment" because he had failed to allege any benefit conferred to defendants that would be unjust for them to retain. *Id.* Specifically, "the plaintiff purchased an insurance policy from an insurance agent with whom he had no previous relationship and later **[*104]** discovered that he was eligible for a less expensive policy." *In re Microsoft Corp. Antitrust Litig., 401 F. Supp. 2d 461, 464 (D. Md. 2005)*. The Court finds *Pitts* to be distinguishable from the instant case because Plaintiffs have pled that it would be unjust for Defendants to retain the money made off of the inflated prices and profits on CISP. Additionally, a court in this Circuit has recently held that there is "no requirement to allege the existence of a duty." *In re Auto. Parts Antitrust Litig., 2014 U.S. Dist. LEXIS 90724, 2014 WL 2993753, at *36* . Accordingly, the Court will **DENY** Defendants' Motion to Dismiss with respect to Consumer Plaintiffs' claim for unjust enrichment in South Carolina.

Mississippi

Mississippi permits plaintiffs to bring a claim for unjust enrichment when "the defendant holds money which in equity and good conscience belongs to the plaintiff." *Owens Corning v. R.J. Reynolds Tobacco Co., 868 So. 2d 331, 342 (Miss. 2004)* (quoting *Fordice Construction Company v. Central States Dredging Company, 631 F.Supp. 1536. (S.D.Miss. 1986))*. Although Defendants argue that Mississippi only permits unjust enrichment claims to be brought when money has been paid based on a mistake of fact, numerous courts have rejected this position. *See* *In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig., 64 F. Supp. 3d 665, 2014 WL 6792663, at*

36* (collecting cases). While it is true that a plaintiff can bring a claim for unjust enrichment when he has mistakenly paid another party, this does not mean that this is the only way that a plaintiff can bring an unjust enrichment claim. Accordingly, Defendants' Motion to **[*105] Dismiss with respect to Consumer Plaintiffs' Mississippi unjust enrichment claims will be **DENIED**.

f. Consumer Clayton Act Claim

In their Motions, Defendants argue that the Consumer's Clayton Act Claim is barred by black letter law. Specifically, Defendants submit that the Consumers' claim under *Section 7 of the Clayton Act* should be dismissed because they fail to allege an antitrust injury proximately caused by Charlotte Pipe's acquisition of Star Pipe. Defendants also submit that Consumers are indirect purchasers and lack standing to bring a claim for treble damages and that it is not possible to grant Consumers injunctive relief because the acquisition was completed in 2010 and remedied by the Consent Order. (Doc. 184 at 51-52). In response to Defendants' position, at the December 19, 2015 Hearing on this Motion, the Consumers conceded that Count V of their Amended Consolidated Complaint should be dismissed. *See* Doc. 235 at 103. Accordingly, Defendants' Motions to Dismiss with respect to the Consumers Clayton Act Claim will be **GRANTED** and this claim will be **DISMISSED**.

g. Consumer TTPA Claim

Defendants next argue that the Consumer's class action under the TTPA should be dismissed because it does **[*106]** not comply with the Tennessee Supreme Court case *Freeman Industries, LLC., 172 S.W.3d at 512*. Additionally, Defendants argue that the Consumer Plaintiffs are Arkansas residents who purchased CISP from Arkansas sellers, leaving them no connection with the state of Tennessee. (Doc. 179 at 28). In response, the Consumer Plaintiffs argue that they have "alleged sufficient factual detail of substantial effects of Defendant manufacturers' conspiracy on Tennessee commerce" in order to withstand Defendants' Motions to Dismiss. (Doc. 202 at 70).

The TTPA provides that:

> [a]ll arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this state, or in the manufacture or sale of articles of domestic growth or of domestic raw material, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article, are declared to be against public policy, unlawful, and void.

Tenn. Code Ann. § 47-25-101. The Tennessee Supreme Court reviewed the purpose **[*107]** and construction of the TTPA in *Freeman*. The plaintiff in *Freeman* was attempting to bring a claim under the TTPA based on defendant's conduct of (1) communicating with co-defendants at in-person meetings to create a price-fixing agreement; (2) implementing the agreement by drafting price schedules, adjusting prices, and taking orders from customers at the new prices; and (3) concealing its conduct by limiting the employees that had knowledge of the price-fixing agreement. *Freeman, 172 S.W.3d at 524*. The court ultimately found these allegations "primarily relate[d] to the defendants' actions in conspiring and implementing the conspiracy" rather than the effects of the conduct on Tennessee commerce and concluded that the claim did not fall within the scope of the TTPA. *Id.*

In its analysis of the TTPA, the court described the TTPA's plain language as prohibiting "arrangements that decrease competition or affect the prices of goods even if those goods arrived in Tennessee through interstate commerce." *Freeman, 172 S.W.3d at 522*. The court also noted that the legislature had not intended to limit the TTPA's scope to intrastate commerce, otherwise it would have included such a limitation. *Id.* In regard to the standard that should be applied in determining **[*108]** the effects of the anticompetitive conduct on Tennessee interstate commerce, the court concluded that the substantial effects standard was the correct one. Under the substantial effects standard, "courts must decide whether the alleged anticompetitive conduct affects Tennessee trade or commerce to a substantial degree." *Id. at 523*. The meaning of the phrase "substantial degree" turns on the circumstances of a given case and constitutes some measure between "mathematical nicety" and "the demise of Tennessee businesses." *Id.* Thus, based on *Freeman*, a non-resident indirect purchaser can bring a TTPA claim as long as the alleged anticompetitive conduct had a substantial effect on Tennessee trade and commerce.

Both parties agree that another case decided in this District, *In re Skelaxin (Metaxalone) Antitrust Litig., 2013 U.S. Dist. LEXIS 70968, 2013 WL 2181185, at *23 (E.D. Tenn. May 20, 2013)*, is relevant to the instant determination of whether the Consumer Plaintiffs have sufficiently plead a TTPA claim. In *Skelaxin*, the court reviewed the *Freeman* decision to determine whether indirect purchasers, consisting of non-resident pharmacies and other purchasers for resale who were forced to pay more for metaxalone products due to Defendants' unlawful conduct, sufficiently pled a TTPA claim. *Id.* The court found that, viewing **[*109]** the facts in the light most favorable to the indirect purchasers, the acts alleged in the complaint would have substantially affected intrastate commerce because: (1) the defendant had its corporate headquarters and principal place of business in Tennessee; (2) the indirect purchasers "paid possibly hundreds of millions of dollars in overcharges" and the defendant "likely received a significant portion of the sales"; (3) a "substantial portion" of the overcharges likely "flowed back to Tennessee"; and (4) at least some of the money used to further the anticompetitive scheme deprived the state of Tennessee of additional funds. *Skelaxin, 2013 U.S. Dist. LEXIS 70968, 2013 WL 2181185, at *24*.

Turning to the facts of the instant case, Consumer Plaintiffs allege that CISP was sold in Tennessee by one or both Defendants, CISPI had its principal place of business in Hixson, Tennessee, the Defendants used CISPI to communicate about the alleged price fixing and coordinate their activities, and the Defendants had bi-annual meetings at CISPI for the purpose of implementing their price-fixing agreement. Based on these facts, Consumer Plaintiffs submit that "[m]illions of dollars in revenue is generated for the . . . Defendants by the utilization of [CISPI] in Tennessee" **[*110]** and Defendants "[d]erived substantial revenue in Tennessee from CISP sold, purchased, and used in Tennessee and throughout the United States." (Doc. 121 at 12).

Taking these facts in the light most favorable to the Consumer Plaintiffs, as the Court is required to do, the Court finds that they fail to establish that the alleged wrongful conduct of Defendants McWane and Charlotte Pipe would have substantially affected intrastate commerce. The allegations stated in the Amended Consolidated Complaint are similar to the conduct alleged in *Freeman*, and thus they fail to state a claim on the same grounds. Specifically, the conduct alleged relates to the Defendants' actions in forming and implementing the conspiracy rather than focusing on the effect of the conspiracy on Tennessee commerce. As for Defendant CISPI, the Court concludes that the conduct alleged could have a substantial effect on interstate commerce in Tennessee. *See Skelaxin., 2013 U.S. Dist. LEXIS 70968, 2013 WL 2181185, at *24*. In fact, the majority of the Consumer Plaintiffs allegations relating to Tennessee-specific conduct are based around CISPI and its role in the price-fixing conspiracy. *See* Doc. 202 at 69. Accordingly, Defendants' Motion to Dismiss will only be granted with respect to Consumer **[*111]** Plaintiffs' TTPA claims brought against Charlotte Pipe and McWane but not to the claim against CISPI.

III. MOTIONS TO STRIKE

Defendants move to strike the Indirect Purchasers' class action allegations because "applying the law of thirty states in a multi-state class action renders the class unmanageable." (Doc. 152 at 3). Defendants move to strike the Consumer Plaintiffs' class action allegations on the same grounds stated in their Motion against the Indirect Purchasers, and also argue that the Consumer Plaintiffs' class action under the TTPA should be stricken. (Doc. 153).

A. Standard of Law

Federal Rule of Civil Procedure 12(f) states that "a court may strike only material that is contained in the pleadings," which are defined as "a complaint and answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third party complaint, if a person who was not an original party is summoned under the provisions of *Rule 14*; and a third-party answer, if a third-party complaint is served." *Fox v. Mich. State Police Dep't, 173 F. App'x 372, 375 (6th Cir. 2006)* (quotation omitted).

The Sixth Circuit has stated that "a district court should defer decision on class certification issues and allow discovery 'if the existing record is inadequate for resolving **[*112]** the relevant issues.'" *Bearden v. Honeywell Int'l*

Inc., 720 F. Supp. 2d 932, 942 (M.D. Tenn. 2010) (quoting In re Am. Med. Sys., 75 F.3d 1069, 1086 (6th Cir. 1996). For a court to determine class certification issues at the pleadings stage of the litigation, there "must be an adequate statement of the basic facts to indicate that each requirement of the rule is fulfilled." Weathers v. Peters Realty Corp., 499 F.2d 1197, 1200 (6th Cir. 1974). Additionally, this determination ordinarily "should be predicated on more information than the pleadings will provide." *Id.*; In re Allstate Ins. Co. Underwriting & Rating Practices Litig., 917 F. Supp. 2d 740, 751 (M.D. Tenn. 2008) ("the plaintiffs are entitled, based on their showing to this point, to develop this case and seek class certification based on developments in discovery.").

Although the ordinary course of proceedings is for this matter to be decided on a class certification motion, there are circumstances in which class certification issues can be decided based on a pleading. These circumstances include when "further discovery and briefing on the certification issue would simply postpone the inevitable conclusion that the putative class cannot be certified." Loreto v. Procter & Gamble Co., 2013 U.S. Dist. LEXIS 162752, 2013 WL 6055401, at *3 (S.D. Ohio Nov. 15, 2013); Cowit v. CitiMortgage, Inc., 2013 U.S. Dist. LEXIS 32219, 2013 WL 940466, at *2 (S.D. Ohio Mar. 8, 2013) ("A court may strike class action allegations before a motion for class certification where the complaint itself demonstrates that the requirements for maintaining a class action cannot be met").

The requirements that a claimant must establish in bringing a claim on behalf of **[*113]** a class as identified in Federal Rule of Civil Procedure 23 are:

(1) the class is so numerous that joinder of all members is impracticable;
(2) there are questions of law or fact common to the class;
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
(4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a)(1-4). Rule 23(c)(1)(A) provides that the court must determine whether an action will be certified as a class action at "an early practicable time after the person sues."

B. Analysis

In support of their position that these class action allegations should be dismissed, Defendants cite to Pilgrim v. Universal Health Card, LLC, 660 F.3d 943 (6th Circuit 2011). In *Pilgrim*, two consumers were seeking to represent a nationwide class of people who had joined a healthcare discount program created by Universal Health Card and Coverdell & Company. Id. at 945. Universal Health Card filed a motion to strike the class action allegations, and the district court concluded that Ohio's choice-of-law rules required it to analyze each class member's claim under the laws of his or her home state, and that this made the class "unmanageable." *Id.* The Sixth Circuit Court of Appeals reviewed this decision and found that the district court did not **[*114]** abuse its discretion in finding that the plaintiffs could not demonstrate that common questions of fact or law to class members predominated over questions of law and fact affecting individual members. Id. at 946. The court reached this conclusion for several reasons: (1) different laws governed the class members' claims; (2) common issue of fact could not overcome the difference in laws; and (3) the conclusion was consistent with other decisions in this Circuit. Id. at 946-49. A court that has examined the *Pilgrim* decision found it distinguishable on the basis that the "minimal facts set forth in the pleadings demonstrated—and the plaintiffs readily conceded—that the class was 'purposely' overbroad and was not ascertainable." Modern Holdings, LLC v. Corning Inc., 2015 U.S. Dist. LEXIS 41138, 2015 WL 1481459, at *4 (E.D. Ky. Mar. 31, 2015).

Defendants also cite to In re Skelaxin (Metaxalone) Antitrust Litig., 299 F.R.D. 555 (E.D. Tenn. 2014) in support of their position. The Court briefly reviewed Skelaxin supra, but with respect to this argument, Defendants cite to a later decision made by the court regarding a motion for class certification. Considering the posture of the litigation at the time the class certification order was issued in *Skelaxin*—the parties having conducted discovery and thoroughly briefed the issue—the Court finds the *Skelaxin* decision to be unhelpful in determining the **[*115]** instant matter.

The Court notes that this issue is typically handled through a class certification motion and extensive briefing. *See Modern Holdings, 2015 U.S. Dist. LEXIS 41138, 2015 WL 1481459, at *7*; *Bearden v. Honeywell Int'l Inc., 720 F. Supp. 2d 932, 942 (M.D. Tenn. 2010)* ("Here, the briefing on class issues is relatively cursory. As discussed below, the court will defer its decision on whether the fraud claims are appropriate for class resolution."); *In re Allstate Ins. Co. Underwriting & Rating Practices Litig., 917 F. Supp. 2d at 751*. Thus, while the Court does not find Defendants' Motion to be procedurally improper, it recognizes the limitations of deciding this issue at the pleadings stage as well as the wealth of information to be gained through class discovery. *See Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)* ("Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question").

In reviewing the parties' briefs, the Court finds Defendants' concern about the Downstream Purchasers' class action claims to be well taken. The numerous states under which the Downstream Purchasers bring their antitrust and consumer protection claims will almost certainly raise issues with some of the requirements under *Rule 23*. However, **[*116]** with the facts stated in the Complaint, the Court is reluctant to strike these allegations at this stage in the litigation. While it is possible that the Downstream Plaintiffs will be unable to meet the class certification requirements, the Court is unwilling to deem it an impossibility based on the pleadings alone. Rather, the Court finds that class discovery will clarify whether Plaintiffs are able to meet the requirements identified in *Federal Rule of Civil Procedure 23(b)*. Thus, a ruling on this issue at this juncture could only be considered premature, and Defendants' Motions to Strike Class Action Allegations (Docs. 151, 154) will be **DENIED**.

IV. CONCLUSION

For the reasons stated herein:

- Defendants' Motions to Dismiss Direct Purchaser Plaintiffs' Consolidated Amended Complaint (Docs. 178, 181) are hereby **GRANTED IN PART** and **DENIED IN PART**;
    - The Direct Purchaser Plaintiffs' claim under the Clayton Act against McWane is hereby **DISMISSED**;
- Defendants' Motions to Dismiss Indirect Purchaser Plaintiffs' Consolidated Amended Complaint (Doc. 176, 182) are hereby **GRANTED IN PART** and **DENIED IN PART**;
    - The Indirect Purchaser Plaintiffs' claims under the antitrust laws of Rhode Island (prior to July 15, 2013), Arkansas, District **[*117]** of Columbia, Mississippi, Nevada, New York, North Carolina, South Dakota, Tennessee, Wisconsin, and West Virginia are hereby **DISMISSED**;
    - The Indirect Purchaser Plaintiffs' claims under the consumer protection and unfair practices laws of Michigan, Rhode Island, District of Columbia, Missouri, Nevada, New Hampshire, New York, North Carolina, Florida, and Hawaii (with respect to claims for unfair or deceptive acts or practices) are hereby **DISMISSED**;
- Defendants' Motions to Dismiss Consumer Plaintiffs' Consolidated Amended Complaint (Docs. 177, 183) are hereby **GRANTED IN PART** and **DENIED IN PART**;
    - The Consumer Plaintiffs' claims under the antitrust laws of Illinois, District of Columbia, Mississippi, Nevada, New York, North Carolina, South Dakota, Tennessee, Wisconsin, and West Virginia are hereby **DISMISSED**;
    - The Consumer Plaintiffs' claims under the consumer protection and unfair practices laws of New Hampshire, New York, North Carolina, and Florida are hereby **DISMISSED**;

○ The Consumer Plaintiffs' claims under the unjust enrichment laws of Arkansas, California, North Dakota, and New York are hereby **DISMISSED**;

○ The Consumer Plaintiffs' claim under the Clayton Act is hereby **DISMISSED**;

○ The **[*118]** Consumer Plaintiffs' claims against Charlotte Pipe and McWane under the TTPA are hereby **DISMISSED**;

• Defendants' Motion to Strike Indirect Purchaser Plaintiffs' Class Action Allegations (Doc. 151) and Motion to Strike Consumer Plaintiffs' Class Action Allegations (Doc. 154) are hereby **DENIED**;

SO ORDERED this 24th day of June, 2015.

/s/ Harry S. Mattice, Jr.

HARRY S. MATTICE, JR.

UNITED STATES DISTRICT JUDGE

Precision Assocs. v. Panalpina World Transp. (Holding) Ltd.

United States District Court for the Eastern District of New York

June 24, 2015, Decided; June 24, 2015, Filed

08-CV-42 (JG)(VVP)

Reporter

2015 U.S. Dist. LEXIS 194073 *; 2015 WL 13650032

PRECISION ASSOCIATES, INC., et al., Plaintiffs, - v - PANALPINA WORLD TRANSPORT (HOLDING) LTD., et al., Defendants.

Prior History: *Precision Assocs. v. Panalpina World Transp. (Holding) Ltd., 2011 U.S. Dist. LEXIS 51330 (E.D.N.Y., Jan. 4, 2011)*

Core Terms

conspiracy, allegations, Surcharge, cases, Global, motion to dismiss, plaintiffs', joined, antitrust, recommends, fraudulent concealment, affiliates, entities, statute of limitations, defendants', additional party, wrong party, forwarding, freight, doctrine of relation back, four year, grouping, limitations period, relates back, connect, notice, collusive, diligence, meetings, corporate structure

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For Nippon Express Co., Ltd., Defendant: Joel M. Cohen, LEAD ATTORNEY, Davis, Polk & Wardwell, New York, NY USA; Brian Stryker Weinstein, Edward Nathaniel Moss, Jason Maxwell Spitalnick, Davis Polk & Wardwell, New York, NY USA; Joshua Buchanan Dugan, Davis Polk & Wardwell LLP, New York, NY USA; Ronan P. Harty, Davis, Polk and Wardwell, New York, NY USA.

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For Yusen Air & Sea Service Co., Ltd., Defendant: **[*11]** John R. Fornaciari, LEAD ATTORNEY, PRO HAC VICE, Baker & Hostetler LLP, Washington, DC USA; Robert M. Disch, PRO HAC VICE, Baker & Hostetler LLP, Washington, DC USA.

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For Kintetsu World Express, Inc., Kintetsu World Express (U.S.A.), Inc., Defendants: Francis Allen Montbach, Mound, Cotton, Wollan & Greengrass, New York, NY USA; Michael R Koblenz, Mound, Cotton, Wollon & Greengrass, New York, NY USA.

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For Nissin Corporation, Defendant: April Williams, Philip R. Seybold, PRO HAC VICE, Wilmer Cutler Pickering Hale & Dorr LLP, Washington, DC USA. **[*12]**

For Nissin International Transport U.S.A., Inc., Defendant: April Williams, Philip R. Seybold, PRO HAC VICE, Steven F. Cherry, Wilmer Cutler Pickering Hale & Dorr LLP, Washington, DC USA.

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For Yamato Global Logistics Japan Co., Ltd., Yamato Transport U.S.A., Inc., Defendant: George B. Yankwitt, Mary Margaret Chang, LEAD ATTORNEY, Squire Sanders (US) LLP, New York, NY USA; Barry A. Pupkin, Christopher H. Gordon, PRO HAC VICE, Squire Sanders (US) LLP, Washington, DC USA; Joseph P. Rodgers, PRO HAC VICE, Squire, Sanders & Dempsey L.L.P., Cleveland, OH USA; Matthew Edward Digby, Squire Sanders & Dempsey LLP, Los Angeles, CA USA; Thomas S. Kilbane, PRO HAC VICE, Squire, Sanders and Dempsey, Cleveland, OH USA.

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For Japan Aircargo Forwarders Association, Defendant: Brian P.R. Eisenhower, Hill Rivkins LLP, New York, **[*13]** NY USA; James A. Saville, Hill Rivkin & Hayden, New York, NY USA; Thomas E. Willoughby, Hill, Rivkins & Hayden, LLP, New York, NY USA.

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For Dsv Solutions Holding A/S, Dsv A/S, Defendants: Amelia Katherine Brankov, Brian E. Maas, LEAD ATTORNEY, Franfurt Kurnit Klein & Selz, P.C, New York, NY USA.

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For Danzas Corporation, Dhl Japan, Defendants: Steven J. Kaiser, LEAD ATTORNEY, PRO HAC VICE, Jeremy Calsyn, Cleary Gottlieb Steen & Hamilton LLP, Washington, DC; Mitchell A. Lowenthal, Cleary, Gottlieb, Steen & Hamilton, New York, NY USA.

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For Geologistics Corporation, Geologistics International Management (Bermuda) Ltd., Agility Holdings, Inc., Defendants: Ari M. Berman, LEAD ATTORNEY, Armita Schacht Cohen, Vinson & Elkins LLP, New York, NY USA; Temilola Olwuatosin Sobowale, Vinson &Elkins, New York, NY USA.

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For Dell, Inc., Intervenor: James B. Niehaus, **[*15]** Jennifer Loren Whitney, Lindsey C. Siegler, Frantz Ward LLP, Cleveland, OH USA.

For Sony Electronics, Inc., Sony Supply Chain Solutions (Americas), Inc., Intervenor: Adil Haq, PRO HAC VICE, Gina Marie Bassi, Schiff Hardin LLP, New York, NY USA.

Alan Lansing, President, Objector, Pro se, Lake Hiawatha, NJ USA.

Judges: VIKTOR V. POHORELSKY, United States Magistrate Judge.

Opinion by: VIKTOR V. POHORELSKY

Opinion

REPORT AND RECOMMENDATION

POHORELSKY, Magistrate Judge:

Currently pending before the court is a motion brought by defendants Hellmann Worldwide Logistics GmbH & Co. KG ("Hellmann GmbH") and Hellmann Worldwide Logistics Limited Hong Kong ("Hellmann HK"), seeking dismissal under *Fed. R. Civ. P. 12(b)(6)* of the claims brought against them in the plaintiffs' Corrected Third Amended Complaint ("CTAC"). The CTAC, which has been brought as a class action, alleges that Hellmann GmbH and Hellmann HK (along with dozens of other entities) "combined, conspired and agreed . . . to fix, inflate and maintain new charges or prices for U.S. Freight Forwarding Services . . . in violation of *Section 1 of the Sherman Antitrust*

Act, *15 U.S.C. §1*." CTAC at ¶ 1. The Honorable John Gleeson has referred the motion to me pursuant to *28 U.S.C. 636(b)(1)(B)* for a report and recommendation. For the reasons **[*16]** that follow, I recommend that the motion be granted.

I. BACKGROUND

A. Factual[1] and Procedural History

This putative class action concerns multiple alleged conspiracies to fix prices in the international commercial freight forwarding industry. The plaintiffs are various businesses who purchased freight forwarding services from the defendants during the class period, which is defined in the CTAC as "the period from at least as early as January 1, 2001 to [ ] January 4, 2011." *See* CTAC at ¶ 18. The defendants are sixty-four domestic and foreign providers of international freight forwarding services, three trade associations, and "John Doe Defendants 1-10." Plaintiffs allege eleven different conspiracies in violation of *Section 1 of the Sherman Act*—nine "local conspiracies," six of which comprise an overarching "Global Agreement" conspiracy, and the remaining three of which comprise an overarching Japanese regional conspiracy.

Plaintiffs initiated this action by filing their initial complaint on January 3, 2008. *See* Dkt. No. 1. On July 21, 2009, the plaintiffs filed their First Amended Class Action Complaint ("FACAC") (Dkt. No. 117), which was followed by the October 7, 2010 Second Amended Class Action **[*17]** Complaint ("SACAC") (Dkt. No. 460). Numerous motions to dismiss were then filed and addressed by this court in its January 4, 2011 report and recommendation (the "First R&R"), *see* Dkt. No. 468, which recommended dismissal without prejudice, with leave to replead the majority of the claims in the SACAC.[2] Judge Gleeson adopted the First R&R in its entirety on August 13, 2012 (*see* Dkt. No. 628).

Plaintiffs then filed a Third Amended Class Action Complaint ("TAC") on November 15, 2012, *see* Dkt. No. 677 (sealed version), and the CTAC on March 27, 2013. *See* Dkt. No. 746 (sealed version); Dkt. No. 772 (redacted version). Several individual and joint motions to dismiss were served on or about February 27, 2013 and filed on May 24, 2013. The court considered these motions in its September 20, 2013 report and recommendation (the "Second R&R"), *see* Dkt. No. 878 (sealed version); Dkt. No. 903 (redacted version),[3] which recommended denial of the majority of the dismissal motions. On January 28, 2014, Judge Gleeson adopted the Second R&R in its entirety. *See* Dkt. No. 992.[4]

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[1] As discussed below, the court has previously issued two reports and recommendations which detail the facts underlying this action. Familiarity with the prior R&Rs is assumed and facts not directly relevant to the instant motion will not be repeated.

[2] Although the dismissal motions were submitted before the filing of the SACAC, because the latter consisted of "ministerial changes" from the prior complaint, *see* First R&R at p. 4 n.3, the motions to dismiss were deemed responsive to the SACAC. *Id.*

[3] This opinion will refer to the page numbers in the ECF versions of the First and Second R&Rs. The First R&R is also available at *Precision Associates, Inc. v. Panalpina World Transp. (Holding) Ltd., No. 08 Civ. 42 (JG)(VVP), 2011 U.S. Dist. LEXIS 51330, 2011 WL 7053807 (E.D.N.Y. Jan. 4, 2011)*, *report and recommendation adopted*, *No. 08 Civ. 00042 (JG)(VVP), 2012 U.S. Dist. LEXIS 113829, 2012 WL 3307486 (E.D.N.Y. Aug. 13, 2012)*, and the Second R&R is available at *Precision Associates, Inc. v. Panalpina World Transp., (Holding) Ltd., No. 08 Civ. 42 (JG)(VVP), 2013 U.S. Dist. LEXIS 177023, 2013 WL 6481195 (E.D.N.Y. Sept. 20, 2013)*, *report and recommendation adopted*, *No. 08 Civ. 00042 (JG)(VVP), 2014 U.S. Dist. LEXIS 10345, 2014 WL 298594 (E.D.N.Y. Jan. 28, 2014)*.

[4] One significant point warrants discussion at the outset. Hellmann GmbH and Hellmann HK have correctly pointed out that the Second R&R (as well as the First R&R, for that matter) considered motions that were served before they were named as defendants in this case. To be sure, it might be procedurally improper if the court were to rely on a law-of-the-case theory to address their arguments for dismissal. *See, e.g.*, *In re Manhattan Inv. Fund Ltd., 310 B.R. 500, 513 (Bankr. S.D.N.Y. 2002)* ("The District Court's ruling in that class action is not binding upon the Trustee because she was not a party to that action.")

B. The Hellmann Defendants

According to the CTAC, **[*18]** Hellmann GmbH is the parent company of both Hellmann HK and Hellmann Worldwide Logistics, Inc. ("Hellmann Inc."). *See* CTAC at ¶ 69. The first instance of any Hellmann entity being sued in this litigation was the July 21, 2009 filing of the FACAC, which named Hellmann Inc. as a defendant. *See* Dkt. No. 117. Hellmann GmbH and Hellmann HK were not named as defendants until the filing of the CTAC on March 27, 2013. Although the Second R&R considered the allegations in the CTAC, because the motions to dismiss that were the subject of that R&R were served before the filing of the CTAC (and accordingly, before Hellmann GmbH and Hellmann HK were parties to this action), the court granted Hellmann GmbH and Hellmann HK[5] leave to submit a post-amendment motion to dismiss. *See* Dkt. No. 933 at p. 9.

II. LEGAL STANDARDS

A motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)* tests the legal, not the factual, sufficiency of a complaint. *See* *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)*, *abrogated on other grounds by* *Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)*; *Sims v. Artuz, 230 F.3d 14, 20 (2d Cir. 2000)* ("At the *Rule 12(b)(6)* stage, '[t]he issue is not whether a plaintiff is likely to prevail ultimately, but whether the claimant is entitled to offer evidence to support the claims.'") (quoting *Chance v. Armstrong, 143 F.3d 698, 701 (2d Cir. 1998))*.

Under the standard set forth by the Supreme Court, "a complaint must contain **[*19]** sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. At this stage, the court accepts as true all factual allegations in the complaint, views the complaint in the light most favorable to the plaintiffs, and draws all reasonable inferences in their favor. *See* *Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002)*; *Gregory v. Daly, 243 F.3d 687, 691 (2d Cir. 2001)*. Conclusory allegations or conclusions of law "couched" as factual allegations need not be accepted as true, however. *See* *Iqbal, 556 U.S. at 678*; *Twombly, 550 U.S. at 555*. To avoid dismissal, plaintiffs must plead facts that "nudg[e] their claims across the line from conceivable to plausible." *Twombly, 550 U.S. at 570*; *Iqbal, 129 S. Ct. at 1949* (requiring factual allegations that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged"). "This standard requires factual allegations that, taken as true, demonstrate 'more than a sheer possibility that a defendant has acted unlawfully.'" *McAllister v. Metropolitan Transit Authority, No. 13 Civ. 2060, 2013 U.S. Dist. LEXIS 120996, 2013 WL 4519795, at *3 (E.D.N.Y. Aug. 26, 2013)* (citing *Iqbal, 556 U.S. at 678*). "If a complaint allows a court to infer no more than 'the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* (quoting *Iqbal, 556 U.S. at 679* (quoting *Fed. R. Civ. P. 8(a)(2)*) (alteration in original).

Courts may also consider documentary exhibits or written instruments annexed to **[*20]** the complaint, documents integral to the parties' case and on which the complaint relies heavily, and matters subject to judicial notice. *See* *Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007)* (citing 5B

(citing *Ackerman v. Schultz, 250 B.R. 22, 27-28 (Bankr. E.D.N.Y. 2000))*; *Bricklayers & Allied Craftsmen, Local Union No. 44 v. Corbetta Constr. Co., 511 F. Supp. 1386, 1390 (S.D.N.Y. 1981)* ("[A]pplication of the [law of the case] doctrine would be particularly inappropriate [in part because] Laborers was not a party to the prior proceeding."). However, although the present opinion invokes—and discusses in considerable detail—the analyses contained in the prior R&Rs, I do not consider those opinions as binding against the newly-named Hellmann GmbH and Hellmann HK. Rather, I refer to the prior R&Rs to obviate the need to begin the instant analysis at square one. Hellmann GmbH's and Hellmann HK's absence from the prior proceedings does not bar the court from doing so. And to the extent Hellmann GmbH and Hellmann HK contend they were not afforded the opportunity to formally object to prior R&Rs, they have had ample opportunity in their submissions on this motion to take issue with the court's previous rulings.

[5] Except where otherwise indicated, the court hereinafter refers to Hellmann GmbH and Hellmann HK collectively as "Hellmann."

Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* §1357 (3d ed. 2004 and Supp. 2007)); *ATSI Commc'ns, Inc. v. Shaar Fund, 493 F.3d 87, 98 (2d Cir. 2007); Int'l Audiotext Network, Inc. v. AT&T, 62 F.3d 69, 72 (2d Cir. 1995)*; *Kramer v. Time Warner Inc., 937 F.2d 767, 773 (2d Cir. 1991)*; *see also* Fed. R. Civ. P. 10(c).

III. HELLMANN'S MOTION TO DISMISS

Hellmann's motion proceeds on three grounds. It first asserts that the CTAC impermissibly lumps together each of the three independent Hellmann entities, thus failing to give any one of them adequate notice of the claims against them. It next attacks the sufficiency of four of the claims asserted against Hellmann. Finally, it argues that the claims against Hellmann are time-barred under the *Sherman Act*'s four-year statute of limitations. As discussed below, the court rejects Hellmann's first two arguments, but agrees that the claims asserted against them in the CTAC are time-barred and should therefore be dismissed with prejudice. Accordingly, the court first addresses Hellmann's statute of limitations argument, since it is on that ground that the court recommends granting Hellmann's motion. It then considers Hellmann's other two arguments for dismissal, which will become relevant in **[*21]** the event the court's statute of limitations analysis is rejected.

A. STATUTE OF LIMITATIONS

1. Introduction and Continuing Violation Doctrine

Hellmann argues for dismissal of the third, fifth, sixth, eighth, ninth and tenth claims on statute of limitations grounds. The statute of limitations for Sherman Act claims is "four years after the cause of action accrued," *15 U.S.C. §15(b)*, and "[t]here is no dispute . . . that an antitrust cause of action generally accrues 'when a defendant commits an act that injures a plaintiff's business.'" *In re Aggrenox Antitrust Litig., 94 F. Supp. 3d 224, 2015 WL 1311352, at *6 (D. Conn. 2015)* (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971))* (emphases removed); First R&R at p. 92 (same). "Thus, with certain exceptions, a complaint that relies on acts committed prior to the four-year limitations period will usually be barred by the statute of limitations." First R&R at p. 92.

"If, however, an antitrust violation consists of a series of acts that repeatedly invade a plaintiff's interests and continue over time, a cause of action may accrue each time the plaintiff is injured anew." *Rite Aid Corp. v. Am. Exp. Travel Related Servs. Co., 708 F. Supp. 2d 257, 267 (E.D.N.Y. 2010)* (citing authorities); *see also* *Zenith Radio Corp., 401 U.S. at 338* (in antitrust context, "each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and . . . as to those **[*22]** damages, the statute of limitations runs from the commission of the act") (citing cases). Such "[a] continuing conspiracy or continuing violation occurs when 'the violator's actions consist not only of some definitive act in violation of the antitrust laws, but also of a series of subsequent acts that cause further injury to the plaintiff.'" First R&R at p. 92 (quoting 2 P. Areeda & H. Hovenkamp, ***Antitrust Law*** ¶ 320(c), p. 285 (3d ed. 2007)).

"When the continuing violation exception applies, '[a]n overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act.'" *Rite Aid, 708 F. Supp. 2d at 268* (quoting *Pace Indus., Inc. v. Three Phoenix Co., 813 F.2d 234, 237 (9th Cir. 1987))*; *see also* *Klehr v. A.O. Smith Corp., 521 U.S. 179, 189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1984)* (In "a price—fixing conspiracy . . . , 'each overt act that is part of the violation and that injures the plaintiff,' *e.g.*, each sale to the plaintiff, 'starts the statutory period running again . . . .'") (quoting 2 P. Areeda & H. Hovenkamp, ***Antitrust Law*** ¶ 338b p. 145 (rev. ed. 1995) and citing cases). Significantly, though, "[a] plaintiff cannot . . . 'use an independent, new predicate act as a bootstrap to recover for injuries caused by other earlier predicate acts that took place outside the limitations period.' The continuing violation exception only allows **[*23]** a plaintiff to recover damages caused by overt acts committed inside the limitations period." *Rite Aid, 708 F. Supp. 2d at 268* (quoting *Klehr, 521 U.S. at 189-90*) (internal citation omitted).

Hellmann takes great pains to establish that the last overt acts underlying each of the claims alleged against it occurred more than four years prior to the filing of the CTAC. Accordingly, it argues that the plaintiffs' claims against it are time-barred because "[n]one of the actual dates pleaded . . . fall within the four years prior to March 27, 2013, when Plaintiffs filed their CTAC against the Hellmann defendants." *See* Defendants Hellmann Worldwide Logistics GmbH & Co. KG and Hellmann Worldwide Logistics Limited Hong Kong's Memorandum in Support of their Motion to Dismiss Plaintiffs' Corrected Third Amended Class Action Complaint ("Motion to Dismiss") at pp. 19-22.

While not incorrect that the latest dates explicitly pled in the CTAC predate March 27, 2009,[6] Hellmann's argument employs an overly strict standard. As this court wrote in the First R&R,

> [a]ntitrust law provides that, in the case of a "continuing violation," say, a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, "each overt act **[*24]** that is part of the violation and that injures the plaintiff," *e.g., each sale to the plaintiff*, 'starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.'"

First R&R at pp. 92-93 (quoting *Klehr, 521 U.S. at 189* and citing *In re Nine W. Shoes Antitrust Litig., 80 F. Supp. 2d 181, 192 (S.D.N.Y. 2000))* (emphasis added in First R&R). Accordingly, the plaintiffs may satisfy the overt act requirement by demonstrating that the plaintiffs sold to them freight forwarding services at artificially inflated prices during the limitations period. As such, the contention that none of the conspiratorial acts explicitly pleaded in the CTAC fall within the limitations period, even if accurate, is of no moment.

The court again turns to the First R&R to derive the applicable standard:

> There is no requirement that the plaintiffs identify specific conduct on the part of a defendant during the limitations period. The Complaint clearly alleges that the defendants formed a conspiracy that was active in selling price-fixed freight forwarding services until a time unknown and that the conspiracy could have been continuing to the date of the filing of the Complaint. It is possible that discovery will reveal that no overt acts did in fact occur **[*25]** during the limitations period, but reading the Complaint in the light most favorable to the plaintiffs, these allegations are sufficient to raise the inference that price fixing did indeed occur within the four-year period before the operative complaints were filed.

First R&R at p. 96 (citing *Thomas v. Petro-Wash, Inc., 429 F. Supp. 808, 812 (M.D.N.C. 1977))* (internal citation omitted). Accordingly, the plaintiffs are not, as Hellmann suggests, required to "identify specific conduct on the part of a defendant during the limitations period," *see id.*; *see also* Motion to Dismiss at pp. 19-22, but instead must simply "raise the inference that price fixing did indeed occur within the four-year period before the operative complaints were filed." *See* First R&R at p. 96.

Nevertheless, even under the more lenient standard articulated in the First R&R, the CTAC fails to "plausibly" state antitrust claims arising during the four-year period prior to the filing of the CTAC. The First R&R is now instructive largely by way of contrast. The "operative complaints" considered there were the original complaint, filed on January 3, 2008, and the FACAC, filed on July 21, 2009. Accordingly, the question before the court was whether it was reasonable to infer that price fixing occurred at some point after **[*26]** January 3, 2004, or alternatively, July 21, 2005. In light of, among other things, a Department of Justice Press Release stating "that these conspiracies extended to dates in 2006 and 2007," and the fact that "it is in 2007 that antitrust authorities announced their investigations into the international freight forwarding industry," *see id.* at pp. 94-95; the court answered this question in the affirmative. *See id.* at p. 96.

But with the CTAC as the presently "operative complaint[]," the court's calculus—and more significantly, its conclusion—is entirely different. As stated, the court must now be able to reasonably infer that price fixing occurred

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[6] Specifically, the last overt acts to be alleged in connection with each claim asserted against Hellmann occurred as follows: Third Claim: November 2004, *see* CTAC at ¶ 346; Fifth Claim: March 2006, *id.* at ¶¶ 439-40; Sixth Claim: January 2008, *id.* at ¶ 450; Eighth Claim: February 2005, *id.* at ¶ 525; [TEXT REDACTED BY THE COURT] he First Claim, which alleges a final overt act in October 2001. *Id.* at ¶ 314.

at some point within four years of the filing of the CTAC. The facts set forth above, while previously leading the court to make a parallel inference in regard to earlier complaints, now compel the opposite conclusion. The conspiracies at issue arguably extended until some point in late 2007, when "various worldwide antitrust authorities announced investigations into possible price-fixing conspiracies in the freight forwarding industry." *See id.* at p. 90. It is simply unreasonable to infer that the plaintiffs were still incurring damages in the form of conspiratorily inflated prices **[*27]** roughly eighteen months later. Thus, although the CTAC alleges in the abstract, for example, that "[t]he pricing practices that were unlawfully and systematically created . . . continued after November 2007 and until January 4, 2011," and that the defendants reaped the benefits of these practices "until at least January 4, 2011," *see* CTAC at ¶ 182, in the absence of specific allegations of conspiratorial activity occurring after March 2009, the CTAC falls short of plausibly "rais[ing] the inference that price fixing did indeed occur within the four-year period before the [CTAC was] filed." *See* First R&R at p. 96.[7]

Significantly, despite Hellmann's comprehensive (albeit slightly misguided) argument that no overt conspiratorial acts occurred within four years of the filing of the CTAC, the plaintiffs make no effort to establish that any requisite acts, in the form of inflated sales or otherwise, did indeed occur within the statutory period. Instead, their Opposition relies *solely* on the doctrines of relation back and fraudulent concealment to render timely their claims against Hellmann. The court agrees with Hellmann that this amounts to a concession on the part of the plaintiffs that the CTAC does not **[*28]** raise the inference that price-fixing occurred within four years of March 27, 2013.

Accordingly, unless salvaged on the grounds of either relation back or fraudulent concealment, the plaintiffs' claims against Hellmann should be dismissed. The court now considers in turn these possible exceptions to the four-year statute of limitations.

2. <u>Fraudulent Concealment</u>

A plaintiff who seeks to toll the statute of limitations on the basis of fraudulent concealment must establish "(1) that the defendant concealed the existence of the cause of action from the plaintiff; (2) that the plaintiff brought suit within the applicable limitations period upon learning of the cause of action; and (3) that the plaintiff's ignorance of the claim did not result from a lack of diligence." First R&R at p. 97 (citing cases). Although a plaintiff must plead fraudulent concealment in accordance with *Fed. R. Civ. P. 9(b)*'s "particularity" standard, "at the *Rule 12(b)(6)* stage, a plaintiff need only plead fraudulent concealment, as opposed to affirmatively proving it." *Id.* (citing cases).

a. *First Prong - Concealment of the Cause of Action*

A plaintiff may satisfy the first prong by demonstrating "either that (1) 'the defendant took affirmative steps to prevent the plaintiff's **[*29]** discovery of his claim or injury' or (2) 'that the wrong itself was of such a nature as to be self-concealing.'" *Id.* at p. 98 (quoting *State of N.Y. v. Hendrickson Bros., 840 F.2d 1065, 1083 (2d Cir. 1988)* and citing *In re Nine W. Shoes Antitrust Litig., 80 F. Supp. 2d 181, 192 (S.D.N.Y. 2000))*.

In the First R&R, the court concluded that although the operative allegations did not support a finding of affirmative concealment, "[t]he plaintiffs here have . . . set forth sufficient allegations to demonstrate that the defendants' price fixing conduct was inherently self-concealing." *Id.* at pp. 100-01 (discussing features of alleged conspiracies evincing their self-concealing nature).

Hellmann's argument to the contrary is of no avail. It disputes the conspiracies' self-concealing nature only in passing, simply quoting the CTAC's allegation that the conspiracies were inherently self-concealing and stating that the plaintiffs have failed to establish with particularity "how Hellmann GmbH or Hellmann HK participated in any of the conspiracies alleged in the CTAC." *See* Motion to Dismiss at p. 23.[8] Because, however, (1) the court finds that

[7] The court acknowledges that it wrote in the First R&R that "[t]aking the allegations at face value, the plaintiffs continued to buy freight forwarding services from the defendants throughout the entire [class] period," which extended until the filing of the FACAC on July 21, 2009. *See* First R&R at pp. 3, 94. This does not dictate, however, that the conspiracies at issue lasted until that date.

the CTAC's allegations sufficiently connect Hellmann to the alleged conspiracies, *see generally* Section III.C, *infra*, and (2) the CTAC's discussion of fraudulent concealment is, with one minor exception, identical to that considered **[*30]** in the First R&R, the court is unmoved that a departure is warranted from its finding that the defendants' price-fixing conduct was inherently self-concealing.

b. *Third Prong - Due Diligence*

Hellmann devotes a single sentence to arguing that the due diligence requirement has not been satisfied, writing that the plaintiffs have failed to make any "allegations regarding any actions that they took to discover their alleged claims against the Hellmann defendants." *See* Motion to Dismiss at p. 23. This argument is nearly identical to that offered in the defendants' Joint Motion to Dismiss, which wrote that the plaintiffs failed to allege "any specific inquiries of [Defendants], [or] detail when such inquiries were made, to whom, regarding what and with what response." First R&R at p. 102 (quoting Joint Motion to Dismiss at p. 28).

The First R&R acknowledged the accuracy of this contention, but disagreed with the premise that it necessitates a conclusion that the due diligence prong has not been satisfied. It noted that "[i]n the antitrust context, '[t]he requisite notice required to defeat a claim of fraudulent concealment is an awareness of sufficient facts to identify . . . the particular cause of action at **[*31]** issue.'" *Id.* at p. 103 (quoting *Molecular Diagnostics Labs. v. Hoffmann-La Roche Inc., 402 F. Supp. 2d 276, 284 (D.D.C. 2005)* and citing *Merck & Co. v. Reynolds, 559 U.S. 633, 130 S.Ct. 1784, 1798, 176 L. Ed. 2d 582 (2010))*. The defendants point to no such awareness here. The mere fact that several defendants simultaneously imposed similar surcharges is not sufficient, because that "could be reflective not of any collusive agreement, but of the fact that the competitors were confronted with the same sets of external variables and already had similar pricing structures in place," and "[i]t is natural to assume that . . . such a reaction would not result from any conspiracy." *Id.* at p. 103 (quoting *In re Air Cargo Shipping Servs. Antitrust Litig., No. 06-MDL-1775 (JG) (VVP), 2010 U.S. Dist. LEXIS 146377, 2010 WL 10947344, at *19 (E.D.N.Y. Sept. 22, 2010))*. Thus, because there were no public statements concerning the existence of a possible conspiracy until October 2007, the court declined to find that plaintiffs had failed to satisfy the due diligence prong, and concluded that "the question of diligence for purposes of fraudulent concealment is better left for" summary judgment or trial. *Id.* at pp. 104-05 (citing cases).

In sum, plaintiffs' failure to affirmatively plead acts of diligence in pursuing a potential cause of action is eclipsed by the overarching fact that the defendants have not identified information of which the plaintiffs were, or should have been, aware that would have triggered **[*32]** the requirement that they take action to discover their claims. Accordingly, ignorance of their claims arose not from their lack of diligence, but instead from the nature of the defendants' activities, which reasonably could have been construed as innocuous, parallel reactions to market forces. Hellmann having offered no novel arguments regarding the due diligence requirement, the court once again adheres to its prior conclusion that the absence of any allegations concerning plaintiffs' affirmative acts of diligence is not fatal to their fraudulent concealment argument.

c. *Second Prong - Timely Initiation of Action*

Finally, the court turns to the question of whether the plaintiffs brought their claims against Hellmann within four years of discovery. In the First R&R this court wrote that "nothing indicates that the plaintiffs have not asserted their claims within four years of discovering them," since the plaintiffs first discovered their claims in October 2007 and subsequently filed the original complaint in January 2008, and the FACAC in July 2009, both of which are well within the four-year limitations period. *See* First R&R at pp. 101-02. Accordingly, plaintiffs argue that since "this Court has already **[*33]** upheld Plaintiffs' fraudulent concealment allegations," it follows that "[t]he analysis is

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[8] Hellmann similarly states that since the plaintiffs "failed to plead facts sufficient to allege conspiratorial conduct on behalf of the Hellmann Defendants, Plaintiffs have failed to plead facts supportive of the first element of fraudulent concealment as to the Hellmann Defendants." Defendants Hellmann Worldwide Logistics GmbH & Co. KG and Hellmann Worldwide Logistics Limited Hong Kong's Memorandum in Support of their Motion to Dismiss Plaintiffs' Corrected Third Amended Class Action Complaint ("Motion to Dismiss") at p. 23.

equally applicable to the Hellmann Defendants." *See* Plaintiffs' Memorandum of Law in Opposition to the Hellmann Defendants' Motion to Dismiss the Third Amended Class Action Complaint ("Opposition") at p. 13.

The court disagrees with the plaintiffs' broad-brush conclusion. Unlike the original complaint and the FACAC, the filing of the March 27, 2013 CTAC (which, as noted, was the first time that Hellmann GmbH and Hellmann HK were named as defendants in this action) did not take place within four years of the plaintiffs' discovery of their claims. Accordingly, the court's prior fraudulent concealment analysis is decidedly not "equally applicable to the Hellmann Defendants." To the contrary, unless the CTAC is held to relate back to the prior complaint (a question addressed in detail below), satisfaction of the second fraudulent concealment prong will require the plaintiffs to demonstrate that they were not aware of their specific claims against Hellmann GmbH and Hellmann HK until March 27, 2009, *i.e.* four years before the claims were first brought against these defendants. *Cf.* *Schenker AG v. Societe Air France, 102 F. Supp. 3d 418, 2015 WL 1951422, at *5 (E.D.N.Y. 2015)* (where allegations **[*34]** "permitt[ed] the inference that [plaintiff] did not suspect Qantas was involved in the conspiracy," court accepted fraudulent concealment argument that plaintiff lacked knowledge of potential antitrust claim against Qantas) (citing *DPWN Holdings (USA), Inc. v. United Air Lines, Inc., No. 11 Civ. 564 (JG), 2014 U.S. Dist. LEXIS 130154, 2014 WL 5394950, at *2 (E.D.N.Y. Sept. 16, 2014))*; *DPWN Holdings, 2014 U.S. Dist. LEXIS 130154, 2014 WL 5394950, at *2* (denying motion to dismiss centering on plaintiff's knowledge of potential antitrust claim where plaintiff "allege[d] that it did not have any direct evidence of United's participation in the conspiracy until" a later date).

A careful reading of the various complaints as well as plaintiffs' motion papers, however, belies such an interpretation. As discussed in Section III.A.3, *infra*, plaintiffs go to great lengths to establish that their naming in the FACAC of only Hellmann Inc. and not Hellmann GmbH or Hellmann HK was the result of a mistake as to the proper defendants' identity. *See* Plaintiffs' Supplemental Memorandum in Further Opposition to the Motion of Defendants Hellmann Worldwide Logistics GmbH & Co. KG and Hellmann Worldwide Logistics Hong Kong to Dismiss Plaintiffs' Corrected Third Amended Class Action Complaint ("Plaintiffs' Supplemental Opposition") at pp. 1-2 ("[T]he FACAC . . . mistakenly alleged that Messrs. Poon, Hellmann and Lai [who were **[*35]** invited to attend meetings concerning the Peak Season Surcharge] were employees of Hellmann [Inc.]. In fact, . . . they were employees of Hellmann HK. Plaintiffs corrected their mistake by adding Hellmann [GmbH] and Hellmann HK as Defendants in the CTAC . . . ."); *id.* at p. 10 ("The FACAC mistakenly identified Hellmann [Inc.] as invited [to] and/or participating, through identified individuals, in meetings concerning surcharge conspiracies. Plaintiffs fixed this mistake in the CTAC . . . .").

As impliedly conceded by plaintiffs, therefore, this case (unlike *Schenker* and *DPWN Holdings*) is not one in which, at the time they filed the FACAC, the plaintiffs lacked the information necessary for the discovery of Hellmann GmbH's and Hellmann HK's involvement in the alleged conspiracies. To the contrary, Plaintiffs' Supplemental Opposition expressly states that "[a]s corrected, the CTAC alleges Hellmann's involvement in the same conspiratorial meetings, through the same identified individuals, as the FACAC does." *See id.* at p. 10. Accordingly, the fact that the court previously recommended that the statute of limitations be tolled in part because the prior complaints were brought within four years of the plaintiffs **[*36]** learning of their cause of action does not, as plaintiffs assert, dictate that the same holds true here. Rather, because the plaintiffs failed to bring any claims against Hellmann GmbH or Hellmann HK within four years of possessing the information necessary to bring an action against those defendants, the second requirement for fraudulent concealment is not satisfied.

Plaintiffs' fraudulent concealment argument thus fails. Accordingly, the claims against Hellmann GmbH and Hellmann HK are timely only if the filing of the CTAC relates back to the date of the FACAC. It is to this issue which the court now turns.

3. Relation Back

a. *Introduction*

The parties' supplemental memoranda address the question of whether *Fed. R. Civ. P. 15*'s relation back doctrine renders timely the plaintiffs' addition of Hellmann HK and Hellmann GmbH in the CTAC. Because, as discussed above, the CTAC was filed after the expiration of the applicable statute of limitations, the amendment would be time-barred if it is not held to relate back to the filing of the FACAC.

Fed. R. Civ. P. 15(c)(1)(C) provides that an amendment to a pleading relates back to the date of the original pleading when

> the amendment changes the party or the naming of the party against whom **[*37]** a claim is asserted, if *Rule 15(c)(1)(B)* is satisfied[9] and if, within the period provided by *Rule 4(m)*[10] for serving the summons and complaint, the party to be brought in by amendment:
> (I) received such notice of the action that it will not be prejudiced in defending on the merits; and
> (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

Fed. R. Civ. P. 15(c)(1)(C). The parties' key point of contention is whether the plaintiffs' failure to name Hellmann HK and Hellmann GmbH in the FACAC was the result of a "mistake" within the meaning of the Rule.

The Supreme Court's decision in *Krupski v. Costa Crociere, 560 U.S. 538, 130 S. Ct. 2485, 177 L. Ed. 2d 48 (2010)* provides the starting point for the *Rule 15(c)(1)(C)(ii)* "mistake" inquiry. In *Krupski*, the plaintiff was injured aboard a cruise ship and sued Costa Cruise Lines, which had issued her ticket. *Id. at 541*. Costa Cruise Lines thereafter informed the plaintiff that Costa Crociere, the ship's carrier, was the proper defendant. *See id. at 543*. After the statute of limitations had expired, the plaintiff sought, and was granted, leave to amend her complaint to add Costa Crociere as a defendant. *Id. at 544*. When the plaintiff then filed an amended complaint and Costa Cruise Lines was dismissed from the case, Costa Crociere moved for dismissal **[*38]** on the grounds that the amended complaint did not relate back to the prior complaint and was therefore untimely. *Id. at 544-45*. The Court rejected Costa Crociere's argument, concluding that, on those facts, *Rule 15*'s "mistake" requirement had been met. *See id. at 556-57*.

Krupski primarily stands for the notion that the correct inquiry under *Rule 15(c)(1)(C)(ii)* is not whether a plaintiff knew or should have known that the proposed defendant was the proper party to be sued, but instead "whether [the proposed defendant] knew or should have known that it would have been named as a defendant but for an error." *Id. at 548*. Information in the plaintiff's possession is relevant only insofar as is "bears on the defendant's understanding of whether the plaintiff made a mistake regarding the proper party's identity." *Id.*

The most immediately significant portion of *Krupski* lies elsewhere, however. The Court stated that "it would be error to conflate knowledge of a party's existence with the absence of mistake," that is, a plaintiff may know of a party's existence and still "mak[e] a mistake with respect to that party's identity." *Id. at 548-49*. Accordingly,

> [a] plaintiff may know that a prospective defendant—call him party A—exists, while erroneously believing him to have **[*39]** the status of party B. Similarly, a plaintiff may know generally what party A does while misunderstanding the roles that party A and party B played in the "conduct, transaction, or occurrence" giving rise to her claim. If the plaintiff sues party B instead of party A under these circumstances, she has made a "mistake concerning the proper party's identity" notwithstanding her knowledge of the existence of both parties.

Id. at 549.

As such, a plaintiff who knows that a prospective defendant exists, but, due to a misunderstanding about that party's status or role with respect to her claim, mistakenly chooses to sue a different defendant, may still satisfy the requirements of *Fed. R. Civ. P. 15*. *See id.* By contrast, the requirements of *Rule 15* are not satisfied when "the

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[9] *Rule 15(c)(1)(B)* requires that "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading."

[10] The relevant time period is 120 days after the complaint is filed. *Fed. R. Civ. P. 4(m)*.

failure to name the prospective defendant in the original complaint was the result of a fully informed decision as opposed to a mistake concerning the proper defendant's identity." *Id. at 552*.

In a vacuum, *Krupski* is straightforward enough and, for present purposes, can be summarized as follows: initially, a court considering the question of "mistake" for relation back purposes must consider the knowledge in the possession of the prospective defendant, not the plaintiff. **[*40]** Further, a *Rule 15(c)* "mistake" is not necessarily limited to instances in which the plaintiff is unaware of the prospective defendant's existence; rather, the rule contemplates scenarios in which the plaintiff knows of a party's existence, but nonetheless harbors a mistake about its status or involvement in the events underlying the plaintiff's claim.

There has emerged, however, significant discord within the Second Circuit concerning one aspect of *Krupski*'s reach. In *In re Vitamin C Antitrust Litig., 995 F. Supp. 2d 125 (E.D.N.Y. 2014)*, Judge Cogan framed the following binary regarding two types of relation back cases:

> The first category, "wrong party" cases, is where a plaintiff has sued the wrong party or used the wrong name and seeks to amend to substitute the right party or the right name. The second category, "additional party" cases, is where the defendants originally sued are indeed exposed to liability on the theories alleged, but the plaintiff has omitted an additional party against whom the plaintiff also could have stated a claim.

Id. at 129 (internal citation omitted). *Krupski* "was a wrong party case if ever there was one, and emphatically not an additional party case," *id. at 130*, insofar as the plaintiff sued one defendant, and upon learning that defendant to be the **[*41]** wrong party, later sought to sue the "right" one. It is beyond cavil that this constitutes a *Rule 15* mistake, and that relation back applies in these situations. What remains unclear, however, is whether an amendment may also relate back in "additional-party" cases; those where a plaintiff sues one defendant, and later seeks to add another one. The instant matter falls squarely within the latter camp, and as such, the parties now contest whether the "mistake" prong articulated in *Rule 15* and construed by the *Krupski* Court applies in the present "additional-party" case. As discussed below, the court agrees with Hellmann's argument (which is premised almost entirely on *Vitamin C*) that this question should be answered in the negative, and therefore finds that the relation back doctrine does not render timely the CTAC's addition of Hellmann GmbH and Hellmann HK.

b. *In re Vitamin C Antitrust Litig.*

As noted, the *Vitamin C* court considered

> whether [*Rule 15*'s] final clause—the proposed party "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity"—refers not only to the substitution of a proper party for an erroneously named party, but **[*42]** also to the addition of a new party when all of the parties previously named were themselves proper parties.

See *id. at 128*.

The court in *Vitamin C* answered the question as follows:

> *Rule 15(c)(1)(C)* does not encompass just any mistake. It requires a mistake "concerning *the proper party's identity*." (Emphasis added.) As a matter of plain language, this provision would appear to include only "wrong party" cases, and not "additional party" cases. This is because the "mistake" has to "concern[ ]" the "identity" of the "proper party [ ]." In an "additional party" case . . . , there generally will be no "mistake concerning" the proper party's "identity." The plaintiff has sued the right defendant, and simply neglected to sue another defendant who might also be liable. If the drafters of *Rule 15* had meant to allow relation back in this situation, they could have easily done so.

Id. at 129. Judge Cogan found support in the Rule's Advisory Committee notes, writing that an interpretation that limits *Fed. R. Civ. P. 15* to wrong party cases "is consistent with the Advisory Committee notes to *Rule 15(c)*, which address the concept of 'wrong party' cases without ever mentioning 'additional party' cases." *See id.* n.2.[11] He concluded that "Rule 15(c)(1)(C) is addressed to the situation where **[*43]** a plaintiff has sued the wrong party, and the right party, reasonably aware of the error, sits on the sidelines while the statute of limitations runs out." Id. at 130.

Citing several of the cases upon which Hellmann's present argument is premised, *see* Section III.A.3.c *infra*, Judge Cogan "recognize[d] that, in the wake of the Supreme Court's decision in *Krupski*, several district courts have . . . held that Rule 15(c) can be satisfied where the plaintiff '[lacked] knowledge regarding the conduct or liability' of the newly added party, even where the originally named party was proper." *See id.* (citing cases and quoting Abdell v. City of New York, 759 F. Supp. 2d 450, 457 (S.D.N.Y. 2010)) (internal citation omitted). However, Judge Cogan took issue with these courts' construction of *Krupski*, writing that

> although *Abdell* and the other decisions cited relied on *Krupski*, they failed to recognize that *Krupski* was a wrong party case if ever there was one, and emphatically not an additional party case. . . . Because *Krupski* spent so much analysis considering the proposed new defendant's knowledge that it was the party that should have been sued (and discounting the significance of the plaintiff's knowledge), it **[*44]** is easy to slide into the belief, as *Abdell* and its progeny did, that all that matters is what the proposed new party knows. However, the starting point for *Krupski* was a suit against the wrong party, and all of its discussion of knowledge must be seen in that context. Where a plaintiff has not mistakenly sued the wrong party, a court need not consider what a defendant knows and when the defendant knew it; the threshold requirement for Rule 15(c)(1)(C)—a "mistake concerning the proper party's identity"—has not been met.

Id. at 130-31 (citing Turner v. Nicoletti, No. 12 Civ. 1855, 2013 U.S. Dist. LEXIS 108580, 2013 WL 3989071, at *3 (W.D. Pa. Aug. 2, 2013)).

Applying this distinction, Judge Cogan wrote that, unlike the plaintiff in *Krupski*, the *Vitamin C* plaintiffs "did not 'mistakenly choose to sue' [the original defendant] based on any 'misimpression.' They correctly sued [the original defendant], and for whatever reason did not sue [the proposed additional defendant] as well." Id. at 131. He therefore concluded that the proposed claims did not relate back under Rule 15 to the timely-filed complaint. *See id.*

In the short time since its passage, *Vitamin C* has been met with approval. The court in Velasquez v. Digital Page, Inc., No. 11 Civ. 3892 (LDW)(AKT), 2014 U.S. Dist. LEXIS 68538, 2014 WL 2048425 (E.D.N.Y. May 19, 2014), for example, cited *Vitamin C* for the proposition that "Rule 15(c) does not apply in cases where a plaintiff seeks to add an *additional* party as a defendant." **[*45]** 2014 U.S. Dist. LEXIS 39321, [WL] at *3; *see* Erdogan v. Nassau Cnty., No. 10 Civ. 05837 (AKT), 2014 U.S. Dist. LEXIS 39321, 2014 WL 1236679, at *11 (E.D.N.Y. Mar. 25, 2014) (same); *see also* Zeller v. PDC Corp., No. 13 Civ. 5035 (ARR)(JO), 2015 U.S. Dist. LEXIS 32573, 2015 WL 1223719, at *2 (E.D.N.Y. Mar. 17, 2015) (quoting *Vitamin C* that "[a]s a matter of plain language, this provision [subsection (C)] would appear to include only 'wrong party' cases, and not 'additional party' cases.").

c. *Analysis*

To be sure (and as acknowledged by Judge Cogan), there exists substantial authority to the contrary. The court in Doe v. Whelan, No. 3:08 Civ. 846 (CSH), 2010 U.S. Dist. LEXIS 130021, 2010 WL 5093102 (D. Conn. Dec. 8, 2010), for example, addressed the question whether, on a motion to amend a complaint pursuant to Rule 15, "Mysogland may be *added* as a third defendant, as Plaintiffs wish, or whether, as Defendants argue, Mysogland must be *substituted* for an existing defendant . . . who must in turn be dismissed." 2010 U.S. Dist. LEXIS 130021,

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[11] The court agrees that the Advisory Committee Notes betray a concern for situations involving changing, rather than adding, parties. *See* Fed. R. Civ. P. 15 advisory committee's note ("In actions between private parties, the problem of relation back of amendments *changing* defendants has generally been better handled by the courts, but incorrect criteria have sometimes been applied, leading sporadically to doubtful results. Rule 15(c) has been amplified to provide a general solution.") (emphasis added) (internal citation omitted). The Advisory Committee's statement that "a complaint may be amended at any time to correct a *formal defect such as a misnomer or misidentification*" further suggests a narrow, substitution-centric reading of Rule 15. *See id.* (emphasis added).

[WL] at *1. In permitting the addition of the new defendant, the court expressly declined to read *Krupski* as requiring the substitution of one defendant for another. *See* 2010 U.S. Dist. LEXIS 130021, [WL] at *3 n.3 ("Regardless of whether [*Krupski*] involved the addition or substitution of defendants, the rationale expressed therein for permitting the relation back, namely the preference for enabling decisions on the merits by permitting the correction of errors, supports a finding that it is appropriate here as well."); *see also* Patrick v. Garlick, 66 F. Supp. 3d 325, 2014 WL 6883634, at *2-3 (W.D.N.Y. 2014) (permitting addition of defendant to relate back where naming of original defendant demonstrated **[*46]** that plaintiffs "clearly harbored a misunderstanding as to" latter's status); S.A.R.L. Galerie Enrico Navarra v. Marlborough Gallery, Inc., No. 10 Civ. 7547 (KMW) (RLE), 2013 WL 1234937, at *5 (S.D.N.Y. Mar. 25, 2013) (court applied relation-back to additional defendants where "the information regarding their involvement only recently came to light," thus constituting a mistake under Rule 15), *reconsideration denied*, No. 10 Civ. 7547 (KMW)(RLE), 2013 U.S. Dist. LEXIS 150273, 2013 WL 5677045 (S.D.N.Y. Oct. 18, 2013); Bayerische Landesbank v. Aladdin Capital Mgmt. LLC, 289 F.R.D. 401, 405 (S.D.N.Y. 2013) ("[T]he three-year statute of limitations does not prohibit an amendment adding ACH as a defendant at this stage because the proposed Second Amended Complaint relates back to the original complaint."); Roe v. Johnson, No. 07 Civ. 2143 (RJD)(RER), 2011 U.S. Dist. LEXIS 155584, 2011 WL 8189861, at *4 (E.D.N.Y. Aug. 12, 2011) (*Krupski*'s "holding applies equally to cases where the 'mistake concerning the proper party's identity' results in the substitution or addition of defendants") (citing cases), *report and recommendation adopted*, No. 07 Civ. 2143 (RJD) (RER), 2012 U.S. Dist. LEXIS 92352, 2012 WL 2575340 (E.D.N.Y. July 3, 2012); Abdell, 759 F. Supp. 2d at 456-57 (S.D.N.Y. 2010) ("Careful review of the *Krupski* opinion . . . belies [a] narrow understanding of a Rule 15(c) 'mistake'" under which relation back is limited to wrong-party cases and does not contemplate mistakes consisting of "lack of knowledge regarding the involvement of additional parties.").[12]

In light of the above, it is clear that there exists considerable authority supporting the notion that a Rule 15 "mistake" permits the addition—as opposed to merely the substitution—of a defendant to relate back to **[*47]** the original complaint. This is true even if the plaintiff was aware of the proposed defendant's existence at the time of the initial pleading, so long as the plaintiff can demonstrate that she misapprehended that party's status or role in the events underlying her claim. Such a reading entails an extension of the decidedly "wrong-party" *Krupski* to the "additional-party" arena.

Ultimately, however, the court is persuaded by Judge Cogan's compelling analysis in *Vitamin C*, which demonstrated that the plain meaning of Rule 15, the Rule's Advisory Committee Notes, and *Krupski* all evince a preference for limiting Rule 15(c) mistakes to wrong-party cases. The Rule plainly refers to mistakes concerning the proper party's identity, which, as Judge Cogan noted, "would appear to include only 'wrong party' cases, and not 'additional party' cases," Vitamin C, 995 F. Supp. 2d at 129, an interpretation that finds support in the Rule's Advisory Committee Notes. Similarly, *Krupski* contemplated a scenario in which "the plaintiff sues party B instead of party A." Krupski, 560 U.S. at 549. It did not, however, discuss one in which the plaintiff sues *only* party B instead of *both* party A and party B. The implication, then, is that *Krupski* is directed toward those scenarios in **[*48]** which one party is sued instead of another party—*i.e.* wrong party cases—to the exclusion of additional party cases, where a plaintiff's need for an amendment stems from her failure to vigorously determine the identities of all potential defendants. In view of this "starting point," therefore, the court agrees with *Vitamin C* that "all of [*Krupski*'s] discussion of knowledge must be seen in th[e wrong party] context," *see* Vitamin C, 995 F. Supp. 2d at 130, a significant factor that appears to have been overlooked by the opposing authority.

Because the present case, like *Krupski*, does not involve John Doe defendants, *Barrow* and its progeny (*e.g.*, *Hogan* and *Scott*) is not directly applicable. It is instructive, however, insofar as both John Doe cases and garden-variety additional-party cases such as this contemplate the same general type of "mistake" arising from a plaintiff's failure to sue a party she knows (or should know) to be involved in her cause of action. In the former instance, this takes the form of the plaintiff being unable to specifically identify the additional party; in the latter, it presents as the

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[12] Plaintiffs also cite as support VKK Corp. v. National Football League, 244 F.3d 114 (2d Cir. 2001), in which the Second Circuit allowed the addition of a defendant to relate back to the timely-filed complaint. *See* id. at 128-29. However, *VVK Corp.* well predates *Krupski*, and as such, carries limited weight.

plaintiff, "for whatever reason," choosing not to sue it. *See* Vitamin C, 995 F. Supp. 2d at 131. Since the plaintiff in both scenarios has **[*49]** or should have at least a general awareness that the additional party should have been sued, it follows that her "lack of knowledge does not constitute a 'mistake' for relation back purposes." *See* id. at 130 (citing Barrow, 66 F.3d at 470). Wrong-party cases such as *Krupski*, however, are analytically distinguishable in that their geneses is not a correctly-sued party, but instead a more fundamental mistake as to the correct target of the litigation. Stated otherwise, additional-party cases are, for present purposes, conceptually analogous to John Doe cases, where the Second Circuit does not allow lack of information about the identities of additional parties to constitute a "mistake" under Rule 15. Thus, although John Doe cases such as *Barrow*, *Hogan*, and *Scott* are categorically distinguishable from the case *sub judice*, they provide indirect support for the court's conclusion that *Krupski* should not extend to additional-party matters.

Despite being widely discussed amongst the district courts, *Krupski* has been cited only twice by the Second Circuit. Both matters, *Hogan v. Fischer, 738 F.3d 509 (2d Cir. 2013)* and *Scott v. Vill. of Spring Valley, 577 F. App'x 81 (2d Cir. 2014)* were "John Doe" cases in which the plaintiff sought to amend a complaint to name defendants whose identities were unknown at the time the original complaint **[*50]** was filed. *Hogan* and *Scott* both relied upon the seminal "John Doe" decision in *Barrow v. Wethersfield Police Dep't, 66 F.3d 466 (2d Cir. 1995)*, where the Second Circuit wrote that "the failure to identify individual defendants when the plaintiff knows that such defendants must be named cannot be characterized as a mistake." *Barrow, 66 F.3d at 470*.

In light of the above, the court finds that *Fed. R. Civ. P. 15(c)(1)(C)(ii)*'s "mistake" prong has not been satisfied.[13] The CTAC's claims against Hellmann therefore do not relate back to the filing of the prior complaint and, accordingly, are time-barred.

B. CORPORATE GROUPING

The discussion that follows addresses corporate grouping and plausibility, the two other areas of argument advanced by Hellmann in support of its motion. As noted at the outset of this opinion, this discussion becomes significant only if the court rejects the recommendation above that the claims against Hellmann be dismissed on statute of limitations grounds.

1. Introduction

Hellmann has also sought dismissal on the strength of an improper corporate grouping argument with which the Court is intimately familiar, having addressed similar arguments in both the First and Second R&Rs. *See* First R&R at pp. 28-41; Second R&R at pp. 22-31. Hellmann contends that the plaintiffs have "impermissibly lumped" together Hellmann GmbH, Hellmann **[*51]** HK, and Hellmann Inc. without providing any factual basis to distinguish their conduct. These allegations, according to Hellmann, fail to satisfy the minimum pleading standard, since none of the individual Hellmann entities has been provided fair notice of the claims asserted against it. *See generally* Motion to Dismiss at pp. 6-8.

Armed with the benefit of having previously considered two sets of corporate grouping allegations—the first in the SACAC, which the First R&R deemed insufficient to withstand dismissal, and the second in the CTAC, which the Second R&R held to satisfy the pleading standard—the court need not begin its analysis at square one. Instead, its task in assessing Hellmann's grouping argument is straightforward: it must determine whether the allegations concerning Hellmann's corporate structure more strongly resemble the analogous portions of the SACAC or the CTAC previously considered by the court. Further, because both the First and Second R&Rs invoked the SACAC's and CTAC's allegations concerning the corporate structure of defendants Panalpina World Transport (Holding) Ltd. and Panalpina, Inc. (collectively "Panalpina") as specific examples, respectively, of insufficient **[*52]** (in the

[13] In view of this conclusion, it is unnecessary to address the question of whether the relation back requirements set forth in *Fed. R. Civ. P. 15(c)(1)(B)* and *Fed. R. Civ. P. 15(c)(1)(C)(I)* have been satisfied.

SACAC) and sufficient (in the CTAC) allegations concerning corporate structure, a comparison of the CTAC's allegations discussing the Hellmann corporate family with the similar portions of the SACAC and CTAC concerning Panalpina will serve as a useful springboard for the court's analysis.

2. SACAC / First R&R

As noted, the First R&R considered the SACAC's allegations regarding Panalpina's corporate structure, the entirety of which was a brief discussion of Panalpina World Transport (Holding) Ltd.'s status as Panalpina, Inc.'s parent, and assertions that both the parent and subsidiary "directly or through [their] subsidiaries and/or affiliates, sold Freight Forwarding Services throughout the United States." *See* SACAC at ¶¶ 23-24. Accordingly, the court wrote that while the plaintiffs "allege that a representative of 'Panalpina' participated in a meeting on a certain date, seeking to attribute the agreement to conspire on that date to all Panalpina entities," they fail to explain "why *these* Panalpina entities, rather than any other Panalpina entities, entered into the agreements to fix prices." *See* First R&R at p. 29.

Observing that "[t]his type of pleading is repeated for the majority of the defendants," **[*53]** the court continued that

> [t]he plaintiffs do not specifically allege that the parents, subsidiaries, or affiliates of these corporate defendants either joined the alleged conspiracies individually nor were aware of their existence. They also make no claim that the separate corporate existence of these entities should be ignored. Instead, they rely on what appears to be a joint liability theory to put entire corporate families on the hook for antitrust violations. . . . The plaintiffs' complaint thus fails the basic pleading requirement that . . . [they] "indicate clearly the defendants against whom relief is sought, and the basis upon which relief is sought against the particular defendants." . . . [T]he plaintiffs wish to put individual defendants on the hook for antitrust violations based on corporate affiliation alone, arguing that because they have alleged that each defendant "directly or through its subsidiaries and affiliates, sold Freight Forwarding Services throughout the United States" the Court can infer that those subsidiaries and affiliates also conspired in violation of antitrust laws. This is not a reasonable inference to be drawn. The conduct that forms the basis for **[*54]** the plaintiffs' conspiracy claims is collusion in the charging of fixed fees and surcharges, not the sale of freight forwarding services generally.

Id. at pp. 29-30, 34-35 (quoting *Yucyco, Ltd. v. Republic of Slovenia, 984 F. Supp. 209, 219 (1997))*.

We thus concluded that "the plaintiffs['] corporate group pleading method only leaves 'open the possibility that [they] might later establish some set of [undisclosed] facts to support recovery' against the affiliates. This is not enough." *Id.* at p. 38 (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))* (internal citation and quotation marks omitted). The court therefore recommended dismissal (without prejudice) of the claims asserted against the improperly grouped defendants. *See id.* at pp. 39-40.

3. CTAC / Second R&R

In contrast to the SACAC's meager allegations concerning the defendants' corporate structures, the plaintiffs in the CTAC offered a thorough exposition of how "the various corporate families acted as single enterprises with the parent companies exercising substantial control over their subsidiaries." *See* CTAC at p. 36; *id.* at ¶¶ 105-79. Included are allegations concerning (1) the nature of the freight forwarding industry; (2) defendant representatives acting on behalf of their entire corporate families; (3) collusive agreements being directed from the top-down; and (4) perhaps most significantly, **[*55]** itemized, defendant-specific "[e]xamples of corporate control over subsidiaries and affiliates and unified activity between corporate families."[14] *See generally* CTAC at ¶¶ 105-79.

[14] For instance, the CTAC alleged that the Panalpina "parent corporation treats its subsidiaries as mere divisions of the company rather than separate entities" and that it exerts "substantial control over its subsidiaries such that it is a single enterprise." *See* CTAC at ¶¶ 140-41.

Accordingly, in the Second R&R we wrote the following regarding the defendants' improper grouping argument:

> The plaintiffs [in the CTAC] have offered extensive allegations as to both the defendants' corporate structure and the means and method of executing the conspiracies. The allegations support the inference that corporate affiliates both entered into the agreements and aided and assisted in executing them. The allegations of the [C]TAC, which provide significantly more detail as to the role of the affiliated entities in the alleged conspiracies than the previous complaint, adequately allege that each entity joined the conspiracy and/or acted as an agent of its affiliates in carrying out the conspiracies. . . . Unlike the SAC[AC], . . . the [C]TAC includes significant detail that establishes how the antitrust misconduct here naturally involved (and often required) the knowledge and participation of the members of corporate families in the conspiracies. Thus, the [C]TAC includes allegations that each representative **[*56]** at a meeting or discussion acted on behalf of its affiliates and reported the agreements to the entire corporate family.

Second R&R at pp. 23-24 (citing CTAC at ¶¶ 105, 107).

In light of the foregoing—coupled with "[t]he plaintiffs' allegations regarding the nature of the industry and the methods of executing the conspiracies"—we recommended denial of the defendants' improper corporate grouping argument. *See generally* Second R&R at pp. 25-31.

4. Application

Against this backdrop the court now turns to the CTAC's allegations concerning Hellmann's corporate structure. As was the case with the CTAC's allegations against Panalpina (and the other corporate defendants, for that matter), the allegations regarding Hellmann suffice to survive dismissal on improper grouping grounds.

First, almost all of the portions of the CTAC referenced in the Second R&R's core grouping discussion either find an expressly Hellman-centric analogue in the CTAC, or, by logical extension, apply with the same force to Hellmann as to the other defendants. *See* Second R&R at pp. 24-26 (citing CTAC ¶¶ 34-97 (discussing each defendant's corporate structure), ¶¶ 105-08 (nature of freight forwarding industry necessitated companies to operate as single enterprises), ¶¶ 109-33 (examples of how **[*57]** defendants "required an integrated enterprise in order to achieve their conspiratorial aims," discussions of corporate representatives acting on behalf of "entire corporate famil[ies]" and collusive agreements being directed from top down)).

Significantly, the Second R&R's conclusion was not undercut by the fact that the CTAC lacked examples for each corporate defendant "of instances where co-conspirators communicated and oversaw their affiliates' knowing participation in the surcharge conspiracies"; such were not necessary because, "[g]iven the nature of the industry and the conspiracies at issue in the [C]TAC, it makes economic sense and is reasonable to infer that the corporate affiliates grouped together acted in concert and individually joined the conspiracies." *See id.* at p. 26. Similarly, although the CTAC's illustrations of "how employees of one corporate family member would report back to its corporate affiliates regarding the collusive surcharges . . . do not include every corporate family, that is not fatal because on a motion to dismiss, the plaintiffs need not prove their allegations; they only have to make plausible ones." *Id.* at p. 28. To this end, the fact that Hellmann is not mentioned in **[*58]** the section of the CTAC that provides "examples of how the Defendants . . . required an integrated enterprise in order to achieve their conspiratorial aims," *see* CTAC ¶¶ 109-33, does not undermine the Second R&R's applicability.

Further, among the CTAC's "[e]xamples of corporate control over subsidiaries and affiliates and unified activity between corporate families" is a discussion of Hellmann GmbH's "corporate control" over its subsidiaries as well as the "unified activity" between the three Hellmann entities. *See* CTAC at ¶ 179. The CTAC's Hellmann-specific allegations thus suggest the same conclusion as that reached in the Second R&R—that the plaintiffs "adequately allege that each [Hellmann] entity joined the conspiracy and/or acted as an agent of its affiliates in carrying out the conspiracies." *See* Second R&R at p. 24.

It also follows that the Second R&R's discussion of *In re Cathode Ray Tube (CRT) Antitrust Litig., 738 F. Supp. 2d 1011 (N.D. Cal. 2010)* ("CRT") and *In re: TFT-LCD (Flat Panel) Antitrust Litig., 599 F. Supp. 2d 1179 (N.D. Cal.*

2009) ("*Flat Panel*")—which, notably, Hellmann has not even attempted to distinguish—is as apposite here as in its original context. Specifically, the court's assertion that "[t]he defendants' arguments are without merit because the allegations in the [C]TAC are very similar to, and at times even more detailed, than those cited **[*59]** as sufficient in *CRT* and *Flat Panel*," Second R&R at p. 28, applies four-square to Hellmann.[15]

Hellmann's arguments to the contrary do not compel a departure from the court's conclusion in the Second R&R. Perhaps most telling is Hellmann's somewhat disingenuous attempt to sidestep the impact of the court's prior holdings. In its motion, Hellmann states that "Plaintiffs allege nothing beyond corporate affiliations, which the Court has already held is insufficient to satisfy pleading requirements." Motion to Dismiss at p. 7. In purported support, however, Hellmann proceeds to quote from Judge Gleeson's August **[*60]** 13, 2012 Order adopting the *First* R&R—which concerned the SACAC, *not* the CTAC. Moreover, after writing that "[p]laintiffs plead only the following bare allegations" regarding the individual Hellmann entities, Hellmann cites only the portion of the CTAC (¶ 69) which provides general information about the Hellmann corporate family, while ignoring the curative ¶ 179, which mirrors the portions of the CTAC previously deemed sufficient to defeat the joint defendants' corporate grouping argument. *See* Motion to Dismiss at pp. 7-8. Hellmann's argument thus relies upon facts and conclusions of law that ceased to be relevant once the plaintiffs filed the TAC, and subsequently, the CTAC.

In sum, the allegations concerning Hellmann's corporate structure (which are supported by entries from Hellmann's website and corporate linkedin.com page) are analogous to those which the court has previously held sufficient to survive a motion to dismiss, and far more robust than those which the court has found to be inadequate. Accordingly, the court recommends denying Hellmann's motion insofar as it seeks dismissal on the grounds of improper corporate grouping.[16]

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[15] In addition, since the issuance of the Second R&R, both *CRT* and *Flat Panel* have been met with approval. The court in *In re Lithium Ion Batteries Antitrust Litig., No. 13-MD-2420 (YGR), 2014 U.S. Dist. LEXIS 141358, 2014 WL 4955377 (N.D. Cal. Oct. 2, 2014)*, for example, relied upon these decisions in denying a motion to dismiss premised upon an improper corporate grouping argument. Citing both cases as support, the *Lithium* court wrote that "[t]he mere failure to observe fine distinctions among corporate entities . . . does not . . . render implausible the suggestion of collusion." *2014 U.S. Dist. LEXIS 141358, [WL] at *32*. It concluded that

> "[a]lthough Plaintiffs will need to provide evidence of each Defendants' participation in any conspiracy, they now [*i.e.* at the motion to dismiss stage] only need to make allegations that plausibly suggest that each Defendant participated in the alleged conspiracy." . . . The inference . . . that generic references to NEC . . . implicate both NEC Corp. and NEC Tokin—is plausible, and the competing inference, that in informal communication defendants' employees carefully delineated between similarly branded corporate entities . . . is not.

*2014 U.S. Dist. LEXIS 141358, [WL] at *34* (quoting *In re Static Random Access Memory (SRAM) Antitrust Litig., 580 F. Supp. 2d 896, 904 (N.D. Cal. 2008))*.

[16] Hellmann also argues that the CTAC does not support a plausible inference of liability on either corporate veil-piercing or agency theories. *See generally* Motion to Dismiss at pp. 8-12. As stated in the Second R&R, however,

> [i]n antitrust cases, courts analyze **[*61]** allegations that group together corporate families under various standards — they look to the standards for agency, for piercing of the corporate veil, or to whether the allegations sufficiently allege that each corporate affiliate individually joined the conspiracy. There is not a clear distinction in the cases between these standards — rather, it depends primarily on the type of case, type of industry, and nature of the antitrust violation.

Second R&R at p. 23.

Accordingly, the paramount inquiry is "whether, based on the allegations, one can plausibly infer that each defendant knowingly joined and played some role in the conspiracy." *See id.* Having answered this question in the affirmative based on the foregoing corporate grouping analysis, the court need not separately address the related doctrines of veil-piercing and agency. *See id.* at p. 24 n.12 (declining to conduct veil-piercing analysis, but noting that "the allegations in the TAC are sufficient to allege that some of the parent defendants here controlled their subsidiaries as to the transactions at issue.") (citing *American Fuel Corp. v. Utah Energy Development Co., Inc., 122 F.3d 130, 134 (2d Cir. 1997))*.

C. PLAUSIBILITY OF THE CLAIMS

Hellmann further argues for dismissal of the Third, Fifth, Ninth, and Tenth Claims for their failure to make specific allegations against Hellmann supportive of a claim under *Section 1 of the Sherman Act*. It also asserts that the Tenth Claim should be dismissed because the allegations contained therein are "[i]nherently [c]ontradictory." The court now addresses *seriatim* the plausibility of these claims' allegations as asserted against Hellmann.

1. Third Claim - New Export System

Fee Agreement ("NES Claim")

Hellmann contends that the CTAC's third claim, which concerns the 2002 New Export System Fee ("NES") Agreement, must be dismissed as against it for failing to satisfactorily allege a claim under the Sherman Antitrust **[*62]** Act. The court in the Second R&R considered a similar individual motion seeking to dismiss the NES claim as against the DSV Defendants. Like Hellmann, DSV argued that the allegations concerning its representative's involvement in the NES conspiracy fell "far short of alleging that any DSV entity engaged in any conduct that constitutes entering into a price fixing agreement." *See* Dkt. No. 779 at p. 7 (citing *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009))*.

The court disagreed and upheld the Third Claim as against the DSV Defendants. Its conclusion rested on the allegations that an employee of DFDS (one of the entities comprising the DSV Defendants, *see* CTAC at ¶ 61) [TEXT REDACTED BY THE COURT]. *See* Second R&R at pp. 52-53 (citing CTAC at ¶¶ 342-51). The court wrote that "[s]uch allegations, that a defendant knowingly agreed to a conspiracy to fix prices with its competitors, are sufficient to state a claim against that defendant." *Id.* at p. 53 (citing *Mayor and City Council of Baltimore, Md. v. Citigroup, Inc., 709 F.3d 129, 135-36 (2d Cir. 2013)*; *Anderson News, L.L.C. v. American Media, Inc., 680 F.3d 162, 184 (2d Cir. 2012))*.

The NES allegations against Hellmann carry equal weight. The CTAC alleges that Peter Cochrane, a Hellmann representative, attended a meeting with representatives from several other corporate defendants at which the attendees "agreed to implement a NES fee on their customers" and "discussed how they would monitor **[*63]** each other's compliance with their agreement." *See* CTAC at ¶¶ 345-46; *id.* at ¶ 349 [TEXT REDACTED BY THE COURT] The CTAC also alleges that the NES Defendants (a group to which Hellmann is alleged to have belonged, *see id.* at p. 99) imposed the agreed-upon NES fee. *See id.* at ¶ 348. Having found essentially identical allegations sufficient to withstand DSV's motion to dismiss, the court sees no reason to grant dismissal of the NES claim as against Hellmann.[17]

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[17] Hellmann here also rehashes its improper corporate grouping argument, asserting that the NES claim fails because it makes the Hellmann entities "a 'corporate family' unit without alleging a basis for doing so," and accordingly "fail[s] to allege sufficient facts to support a claim of conspiracy" against any of the individual Hellmann entities. *See* Motion to Dismiss at p. 12. In the Second R&R, the court considered the DSV Defendants' similar argument for dismissal which asserted that the plaintiffs "do not allege which corporate entity employed [a DSV representative] nor do plaintiffs allege he was acting for either DSV A/S or DSV Solutions." *See* Dkt. No. 779 at pp. 6-7. Although, as we do here, the Second R&R found this argument to fail "[f]or the reasons discussed in the grouping section above," the court's elucidation for its DSV-specific finding—namely, that the plaintiffs adequately alleged that the DSV parent and a DSV subsidiary "are responsible for the conduct of [a second DSV subsidiary] or independently joined the agreements," *see* Second R&R at pp. 53-54—further supports the court's identical holding here. To wit, the court noted that "[t]he TAC alleges that DSV A/S . . . is the parent company of both DSV Solutions and DFDS." *Id.* at p. 54 (citing TAC ¶¶ 59-61). This, coupled with "the allegations of corporate control, the nature of the freight forwarding industry, and the allegations that the participation of corporate affiliates was necessary to the conspiracies" sufficed to "make[ ] it plausible that these defendants acted in concert and individually joined the conspiracies." *See id.* Here too, the CTAC alleges that Hellmann Inc. and Hellmann HK are subsidiaries of Hellmann GmbH, *see* CTAC ¶ 69, and, as noted above, the discussions of corporate

The only novel argument set forth by Hellmann is that the NES claim provides an overly vague time frame, thereby failing to provide Hellmann with fair notice of the claims pleaded against it. *See* Motion to Dismiss at pp. 13-14. Hellmann's argument is unavailing. First, the NES Claim provides an October 1, 2002 date for the meeting attended by Hellmann representative Peter Cochrane, *see* CTAC at ¶¶ 345-46, as well as several critical dates for the creation and implementation of the NES conspiracy. *See, e.g.*, CTAC at ¶ 339 ("Such Defendants made and implemented this agreement through the use of code words, emails and clandestine meetings held on or about October 1, 2002, in June 2004, and in October 2004 as alleged below."). Further, **[*64]** the fact that the alleged conspiracy continued "until a date unknown" does not, as Hellmann argues, preclude fair notice of the claims, nor does Hellmann provide any authority that it does. *See, e.g., Young-Wolff v. McGraw-Hill Sch. Educ. Holdings, LLC, No. 13-CV-4372 KMW, 2015 U.S. Dist. LEXIS 39643, 2015 WL 1399702, at *4 (S.D.N.Y. Mar. 27, 2015)* (complaint that "although somewhat imprecise, provides fair notice of the approximate time period of Defendants' alleged [misdeeds] . . . is all that *Rule 8* requires.") (citing cases); *accord United States v. Miller, 771 F.2d 1219, 1227 (9th Cir. 1985)* ("Although it is true that this [antitrust] indictment places the conspiracies within an open-ended time frame, this defect alone does not automatically render it insufficient. . . . [I]t does contain sufficient factual particularity to afford appellants adequate notice of the charges against them.").

In light of the above, the court recommends that Hellmann's argument for dismissal of the NES Claim be rejected.

3. Fifth Claim - 2005 Chinese Currency Adjustment Factor Surcharge Agreement ("CAF Claim")

Hellmann has also moved to dismiss the CTAC's Fifth Claim, which concerns allegations of a 2005 Chinese Currency Adjustment Factor ("CAF") surcharge. In addition to rehashing its contentions of improper corporate grouping and lack of notice due **[*65]** to the CTAC's indefinite time frame, Hellmann contends that dismissal is warranted because the allegations of its involvement in the CAF Conspiracy are particularly anemic. The argument has some appeal. Indeed, Hellmann is named only twice throughout the sixty-seven-paragraph CAF Claim: once in ¶ 397, which provides that [TEXT REDACTED BY THE COURT] *see* CTAC at ¶ 389, and once in ¶ 402, which references [TEXT REDACTED BY THE COURT]

Although the specific allegations against Hellmann are not particularly damning, the court finds that the plaintiffs have sufficiently alleged Hellmann's participation in the CAF Conspiracy. As Judge Gleeson wrote in his August 13, 2012 Order adopting this court's First Report and Recommendation, "only 'slight evidence' is necessary to connect a defendant to an antitrust conspiracy once the conspiracy is established." *See* Dkt. No. 628 at p. 3 and n.4 (citing *Vandervelde v. Put & Call Brokers & Dealers Ass'n, 344 F. Supp. 118, 154-55 (S.D.N.Y.1972)* ("Courts have commented with respect to antitrust conspiracies that once the conspiracy itself has been established only 'slight evidence' is necessary to connect individual defendants with it."), *opinion supplemented*, *344 F.Supp. 157 (S.D.N.Y.1972)*; *Safeway Stores, Inc. v. F.T.C., 366 F.2d 795, 801 (9th Cir. 1966)* ("Once the existence of the common scheme is established, very little is required **[*66]** to show that defendant became a party — slight evidence may be sufficient to connect a defendant to it.") (internal quotation marks omitted); *accord United States v. Consol. Packaging Corp., 575 F.2d 117, 126 (7th Cir. 1978)* ("Even a single act may be sufficient to draw a defendant within the ambit of a conspiracy where the act is such that one may infer from it an intent to participate in the unlawful enterprise.") (citing *United States v. Cardi, 478 F.2d 1362, 1369 (7th Cir. 1973)*, *cert. denied*, *414 U.S. 852, 94 S. Ct. 147, 38 L. Ed. 2d 101 (1973))*.

To this end, the court has previously denied motions to dismiss made by defendants with similarly tenuous links to various conspiracies. In addressing defendants Kintetsu's and Nippon's motion to dismiss the Peak Surcharge Claim, for example, the court wrote, in language equally applicable here, that the

> allegations of parallel conduct, while sparse, are sufficient to tie these defendants to the conspiracy asserted in the Peak Season Surcharge claim. The plaintiffs have provided a great amount of detail as to the who, what,

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control, the nature of the freight forwarding industry, and the necessity of the full participation of corporate affiliates apply with equal force to Hellmann as they did to DSV. So too, therefore, does the conclusion that these entities plausibly "acted in concert and individually joined the conspiracies."

> when, where and how of the Peak Season Surcharge conspiracy, and in most instances have identified the defendants who were present at in-person meetings and have alleged that other unidentified individuals were also present at the meetings. In this context, allegations that a co-conspirator told others **[*67]** that he would inform Kintetsu and Nippon of the conspiracy and that Kintetsu and Nippon later imposed the conspiratorial surcharges makes it plausible that they joined the conspiracy.[18]

Second R&R at p. 61. Accordingly, where the "who, what, when, where, and how" of a conspiracy is well-described, parallel conduct, *i.e.* imposition of the surcharge, is sufficient to tie a defendant to the conspiracy.

This principle serves to plausibly connect Hellmann to the CAF Conspiracy. Initially, the CTAC describes the formation and execution of the CAF Conspiracy in considerable detail, including allegations of an email group (the "Yahoo Group"), a series of five meetings, and a conference call—all geared toward furthering the alleged conspiracy—as well as additional steps taken to implement the surcharge through the Shanghai International Freight Forwarding Association. *See generally* CTAC at ¶¶ 379-446.

Further, the CTAC sufficiently alleges Hellmann to have imposed the CAF Surcharge. It names Hellmann as belonging to a cohort referred to as the "CAF Surcharge Defendants," *see id.* at p. 109, which is alleged to have "combined, conspired and agreed to fix and maintain . . . the [CAF] Surcharge," *see id.* at ¶ 380, and to have taken **[*68]** a number of collusive actions in furtherance of the CAF Conspiracy. *See id.* at ¶ 405 [TEXT REDACTED BY THE COURT]; *id.* at ¶¶ 412-14 (CAF Surcharge Defendants "sen[t] letters to their customers with the exact or substantively identical language and in this way, among others, implemented their CAF Surcharge agreement"); *id.* at ¶ 416 (CAF Surcharge Defendants took "actions to ensure customers could not negotiate paying the CAF Surcharge."). Most significantly, the CTAC expressly states that "the CAF Defendants . . . did impose artificially fixed and inflated CAF fees." *Id.* at ¶ 443. Thus, although the Fifth Claim makes scant *explicit* reference to Hellmann's participation in the CAF Conspiracy, it does plausibly connect Hellmann with the conspiracy by way of Hellmann's inclusion among the parties collectively alleged to have formulated the CAF Conspiracy and imposed the CAF Surcharge.[19]

In sum, the combination of the CTAC's detailed description of the CAF Surcharge and Hellmann's inclusion among the group of defendants alleged to have imposed the surcharge (as well as the CTAC's allegation that Hellmann was contacted by a codefendant in connection with the alleged **[*69]** conspiracy) suffice to plausibly connect Hellmann to the CAF Conspiracy. This principle has justified the survival of claims against several similarly situated defendants, and Hellmann has not demonstrated, nor does the court believe, that departure from these prior

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[18] The court reached a similar conclusion regarding defendant Geodis' motion to dismiss. *See* Second R&R at pp. 57-58 ("Although the plaintiffs may have barely alleged Geodis' participation in this conspiracy by only alleging that it imposed the collusive surcharges," in light of details as to formation and execution of AMS Conspiracy, plaintiffs' allegations were "enough at this stage to assert a claim against Geodis.") (citing Dkt. No. 628 at p. 3 and n.4).

[19] Although, as noted above, the CAF allegations lodged against Hellmann are not particularly robust, it bears restating that they consist of more than a mere reference to Hellmann as one of the CAF Defendants. Thus, the allegation that Hellmann was contacted by a co-defendant in connection with the CAF Conspiracy—coupled with the factors described above—further supports tying Hellmann to the CAF Conspiracy. *See* Second R&R at p. 61 (connecting defendants Kintetsu and Nippon to Peak Season Surcharge Conspiracy on the strength of similar allegations).

Nor is the court's conclusion undermined by the fact that the CTAC fails to establish that a Hellmann representative participated in the CAF meetings and conference call, since the CTAC makes clear that the lists of defendants involved in these proceedings is not exhaustive. *See* CTAC at ¶ 388 (meeting attended by "representatives of *at least*" defendants named therein) (emphasis added); *id.* at ¶¶ 424, 426, 429 (same); *id.* at ¶ 419 (listing, "among others," attendees at August 12, 2005 meeting); *see also* Second R&R at p. 55 (failure to name specific defendant as attending conspiratorial meeting not fatal because defendant was alleged to have imposed surcharge, and list of meeting attendees not exhaustive); First R&R at pp. 48-49 (same); First R&R at pp. 45-46 (allegation that participants in meetings and conference call included "at least" specified defendants indicates that others may have been present).

conclusions is warranted. Accordingly, the court recommends denying Hellmann's motion for dismissal of the Fifth Claim.

4. Ninth Claim - U.S. Customs Ocean "AMS" Charge Agreement

Hellmann similarly seeks dismissal of the CTAC's Ninth Claim, which concerns the U.S. Customs Ocean AMS Charge Agreement (the "Ocean AMS Claim"). Both Hellmann's and the plaintiffs' respective arguments center on the court's prior discussion of defendant Geodis. In the Second R&R, the court upheld the Ocean AMS Claim as against Geodis—notwithstanding the fact that Geodis is only mentioned in the Ocean AMS Claim's caption—because

> the plaintiffs here have alleged more than parallel conduct by [Geodis]. In the Ocean AMS claim the plaintiffs go through great detail as to the formation and execution of this conspiracy, providing specific dates, locations of meetings, and the names of participants and the defendants who they represented. The plaintiffs **[*70]** have done more than allege "conscious parallelism," or even "allegations of parallel conduct . . . in a context that raises a suggestion of a preceding agreement[.]" They have sufficiently and plausibly alleged the conspiratorial agreement between the Ocean AMS defendants who are alleged to have participated in the conspiratorial meetings and communications. Although the plaintiffs may have barely alleged Geodis' participation in this conspiracy by only alleging that it imposed the collusive surcharges,[20] that is enough at this stage to assert a claim against Geodis.

Second R&R at p. 57 (quoting *Twombly, 550 U.S. at 553*; *Starr v. Sony BMG Music Entm't, 592 F.3d 314, 322 (2d Cir. 2010)* and citing Dkt. No. 628 at p. 3 & n.4) (internal citations omitted).

The court finds that plaintiffs have likewise sufficiently alleged the Ocean AMS Claim as against Hellmann. As noted above, once an antitrust conspiracy has been established, "only 'slight evidence' is necessary to connect a defendant" to it. *See* Dkt. No. 628 at p. 3 and n.4 (citing *Vandervelde v. Put & Call Brokers & Dealers Ass'n, 344 F. Supp. 118, 154-55 (S.D.N.Y. 1972)*, *opinion supplemented*, *344 F.Supp. 157 (S.D.N.Y. 1972)*; *Safeway Stores, Inc. v. F.T.C., 366 F.2d 795, 801 (9th Cir. 1966)*. Thus, as was the case with Geodis, "[a]lthough the plaintiffs may have barely alleged [Hellmann's] participation in this conspiracy by only alleging that it imposed the collusive surcharges, that is enough at this stage to assert a claim **[*71]** against" Hellmann. *See* Second R&R at p. 57 (citing Dkt. No. 628 at p. 3 and n.4).

Hellmann's argument for dismissal rests upon the court's recommendation to dismiss the Tenth Claim as against Geodis because "Geodis is not mentioned at all in Claim 10 except in the Caption." *See* Motion to Dismiss at p. 15 (quoting Second R&R at p. 36). Hellmann argues that it, too, should be dismissed from the Ninth Claim, in which it similarly is named only in the caption. *See id.*

The above discussion demonstrates, however, that the fact that a defendant is mentioned only in a claim's caption does not vitiate the prospect of liability. Instead, the court must analyze the caption's reference to that defendant—a fleeting one, to be sure—against the backdrop of the claim's substantive allegations.

So viewed, Hellmann's argument for dismissal of the Ninth Claim is unconvincing. The Global Agreement (along with the Japanese Regional Conspiracy) is *sui generis* in that, unlike the individual conspiracies, it comprises several component agreements. Liability for the Global Agreement, therefore, entails a different (and indeed, higher) standard than that for the individual conspiracies. *See* Second R&R at p. 36 (dismissing Tenth Claim because "the only factual allegations **[*72]** connecting these defendants to the global conspiracy are the defendants' imposition of some, but not all, of the surcharges at issue in the global conspiracy claim. . . . [T]he naked allegation that a defendant joined a conspiracy whose goal was to pass on all future surcharges without at

[20] Plaintiffs impliedly made this allegation by writing that the Ocean AMS Defendants—a group which Geodis (and Hellmann, for that matter) is alleged to have belonged—imposed the Ocean AMS surcharge. *See* CTAC at p. 148 and ¶ 558.

least the allegation that it imposed those surcharges is implausible.") (citing *Standard Iron Works v. ArcelorMittal, 639 F. Supp. 2d 877, 895 (N.D. Ill. 2009))*. Accordingly, the logic underlying the court's decision to dismiss the Tenth Claim as against Geodis is unique to that cause of action, and as such has little conceptual bearing on the Ocean AMS Claim.

Thus, although the court previously dismissed the Tenth Claim against Geodis in part because Geodis is only mentioned in the claim's caption, the logic behind that determination is peculiar to that claim. By contrast, the rationale underlying the court's recommendation to uphold the Ocean AMS Claim against Geodis—despite the fact that Geodis likewise is mentioned only in that claim's caption—applies with equal force to Hellmann, which is situated identically to Geodis *viz-a-viz* the Ninth Claim. Accordingly, the court finds that the plaintiffs have adequately pled the Ocean AMS Conspiracy as against Hellmann, and therefore **[*73]** recommends denying Hellmann's motion to dismiss the Ninth Claim.

5. Tenth Claim - Global Agreement

Hellmann also seeks dismissal of the Global Agreement asserted in the CTAC's Tenth Claim. The court has previously addressed head-on the prospect of dismissal of this claim as against Hellmann Inc. It concluded in the Second R&R that

> [t]he plaintiffs have also presented sufficient allegations that the defendant Hellman [Inc.] joined the global conspiracy. Hellman [Inc.] is alleged to have joined the global conspiracy at a "later date." While this sentence alone is conclusory, Hellman [Inc.] is also alleged to have imposed all of the collusive surcharges that formed the global conspiracy other than the security surcharge in Claim 1. That Hellman [Inc.] imposed all of the surcharges at issue in the global conspiracy after a certain date makes the plaintiffs' allegation that Hellman [Inc.] "later" joined the conspiracy plausible at this stage.

Second R&R at p. 35 (quoting CTAC ¶ 571 and citing Dec. & Order, at 3 & n.4 that only "slight evidence" is necessary to join a defendant to an established conspiracy) (internal citation omitted).

The court explicitly distinguished the CTAC's allegations against Hellmann from **[*74]** those concerning defendants Dachser, UPS, BAX Global, and Geodis, against which the Tenth Claim was dismissed (the "dismissed defendants"), writing that "[u]nlike Hellman, these defendants are not alleged to have consistently imposed all of the surcharges at issue after a certain date. The lack of concerted action on their part undermines the inference that they joined a global conspiracy to fix all surcharges." *Id.* at p. 36 (citing *Standard Iron Works, 639 F. Supp. 2d at 895*).

While the Second R&R's conclusion concerning Hellmann Inc. may rightly be applied to the each of the Hellmann entities, the arguments in the instant motion merit further discussion. First, Hellmann notes the court's finding that the allegations tying Dachser and UPS to the Global Agreement consisted of nothing more than a "conclusory statement that at an unspecified 'later date, [they] joined the Global Agreement to pass on surcharges to their customers,'" and argues that "[t]hat is all that is pleaded as to Hellmann GmbH and Hellmann HK as well." *See* Motion to Dismiss at p. 16 (quoting Second R&R at p. 35).

While not incorrect that the Tenth Claim's allegations connecting Hellmann to the Global Agreement are somewhat sparse, Hellmann's argument overlooks the above passage's broader **[*75]** context. The court's decision to uphold the Tenth Claim against Hellmann did not rest upon the foregoing allegation; to the contrary, regarding both the dismissed defendants *as well as* Hellmann, the court found this allegation to be conclusory and therefore insufficient to establish a plausible claim. *See* Second R&R at p. 35. Instead, it was the fact that the CTAC alleged Hellmann to have "imposed all of the collusive surcharges that formed the global conspiracy other than the security surcharge in Claim 1" that rendered plausible the allegation that Hellmann later joined the Global Agreement, *see id.*, and conversely, that the same did not hold true with regard to the dismissed defendants that led the court to dismiss the Tenth Claim as against them. *See id.* at p. 36 ("[T]he only factual allegations connecting these defendants to the global conspiracy are the defendants' imposition of some, but not all, of the surcharges at issue in the global conspiracy claim. Unlike Hellman, these defendants are not alleged to have consistently imposed all of the surcharges at issue . . . .").

Hellmann nonetheless disputes the Second R&R's conclusion, arguing that since Hellmann (1) is not alleged to have participated in the Security **[*76]** Surcharge Agreement; and (2) is only mentioned in the caption of the Ninth Claim, it follows that "Hellmann is not alleged to have been part of at least two agreements that form part of the purported Global Agreement," and is therefore similarly situated to the dismissed defendants for purposes of the Tenth Claim. *See* Motion to Dismiss at pp. 16-17. However, as the court has found the Ninth Claim to state a claim as against Hellmann, *see* Section III.C.4, *supra*, there remains only one claim within the Global Agreement (*i.e.* the Security Surcharge Claim) that does not implicate Hellmann. Thus, for purposes of comparison with the dismissed defendants, Dachser is alleged to have joined three of the six conspiracies underlying the Global Agreement (Claims No. 1, 5, and 8); UPS is alleged to have joined four of the six (Claims No. 3, 5, 6, and 8), and Hellmann is alleged to have joined all but the Security Surcharge.[21]

To be sure, then, the distinction between the *number* of conspiracies Hellmann is alleged to have joined (five) and those Dachser and UPS are alleged to have joined (three and four, respectively) is not terribly vast. But a careful review of the chronology of the CTAC's allegations **[*77]** places Hellmann and Dachser/UPS on categorically distinct footing for purposes of the Global Agreement. Significantly, the only conspiracy within the Global Agreement that does not implicate Hellmann, *i.e.* the Security Surcharge Conspiracy, predates each of the other underlying conspiracies. *See* CTAC at ¶¶ 307-14 (referencing October 2001 Security Surcharge meetings). Thus, it is entirely plausible to read the CTAC as alleging that Hellmann, although not getting in on the Global Agreement's ground floor, "*[a]t a later date*, . . . joined the Global Agreement to pass on surcharges to their customers," *see* CTAC at ¶ 571 (emphasis added), and was a full-fledged participant in the overarching conspiracy from that point forward. *See* Second R&R at p. 35 ("That Hellman imposed all of the surcharges at issue in the global conspiracy after a certain date makes the plaintiffs' allegation that Hellman 'later' joined the conspiracy plausible at this stage.") (citing Dkt. No. 628 at p. 3 and n.4). In light of its alleged participation in each of the subsequent component conspiracies, Hellmann's absence from the initial stages of the Global Agreement is not indicative, let alone dispositive, of the notion that it did **[*78]** not join in the Global Agreement.

Such a reading, however, does not extend to Dachser and UPS, both of which are absent from the CTAC's allegations concerning multiple component conspiracies arising at various times from 2001 through 2007. Accordingly, Dachser's and UPS's imposition of some of the surcharges falling under the Global Agreement is more plausibly read as incidental to the overarching conspiracy, rather than indicative of their participation in it. Accordingly, Hellmann's contention that it is on similar footing as Dachser and UPS for purposes of the Global Agreement is incorrect. As the court found in the Second R&R, the CTAC has plausibly alleged Hellmann's involvement in the Global Agreement, despite the fact that Hellmann is not alleged to have joined in the Security Surcharge Conspiracy. The court therefore recommends denying Hellmann's argument for dismissal of the Tenth Claim.[22]

CONCLUSION

The plaintiffs' allegations against Hellmann GmbH and Hellmann HK do not improperly group these entities with Hellmann, Inc., and satisfy the minimum pleading standards necessary to avoid dismissal at the *Rule 12(b)(6)* stage. However, because the CTAC was filed outside the applicable limitations **[*79]** period and is not salvaged on either fraudulent concealment or relation-back grounds, the claims against Hellmann GmbH and Hellmann HK are time-barred. I therefore recommend that the court grant the motion to dismiss the claims against Hellmann GmbH and Hellmann HK with prejudice.

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[21] Because the CTAC alleges that Dachser and UPS, like Hellmann, joined the global conspiracy, but makes no similar reference to BAX and Geodis, *see* CTAC at ¶ 571, the court's analysis will center on Dachser and UPS, rather than BAX and Geodis, since the allegations against the latter are facially distinguishable from those against Hellmann.

[22] It bears mention that the court's finding that the CTAC plausibly alleges the Global Conspiracy as against Hellmann lends credence to the plausibility of the component conspiracies as alleged against Hellmann.

Copies of this sealed opinion will be provided only to the parties. The plaintiffs shall provide the court with a redacted copy of this opinion that complies with the protective order applicable to this action for public filing within ten days, and with three days notice to the defendants. The plaintiffs should contact the court by telephone for further instructions on how to submit the redacted document.

* * * *

Any objections to the Report and Recommendation above must be filed with the Clerk of the Court within 14 days of receipt of this report. Failure to file objections within the specified time waives the right to appeal any judgment or order entered by the District Court in reliance on this Report and Recommendation. *28 U.S.C. § 636(b)(1)*; *Fed. R. Civ. P. 72(b)*; *see, e.g., Thomas v. Arn, 474 U.S. 140, 155, 106 S.Ct. 466, 474, 88 L.Ed.2d 435 (1985)*; *Mario v. P & C Food Markets, Inc., 313 F.3d 758, 766 (2nd Cir. 2002)*; *IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993)*; *Frank v. Johnson, 968 F.2d 298 (2d Cir.)*, *cert. denied*, *506 U.S. 1038, 113 S. Ct. 825, 121 L. Ed. 2d 696 (1992)*; *Small v. Secretary of Health and Human Serv., 892 F.2d 15, 16 (2d Cir. 1989)* (per curiam).

Respectfully Recommended,

Viktor V. Pohorelsky

VIKTOR V. POHORELSKY

United States Magistrate Judge

Dated: Brooklyn, New York

June 24, 2015

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Xitronix Corp. v. Kla-Tencor Corp.

United States District Court for the Western District of Texas, Austin Division

June 24, 2015, Decided; June 25, 2015, Filed

Case No. A-14-CA-1113-SS

Reporter

2015 U.S. Dist. LEXIS 82312 *; 2015-2 Trade Cas. (CCH) P79,234

XITRONIX CORPORATION, Plaintiff, -vs- KLA-TENCOR CORPORATION, Defendant.

Subsequent History: Motion denied by *Xitronix Corp. v. KLA-Tencor Corp., 2015 U.S. Dist. LEXIS 112192 (W.D. Tex., Aug. 24, 2015)*

Summary judgment granted by *Xitronix Corp. v. KLA-Tencor Corp., 2016 U.S. Dist. LEXIS 115535 (W.D. Tex., Aug. 26, 2016)*

Prior History: *KLA-Tencor Corp. v. Xitronix Corp., 2011 U.S. Dist. LEXIS 9436 (W.D. Tex., Jan. 31, 2011)*

Core Terms

patent, Lawsuit, allegations, prior art, invalid, declaratory judgment, wavelength, procurement, overt, antitrust claim, infringement, parties, fraudulent, technology, beam, substantial controversy, final judgment, motion to dismiss, probe, indefiniteness, semiconductor, monopolize, patentee, output, signal, reasonable apprehension, anti trust law, misrepresentations, anticipation, courts

Counsel: **[*1]** For Xitronix Corporation, Plaintiff: Michael S. Truesdale, LEAD ATTORNEY, Law Office of Michael S. Truesdale, PLLC, Austin, TX; Steve Hershberger, LEAD ATTORNEY, Attorney at Law, Midland, TX.

For KLA-Tencor Corporation, doing business as KLA-Tencor, Inc., a Delaware Corporation, Defendant: Brian K. Erickson, Courtney Thornton Stewart, John Michael Guaragna, LEAD ATTORNEYS, DLA Piper LLP (US), Austin, TX.

Judges: SAM SPARKS, UNITED STATES DISTRICT JUDGE.

Opinion by: SAM SPARKS

Opinion

ORDER

BE IT REMEMBERED on this day the Court reviewed the file in the above-styled cause, and specifically Defendant KLA-Tencor Corporation's Motion to Dismiss [#5], Plaintiff Xitronix Corporation's Response [#7], and KLA-Tencor Corporation's Reply [#9], Having reviewed the documents, the relevant law, and the file as a whole, the Court now enters the following opinion and orders DENYING the motion.

Background

Reading the allegations in Plaintiff Xitronix Corporation (Xitronix)'s favor, this lawsuit involves Xitronix's attempt to compete in the dopant activation metrology marketplace and Defendant KLA-Tencor Corporation (KLA)'s repeated and sustained attempts to illegally prohibit Xitronix from competing with KLA through the use of patent **[*2]** law. KLA is the assignee of the following related patents: (1) United States Patent No. 8,817,260 (the '260 Patent); (2) U.S. Patent No. 7,646,486 (the '486 Patent); and (3) United States Patent No. 7,362,441 (the '441 Patent). The '260 Patent is a continuation of the '486 Patent, which is a continuation of the '441 Patent, which itself was a continuation of an earlier patent, United States Patent No. 7,126,690 (the '690 Patent). The patented technology involves, in general terms, a system which provides high resolution, non-destructive evaluation of semiconductor wafers as they pass through various semiconductor manufacturing stages. More specifically, the patent claims the parties have disputed deal with the wavelength of the probe beam used in this system. According to Xitronix, KLA prosecuted these patents "with the central aim of capturing Xitronix's technology within the scope of their respective claims." Compl. [#1] ¶ 7.

In the current lawsuit, Xitronix has brought a *Walker Process* antitrust claim against KLA based on KLA's allegedly fraudulent procurement of the '260 Patent, and KLA has filed a motion to dismiss for failure to state a claim upon which relief can be granted. In order to assess whether Xitronix's allegations satisfy *Rule 12*, the Court must first describe the litigation history between these two parties, as the instant case is the third installment in a trilogy of lawsuits.

I. The First Two Lawsuits

First, in **[*3]** September 2008, Xitronix sued KLA, asserting a declaratory judgment of non-infringement with respect to the '441 Patent and its parent, the '690 Patent. *See* Compl. [#1] at 2, *Xitronix Corp. v. KLA-Tencor Corp.*, No. l:08-CV-723-SS (W.D. Tex. Jan. 31, 2011) (the First Lawsuit). KLA had apparently informed Xitronix through numerous letters of its belief Xitronix was engaged in ongoing infringement of KLA's patents, prompting Xitronix to respond with its non-infringement suit. *Id.* at 4-9. In November 2010, the parties tried the case to a jury, which returned a verdict finding Xitronix had infringed claim 7 of the '441 Patent but had not infringed any other claims. Order of Jan. 31, 2011 [#210] at 1, the First Lawsuit. The jury also found, however, that claim 7 of the '441 Patent was invalid as anticipated by prior art. *Id.* at 1-2. The jury further found all of the asserted claims—claims 7, 9, 11, and 12—of the '441 Patent were invalid due to obviousness. *Id.* at 2. Post-trial, the Court ordered the parties to brief whether the claims at issue were also invalid due to indefiniteness, and the Court ultimately held the claims were indefinite. *Id.* at 3, 5-9. Additionally, the Court held there was ample evidence to support the jury's verdict of invalidity based on anticipation and obviousness. **[*4]** *Id.* at 10-12. KLA did not appeal the case.

Second, in March 2011, Xitronix filed a lawsuit against KLA in Texas state court, alleging state law causes of action for business disparagement, tortious interference, and unlawful restraint of trade, which was subsequently removed by KLA to this Court. See Notice Removal [#1], Xitronix Corporation v. KLA-Tencor Corporation, No. L11-CV-358-SS (W.D. Tex. July 7, 2011) (the Second Lawsuit). Xitronix's state law claims were based on KLA's conduct in and surrounding the First Lawsuit, including: "(1) KLA's alleged knowing false statements of infringement of the '441 Patent by Xitronix; and (2) KLA's alleged bad faith use of litigation to impair Xitronix's business operations." Order of July 7, 2011 [#16] at 2, the Second Lawsuit. Xitronix moved to remand, and the Court granted the motion because the only substantial question of patent law (which supposedly provided the basis for removal) was already decided in the First Lawsuit. *Id.* On remand, the state court, according to Xitronix's allegations, granted summary judgment in favor of KLA for unspecified reasons, and on appeal, the Third District Court of Appeals of Austin affirmed the summary judgment on res judicata **[*5]** grounds, holding Xitronix's antitrust claims arose out of the same nucleus of operative facts underlying its claims in the First Lawsuit. Compl. [#1] ¶ 34. Xitronix has a petition for review of that decision pending before the Supreme Court of Texas. *Id.*

II. The Current Lawsuit

As previously stated, Xitronix has now filed a third lawsuit, asserting a *Walker Process* antitrust claim based on KLA's alleged fraudulent procurement of the '260 Patent. KLA obtained the '260 Patent over a period of years involving back-and-forth exchanges with the PTO. KLA filed its patent application for the '260 Patent on November 11, 2009, and on February 2, 2011, just two days after the Court's entry of the final judgment in the First Lawsuit, the PTO examiner allowed KLA's pending claims in the '260 Patent, claims which Xitronix contends are essentially identical to the invalidated patent claims of the '441 Patent. Compl. [#1] ¶ 28. On February 10, 2011, KLA's patent prosecution attorney, Michael Stallman, submitted a request for a continued examination of the '260 Patent, and he concurrently submitted an information disclosure statement listing an "Executed ORDER from the United States District Court for the Western District of Texas, Austin Division, Case no. A-08-CA-723-SS, **[*6]** dated January 31, 2011, 13 pages in length." *Id.* ¶ 29. Xitronix, however, alleges Stallman did not explain to the patent examiner how this Court's January 31, 2011 Order related to the then-pending '260 Patent; how the pending claims were identical to, or broadened from, claims in the '441 Patent held in valid as a final judgment in the First Lawsuit; and how, as a result, the pending claims were unpatentable. *Id.* ¶ 30.

On July 25,2013, the PTO examiner issued an initial rejection of the claims in the continuing '260 Patent application, but, according to Xitronix, the examiner had still missed the significance of the First Lawsuit. *Id.* ¶ 37. In response to the initial rejection, Xitronix contends Stallman repeatedly submitted arguments for patentability which directly contradicted the final judgment in the First Lawsuit. *Id.* The '260 Patent ultimately issued August 26, 2014, and Xitronix alleges that but for Stallman's fraudulent omissions and affirmative misrepresentations, the PTO would not have issued the patent. *Id.* ¶¶ 35, 37.

Xitronix contends the '260 Patent has created artificial impediments to Xitronix's ability to obtain the financing necessary to compete in the market and to the market's adoption of Xitronix's technology. *Id.* ¶ **[*7]** 11. Through the '260 Patent, Xitronix alleges KLA has "obtained the illegitimate power to exclude its competitor Xitronix from the relevant market. *Id.* According to Xitronix, KLA has engaged in exclusionary conduct through its fraudulent procurement of the '260 Patent, and this conduct "was, and is, specifically intended to monopolize and destroy competition in the market for dopant activiation metrology, a market currently valued at approximately $650 million." *Id.* ¶ 12. Xitronix represents KLA's Therma-Probe 680 and Xitronix's XP700 system are the only two products in the market, and KLA has now obtained the power to exclude Xitronix from manufacturing or selling its product. *Id.* ¶ 13.

In response to these allegations, KLA has filed a motion to dismiss under *Rule 12(b)(6)*, arguing (1) it has never "enforced" the '260 Patent for purposes of a *Walker Process* claim, and (2) it disclosed all relevant material to the PTO in prosecuting the '260 Patent, including this Court's final order and judgment from the First Lawsuit. The parties fully briefed the motion, which is now ripe for the Court's consideration.

Analysis

I. *Rule 12(b)(6)*—Legal Standard

Federal Rule of Civil Procedure 8(a)(2) requires a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to **[*8]** relief." *Fed. R. Civ. P. 8(a)(2)*. A motion under *Federal Rule of Civil Procedure 12(b)(6)* asks a court to dismiss a complaint for "failure to state a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. In deciding a motion to dismiss under *12(b)(6)*, a court generally accepts as true all factual allegations contained within the complaint. *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 164, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993)*. However, a court is not bound to accept legal conclusions couched as factual allegations. *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)*. Although all reasonable inferences will be resolved in favor of the plaintiff, the plaintiff must plead "specific facts, not mere conclusory allegations." *Tuchman v. DSC Commc'ns Corp., 14 F.3d 1061, 1067 (5th Cir. 1994)*. The plaintiff must plead sufficient facts to state a claim for relief that is facially plausible. *Ashcroft v.*

Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678*. Although a plaintiff's factual allegations need not establish the defendant is probably liable, they must establish more than a "sheer possibility" that a defendant has acted unlawfully. *Id.* Determining plausibility is a "context-specific task," that must be performed in light of a court's "judicial experience and common sense." *Id. at 679*. In deciding a motion to **[*9]** dismiss, courts may consider the complaint, as well as other sources courts ordinarily examine when ruling on *Rule 12(b)(6)* motions to dismiss, such as documents incorporated into the complaint by reference, and matters of which a court may take judicial notice. *Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007)*.

II. Application

A. *Walker Process* Antitrust Claim and the Requisite Level of Enforcement

1. Dispute Over Applicable Legal Standard

Xitronix has asserted only one claim in its complaint: a *Walker Process* antitrust claim, which finds its origin in the Supreme Court opinion *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*. In that case, the Supreme Court held:

> The enforcement of a patent procured by fraud on the Patent Office may be violative of *§ 2* of the Sherman Act provided the other elements necessary to a *§ 2* case are present. In such event the treble damage provisions of *§ 4* of the Clayton Act would be available to an injured party.

Id. at 174. *Section 2* of the Sherman Antitrust Act provides that a "person who shall monopolize, or attempt to monopolize, or combine with any other person, to monopolize any part of the trade or commerce ... shall be deemed guilty of a felony." *15 U.S.C. § 2*. Xitronix has asserted "attempted monopolization" against KLA. *See* Compl. [#1] ¶¶ 144-48.

KLA's first argument for dismissal centers on a **[*10]** *Walker Process* claim's requirement for *enforcement* of the patent. The parties agree KLA has not taken any affirmative action with respect to the '260 Patent. For instance, KLA has not sent Xitronix a cease-and-desist letter charging Xitronix with infringement of the '260 Patent nor has KLA filed an infringement lawsuit against Xitronix concerning the '260 Patent. According to KLA, there must be an overt act of enforcement before a plaintiff has standing to bring a *Walker Process* claim, and KLA cites cases holding mere procurement of a patent, even if by fraud, cannot in itself violate antitrust laws. *See* Mot. Dismiss [#5] at 7 (citing cases).

The Court agrees with KLA that there is an "enforcement" element to a *Walker Process* claim, and mere procurement of the patent by fraud is insufficient to state a claim for antitrust violations. KLA oversimplifies the matter, however, when it takes these two principles and leaps to the assumption that "enforcement" must entail an overt act such as a cease-and-desist letter or an infringement action. Notably, KLA cites no case holding the "enforcement" requirement can only be satisfied by an overt action. The critical question then emerges: what level of "enforcement" is required? **[*11]** Unfortunately, what is meant by "enforcement" has rarely been an issue in the case law because a *Walker Process* claim is typically asserted as a counterclaim to an infringement lawsuit. *See* *Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1068 (Fed. Cir. 1998)* (An antitrust claim premised on stripping a patentee of its immunity from the antitrust laws is typically raised as a counterclaim by a defendant in a patent infringement lawsuit."). In other words, the "enforcement" element is usually taken for granted.

The Federal Circuit, however, has addressed the "enforcement" requirement and made clear the inquiry does not turn on the existence of an overt act. In *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc., 375 F.3d 1341 (Fed. Cir. 2004)*, the plaintiff sought a declaration that the defendant-competitor's patent was invalid and asserted an ancillary *Walker Process* claim. *Id. at 1345*. The defendant moved to dismiss the antitrust claim for lack of standing. *Id. at 1347*. In considering the meaning of "enforcement," the Federal Circuit compared the standard for standing under a Walker Process cause of action to the standard in a Declaratory Judgment Action. *Id. at 1357-58*. The court observed that "[s]trictly speaking, a *Walker Process* claim is premised upon 'the enforcement of a patent procured by fraud on the Patent Office.'" *Id.* (quoting *Walker Process, 382 U.S. at 174*). In comparison, "[a] plaintiff **[*12]** may bring a Declaratory Judgment Action of patent invalidity . . . even in the absence of overt enforcement actions." *Id. at 1358*. To the extent there was any tension between these two standards, the Federal Circuit clarified the law.

> We therefore hold that, as a matter of Federal Circuit ***antitrust law***, the standards that we have developed for determining jurisdiction in a Declaratory Judgment Action of patent invalidity also define the minimum level of ' enforcement' necessary to expose the patentee to a Walker Process claim for attempted monopolization.

Id. This holding is critical to the issue presently before this Court, as it lies at the heart of the parties' dispute, and therefore bears repeating: for *Walker Process* claims, "enforcement does not mean active, overt enforcement and instead refers to whatever is necessary to establish jurisdiction in a Declaratory Judgment Action.

Having pegged the standard for *Walker Process* claim standing to the standard for Declaratory Judgment Actions, the next question becomes: what is the applicable standard for determining jurisdiction in a Declaratory Judgment Action? At the time of the *Unitherm* decision, the prevailing standard in the Federal Circuit **[*13]** was "a two-part test that first consider[ed] whether conduct by the patentee create[d] a reasonable apprehension on the part of the declaratory judgment plaintiff that it will face an infringement suit, and second examine[d] whether conduct by the declaratory judgment plaintiff amount[ed] to infringing activity or demonstrate[d] concrete steps taken with the intent to conduct such activity." *SanDisk Corp. v. STMicroelectronics, Inc., 480 F.3d 1372, 1379 (Fed. Cir. 2007)* (citing *Arrowhead Indus. Water, Inc. v. Ecolochem, Inc., 846 F.2d 731, 736 (Fed. Cir. 1988))*. In 2007, however, the Supreme Court in *MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007)*, rejected the "reasonable apprehension of suit" aspect of the two-part test, and instead held the proper test is whether "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id. at 127*; *see also* *SanDisk Corp., 480 F.3d at 1380* ("The Supreme Court's opinion in *MedImmune* represents a rejection of our reasonable apprehension of suit test.").

KLA suggests that since *Unitherm* was decided before *MedImmune* and since the Federal Circuit has not specifically adopted the standard for Declaratory Judgment Action standing announced in *MedImmune* in the *Walker Process* context, then *Unitherm*'s status as currently viable law is in doubt. See Reply [#9] at 3 n.3. The Court disagrees. First, *Unitherm* attached the *Walker Process* standard **[*14]** to the Declaratory Judgment standard as a general principle and not to the specific standard for Declaratory Judgment that existed at the time. KLA cites no reason, much less a case since *MedImmune*, indicating the courts should not continue matching the *Walker Process* standard to the Declaratory Judgment standard as held in *Unitherm*, even as the standard changes.

Second, KLA's argument is immaterial because neither the Declaratory Judgment standard in existence pre-*MedImmune* nor the standard established in *MedImmune* include overt enforcement of the patent as a requirement. In *Unitherm*, the court described the then-prevailing "reasonable apprehension of suit" test for the specific purpose of explaining that overt enforcement actions are unnecessary to establish Declaratory Judgment jurisdiction. *See* *Unitherm, 375 F.3d at 1358* (citing *Arrowhead, 846 F.2d at 736*).[1] The test announced in *MedImmune* is an even more relaxed standard which eliminated the "reasonable apprehension of suit" concept in favor of the more general

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[1] In *Arrowhead*, the court made clear that "[w]hen the defendant's conduct, including its statements, falls **[*15]** short of an express charge [of infringement], one must consider the 'totality of the circumstances' in determining whether that conduct meets the first prong of the test." *Arrowhead, 846 F.2d at 736*. The court continued: "If the circumstances warrant, a reasonable apprehension may be found in the absence of *any* communication from defendant to plaintiff" *Id.* (citation omitted) (emphasis in original).

idea of a "substantial controversy." Either way, overt enforcement actions are not required as suggested by KLA's arguments.

In sum, Federal Circuit ***antitrust law*** equates the standards for determining jurisdiction in a Declaratory Judgment Action with those for defining the minimum level of "enforcement" necessary to state a *Walker Process* claim, and the standard for determining Declaratory Judgment jurisdiction is a flexible totality-of-the-circumstances approach focused on whether "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, 549 U.S. at 127*.

2. Sufficiency of Xitronix's Pleadings

With the legal standard in place, the Court turns its attention to Xitronix's allegations and considers whether they satisfy the "substantial controversy" standard for Declaratory Judgments. Xitronix's complaint is lengthy and details the history between **[*16]** the parties and how the issuance of the '260 Patent has, in its view, created a substantial controversy. *See* Compl. [#1] ¶¶ 15-143. In its response, Xitronix summarizes the allegations it contends support a finding of standing [sic throughout]:

- The entirety of the six-plus year history of KLA's attempts to capture Xitronix's technology within its patents. Compl.[#1] at 5, ¶¶ 19-20;

- KLA's historic threats against Xitronix, including its expression of its intent to enforce the '441 patent it obtained incorporating elements of Xitronix's technology *id.* at 5, ¶ 21;

- KLA's knowledge that, as long as it maintained artificial "intellectual property issues" surrounding Xitronix's technology, the market would not adopt Xitronix's technology, *id.*; and

- KLA's ongoing efforts, during the [First Lawsuit] and after, to do whatever it could to obtain patent claims covering Xitronix's technology, including pursuing the '260 patent claim that embedded this Court's claim construction from, and carried forward claims that had been litigated essentially verbatim in, the '441 litigation, *id.* at 6, ¶ 24; and

- The exclusionary consequences of KLA's procurement of the '260 patent on Xitronix's ability to enter the market, *id.* at 28-30, ¶¶ 120-25.

Resp. [#7] at 11-12 (footnote **[*17]** omitted).

Taking these specific citations and the complaint as a whole, the Court agrees with Xitronix that its allegations support a finding of a substantial controversy between these two parties with adverse legal interests as described in *MedImmune*. In short, Xitronix alleges KLA purchased a company active in the semiconductor optical inspection market for $75 million. When Xitronix introduced a supposedly superior competing product with more advanced technology, KLA modified an already-existing patent application with the express purpose of capturing Xitronix's technology, and that application ultimately resulted in the '441 Patent. KLA actively asserted the '441 Patent against Xitronix, which caused Xitronix to file a declaratory judgment of non-infringement. A jury eventually found the asserted claims of the '441 Patent invalid on anticipation and obviousness grounds, and the Court additionally found the claims invalid for indefiniteness. Undeterred, KLA went back to the PTO and was able, through fraud, to obtain a new patent, the '260 Patent, which is essentially identical to the '441 Patent. While KLA has taken no action with respect to the '260 Patent, the effect of its existence—within the context of these two parties' history—is a variety **[*18]** of exclusionary consequences for Xitronix in the marketplace. The Court finds these allegations sufficient to survive *Rule 12* scrutiny.

Additionally, the Court notes KLA has not actually disputed the sufficiency of Xitronix's allegations with respect to the "substantial controversy" standard from *MedImmune*. Instead, KLA has only argued the "enforcement" requirement necessarily means an overt act—an argument rejected by the Court. As such, KLA has not actually moved to dismiss on the ground Xitronix does not adequately plead a "substantial controversy."

3. Policy

By concluding Xitronix satisfies the "enforcement" requirement despite the fact KLA has apparently done nothing with the '260 Patent since its issuance, the Court wants to be clear it is not holding mere procurement of a patent can support a *Walker Process* claim. To the contrary, the Court agrees with KLA and the cases it cites that a patentee should not be subject to a *Walker Process* claim simply because it obtains a patent. What makes this case unique are Xitronix's allegations, in addition to KLA's simple procurement of the '260 Patent, about the history of litigation between these parties and the connection between the '441 Patent and the '260 Patent. Here, taking Xitronix's **[*19]** allegations as true, KLA actively enforced the '441 Patent before it was ruled invalid through a final judgment in this Court. KLA, however, has since obtained the exact same patent, only now it has a different number. Faced with an antitrust claim, KLA seeks to have the claim dismissed because it has not technically taken any overt actions concerning the '260 Patent, even though it did take such action with the '441 Patent. The resulting conundrum is that KLA is actually best served by not actively asserting the patent at all. Put differently, KLA can benefit from merely owning an invalid patent while also remaining immune from any *Walker Process* antitrust claims as long as it never takes any action concerning the '260 Patent. In the Court's view, such an outcome undermines both patent and ***antitrust law***.

Relatedly, the Court's decision does not pose a danger of broadening *Walker Process* claims beyond their intended scope. In *Unitherm,* the Federal Circuit made clear there are circumstances under which a plaintiff may assert a *Walker Process* claim despite the absence of any overt enforcement by the patent owner. This case presents the sort of unique allegations contemplated by the Federal Circuit's holding and is the sort of case **[*20]** that, in the Court's view, occurs infrequently. Moreover, declaratory judgment jurisdiction is discretionary with the courts, and each case requires careful analysis of the specific allegations present in the complaint. *See* MedImmune, 549 U.S. at 127 ("The Declaratory Judgment Act provides that a court may declare the rights and other legal relations of any interested party, not that it *must* do so.") (emphasis in original); Wilton v. Seven Falls Co., 515 U.S. 277, 286, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (1995) (nothing the federal courts have "unique and substantial discretion in deciding whether to declare the rights of the litigants"). The Court's decision is limited to the circumstances of this case, and the Court rejects any notion its decision could open the floodgates of Walker Process litigation or expose patentees to such claims simply based on their procurement of a patent.[2]

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[2] The Court notes the scholarship of Professor Christopher R. Leslie who has advocated for the abolishment of the "enforcement" requirement altogether. In a law review article directly on point to the issue before the Court, Professor Leslie has challenged the notion that mere procurement of a patent, no matter the conduct of the patentee in obtaining the patent, cannot—without more—affect the welfare of the consumer **[*21]** and in itself violate the antitrust laws. *See* Christopher R. Leslie, *The Anticompetitive Effects of Unenforced Invalid Patents*, 91 Minn. L. Rev. 101 (2006). Instead, Professor Leslie contends "mere procurement and possession of an invalid patent can, in fact, injure competition and reduce consumer welfare." *Id. at 113*. Professor Leslie persuasively documents the variety of ways simple possession of an invalid patent can help maintain an illegitimate monopoly, including (1) how the "[t]he fear of infringement can deter entry into the monopolist's market, even if the potential competitor strongly believes that the patent at issue is invalid"; (2) the "increase[d] entry costs by compelling rivals to research the patent's validity, to attempt to design around the patent, or to pay (unnecessary) licensing fees"; (3) how "a monopolist's suspect patents can deter its competitor's customers, business partners, and venture capitalists from doing business with them"; and (4) how "firms may avoid entire fields of research out of fear of infringement litigation, a phenomenon that can distort innovation and reduce long term competition even further." *Id. at 104, 114-39*. Many of these factors are present in Xitronix's allegations, and Professor Leslie's **[*22]** research supports Xitronix's claims of antitrust injury despite the fact KLA has not overtly enforced the '260 Patent.

While Professor Leslie argued for elimination of the "enforcement" requirement in his article, which, notably, he wrote prior to *MedImmune* and the adoption of an even more adaptable standard for Declaratory Judgment jurisdiction, such a decision is beyond this Court's limited function. Interestingly, however, in subsequent papers, Professor Leslie has noted how *MedImmune* "has important implications for ***antitrust law***" and that it has the potential to move courts away from rigid applications of the "enforcement" requirement. *See* Christopher R. Leslie, *New Possibilities for Asserting Walker Process Claims*, 21-SUM ANTITRUST 48, 50-51 (2007).

B. Fraud on the PTO

KLA's second ground for dismissal is the failure to allege fraud. Specifically, KLA argues that, according to Xitronix's own pleadings, KLA provided all of the relevant material, including the Court's final order and judgment from the First Lawsuit, to the PTO, and therefore it complied with its duty to disclose. In order to prevail on the fraud components of its antitrust claim, Xitronix must show either that "the patentee 'obtained **[*23]** the patent by knowingly and willfully misrepresenting facts' to the [PTO]" or that it made a fraudulent omission. *Nobelpharma, 141 F.3d at 1068-71*. Xitronix presents both an affirmative misrepresentation theory and a fraud-by-omission theory.

First, Xitronix argues KLA' s patent attorney, Stallman, made affirmative misrepresentations regarding the status of relevant prior art. In the Court's post-trial final order in the First Lawsuit, it discussed the ample evidence that existed to support the jury's finding of invalidity of the '441 Patent based on anticipation and obviousness. *See* Order of Jan. 31, 2011 [#210] at 10-12, the First Lawsuit. In particular, the Court discussed to two specific examples of prior art, Batista and Mansanares, and the probe beam wavelength they taught, which was a range of 355 to 410 nanometers (nm):

> The inventors and the experts testified that it was known by persons of ordinary skill that overcoming noise problems would improve the commercial embodiment of the prior art Therma-Probe device, and this problem was overcome by increasing the strength of the output signal. Batista and Mansanares each individually taught that changing the probe beam wavelength from 670 to a particular wavelengths [sic] **[*24]** in the range of 355 to 410 would increase the output signal by a factor of ten. This was strong motivation for a person of ordinary skill to change the wavelengths [sic] of the prior art Therma-Probe device and method using the teachings of Batista or Mansanares. Thus, a reason existed at the time of the effective filing date of the '441 Patent that prompted a person of ordinary skill to change the wavelength of the probe beam in the prior art Therma-Probe device to a wavelength that increased the strength of the output signal, which reflects the obviousness of the claims.

Id. at 12 (citations to the trial record omitted).

Soon after entrance of the January 31, 2011 Order, KLA submitted the final order and final judgment to the PTO in February 2011. In 2013 and 2014, however, when a new patent examiner had taken over the ongoing '260 Patent application, Stallman made representations to the new examiner regarding the prior art, which Xitronix alleges contradict the actual state of the prior art and this Court's statements about the prior art. For example, Stallman claimed on March 12, 2014:

> [N]one of the prior art related to measuring modulated reflectivity on silicon semiconductor samples taught the claimed probe beam wavelength **[*25]** of 360 to 410 nm.

Compl. [#1] ¶ 72.

Similarly, in October 2013, Stallman represented:

> [T]he prior art fails to teach [the 360 to 410 nm] wavelength range for use in semiconductor samples when performing modulated optical reflectivity measurement.

Id. ¶ 73.

On April 17, 2014, the examiner allowed claim 1 of the '260 Patent, and Xitronix argues the examiner's stated rationale reflects his acceptance of KLA's fraudulent misrepresentations of the prior art:

> Regarding claim [1], the prior art of record fails to anticipate or render obvious a method for evaluating a silicon semiconductor sample comprising, among other essential features, focusing a fixed wavelength prove [sic] beam generated by a laser onto the sample within the region that has been excited, wherein the wavelength of the probe beam is between 360 and 410 nm; monitoring the changes in the power of the reflected beam induced by the pump beam; and generating output signals in response thereto, said output signals

> corresponding to the changes in the optical reflectivity of the sample the output signals containing information which is used to evaluate the sample, in combination with the rest of the limitations of claim [1].

Id. ¶ 78.

In the Court's **[*26]** view, these allegations are sufficient to satisfy the fraudulent misrepresentation element of a fraud-on-the-PTO claim. While Stallman was certainly free to present argument in favor of patentability, he was not free to misrepresent the state of the prior art as alleged by Xitronix. Moreover, the disclosure of all of the relevant prior art does not permit Stallman to make representations about that prior art that are false. Xitronix's allegations support a theory whereby Stallman told the PTO there was no prior art teaching a probe beam wavelength of 360 to 410 nm when he was fully aware of the Batista and Mansanares references that taught those wavelength ranges and this Court's final judgment that the '441 Patent was invalid as obvious due to those references.

Xitronix's second theory for fraud-on-the-PTO, which is related to its first, is that KLA had more than a duty merely to disclose all material information but also a duty to explicitly inform the examiner of the relationship between the pending claims of the '260 Patent and the invalid claims of the '441 Patent. When KLA failed to do so, Xitronix argues KLA fraudulently omitted material information.

"A patent applicant's duty to disclose material information **[*27]** to the PTO arises under the general duty of candor, good faith, and honesty embodied in *37 C.F.R. § 1.56(a) (1996)*." *Critikon, Inc. v. Becton Dickinson Vascular Access, Inc., 120 F.3d 1253, 1256 (Fed. Cir. 1997)*. Materiality embraces "any information that a reasonable examiner would substantially consider important in deciding whether to allow an application to issue as a patent." *Akron Polymer Container Corp. v. Exxel Container, Inc., 148 F.3d 1380, 1382 (Fed. Cir. 1998)* (quotation omitted).

As an example of KLA's alleged fraudulent omissions and its failure to uphold its duty of candor, good faith, and honesty, Xitronix points to the fact the Court held the '441 Patent invalid for indefiniteness because of its use of the term "substantially maximize" to describe the patented wavelengths at issue. *See* Order of Jan. 31, 2011 [#210] at 5-9, the First Lawsuit. During prosecution of the '260 Patent, the examiner recommended KLA incorporate the same "substantially maximize" language. Instead of pointing out to the examiner that the Court had held this same language indefinite, Stallman accepted the examiner's recommendation. According to Xitronix, this failure to inform the examiner of the contradiction between his suggestion and the final judgment of the First Lawsuit amounts to a breach of KLA's duty of candor, honesty, and good faith.

Again, the Court finds these allegations sufficient to state a claim for **[*28]** fraud. To remain silent and not inform the examiner that his suggested language had been previously ruled invalid for indefiniteness in a final judgment states a claim that Stallman fraudulently omitted material information and did not comply with his duties of candor, honesty, and good faith.

Conclusion

After careful review of the applicable legal standards and the allegations in the complaint, the Court concludes Xitronix has adequately pleaded "enforcement" for purposes of a *Walker Process* antitrust claim and fraud in procuring the '260 Patent.

Accordingly,

IT IS ORDERED that Defendant KLA-Tencor Corporation's Motion to Dismiss [#5] is DENIED.

SIGNED this the 24th day of June 2015.

/s/ Sam Sparks

SAM SPARKS

UNITED STATES DISTRICT JUDGE

[King Drug Co. of Florence, Inc. v. SmithKline Beecham Corp.]

United States Court of Appeals for the Third Circuit

November 19, 2014, Argued; June 26, 2015, Opinion Filed

No. 14-1243

Reporter

791 F.3d 388 *; 2015 U.S. App. LEXIS 10859 **; 2015-2 Trade Cas. (CCH) P79,223

KING DRUG COMPANY OF FLORENCE, INC.; LOUISIANA WHOLESALE DRUG CO., INC., on behalf of itself and all others similarly situated, Appellants v. SMITHKLINE BEECHAM CORPORATION, doing business as GLAXOSMITHKLINE; TEVA PHARMACEUTICAL INDUSTRIES LTD.; TEVA PHARMACEUTICALS

Subsequent History: As Amended September 23, 2015.

Later proceeding at *SmithKline Beecham Corp. v. King Drug Co. of Florence, Inc., 136 S. Ct. 2428, 195 L. Ed. 2d 778, 2016 U.S. LEXIS 3640 (U.S., 2016)*

US Supreme Court certiorari denied by *Smithkline Beecham Corp. v. King Drug Co. of Florence, Inc., 2016 U.S. LEXIS 6717 (U.S., Nov. 7, 2016)*

Prior History: [1]** On Appeal from the United States District Court for the District of New Jersey. D.C. Civil Action No. 2-12-cv-00995. District Judge: Honorable William H. Walls.

Lamictal Direct Purchaser Antitrust Litig. v. All Direct Purchaser Action (In re Lamictal Direct Purchaser Antitrust Litig.), 18 F. Supp. 3d 560, 2014 U.S. Dist. LEXIS 9257 (D.N.J., 2014)

Core Terms

patent, generic, settlement, antitrust, anticompetitive, invalid, no-AG, patentee, monopoly, tablets, anti trust law, manufacturer, infringed, effects, rule of reason, lamotrigine, challenger, expiration, parties, profits, promise, induce, licensing, brand, noninfringement, consumer, settle, rule-of-reason, chewables, launch

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

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

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

In Actavis, the Supreme Court held that unexplained large payments from the holder of a patent on a drug to an alleged infringer to settle litigation of the validity or infringement of the patent (reverse payment) can sometimes violate the antitrust laws. The Court rejected the near-irrebuttable presumption, known as the scope of the patent test, that a patentee can make such reverse payments so long as it is paying potential competitors not to challenge its patent within the patent's lifetime.

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

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

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

Plenary review is exercised over a district court's ruling on a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss.

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

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

HN3[] **Per Se Rule & Rule of Reason, Sherman Act**

The Supreme Court's holding in Actavis is not limited to reverse payments of cash. A no-authorized generic agreement, when it represents an unexplained large transfer of value from the patent holder to the alleged infringer, may be subject to antitrust scrutiny under the rule of reason.

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

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

HN4[] **Per Se Rule & Rule of Reason, Sherman Act**

In Actavis, the Supreme Court found that reverse payments are problematic because of their potential to negatively impact consumer welfare by preventing the risk of competition, which arises from expected litigation outcomes. The Court's reasoning was not that reverse payments per se violate the antitrust laws, or are per se anticompetitive. Instead, the Court focused on whether a reverse payment could have an anticompetitive effect or, alternatively, whether it was reasonable compensation for litigation costs or the value of services. In other words, the Court reasoned that even a small risk of invalidity may not justify a large payment (presumably enabled by patent-generated monopoly profits) that likely seeks to prevent the risk of competition. It is the prevention of that risk of competition—eliminating the risk of patent invalidation or a finding of noninfringement by paying the challenger to stay out of the market (for longer than the patent's strength would otherwise allow)—that constitutes the relevant anticompetitive harm, which must then be analyzed under the rule of reason.

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

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

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

Antitrust law is designed to protect consumers from arrangements that prevent competition in the marketplace. A no-authorized generic agreement could prevent the risk of competition. The Actavis Court did not intend to draw a formal line applying only to a reverse payment involving a payment of money. Nor did the Actavis Court limit its reasoning or holding to cash payments only.

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

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

HN6[] **Inequitable Conduct, Anticompetitive Conduct**

The fact that the Patent Act expressly authorizes licensing does not necessarily mean it also authorizes reverse payments to prevent generic competition.

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

HN7[] **Inequitable Conduct, Anticompetitive Conduct**

The United States Court of Appeals for the Third Circuit does not read the Supreme Court's Actavis decision to require allegations that defendants could in fact have reached another, more competitive settlement. Actavis embraces the concept that a patent may or may not be valid, and may or may not be infringed, and holds that the anticompetitive harm from a settlement is not certain consumer loss through higher prices, but rather the patentee's avoidance of the risk of patent invalidation or a finding of noninfringement—that is, prevention of the risk of competition beyond what the patent's strength would otherwise allow—and, thus, consumer harm. In other words, under the substantive standard, the question is not whether the defendants have only possibly acted unlawfully, but whether they have acted unlawfully by seeking to prevent competition.

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

HN8[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The rule-of-reason analysis is for the finder of fact, not the court as a matter of law.

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

Evidence > Burdens of Proof > Allocation

HN9[] **Per Se Rule & Rule of Reason, Sherman Act**

Under the traditional rule-of-reason analysis, the factfinder must weigh all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. The plaintiff bears an initial burden under the rule of reason of showing that the alleged combination or agreement produced adverse, anti-competitive effects within the relevant product and geographic markets. The plaintiff may satisfy this burden by proving the existence of actual anticompetitive effects, such as reduction of output, increase in price, or deterioration in quality of goods or services. Such proof is often impossible to make, however, due to the difficulty of isolating the market effects of challenged conduct. Accordingly, courts typically allow proof of the defendant's market power instead. Market power, the ability to raise prices above those that would prevail in a competitive market, is essentially a surrogate for detrimental effects. If a plaintiff meets his initial burden of adducing adequate evidence of market power or actual anti-competitive effects, the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective. To rebut, the plaintiff must demonstrate that the restraint is not reasonably necessary to achieve the stated objective.

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Judges: Before: AMBRO, SCIRICA, and ROTH, Circuit Judges.

Opinion by: SCIRICA

Opinion

[*392] OPINION OF THE COURT

SCIRICA, *Circuit Judge*.

In this appeal from the grant of a motion to dismiss for failure to state a rule-of-reason **[*393]** claim under *Sections 1* and *2* of the Sherman Act under *Federal Rule of Civil Procedure 12(b)(6)*, we are asked to determine whether *FTC v. Actavis, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*, covers, in addition to reverse **[**4]** cash payments, a settlement in which the patentee drug manufacturer agrees to relinquish its right to produce an "authorized generic" of the drug ("no-AG agreement") to compete with a first-filing generic's drug during the generic's statutorily guaranteed 180 days of market exclusivity under the Hatch-Waxman Act[1] as against the rest of the world.

HN1[] In *Actavis*, the Supreme Court held that unexplained large payments from the holder of a patent on a drug to an alleged infringer to settle litigation of the validity or infringement of the patent ("reverse payment") "can sometimes violate the antitrust laws." *Id. at 2227*. The Court rejected the near-irrebuttable presumption, known as the "scope of the patent" test, that a patentee can make such reverse payments so long as it is paying potential competitors not to challenge its patent within the patent's lifetime.

Plaintiffs here, direct purchasers of the brand-name drug Lamictal, sued Lamictal's producer, Smithkline Beecham Corporation, d/b/a GlaxoSmithKline ("GSK"), and Teva Pharmaceutical Industries Ltd. ("Teva"),[2] a manufacturer of generic Lamictal, **[**5]** for violation of Sections 1 and 2 of the Sherman Act, *15 U.S.C. §§ 1* & *2*.[3] In earlier litigation, Teva had challenged the validity and enforceability of GSK's patents on lamotrigine, Lamictal's active ingredient. Teva was also first to file an application with the FDA alleging patent invalidity or nonenforceability and seeking approval to produce generic lamotrigine tablets and chewable tablets for markets alleged to be annually worth $2 billion and $50 million, respectively. If the patent suit resulted in a judicial determination of invalidity or nonenforceability—or a settlement incorporating such terms—Teva would be statutorily entitled to a valuable 180-day period of market exclusivity, during which time only it and GSK could produce generic lamotrigine tablets. (The relevant statute permits the brand to produce an "authorized generic" during the exclusivity period. *Mylan Pharms., Inc. v. United States FDA, 454 F.3d 270, 276-77 (4th Cir. 2006)*; *Teva Pharm. Indus. Ltd. v. Crawford, 410 F.3d 51, 55, 366 U.S. App. D.C. 203 (D.C. Cir. 2005)*; *see also* *Sanofi-Aventis v. Apotex Inc., 659 F.3d 1171, 1175 (Fed. Cir. 2011)*.)

After the judge presiding over the patent litigation ruled the patent's main claim invalid, GSK and Teva settled. They **[*394]** agreed Teva would end its challenge to GSK's patent in exchange for early entry into the $50 million annual lamotrigine chewables market and GSK's commitment not to produce its own, "authorized generic" version of Lamictal tablets for the market alleged to be worth $2 billion annually. Plaintiffs contend that this "no-AG agreement" qualifies as a "reverse payment" under *Actavis* because, like the cash reverse payments the Court there warned could face antitrust scrutiny, GSK's no-AG commitment was designed to induce Teva to abandon the patent **[**7]** fight and thereby agree to eliminate the risk of competition in the $2 billion lamotrigine tablet market for longer than the patent's strength would otherwise permit.

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[1] Hatch-Waxman is the short name for the Drug Price Competition and Patent Term Restoration Act of 1984, *Pub. L. No. 98-417, 98 Stat. 1585*.

[2] "Teva" refers collectively to Teva Pharmaceutical Industries Ltd. and its subsidiary Teva Pharmaceuticals USA, Inc.

[3] Plaintiffs bring their Sherman Act claims under Sections 4 (damages) and 16 (injunctive relief) of the Clayton Act, *15 U.S.C. §§ 15* & *26*, respectively. The Clayton Act requires "a plaintiff to have standing to bring an antitrust claim." *Angelico v. Lehigh Valley Hosp., Inc., 184 F.3d 268, 273 (3d Cir. 1999)*. At **[**6]** the motion-to-dismiss stage, "a plaintiff must allege more than that it has suffered an injury causally linked to a violation of the antitrust laws." *Pace Elecs., Inc. v. Canon Computer Sys., Inc., 213 F.3d 118, 120 (3d Cir. 2000)*. The plaintiff must also "allege antitrust injury, 'which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Id.* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*). As noted below, we do not here address the issue of antitrust injury, nor do we preclude consideration of the issue on remand. *See infra* notes 20 & 35 and accompanying text.

We believe this no-AG agreement falls under *Actavis's* rule because it may represent an unusual, unexplained reverse transfer of considerable value from the patentee to the alleged infringer and may therefore give rise to the inference that it is a payment to eliminate the risk of competition. As the Court noted, these kinds of settlements are subject to the rule of reason.

I.

"A patent . . . is an exception to the general rule against monopolies and to the right to access to a free and open market." *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)* (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 816, 65 S. Ct. 993, 89 L. Ed. 1381, 1945 Dec. Comm'r Pat. 582 (1945))*. The Constitution's "*Patent Clause* itself reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the 'Progress of Science and useful Arts.'" *Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 146, 109 S. Ct. 971, 103 L. Ed. 2d 118 (1989)* (quoting *U.S. Const. art. I., § 8, cl. 8*). In turn, "[f]rom their inception, the federal patent laws have embodied a careful balance between the need to promote innovation and the recognition that imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy." *Id.;* ***[**8]*** *see* X Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 1780a (3d ed. 2011) ("Patent law . . . serves the interests of consumers by protecting invention against prompt imitation in order to encourage more innovation than would otherwise occur."). A patent, consequently, "is a special privilege designed to serve the public purpose of promoting the 'Progress of Science and useful Arts.'" *Precision Instrument Mfg. Co., 324 U.S. at 816*.

With the Drug Price Competition and Patent Term Restoration Act of 1984, *Pub. L. No. 98-417, 98 Stat. 1585*, commonly known as the Hatch-Waxman Act, Congress attempted to balance the goal of "mak[ing] available more low cost generic drugs," H.R. Rep. No. 98-857, pt. 1, at 14-15 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2647, 2647-48, with the value of patent monopolies in incentivizing beneficial pharmaceutical advancement, *see* H.R. Rep. No. 98-857, pt. 2, at 30 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2686, 2714. The Act seeks to accomplish this purpose, in part, by encouraging "manufacturers of generic drugs . . . to challenge weak or invalid patents on brand name drugs so consumers can enjoy lower drug prices." S. Rep. No. 107-167, at 4 (2002). The resulting regulatory framework has the following four relevant features identified by the **[**9]** Supreme Court in *Actavis, 133 S. Ct. at 2227-29*.

First, a new drug—that is, a pioneer, "brand-name" drug—cannot be introduced **[*395]** until it is approved by the Food and Drug Administration ("FDA"). *21 U.S.C. § 355(a)*. A New Drug Application ("NDA") requires the applicant to submit, among other things, "full reports of investigations which have been made to show whether or not such drug is safe for use and whether such drug is effective in use," *id. § 355(b)(1)(A)*, as well as comprehensive information about the drug, *id. § 355(b)(1)*. This reporting requirement entails "a long, comprehensive, and costly testing process." *Actavis, 133 S. Ct. at 2228*.

Second, the Hatch-Waxman Act facilitates the development of generic drugs by allowing an applicant to file, for new drugs shown to be "bioequivalent" to a drug previously approved by the FDA, *21 U.S.C. § 355(j)(2)(A)(iv)*, a less onerous and less costly "Abbreviated New Drug Application" ("ANDA") in lieu of an NDA. *See id. § 355(j)*; *Actavis, 133 S. Ct. at 2228*. The ANDA process "allow[s] the generic to piggy-back on the pioneer's approval efforts . . . , thereby furthering drug competition." *Actavis, 133 S. Ct. at 2228* (citing *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S, 132 S. Ct. 1670, 1676, 182 L. Ed. 2d 678 (2012))*.[4]

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[4] "Rather than providing independent evidence of safety and efficacy, the typical ANDA shows that the generic drug has the same active ingredients as, and is biologically equivalent to, the brand-name drug." *Caraco, 132 S. Ct. at 1676*; *see* *21 U.S.C. § 355(j)* (ANDA **[**10]** requirements). Before Hatch-Waxman, a company desiring to produce a generic version of a drug approved after 1962 had to conduct its own testing and trials to show that its generic version was safe and effective for human use. H.R. Rep. No. 98-857, pt. 1, at 16-17.

Third, Hatch-Waxman "sets forth special procedures for identifying, and resolving, related patent disputes." *Id.* A new drug applicant must list information on any patents issued on the drug's composition or methods of use. *See* 21 U.S.C. § 355(b)(1); *Caraco, 132 S. Ct. at 1676*. If the FDA approves the new drug, it publishes this information, without verification, in its Orange Book.[5] *Caraco, 132 S. Ct. at 1676*. In turn, any manufacturer filing an ANDA to produce a generic version of that pioneer drug must consult the *Orange Book* and "assure the FDA that [the] proposed generic drug will not infringe the brand's patents." *Id.*[6] As relevant here, the manufacturer may tender that assurance with a "paragraph IV" certification that the relevant listed patents are "invalid or will not be infringed by the manufacture, use, or sale of the [generic] drug." 21 U.S.C. § 355(j)(2)(A)(vii)(IV). But "[f]iling a paragraph IV certification means provoking litigation," *Caraco, 132 S. Ct. at 1677*, because the patent statute treats paragraph IV certification as a per se act of infringement, *see* **[**11]** 35 U.S.C. § 271(e)(2)(A).[7] The patentee then has an incentive to sue within 45 days in order to trigger a 30-month stay of the FDA's potential **[*396]** approval of the generic "while the parties litigate patent validity (or infringement) in court. If the courts decide the matter within that period, the FDA follows that determination; if they do not, the FDA may go forward and give approval to market the generic product." *Actavis, 133 S. Ct. at 2228* (citing 21 U.S.C. § 355(j)(5)(B)(iii)).[8]

"Fourth, Hatch-Waxman provides a special incentive for a generic to be the first to file an Abbreviated New Drug Application taking the paragraph IV route." *Id. at 2228-29*. From when it first begins marketing its drug or when a court enters judgment finding the challenged patent invalid or unenforceable, the first-filing generic enjoys a 180-day period of exclusivity during which no other generic manufacturer can enter the market. *See* 21 U.S.C. § 355(j)(5)(B)(iii), (iv).[9] This exclusivity period belongs to first-filing ANDA applicants[10] alone and is nontransferable. *See id.* § 355(j)(5)(D); *Actavis, 133 S. Ct. at 2229*. The period does not, however, prevent the brand-patentee from marketing its own "authorized generic." *Mylan Pharms., 454 F.3d at 276-77*; *Teva Pharm. Indus., 410 F.3d at 55*; *see also* Sanofi-Aventis, 659 F.3d at 1175.

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[5] The volume, officially known as *Approved Drug Products with Therapeutic Equivalence Evaluations*, is available at http://www.fda.gov/cder/ob/ . *See generally, e.g.*, 21 U.S.C. § 355(b)(1) ("Upon approval of the application, the Secretary shall publish information submitted . . . ."); *Caraco, 132 S. Ct. at 1676*.

[6] Although the FDA performs no independent patent review, it cannot approve an ANDA if the proposed generic would infringe any of the brand's asserted patents. *See Caraco, 132 S. Ct. at 1676*.

[7] Further, an ANDA applicant making a paragraph IV certification must notify any patent holder within twenty days of the FDA's confirmation of its ANDA filing, 21 U.S.C. § 355(j)(2)(B)(ii), (iii), "of the factual and legal basis of [its] opinion . . . that the patent is invalid or will not be infringed," *id.* § 355(j)(2)(B)(iv)(II). *See also* 21 C.F.R. § 314.52 ("Notice of certification of invalidity or noninfringement of a patent").

[8] Hatch-Waxman "allows competitors, prior to the expiration of a patent, to engage in otherwise infringing activities necessary to obtain regulatory approval." *Eli Lilly & Co. v. Medtronic, Inc., 496 U.S. 661, 671, 110 S. Ct. 2683, 110 L. Ed. 2d 605 (1990)*; *see* 35 U.S.C. § 271(e)(1). As long as a generic applicant does not launch its generic "at risk" (i.e., after FDA approval after 30 months but before a determination of patent validity), it will not be forced to pay money damages. *See* 35 U.S.C. § 271(e)(4)(C). This feature also explains "the creation of a highly artificial act **[**12]** of infringement"—the paragraph IV certification—to permit the brand and generic to litigate patent validity. *Eli Lilly, 496 U.S. at 678*.

[9] Under current law, the specific mechanism is that an application by a non-first filer "shall be made effective on the date that is 180 days after the date of the first commercial marketing of the drug . . . by any first applicant." 21 U.S.C. § 355(j)(5)(B)(iv)(I). But the parties appear to agree that because the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, ***Pub. L. No. 108-173, § 1102(b)(1)***, amended Hatch-Waxman's exclusivity provisions only for subsequent ANDAs, the exclusivity **[**13]** rules in place in 2002 control. *See* Teva Br. 8 & n.1. Under those rules, the 180-day period begins from the earlier of a generic's launching "at risk" or a court's finding the patent invalid or unenforceable. *See* 21 U.S.C. § 355(j)(5)(B)(iv) (2002).

[10] "[A]ccording to the Food and Drug Administration, all manufacturers who file on the first day are considered 'first applicants' who share the exclusivity period. Thus, if ten generics file an application to market a generic drug on the first day, all will be considered 'first applicants.'" *Actavis, 133 S. Ct. at 2246* (Roberts, C.J., dissenting) (citing 21 U.S.C. § 355(j)(5)(B)(iv)(II)(bb)).

II.

A.[11]

Plaintiffs, a putative class represented by King Drug Company of Florence, Inc., and Louisiana Wholesale Drug Co., Inc., are direct purchasers of Lamictal from Defendant GSK. GSK pioneered Lamictal, a brand-name drug used to treat epilepsy and bipolar disorder, and secured U.S. Patent No. 4,602,017 ("the '017 patent") on lamotrigine, Lamictal's active ingredient. The patent expired on July 22, 2008. GSK sells both Lamictal tablets and Lamictal chewable tablets, although most Lamictal prescriptions **[**14]** are for the nonchewable tablets **[*397]** (most relevant here). Lamictal tablet sales exceeded $2 billion between March 2007 and 2008, while chewable sales measured about $50 million over a yearlong span around 2005.

In April 2002, Defendant Teva filed the first paragraph IV ANDAs to market generic lamotrigine tablets and chewables. Teva certified that its proposed generics did not infringe the '017 patent and/or that the '017 patent was unenforceable. GSK soon sued in federal court, *see* Complaint, *Smithkline Beecham Corp. v. Teva Pharm. USA, Inc.*, No. 02-3779 (D.N.J. Aug. 5, 2002) (ECF No. 1), staying the FDA's approval of Teva's ANDAs for 30 months. In late January 2005, the parties tried the patent case before Judge Bissell, who ruled that the patent's main claim, for the invention of lamotrigine, was invalid. Plaintiffs allege that "it was highly likely that Teva would prevail with respect to the remaining patent claims," which "were extremely weak in view of Judge Bissell's ruling that claim 1 was invalid."

In February 2005, the parties settled their dispute before Judge Bissell could rule on the validity of the '017 patent's remaining claims. GSK agreed to allow Teva to market generic lamotrigine chewables by no later than **[**15]** June 1, 2005, or 37 months before the patent was to expire on July 22, 2008.[12] GSK further agreed to permit Teva to sell generic lamotrigine tablets on July 21, 2008, if GSK received a "pediatric exclusivity" extension,[13] or March 1, 2008, if GSK did not. (With a pediatric exclusivity extension, the patent would still have expired on July 22, 2008, but the FDA would have been foreclosed from approving ANDAs filed by competing generics until January 22, 2009. *See generally* AstraZeneca AB v. Apotex Corp., 782 F.3d 1324, 1341, 1343 (Fed. Cir. 2015).)

Most relevant here, GSK also agreed not to market an authorized generic until January 2009, after Teva's 180-day market exclusivity period was to expire (the "no-AG agreement" component of the settlement). In fact, plaintiffs allege, Teva "had an interest in delaying a final court decision finding the '017 patent invalid" because the FDA had not yet approved Teva's ANDAs, and Teva **[**16]** therefore wanted time to secure FDA approval so it could "take advantage of its valuable 180-day period," which would have begun to run with a final judgment finding the patent invalid or noninfringed.

In exchange, Teva agreed to drop its litigation challenging GSK's patent and, plaintiffs allege, delay its entry into the lamotrigine tablet market. If not for the consideration it received, plaintiffs allege, Teva would have launched its generic lamotrigine tablet "at risk" after receiving FDA approval (which occurred later, in August 2006), even if Judge Bissell had not yet ruled the patent invalid (as, they allege, he was likely to do). Indeed, Teva was later to assert, in other litigation against GSK, that GSK's no-AG agreement was "an important component of the settlement between the parties and formed part of the inducement to Teva to relinquish the rights and defenses it was

[11] The facts recounted in this opinion are taken from the well-pleaded, nonconclusory factual allegations in plaintiffs' Amended Complaint and all reasonable inferences to be drawn therefrom. *See* Ashcroft v. Iqbal, 556 U.S. 662, 678-79, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

[12] Because Teva's ANDAs had not yet been approved, GSK also agreed to supply Teva with lamotrigine chewables.

[13] *See generally* 21 U.S.C. § 355a(c)(2)(B) (2002) (then in effect) (providing for situations in which the FDA may not approve ANDAs for an additional six months if the patent holder completes certain studies "relating to the use of [the] drug in the pediatric population").

asserting against GSK in the Patent Litigation." JA 76 (alteration and emphases omitted).[14] **[*398]** Judge Bissell approved the parties' settlement and dismissed the case on April 4, 2005.

B.

Plaintiffs here, direct purchasers of Lamictal from GSK, sued GSK and Teva in federal court in February 2012 and filed their Consolidated Amended Class Action Complaint the following June. They allege that defendants, by their no-AG agreement—in effect, a "reverse payment" from GSK to Teva—violated *section 1* of the Sherman Act by conspiring to delay generic competition for Lamictal tablets and *section 2* by conspiring to monopolize the lamotrigine tablet market. GSK and Teva moved to dismiss, countering that, under our decision in *In re K-Dur Antitrust Litigation, 686 F.3d 197 (3d Cir. 2012)*,[15] only cash payments constitute actionable "reverse payments."

In *K-Dur*, we charted a course different from that set by several other courts of appeals by rejecting the "scope of the patent" test, under which "a reverse payment settlement is immune from antitrust attack so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent," *Actavis, 133 S. Ct. at 2230* (citation omitted). We reasoned that the scope-of-the-patent test "is contrary to the policies underlying the Hatch-Waxman Act and a long line of Supreme Court precedent on patent litigation and competition." *K-Dur, 686 F.3d at 214*. Patents, we noted, are simply legal conclusions of the Patent Office. They should not be irrebuttably presumed valid, we said, especially given "the public interest support[ing] judicial testing and elimination of weak patents," *id. at 215-16*, and "[t]he line that Congress drew [in Hatch-Waxman specifically] between the[] competing objectives" of promoting innovation and advancing the public interest, *id. at 217*. For these reasons, we held that rule of reason scrutiny is proper for reverse payment settlements. *Id. at 218*.[16]

The District Court here focused on our limitation of *KDur* to the pharmaceutical context, **[**19]** *see id. at 216-18*, and statements approving "settlements based on a negotiated entry date for marketing of the generic drug," *id. at 217-18*, to restrict *K-Dur*'s reach to "settlements when a generic manufacturer is paid off with money, which is not the case here," *In re Lamictal Direct Purchaser Antitrust Litig., No. 12-0995, 2012 U.S. Dist. LEXIS 183627, 2012 WL 6725580, at *6 (D.N.J. Dec. 6, 2012)*. The court observed that Teva surely "received consideration," or otherwise would have had "no incentive to settle," but it viewed the parties' settlement as "based on negotiated entry dates" rather than money. *Id.* Concluding the settlement **[*399]** was "not subject to antitrust scrutiny" under *K-Dur, id.*, and that, "from a policy perspective, this settlement did introduce generic products onto the market sooner than what would have occurred had GSK's patent not been challenged," *2012 U.S. Dist. LEXIS 183627, [WL] at *7*, the court granted the defendants' motion to dismiss for failure to state a claim.

Plaintiffs appealed and we stayed proceedings pending the Supreme Court's decision in *Actavis*. After the Court's decision, we remanded for further consideration in light of *Actavis*. In January 2014, the District Court "affirm[ed] its

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[14] In July 2008, "[j]ust prior to Teva launching its generic, GSK approached various pharmacies, group purchasing organizations, and long-term **[**17]** care facilities and proposed that they purchase and distribute GSK's Lamictal at a generic product price." *Teva Pharm. Indus. v. SmithKline Beecham Corp., No. 08-3706, 2009 U.S. Dist. LEXIS 50499, 2009 WL 1687457, at *2 (D.N.J. June 16, 2009)*. Teva sued GSK to attempt to prevent GSK from "develop[ing] a generic of lamotrigine" because the parties' settlement agreement "made clear that [Teva's] right [to sell generic lamotrigine] was exclusive—including as to GSK and its affiliates." *2009 U.S. Dist. LEXIS 50499, [WL] at *1, *4*.

[15] The Supreme Court later vacated *K-Dur* and remanded for reconsideration in light of *Actavis, see* ***Merck & Co. v. La. Wholesale Drug Co., 133 S. Ct. 2849, 186 L. Ed. 2d 904 (2013)***; ***Upsher-Smith Labs., Inc. v. La. Wholesale Drug Co., 133 S. Ct. 2849, 186 L. Ed. 2d 904 (2013)***. *K-Dur* was inconsistent with *Actavis* in that we had directed application of "quick look rule of reason analysis," *K-Dur, 686 F.3d at 218*, rather than the traditional, full-fledged rule of reason standard that the Supreme **[**18]** Court subsequently decided is proper for reverse payment settlement agreements, *see Actavis, 133 S. Ct. at 2237-38*.

[16] *See supra* note 15.

order of dismissal." *In re Lamictal Direct Purchaser Antitrust Litig., 18 F. Supp. 3d 560, 561 (D.N.J. 2014)*. Although conceding that "there is some very broad language in the [*Actavis]* opinion regarding patent settlements of all kinds," *id. at 566*, the court read ***[**20]*** *Actavis*, as it had *K-Dur* before, as requiring antitrust scrutiny only of reverse payment patent settlements that "involve an exchange of money" rather than some other type of valuable consideration, *id. at 568*. In the alternative, the court stated, it "considered the settlement under the 'five considerations'" of *Actavis*'s rule of reason and concluded that the settlement "would survive." *Id. at 570*.

III.[17]

Plaintiffs contend that under *Actavis* antitrust scrutiny is not limited to reverse payments of cash. They assert the antitrust laws may be violated when a brand-name drug manufacturer induces a would-be generic competitor to delay market entry by agreeing not to launch an authorized generic to compete with the generic. Further, they argue, the District Court usurped the jury's role in purporting to conduct a rule of reason analysis by applying the five considerations the *Actavis* Court discussed to justify, not redefine, use of the already well-established rule of reason analysis. We will vacate and remand.

[21] A**.

As noted, in *Actavis*, the Supreme Court rejected the "scope of the patent" test, a categorical rule that reverse payment patent settlements in the Hatch-Waxman context were immune from antitrust scrutiny so long as the asserted anticompetitive effects fell within the scope of the patent. The Court held that "reverse payment settlements . . . can sometimes violate the antitrust laws," *Actavis, 133 S. Ct. at 2227*, because "[a]n unexplained large reverse payment itself would normally suggest that the patentee has serious doubts about the patent's survival," thereby "suggest[ing] that the payment's objective is to maintain supracompetitive prices to be shared among the patentee and the challenger rather than face what might have been a competitive market," *id. at 2236*. Consequently, the Court held, plaintiffs should be able to prove "[t]he existence and degree of any anticompetitive consequence" of such an agreement under the traditional rule-of-reason test. *Id. at 2237*.

Justice Breyer framed the issue of reverse payments then before the Court as follows:

> Company A sues Company B for patent infringement. The two companies settle under terms that require (1) Company **[*400]** B, the claimed infringer, not to produce the patented product until the patent's term **[**22]** expires, and (2) Company A, the patentee, to pay B many millions of dollars. Because the settlement requires the patentee to pay the alleged infringer, rather than the other way around, this kind of settlement agreement is often called a "reverse payment" settlement agreement. And the basic question here is whether such an agreement can sometimes unreasonably diminish competition in violation of the antitrust laws. See, *e.g.*, *15 U.S.C. § 1* (Sherman Act prohibition of "restraint[s] of trade or commerce"). Cf. *Palmer v. BRG of Ga., Inc., 498 U.S. 46, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990)* (*per curiam)* (invalidating agreement not to compete).

Actavis, 133 S. Ct. at 2227.

The Court of Appeals for the Eleventh Circuit had applied its scope-of-the-patent test to the following facts. *See id. at 2227*; *FTC v. Watson Pharms., Inc., 677 F.3d 1298 (11th Cir. 2012)*, *rev'd sub nom.* *Actavis, 133 S. Ct. 2223, 186 L. Ed. 2d 343*. Solvay Pharmaceuticals developed a brand-name drug called AndroGel in 1999 and obtained a relevant patent in 2003. Later in 2003, three would-be generic AndroGel manufacturers, Actavis first (soon followed by Paddock Laboratories and Par Pharmaceutical), filed ANDAs with paragraph IV certifications. Solvay sued. Thirty months into the litigation, the FDA approved Actavis's first-filed ANDA. *Actavis, 133 S. Ct. at 2229*.

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[17] The District Court had jurisdiction under section 4(a) of the Clayton Act, *15 U.S.C. § 15(a)*, and *28 U.S.C. §§ 1331* and *1337*. We have jurisdiction under *28 U.S.C. § 1291*. ***HN2***[] We exercise plenary review over a district court's ruling on a *Federal Rule of Civil Procedure 12(b)(6)* motion to dismiss. *E.g., Byers v. Intuit, Inc., 600 F.3d 286, 291 (3d Cir. 2010)*.

The parties settled in 2006. Under the terms of the settlement,

> Actavis agreed that it would not bring its generic to market **[**23]** until August 31, 2015, 65 months before Solvay's patent expired (unless someone else marketed a generic sooner). Actavis also agreed to promote AndroGel to urologists. The other generic manufacturers made roughly similar promises. And Solvay agreed to pay millions of dollars to each generic—$12 million in total to Paddock; $60 million in total to Par; and an estimated $19-$30 million annually, for nine years, to Actavis. The companies described these payments as compensation for other services the generics promised to perform, but the FTC contends the other services had little value.

Id. (citations omitted).

The FTC sued the settling manufacturers for violating the antitrust laws by agreeing to share Solvay's monopoly profits. *Id. at 2229-30*. The FTC contended Solvay's reverse payments to the generic manufacturers were compensation for the generics' agreements not to compete with AndroGel. *Id. at 2229*. The Court of Appeals for the Eleventh Circuit disagreed, and affirmed the dismissal of the FTC's complaint, on the ground "that, absent sham litigation or fraud in obtaining the patent, a reverse payment settlement is immune from antitrust attack so long as its anticompetitive effects fall within the scope **[**24]** of the exclusionary potential of the patent." *Watson Pharms., 677 F.3d at 1312*. In its view, "patent holder[s] had a lawful right to exclude others from the market." *Id. at 1307* (internal quotation marks omitted). Even though a patent might be found invalid if litigated, the court thought "the FTC's approach would put that burden back on the parties and the court, undo much of the benefit of settling patent litigation, and discourage settlements," in derogation of the important public policy interests served by settlement. *Id. at 1313-14*.

The Supreme Court disagreed. It began with the premise that an asserted patent "may or may not be valid, and may or may not be infringed." *Actavis, 133 S. Ct. at 2231*. Although a valid patent gives its holder the right to "'exclude[] all . . . **[*401]** from the use of the protected process or product'" and charge prices of its choosing, including supracompetitive prices, "an *invalidated* patent carries with it no such right. And even a valid patent confers no right to exclude products or processes that do not actually infringe." *Id.* (emphasis in original) (quoting *United States v. Line Material Co., 333 U.S. 287, 308, 68 S. Ct. 550, 92 L. Ed. 701 (1948))*. And from the time of their paragraph IV certification, the generics in *Actavis* had challenged both the validity and the scope of the AndroGel patent. *Id.* The Court observed that, as **[**25]** alleged by the FTC, Solvay had "agreed to pay the [generics] many millions of dollars to stay out of its market, even though the [generics] did not have any claim that [Solvay] was liable to them for damages." *Id.* The Court was concerned that this "unusual" "form of settlement" could "have significant adverse effects on competition" and thought, accordingly, "that patent and antitrust policies are both relevant in determining the 'scope of the patent monopoly'—and consequently ***antitrust law*** immunity—that is conferred by a patent." *Id.*

The Court cited several of its earlier cases for this proposition that courts must balance "the lawful restraint on trade of the patent monopoly and the illegal restraint prohibited broadly by the Sherman Act." *Id.* (quoting *Line Material, 333 U.S. at 310*); *see also United States v. United States Gypsum Co., 333 U.S. 364, 390-91, 68 S. Ct. 525, 92 L. Ed. 746 (1948)*. The antitrust question, it reasoned, must be answered "by considering traditional antitrust factors such as likely anticompetitive effects, redeeming virtues, market power, and potentially offsetting legal considerations present in the circumstances, such as here those related to patents." *Actavis, 133 S. Ct. at 2231*. Only then can a court conclude "[w]hether a particular restraint lies 'beyond the limits of the patent monopoly.'" *Id. at 2231-32* (quoting *id. at 2241-42* (Roberts, **[**26]** C.J., dissenting)). By contrast, Chief Justice Roberts, joined in dissent by Justices Scalia and Thomas, would have held that "the scope of the patent—*i.e.*, the rights conferred by the patent—forms the zone within which the patent holder may operate without facing antitrust liability." *Id. at 2238* (Roberts, C.J., dissenting). In the dissenters' view, "a patent holder acting within the scope of its patent does not engage in any unlawful anticompetitive behavior; it is simply exercising the monopoly rights granted to it by the Government." *Id. at 2240*. And, they maintained, the patent's scope "should be determined by reference to *patent law." Id.* (emphasis in original).

As noted, the Court explained that its "precedents make clear that patent-related settlement agreements can sometimes violate the antitrust laws." *Id. at 2232* (majority opinion) (citing *United States v. Singer Mfg. Co., 374 U.S. 174, 83 S. Ct. 1773, 10 L. Ed. 2d 823, 1963 Dec. Comm'r Pat. 547 (1963)*; *Line Material, 333 U.S. at 310-11*; *United States v. New Wrinkle, Inc., 342 U.S. 371, 378-80, 72 S. Ct. 350, 96 L. Ed. 417, 1952 Dec. Comm'r Pat. 411 (1952))*. The Court viewed these prior cases as "seek[ing] to accommodate patent and antitrust policies, finding challenged terms and conditions unlawful unless patent law policy offsets the ***antitrust law*** policy strongly favoring competition," notwithstanding the possible validity or infringement of the patent in question. *Id. at 2233*; *see id. at 2244* (Roberts, C.J., dissenting) ("The majority **[**27]** seems to think that *even if* the patent is valid, a patent holder violates the antitrust laws merely because the settlement took away some chance that his patent would be declared invalid by a court." (emphasis in original)). Rejecting the dissent's view "that a patent holder may simply 'pa[y] a competitor to respect its patent' and quit its patent invalidity **[*402]** or noninfringement claim without any antitrust scrutiny whatever," *id. at 2233* (majority opinion) (alteration in original) (quoting *id. at 2239* (Roberts, C.J., dissenting)), the Court reasoned that "[t]he dissent does not identify any patent statute that it understands to grant such a right to a patentee, whether expressly or by fair implication," *id.* Such a right, the Court thought, "would be difficult to reconcile . . . with the patent-related policy of eliminating unwarranted patent grants so the public will not 'continually be required to pay tribute to would-be monopolists without need or justification.'" *Id.* (quoting *Lear, Inc. v. Adkins, 395 U.S. 653, 670, 89 S. Ct. 1902, 23 L. Ed. 2d 610 (1969))*.[18]

The Court further explained that its holding should not be read to subject to antitrust scrutiny "commonplace forms" of settlement, such as tender by an infringer of less than the patentee's full demand. *See id.* But reverse payments, it said, are not such "familiar settlement forms." *Id.* In a reverse payment settlement, the patentee "pays money . . . purely so [the alleged infringer] will give up the patent fight." *Id.* These payments are said to flow in "reverse" because "a party with no claim for damages (something that is usually true of a paragraph IV **[**29]** litigation defendant) walks away with money simply so it will stay away from the patentee's market. That," the Court thought, "is something quite different," and something that falls outside accepted "traditional examples" of settlement. *Id.*

Notwithstanding the potential concern "that antitrust scrutiny of a reverse payment agreement would require the parties to litigate the validity of the patent in order to demonstrate what would have happened to competition in the absence of the settlement," the Court identified "five sets of considerations" militating in favor of permitting antitrust scrutiny. *Id. at 2234*. First, the Court saw in reverse payments the "potential for genuine adverse effects on competition." *Id.* (quoting *FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 460-61, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986))*. The inference may be drawn from a reverse payment that the patent holder is paying the alleged infringer to defend "a right it already claims but would lose if the patent litigation were to continue and the patent were held invalid or not infringed by the generic product." *Id.* Even though other settlement terms might allow a generic challenger to enter the market prior to patent expiration, and thus permit some competition benefiting consumers, a reverse payment inducing **[**30]** delay—i.e., a "payment in return for staying out of the market—simply keeps prices at patentee-set [supracompetitive] levels . . . while dividing that return between the challenged patentee and the patent challenger." *Id. at 2234-35*.

Second, the Court thought "these anticompetitive consequences will at least sometimes prove unjustified." *Id. at 2235-36*. Although a payment may be justified **[*403]** if, for example, it approximates litigation expenses saved by the settlement or is true "compensation for other services that the generic has promised to perform," it may not be justified when used "to prevent the risk of competition" by eliminating "the risk of patent invalidation or a finding of noninfringement." *Id. at 2236*; *see also, e.g., id.* (noting that the antitrust harm occurs when "the payment's

[18] Unlike the majority, the dissenters read the Court's precedents to stand for the proposition that a patentee's actions are subject to antitrust scrutiny only when they "go beyond the monopoly powers conferred by the patent," with just **[**28]** two exceptions—settlement of sham litigation and litigation involving patents obtained by fraud on the Patent and Trademark Office. *Actavis, 133 S. Ct. at 2239* (Roberts, C.J., dissenting); *see also id. at 2241-42*. No case cited by the majority, they said, subjected a patent settlement "to antitrust scrutiny merely because the validity of the patent was uncertain," and no reference to "a 'general procompetitive thrust'" of the Hatch-Waxman Act should be interpreted "to unsettle the established relationship between patent and ***antitrust law***," especially when "Congress has repeatedly declined to enact legislation addressing the issue." *Id. at 2242* (quoting *id. at 2234* (majority opinion)).

objective is to maintain supracompetitive prices to be shared among the patentee and the challenger rather than face what might have been a competitive market—the very anticompetitive consequence that underlies the claim of antitrust unlawfulness"). At the same time, the Court did not rule out other justifications.

Third, the Court reasoned, in reverse payment situations "the patentee likely possesses the power to bring" about **[**31]** this anticompetitive harm. *Id.* Not only does a patent protect such market power, but the size of a reverse payment may serve as a proxy for this power because a firm without such power (and the supracompetitive profits that power enables) is unlikely to buy off potential competitors. *Id.*

Fourth, "the size of the unexplained reverse payment can provide a workable surrogate for a patent's weakness, all without forcing a court to conduct a detailed exploration of the validity of the patent itself." *Id. at 2236-37*. Instead, the anticompetitive harm from such a payment appears not to be that the patentee is reaping supracompetitive monopoly profits from a decidedly invalid or noninfringed patent, but rather that there is a risk that the patent-enabled monopoly is unwarranted, and foreclosing such a challenge harms consumers. *See id. at 2236* ("[T]he payment (if otherwise unexplained) likely seeks to prevent the risk of competition. And, as we have said, that consequence constitutes the relevant anticompetitive harm.").[19]

Fifth, parties may still find other ways to settle, such as "by allowing the generic manufacturer to enter the patentee's market prior to the patent's expiration, without the patentee paying the challenger to stay out prior to that point." *Id. at 2237*. The Court emphasized, however, that "[i]f the basic reason [for the reverse payment] is a desire to maintain and to share patent-generated monopoly profits, then, in the absence of some other justification, the antitrust laws are likely to forbid the arrangement." *Id.*

The Court concluded that, because of the fact-specific nature and the complexity of reverse payment agreements, courts should apply the traditional rule-of-reason analysis. *See id. at 2237-38*.

B.

HN3[] We do not believe *Actavis's* holding can be limited to reverse payments of cash. For the following reasons, we think that a no-AG agreement, when it represents an unexplained large transfer of value from the patent holder to the alleged infringer, may be subject to antitrust scrutiny under the rule of reason. We find the allegations here sufficient to state such a claim under the Sherman Act.[20]

1.

HN4[] In the *Actavis* Court's view, reverse payments are problematic because of **[*404]** their potential to negatively impact consumer welfare by preventing the risk of competition, which arises from expected litigation outcomes. *See Actavis, 133 S. Ct. at 2236*. The Court's reasoning was not that reverse payments per se violate the antitrust laws, or are per se anticompetitive. To the contrary, the Court declined to "abandon[] . . . the 'rule of reason' in favor of presumptive rules (or a 'quick-look' approach)," which are "appropriate only where an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Id. at 2237* (internal quotation marks omitted). Instead, the Court focused on whether a reverse payment could have an anticompetitive effect or, alternatively, whether it was reasonable compensation for litigation costs or the value of services. In other words, the Court reasoned that "even a small risk of invalidity" may not justify a "large payment" (presumably enabled by "patent-generated monopoly

[19] *See also, e.g., Actavis, 133 S. Ct. at 2244* (Roberts, C.J., dissenting) ("The majority seems to think that *even if* the patent is valid, a patent holder violates the antitrust laws merely because the settlement took away some **[**32]** chance that his patent would be declared invalid by a court." (emphasis in original)).

[20] *See supra* note 3; *infra* note **[**33]** 35.

profits") that "likely seeks to prevent the risk of competition." *Id. at 2236*. And, the Court reiterated, it is the prevention **[**34]** of that risk of competition—eliminating "the risk of patent invalidation or a finding of noninfringement" by "paying the challenger to stay out" of the market (for longer than the patent's strength would otherwise allow)—that "constitutes the relevant anticompetitive harm," which must then be analyzed under the rule of reason. *Id. at 2236-37*.

It seems to us that no-AG agreements are likely to present the same types of problems as reverse payments of cash. The no-AG agreement here may be of great monetary value to Teva as the first-filing generic. In *Actavis*, the Supreme Court recognized generally that the 180-day exclusivity period is "possibly 'worth several hundred million dollars,'" and may be where the bulk of the first-filer's profits lie. *Id. at 2229* (quoting C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, *81 N.Y.U. L. Rev. 1553, 1579 (2006)*).[21] There are also plausible indicia that this pattern held true here: The Amici States point out that "[p]ublic records show that generic sales of Lamictal in 2008 were some 671 million dollars," so the no-AG agreement "was clearly worth millions of dollars, if not hundreds of millions of dollars[,] to the generic." Amici States' Br. 16. And the FTC **[**35]** suggests, using sales of the drug Paxil as a yardstick, that GSK's no-AG agreement would have been worth hundreds of millions of dollars to Teva. Appellants' Br. 24.[22]

[*405] At the same time, a brand's commitment not to produce an authorized generic means that it must give up the valuable right to capture profits in the new two-tiered market. The no-AG agreement transfers the profits the patentee would have made from its authorized generic to the settling generic—plus potentially more, in the form of higher prices, because there will now be a generic monopoly instead of a generic duopoly. Thus, "the source of the benefit to the claimed infringer is something costly to the patentee." Aaron Edlin et al., *Activating* Actavis, Antitrust, Fall 2013, at 16, 22 n.22. Absent a no-AG promise, launching an authorized generic would seem to be economically rational for the brand. For this reason, the fact that the brand promises not to launch an authorized generic (thereby giving up considerable value to the settling generic) makes the settlement something more than just an agreed-upon early entry: it "may instead provide strong evidence that the patentee seeks to induce **[**37]** the generic challenger to abandon its claim with a share of its monopoly profits that would otherwise be lost in the competitive market." *Actavis, 133 S. Ct. at 2235*.

The anticompetitive consequences of this pay-for-delay may be as harmful as those resulting from reverse payments of cash. If the brand uses a no-AG agreement to induce the generic to abandon the patent fight, the chance of dissolving a questionable patent vanishes (and along with it, the prospects of a more competitive market). As with a reverse payment of cash, a brand agreeing not to produce an authorized generic may thereby have "avoid[ed] the risk of patent invalidation or a finding of noninfringement." *Id. at 2236*. In addition, when the parties' settlement includes a no-AG agreement, the generic also presumably agrees to an early entry date that is

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[21] In addition, a comprehensive FTC study suggests that having to compete with an authorized generic will likely both cut the generic's sales and force down its price: "the presence of authorized generic competition reduces the first-filer generic's revenues by 40 to 52 percent, on average." FTC, *Authorized Generic Drugs: Short-Term Effects and Long-Term Impact* iii (2011), *available at* *http://www.ftc.gov/os/2011/08/2011genericdrugreport.pdf* ; *see* FTC Amicus Br. 8 ("Prices fall further when additional generic competitors enter . . . ." (citing FTC, *Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions* 8 (2010), *available at* *http://www.ftc.gov/os/2010/01/100112payfordelayrpt.pdf);* FTC Amicus Br. 12 ("[G]eneric wholesale prices average 70 percent of the pre-entry brand-name drug price when the firstfiler faces an AG, compared to 80 percent of the brand price when it does not." (citing FTC, *Authorized Generic Drugs*, *supra*, at iii)).

[22] "The U.S. sales of Paxil were roughly equivalent to those of Lamictal in the year before each product faced generic competition ($2.3 billion and $2.2 billion, respectively)." Appellants' Br. 24 (quoting FTC Br. as *Amicus Curiae* at 8, *Lamictal, 18 F. Supp. 3d. 560* **[**36]** (ECF No. 89-3)). The magnitude of these figures is proportionate to the estimated $2.6 billion average cost of developing a new brand-name drug. *See* Tufts Ctr. for the Study of Drug Dev., *Briefing: Cost of Developing a New Drug* (Nov. 18, 2014), *available at* *http://csdd.tufts.edu/files/uploads/Tufts_CSDD_briefing_on_RD_cost_study_-_Nov_18,_2014..pdf* .

later than it would have otherwise accepted.[23] And during this time, the brand's monopoly remains in force. Once the generic enters, moreover, it faces no competition with other generics at all.

HN5[] ***Antitrust law*** is designed to protect consumers from arrangements that prevent competition in the marketplace. *See, e.g., Actavis, 133 S. Ct. at 2234-35*; *id. at 2238* (Roberts, C.J., dissenting); *accord* XII Areeda & Hovenkamp, *supra*, ¶ 2046c (2014 Supp.). The District Court here held that "the Supreme Court considered a reverse payment to involve an exchange of money" because "when the Supreme Court said 'payment' it meant a payment of money." *Lamictal, 18 F. Supp. 3d at 568*. But, we think, a no-AG agreement could likewise "prevent the risk of competition." *Actavis, 133 S. Ct. at 2236*; *cf.* XII Areeda & Hovenkamp, *supra*, ¶ 2046c1 (2014 Supp.) (explaining that under a "pay-for-delay settlement . . . consumer welfare remains the same as it would be under continued monopoly production by a single firm"); FTC Amicus Br. 22 ("It is not the transfer of cash or the form of reverse payment that triggers antitrust concern; it is the impact of that payment on consumer welfare."). We do not believe the Court **[*406]** intended to draw such a formal line.[24] Nor did the *Actavis* Court limit its reasoning or holding to cash **[**39]** payments only.[25]

2.

Defendants contend that no-AG agreements are distinguishable from reverse payments because they are in essence "exclusive licenses" and patent law expressly contemplates exclusive licenses.[26] They argue the *Actavis* Court rejected **[**40]** the dissent's arguments in part because the dissent could "not identify any patent statute that it understands to grant such a right to a patentee, whether expressly or by fair implication." *Actavis, 133 S. Ct. at 2233*; *see* GSK Br. 22-23, 34; Teva Br. 22-26. They suggest that if "the patent statute specifically gives a right to restrain competition in the manner challenged," *Actavis, 133 S. Ct. at 2231* (internal quotation marks omitted), such conduct is immune from antitrust scrutiny. *See* GSK Br. 22-23; Teva Br. 22-26, 34. In short, defendants argue GSK's concession not to produce an authorized generic during Teva's 180-day exclusivity period is an "exclusive license" exempt from antitrust scrutiny.

But the "right" defendants seek is not in fact a patentee's right to grant licenses, exclusive or otherwise.[27] **[*407]** Instead, it is a right to use valuable licensing in such a way as to induce a patent challenger's delay. The *Actavis*

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[23] When parties compromise on an early-entry date alone—rather than an early-entry date plus valuable consideration—it is possible that they may compromise on an early-entry date reflecting their assessment of the strength of **[**38]** the patent. The concern with combining an early-entry date with the valuable consideration of a no-AG agreement is that the generic manufacturer may be willing to accept a later early-entry date without any corresponding benefit to consumers.

[24] *Cf., e.g., Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58-59, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)* ("[D]eparture from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing."); *United States v. Dentsply Int'l, Inc., 399 F.3d 181, 189 (3d Cir. 2005)* ("The Supreme Court on more than one occasion has emphasized that economic realities rather than a formalistic approach must govern review of antitrust activity." (citing *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 466-67, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992))*); Michael A. Carrier, *Payment After* Actavis, *100 Iowa L. Rev. 7, 41-44 (2014)*.

[25] The dissent recognized the majority's reasoning could reach noncash transactions. *See Actavis, 133 S. Ct. at 2239* (Roberts, C.J., dissenting) ("As in any settlement, Solvay gave its competitors something of value (money) and, in exchange, its competitors gave it something of value (dropping their legal claims)."); *id. at 2245* ("[The majority's] logic . . . cannot possibly be limited to reverse-payment agreements . . . . The Government's brief acknowledges as much, suggesting that if antitrust scrutiny is invited for such cash payments, it may also be required for 'other consideration' and 'alternative arrangements.'").

[26] *See 35 U.S.C. § 261* ("The . . . patentee, or his assigns or legal representatives may in like manner grant and convey an exclusive right under his application for patent, or patents, to the whole or any specified part of the United States.").

[27] We do not believe the no-AG agreement was in fact an "exclusive" license. **[**43]** However, since the issue of whether such agreement is an exclusive license is not necessary for our decision here, we will leave its determination for another day.

Court rejected the latter. The thrust of the Court's reasoning is not that it is problematic **[**41]** that money is used to effect an end to the patent challenge, but rather that the patentee leverages some part of its patent power (in *Actavis*, its supracompetitive profits) to cause anticompetitive harm—namely, elimination of the risk of competition. There, the patentee gave the challenger a license to enter 65 months before patent expiration, *plus* a reverse payment of "millions of dollars." *Actavis, 133 S. Ct. at 2229*. This reverse payment was not immunized, of course, simply because of that early-entry "license." Similarly, the fact that a patent holder may generally have the right to grant licenses, exclusive or otherwise, does not mean it also has the right to give a challenger a license along with a promise not to produce an authorized generic—i.e., a promise not to compete—in order to induce the challenger "to respect its patent and quit [the competitor's] patent invalidity or noninfringement claim without any antitrust scrutiny." *Id. at 2233* (internal quotation marks omitted). In the *Actavis* Court's view, the question is not one of patent law, but of ***antitrust law***, the latter of which invalidates "the improper use of [a patent] monopoly." *Id. at 2231* (alteration in original) (quoting *Line Material, 333 U.S. at 310*). *But see id. at 2243* (Roberts, C.J., dissenting). **[**42]** And as we read the Court's opinion, even exclusive licenses cannot avoid antitrust scrutiny where they are used in anticompetitive ways. *See id. at 2227* (citing *Palmer, 498 U.S. 46, 111 S. Ct. 401, 112 L. Ed. 2d 349*); *Palmer, 498 U.S. at 50* (holding an agreement not to compete based on an exclusive copyright license[28] "unlawful on its face"). We make no statement about patent licensing more generally. But in this context we believe ***HN6***[] the fact that the Patent Act expressly authorizes licensing does not necessarily mean it also authorizes reverse payments to prevent generic competition.[29]

We also disagree with defendants' attempt to recharacterize Teva's gain as resulting **[*408]** from its early entry alone. First, that characterization is inaccurate as a descriptive matter: What GSK gave Teva was a 180-day monopoly over the generic market. The first-filing generic cannot capture this value by early entry alone. It can only hope to obtain this value with the brand's self-restraint, and here, without GSK's no-AG commitment, GSK allegedly would have introduced an AG. Second, although we agree that the *Actavis* "Court expressly identified early-entry licensing as a traditional form of settlement whose legality the opinion took pains not to disturb," Teva Br. 25-26,[30] a no-AG agreement is no more solely an early-entry licensing agreement than the settlement in *Actavis* itself, where entry was permitted 65 months before patent expiration. *Actavis, 133 S. Ct. at 2229*. Notwithstanding such "early entry," the antitrust problem was that, as the Court inferred, entry might have been earlier, and/or the risk of competition not eliminated, had the reverse payment not been tendered. *See Actavis, 133 S. Ct. at 2237* ("They may, as in other industries, settle in other ways, for example, by allowing the generic manufacturer to enter the patentee's **[**46]** market prior to the patent's expiration, without the patentee paying the challenger to stay out prior to that point."); *see also* FTC Amicus Br. 21-22 ("[C]ompetitors do not normally raise antitrust concerns if they agree on a date for generic entry but do *not* simultaneously agree that the brand-name manufacturer will compensate the

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[28] The Supreme Court opinion does not say what kind of "exclusive license" it is referring to, but the Eleventh Circuit's opinion states, "BRG and HBJ disavow any intent to restrain trade and claim that their agreement is nothing more than an ordinary copyright royalty arrangement which courts have routinely sustained." *Palmer v. BRG of Ga., Inc., 874 F.2d 1417, 1434 (11th Cir. 1989)* (internal quotation **[**44]** marks omitted), *rev'd*, *498 U.S. 46, 111 S. Ct. 401, 112 L. Ed. 2d 349*.

[29] The defendants' arguments are much like those rejected by the majority in *Actavis.* The disagreement in the Court was fundamental. In the dissenters' view, "a patent claim *cannot possibly* impose unlawful anticompetitive harm if the patent holder is acting within the scope of a valid patent and therefore permitted to do precisely what the antitrust suit claims is unlawful." *133 S. Ct. at 2244* (Roberts, C.J., dissenting) (emphasis in original). The dissenters viewed the majority as "impos[ing] antitrust liability based on the parties' subjective uncertainty about [a] legal conclusion," namely, whether a patent is valid (and it is one or the other), because "[t]he majority seems to think that *even if* the patent is valid, a patent holder violates the antitrust laws merely because the settlement took away some chance that his patent would be declared invalid by a court." *Id.* (emphasis in original). In fact, the dissenters perceived a slippery slope in that the majority's "logic—that taking away any *chance* that a patent will be invalidated is itself an antitrust problem—cannot possibly be limited to reverse-payment agreements, or those that are 'large.'" *Id. at 2245* (emphasis in original) (quoting *id. at 2236* (majority **[**45]** opinion)).

[30] *See Actavis, 133 S. Ct. at 2237*; *cf. K-Dur, 686 F.3d at 217-18* ("[N]othing in the rule of reason test that we adopt here limits the ability of the parties to reach settlements based on a negotiated entry date for marketing of the generic drug . . . .").

generic company for staying out of the market until that date, thereby sharing (while enlarging) their aggregate pool of monopoly profits.").

3.

Defendants present additional arguments as to why no-AG agreements, as "exclusive licenses," should not be subjected to antitrust scrutiny. Noting that public policy favors settlements, they contend that subjecting such agreements to scrutiny will discourage settlements. GSK Br. 37. Furthermore, they contend that "courts should not review pro-competitive conduct to determine whether an even more pro-competitive transaction exists." GSK Br. 37 (citing *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 415-16, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* ("The Sherman Act . . . does not give judges *carte blanche* to insist that a monopolist alter **[**47]** its way of doing business whenever some other approach might yield greater competition." (citation omitted))); *see* Teva Br. 32.

But *Actavis* addressed and rejected these arguments. First, the Court thought the possible discouragement of settlements was "outweigh[ed]" by other considerations and stated that "parties may well find ways to settle patent disputes without the use of reverse payments." *Actavis, 133 S. Ct. at 2237*.[31] But **[*409]** whatever the effect on settlements, we do not perceive how the noncash nature of no-AG agreements alters that balance. Second, we think *Trinko* inapposite. *Actavis* does not stand for the proposition that parties must reach the most procompetitive settlements possible. Instead, we read *Actavis* to hold that ***antitrust law*** may prohibit settlements that are anticompetitive because, without justification, they delay competition for longer than the patent's strength would otherwise permit.[32]

4.

For the reasons we have explained, we think this no-AG agreement, because it may represent an unusual, unexplained transfer of value from the patent holder to the alleged infringer that cannot be adequately justified—whether as compensation for litigation expenses or services, or otherwise[33]—is subject to antitrust scrutiny under the rule of reason. But even if that is the rule, defendants contend, plaintiffs fail to state a claim under *Bell Atlantic*

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[31] The Court was unpersuaded by the dissenters' arguments in this vein. The dissenters contended there was no empirical evidence that most reverse payment settlements occur in the Hatch-Waxman context, and that payments from patentee to alleged infringer "are a well-known feature of intellectual property litigation, and reflect **[**48]** an intuitive way to settle such disputes." *Actavis, 133 S. Ct. at 2242-43* (Roberts, C.J., dissenting). The Court, however, thought that "[a]pparently most if not all reverse payment settlement agreements arise in the context of pharmaceutical drug regulation, and specifically in the context of suits brought under statutory provisions allowing a generic drug manufacturer (seeking speedy marketing approval) to challenge the validity of a patent owned by an already approved brand-name drug owner." *Id. at 2227* (majority opinion). Similarly, although the dissenters contended that "[w]hile the alleged infringer may not be suing for the patent holder's *money*, it is suing for the right to use and market the (intellectual) property, which is worth money," *id. at 2243* (Roberts, C.J., dissenting) (emphasis in original), the Court thought reverse payments "unusual," *id. at 2231* (majority opinion). The dissenters also thought that the Court's holding would discourage settlement even though "the right to settle generally accompanies the right to litigate in the first place." *Id. at 2243* (Roberts, C.J., dissenting). They postulated that "the majority's decision may very well discourage generics from challenging pharmaceutical patents in the first place" by "[t]aking the prospect of settlements **[**49]** off the table—or limiting settlements to an earlier entry date for the generic, which may still be many years in the future." *Id. at 2247*.

[32] In addition, *Trinko* dealt with different questions regarding unlawful monopolization and the refusal to deal—set against the background of "the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal," *540 U.S. at 408* (alteration in original) (quoting *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919))*—and the role of the Telecommunications Act of 1996, which focuses on a different goal of eliminating certain monopolies, *id. at 415*.

[33] *See* *Actavis, 133 S. Ct. at 2236* ("There may be other justifications.").

Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), and Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), because their "allegations are far too speculative to satisfy their burden of plausibly alleging that the settlement was anticompetitive." **[**50]** *See* GSK Br. 44-45. In particular, defendants argue that "[p]laintiffs fail to plausibly allege that in this but-for world, the parties would have successfully negotiated an alternative, competition-maximizing agreement," Teva Br. 44; that continued litigation in favor of settlement "would have yielded a more competitive result," Teva Br. 45; or that Teva would have launched their generics "at risk," Teva Br. 46.

We believe plaintiffs' allegations, and the plausible inferences that can be drawn from them, are sufficient to state a rule-of-reason claim under *Twombly* and *Iqbal* for violation of the Sherman Act on the ground that GSK sought to induce Teva to delay its entry into the lamotrigine tablet market by way of an unjustified no-AG agreement. As recited earlier, plaintiffs alleged that GSK agreed not to launch a competing authorized generic during Teva's 180-day exclusivity period, which was to begin near the expiration of the **[*410]** '017 patent; that such promises can be worth "many millions of dollars of additional revenue"; that "GSK had an incentive to launch its own authorized generic versions of tablets"; that Teva had a history of launching "at risk"; and that **[**51]** the '017 patent was likely to be invalidated—as, in fact, its main claim had been. Because marketing an authorized generic was allegedly in GSK's economic interest, its agreement not to launch an authorized generic was an inducement—valuable to both it and Teva—to ensure a longer period of supracompetitive monopoly profits based on a patent at risk of being found invalid or not infringed. (Indeed, Teva asserted in other litigation that the no-AG agreement "formed part of the inducement to Teva to relinquish the rights and defenses it was asserting against GSK in the Patent Litigation." JA 76 (alteration and emphases omitted).) And although plaintiffs concede that Teva entered the lamotrigine chewables market about 37 months early, *see, e.g.*, GSK Br. 7, the chewables market, allegedly worth only $50 million annually, was orders of magnitude smaller than the alleged $2 billion tablet market the agreement is said to have protected. Accordingly, at the pleading stage plaintiffs have sufficiently alleged that any procompetitive aspects of the chewables arrangement were outweighed by the anticompetitive harm from the no-AG agreement.[34]

Moreover, ***HN7***[] we do not read *Actavis* to require allegations that defendants could in fact have reached another, more competitive settlement. *Actavis* embraces the concept that a patent "may or may not be valid, and may or may not be infringed," *133 S. Ct. at 2231*, and holds that the anticompetitive harm is not *certain* consumer loss through higher prices, but rather the patentee's "avoid[ance of] the risk of patent invalidation or a finding of noninfringement"—that is, "prevent[ion **[**53]** of] the risk of competition," *id. at 2236*, beyond what the patent's strength would otherwise allow—and, thus, consumer harm. In other words, under the substantive standard, the question is not whether the defendants have only possibly acted unlawfully, *but see* Teva Br. 43, but whether they have acted unlawfully by seeking to prevent competition. Plaintiffs have sufficiently pleaded as much.[35]

C.

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[34] It may also be (though we do not decide) that "procompetitive effects **[**52]** in one market cannot justify anticompetitive effects in a separate market" (i.e., the lamotrigine tablet market). Amicus Br. Nat'l Ass'n Chain Drug Stores in Support of Appellants 27-28 (citing, inter alia, *Paladin Assocs., Inc. v. Mont. Power Co., 328 F.3d 1145, 1157 n.11 (9th Cir. 2003))*; *see* *Paladin Assocs., 328 F.3d at 1157 n.11* ("It may be . . . that this procompetitive effect should not be considered in our rule of reason analysis, based on the theory that procompetitive effects in a separate market cannot justify anti-competitive effects in the market for pipeline transportation under analysis.") (citing *United States v. Topco Assocs., 405 U.S. 596, 610, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*; *see also* *Topco, 405 U.S. at 610* ("[Competition] cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.").

[35] We do not decide the question of antitrust injury in private actions such as this litigation, *see generally, e.g.*, Ian Simmons et al., *Viewing* FTC v. Actavis *Through the Lens of Clayton Act Section 4*, Antitrust, Fall 2013, at 24; *In re Niaspan Antitrust Litig., 42 F. Supp. 3d 735, 755-57 (E.D. Pa. 2014)*, nor do we preclude the parties from raising the issue on remand.

1.

In the alternative, the District Court stated that "[i]t finds that the settlement . . . **[*411]** would survive *Actavis* scrutiny and is reasonable." *18 F. Supp. 3d at 570*. This was error. As explained above, plaintiffs have sufficiently pleaded violation of the antitrust laws so as to overcome defendants' motion to dismiss. If genuine issues of material fact remain after discovery, ***HN8***[] the rule-of-reason analysis is for the finder of fact, not the court as a matter of law.[36]

In addition, the District Court mistook the "five sets of considerations" that persuaded the *Actavis* Court "to conclude that the FTC should have been given the opportunity to prove its antitrust claim" under the rule of reason, *133 S. Ct. at 2234*, as a redefinition of the "rule of reason" itself. But the general contours of the rule of reason are well-mapped. *See generally, e.g., id. at 2236* (citing *Ind. Fed'n of Dentists, 476 U.S. at 459*); *Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 829-30 (3d Cir. 2010)*. We recognize the *Actavis* Court "le[ft] to the lower courts the structuring of [this type of] rule-of-reason antitrust litigation," *133 S. Ct. at 2238*, and that there may be some uncertainty as to how, exactly, a "defendant may show in the antitrust proceeding that legitimate justifications are present, thereby explaining the presence of the challenged term and showing the lawfulness of that term under the rule of reason," *id. at 2236* (citing *Ind. Fed'n of Dentists, 476 U.S. at 459*). But the Court noted that justifications might include "litigation expenses saved through the **[**55]** settlement" or "compensation for other services that the generic has promised to perform." *Id.* And although the Court left such details of how to apply the proper antitrust theories to "the basic question—that of the presence of significant unjustified anticompetitive consequences," *id. at 2238*—it suggested "the antitrust laws are likely to forbid" payment *for delay* (or, that is, to eliminate risk of patent invalidity or noninfringement), *id. at 2237*.

Here, the District Court thought the no-AG agreement was "justified" because, although the settlement amount was likely greater than litigation costs, "the consideration which the parties exchanged in the settlement [wa]s reasonably related to the removal of the uncertainty created by the dispute." *Lamictal, 18 F. Supp. 3d at 570*. That conclusion is in tension with *Actavis* in that, without proper justification, the brand cannot pay the generic simply to eliminate the risk of competition. Nor did the court properly conclude "that the potential for adverse effects on competition [wa]s minimal," or that the settlement was reasonable, because "the duration of the No-AG Agreement was a relatively brief six months." *Id.* The anticompetitive harm plaintiffs allege—consistent with *Actavis—* is that the **[**56]** promise of no authorized-generic competition during those six months induced Teva to quit its patent challenge. As discussed above, plaintiffs plausibly allege this no-AG promise was of considerable value and thus designed to protect GSK's patents against the risk of invalidation or noninfringement, rather than reimburse litigation costs or compensate for services. Accordingly, the District Court should have permitted the litigation to proceed under the traditional rule-of-reason approach.

[*412] 2.

HN9[] Under the traditional rule-of-reason analysis, the factfinder must

> weigh all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. The plaintiff bears an initial burden under the rule of reason of showing that the alleged combination or agreement produced adverse, anti-competitive effects within the relevant product and geographic markets. The plaintiff may satisfy this burden by proving the existence of actual anticompetitive effects, such as reduction of output, increase in price, or deterioration in quality of goods

[36] *See, e.g., Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 343, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)* ("[T]he rule of reason requires the factfinder to decide whether under all the **[**54]** circumstances of the case the restrictive practice imposes an unreasonable restraint on competition."); *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 316 & n.12 (3d Cir. 2010)* (discussing the fact-bound, burden-shifting standard and noting that "[i]n the event a genuinely disputed issue of fact exists regarding the reasonableness of the restraint, the determination is for the jury").

> or services. Such proof is often impossible to make, however, due to the difficulty of **[**57]** isolating the market effects of challenged conduct. Accordingly, courts typically allow proof of the defendant's market power instead. Market power, the ability to raise prices above those that would prevail in a competitive market, is essentially a surrogate for detrimental effects.
> If a plaintiff meets his initial burden of adducing adequate evidence of market power or actual anti-competitive effects, the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective. . . . To rebut, the plaintiff must demonstrate that the restraint is not reasonably necessary to achieve the stated objective.

United States v. Brown Univ., 5 F.3d 658, 668-69 (3d Cir. 1993) (alteration, citations, internal quotation marks, and footnotes omitted).

The *Actavis* Court provided initial guidance on how to structure rule-of-reason litigation in the reverse payment context. The Court explained that such antitrust questions must be answered "by considering traditional antitrust factors such as likely anticompetitive effects, redeeming virtues, market power, and potentially offsetting legal considerations present in the circumstances, such as here those related to patents." Actavis, 133 S. Ct. at 2231.

First, to prove anticompetitive effects, the **[**58]** plaintiff must prove payment for delay, or, in other words, payment to prevent the risk of competition. *See* id. at 2235-36. "[T]he likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification." Id. at 2237.

Second, the burden then shifts to the defendant to show "that legitimate justifications are present, thereby explaining the presence of the challenged term and showing the lawfulness of that term under the rule of reason." Id. at 2235-36.

> The reverse payment, for example, may amount to no more than a rough approximation of the litigation expenses saved through the settlement. That payment may reflect compensation for other services that the generic has promised to perform—such as distributing the patented item or helping to develop a market for that item. There may be other justifications.

Id. at 2236. The Court does not foreclose other justifications, and we need not decide today what those other justifications might be.

Finally, the plaintiff will have the opportunity to rebut the defendant's explanation. **[**59]** [37]

[*413] On remand, we invite the District Court to proceed with the litigation under the traditional rule of reason, tailored, as necessary, to the circumstances of this case.[38]

IV.

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[37] *See generally, e.g.,* King Drug Co. of Florence v. Cephalon, Inc., 88 F. Supp. 3d 402, 412, 2015 U.S. Dist. LEXIS 9545, 2015 WL 356913, at *7-16 (E.D. Pa. 2015).

[38] We note that the rule of reason allows the court, depending on the circumstances, to

> structure antitrust litigation so as to avoid, on the one hand, the use of antitrust theories too abbreviated to permit proper analysis, and, on the other, consideration of every possible fact or theory irrespective of the minimal light it may shed on the basic question—that of the presence of significant unjustified anticompetitive consequences.

Actavis, 133 S. Ct. at 2238. In addition, nothing in this opinion precludes a defendant from prevailing on a motion to dismiss or motion for summary judgment if, for example, there is no dispute that, under the rule of reason, the procompetitive benefits of a reverse payment outweigh the payment's alleged anticompetitive harm.

For the foregoing reasons, we vacate the judgment of the District Court and remand for further proceedings consistent with this opinion.

LexisNexis®

In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.

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

June 29, 2015, Decided; June 29, 2015, Filed

Master File No. 9 CV 3690; MDL No. 2031

Reporter

2015 U.S. Dist. LEXIS 84152 *; 2015-2 Trade Cas. (CCH) P79,224; 2015 WL 3988488

IN RE: DAIRY FARMERS OF AMERICA, INC. CHEESE ANTITRUST LITIGATION. THIS DOCUMENT RELATES TO: Indirect Purchaser Actions

Prior History: *In re Dairy Farmers of Am., Inc., Cheese Antitrust Litig., 80 F. Supp. 3d 838, 2015 U.S. Dist. LEXIS 20408 (N.D. Ill., Feb. 20, 2015)*

Core Terms

Indirect, antitrust, Plaintiffs', anti trust law, class action, tolling, purchasers, unjust enrichment, Brick, antitrust claim, consumer-protection, harmonization, price-fixing, remoteness, cheese, courts, cases, monopolization, factors, Defendants', milk, statute of limitations, finished, prices, dairy product, named plaintiff, Consolidated, provisions, exemption, unfair

LexisNexis® Headnotes

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

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

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

The purpose of a *Fed. R. Civ. P. 12(b)* motion to dismiss is not to decide the merits of the case, but rather to test the sufficiency of the complaint. In the context of a motion to dismiss, the Court takes as true the facts as set forth in the complaint along with all reasonable inferences. To survive a *Rule 12(b)(6)* motion to dismiss, the claim first must comply with *Fed. R. Civ. P. 8(a)* by providing a short and plain statement of the claim showing that the pleader is entitled to relief, *Fed. R. Civ. P. 8(a)(2)*, such that the defendant is given fair notice of what the claim is and the grounds upon which it rests. Second, the factual allegations in the claim must be sufficient to raise the possibility of relief above the speculative level, assuming that all of the allegations in the complaint are true. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. However, specific facts are not necessary; the statement need only give the defendant fair notice of what the claim is and the grounds upon which it rests.

Governments > Courts > Judicial Precedent

HN2[] **Courts, Judicial Precedent**

In the absence of guiding decisions by the state's highest court, federal courts consult and follow the decisions of intermediate state appellate courts unless there is a convincing reason to predict that the state's highest court would disagree.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN3[] **Private Actions, State Regulation**

A harmonization provision—which can either be statutory or derived from the common law—says that a state's antitrust laws should be read in harmony with federal antitrust laws.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN4[] **Private Actions, State Regulation**

Some states have interpreted harmonization provisions narrowly, excluding the incorporation of federal law regarding antitrust standing. other courts have applied Associated General Contractors to state ***antitrust law*** based solely on harmonization provisions. Still other courts have played it safe, punting the issue absent clear guidance from the state in question.

Antitrust & Trade Law > Regulated Practices > Private Actions > Standing

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN5[] **Private Actions, Standing**

The presence of a statutory harmonization provision (either statutory or common law), absent any countervailing statutory law or case law from a state appellate court, is sufficient to permit a district court to apply federal antitrust-standing law—including Associated General Contractors—to claims brought under that state's antitrust laws.

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

Constitutional Law > The Judiciary > Case or Controversy > Standing

HN6[] **Standing, Clayton Act**

Antitrust standing is not Article III standing; the very concept of antitrust standing, which exists in addition to Article III standing, is so intertwined with substantive antitrust principles that it would be counterintuitive to assume that states would not read this body of law in harmony with the remainder of the Supreme Court's substantive antitrust opinions. Indeed, the entire premise of the judicially-created antitrust standing inquiry stems from the fact that the plain language of the *Clayton Act's* standing provision is exceedingly broad, and so the Supreme Court derived a set of narrowing factors influenced by the same policies that gave birth to the antitrust laws in the first place.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN7[] **Private Actions, State Regulation**

A harmonization provision does not guarantee that a state will apply Associated General Contractors. Even states with a harmonization provision have the authority to reject the application of Associated General Contractors if Associated General Contractors conflicts with existing state law (statutory or common law).

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

HN8[] **Standing, Clayton Act**

Although the standing provision in *§ 4 of the Clayton Act* is broad—permitting civil suits by any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws, *15 U.S.C.S. § 15*—the Supreme Court has endorsed several limiting principles such that not every person, however tangentially injured by an antitrust violator, has standing to sue. One such limiting principle comes from Illinois Brick, where the Court found unacceptable the risk of duplicative recovery engendered by allowing both direct and indirect purchasers to claim damages resulting from a single overcharge by the antitrust defendant. The splintered recoveries and litigative burdens that would result from a rule requiring that the impact of an overcharge be apportioned between direct and indirect purchasers could undermine the active enforcement of the antitrust laws by private actions.

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

HN9[] **Standing, Clayton Act**

Illinois Brick holds that the direct purchaser from the alleged antitrust violator(s) is the one with the right of action; those further removed from the illegal arrangement may not, under the federal antitrust laws, bring their own actions. Only the immediate purchaser of goods may sue under the antitrust laws.

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

HN10[] **Standing, Clayton Act**

The chain-of-distribution inquiry in Illinois Brick was meant only to preclude duplicate recovery.

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

HN11[] **Standing, Requirements**

Associated General Contractors provides a six-factor test for examining the link between a plaintiff's harm and a defendant's wrongdoing: (1) the causal connection between the violation and the harm; (2) the presence of improper motive; (3) the type of injury and whether it was one Congress sought to redress; (4) the directness of the injury; (5) the speculative nature of the damages; and (6) the risk of duplicate recovery or complex damage apportionment. The broad proposition emanating from Associated General Contractors is that a party cannot recover when others more directly injured are better able to state a claim.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN12[] **Private Actions, State Regulation**

By enacting a repealer statute, each state has taken some action to differentiate its antitrust-standing law from the federal landscape.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

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

HN13[] **Standing, Clayton Act**

Much like the standing provision in the Clayton Act, California's Cartwright Act is broad in scope, permitting any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter to bring an antitrust action. *Cal. Bus. & Prof. Code § 16750(a)*. The California Supreme Court has rejected arguments that judicial interpretations of the Sherman and Clayton Acts apply fully to California's antitrust laws, noting that interpretations of federal ***antitrust law*** are at most instructive, not conclusive, when construing the Cartwright Act.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN14[] **Private Actions, State Regulation**

A person injured by an antitrust violator may bring suit regardless of whether such injured person dealt directly or indirectly with the defendant. *Cal. Bus. & Prof. Code § 16750(a)*.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN15[] **Standing, Requirements**

California's intermediate appellate court has endorsed the application of the Associated General Contractors factors in interpreting California's antitrust laws, despite the state's Illinois Brick repealer statute.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN16[] **Standing, Requirements**

California's antitrust-standing provision is broader in some respects than federal antitrust-standing law because of California's repealer statute, but California's repealer statute applies only to Illinois Brick, and Illinois Brick and Associated General Contractors are separate inquiries. Absent any binding California law to the contrary, the appellate court decision in Vinci and the moderately-deferential harmonization provision remain the best indicators of how the California Supreme Court would address the issue, and both lean in favor of applying Associated General Contractors to claims brought under the Cartwright Act.

Antitrust & Trade Law > Regulated Practices > Private Actions > Standing

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN17[] **Private Actions, Standing**

Kansas has a broadly-worded antitrust-standing provision, stating that a cause of action may be brought by any person who is injured in such person's business or property by reason of an antitrust violation. *Kan. Stat. Ann. § 50-161(b)*.

Antitrust & Trade Law > Regulated Practices > Private Actions > Standing

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN18[] **Private Actions, Standing**

See *Kan. Stat. Ann. § 50-163(b)*.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Governments > Courts > Judicial Precedent

HN19[] **Private Actions, State Regulation**

The Supreme Court of Kansas has noted that while it is certainly foreseeable that it would apply federal ***antitrust law*** in interpreting Kansas's antitrust laws and that such law would be persuasive authority, ultimately federal ***antitrust law*** is not binding upon any court in Kansas interpreting Kansas ***antitrust law***.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN20[] **Standing, Requirements**

Kansas's repealer statute provides that an antitrust cause of action may be brought regardless of whether such injured person dealt directly or indirectly with the defendant. *Kan. Stat. Ann. § 50-161(b)*.

Antitrust & Trade Law > Regulated Practices > Private Actions > Standing

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN21[] **Private Actions, Standing**

The Kansas legislature has amended the Kansas Restraint of Trade Act (KRTA) to provide that it shall be construed in harmony with ruling judicial interpretations of federal ***antitrust law*** by the United States supreme court. *Kan. Stat. Ann. § 50-163(b)*. Accordingly, and absent any binding authority to the contrary, the Court is persuaded that the

Kansas Supreme Court would apply Associated General Contractors in interpreting antitrust standing under the KRTA.

Antitrust & Trade Law > Regulated Practices > Private Actions > Standing

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN22[] Private Actions, Standing

Michigan affords a right to sue under its antitrust reform act to any person threatened with injury or injured directly or indirectly in his or her business or property by a violation of the act. *Mich. Comp. Laws § 445.778(2)*.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN23[] Standing, Requirements

See *Mich. Comp. Laws § 445.784(2)*.

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

HN24[] Standing, Sherman Act

Because Michigan's antitrust legislation is patterned after federal antitrust legislation, federal court decisions applying the *Sherman Act* are persuasive authority in interpreting the Michigan Antitrust Reform Act.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN25[] Standing, Requirements

Michigan's repealer statute extended antitrust standing to any person threatened with injury or injured directly or indirectly. *Mich. Comp. Laws § 445.778(2)*

Antitrust & Trade Law > Regulated Practices > Private Actions > Standing

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN26[] Private Actions, Standing

While Michigan appellate courts have not developed a test for determining when a plaintiff's injury is too remote to permit suit under the Michigan Antitrust Reform Act, the Act requires courts to give due deference to interpretations given by the federal courts to comparable antitrust statutes. *Mich. Comp. Laws § 445.784(2)*.

Antitrust & Trade Law > Regulated Practices > Private Actions > Standing

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN27[] **Private Actions, Standing**

The Michigan Supreme Court would apply the Associated General Contractors factors to assess antitrust standing, and the Court sees no evidence to the contrary, binding or otherwise.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN28[] **Standing, Requirements**

Any person injured by an antitrust violation may sue under Minnesota's ***antitrust law***. *Minn. Stat. § 325D.57*.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN29[] **Private Actions, State Regulation**

Minnesota law is generally interpreted consistently with federal ***antitrust law***.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN30[] **Standing, Requirements**

In 1984, the Minnesota legislature added the words "directly or indirectly" to *Minn. Stat. § 325D.57* to make clear that, contrary to Illinois Brick, Minnesota ***antitrust law*** permits indirect purchasers to recover. The Associated General Contractors factors do not provide the benchmark for standing under Minnesota ***antitrust law***.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN31[] **Standing, Requirements**

While Minnesota courts should analyze an alleged injury's relation to the goals of ***antitrust law*** by identifying the markets involved, the market analysis is not the focus of the standing inquiry. Whether damages are speculative is relevant to standing under the Minnesota ***antitrust law***. Despite the broad language of its antitrust provision, there are injuries so remotely related to antitrust violations that courts simply cannot provide relief, such that standing under Minnesota ***antitrust law*** must be defined by some prudential limits informed by foreseeability, proximate cause, remoteness, and relation of the injury to the purposes of the ***antitrust law***; otherwise, almost any antitrust violation would provide almost any citizen with a cause of action arising from the resulting ripples of harm throughout the state's economy.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN32[] **Standing, Requirements**

Any assessment of antitrust standing must be informed by foreseeability, proximate cause, remoteness, and relation of the injury to the purposes of the ***antitrust law*** in holding that injuries are too remote and speculative to afford standing under Minnesota ***antitrust law***.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN33[] **Standing, Requirements**

New York law extends standing to any person who shall sustain damages by reason of any violation of the state's antitrust act, called the Donnelly Act, *N.Y. Gen. Bus. Law § 340*.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN34[] **Private Actions, State Regulation**

While New York courts generally construe the Donnelly Act, *N.Y. Gen. Bus. Law § 340*, in harmony with federal antitrust case law, it is well settled that New York courts interpret the Donnelly Act differently where State policy, differences in the statutory language, or the legislative history justify such a result.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN35[] **Standing, Requirements**

New York's repealer statute specifies that a person who sustains damages as a result of an antitrust violation shall not have his or her recovery limited due to the fact that the person has not dealt directly with the defendant. *N.Y. Gen. Bus. Law § 340*.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN36[] **Standing, Requirements**

Where state courts and legislatures have indicated that they would look to federal antitrust precedent in applying their ***antitrust law***, it seems that at the very least courts would require plaintiffs in antitrust actions to plausibly allege that they were participants in the relevant product market where the alleged anti-competitive activity took place. If the plaintiffs do not have standing to assert a federal antitrust claim, they do not have standing to bring a claim under the Donnelly Act, *N.Y. Gen. Bus. Law § 340*.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN37[] **Standing, Requirements**

North Carolina grants standing to any person injured by an antitrust violation. *N.C. Gen. Stat. § 75-16*.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN38[] **Private Actions, Sherman Act**

North Carolina's harmonization provision, arising from common law, is similar to the New York provision, which recognizes the federal opinions interpreting the *Sherman Act* are instructive, but not binding, when interpreting its antitrust statute.

Antitrust & Trade Law > Regulated Practices > Private Actions > Standing

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN39[] **Private Actions, Standing**

North Carolina does not have a repealer statute, although the North Carolina Court of Appeals deemed such a provision unnecessary, claiming that North Carolina's standing provision is broad enough to incorporate indirect purchasers. A slight risk of multiple liability is greatly outweighed by the benefit of advancing the aforementioned policies of North Carolina's Antitrust Act. In addition, the legislative history also leads to the conclusion that the General Assembly intended to create indirect purchaser standing to sue under the state antitrust laws.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN40[] **Standing, Requirements**

It is likely that North Carolina's highest court would follow Crouch and Associated General Contractors in determining whether indirect purchasers lack antitrust standing under North Carolina ***antitrust law***.

Antitrust & Trade Law > Consumer Protection

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

HN41[] **Antitrust & Trade Law, Consumer Protection**

There is no legal principle saying that a finding of remoteness in the antitrust context functions, as a matter of law, as a bar to any related consumer-protection claims. However, the directness inquiry in antitrust-standing law is predicated on the well-known concept of proximate causation.

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

HN42[] **Deceptive & Unfair Trade Practices, State Regulation**

The Arkansas Deceptive Trade Practices Act (ADTPA), *Ark. Code Ann. § 4-88-101 et seq.*, provides a private right of action to any person who suffers actual damage or injury as a result of a violation of the Act. *Ark. Code Ann. § 4-88-113(f)*. And based on the language of *§ 4-88-113(f)*, there must be a causal connection between the violation of the ADTPA and the injury. Separate from the causation requirement, Arkansas law recognizes the remoteness doctrine as applied to claims under the ADTPA, favoring suits by those directly injured over more-indirect victims. Directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

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

HN43[] **Private Actions, State Regulation**

Ark. Code Ann. § 4-88-107 lists ten examples of actionable violations under the Arkansas Deceptive Trade Practices Act, none of which is recognizable as an antitrust violation (e.g., price fixing or monopolization). However, the statute does contain a catch-all provision that proscribes engaging in any other unconscionable, false, or deceptive act or practice in business, commerce, or trade, *Ark. Code Ann. § 4-88-107(a)*, and courts have interpreted this catch-all broadly so as to include antitrust claims.

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

Torts > Negligence > Elements > Causation

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

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

HN44[] **State Regulation, Claims**

The causation element makes its way into the California Unfair Competition Law (UCL) through the standing requirement, whereby a private person has standing to assert a UCL claim only if he or she (1) has suffered injury in fact, and (2) has lost money or property as a result of the unfair competition. The second prong of the standing test imposes a causation requirement. The phrase as a result of in its plain and ordinary sense means caused by and requires a showing of a causal connection or reliance on the alleged misrepresentation. Courts use the word "causation" to refer both to the causation element of a negligence cause of action and to the justifiable reliance element of a fraud cause of action. A private person has standing to sue only if he or she has suffered injury in fact and has lost money or property as a result of such unfair competition.

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

HN45[] State Regulation, Claims

There are three varieties of unfair competition: practices which are unlawful, unfair or fraudulent. A showing of actual reliance is required for a fraud-based California Unfair Competition Law claim.

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

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN46[] Standing, Requirements

Indirect antitrust plaintiffs who have had business dealings with a defendant and lost money or property as a result of the defendant's unfair business practices have standing under the California Unfair Competition Law. But the intent of Proposition 64 was to confine standing to those actually injured by a defendant's business practices and to curtail the prior practice of filing suits on behalf of clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant.

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

HN47[] State Regulation, Claims

The breadth of *Cal. Bus. & Prof. Code § 17200* does not give a plaintiff license to plead around the absolute bars to relief contained in other possible causes of action by recasting those causes of action as ones for unfair competition.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN48[] State Regulation, Claims

Where a plaintiff fails to state an antitrust claim, and where an unfair competition claim is based upon the same allegations, such state claims are properly dismissed.

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

HN49[] Deceptive & Unfair Trade Practices, State Regulation

A consumer claim for damages under Florida Deceptive and Unfair Trade Practices Act, *Fla. Stat. § 501.201 et seq.*, has three elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

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

HN50[] **Private Actions, State Regulation**

When a plaintiff's claim under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), *Fla. Stat. § 501.201 et seq.*, is based on the same allegations as its antitrust claim, failure to establish a violation of the ***antitrust law*** is sufficient to conclude that the plaintiff has also failed to state a FDUTPA claim.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN51[] **Standing, Requirements**

Florida adheres to the direct purchaser rule articulated in Illinois Brick.

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

HN52[] **Deceptive & Unfair Trade Practices, State Regulation**

The North Carolina Unfair and Deceptive Trade Practices Act (NCUDTPA), *N.C. Gen. Stat. § 75-1 et seq.*, declares unlawful unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce. *N.C. Gen. Stat. § 75-1.1*. To state a claim under NCUDTPA, a plaintiff must show: (1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused injury to the plaintiff or to his business.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

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

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

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN53[] **Deceptive & Unfair Trade Practices, Federal Trade Commission Act**

The Fourth Circuit has construed the North Carolina Unfair and Deceptive Trade Practices Act (NCUDTPA), *N.C. Gen. Stat. § 75-1 et seq.*,—a statute modeled (verbatim) after § 5 of the Federal Trade Commission Act (FTC Act)—consistently with the *Sherman Act* in assessing the merits of an antitrust claim brought under the guise of a consumer-protection claim. The FTC Act sweeps within its prohibitory scope conduct also condemned by *§ 1 of the Sherman Act*, ultimately finding no reason to conclude that, given the opportunity, North Carolina's Supreme Court would construe its state's act any differently.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN54[] Types of Contracts, Quasi Contracts

There is no cause of action in California for unjust enrichment. Unjust enrichment is not a cause of action, just a restitution claim.

Antitrust & Trade Law > Regulated Practices > Private Actions > Standing

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN55[] Private Actions, Standing

A failure to state an antitrust claim does not categorically preclude a plaintiff from succeeding on a related unjust enrichment claim. No reason or logic supports a conclusion that a state's adherence to the rule of Illinois Brick dispossesses a person not only of a statutory legal remedy for an antitrust violation, but also dispossess the same person of his right to pursue a common law equitable remedy. The viability of an unjust enrichment claim does not hinge upon the success of the state statutory antitrust claims. Unjust enrichment claims are viable regardless of the applicable state antitrust laws.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN56[] Types of Contracts, Quasi Contracts

The elements for unjust enrichment claims under Arkansas, Florida, Kansas, Michigan, Minnesota, New York, and North Carolina are essentially the same: plaintiff must establish that (1) plaintiff conferred a benefit on the defendant; (2) defendant knew and received a benefit; and (3) defendant retained the benefit under circumstances that make it unjust.

Governments > Legislation > Statute of Limitations > Time Limitations

HN57[] Statute of Limitations, Time Limitations

See *Cal. Bus. & Prof. Code § 16750.1*.

Governments > Legislation > Statute of Limitations > Time Limitations

HN58[] Statute of Limitations, Time Limitations

Fla. Stat. § 95.11(3)(f) sets a four-year statute of limitations for an action founded on a statutory liability.

Governments > Legislation > Statute of Limitations > Time Limitations

HN59[] **Statute of Limitations, Time Limitations**

See *Minn. Stat. § 325D.64*.

Governments > Legislation > Statute of Limitations > Time Limitations

HN60[] **Statute of Limitations, Time Limitations**

See *N.C. Gen Stat. § 75-16.2*.

Contracts Law > Defenses > Affirmative Defenses > Statute of Limitations

Governments > Legislation > Statute of Limitations > Time Limitations

HN61[] **Affirmative Defenses, Statute of Limitations**

Ark. Code Ann. § 16-56-105(3) states that all actions founded on any contract or liability, expressed or implied are subject to a three-year statute of limitations.

Contracts Law > Defenses > Affirmative Defenses > Statute of Limitations

Governments > Legislation > Statute of Limitations > Time Limitations

HN62[] **Affirmative Defenses, Statute of Limitations**

N.C. Gen. Stat. § 1-52(1) states that an action upon a contract, obligation or liability arising out of a contract, express or implied, is subject to a three-year statute of limitations.

Contracts Law > Defenses > Affirmative Defenses > Statute of Limitations

Governments > Legislation > Statute of Limitations > Time Limitations

HN63[] **Affirmative Defenses, Statute of Limitations**

Fla. Stat. § 95.11(3)(k) sets a three-year statute of limitations for a legal or equitable action on a contract, obligation, or liability not founded on a written instrument.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Choice of Law

HN64[] **Federal & State Interrelationships, Choice of Law**

In an MDL, a court must apply the choice-of-law rules of the transferor forum.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Choice of Law

HN65[] **Federal & State Interrelationships, Choice of Law**

Where there is a conflict between the laws of Vermont and other jurisdictions, a court must ascertain whether a specific section of the Restatement (Second) of Conflict of Laws governs what law should ordinarily apply to the particular action or legal issue. If such a section exists, generally the law of a particular state is presumed to be the correct forum unless another state has a more significant interest in the litigation.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Choice of Law

Civil Procedure > ... > Affirmative Defenses > Statute of Limitations > Tolling of Statute of Limitations

HN66[] **Federal & State Interrelationships, Choice of Law**

Regarding Vermont law, whether a claim will be maintained against the defense of the statute of limitations is determined under the principles stated in *§ 6 of the Restatement (Second) of Conflict of Laws*. In general, unless the exceptional circumstances of the case make such a result unreasonable: (1) the forum will apply its own statute of limitations barring the claim. (2) The forum will apply its own statute of limitations permitting the claim unless: (a) maintenance of the claim would serve no substantial interest of the forum; and (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Relation Back

HN67[] **Amendment of Pleadings, Relation Back**

See *Fed. R. Civ. P. 15(c)(1)(B)*.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Statute of Limitations

Governments > Legislation > Statute of Limitations > Time Limitations

HN68[] **Affirmative Defenses, Statute of Limitations**

To determine which statute of limitations to apply in an MDL action, (1) the Court must first determine which state's choice-of-law rules to apply in these cases, (2) then, pursuant to those rules, it must choose the applicable statute of limitations, and (3) lastly, the Court must determine when each limitations period began to run and whether or not the applicable statutes of limitations have been tolled, either by the pendency of class actions or otherwise.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Class Actions

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN69[] **Tolling of Statute of Limitations, Class Actions**

Where a district court has denied class certification—at least where class action status has been denied solely because of failure to demonstrate that the class is so numerous that joinder of all members is impracticable—the commencement of the original class suit tolls the running of the statute of limitations for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status. The rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Preliminary Considerations > Justiciability > Standing

HN70[] **Class Actions, Certification of Classes**

Class certification issues are not always appropriate for a pre-standing evaluation.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Preliminary Considerations > Justiciability > Standing

HN71[] **Class Actions, Certification of Classes**

Unlike *Fed. R. Civ. P. 23* deficiencies, standing deficiencies are inexplicably linked to a court's jurisdiction. Plaintiffs can exploit standing deficiencies (especially where the deficiency is obvious) to their benefit, whereas a *Rule 23* deficiency is an unlikely vehicle for abuse. Also, from a practical perspective, standing deficiencies are often apparent from the face of the complaints, whereas *Rule 23* deficiencies are often not so obvious.

Civil Procedure > Special Proceedings > Class Actions

Civil Procedure > Preliminary Considerations > Justiciability > Standing

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Class Actions

HN72[] **Special Proceedings, Class Actions**

The filing of a purported class-action complaint by a plaintiff who lacks standing does not toll the statute of limitations for those who later seek to intervene as plaintiffs. Jurisdiction cannot be preserved if the named plaintiffs lacked standing when the suit was filed.

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Judges: Robert M. Dow, Jr., United States District Judge.

Opinion by: Robert M. Dow, Jr.

Opinion

MEMORANDUM OPINION AND ORDER

Before the Court is Defendants' motion to dismiss Indirect Purchaser Plaintiffs' Consolidated Class Action Complaint [497]. For the reasons state below, the Court grants Defendants' motion. In addition, putative Intervenors' motion to intervene [723] is denied.

I. [*5] Background

This multi-district litigation—composed of separate consolidated actions by both Direct Purchaser Plaintiffs and Indirect Purchaser Plaintiffs—has been pending for approximately six years now. Detailed descriptions of the underlying facts of the case can be found in Judge Hibbler's opinion on Defendants' motion to dismiss the Direct Purchaser Plaintiffs' complaint, *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig., 767 F. Supp. 2d 880, 885-90 (N.D. Ill. 2011)* (hereinafter "*DFA I*"), and in this Court's opinion on Defendants' motion to dismiss Indirect Purchaser Plaintiffs' federal claims, *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig., 2013 U.S. Dist. LEXIS 119962, 2013 WL 4506000, at *1-4 (N.D. Ill. Aug. 23, 2013)* (hereinafter "*DFA II*").

This opinion is closely related to the Court's *DFA II* opinion, as it concerns Defendants' motion to dismiss the Indirect Plaintiffs' state-law claims as raised in their Consolidated Class Action Complaint [483]. The Court adopts the detailed factual history of the case as set forth in *DFA I* and *DFA II*, and highlights only those facts necessary to address the present motion.

A. Factual Background

Indirect Plaintiffs allege that Defendants and Schreiber Foods, Inc. conspired to fix, stabilize, raise, and maintain the prices of Class I & III milk and products containing Class I & III milk. The basic allegation is that Defendants bought all of the Class III milk futures **[*6]** on the Chicago Mercantile Exchange ("CME") covering a certain period of time. Defendants then monopolized the CME's Cheese Spot market (*i.e.*, the only commodity exchange market for cheddar cheese in the United States), which allegedly caused an increase in the USDA's milk rate, which in turn increased the price of Defendants' milk futures and the nationwide price for finished dairy products sold to consumers. This chain of events allowed Defendants to profit from both (a) the artificially high price of milk futures and (b) the artificially high price of finished dairy products. Indirect Plaintiffs contend that Defendants' scheme injured them by forcing them to overpay for finished dairy products, namely various types of cheese. The named Plaintiffs are citizens of eight states (Arkansas, California, Florida, Kansas, Michigan, Minnesota, North Carolina, and New York) who allegedly purchased Defendants' finished dairy products during the relevant time periods in their respective states.

B. Procedural Background

The "indirect" component of this MDL, as currently set forth in Indirect Plaintiffs' Consolidated Class Action Complaint [483 (under seal)], is composed of four class-action lawsuits **[*7]** brought by and on behalf of so-called indirect-purchaser Plaintiffs, filed at various times in various courts: *Rudman v. DFA*, No. 2:09-cv-00134 (D. Vt. May 29, 2009); *Waun v. DFA*, No. 2:11-cv-00219 (D. Vt. Sept. 13, 2011); *Asmann v. DFA*, No. 11-cv-4428 (Kan. Dist. Ct. Dec. 15, 2011); and *Rogers v. DFA*, No. 5:13-cv-00034 (D. Vt. Feb. 19, 2013).

In *DFA II*, the Court addressed Defendants' motions to dismiss three of these class-action complaints [160, 197, 287], granting the motions as they related to Indirect Plaintiffs' federal antitrust claims, but leaving open the question of whether the Court would exercise jurisdiction over Indirect Plaintiffs' related state-law claims. [365.]

Approximately six months later, the Court granted Indirect Plaintiffs' request to file a Consolidated Class Action Complaint to present their remaining state-law allegations to the Court. [476.] Indirect Plaintiffs filed their Consolidated Class Action Complaint under seal on February 25, 2014, invoking various antitrust, consumer-protection, and unjust-enrichment laws from the eight states at issue. [483.]

C. Indirect Purchaser Plaintiffs' Consolidated Class Action Complaint

Indirect Plaintiffs' Consolidated **[*8]** Class Action Complaint wends its way through the antitrust laws of eight states, picking up related consumer-protection and unjust-enrichment claims along the way. All said, Indirect Plaintiffs raise three counts, which they label (1) State Statutes, (2) Violation of State Statutes, and (3) Unjust Enrichment. Decoded, these counts are best read as (1) Price-Fixing and Conspiracy, (2) Monopolization, and (3) Unjust Enrichment.

1. Counts I and II: Antitrust and Consumer-Protection Claims

While Counts I and II of Indirect Plaintiffs' Consolidated Class Action Complaint sound in ***antitrust law***, for various reasons, Indirect Plaintiffs were unable to bring claims under the antitrust statutes of two of the eight states at issue: Arkansas and Florida. For those two states, Indirect Plaintiffs brought their antitrust claims under the states' consumer-protection statutes instead. See *Ark. Code § 4-88-107*; *Fla. Stat. § 501.204*. Indirect Plaintiffs also invoked the consumer-protection laws of California (*Cal. Bus. & Prof. Code § 17200*) and North Carolina (*N.C. Gen. Stat. § 75-1.1*) *in addition to* their invocation of the antitrust statutes of those states.

Although Indirect Plaintiffs have alleged violations of a mix of both state antitrust and consumer-protection laws in Counts I and II, they **[*9]** do not distinguish between the two. For purposes of this opinion, however, delineation is imperative. Accordingly, the following chart provides a breakdown of Counts I and II, distinguishing Indirect Plaintiffs' antitrust claims from their consumer-protection claims.

State	Count I: Price Fixing and Conspiracy	
	Antitrust	**Consumer Protection**
Arkansas		Ark. Code *§ 4-88-107*
California	Cal. Bus. & Prof. Code *§ 16726*	Cal. Bus. & Prof. Code *§ 17200*
Florida		*Fla. Stat. § 501.204*
Kansas	Kan. Stat. Ann. *§ 50-112*	
Michigan	Mich. Comp. Laws *§ 445.772*	
Minnesota	Minn. Stat. *§§ 325D.51* & *325D.53*	
New York	N.Y. Gen. Bus.	

State	Count I: Price Fixing and Conspiracy	
	Antitrust	**Consumer Protection**
	Law *§ 340*	
North Carolina	N.C. Gen. Stat. *§ 75-1*	N.C. Gen. Stat. *§ 75-1.1*

State	Count II: Monopolization	
	Antitrust	**Consumer Protection**
Arkansas		Ark. Code *§ 4-88-107*
California		Cal. Bus. & Prof. Code *§ 17200*
Florida		*Fla. Stat. § 501.204*
Kansas		
Michigan	Mich. Comp. Laws *§ 445.773*	
Minnesota	Minn. Stat. *§ 325D.52*	
New York		
North Carolina	N.C. Gen. Stat. *§ 75-2.1*	

2. Count III: Unjust Enrichment Claims

Without specifying the laws of any particular state, Indirect Plaintiffs allege in Count III that Defendants were unjustly enriched by the Indirect Plaintiffs' overpayments for Defendants' finished dairy products. Indirect Plaintiffs ask the Court to disgorge **[*10]** Defendants of their unjust profits and return the overpayments to them in restitution.

II. Legal Standard on Motion to Dismiss

HN1[] The purpose of a *Rule 12(b)* motion to dismiss is not to decide the merits of the case, but rather to test the sufficiency of the complaint. *Gibson v. City of Chicago, 910 F.2d 1510, 1520 (7th Cir. 1990)*. In the context of a motion to dismiss, the Court takes as true the facts as set forth in the complaint along with all reasonable inferences. *Thulin v. Shopko Stores Operating Co., LLC, 771 F.3d 994, 995 (7th Cir. 2014)*. To survive a *Rule*

12(b)(6) motion to dismiss, the claim first must comply with Rule 8(a) by providing "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), such that the defendant is given "fair notice of what the * * * claim is and the grounds upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). Second, the factual allegations in the claim must be sufficient to raise the possibility of relief above the "speculative level," assuming that all of the allegations in the complaint are true. E.E.O.C. v. Concentra Health Servs., Inc., 496 F.3d 773, 776 (7th Cir. 2007) (quoting Twombly, 550 U.S. at 555). "A pleading that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action will not do.'" Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting Twombly, 550 U.S. at 555). However, "[s]pecific facts are not necessary; the statement need only give the defendant fair notice of what the * * * claim is and the grounds upon which it rests." **[*11]** Erickson v. Pardus, 551 U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) (citing Twombly, 550 U.S. at 555).

III. Antitrust Standing

In granting Defendants' prior motion to dismiss the federal antitrust claims raised by Indirect Plaintiffs in their (then three separate) class-action complaints, the Court held that Plaintiffs lacked antitrust standing to bring those claims under the "directness inquiry" set forth in Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983) (hereinafter "*AGC*"). DFA II, 2013 U.S. Dist. LEXIS 119962, 2013 WL 4506000, at *9-14. But the Court left open the questions of "whether and how the *AGC* factors apply to each of the various *state* antitrust claims that Plaintiffs seek to bring." 2013 U.S. Dist. LEXIS 119962, [WL] at *15 (emphasis added). Those questions are now before the Court.

Defendants argue that (1) the Court should apply *AGC* to the state-law claims, dismissing them for lack of antitrust standing, (2) even if the Court does not apply *AGC* to the state-law claims, the Court should still dismiss those claims under state-law remoteness principles, and (3) the dismissal (under either theory) should apply to all of Plaintiffs' claims (*i.e.*, antitrust, consumer protection, and unjust enrichment), not just the antitrust claims.

In deciding whether to apply *AGC* to state-law antitrust claims, the Court looks to whether the relevant state supreme court or state legislature has spoken to the issue. See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938); Jean v. Dugan, 20 F.3d 255, 260 (7th Cir. 1994). ***HN2***[] "In the **[*12]** absence of guiding decisions by the state's highest court, [federal courts] consult and follow the decisions of intermediate [state] appellate courts unless there is a convincing reason to predict [that] the state's highest court would disagree." ADT Sec. Servs., Inc. v. Lisle-Woodridge Fire Prot. Dist., 672 F.3d 492, 498 (7th Cir. 2012).

Indirect Plaintiffs allege that Defendants have violated the antitrust laws of six states: California, Kansas, Michigan, Minnesota, New York, and North Carolina. Defendants argue that the state legislatures or the highest courts in each of these six states have issued clear directives that courts interpreting their state's antitrust statutes should follow federal law, and Indirect Plaintiffs (predictably) disagree. But before beginning a state-by-state analysis, the Court notes two general topics that are relevant in all six states: (1) harmonization provisions and (2) *Illinois Brick* repealer statutes.

A. Harmonization Provisions

HN3[] A harmonization provision—which can either be statutory or derived from the common law—says that a state's antitrust laws should be read in harmony with federal antitrust laws. All six of the states at issue have such provisions. Defendants point to these provisions as proof that the states would apply *AGC*. Indirect **[*13]** Plaintiffs disagree, arguing that (1) harmonization provisions apply to determine what qualifies as prohibited conduct, not who has standing to sue, and (2) even if a state has a harmonization provision, there nonetheless must be clear guidance under the state's law for applying *AGC*.

Both parties are correct, depending on where you look. ***HN4***[] Some states have interpreted harmonization provisions narrowly, excluding the incorporation of federal law regarding antitrust standing. See *Lorix v. Crompton Corp., 736 N.W.2d 619, 626 (Minn. 2007)* (noting that "[t]he desire for harmony between federal and state ***antitrust law*** relates more to prohibited conduct than to who can bring a lawsuit," such that state courts are "not required * * * to abide by federal antitrust standing limitations" (citing *Comes v. Microsoft Corp., 646 N.W.2d 440, 446 (Iowa 2002)* (noting that the purpose of Iowa's antitrust harmonization statute was to "achieve uniform application of the state and federal laws prohibiting monopolistic practices," not to define who can sue under ***antitrust law***))).

That being said, other courts have applied *AGC* to state ***antitrust law*** based solely on harmonization provisions. See, *e.g., In re Refrigerant Compressors Antitrust Litig., 2013 U.S. Dist. LEXIS 50737, 2013 WL 1431756, at *10 (E.D. Mich. Apr. 9, 2013)* ("This Court shall also apply the *AGC* test to the claims asserted under the laws of the three relevant states with harmonization **[*14]** provisions * * *."); *In re Dynamic Random Access Memory Antitrust Litig., 516 F. Supp. 2d 1072, 1095 (N.D. Cal. 2007)* (hereinafter "*DRAM*").

Still other courts have played it safe, punting the issue absent clear guidance from the state in question. See, *e.g., In re Potash Antitrust Litig., 667 F. Supp. 2d 907, 943-44 (N.D. Ill. 2009)* ("[T]his Court is hesitant to decide who may be a proper plaintiff under Michigan's antitrust laws without any signal from an authoritative judicial or legislative source."), *vacated and remanded on other grounds, sub nom. Minn-Chem, Inc. v. Agrium Inc., 657 F.3d 650 (7th Cir. 2011)*; *In re Flash Memory Antitrust Litig., 643 F. Supp. 2d 1133, 1153 (N.D. Cal. 2009)* ("This Court, however, is reticent to adopt an across-the-board rule that a state's harmonization provision, whether created by statute or common law, is an appropriate means of predicting how a state's highest court would rule regarding the applicability of *AGC* to state law antitrust claims. Neither party has provided the Court with the requisite, individualized analysis on a per state basis to enable the Court to render such a determination."); *In re Pool Prods. Distrib. Mktg. Antitrust Litig., 946 F. Supp. 2d 554, 564 (E.D. La. 2012)* ("The *AGC* factors apply to standing inquires under state antitrust laws only to the extent that a state has adopted them.").

The Court is persuaded that ***HN5***[] the presence of a statutory harmonization provision (either statutory or common law), *absent any countervailing statutory law or case law from a state appellate court*, is sufficient to permit a district court to apply **[*15]** federal antitrust-standing law—including *AGC*—to claims brought under that state's antitrust laws.

First, the plain language of the harmonization statutes at issue—disseminated by the states' supreme courts and/or legislatures—offers no such limitation, instructing instead that each respective state's antitrust laws be read in harmony with federal antitrust laws, absent contradictory state law or policy. See, *e.g., Mailand v. Burckle, 20 Cal. 3d 367, 143 Cal. Rptr. 1, 572 P.2d 1142, 1147 (Cal. 1978)* (California); *Kan. Stat. Ann. § 50-163(b)* (Kansas); *Mich. Comp. Laws § 445.784(2)* (Michigan); *Minn. Twins P'ship v. State, 592 N.W.2d 847, 851 (Minn. 1999)* (Minnesota); *Sperry v. Crompton Corp., 8 N.Y.3d 204, 863 N.E.2d 1012, 1018, 831 N.Y.S.2d 760 (N.Y. 2007)* (New York); *Madison Cablevision, Inc. v. Morganton, 325 N.C. 634, 386 S.E.2d 200, 213 (N.C. 1989)* (North Carolina). It seems odd, then, that a district court would read a non-existent exception into a state's harmonization provision as its prediction of how the state's highest court would rule on the issue. The safer prediction is to assume that the state court would apply the plain language of the provision.

Second, (as discussed in more detail below), the fact that many state legislatures found it necessary to repeal the Supreme Court's *Illinois Brick* decision—a federal antitrust-standing opinion—implies that absent the repeal, the *Illinois Brick* antitrust-standing rule *would have* applied to the states' laws under their respective harmonization provisions (*i.e.*, if the states' harmonization provisions **[*16]** didn't incorporate federal antitrust-standing law, *Illinois Brick* repealer statutes wouldn't have been necessary).

Third, ***HN6***[] antitrust standing is not Article III standing; the very concept of antitrust standing, which exists *in addition to* Article III standing,[1] is so intertwined with substantive antitrust principles that it would be counterintuitive to assume that states would not read this body of law in harmony with the remainder of the Supreme Court's

[1] See, *e.g., Loeb Indus., Inc. v. Sumitomo Corp., 306 F.3d 469, 480-81 (7th Cir. 2002)*.

substantive antitrust opinions. Indeed, the entire premise of the judicially-created "antitrust standing" inquiry stems from the fact that the plain language of the *Clayton Act's* standing provision is exceedingly broad, and so the Supreme Court derived a set of narrowing factors influenced by the same policies that gave birth to the antitrust laws in the first place. See *AGC, 459 U.S. at 536-38*. Thus, as a threshold matter, the Court will follow the plain language of the states' harmonization provisions and adopt federal antitrust-standing law in applying the states' antitrust laws absent contrary authority.

But to be clear,***HN7***[] a harmonization provision does not guarantee that a state will apply *AGC*. Even states with a harmonization provision have the **[*17]** authority to reject the application of *AGC* if *AGC* conflicts with existing state law (statutory or common law). For example, in *Lorix*, the Minnesota Supreme Court first rejected the broader notion that its common-law harmonization provision automatically incorporated federal antitrust-standing law, and then, in a separate analysis, specifically rejected the application of *AGC* under Minnesota ***antitrust law***. *Lorix, 736 N.W.2d at 626-29* ("Even viewed as guideposts rather than requirements, the *AGC* factors are not harmonious with our ***antitrust law***."). It is this sort of analysis that makes the Court's decision more academic than effectual, since the identification of a harmonization provision is only the first step in deciding whether a state supreme court would apply the *AGC* factors, with an assessment of the state's extant antitrust-standing law a necessary follow-up.

B. *Illinois Brick* Repealer Statutes

HN8[] Although the standing provision in *§ 4* of the Clayton Act is broad—permitting civil suits by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws," *15 U.S.C. § 15*—the Supreme Court has endorsed several limiting principles such that not every person, however tangentially **[*18]** injured by an antitrust violator, has standing to sue. See *Blue Shield of Virginia v. McCready, 457 U.S. 465, 472-75, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)*; *Hawaii v. Standard Oil Co., 405 U.S. 251, 263 n.3, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972)* (observing that the lower federal courts were "virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation").

One such limiting principle (of particular relevance here) came from the Supreme Court's *Illinois Brick* decision, where the Court held that indirect purchasers of bricks lacked antitrust standing where their alleged damages were measured by the amount of overcharge passed onto them from the direct purchasers. *Illinois Brick, 431 U.S. at 730-31*; *McCready, 457 U.S. at 474* ("[T]he Court found unacceptable the risk of duplicative recovery engendered by allowing both direct and indirect purchasers to claim damages resulting from a single overcharge by the antitrust defendant. The Court found that the splintered recoveries and litigative burdens that would result from a rule requiring that the impact of an overcharge be apportioned between direct and indirect purchasers could undermine the active enforcement of the antitrust laws by private actions." (citations omitted)); *AGC, 459 U.S. at 544* ("We observed that potential plaintiffs at each level in the distribution chain would **[*19]** be in a position to assert conflicting claims to a common fund, the amount of the alleged overcharge, thereby creating the danger of multiple liability for the fund and prejudice to absent plaintiffs."); see also *Loeb, 306 F.3d at 481* (***HN9***[] "*Illinois Brick* holds that the direct purchaser from the alleged antitrust violator(s) is the one with the right of action; those further removed from the illegal arrangement may not (under the federal antitrust laws, at least) bring their own actions."); *Int'l Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris Inc., 196 F.3d 818, 825 (7th Cir. 1999)* ("[O]nly the immediate purchaser of goods may sue under the antitrust laws.").

Since *Illinois Brick* came down in 1977, antitrust defendants have tried to stretch its application to stand for the proposition that "a defendant cannot be sued under the antitrust laws by any plaintiff to whom it does not sell (or from whom it does not purchase)," but, as the Seventh Circuit has noted, "[s]uch a rule would eliminate in one fell swoop all competitor suits based on exclusionary practices," which is "a step that the Supreme Court has never taken." *Loeb, 306 F.3d at 481*. And the Supreme Court subsequently clarified that ***HN10***[] "the chain-of-distribution inquiry in *Illinois Brick* was meant only to preclude duplicate recovery." *Id.* (citing **[*20]** *McCready, 457 U.S. at 468-70*); see also *id. at 482* ("The reason the plaintiffs' suit in *Illinois Brick* failed was not because the defendants did *not* sell to them. Rather, it was because the defendants *did* sell to a third party who * * * could recover for any injury they claimed.").

Six years later, in 1983, the Supreme Court issued another opinion on antitrust standing—**HN11**[] *AGC*—providing a six-factor test for examining the link between a plaintiff's harm and a defendant's wrongdoing: (1) the causal connection between the violation and the harm; (2) the presence of improper motive; (3) the type of injury and whether it was one Congress sought to redress; (4) the directness of the injury; (5) the speculative nature of the damages; and (6) the risk of duplicate recovery or complex damage apportionment. *Loeb, 306 F.3d at 484* (citing *AGC, 459 U.S. at 537-45*). The "broad proposition" emanating from *AGC* is that "a party cannot recover when others more directly injured are better able to state a claim." *Id. at 489*.

At first glance, there appears to be some overlap between the *Illinois Brick* doctrine and the *AGC* six-factor test. In general, both tests relate to the directness of a plaintiff's injury. And specifically, several of the *AGC* factors—especially factor number six—echo the **[*21]** Court's ruling in *Illinois Brick*. See *Lorix, 736 N.W.2d at 628* (holding that the "complexity of apportionment and risk of duplicative recoveries" factor "was at the heart of *Illinois Brick*'s bar to indirect purchaser suits"). However, other courts have been quite clear in holding that *Illinois Brick* and *AGC* present separate, distinct inquiries. See *Int'l Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris Inc., 196 F.3d 818, 825 (7th Cir. 1999)* (noting that the "direct-purchaser doctrine of *Illinois Brick* and the direct-injury doctrine of *Associated General Contractors* are analytically distinct" and are "independent obstacle[s] to recovery"); *Loeb, 306 F.3d at 475* ("We find that *Illinois Brick* presents no obstacle to any of the plaintiffs' claims but that the claims of the scrap copper dealers are precluded under *AGC*."); *DFA II, 2013 U.S. Dist. LEXIS 119962, 2013 WL 4506000, at *14* (noting that *AGC*, and specifically its "directness inquiry," "presents a separate hurdle to Indirect Purchasers' claims"); see also *Southard v. Visa USA Inc., 734 N.W.2d 192, 198-99 (Iowa 2007)* (adopting *AGC* despite its repealer statute); *Kanne v. Visa USA Inc., 272 Neb. 489, 723 N.W.2d 293, 298-300 (Neb. 2006)* (same).

This delineation between *Illinois Brick* and *AGC* is important because in reaction to *Illinois Brick*, multiple state legislatures—including the legislatures of all but one of the states at issue here—passed "repealer statutes" abrogating the Supreme Court's prohibition of indirect-purchaser actions as articulated **[*22]** in *Illinois Brick*. The key question is how, if at all, these repealer statutes impact the Court's application of *AGC* under each state's law.

To answer that question fully, the Court must (and will) review the language of the repealer statutes at issue, as well as the relevant case law interpreting those statutes. But the Court notes that while at least 25 states enacted repealer statutes in response to *Illinois Brick* (see *Lorix, 736 N.W.2d at 627*), the Court is not aware of any legislative action by any state expressly rejecting *AGC*. The fact that so many states took action in response to *Illinois Brick* shows that states are quite capable of rejecting federal ***antitrust law*** when they see fit to do so. *Illinois Brick* was decided in 1977 and *AGC* in 1983, so state legislatures have had ample time to pass equivalent "repealer statutes" regarding *AGC*. On the other hand, the Court recognizes that **HN12**[] by enacting a repealer statute, each state has taken some action to differentiate its antitrust-standing law from the federal landscape. In addition, despite the Seventh Circuit's recognition that *Illinois Brick* and *AGC* represent separate and distinct hurdles, this Court cannot overlook the overlap between some of the *AGC* ***[*23]*** factors and the *Illinois Brick* inquiry, which is not surprising since the *AGC* test was, at least in some ways, influenced by *Illinois Brick*. See, *e.g., Wrobel v. Avery Dennison Corp.*, No. 05-cv-1296, 2006 WL 7130617 (Kan. Dist. Ct., Feb. 1, 2006) (state court opinion), available at [574-1, at 6] ("Because '*AGC* incorporates, rather that repudiates, the principles of *Illinois Brick*,' one could argue that jurisdictions rejecting *Illinois Brick* would also reject the *AGC* standing test since its broad application would preclude most, if not all, indirect purchaser suits. In other words, applying *AGC* in a jurisdiction that recognizes indirect purchaser suits could effectively negate the legislative or judicial rejection of *Illinois Brick*." (quoting *McCarthy v. Recordex Serv., 80 F.3d 842, 851 (3d Cir. 1996)))*. But see *id.* ("Although this argument has some intuitive appeal, it fails to consider that '*AGC* and *Illinois Brick* address two analytically distinct aspects of antitrust standing." (quoting *McCarthy, 80 F.3d at 851*)). Ultimately, while the Court recognizes that similar policy concerns may have motivated both *Illinois Brick* and *AGC*, they remain separate and distinct tests. Accordingly, to determine whether a state's repealer statute has any impact on the state's willingness to apply *AGC*, the Court must review the **[*24]** specific language of the repealer statute and any associated case law.

C. State-by-State Analysis

With assistance from the parties, the Court now "undertake[s] the back-breaking labor involved in deciphering the state of antitrust standing in each of th[e] states on this motion" to determine whether to apply the *AGC* factors that the Court applied in dismissing Indirect Plaintiffs' federal antitrust claims. *In re Flash Memory Antitrust Litig., 643 F. Supp. 2d at 1153*.

1. California

Standing Provision:

HN13[] Much like the standing provision in the Clayton Act, California's Cartwright Act is broad in scope, permitting "[a]ny person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter" to bring an antitrust action. *Calif. Bus. & Prof. Code § 16750 subd. (a)*.

Harmonization Provision:

California's harmonization provision is based in common law, and is well-recognized in the California Supreme Court. *Clayworth v. Pfizer, Inc., 49 Cal. 4th 758, 111 Cal. Rptr. 3d 666, 233 P.3d 1066, 1082 n.18 (Cal. 2010)* (explaining that the *Illinois Brick* repealer statute was necessary because federal antitrust cases are otherwise treated as applicable and authoritative on Cartwright Act questions); *Mailand v. Burckle, 20 Cal. 3d 367, 143 Cal. Rptr. 1, 572 P.2d 1142, 1147 (Cal. 1978)*; *Marin Cty. Bd. of Realtors, Inc. v. Palsson, 16 Cal. 3d 920, 130 Cal. Rptr. 1, 549 P.2d 833, 835 (Cal. 1976)* (noting that a "long line of California cases" has recognized that federal cases interpreting the *Sherman Act* are applicable to state antitrust cases because "both statutes have **[*25]** their roots in the common law"); *Cnty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001)* ("[T]he Cartwright Act, *Cal. Bus. & Prof. Code § 16700 et seq.*, was modeled after the *Sherman Act*."). The California Supreme Court has rejected arguments that judicial interpretations of the Sherman and Clayton Acts "apply fully" to California's antitrust laws, noting that "[i]nterpretations of federal ***antitrust law*** are at most instructive, not conclusive, when construing the Cartwright Act." *Aryeh v. Canon Business Solutions, Inc., 55 Cal. 4th 1185, 151 Cal. Rptr. 3d 827, 292 P.3d 871, 877 (2013)*; see also *Samsun Electronics Co., Ltd. v. Panasonic Corp., 747 F.3d 1199, 1205 n.4 (9th Cir. 2014)*.

Illinois Brick Repealer Statute:

The California legislature took action "[w]ithin months of the decision," (*i.e.*, prior to the *AGC* decision), introducing Assembly Bill No. 3222 (1977-1978 Reg. Sess.) to prevent *Illinois Brick* "from having any effect on judicial interpretation of the Cartwright Act." *Clayworth, 233 P.3d at 1082*. The bill passed unanimously, and added a provision to the Act's standing provision stating that ***HN14***[] a person injured by an antitrust violator may bring suit "regardless of whether such injured person dealt directly or indirectly with the defendant." *Calif. Bus. & Prof. Code § 16750 subd. (a)*, added by Stats. 1978, ch. 536, § 1, p. 1693; see also *Clayworth, 233 P.3d at 1082* (citing *Union Carbide Corp. v. Superior Court, 36 Cal. 3d 15, 201 Cal. Rptr. 580, 679 P.2d 14, 19-20 (Cal. 1984))*.

Supreme Court/Appellate Court Law:

HN15[] California's intermediate appellate court has endorsed the application of the *AGC* factors in interpreting California's antitrust laws, despite the state's *Illinois Brick* repealer **[*26]** statute. See *In re Flash Memory Antitrust Litig., 643 F. Supp. 2d at 1151-52* (applying *AGC* under California law, noting that while the California Supreme

Court has not reached the issue, at least one of its intermediate appellate courts has applied *AGC* to its antitrust laws (citing *Vinci v. Waste Mgmt., Inc., 36 Cal. App. 4th 1811, 43 Cal. Rptr. 2d 337, 338-39 (Cal. 1995)))*. But see *In re Capacitors Antitrust Litig., 2015 U.S. Dist. LEXIS 68615, 2015 WL 3398199, at *13 (N.D. Cal. May 26, 2015)* ("The application of *AGC* to California state antitrust claims has recently become murky, and that murkiness persuades the Court *AGC* should not be applied."). The Ninth Circuit has also applied the *AGC* factors to assess standing under California ***antitrust law*** (albeit "more liberally"), noting only that the scope of the directness inquiry is broader under California law based on the state's repeal of *Illinois Brick*. See *Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 987-91 (9th Cir. 2000)*; see also *Clayworth, 233 P.3d at 1077* (citing *AGC* and *Vinci* as cases that dealt with antitrust causation, and then noting that these cases have "nothing to say on the general topic that concerns us: when (as here) causation *has* been properly alleged, how are antitrust damages to be measured?").

Analysis:

The Court agrees with the *In re Flash Memory Antitrust Litigation* court, which followed *Vinci* in applying the *AGC* factors to antitrust claims brought under the Cartwright Act. The Court is mindful that, as the Ninth Circuit mentioned, ***HN16***[] California's antitrust-standing provision **[*27]** is broader in some respects than federal antitrust-standing law because of California's repealer statute, but the Court also recognizes that California's repealer statute applied only to *Illinois Brick*, and *Illinois Brick* and *AGC* are separate inquiries. See *In re Refrigerant Compressors Antitrust Litig., 2013 U.S. Dist. LEXIS 50737, 2013 WL 1431756, at *10*. Absent any binding California law to the contrary, the appellate court decision in *Vinci* and the moderately-deferential harmonization provision remain the best indicators of how the California Supreme Court would address the issue, and both lean in favor of applying *AGC* to claims brought under the Cartwright Act.

2. Kansas

Standing Provision:

HN17[] Kansas also has a broadly-worded antitrust-standing provision, stating that a cause of action "may be brought by any person who is injured in such person's business or property by reason of" an antitrust violation. *Kan. Stat. Ann. § 50-161(b)*.

Harmonization Provision:

Kansas is one of the two states at issue with a statutory harmonization provision. See *Kan. Stat. Ann. § 50-163(b)* (***HN18***[] "Except as otherwise provided in subsections (d) and (e), the Kansas restraint of trade act shall be construed in harmony with ruling judicial interpretations of federal ***antitrust law*** by the United States [S]upreme [C]ourt. If such judicial interpretations are in conflict with or inconsistent with the **[*28]** express provisions of subsection (c), the provisions of subsection (c) shall control."). The harmonization provision also is echoed in Kansas's case law. See *O'Brien v. Leegin Creative Leather Prods., Inc., 321 P.3d 799, 2014 Kan. App. Unpub. LEXIS 221, *13, at *5 (Kan. Ct. App. 2014)* (noting the Kansas legislature's recent amendment of the Kansas Restraint of Trade Act, and the legislature's instruction that "its provisions will be 'construed in harmony' with the United States Supreme Court's antitrust decisions" (citing *Kan. State. Ann. 2013 Supp. 50-163(b)*, *(c)*)); *Smith v. Philip Morris Cos., Inc., 50 Kan. App. 2d 535, 335 P.3d 644, 652 (Kan. Ct. App. 2014)* (same). ***HN19***[] The Supreme Court of Kansas has noted that while it is "certainly foreseeable" that it would apply federal ***antitrust law*** in interpreting Kansas's antitrust laws and that such law would be "persuasive authority," ultimately federal ***antitrust law*** "is not binding upon any court in Kansas interpreting Kansas ***antitrust law***." *Bergstrom v. Noah, 266 Kan. 829, 974 P.2d 520, 531 (Kan. 1999)*.

Illinois Brick Repealer Statute:

Similar to other states, ***HN20***[] Kansas's repealer statute provides that a cause of action may be brought "regardless of whether such injured person dealt directly or indirectly with the defendant." *Kan. Stat. Ann. § 50-161(b)*.

Supreme Court/Appellate Court Law:

Neither the parties nor the Court have located any appellate court decisions in Kansas discussing antitrust standing. At least one Kansas district court (*i.e.*, Kansas's trial court) has addressed the issue, concluding **[*29]** that Kansas courts should apply *AGC* despite its repealer statute:

> Because "*AGC* incorporates, rather than repudiates, the principles of *Illinois Brick*," one could argue that jurisdictions rejecting Illinois Brick would also reject the AGC standing test since its broad application would preclude most, if not all, indirect purchaser suits. In other words, applying *AGC* in a jurisdiction that recognizes indirect purchaser suits could effectively negate the legislative or judicial rejection of *Illinois Brick*.
>
> Although this argument has some intuitive appeal, it fails to consider that "*AGC* and *Illinois Brick* address two analytically distinct aspects of antitrust standing." In *AGC*, the Court was primarily concerned with the remoteness of the plaintiff's injury and whether it was too far removed from the antitrust injury to warrant a section 4 remedy. "This inquiry, akin to the determination of 'proximate cause' in the negligence context, is subtle and resists the use of hard-and-fast 'black letter' rules." In *Illinois Brick*, however, the Court created a bright-line rule that focused "exclusively on the risk of duplicative recovery and potential for overly-complex damages and apportionment calculations." **[*30]** Viewed in this context, the Court finds that the *AGC* standing test may be applied to this action even though the KRTA specifically contemplates indirect purchaser suits. The Court, therefore, agrees with Defendants that "the KRTA does not implicitly grant standing to every antitrust plaintiff who characterizes himself as an 'indirect purchaser.'"

Wrobel, No. 05-cv-1296, 2006 WL 7130617, available at [574-1, at 6-7] (internal citations omitted). Several federal courts have also applied *AGC* to antitrust-standing questions under Kansas law. See, *e.g., Orr v. Beamon, 77 F. Supp. 2d 1208, 1212 (D. Kan. 1999)*; *DRAM, 516 F. Supp. 2d at 1094*; *Sahagian v. Genera Corp., 2009 U.S. Dist. LEXIS 132583, 2009 WL 9504039, at *6 (C.D. Cal. July 6, 2009)*; *In re Refrigerant Compressors Antitrust Litig., 2013 U.S. Dist. LEXIS 50737, 2013 WL 1431756, at *10*.

Analysis:

In Kansas, the only known state court to cite to *AGC* elected to adopt and apply the *AGC* test, despite the state's repeal of *Illinois Brick*. See *Wrobel*, No. 05-cv-1296, 2006 WL 7130617, available at [574-1, at 6] ("[T]he Court finds that the *AGC* standing test may be applied to this action even though the KRTA specifically contemplates indirect purchaser suits."); see also *Orr, 77 F. Supp. 2d at 1211* ("In finding no Kansas cases to the contrary, the court concludes that standing under the Kansas antitrust statutes requires an antitrust injury similar to that required under the Sherman and Clayton Acts."); *DRAM, 516 F. Supp. 2d at 1093-94* (holding that Kansas courts "would support application of the *AGC* test in assessing **[*31]** antitrust standing").

Although the court in *In re Potash Antitrust Litigation* elected not to follow *Wrobel, Orr*, or *DRAM* in its decision not to apply *AGC* in interpreting Kansas's antitrust laws, see *667 F. Supp. 2d at 944*, the court did not cite any authority contradicting those cases, and simply found the supporting authority to be insufficient. This Court is not persuaded by the *Potash* analysis, and instead finds the well-reasoned *Wrobel* opinion to be more indicative of how the Kansas Supreme Court would address the application of *AGC.*

Nor is the Court persuaded by the Kansas cases that mention the fact that federal ***antitrust law*** is not binding on Kansas courts. See, *e.g., Bergstrom, 974 P.2d at 531*; *O'Brien v. Leegin Creative Leather Prods., Inc., 294 Kan. 318, 277 P.3d 1062, 1068 (Kan. 2012)*. First off, these are not antitrust-standing cases, and they do not address *AGC.* But perhaps more persuasively, since the *Bergstrom* and *O'Brien* decisions,***HN21***[] the Kansas legislature has amended KRTA to provide that it "shall be construed in harmony with ruling judicial interpretations of federal ***antitrust law*** by the United States supreme court." *Kan. Stat. Ann. § 50-163(b)*. Accordingly, and absent any binding authority to the contrary, the Court is persuaded that the Kansas Supreme Court would apply *AGC* in interpreting antitrust standing under KRTA.

3. Michigan

Standing **[*32]** Provision:

HN22[] Michigan affords a right to sue under its antitrust reform act to "[a]ny * * * person threatened with injury or injured directly or indirectly in his or her business or property by a violation of th[e] act." *Mich. Comp. Laws § 445.778(2)*.

Harmonization Provision:

Michigan is the other state at issue with a statutory harmonization provision. See *Mich. Comp. Laws § 445.784(2)* (***HN23***[] "It is the intent of the legislature that in construing all sections of this act, the courts shall give due deference to interpretations given by the federal courts to comparable antitrust statutes, including, without limitation, the doctrine of per se violations and the rule of reason."); *Salmon v. City of Cadillac, 2005 Mich. App. LEXIS 3117, 2005 WL 3416119, at *5 (Mich. Ct. App. Dec. 13, 2005)* (***HN24***[] "[B]ecause Michigan's antitrust legislation is patterned after federal antitrust legislation, federal court decisions applying the *Sherman Act* are persuasive authority in interpreting the [Michigan Antitrust Reform Act]."); *Mercy Mem'l Hosp. v. Porter, 1999 Mich. App. LEXIS 2243, 1999 WL 33326821, at *3 (Mich. Ct. App. Dec. 21, 1999)* (same); *Elias v. Fed. Home Loan Mortg. Corp., 581 F. App'x 461, 468-69 (6th Cir. 2014)*.

Illinois Brick Repealer Statute:

HN25[] Michigan's repealer statute extended antitrust standing to any person "threatened with injury or injured directly or indirectly." *Mich. Comp. Laws § 445.778(2)*.

Supreme Court/Appellate Court Law:

The only opinion from a Michigan court citing *AGC* is a circuit court opinion (*i.e.*, not an appellate-court decision), where the court applied *AGC* despite Michigan's repealer **[*33]** statute:

> [T]his Court agrees with Defendants that it does not necessarily follow that Michigan's repeal of the *Illinois Brick* rule also eliminated the *Associated General Contractors* standing requirements. The Supreme Court in *Illinois Brick* made clear that its decision addressed only whether there should be a bar on "indirect purchaser" suits. It expressly "d[id] not address the standing issue," explaining that the "indirect purchaser" question is "analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue."

Stark v. Visa U.S.A. Inc., 2004 Extra LEXIS 214, 2004 WL 1879003, at *4 (Mich. Cir. Ct. July 23, 2004) (citing *Illinois Brick, 431 U.S. at 728 n.7*.). The *Stark* court also noted that ***HN26***[] "while Michigan appellate courts have not developed a test for determining when a plaintiff's injury is too remote to permit suit under [the Michigan Antitrust Reform Act], the Act requires courts to give 'due deference to interpretations given by the federal courts to comparable antitrust statutes.'" *Id.* (citing *Mich. Comp. Laws § 445.784(2)*). This nuanced understanding of the distinction between *Illinois Brick* and *AGC*, coupled with this application of the plain language of Michigan's harmonization provision, have inspired other courts to apply *AGC* to questions of antitrust standing under Michigan law. See, *e.g.,* ***[*34]*** *In re Ductile Iron Pipe Fittings Indirect Purchaser Antitrust Litig., 2013 U.S. Dist. LEXIS 142466, 2013 WL 5503308, at *15 (D.N.J. Oct. 2, 2013)*; *In re Cathode Ray Tube Antitrust Litig., 2013 U.S. Dist. LEXIS 119598, 2013 WL 4505701, at *9 (N.D. Cal. Aug. 21, 2013)*; *In re Refrigerant Compressors Antitrust Litig., 2013 U.S. Dist. LEXIS 50737, 2013 WL 1431756, at *10*; *Sahagian, 2009 U.S. Dist. LEXIS 132583, 2009 WL 9504039, at *6*; *DRAM, 516 F. Supp. 2d at 1094*.

Analysis:

The combination of the *Stark* decision and Michigan's harmonization provision persuades the Court that ***HN27***[] the Michigan Supreme Court would apply the *AGC* factors to assess antitrust standing, and the Court sees no evidence to the contrary, binding or otherwise.

4. Minnesota

The Court need not delve heavily into Minnesota law, as the Minnesota Supreme Court has already made clear that the *AGC* factors conflict with Minnesota ***antitrust law***.

Standing Provision:

HN28[] "Any person" injured by an antitrust violation may sue under Minnesota's ***antitrust law***. *Minn. Stat. § 325D.57*.

Harmonization Provision:

HN29[] "Minnesota law is generally interpreted consistently with federal ***antitrust law***." *Lorix, 736 N.W.2d at 626* (citing *Minn. Twins P'ship v. State, 592 N.W.2d 847, 851 (Minn. 1999))*.

Illinois Brick Repealer Statute:

HN30[] "In 1984, our legislature added the words 'directly or indirectly' to *Minn. Stat. § 325D.57* to make clear that, contrary to *Illinois Brick*, Minnesota ***antitrust law*** permits indirect purchasers to recover." *Lorix, 736 N.W.2d at 626-27*.

Supreme Court/Appellate Court Law:

The Minnesota Supreme Court is the only known state supreme court to reject (in most part, at least) the adoption of the *AGC* factors. *Lorix, 736 N.W.2d at 632* ("The *AGC* factors * * * do not provide the benchmark for standing under Minnesota ***antitrust law***.").

Analysis:

In light of *Lorix*, the Court will **[*35]** not apply the *AGC* factors to Plaintiffs' claims under Minnesota law.

Importantly, though, despite holding that the lower courts "erred in applying *AGC*," the *Lorix* court nonetheless noted that its rejection of *AGC* "d[id] not necessarily mean that Lorix ha[d] standing." *Lorix, 736 N.W.2d at 630*. Thus—although the Court is jumping the gun a bit by addressing this here—it is relevant to understand what antitrust-standing rules Minnesota does apply before deciding whether Plaintiffs' claims would pass muster in that court.

In spite of its refusal to adopt *AGC*, the *Lorix* court still acknowledged that some of the *AGC* factors overlap with Minnesota's antitrust-standing inquiry. Specifically, the court noted that ***HN31***[] "[w]hile Minnesota courts should analyze an alleged injury's relation to the goals of ***antitrust law*** by identifying the markets involved, the market analysis is not the focus of the standing inquiry." *Lorix, 736 N.W.2d at 628*. The court also noted that "whether the damages are speculative[] is relevant to standing under the Minnesota ***antitrust law***." *Id.* And most importantly here, the court conceded that despite the broad language of its antitrust provision, "there are injuries so remotely related to antitrust violations that courts simply cannot provide **[*36]** relief," such that "[s]tanding under Minnesota ***antitrust law*** must be defined by some prudential limits informed by foreseeability, proximate cause, remoteness, and relation of the injury to the purposes of the ***antitrust law***; otherwise, almost any antitrust violation would provide almost any citizen with a cause of action arising from the resulting ripples of harm throughout the state's economy." *Id. at 631*.

Lorix (the indirect purchaser) bought tires that were manufactured with price-fixed chemicals. *Lorix, 736 N.W.2d at 622-23*. Refusing to define the outer limits of standing under Minnesota law, the court held that Lorix had standing because "she is an end user of a consumer good whose price was inflated by anticompetitive conduct earlier in the chain of manufacture," and that "as an end user, Lorix is the party most likely to be injured by an anticompetitive overcharge because she is the only party in the chain of purchase who cannot pass on part or all of that overcharge." *Id. at 631*. The court affirmatively rejected any "market-participant requirement," and held that "indirect purchasers of goods manufactured with price-fixed components" had standing to sue under Minnesota law. *Id. at 628*. However, the court did give one example of an **[*37]** indirect-purchaser injury that would be too remote to establish standing: namely, the Visa/Mastercard litigation cases where consumers alleged that they paid more for consumer goods due to Visa and Mastercard's illegal tying of debit card services with credit card services. *Id. at 632* (citing *Gutzwiller v. Visa USA, Inc., 2004 Minn. Dist. LEXIS 19, 2004 WL 2114991 (Minn. Dist. Ct. Sept. 15, 2004)*). It was the fact that the overcharges stemming from these violations "were passed on to consumers in the form of higher prices on essentially every good sold in the state of Minnesota" that led the *Lorix* court to declare that consumer standing should not "allow[] every person in the state to sue for an antitrust violation simply by virtue of his or her status as a consumer." *Id.*

To round out this analysis, the Court must predict whether the Minnesota Supreme Court would find that Indirect Plaintiffs have antitrust standing under Minnesota law without relying on the *AGC* factors. As a starting point, the injury here is certainly more remote than the injury in *Lorix*. In *Lorix*, the alleged antitrust-violators (*i.e.*, the chemical manufacturers) sold chemicals to tire manufacturers, who produced tires that were eventually sold to consumers. The path from the price-fixed thing (*i.e.*, tire chemicals) to the **[*38]** end product (*i.e.*, consumer tires) was short and narrow (or, as the *Lorix* court described it, "relatively focused"), and the list of affected individuals and entities (*e.g.*, tire manufacturers, tire wholesalers/distributors/retailers, and tire consumers) was small. Here, the alleged antitrust-violators dealt in spot cheese and milk futures bought and sold on a commodities exchange, which allegedly translated to higher prices in the physical markets of milk and cheese products (finished dairy products) across the country. The leap from the commodities exchange to the vast end-user market here is sizeable, and making that leap would result in a grant of standing to any individual who purchased any product containing milk or cheese in the United States. To be clear, the ubiquity of the end-user product is not the problem (*i.e.*, there is no too-big-to-sue doctrine), but such a scenario presents a red flag as to the potential remoteness of the alleged injury. For example, while the chain in *Lorix* could be described as pyramidal (increasing in size from the original violators to the secondary and tertiary markets), the chain that Indirect Plaintiffs present begins with a similar pyramid **[*39]** but adds an exponentially larger tier to the bottom that overshadows the actual offense. In other words, by extending the alleged antitrust violation across markets and then further extending it to include all consumers of finished dairy products, Indirect Plaintiffs have transformed a "relatively focused" antitrust scheme into a distorted and overly broad arrangement that masks the underlying violation and highlights the remoteness of Indirect Plaintiffs' injury.

In addition, *Lorix* was a "component" case, where the price-fixed product was a component of the end-user product. *Id. at 633* ("Antitrust laws * * * provide a remedy for consumers who have purchased goods manufactured with price-fixed components."). But here, the spot cheese and milk futures are not components of finished milk products. See *DFA II, 2013 U.S. Dist. LEXIS 119962, 2013 WL 4506000, at *14 n.13* (noting that "the causal connection is even more attenuated and complicated here * * * because the allegedly price-fixed products are not components of the finished goods."). Further, in addition to conceding that it would still consider certain of the *AGC* factors, the Minnesota Supreme Court favorably cited the Minnesota district court's *Gutzwiller* decision, which denied standing to a plaintiff **[*40]** who was "not a consumer * * * in the allegedly restrained market." *Gutzwiller, 2004 Minn. Dist. LEXIS 19, 2004 WL 2114991, at *6*; see also *Lorix, 736 N.W.2d at 628* (noting that while it's not "the focus of the standing inquiry," "courts should analyze an alleged injury's relation to the goals of ***antitrust law*** by identifying the markets involved"); *id. at 626* (noting that "the purposes of Minnesota and federal ***antitrust law*** are the same," and that "[t]he primary purpose of antitrust laws is to protect interbrand competition" (citing *State Oil Co. v. Khan, 522 U.S. 3, 14, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997))*). And regarding *Lorix*'s instruction that the court focus on the purpose of the antitrust laws in assessing standing, as the *Gutzwiller* court noted, "this is obviously not a situation where the [alleged] antitrust violators will go unpunished," *2004 Minn. Dist. LEXIS 19, 2004 WL 2114991, at *9*, which is a sentiment that this Court has already articulated. See *DFA II, 2013 U.S. Dist. LEXIS 119962, 2013 WL 4506000, at *14* ("[B]y denying Indirect Plaintiffs leave to proceed with their * * * antitrust claims, the Court would not 'leave a significant antitrust violation undetected or unremedied.'" (quoting *Kochert v. Greater Lafayette Health Servs., 463 F.3d 710, 718-19 (7th Cir. 2006))*).

The facts here align more with the facts in the Visa/Mastercard cases (including *Gutzwiller*) than the facts in *Lorix*, implying that even the Minnesota Supreme Court would draw a line somewhere along this extended, mixed-market chain. Ultimately, despite the *Lorix* **[*41]** court's refusal to adopt *AGC*, the Court is nonetheless persuaded by the court's citation to *Gutzwiller* as well as its concession that ***HN32***[] any assessment of antitrust standing must be "informed by foreseeability, proximate cause, remoteness, and relation of the injury to the purposes of the ***antitrust law***" in holding that the Indirect Plaintiffs' injuries are too remote and speculative to afford standing under Minnesota ***antitrust law***. *Lorix, 736 N.W.2d at 629*.

5. New York

Standing Provision:

Similar to the other standing provisions reviewed herein, ***HN33***[] New York law extends standing to "any person who shall sustain damages by reason of any violation" of the state's antitrust act (called the Donnelly Act). *N.Y. Gen. Bus. Law § 340*.

Harmonization Provision:

New York's top court recently clarified that ***HN34***[] while New York courts generally construe the Donnelly Act in harmony with federal antitrust case law, it is "well settled" that New York courts interpret the Donnelly Act differently "where State policy, differences in the statutory language or the legislative history justify such a result." *Sperry v. Crompton Corp., 8 N.Y.3d 204, 863 N.E.2d 1012, 1018, 831 N.Y.S.2d 760 (N.Y. 2007)*; see also *Anheuser-Busch, Inc. v. Abrams, 71 N.Y.2d 327, 520 N.E.2d 535, 539, 525 N.Y.S.2d 816 (N.Y. 1988)* ("Although we do not move in lockstep with the Federal courts in our interpretation of ***antitrust law***, the Donnelly Act—often called a 'Little *Sherman Act*'—should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result." (internal citations omitted)).

Illinois Brick Repealer Statute:

HN35[] New York's repealer statute specifies that a person who sustains damages as a result of an antitrust violation shall **[*42]** not have his or her recovery limited due to the fact that the person "has not dealt directly with the defendant." See *N.Y. Gen. Bus. Law § 340*.

Supreme Court/Appellate Court Law:

New York's Court of Appeals, its highest court, has not weighed in on the application of the *AGC* factors under the Donnelly Act. New York's Appellate Division, its second-highest court, has endorsed the lower court's application of the *AGC* factors in two indirect-purchaser cases. See *Ho v. Visa USA, Inc., 16 A.D.3d 256, 793 N.Y.S.2d 8, 8-9 (N.Y. App. Div. 2005)* (affirming the dismissal of plaintiffs' antitrust claims due to "the remoteness of their damages from the alleged injurious activity"), *aff'g*, *3 Misc. 3d 1105[A], 787 N.Y.S.2d 677, 2004 NY Slip Op 50415[U] (N.Y. Sup. Ct. 2004)* (applying the *AGC* factors in determining that "plaintiffs' alleged injury is far too remote to provide antitrust standing under the Donnelly Act"); *State ex rel. Spitzer v. Daicel Chem. Indus., Ltd., 42 A.D.3d 301, 840 N.Y.S.2d 8, 12 (N.Y. App. Div. 2007)* (affirming the dismissal of claims where the plaintiff's injury was "too remote" from the alleged wrongdoing), *aff'g in relevant part, sub nom. State v. Daicel Chem. Indus., Ltd., 2005 N.Y. Misc. LEXIS 8435, 2005 WL 6056054 (Sup. Ct. Aug. 9, 2005)*; see also *Williams v. Citigroup, Inc., 36 Misc. 3d 1201[A], 954 N.Y.S.2d 762, 2012 NY Slip Op 51145[U], at *4 (N.Y. Sup. Ct. 2012)* (finding that plaintiffs "damages [we]re too remote 'from the alleged injurious activity' to confer standing," citing *Ho*).

Other courts have followed suit in finding that New York's highest court would likewise apply the *AGC* factors to issues of antitrust standing under the Donnelly Act. See, *e.g., In re Refrigerant Compressors Antitrust Litig., 2013 U.S. Dist. LEXIS 50737, 2013 WL 1431756, at *10*; *Sahagian v. Genera Corp., 2009 U.S. Dist. LEXIS 132583, 2009 WL 9504039, at *6 (C.D. Cal. July 6, 2009)* (applying *AGC* under **[*43]** New York law, noting that *HN36*[] "where state courts and legislatures have indicated that they would look to federal antitrust precedent in applying [their ***antitrust law***], it seems that at the very least courts would require plaintiffs in antitrust actions to plausibly allege that they were participants in the relevant product market where the alleged anti-competitive activity took place."); *Nichols v. Mahoney, 608 F. Supp. 2d 526, 545 (S.D.N.Y. 2009)* ("[I]f the plaintiffs do not have standing to assert a federal antitrust claim, they do not have standing to bring a Donnelly Act claim."). But see *In re Ductile Iron Pipe Fittings Indirect Purchaser Antitrust Litig., 2013 U.S. Dist. LEXIS 142466, 2013 WL 5503308, at *16* ("The Court is not persuaded that the *AGC* test applies to New York * * * ***antitrust law***. In reaching this conclusion, the Court notes that Defendants have not cited any state appellate cases to show that the highest court in [New York] would apply the *AGC* factors in th[at] state[].")

Analysis:

New York's lower- and mid-level courts have consistently endorsed the application of the *AGC* factors in assessing antitrust standing, in accordance with the state's harmonization provision. The Court has no reason to believe that New York's highest court would not do the same. Accordingly, the Court will apply the *AGC* factors in determining whether Indirect Plaintiffs have standing **[*44]** under New York's Donnelly Act.

6. North Carolina

Standing Provision:

HN37[] North Carolina grants standing to "any person" injured by an antitrust violation. *N.C. Gen. Stat. § 75-16*.

Harmonization Provision:

HN38[] North Carolina's harmonization provision, arising from common law, is similar to the New York provision, which recognizes the federal opinions interpreting the *Sherman Act* are instructive, but not binding, when interpreting its antitrust statute. *Madison Cablevision, Inc. v. Morganton, 325 N.C. 634, 386 S.E.2d 200, 213 (N.C. 1989)* (citing *Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521, 530 (N.C. 1973))*.

Illinois Brick Repealer Statute:

HN39[] North Carolina does not have a repealer statute, although the North Carolina Court of Appeals deemed such a provision unnecessary, claiming that North Carolina's standing provision is broad enough to incorporate indirect purchasers. See *Hyde v. Abbott Lab., Inc., 123 N.C. App. 572, 473 S.E.2d 680, 684-87 (N.C. Ct. App. 1996)* ("We find that a slight risk of multiple liability is greatly outweighed by the benefit of advancing the aforementioned policies of [North Carolina's Antitrust Act]."). In addition, the "legislative history also leads to the conclusion that the General Assembly intended to create indirect purchaser standing to sue under the state antitrust laws." *Crouch v. Crompton Corp., 2004 NCBC LEXIS 6, 2004 WL 2414027, at *11 (N.C. Super. Ct. Oct. 28, 2004)*. The *Crouch* court nonetheless realized that this broad reading of North Carolina's standing provision conflicts with the states harmonization provision, **[*45]** resolving that "unless and until *Hyde* is overruled by the Supreme Court or new legislation is passed, this Court is bound by the decision in *Hyde* to the extent that it holds that indirect purchasers have standing under the North Carolina antitrust laws."

Supreme Court/Appellate Court Law:

There are two North Carolina cases that discuss the application of *AGC.* First is the appellate court case of *Teague v. Bayer AG, 195 N.C. App. 18, 671 S.E.2d 550 (N.C. Ct. App. 2009)*. While *Teague* did not reject the application of *AGC* in general, it did reject its application to the facts of that case.[2] *Id. at 556-57*. The court (somewhat questionably) distinguished the facts of its case from those in *AGC* "in several relevant ways," noting that "the plaintiff in *AGC* was not an indirect purchaser, * * * was not a person injured by reason of an antitrust violation * * * [and] alleged breach of a collective-bargaining agreement and not antitrust violations." *Id. at 556*. Because the court viewed its case as one that involved indirect-purchaser standing, it applied its reasoning in *Hyde* in holding that allowing indirect-purchaser standing would "best advance the legislative intent that such violations be deterred, and that aggrieved consumers have a private cause of action to redress [antitrust] **[*46]** violations." *Id. at 558*.

Despite its sometimes-dubious and often-difficult-to-follow analysis, *Teague* cannot be interpreted as a wholesale rejection of *AGC.* The indirect plaintiffs in *Teague* alleged that defendants engaged in a price fixing scheme over a synthetic rubber product called EPDM, which was a key component in many rubber-based products that defendants manufactured, marketed, sold, and/or distributed to plaintiffs, including certain roofing materials. *Id. at 553*. At a minimum, *Teague* is distinguishable as a single-market component case involving indirect purchasers, as opposed to a mixed-market case where the price-fixed thing is not a component of end-user product and the Indirect Purchaser Plaintiffs are not—at least under the *Teague* standard—indirect purchasers. See, *e.g., Teague, 671 S.E.2d at 556-57* (distinguishing several cases that applied the *AGC* factors, noting that the **[*47]** plaintiffs in those cases were not indirect purchasers because "plaintiffs did not end up with a product supplied by the defendants").

More persuasive is the North Carolina Superior Court's decision in *Crouch v. Crompton Corp., 2004 NCBC LEXIS 6, 2004 WL 2414027*. Although a lower-court decision, this densely-packed and well-supported opinion reconciles *Hyde* and the legislative history of the North Carolina Antitrust Act with the *Illinois Brick* and *AGC* opinions, resolving to apply a modified version of the *AGC* test to determine antitrust standing that retains the proximate-

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[2] *Teague* relied on an Iowa district court decision that rejected the *AGC* factors in determining an indirect purchaser's standing because "*AGC* did not involve price fixing and because the plaintiffs in *AGC* were competitors rather than purchasers." *671 S.E.2d at 557* (citing *Anderson Contracting, Inc. v. Bayer AG*, 2005 WL 6939352 (Iowa Dist. Ct. May 31, 2005)). Two years later, the Iowa Supreme Court made clear that *AGC* applies under Iowa law. *Southard, 734 N.W.2d at 198-99*.

cause inquiry inherent in *AGC* while still respecting *Illinois Brick*'s ban on indirect-purchaser actions. 2004 NCBC LEXIS 6, [WL] at *19 (discussing the modified five-factor inquiry in detail). The facts of *Crouch* mirror those of the *Lorix* case from Minnesota, where the indirect plaintiffs were purchasers of tires made with an allegedly price-fixed rubber component (*i.e.*, a mixed-market scheme involving both the chemicals market and the rubber market). Recognizing that "[t]here is no bright line test" and that "each situation must be considered on its facts and the factors applied" where "[d]ifferent factors might be important in different cases," 2004 NCBC LEXIS 6, [WL] at *20, the court ultimately found that the indirect purchasers lacked antitrust **[*48]** standing based on a combination of all five *AGC* factors, all of which weighed against standing to some extent. 2004 NCBC LEXIS 6, [WL] at *24-25.

Other courts have reviewed North Carolina's case law and statutory provisions in determining that North Carolina's highest court would apply the *AGC* factors, including at least one case decided after *Teague*. See, *e.g.,* Sahagian, 2009 U.S. Dist. LEXIS 132583, 2009 WL 9504039, at *6; DRAM, 516 F. Supp. 2d at 1087-89.

Analysis:

Based predominantly on *Crouch* and the distinguishing facts of *Teague*, the Court is persuaded that the North Carolina Supreme Court would adopt and apply the *AGC* factors, at least in modified form. Despite its precedential value, the Court finds that the *Teague* opinion—which rejects a strict application of the *AGC* factors—is both distinguishable on its facts and questionable in its failure to recognize the analytical distinction between the *Illinois Brick* and *AGC* inquiries. While casting *Crouch* in a negative light, *Teague* did not expressly overrule that opinion, and because *Crouch* is both the better-reasoned of the two opinions and the case most factually-similar to Indirect Plaintiffs' position, ***HN40***[] it is likely that North Carolina's highest court would follow *Crouch* and *AGC* in determining whether Indirect Plaintiffs lack antitrust standing under **[*49]** North Carolina ***antitrust law***.

D. Antitrust Standing Analysis

To recap, the Court has concluded that the highest courts in five of the six states at issue (California, Kansas, Michigan, New York, and North Carolina) would apply *AGC*, with Minnesota being the one outlier. But the Court also determined that despite its rejection of *AGC*, the Minnesota Supreme Court nonetheless recognizes prudential limits to antitrust standing such that it would likely find Indirect Plaintiffs' injuries too remote and speculative to award standing.

With regard to the five *AGC*-applying states, the Court reaffirms its prior reasoning with regards to Indirect Plaintiffs' federal antitrust claims in holding that Indirect Plaintiffs lack antitrust standing under *AGC.* See DFA II, 2013 U.S. Dist. LEXIS 119962, 2013 WL 4506000, at *9-14. This remains true even under a modified *AGC* test that takes into account the many repealer statutes at play in the states at issue, as well as any common-law protections afforded to indirect purchasers. This decision is driven by several key factors, including (1) that this is a mixed-market case, where damages inflicted on the physical commodity market are not derivative of injuries in the futures market and the price-fixed products are not **[*50]** components of the finished goods, (2) the remoteness of Plaintiffs' injuries, highlighted by the long chain of more-immediate victims that precede Plaintiffs, and (3) the rapid and over-inclusive expansion of the causal chain required to reach Plaintiffs. And while the Direct Purchasers here were in a better position to remedy the alleged antitrust violation (and likewise to ensure that an alleged antitrust violation will not go undetected), the Court does not hold that Direct Purchasers are necessarily the only actors in the causal chain who have antitrust standing to sue; rather, the Court holds only that Indirect Plaintiffs' injuries are too remote and speculative to afford them antitrust standing.

E. Remoteness Doctrine in Monopolization Claims

Indirect Plaintiffs alleged both price-fixing and monopolization claims under various states' antitrust laws. Although the parties do not directly address the issue, the Court must decide whether its antitrust-standing analysis applies equally to both types of antitrust claims.

Judge Hibbler touched on this issue in *DFA I*, concluding that there was no precedent "suggest[ing] that the standing analysis should differ between claims under *§ 1* and *§ 2* simply because **[*51]** monopolization plaintiffs must prove the existence of a relevant market." *DFA I, 767 F. Supp. 2d at 907*. And other courts have applied the *AGC* antitrust-standing test to claims under *§ 2* of the Sherman Act (*i.e.*, the monopolization provision) without alteration. See, *e.g.*, *In re DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677, 687-92 (2d Cir. 2009)*; *NicSand, Inc. v. 3M Co., 507 F.3d 442, 449-50 (6th Cir. 2007)* (en banc); *Angelico v. Lehigh Valley Hosp., Inc., 784 F.3d 273-75 (3d Cir. 1999)*; see also *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 416-18, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* (Stevens, J., dissenting) (endorsing the dismissal of a monopolization claim for lack of antitrust standing, citing *AGC*).

The Court sees no reason why Indirect Plaintiffs' shortcomings in failing to establish antitrust standing for their price-fixing claims should not preclude them from raising their monopolization claims as well. Accordingly, because Indirect Plaintiffs lack antitrust standing, their price-fixing claims brought under state antitrust laws (*i.e.*, *Cal Bus. & Prof. Code § 16726*, *Kan. Stat. Ann. § 50-112*, *Mich. Comp. Laws § 445.772*, *Minn. Stat. §§ 325D.51* and *325D.53*, *N.Y. Gen Bus. Law § 340*, and *N.C. Gen Stat. § 75-1*), and their monopolization claims brought under state antitrust laws (*Mich. Comp. Laws § 445.773*, *Minn. Stat. § 325D.52*, and *N.C. Gen. Stat. § 75-2.1*) [see 483, ¶¶ 103(b), (d)-(h), 104(d)-(f)] are dismissed.

F. Remoteness Doctrine in Consumer-Protection Claims

Because of variances in the relevant states' price-fixing and monopolization laws, in addition to invoking claims under various state antitrust statutes, Indirect Plaintiffs also raised price-fixing and monopolization claims under several **[*52]** states' consumer-protection statutes. Specifically, Indirect Plaintiffs have raised price-fixing claims under four consumer-protection statutes (*Ark. Code § 4-88-107* (Arkansas Deceptive Trade Practices Act), *Cal. Bus. & Prof. Code § 17200* (California Unfair Competition Law), *Fla. Stat. § 501.204* (Florida Deceptive and Unfair Trade Practices Act), and *N.C. Gen Stat. § 75-1.1* (North Carolina Unfair and Deceptive Trade Practices Act) and monopolization claims under three consumer-protection statutes (*Ark. Code § 4-88-107*, *Cal. Bus. & Prof. Code § 17200*, and *Fla. Stat. § 501.204*). [See 483, ¶¶ 103(a)-(c), (h), 113(a)-(c).] In two instances, Indirect Plaintiffs raised price-fixing claims in the alternative, invoking both the states' antitrust and consumer-protection provisions (*i.e.*, California and North Carolina). [See 483, ¶ 103(b), (f), (h).]

The question is whether Indirect Plaintiffs' lack of antitrust standing also disposes of their price-fixing and monopolization claims brought under the states' consumer-protection statutes. In short, ***HN41***[] there is no legal principle saying that a finding of remoteness in the antitrust context functions, as a matter of law, as a bar to any related consumer-protection claims. However, the directness inquiry in antitrust-standing law is predicated on the well-known concept of proximate causation. See *McCready, 457 U.S. at 477* ("In the absence **[*53]** of direct guidance from Congress, and faced with the claim that a particular injury is too remote from the alleged violation to warrant § 4 standing, the courts are thus forced to resort to an analysis no less elusive than that employed traditionally by courts at common law with respect to the matter of 'proximate cause.'"); *DFA II, 2013 U.S. Dist. LEXIS 119962, 2013 WL 4506000, at *12* ("Because the concept of antitrust standing was developed with common law proximate causation standards in mind, directness is a particularly important factor in the Court's analysis."). Because causation also plays a role in consumer-protection claims, the Court must assess each state's consumer-protection laws to determine if the remoteness of Indirect Plaintiffs' injury precludes their ability to raise such claims.

1. Arkansas

Indirect Plaintiffs allege both price-fixing and monopolization claims under *§ 4-88-107* of the Arkansas Deceptive Trade Practices Act.[3] ***HN42***[] The Act "provides a private right of action to 'any person' who suffers actual damage or injury as a result of a violation of the Act." *Forever Green Athletic Fields, Inc. v. Lasiter Const., Inc., 2011 Ark. App. 347, 384 S.W.3d 540, 552 (Ark. Ct. App. 2011)* (quoting *Ark. Code Ann. § 4-88-113(f)*). And "[b]ased on the language of *section 4-88-113(f)*, there must be a causal connection between the violation of the Deceptive Trade Practices Act and the injury." *Id.*; see also *Independence Cnty. v. Pfizer, Inc., 534 F. Supp. 2d 882, 888 (E.D. Ark. 2008)* (dismissing a claim **[*54]** under the ADTPA based on causation issues and the overall remoteness of the injury). Separate from the causation requirement, "Arkansas law recognizes the remoteness doctrine" as applied to claims under the ADTPA, favoring suits by those directly injured over more-indirect victims. See *Independence Cnty., 534 F. Supp. 2d at 888* ("'[D]irectly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely.'" (quoting *Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 269-70, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992))*).

In light of the importance of causation under Arkansas law, Indirect Plaintiffs' remoteness problems in the antitrust context also preclude their rebranded antitrust claims brought under the Arkansas Deceptive Trade Practices Act, requiring dismissal of those claims. **[*55]**

2. California

Indirect Plaintiffs allege price-fixing and monopolization claims under *§ 17200* of the California Unfair Competition Law.***HN44***[] The causation element makes its way into the UCL through the standing requirement, whereby "[a] private person * * * has standing to assert a UCL claim only if he or she (1) 'has suffered injury in fact,' and (2) 'has lost money or property as a result of the unfair competition.'" *Hall v. Time, 158 Cal. App. 4th 847, 70 Cal. Rptr. 3d 466, 469 (Cal. Ct. App. 2008)*. The second prong of the standing test "imposes a causation requirement. The phrase 'as a result of' in its plain and ordinary sense means 'caused by' and requires a showing of a causal connection or reliance on the alleged misrepresentation."[4] *Id.*; see *id. at 471 n.2* ("We use the word 'causation' to refer both to the causation element of a negligence cause of action * * * and to the justifiable reliance element of a fraud cause of action."). This causation requirement was refined in 2004 by the passage of Proposition 64, which made it so that "a private person has standing to sue only if he or she 'has suffered injury in fact and has lost money or property as a result of such unfair competition.'" *In re Tobacco II Cases, 46 Cal. 4th 298, 93 Cal. Rptr. 3d 559,*

[3] ***HN43***[] *Section 4-88-107* lists ten examples of actionable violations under the ADTPA, none of which is recognizable as an antitrust violation (*e.g.*, price fixing or monopolization). However, the statute does contain a catch-all provision that proscribes "[e]ngaging in any other unconscionable, false, or deceptive act or practice in business, commerce, or trade," *Ark. Code Ann. § 4-88-107(a)*, and courts have interpreted this catch-all broadly so as to include antitrust claims. See, *e.g.*, *Independence Cnty. v. Pfizer, Inc., 534 F. Supp. 2d 882, 888 (E.D. Ark. 2008)*, *aff'd, sub nom.* *Ashley Cnty. v. Pfizer, Inc., 552 F.3d 659 (8th Cir. 2009)*.

[4] The parties dispute whether Indirect Plaintiffs **[*56]** must allege reliance to state a claim under the UCL. In *Kwikset Corp. v. Superior Court*, the Supreme Court of California addressed a claim "based on a fraud theory involving false advertising and misrepresentations to consumers," and noted that "in accordance with well-settled principles regarding the element of reliance in ordinary fraud actions," plaintiffs were required to "demonstrate actual reliance on the allegedly deceptive or misleading statements." *246 P.3d at 888* (citations omitted); see also *Hall, 70 Cal. Rptr. 3d at 471 n.2* ("In a fraud case, justifiable reliance is the same as causation * * *."). Here, however, Indirect Plaintiffs' UCL claim is based on an "unlawful" or "unfair" antitrust violation, not a "fraudulent" misrepresentation. *In re Tobacco II Cases, 46 Cal. 4th 298, 93 Cal. Rptr. 3d 559, 207 P.3d 20, 29-30, 38 (Cal. 2009)* (noting that ***HN45***[] "there are three varieties of unfair competition: practices which are unlawful, unfair or fraudulent," and requiring a showing of actual reliance for a fraud-based UCL claim). Accordingly, the Court is not persuaded that Indirect Plaintiffs must allege reliance on an alleged misrepresentation. But see *Lorenzo v. Qualcomm Inc., 603 F. Supp. 2d 1291, 1303-04 (S.D. Cal. 2009)* (dismissing UCL claims for lack of standing where the antitrust plaintiff did not allege that he relied on any misrepresentations made by defendant (citing *Laster v. T-Mobile USA, Inc., 407 F. Supp. 2d 1181, 1183 (S.D. Cal. 2005)*)).

571, 207 P.3d 20 (citing UCL *§ 17203*); see also *Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 120 Cal. Rptr. 3d 741, 246 P.3d 877, 887-88* (explaining the causation element).

Noting that "the **[*57]** voters clearly intended to restrict UCL standing," the Supreme Court of California nonetheless found that ***HN46***[] indirect antitrust plaintiffs "who *had* had business dealings with a defendant and had lost money or property as a result of the defendant's unfair business practices" had standing under the UCL. *Clayworth v. Pfizer, Inc., 49 Cal. 4th 758, 111 Cal. Rptr. 3d 666, 233 P.3d 1066, 1087 (Cal. 2010)* (noting that "indirect purchases may support UCL standing"). But despite its liberal approach to standing, the *Clayworth* court noted that the intent of Proposition 64 "was to confine standing to those actually injured by a defendant's business practices and to curtail the prior practice of filing suits on behalf of clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant." *Id. at 1086-87* (internal citations omitted). In *Clayworth*, the price-fixing manufacturers sold the price-fixed medications to wholesalers, who then sold them to the plaintiff pharmacies. Thus, plaintiffs—one step removed from the alleged price-fixers—actually used defendants' products and had indirect dealings with defendants. Here, Indirect Purchasers did not use the allegedly price-fixed commodities and had no business dealings with **[*58]** defendants in the relevant markets. See, *e.g., Troyk v. Farmers Grp., Inc., 171 Cal. App. 4th 1305, 90 Cal. Rptr. 3d 589, 626 n.33 (Cal. Ct. App. 2009)* (refusing to define the extent of the UCL's causation requirement, but noting that defendant's conduct "must be more than a *remote* or trivial factor" in causing the injury (emphasis added)). These facts counsel against a broad application of *Clayworth* and Proposition 64.

In addition, the Court is also mindful of the fact that "***HN47***[] the breadth of *§ 17200* does not give a plaintiff license to 'plead around' the absolute bars to relief contained in other possible causes of action by recasting those causes of action as ones for unfair competition," as Indirect Plaintiffs have done here. *Glenn K. Jackson Inc. v. Roe, 273 F.3d 1192, 1203 (9th Cir. 2001)* (citing *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527, 541 (Cal. 1999))*.

Somewhat related, Indirect Plaintiffs based their price-fixing and monopolization claims—regardless of whether those claims were brought under state antitrust laws, consumer-protection provisions, or both—on the same set of facts, theories, and allegations. In other words, Indirect Plaintiffs made no attempts to distinguish their antitrust claims from their consumer-protection claims. And under California law, because Indirect Plaintiffs failed to adequately plead their antitrust claims, their state claims must also fail. See *Formula One Licensing, B.V. v. Purple Interactive Ltd., 2001 U.S. Dist. LEXIS 2968, 2001 WL 34792530, at *4 (N.D. Cal. Feb. 6, 2001)* (***HN48***[] "Where a plaintiff fails to state **[*59]** an antitrust claim, and where an unfair competition claim is based upon the same allegations, such state claims are properly dismissed." (citing *Kentmaster Mfg. Co. v. Jarvis Prods. Corp., 146 F.3d 691, 695 (9th Cir. 1998)))*; see also *In re Wellpoint, Inc., Out-of-Network UCR Rates Litig., 903 F. Supp. 2d 880, 927-28 (C.D. Cal. 2012)* (dismissing UCL claims based on a lack of antitrust standing for plaintiffs' *Sherman Act* claims).

For all of these reasons, the Court finds that Indirect Plaintiffs lack standing to bring their claims under the UCL.

3. Florida

Indirect Plaintiffs allege price-fixing and monopolization claims under *§ 501.204* of the Florida Deceptive and Unfair Trade Practices Act. ***HN49***[] A consumer claim for damages under FDUTPA has three elements: "(1) a deceptive act or unfair practice; (2) causation; and (3) actual damages." *Soper v. Tire Kingdom, Inc., 124 So.3d 804, 806 (Fla. 2013)* (citing *Rollins, Inc. v. Butland, 951 So. 2d 860, 869 (Fla. Dist. Ct. App. 2006))*.

Although causation is a necessary element of a FDUTPA claim, Defendants do not press the expected argument, which is that the remoteness of Indirect Plaintiffs' injuries is insufficient to satisfy the FDUTPA causation requirement. See, *e.g., 2P Commercial Agency S.R.O. v. SRT USA, Inc., 2013 U.S. Dist. LEXIS 9186, 2013 WL 246650, at *4 (M.D. Fla. Jan. 23, 2013)* (noting that causation under FDUTPA "must be direct, rather than remote or speculative").

Instead, Defendants approach this issue indirectly, arguing that Florida courts regularly dismiss FDUTPA claims that are "merely a repackaging of the allegations offered for [failed] antitrust claims." **[*60]** *QSGI, Inc. v. IBM Global Fin., 2012 U.S. Dist. LEXIS 49601, 2012 WL 1150402, at *4 (S.D. Fla. Mar. 14, 2012)* (***HN50***[] "When * * * a plaintiff's FDUTPA claim is based on the same allegations as its antitrust claim, failure to establish a violation of the ***antitrust law*** is sufficient to conclude that the plaintiff has also failed to state a FDUTPA claim."); *JES Props., Inc. v. USA Equestrian, Inc., 2005 U.S. Dist. LEXIS 43122, 2005 WL 1126665, at *19 & n.23 (M.D. Fla. May 9, 2005)* ("Plaintiffs concede that their FDUTPA claims 'survive' or 'fall' with their antitrust claims."); *Hunter v. Bev Smith Ford, LLC, 2008 U.S. Dist. LEXIS 34982, 2008 WL 1925265, at *9 (S.D. Fla. Apr. 29, 2008)*; *Natural Answers, Inc. v. SmithKline Beecham Corp., 529 F.3d 1325, 1332-33 (11th Cir. 2008)* (dismissing a *Lanham Act* claim because, *inter alia*, "the injury claims [wa]s far more remote" than what the statute requires, and then dismissing a related FDUTPA claim on the same grounds).

But Defendants' "repackaging" theory has only been applied where the underlying antitrust claims were rejected for substantive reasons, not simply due to a lack of standing. Indirect Plaintiffs' argument, then, is that a state consumer-protection claim should not be automatically rejected because the plaintiff lacked standing to bring a corresponding federal antitrust claim. While this argument has facial appeal, it fails to appreciate (a) the importance of antitrust standing, and (b) the nuances of Florida's antitrust laws. To the former, this Court has already distinguished antitrust standing from Article III standing by noting that **[*61]** antitrust standing is intertwined with substantive antitrust principles, thus requiring the importation of federal antitrust-standing law into state antitrust-standing law where the state has a harmonization provision. And to the latter, the reason why Indirect Plaintiffs brought their claims under FDUTPA is because ***HN51***[] Florida still adheres to the "direct purchaser" rule articulated in *Illinois Brick*. See *Mack v. Bristol-Myers Squibb Co., 673 So.2d 100, 102 (Fla. Dist. Ct. App. 1996)*. In other words, Indirect Plaintiffs avoided bringing their antitrust claim under Florida's antitrust laws knowing that such a claim would be doomed. The contours of Florida's antitrust laws would be rendered moot were the Court to allow Indirect Plaintiffs to repackage their dead-on-arrival antitrust claims as FDUTPA claims.

In light of these concerns, the Court is persuaded that the Florida Supreme Court would either adopt the federal court's repackaging theory or read FDUTPA's causation requirement narrowly so as to preclude injuries that are too remote from the alleged antitrust violation. See, *e.g., In re Wellpoint, Inc., Out-of-Network UCR Rates Litig., 903 F. Supp. 2d at 927-28* (dismissing a California consumer-protection claim where plaintiffs lacked antitrust standing to raise *Sherman Act* claims). Either way, Indirect Plaintiffs' FDUTPA claims must be dismissed. **[*62]**

4. North Carolina

In addition to its antitrust claim under *§ 75-1* of the North Carolina Unfair and Deceptive Trade Practices Act, Indirect Plaintiffs also allege a price-fixing claim under *§ 75-1.1* of the Act. ***HN52***[] The Act declares unlawful "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." *N.C. Gen. Stat. § 75-1.1*. To state a claim under NCUDTPA, a plaintiff must show: "(1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused injury to the plaintiff or to his business." *Furr v. Fonville Morisey Realty, Inc., 130 N.C. App. 541, 503 S.E.2d 401, 408 (N.C. 1998)*; *Dalton v. Camp, 353 N.C. 647, 548 S.E.2d 704, 711 (N.C. 2001)*; *Stetser v. TAP Pharm. Prods. Inc., 165 N.C. App. 1, 598 S.E.2d 570, 583-84 (N.C. Ct. App. 2004)* (applying the same *prima facie* case to an antitrust claim brought under the consumer-protection statute). Again, the obvious (and perhaps most persuasive) argument is that Indirect Plaintiffs' alleged injuries are too remote to satisfy NCUDTPA's proximate-causation requirement.

But similar to their arguments regarding Indirect Plaintiffs' claims under FDUTPA, Defendants instead argue that Indirect Plaintiffs' claim under NCUDTPA should be dismissed because it is premised on the same allegations as Plaintiffs' insufficiently-pled price-fixing claims (both state and federal). See, *e.g., In re Digital Music Antitrust Litig., 592 F. Supp. 2d 435, 450-51 (S.D.N.Y. 2008)* (dismissing consumer **[*63]** protection claims under, *inter alia*, California, Florida, and North Carolina law, noting that "[the courts] conclusion that Plaintiffs have not adequately alleged [a federal antitrust] violation necessarily precludes their attempt to recast that violation as an unfair business practice"), *vacated and remanded on other grounds, sub nom.* Starr v. Sony BMG Music Entm't, 592 F.3d 314 (2d Cir. 2010); see also R.J. Reynolds Tobacco Co. v. Philip Morris Inc., 199 F. Supp. 2d 362, 396 (N.D.N.C. 2002) ("Because Plaintiffs do not allege any facts that suggest that Defendant's conduct is unlawful beyond the conduct that is the basis for their failed federal [antitrust] claims, Plaintiffs' state common law and statutory claims fail as well."). This argument is also persuasive, although rather broad in application.

Interestingly though, **HN53**[] the Fourth Circuit has construed NCUDTPA—a statute modeled (verbatim) after § 5 of the FTC Act—consistently with the Sherman Act in assessing the merits of an antitrust claim brought under the guise on a consumer-protection claim, noting that the FTC Act "sweeps within its prohibitory scope conduct also condemned by § 1 of the Sherman Act," ultimately finding "no reason to conclude that, given the opportunity, North Carolina's Supreme Court would construe its state's act any differently." ITCO Corp. v. Michelin Tire Corp., Commercial Div., 722 F.2d 42, 48 (4th Cir. 1983). True, "the Federal Trade Commission Act was designed to supplement and bolster **[*64]** the Sherman Act and the Clayton Act" such that the FTC has the power "to arrest trade restraints in their incipiency without proof that amount to an outright violation" of the federal antitrust laws, see FTC v. Brown Shoe Co., 384 U.S. 316, 321, 86 S. Ct. 1501, 16 L. Ed. 2d 587 (1966) (citations omitted), but this is not one of those cases that would evade regulation but for the breadth of the FTC Act and its related state provisions.

The Fourth Circuit's rationale in *ITCO* adds credence to the broad-sweeping rule articulated in *In re Digital Music Antitrust Litigation* and *R.J. Reynolds Tobacco Co. v. Philip Morris Inc.*, and counsels in favor of reading NCUDTPA's causation requirement narrowly so as to preclude Indirect Plaintiffs from repackaging their failed antitrust claim as an unfair-competition claim. See, *e.g.,* Miller v. W.H. Bristow, Inc., 739 F. Supp. 1044, 1055 (D.S.C. 1990) (noting that "[w]hile it is true that an anticompetitive practice falling short of a Sherman Act or Clayton Act violation may nonetheless violate the FTC Act, the scope of the FTC Act is directly linked to the antitrust laws," and holding that because "the relationship between the parties does not violate the Sherman Act * * * plaintiff has failed to show how the circumstances of this case bring it within the reach of the FTC Act"). For these reasons, the **[*65]** Court dismisses Indirect Plaintiffs' price-fixing claim under § 75-1.1 of NCUDTPA.

In summary, the same causation issue that plagued Indirect Plaintiffs' state-law antitrust claims also provides grounds for dismissal for Indirect Plaintiffs' state-law consumer-protection claims under Arkansas, California, Florida, and North Carolina law.

G. Remoteness Doctrine in Unjust Enrichment Claims

Defendants next argue that the same "remoteness" issue troubling Indirect Plaintiffs' antitrust and consumer-protection claims also precludes Indirect Plaintiffs from raising their related state-law unjust enrichment claims. Indirect Plaintiffs raised their unjust enrichment claims generally without reference to the unjust enrichment law of any particular state, and thus the Court will review the law under all eight states.

As an initial matter, although there is some dispute on this issue, the general consensus is that California law does not recognize a cause of action for unjust enrichment. See Melchior v. New Line Prods., Inc., 106 Cal. App. 4th 779, 131 Cal. Rptr. 2d 347, 357 (Cal. Ct. App. 2003) (**HN54**[] "[T]here is no cause of action in California for unjust enrichment."); Hill v. Roll Int'l Corp., 195 Cal. App. 4th 1295, 128 Cal. Rptr. 3d 109, 118 (Cal. Ct. App. 2011) ("Unjust enrichment is not a cause of action, just a restitution claim.").

With regard to the remaining states, the Court notes at the outset that **HN55**[] a failure to state **[*66]** an antitrust claim does not categorically preclude a plaintiff from succeeding on a related unjust enrichment claim. See, *e.g.,* In re G-Fees Antitrust Litig., 584 F. Supp. 2d 26, 46 (D.D.C. 2008) ("No reason or logic supports a conclusion that a state's adherence to the rule of *Illinois Brick* dispossesses a person not only of a statutory legal remedy for an antitrust violation, but also dispossess the same person of his right to pursue a common law equitable remedy."); D.R. Ward Constr. Co. v. Rohm & Hass Co., 470 F. Supp. 2d 485, 506-07 (E.D. Pa. 2006) (stating that the viability of an unjust enrichment claim "does not hinge upon the success of the state statutory antitrust claims"); King Drug Co. of Florence v. Cephalon, Inc., 702 F. Supp. 2d 514, 540 (E.D. Pa. 2010) ("Unjust enrichment claims * * * are viable regardless of the applicable state antitrust laws."). But see *In re Flonase Antitrust Litig., 692 F. Supp. 2d 524, 542 (E.D. Pa. 2010)* ("[W]here an antitrust defendant's conduct cannot give rise to liability under state antitrust and consumer protection laws, [p]laintiffs should be prohibited from recovery under a claim for unjust enrichment.").

However, because state antitrust claims and unjust-enrichment claims have similar elements, it may be that a fatal flaw in a plaintiff's antitrust claim will also seal the fate of the plaintiff's corresponding unjust enrichment claim (as was the case with Indirect Plaintiffs' consumer-protection claims). ***HN56***[] The elements for unjust enrichment claims under Arkansas, **[*67]** Florida, Kansas, Michigan, Minnesota, New York, and North Carolina are essentially the same: "plaintiff must establish that (1) plaintiff conferred a benefit on the defendant; (2) defendant knew and received a benefit; and (3) defendant retained the benefit under circumstances that make it unjust." *In re Potash Antitrust Litig., 667 F. Supp. 2d at 948* (summarizing the unjust enrichment law of Michigan, Florida, and Kansas); see *Dews v. Halliburton Indus., Inc., 288 Ark. 532, 708 S.W.2d 67, 69 (Ark. 1986)*; *Fla. Power Corp. v. City of Winter Park, 887 So.2d 1237, 1242 n.4 (Fla. 2004)*; *In re Estate of Sauder, 283 Kan. 694, 156 P.3d 1204, 1220 (Kan. 2007)*; *Hudson v. Mathers, 283 Mich. App. 91, 770 N.W.2d 883, 887 (Mich. Ct. App. 2009)*; *Caldas v. Affordable Granite & Stone, Inc., 820 N.W.2d 826, 838 (Minn. 2012)*; *Corsello v. Verizon N.Y., Inc., 18 N.Y.3d 777, 967 N.E.2d 1177, 1185, 944 N.Y.S.2d 732 (N.Y. 2012)*; *Booe v. Shadrick, 322 N.C. 567, 369 S.E.2d 554, 555-56 (N.C. 1988)*.

Akin to the remoteness inquiry in the antitrust and consumer-protection contexts, five of the seven states (all but Arkansas and Minnesota) require that the plaintiff confer a direct benefit on the defendant in order to state a claim for unjust enrichment. See *Extraordinary Title Servs. v. Fla. Power & Light Co., 1 So.3d 400, 404 (Fla. Dist. Ct. App. 2009)* (affirming dismissal of unjust enrichment claim where plaintiff could not "allege or establish that it conferred a direct benefit" upon defendant); *Spires v. Hosp. Corp. of Am., 289 F. App'x 269, 273 (10th Cir. 2008)* (noting that Kansas law does not support an "indirect unjust enrichment claim"); *A&M Supply v. Microsoft Corp., 2008 Mich. App. LEXIS 433, 2008 WL 540883, *2-3, (Mich. App. Ct. 2008)* (concluding that the unjust enrichment doctrine requires "direct receipt" of a benefit, and was therefore inapplicable to "indirect purchasers"); *New Dimension Dev., Inc. v. Orchard, Hiltz & McCliment, Inc., 2005 Mich. App. LEXIS 2667, 2005 WL 2806234, at *6 (Mich. App. Ct. Oct. 27, 2005)* ("[A]ny indirect benefit defendant derived from plaintiffs was too attenuated to warrant imposing the equitable doctrine of unjust enrichment, which must be 'employed * * * **[*68]** with caution,' because it 'vitiates normal contract principles.'" (quoting *Kammer Asphalt Paving Co., Inc. v. East China Twp. Schs., 443 Mich. 176, 504 N.W.2d 635 (Mich. 1993)))*; *Sperry v. Crompton Corp., 8 N.Y.3d 204, 863 N.E.2d 1012, 1018, 831 N.Y.S.2d 760 (N.Y. 2007)* (holding that the connection between the indirect plaintiffs and defendants in an antitrust action was "simply too attenuated" to support a claim for unjust enrichment); *Laydon v. Mizuho Bank, Ltd., 2014 U.S. Dist. LEXIS 46368, 2014 WL 1280464, at * (S.D.N.Y. Mar. 28, 2014)* (noting that under New York law, an unjust enrichment claim "requires some type of direct dealing or actual, substantive relationship with a Defendant," citing relevant cases); *Effler v. Pyles, 94 N.C. App. 349, 380 S.E.2d 149, 152 (N.C. Ct. App. 1989)* (dismissing an unjust enrichment claim where plaintiff failed to satisfy her "burden of showing that she conferred a benefit directly on defendant"); see also *In re Aftermarket Filters Antitrust Litig., 2010 U.S. Dist. LEXIS 32652, 2010 WL 1416259, at *2-3 (N.D. Ill. Apr. 1, 2010)* (dismissing unjust enrichment claims under the laws of Kansas, Michigan, and North Carolina because "plaintiffs [we]re unable to allege that they have conferred a benefit on defendants except to argue that they are the ultimate end users").

Here, Indirect Plaintiffs argue that Defendants were unjustly enriched because, "[a]s a result of the wrongful conduct, defendants charged *resellers* more for Finished Dairy Products," forcing Indirect Plaintiffs to "pay[] more for Finished Dairy Products" from the so-called resellers. [483, ¶¶ 116-17 (emphasis added).] In other words, Indirect Plaintiffs **[*69]** did not themselves confer any benefit directly on Defendants, and for that reason, they have failed to state a claim for unjust enrichment under the laws of Florida, Kansas,[5] Michigan, New York, and North Carolina.

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[5] But see *Wrobel*, No. 05-cv-1296, 2006 WL 7130617, available at [574-1, at 9] (allowing indirect plaintiff's unjust enrichment claim to survive a motion to dismiss based on the fact that "Kansas specifically allows indirect-purchaser claims," but nonetheless noting that "there may be some limits that would apply," but that the court "d[id] not know, on the present pleadings,

That leaves Indirect Plaintiffs' unjust enrichment claims under Arkansas and Minnesota law. Because those states do not require direct dealing between the plaintiff and defendant, and because the Court has not adopted a categorical rule prohibiting unjust enrichment claims that are modeled after failed antitrust and consumer-protection claims—see, **[*70]** *e.g., In re Flonase Antitrust Litig., 692 F. Supp. 2d at 542*—the Court will not dismiss Indirect Plaintiffs' Arkansas and Minnesota unjust enrichment claims on causation/remoteness grounds.[6]

IV. Statute of Limitations

Defendants argue that Indirect Plaintiffs' statutory claims under California, Florida, Minnesota, and North Carolina law are barred by those states' four-year statutes of limitation.[7] See *Cal. Bus. & Prof. Code § 16750.1* (***HN57***[] "Any civil action to enforce any cause of action for a violation of this chapter shall be commenced within four years after the cause of action accrued.); ***HN58***[] *Fla. Stat. § 95.11(3)(f)* (setting a four-year statute of limitations for "[a]n action founded on a statutory liability"); *Minn. Stat. § 325D.64* (***HN59***[] "An action under *sections 325D.49 to 325D.66* shall be forever barred unless commenced within four years of the date upon which the cause of action arose."); *N.C. Gen Stat. § 75-16.2* (***HN60***[] "Any civil action brought under this Chapter to enforce the provisions thereof shall be barred unless commenced within four years after the cause of action accrues."). Defendants further argue that Indirect Plaintiffs' unjust enrichment claims under Arkansas and North Carolina law are **[*71]** barred by those states' three-year statutes of limitations, see ***HN61***[] *Ark. Code Ann. § 16-56-105(3)* (stating that "[a]ll actions founded on any contract or liability, expressed or implied" are subject to a three-year statute of limitations); ***HN62***[] *N.C. Gen. Stat. § 1-52(1)* (stating that an action "[u]pon a contract, obligation or liability arising out of a contract, express or implied," is subject to a three-year statute of limitations), and their Florida unjust enrichment claim is barred by that state's four-year statute of limitations, see ***HN63***[] *Fla. Stat. § 95.11(3)(k)* (setting a three-year statute of limitations for "[a] legal or equitable action on a contract, obligation, or liability not founded on a written instrument").

To assess this argument, the Court must first determine the date of accrual for the claims **[*72]** at issue. Defendants argue that all of these claims accrued—at the latest—on December 16, 2008, when the Commodity Futures Trading Commission issued a publicly-available consent decree announcing its findings regarding its investigation of DFA's allegedly-manipulative trading activities. [483, ¶ 91.] Indirect Plaintiffs do not object to this assertion, and thus the Court will adopt December 16, 2008 as the date of accrual. Accordingly, absent any tolling (and assuming that the various states' statutes of limitations apply here), the filing deadlines at issue under the relevant three- and four-year statutes of limitations are December 16, 2011 and 2012, respectively.

Next, the Court must review when Indirect Plaintiffs filed their claims. As a reminder, Indirect Plaintiffs' Consolidated Class Action Compliant "consolidate[d] four already-pending actions into one complaint." [476, at 3.] Indirect Plaintiffs' first-filed complaint, *Rudman v. DFA*, originally filed on May 29, 2009 in the federal district court in Vermont, included claims invoking the antitrust and unjust-enrichment laws of 25 states, including all of the states at issue here. But the *Rudman* complaint was brought by a single named Plaintiff—Jacqueline **[*73]** Rudman, a New York citizen—and did not include named plaintiffs from any of the other states whose laws Ms. Rudman invoked in her complaint. Instead, it wasn't until the fourth-filed complaint, *Rogers v. DFA*, originally filed on February 19, 2013

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how far removed from direct-purchaser status Plaintiff may be"). Here, six years into this MDL litigation, the Court has a much better grasp on the extent of the remoteness between Indirect Plaintiffs and Defendants, and thus finds dismissal appropriate at the motion-to-dismiss phase.

[6] To avoid confusion, the Court notes that dismissal of Indirect Plaintiffs' unjust enrichment claims under Arkansas and Minnesota law is appropriate on other grounds, as discussed below.

[7] Indirect Plaintiffs' claims under Arkansas law as raised in the *Rogers* complaint were timely filed because Arkansas law provides a five-year statute of limitations. See *Ark. Code Ann. § 4-88-115*. Indirect Plaintiffs' claims under New York, Michigan, and Kansas law—as raised in the *Rudman, Waun*, and *Asmann* lawsuits—are not time barred because those named Plaintiffs had standing to raise those claims when their respective suits were filed, which in each case was within the relevant limitations period.

in federal district court in Vermont, that Indirect Plaintiffs included claims on behalf of actual citizens of the states at issue here: Arkansas (Brian Rogers), California (Constantin Yiannacopoulos), Florida (Ann Miller), Minnesota (Mike Jackson), and North Carolina (Cravon Williams). Thus, for purposes of this analysis, December 16, 2008 is the date of accrual and February 19, 2013 is the date of filing, leaving a gap of approximately four years and two months.

To be clear, Indirect Plaintiffs do not argue that they validly stated claims on May 29, 2009 (*i.e.*, upon filing the *Rudman* complaint). Instead, they argue that Vermont's (the forum state's) choice-of-law provisions require the application of Vermont's six-year statute of limitations to many of the claims at issue, making the *Rogers* complaint timely without reference to the earlier-filed *Rudman* complaint. Alternatively, Indirect Plaintiffs argue that even if Vermont's six-year statute **[*74]** doesn't apply, their May 29, 2009 filing established placeholders for the claims at issue that were later filled by the filing of the *Rogers* complaint (either via the relation-back doctrine or a theory of tolling). The Court addresses each theory in turn.

A. Choice of Law

Indirect Plaintiffs argue that their claims under Florida law and their unjust-enrichment claims under all states' laws are governed by Vermont's six-year statute of limitations,[8] making the 2013 *Rogers* complaint timely as to those claims.

HN64[] In an MDL, a court must apply the choice-of-law rules of the transferor forum. See, *e.g., Ferens v. John Deere Co., 494 U.S. 516, 523, 110 S. Ct. 1274, 108 L. Ed. 2d 443 (1990)*; *In re Air Crash Disaster Near Chicago, Ill. on May 25, 1979, 644 F.2d 594, 610 (7th Cir. 1981)* (holding that in MDL's "the choice-of-law rules to be used are those choice-of-law rules of the states where the actions were originally filed"); see also **[*75]** *In re Welding Fume Prods. Liability Litig., at 2010 U.S. Dist. LEXIS 146067, 2010 WL 7699456, at *12-13 (N.D. Ohio June 4, 2010)* (explaining choice-of-law principles for MDLs). Here, both *Rudman* and *Rogers* originated in Vermont's federal district court (invoking the court's diversity jurisdiction under *28 U.S.C. § 1332(d)*), and "[a] federal court sitting in diversity jurisdiction applies the choice of law rules of the forum state." *Forest Park Pictures v. Universal Television Network, Inc., 683 F.3d 424, 433 (2d Cir. 2012)*.

Vermont follows the Restatement (Second) of Conflict of Laws for claims that sound in contract (*e.g.*, unjust enrichment) and claims invoking consumer-protection laws. See *Long v. Parry, 921 F. Supp. 2d 269, 274 (D. Vt. 2013)* (citing *McKinnon v. F.H. Morgan & Co., 170 Vt. 422, 750 A.2d 1026, 1028 (2000))*. While Vermont courts have not yet addressed whether they would apply the Restatement to choice-of-law questions in antitrust actions, this seems to be the trend. See *Seidman v. Killington Ltd., 1990 U.S. Dist. LEXIS 2636, 1990 WL 26680, at *4 (E.D. Pa. 1990)* (debating which choice-of-law rule to apply under Vermont law and resolving to apply the Restatement based on "the overall trend of Vermont choice of law doctrine"); *Bryant v. Braithwaite, 2013 U.S. Dist. LEXIS 32338, 2013 WL 877107, at *4 (D. Vt. Mar. 8, 2013)* (stating generally that Vermont "has adopted the Second Restatement of Conflicts of Laws"). The alternative would likely be the *lex loci delicti* rule that Vermont previously applied in tort and contract cases, which requires the court to apply the law of the state where the injury occurred. See, *e.g., Goldman v. Beaudry, 122 Vt. 299, 170 A.2d 636, 638 (1961)*. And not to spoil the ending, but because Vermont has no interest in **[*76]** adjudicating cases that neither involve any Vermont citizens nor invoke any Vermont laws, both approaches produce the same result, meaning that the selection of which choice-of-law rule to follow is inconsequential. The Court will nonetheless follow the Restatement's choice-of-law approach to all claims.

HN65[] Where, as here, there is a conflict between the laws of Vermont and other jurisdictions, a court must "ascertain whether a specific section of the Restatement governs what law should ordinarily apply to the particular action or legal issue." *Martineau v. Guertin, 170 Vt. 415, 751 A.2d 776, 778 (2000)*. "If such a section exists,

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[8] The rationale behind Indirect Plaintiffs' selection of these particular claims is based on their allegation that these claims are governed by "general state statutes of limitations," and Vermont's so-called "general statute of limitations" is six years. *Vt. Stat. Ann. tit. 12, § 511*. Assumedly Vermont would apply a shorter statute of limitations to Indirect Plaintiffs' other claims.

generally the law of a particular state is presumed to be the correct forum unless another state has a more significant interest in the litigation." *Id*. *Section 142 of the Restatement* is on point:

> *HN66*[] [W]hether a claim will be maintained against the defense of the statute of limitations is determined under the principles stated in *§ 6*. In general, unless the exceptional circumstances of the case make such a result unreasonable:
> (1) the forum will apply its own statute of limitations barring the claim.
> (2) The forum will apply its own statute of limitations permitting the claim unless:
> (a) maintenance of the claim would serve no substantial interest of the forum; and
>
> **[*77]** (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence.

Restatement (Second) of Conflicts § 142 (1988 revision). Here, the Court need not review the *§ 6* factors, as it is clear that the states at issue have a far-more significant relationship to the parties and the occurrence than does Vermont. Juxtaposed against Vermont's total lack of interest in this lawsuit (Indirect Plaintiffs do not even mention the word "Vermont" in their Consolidated Class Action Complaint) is the fact that the named Plaintiffs are citizens of the states at issue who purchased allegedly price-fixed products in those states. And Indirect Plaintiffs enlisted named Plaintiffs from the various states at issue solely to take advantage of the laws of those states. It would be a sure misfire to allow Indirect Plaintiffs to benefit from the favorable aspects of certain states' laws and then scurry off to disinterested Vermont to avoid the less-favorable aspects of those states' laws. That would be an exercise in Forum Shopping 101, and neither this Court nor a Vermont court would allow it. Thus, the applicable statutes of limitations are those prescribed by the various **[*78]** states at issue, not Vermont.

B. Relation-Back Doctrine

Indirect Plaintiffs argue in the alternative that the claims raised in the 2013 *Rogers* complaint relate back to the 2009 *Rudman* complaint. *HN67*[] "An amendment to a pleading relates back to the date of the original pleading when the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." *Fed. R. Civ. P. 15(c)(1)(B)*.

Simply put, the *Rogers* complaint was filed as a stand-alone complaint, not as an amendment to the *Rudman* complaint, and therefore the claims raised in the *Rogers* complaint cannot relate back to the *Rudman* complaint. The consolidation of the four stand-alone complaints does not reclassify the complaints as amendments of their earlier-filed companions so as to justify a relation back.

Indirect Plaintiffs argue that a refusal to permit relating back in this instance would mean that "many class actions would effectively be barred from substituting named plaintiffs." [521, at 18 (citing *Phillips v. Ford Motor Co., 435 F.3d 785, 787 (7th Cir. 2006))*.] But *Phillips* doesn't apply here. The point in *Phillips* was that without allowing substitute-named-plaintiffs' claims to relate back to original-named-plaintiffs' claims, a **[*79]** defendant could settle with a named plaintiff after the statute of limitations runs and effectively bar the class from relief. But Indirect Plaintiffs have not attempted to substitute the *Rogers* Plaintiffs for the *Rudman* Plaintiff, and even if they did, they would face other insurmountable hurdles not addressed in *Phillips* (*e.g.*, the Article III standing issue discussed below). Indirect Plaintiffs cannot benefit from the relation-back doctrine.

What Indirect Plaintiffs are seeking to invoke here is not the relation-back rule, but rather a form of equitable tolling that would allow the state-law claims of named Plaintiffs in a later-filed federal class action to take advantage of "placeholder" state-law claims in an earlier-filed federal class action, which segues the Court to its next topic of discussion.

C. Equitable Tolling

As one court put it, ***HN68***[] to determine which statute of limitations to apply in an MDL action, (1) "the Court must first determine which state's choice-of-law rules to apply in these cases," (2) "[t]hen, pursuant to those rules, it must choose the applicable statute of limitations," and (3) [l]astly, the Court must determine when each limitations period began to run and whether or **[*80]** not the applicable statutes of limitations have been tolled, either by the pendency of class actions or otherwise." *In re Vioxx Prods. Liability Litig., 2007 U.S. Dist. LEXIS 83710, 2007 WL 3334339, at *2 (E.D. La. Nov. 8, 2007)*. The Court has now reached the final part of the last step in this analysis, where it must determine whether the filing of the *Rudman* class-action complaint tolled the statute of limitations for the claims raised in the later-filed *Rogers* class-action complaint.

Indirect Plaintiffs invoke "the doctrine of class-action tolling," citing the Supreme Court's *American Pipe* decision in support of their argument that the first-filed class action tolled the statute of limitations for any later-filed class actions where the plaintiffs in the later-filed class actions fall within the class definition of the first-filed class action. See *Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974)*.

In *American Pipe*, the Supreme Court held that ***HN69***[] where a district court has denied class certification—"at least where class action status has been denied solely because of failure to demonstrate that the class is so numerous that joinder of all members is impracticable"—"the commencement of the original class suit tolls the running of the statute [of limitations] for all purported member of the class who make timely motions to intervene after the **[*81]** court has found the suit inappropriate for class action status." *414 U.S. at 553*. The Supreme Court was concerned that a contrary rule would "deprive *Rule 23* class actions of the efficiency and economy of litigation which is a principal purpose of the procedure" because "[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable." *Id.*; see also *id. at 554* ("We are convinced that the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action."). The Supreme Court subsequently extended the doctrine to all putative class members, rather than solely intervenors. *Crown, Cork, & Seal Co. v. Parker, 462 U.S. 345, 350, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983)*.

But Indirect Plaintiffs face several sizable speedbumps in their attempt to extend *American Pipe* to the facts at hand. First, there is a threshold issue as to whether Ms. Rudman's lack of standing to raise claims under the laws of any states but New York precludes her ability to "place hold" on behalf of out-of-state plaintiffs. Second, the posture of this case is **[*82]** unlike that of *American Pipe* and *Crown, Cork & Seal* because the *Rogers* Plaintiffs filed their successive class action prior to any determination regarding the viability of Ms. Rudman's first-filed class action, making their suit a potentially-inappropriate "piggyback" class action. Third, *American Pipe* applies only to claims under federal law for which the period of limitations is also federal, whereas "[w]hen state law supplies the period of limitations, it also supplies the tolling rules." *Hemenway v. Peabody Coal Co., 159 F.3d 255, 265 (7th Cir. 1998)*; *Bd. of Regents of Tomanio, 446 U.S. 478, 485, 100 S. Ct. 1790, 64 L. Ed. 2d 440 (1980)*. Thus, the Court must look to the laws of the various states at issue to determine whether those states recognize class-action tolling during the pendency of a federally-filed action (*i.e.*, whether the filing of a putative class action in federal court tolls the statutes of limitation applicable to state law claims asserted by new plaintiffs in a subsequent putative class action in federal court). See *In re Linerboard Antitrust Litig., 223 F.R.D. 335, 345 (E.D. Pa. 2004)* (referring to this as "cross-jurisdictional class action tolling"). The Court addresses each issue in turn.

1. Article III Standing

Defendants argue that the filing of the *Rudman* complaint only tolled the statute for New York claimants because the only named Plaintiff in that action, Ms. Rudman, was a **[*83]** citizen of New York who purchased allegedly price-fixed products in New York, and thus only had Article III standing to raise claims under New York law, not the laws of any of the other states named in her class action complaint. See, *e.g., In re Carrier IQ, Inc., 78 F. Supp. 3d 1051, 2015 U.S. Dist. LEXIS 7123, 2015 WL 274054, at *10 (N.D. Cal. Jan. 21, 2015)* ("[W]here a complaint includes multiple claims[,] 'at least one named class representative must have Article III standing to raise each claim' and * * * in a class action[,] 'each claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim.'" (quoting *Los Gatos Mercantile, Inc. v. E.I. DuPont De Nemours & Co., 2014 U.S. Dist. LEXIS 133540, 2014 WL 4774611, at *4 (N.D. Cal. Sept. 22, 2014)))*; *In re Flash Memory Antitrust Litig., 643 F. Supp. 2d 1133, 1164 (N.D. Cal. 2009)* ("A class cannot assert a claim on behalf of an individual that they do not represent. Where * * * a representative plaintiff is lacking for a particular state, all claims based on *that* state's laws are subject to dismissal."); *In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig., 934 F. Supp. 2d 1219, 1230 (C.D. Cal. 2013)* ("[A] class action only tolls the statute of limitation for a claim when the name plaintiff had Article III standing with respect to that claim." (citing *Walters v. Edgar, 163 F.3d 430, 432 (7th Cir. 1998)))*.

Before assessing this argument, there is a threshold question as to whether the Court can consider the issue of standing before addressing class certification. While the Supreme Court has deemed the resolution **[*84]** of class certification to be "logically antecedent" to Article III concerns, see *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 612, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*; *Ortiz v. Fibreboard Corp., 527 U.S. 815, 831, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)*, "'[t]here is currently a split among federal courts as to * * * the question of whether standing can be considered prior to class certification in class action lawsuits.'" *In re Carrier IQ, Inc., 2015 U.S. Dist. LEXIS 7123, 2015 WL 274054, at *9* (quoting *In re Refrigerant Compressors Antitrust Litig., 2012 U.S. Dist. LEXIS 98827, 2012 WL 2917365, at *5 (E.D. Mich. July 17, 2012))*. The Seventh Circuit has referred to the Supreme Court's language as a "directive" regarding order of operations, but that was based on the larger concern that "[t]he certification of a class changes the standing aspects of a suit, because '[a] properly certified class has a legal status separate from and independent of the interest asserted by the named plaintiff.'" *Payton v. Cnty. of Kane, 308 F.3d 673, 680 (7th Cir. 2002)* (citation omitted). In other instances, though, the Seventh Circuit has deemed standing "an antecedent legal issue" and thus considered it prior to evaluating class certification. *Arreola v. Godinez, 546 F.3d 788, 794 (7th Cir. 2008)*. Much like the Seventh Circuit and other courts in this district, this Court concludes that ***HN70***[] "class certification issues are not always appropriate for a pre-standing evaluation." *In re Plasma-Derivative Protein Therapies Antitrust Litig., 2012 U.S. Dist. LEXIS 2501, 2012 WL 39766, at *4-5 (N.D. Ill. Jan. 9, 2012)*. Here, the class-certification issue is not logically antecedent to the Article III issue because "[a] ruling as to [Ms. Rudman's] standing depends in no way upon the standing of proposed class members," *In re Wellbutrin XL Antitrust Litig., 260 F.R.D. 143, 155 (E.D. Pa. 2009)*, and thus **[*85]** the Court will proceed to assess whether Ms. Rudman's lack of standing to raise non-New York claims also bars her ability to create tolled placeholders for those claims.

Indirect Plaintiffs argue that it would be unrealistic to charge class members with the task of assessing whether the named plaintiffs in a putative class have Article III standing to raise claims on their behalf, and any rule requiring such an undertaking would likely result in the filing of additional (and potentially unnecessary) lawsuits. See, *e.g., In re Wachovia Equity Sec. Litig., 753 F. Supp. 2d 326, 372 (S.D.N.Y. 2011)* (noting that withholding *American Pipe* tolling where a named plaintiff was found to lack standing would "punish class members for relying on the very thing *Rule 23* is intended to provide: an efficient method for resolving class claims common to a class of individuals without the need for wasteful and duplicative litigation" (quotation omitted)). Indirect Plaintiffs also argue that if the goal of statutes of limitations is to put defendants on notice (see, *e.g., Crown, Cork & Seal, 462 U.S. at 355*), then Ms. Rudman's allegations of a nationwide price-fixing conspiracy accomplished that feat, regardless of whether she personally had standing to raise each and every claim stated in her class-action complaint.

[*86] In addition, Indirect Plaintiffs cite a string of cases allegedly endorsing these (and other) pro-plaintiff policy positions. See, *e.g., Haas v. Pittsburgh Nat'l Bank, 526 F.2d 1083, 1097 (3d Cir. 1975)*; *Griffin v. Singletary, 17 F.3d 356, 360 (11th Cir. 1994)* (finding that *American Pipe* tolls the statute of limitations for putative class members where the plaintiff lacks standing, and noting that a contrary rule "'would produce the very evil which the [Supreme] Court sought to avoid in *American Pipe* and *Crown, Cork & Seal*'" because "class members uncertain of the district court's standing analysis * * * 'would have every incentive to file a separate action prior to the expiration of his own period of limitations'" (quoting *Edwards v. Boeing Vertol Co., 717 F.2d 761, 766 (3d Cir. 1983)))*; *Genesee Cnty. Emps.' Ret. Sys. v. Thornburg Mortg. Sec. Trust 2006-3, 825 F. Supp. 2d 1082, 1132 (D.N.M. 2011)* (adopting *Griffin*); *Rose v. Ark. Valley Envtl. & Util. Auth., 562 F. Supp. 1180, 1192-93 (W.D. Mo. 1983)* ("I can see no more reason, as a general matter, to require a passive class member to anticipate the existence of and ultimate ruling upon [whether the plaintiff has standing] than to require him to do so with respect to questions of 'numerosity,' 'commonality' or 'typicality.'"); Popoola v. Md-Individual Practice Ass'n, 230 F.R.D. 424, 430 (D. Md. 2005) (adopting *Haas* and *Rose*, noting that a contrary rule would force individual class members to seek to intervene prior to the running of the statute to preserve their rights); In re IndyMac Mortgage-Backed Sec. Litig., 793 F. Supp. 2d 637, 645-47 (S.D.N.Y. 2011); see also W. & S. Life Ins. Co. v. JPMorgan Chase Bank, N.A., 54 F. Supp. 3d 888, 2014 WL 5308422, at *17-18 (S.D. Ohio 2014) ("The *American Pipe* tolling analysis can be extended to cases where the class action claims are dismissed for lack of standing."); In re Wachovia Equity Sec. Litig., 753 F. Supp. 2d 326, 371-72 (S.D.N.Y. 2011) ("Although the law of the Second Circuit is far from settled on this issue, the failure to apply *American Pipe* tolling to this case would undermine the policies of 'efficiency and economy of litigation' that underlie Rule 23."). The Court addresses each of Indirect Plaintiffs' arguments in turn.

The Third Circuit's Haas opinion is the most on point, but is nonetheless unpersuasive. In that case, a Pennsylvania citizen brought class claims against three banks, although she only held accounts with two of them. The court's basis for tolling claims against the third bank (Equibank) rested almost exclusively on the fact that defendants received adequate notice of the relevant claim despite plaintiff's lack of standing to bring it. The court observed that the missing plaintiffs "were in existence at the time the action was originally brought and were described as claimants in the complaint," such that all that was needed to remedy the issue "was the prompt addition of a nominal plaintiff who held an Equibank card." 526 F.2d at 1097. The court's analysis was brief, and said nothing of the policy considerations on the other side of the coin **[*87]** (discussed below) or Article III standing principles generally. While this decision was likely the most practical decision for this case—*i.e.*, triggering the "prompt addition of a nominal plaintiff" such that the case could continue—it seems unlikely that the court would have reached the same conclusion had Ms. Haas filed placeholder claims with respect to 50 banks instead of just one.

The most thought-provoking issue raised in the cases cited by Indirect Plaintiffs is whether there is anything special or unique about a named plaintiff's lack of standing that would differentiate such a shortcoming from a named plaintiff's failure to satisfy one of the Rule 23 categories (*i.e.*, numerosity, commonality, and typicality), so as to justify requiring putative class members to identify one but not the other in order to take advantage of *American Pipe* tolling. See Rose, 562 F. Supp. at 1192-93 ("I can see no more reason, as a general matter, to require a passive class member to anticipate the existence of and ultimate ruling upon [whether the plaintiff has standing] than to require him to do so with respect to questions of 'numerosity,' 'commonality' or 'typicality.'"). One potential difference is that from a legal perspective, **[*88]** **HN71**[] unlike Rule 23 deficiencies, standing deficiencies are inexplicably linked to a court's jurisdiction. Another notable difference is that plaintiffs can exploit standing deficiencies (especially where, like here, the deficiency is obvious) to their benefit, whereas a Rule 23 deficiency is an unlikely vehicle for abuse. See Me. State Ret. Sys. v. Countrywide Fin. Corp., 722 F. Supp. 2d 1157, 1166-67 (C.D. Cal. 2010) (refusing to extend *American Pipe* tolling where the plaintiff lacked standing because such a rule would "encourage filings made merely to extend the period in which to find a class representative"). Also, from a practical perspective, standing deficiencies such as these are often "apparent from the face of the complaints," In re TFT-LCD (Flat Panel) Antitrust Litig., 2012 U.S. Dist. LEXIS 6394, 2012 WL 149637, at *2 n.3 (N.D. Cal. Jan. 18, 2012), whereas Rule 23 deficiencies are often not so obvious. At a minimum, standing deficiencies and Rule 23 deficiencies make unexpected bedfellows (at least in this context), and the Court is not convinced that the *American Pipe* rule should transfer so easily from one category to the other absent express authority to the contrary.

Regarding the argument that Ms. Rudman's complaint sufficiently put Defendants on notice of the *Rogers* claims—thus satisfying the core concern behind the existence of statutes of limitations—were this the proper logic, then there would be nothing stopping **[*89]** plaintiffs from raising claims under the laws of all 50 states at the time of filing, keeping the door open for any plaintiffs that might filter in at any given time. Crown, Cork & Seal, 462 U.S. at 354-55 (noting that "[t]he tolling rule of *American Pipe* is a generous one, inviting abuse," and that "[i]t is important to make certain, however, that *American Pipe* is not abused by the assertion of claims that differ from those raised in the original class suit."). The Court is concerned that these out-of-state placeholder suits might qualify as the type of abuse that the Supreme Court presaged.

Next, several of the cases cited by Indirect Plaintiffs argue that a refusal to extend *American Pipe* tolling to instances where the named plaintiffs lack of standing would incentivize putative class members—unsure of whether the named plaintiff has standing to bring claims on their behalf—to file duplicative and unnecessary suits prior to the expiration of the statute of limitations in order to preserve their rights. See, *e.g.,* Griffin, 17 F.3d at 360. While this is a possibility, it requires little legal acumen (at least in this instance) to determine that Ms. Rudman—a New York citizen who purchased allegedly price-fixed products in New York—lacks standing to bring **[*90]** claims under the laws of other states. See In re TFT-LCD (Flat Panel) Antitrust Litig., 2012 U.S. Dist. LEXIS 6394, 2012 WL 149637, at *2 n.3. More relevant here, however, is the flipside of Indirect Plaintiffs' argument, which is that "extending *American Pipe* tolling to class action claims the original named plaintiffs had no standing to bring will encourage filings made merely to extend the period in which to find a class representative." Me. State Ret. Sys. v. Countrywide Fin. Corp., 722 F. Supp. 2d at 1166-67; accord FDIC v. Countrywide Fin. Corp., 2012 U.S. Dist. LEXIS 167696, 2012 WL 5900973, at *9 (C.D. Cal. Nov. 21, 2012); *cf.* In re Crazy Eddie Sec. Litig., 747 F. Supp. 850, 856 (E.D.N.Y. 1990) (refusing to extend *American Pipe* tolling to successive class actions following the dismissal of the original suit for lack of standing, noting that "[t]here appears to be no good reason to encourage bringing of a suit merely to extend the period in which to find a class representative"). And to further allay the fear that putative class members, unsure of the named plaintiffs' standing, might file duplicative lawsuits to protect their rights, courts should maintain "scrupulous adherence to the requirement that the determination whether to certify a suit as a class action be made 'as soon as practicable after the commencement of the action.'" Walters, 163 F.3d at 433 (quoting Fed. R. Civ. P. 23(c)(1)).

Most importantly, though, "[t]he Seventh Circuit has [already] decided the issue, holding that ***HN72***[] the filing of a purported class-action complaint by a plaintiff who lacks standing does not **[*91]** toll the statute of limitations for those who later seek to intervene as plaintiffs." Palmer v. Stassinos, 236 F.R.D. 460, 465 (N.D. Cal. 2006) (citing Walters, 163 F.3d at 432). In Walters, a 14-year-old class action brought by a number of Illinois inmates was suddenly dismissed after the Supreme Court issued an opinion in an unrelated case that led to a finding that the named plaintiffs in Walters lacked standing to sue. The named plaintiffs argued that rather than dismissing the case, other class members should have been substituted as class representatives. But the reality was that, in light of the Supreme Court's ruling, the named plaintiffs lacked standing from day one. The Seventh Circuit held that "if the named plaintiffs lacked standing when they filed the suit, there were no other party plaintiffs to step into the breach created by the named plaintiffs' lack of standing," thus dismissing the argument that "jurisdiction can be preserved even though the named plaintiffs lacked standing when the suit was filed." Id. at 432-33.

Additionally, from a defense perspective, requiring the named plaintiffs to have standing in order to activate *American Pipe* tolling would eliminate the concern over so-called placeholder actions, which arguably give plaintiffs unearned leverage **[*92]** over defendants by artificially raising the stakes while simultaneously buying time to piece together a more formidable lawsuit. As one court put it:

> The alternative proposed by the plaintiffs would allow named plaintiffs in a proposed class action, with no injuries in relation to the laws of certain states referenced in their complaint, to embark on lengthy class discovery with respect to injuries in potentially every state in the Union. At the conclusion of discovery, the plaintiffs would apply for class certification, proposing to represent the claims of parties whose injuries and modes of redress they would not share. That would present the precise problem that the limitations of standing seek to avoid. The Court will not indulge in the prolonged and expensive implications of the plaintiffs' position only to be faced with the same problem months down the road.

In re Packaged Ice Antitrust Litig., 779 F. Supp. 2d 642, 654 (E.D. Mich. 2011) (quoting In re Wellbutrin XL Antitrust Litig., 260 F.R.D. at 155); see also Crown, Cork & Seal, 462 U.S. at 354 (Powell, J., concurring) (reiterating that *American Pipe* "must not be regarded as encouragement to lawyers * * * to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights" (quoting Am. Pipe, 414 U.S. at 561)); see also In re Elscint, Ltd. Sec. Litig., 674 F. Supp. 374, 377-78 (D. Mass. 1987).

Because Ms. Rudman lacked **[*93]** standing to raise claims under the laws of any states other than New York, her class action did not toll the statute of limitations for any such claims, making the *Rogers* claims at issue untimely. While this finding is dispositive as to Indirect Plaintiffs' claims, the Court will nonetheless address the remaining arguments regarding the alleged untimeliness of certain of Indirect Plaintiffs' claims for the sake of completeness.

2. Successive ("Piggyback") Class Actions

According to most courts that have addressed the issue, plaintiffs may not "piggyback one class action onto another," Salazar—Calderon v. Presidio Valley Farmers Ass'n, 765 F.2d 1334, 1351 (5th Cir. 1985), "and thereby engage in endless rounds of litigation in the district court." Griffin, 17 F.3d at 359 (affirming that "Plaintiffs may not piggyback one class action onto another and thus toll the statute of limitations indefinitely"); see also Andrews v. Orr, 851 F.2d 146, 149 (6th Cir. 1988) ("The courts of appeals that have dealt with the issue appear to be in unanimous agreement that the pendency of a previously filed class action does not toll the limitations period for additional class actions by putative members of the original asserted class." (citing cases)), *overruled on other grounds*, Hall v. Warden, Lebanon Corr. Inst., 662 F.3d 745, 749-50 (6th Cir. 2011).

There are really two legal concerns subsumed in these cases. The first, **[*94]** as the Seventh Circuit has pointed out, is a concern regarding "the preclusive effect of a judicial decision in the initial suit applying the criteria of Rule 23." Sawyer v. Atlas Heating & Sheet Metal Works, Inc., 642 F.3d 560, 563 (7th Cir. 2011). This concern applies to successive class actions (as opposed to individual lawsuits) filed *after* the denial of class certification, where the concern is that the new class may get an unwarranted second bite at the class-certification apple (depending, of course, on the reason for denial of class certification the first go-round). See, *e.g.,* McKowan Lowe & Co. v. Jasmine, Ltd., 295 F.3d 380, 386 (3d Cir. 2002) (noting that "application of *American Pipe* tolling to successive attempts to certify *a previously rejected class* would sanction an endless succession of class filings" (emphasis added)). This concern has nothing to do with *American Pipe* or tolling principles generally, and has no direct application here.

The second concern—which is relevant here—relates to the difference between the tolling effect of a successive class-action complaint that is filed *prior to* any ruling on the viability of the initial class-action complaint as opposed to one filed *after* a class-certification ruling (as contemplated by *American Pipe*). Compare Wyser—Pratte Mgmt. Co. v. Telxon Corp., 413 F.3d 553, 568-69 (6th Cir. 2005) ("[A] plaintiff who chooses to file an independent action without **[*95]** waiting for a determination on the class certification issue may not rely on the *American Pipe* tolling doctrine."), with In re Vertrue Inc. Marketing & Sales Practices Litig., 719 F.3d 474, 480 (6th Cir. 2013) (distinguishing *Wyser—Pratte* as a case where "a putative class member who initiated a lawsuit four months before a lead plaintiff's motion for certification was granted," where tolling did not occur, from a case where "the district court had confirmed that it would not address the class certification issue," where tolling did occur).

The first appellate courts to address the issue found that *American Pipe* tolling does not apply to successive individual actions filed prior to class certification. According to the Sixth Circuit, "[t]he purposes of *American Pipe* tolling are not furthered when plaintiffs file independent actions before decision on the issue of class certification" because the secondary filing creates duplicative litigation. Wyser—Pratte, 413 F.3d at 569; see also Glater v. Eli Lilly & Co., 712 F.2d 735, 739 (1st Cir. 1983) ("The policies behind Rule 23 and *American Pipe* would not be served, in fact would be disserved, by guaranteeing a separate suit at the same time that a class action is ongoing."); In re Enron Corp. Sec., 465 F. Supp. 2d 687, 715-16 (S.D. Tex. 2006) (collecting cases on both sides, and concluding that "the *American Pipe* tolling doctrine applies only to opt-out plaintiffs **[*96]** after the district court makes the class certification determination, regardless of whether it denies or grants certification").

However, three recent appellate-court decisions have gone against the First and Sixth Circuits in finding that *American Pipe* tolling can be invoked in cases filed prior to a ruling on class certification, albeit only in successive *individual* suits (*i.e.*, not class actions). See In re WorldCom Sec. Litig., 496 F.3d 245, 254-56 (2d Cir. 2007) (noting that while the *American Pipe* Court had the benefits of judicial efficiency and economy on its mind, the case "was not meant to induce class members to forgo their right to sue individually); *In re Hanford Nuclear Reservation Litig., 534 F.3d 986, 1009 (9th Cir. 2008)* (echoing *In re WorldCom* and noting that plaintiffs "have a right to file at the time of their choosing"); State Farm Mut. Auto. Ins. Co. v. Boellstoff, 540 F.3d 1223, 1230-31 (10th Cir. 2008) (relying heavily on the *Crown, Cork & Seal* rule that "[o]nce the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied" (quoting Crown, Cork & Seal, 414 U.S. at 554)); see also Rochford v. Joyce, 755 F. Supp. 1423, 1428 (N.D. Ill. 1990) (disagreeing with the First Circuit's Glater opinion based on the "clear" directive in *Crown, Cork & Seal*).

While the Court sees the appeal of the *Wyser-Pratte* and *Glater* decisions, it finds the more-recent opinions on the matter to be more persuasive. That being said, the **[*97]** Court questions whether the "plain language" of *Crown, Cork & Seal* that these more-recent decisions relied upon is as plain as the courts suggest: "Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. *At that point*, class members may choose to file their own suits or to intervene as plaintiffs in the pending action." *462 U.S. at 354* (emphasis added). To be sure, we are not "at that point" yet. But such an interpretation of *Crown, Cork & Seal* would require the Court to hold that the statute *is* currently tolled, but that plaintiffs cannot take advantage of this tolling unless and until the Court makes a class-certification ruling. While there is an economic allure to such a rule, it comes at the cost of sacrificing individual choice. As one district court put it, it would run contrary to any known principle governing statutes of limitations "to say that [a successive plaintiff] must wait until the dispute is more stale before he can file his individual case." *Lehman v. United Parcel Serv., Inc., 443 F. Supp. 2d 1146, 1151 (W.D. Miss. 2006)*.

There is an ancillary issue as to whether successive *class actions* (as opposed to individual suits) may proceed prior to a certification ruling in a preceding **[*98]** class action and still take advantage of *American Pipe*'s tolling principle. As the Seventh Circuit noted, the factor that distinguishes post-certification *class* actions from post-certification *individual* actions is the potential for issue preclusion in successive class actions based on the court's *Rule 23* findings in the initial class action. See *Sawyer, 642 F.3d 560*. But if a successive class action is filed before any *Rule 23* decision in the initial suit, then this concern over issue preclusion disappears (at least until one of the cases reaches the class-certification stage). The Court sees no reason why *American Pipe*'s tolling principle should apply only to successive individual actions, and not to successive class actions.

Absent guidance to the contrary from the Seventh Circuit or the Supreme Court, this Court is inclined to extend *American Pipe* tolling to successive class-action plaintiffs who choose to file suit before a decision is rendered on class certification in the initial action. See, *e.g., McKowan, 295 F.3d at 389* ("[W]e see no good reason why class claims should not be tolled where the district court had not yet reached the issue of the validity of the class."). To be clear, this sub-holding (a) ignores the dispositive effect **[*99]** of Ms. Rudman's lack of Article III standing, as discussed above, and (b) assumes that *American Pipe* tolling applies in the cross-jurisdiction setting in the first place, which the Court addresses (and rejects) in the following section.

3. Cross-Jurisdictional Tolling

The elephant in the room here is that both *American Pipe* and *Crown, Cork & Seal* involve the tolling of *federal* statutes of limitations in class actions filed in federal courts, not the tolling of *state* statutes of limitations in class actions filed in federal courts. As mentioned above, "[w]hen state law supplies the period of limitations, it also supplies the tolling rules," *Hemenway, 159 F.3d at 265*, and thus the Court must look to the laws of the various states at issue to determine whether those states recognize cross-jurisdictional class-action tolling. See *In re Linerboard Antitrust Litig., 223 F.R.D. at 345*.

Relevant here are the tolling laws of Arkansas, California, Florida, Minnesota, and North Carolina. Before reviewing those states' laws, there is some low-hanging fruit to tend to. Specifically, Indirect Plaintiffs raised claims under *Cal. Bus. & Prof. Code § 17200*, *Minn. Stat. § 325D.53*, and N.C. Gen. State. *§ 75-1.1* for the first time in their Consolidated Class Action Complaint. But *American Pipe* does not apply to toll new claims. *Crown, Cork & Seal, 462 U.S. at 355* (Powell, J., concurring) **[*100]** ("It is important to make certain * * * that *American Pipe* is not abused by the assertion of claims that differ from those raised in the original class suit."); *Spann v. Cmty. Bank of N. Va., 2004 U.S. Dist. LEXIS 5148, 2004 WL 691785, at *6 (N.D. Ill. Mar. 30, 2004)* ("[T]he [first-filed] complaint only tolled the statute of limitations as to those claims actually alleged against [defendant] in the [first-filed] action."). Because these three claims did not appear in the *Rudman* complaint, they are time barred, and *American Pipe* tolling cannot save them.

As to the remaining states' laws at issue (addressed in alphabetical order), the Ninth Circuit has refused to import cross-jurisdictional tolling into California law. *Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1025 (9th Cir. 2008)* ("[T]he weight of authority and California's interest in managing its own judicial system counsel us not to import the doctrine of cross-jurisdictional tolling into California law."). Florida does not allow *American Pipe* tolling at all, let alone in a cross-jurisdictional setting. See *Becnel v. Deutsche Bank, AG, 507 F. App'x 71, 73 (2d Cir. 2013)* ("Florida does not allow tolling during the pendency of class action lawsuits no matter where they are filed." (citing *Fla. Stat. § 95.051(2)*)). Neither Minnesota nor North Carolina has considered the issue of cross-jurisdictional tolling, and as the Ninth Circuit noted in *Clemens*, "several federal courts have declined to **[*101]** import the doctrine into state law where it did not previously exist." *534 F.3d at 1025*; *In re Urethane Antitrust Litig., 663 F. Supp. 2d 1067, 1082 n.10 (D. Kan. 2009)* ("Plaintiffs (and the *Linerboard* court) were able to identify courts in only two states that have adopted cross-jurisdictional tolling.").[9] This Court likewise refuses to import cross-jurisdictional tolling into the laws of a state that has not addressed the issue.

Because the states at issue do not apply cross-jurisdictional tolling, the federally-filed *Rudman* class-action complaint did not toll the statute of limitations for statutory state-law claims brought under the laws of California, Florida, Minnesota, or North Carolina or for unjust enrichment claims brought under the laws of Arkansas, North Carolina, and Florida. This bar exists independently of Indirect Plaintiffs' Article III issues in bringing these claims, and moots the Court's decision to extend *American Pipe* tolling to successive class-action plaintiffs who choose to file suit before a decision is rendered on class certification in the initial action.

V. Filed-Rate Doctrine

In ruling on Defendants' motion to dismiss Direct Purchaser Plaintiffs' Corrected Consolidated Class Action Complaint, Judge Hibbler assessed the application of the filed-rate doctrine to the case, and held that plaintiffs were barred from raising claims based on the purchase of "products whose value is determined, at least in part, by the government minimum rate" for milk, and thus dismissed Direct Plaintiffs' "claims for damages stemming from the purchase **[*103]** of products priced on the basis of the government minimum milk prices." *DFA I, 767 F. Supp. 2d at 894, 897*. The filed-rate doctrine did not bar claims based on the purchase of "products whose price was based on CME prices." *Id. at 896*. This ruling is the law of the case.

Indirect Plaintiffs do not dispute the filed-rate doctrine's applicability to state-law claims. See, *e.g., AT&T Co. v. Cent. Office Tel., Inc., 524 U.S. 214, 228, 118 S. Ct. 1956, 141 L. Ed. 2d 222 (1998)*. Instead, they attempt to avoid Judge Hibbler's ruling altogether by arguing that "the price of the products Plaintiffs purchased (*i.e.*, cheese) was determined solely by reference to the CME cheese spot market price totally independent of the price set by any government entity," and that "[t]he price of cheese was set by adding a margin to the CME cheese spot market prices and nothing else is involved." [521, at 12 (citing Consol. Class Action Compl., 483, ¶ 75).] If this were true, then Indirect Plaintiffs could potentially[10] have positioned themselves outside of realm of forbidden claims as explained in *DFA I.* But this is not what Indirect Plaintiffs' alleged in their complaint. Instead, paragraph 75 says that "[t]he price of Finished Dairy Products *sold to resellers* depends in whole or large part on the Cheese Spot price, without reference to, and independent **[*104]** of, prices set by any government agency." [Consol. Class Action Compl., 483, ¶ 75 (emphasis added).] While the Court must make reasonable inferences in Indirect Plaintiffs' favor,

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[9] The Illinois Supreme Court laid the foundation for why states should not adopt cross-jurisdictional tolling, reasoning that "[u]nless all states simultaneously adopt the rule of cross-jurisdictional class action tolling, any state which independently does so will invite into its courts a disproportionate share of suits which the federal courts have refused to certify as class actions after the statute of limitations has run." *Portwood v. Ford Motor Co., 183 Ill. 2d 459, 701 N.E.2d 1102, 1103-05, 233 Ill. Dec. 828 (1998)* ("[B]ecause state courts have no control over the work of the federal judiciary, we believe it would be unwise to adopt a policy basing the length of Illinois limitation periods on the federal courts' disposition of suits seeking class certification."). But see *In re Linerboard Antitrust Litig., 223 F.R.D. at 346* ("[D]eclining to adopt cross-jurisdictional class action tolling will invite the filing of numerous protective, duplicative and in many cases, unnecessary, suits by class members that want to consider **[*102]** filing claims under state ***antitrust law*** not included in a federal class action complaint.").

[10] The reason that such an allegation would only *potentially* save Indirect Plaintiffs' claims is because the claim is still dependent on the assumption that the entire class of indirect plaintiffs purchased finished dairy products made exclusively out of the cheese that Defendants purchased on the CME cheese spot market.

it would be pure speculation to infer that the price of finished dairy products *sold to consumers* is not determined, even in part, by government minimum milk prices.

Approaching this argument from a different angle, Indirect Plaintiffs divide the world of finished dairy products into two categories—those that include milk that was priced based on a government rate and those that do not—and argue that because Defendants produce their own milk (at least in part), it is *possible* that the finished dairy products that Indirect Plaintiffs purchased fall entirely into the latter (non-barred) category. But whether the finished dairy products at issue *contain* government-priced milk is not the same inquiry **[*105]** as whether their prices were *determined*, at least in part, by the government minimum rate. And Indirect Plaintiffs repeatedly highlight the influence that the USDA rate had on finished dairy products nationwide, noting that "minimum prices for raw farm milk bought by many cheese manufacturers are set using a [USDA] pricing formula," that "Cheese Spot prices are also used as a component for the pricing of Class I Milk by, *inter alia*, the USDA and State of California," that "[p]rivate industry participants throughout the nation use the prices set by the USDA and State of California for Class I Milk as the mechanism for pricing in their contracts for the sale/purchase of Class I Milk and products containing Class I Milk," and that Defendants' "manipulation of the Cheese Spot market or the Milk Futures market caused an artificial and unlawful increase in the prices of Dairy Products including, but not limited to, Class I and III Milk prices set by the USDA and the California Department of Food and Agriculture, throughout the United States." [Consol. Class Action Compl., 483, ¶¶ 77-78, 81.]

If the USDA pricing did not determine (at least in part) the price of Defendants' finished dairy products, **[*106]** it is curious why Indirect Plaintiffs put such an emphasis on this element of the story in their complaint (especially in light of Judge Hibbler's filed-rate ruling). This mystery quickly unravels when one considers the core allegation in Indirect Plaintiffs' complaint, which is that Defendants' actions in the commodities markets artificially raised the governmental price for milk, which in turn artificially raised the national price of milk and cheese, which ultimately allowed Indirect Plaintiffs to reap the benefit of the nationwide price increase in finished diary products. Regardless of what inferences the Court may make in Indirect Plaintiffs' favor, the Court cannot ignore Indirect Plaintiffs' allegation that Defendants' activities raised the governmental price of milk, and that governmental pricing in turn influenced the price of finished dairy products nationwide; inferences do not overcome the big picture.

This holding also comports with the policies underpinning the filed-rate doctrine. The theory behind the doctrine is that "any 'filed rate'—that is, one approved by [a] governing regulatory agency—is per se reasonable and unassailable in judicial proceedings brought by ratepayers." **[*107]** *DFA I, 767 F. Supp. 2d at 893* (quoting *Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 18 (2d Cir. 1994))*. The concern is that if an allegedly price-fixed product is priced based (even in part) on a government rate, then "determining a hypothetically reasonable rate for the purposes of calculating damages * * * would interfere with the regulatory agency's ratemaking authority." *Id.* Indirect Plaintiffs argue that the Court will not have to involve itself with any government rates in order to calculate damages in this case because the retailers that sold products to Indirect Plaintiffs "are in a fiercely competitive market and pass on the price increases incurred from the increases that defendants orchestrated on the CME cheese spot market." [521, at 12.] But this argument is belied by Indirect Plaintiffs' statements regarding the nationwide impact that governmental milk prices have on finished dairy products; Defendants' ability to impact governmental milk pricing defines the nature of the scheme. See *DFA I, 767 F. Supp. 2d at 896-97* (citing *Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1157 (3d Cir. 1993))*. As such, any calculation of damages resulting from the price of finished dairy products would inevitably include, at least in part, an assessment of what governmental milk prices would have been absent Defendants' actions.[11] Accordingly, Indirect Plaintiffs' claims for **[*108]** damages are barred by the filed-rate doctrine.[12]

[11] Indirect Plaintiffs argue that a damages calculation will require them "to establish [1] what the price on the CME cheese spot market would have been in the absence of the wrongful conduct; [2] how much that caused the price Defendants charged for their branded cheese products to retailers or wholesalers to increase; and [3] how much of that increase was passed on to Plaintiffs and other consumers." [521, at 12.] It is the second step that necessarily involves a calculation of the government rate because Defendants' sale price was based on the going rate in the national market, which in turn was based, at least in part, on government milk prices.

VI. Failure to State a Claim: Monopolization

Invoking the antitrust laws of Michigan, Minnesota, and North Carolina, and the consumer-protection laws of Arkansas, California, and Florida, Indirect Plaintiffs allege that Defendants wrongfully acquired and maintained monopoly power in the Cheese Spot market. In response—and in addition to their arguments regarding Indirect Plaintiffs' lack of standing to raise these claims, as discussed above—Defendants argue that Indirect Plaintiffs failed to state a claim for monopolization under each state's law because (1) the purportedly monopolized market—the Cheese Spot market—does not encompass all interchangeable substitute products, and (2) Plaintiffs failed to allege that DFA had sufficient market power or excluded others from participating in **[*110]** the CME cheese spot call. The Court addresses each argument in turn.

A. Legal Standard

To state a claim for monopolization under *federal* law, Plaintiffs must plead "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power." *DFA I, 767 F. Supp. 2d at 901*. Michigan, Minnesota, and North Carolina interpret their antitrust statutes in harmony with federal law, and the parties do not dispute the applicability of this two-part test under those states' laws.

However, Defendants *do not* allege that this two-part test applies to Indirect Plaintiffs' monopolization claims brought under the consumer-protection laws of Arkansas, California, and Florida, nor do they explain what the monopolization standards are in those states. Instead, Defendants claim that Indirect Plaintiffs raised monopolization claims under these states' consumer-protection statutes only because they are barred from bringing monopolization claims under those states' antitrust statutes. Defendants then argue that Indirect Plaintiffs should be forbidden from circumventing those states' legislatures' limitations on antitrust recovery by repackaging their antitrust claims as "ill-fitting" consumer **[*111]** protection claims. Even though this is not a "failure to state a claim" argument (thus making it "ill-fitting" in regard to this section of the Court's opinion), the Court can dispose if it efficiently here.

Addressing the three states alphabetically, courts have interpreted the catchall provision of the Arkansas Deceptive Trade Practices Act—which prohibits any "unconscionable, false, or deceptive act or practice in business, commerce, or trade," *Ark. Code § 4-88-107(a)(10)*—broadly so as to encompass monopolization claims. See *Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, 737 F. Supp. 2d 380, 404-05 (E.D. Pa. 2010)*. Similarly, individual plaintiffs can bring monopolization claims under California's Unfair Competition Law ("CUCL")—which prohibits "unlawful, unfair, or fraudulent business practice[s]," *Cal. Bus. & Prof. Code § 17200*—such that a "decision to grand [defendants'] motion to dismiss plaintiffs' Cartwright Act monopolization claims does not in any way prevent [a court] from allowing their CUCL claim to proceed." *Sheet Metal Workers, 737 F. Supp. 2d at 406*. And plaintiffs have also been successful in bringing monopolization claims under the Florida Deceptive and Unfair Trade Practices Act, which prohibits "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce," **[*112]** *Fla. Stat. § 501.204(1)*. *Sheet Metal Workers, 737 F. Supp. 2d at 408-09*. In summation, Indirect Plaintiffs' consumer-protection claims

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[12] Indirect Plaintiffs argue that California's Cartwright Act does not recognize the filed-rate doctrine for rates set by state rate-making agencies. See *Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 992 (9th Cir. 2000))*. Defendants disagree, arguing that since *Knevelbaard*, the tide has changed in California. See *MacKay v. Superior Court, 188 Cal. App. 4th 1427, 115 Cal. Rptr. 3d 893, 910 (Cal Ct. App. 2010)*. The Court is not convinced that *MacKay*—an insurance-rate case where the court noted "the limited nature of [its] holding"—expressly overruled what was otherwise established California law. See *In re Conseco Life Ins. Co. Life Trend Ins. Marketing & Sales Practice Litig., 2012 U.S. Dist. LEXIS 99859, 2012 WL 2917227, at *9-10 (N.D. Cal. July 17, 2012)* (noting disagreement amongst California courts regarding the **[*109]** filed-rate doctrine and refusing to apply it). As such, the Court will not apply the filed-rate doctrine to dismiss Indirect Plaintiffs' damages claims based on California law regarding rates set by the California Department of Food and Agriculture. This is somewhat of a moot point, as the Court has already found dismissal of Indirect Plaintiffs' California-law claims to be appropriate on other grounds.

under the laws of Arkansas, California, and Florida are not dismissible simply because those states do not provide a private right of action for monopolization claims under their respective antitrust statutes.

Accordingly, the Court will apply the two-part test to Indirect Plaintiffs' monopolization claims under Michigan, Minnesota, and North Carolina ***antitrust law***, but because Defendants do not allege that Indirect Plaintiffs failed to state a claim under the Arkansas, California, and Florida consumer-protection statutes (or at least Defendants failed to provide the relevant legal standards under those states' laws), the Court will not address such arguments.

B. Relevant Market

Under federal law, "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. "In other words, the products in a market must have unique attributes that allow them to be substituted for one another, but make them difficult to replace with substitute products from outside the market." *DFA I, 767 F. Supp. 2d at 901*. In most cases, proper market definition **[*113]** is a factintensive inquiry that is not suited for resolution on a motion to dismiss. *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 482, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*.

Indirect Plaintiffs allege in their Consolidated Class Action Complaint that DFA wrongfully acquired and maintained monopoly power in the Cheese Spot market. [483, ¶ 108.] Indirect Plaintiffs define this market as the only commodities exchange for cheddar cheese in the United States [*id. ¶ 30*], explaining that the market provides a reference point for pricing for the USDA and for many cheese manufacturers nationwide [*id. ¶¶ 32*, 75-78]. Indirect Plaintiffs also note that the CME sets detailed trading rules for the Cheese Spot market that govern the quality and color of the cheese, freight charges, packaging requirements, inspection specifications, penalties for non-compliance, etc. [*id. ¶¶ 31-34*].

In response, Defendants highlight Plaintiffs' concession that the cheese traded on the CME Cheese Spot call market accounts for less than 2% of the annual supply of cheddar cheese, and argue that Plaintiffs' recounting of the characteristics of the CME does not refute that interchangeable substitute products—let alone the other 98% of the annual supply of cheddar cheese—should also be included in the relevant **[*114]** market.

At this stage, Indirect Plaintiffs have adequately pled a relevant market. The key factor in this decision relates to Plaintiffs' claims that (a) the Cheese Spot market is the only cheddar cheese market in the United States, and (b) purchases made on the Cheese Spot market are highly influential in setting the national price for finished dairy products. This aspect of the market makes it distinct from cheddar cheese purchases made outside of the Cheese Spot market, and is enough to satisfy the pleading standard.

C. Market Power / Exclusionary Conduct

In addition to establishing a relevant market, Indirect Plaintiffs must also plead that DFA possessed monopoly power in the Cheese Spot market—*i.e.*, that DFA possessed "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. There are two methods for proving that a defendant possessed monopoly power: (1) "through direct evidence of anticompetitive effects," or (2) "by proving relevant product and geographic markets and by showing that the defendant's share exceeds whatever threshold is important for the practice in that case." *Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 937 (7th Cir. 2000)*. While "[t]he existence of [monopoly] power ordinarily may be inferred from the predominant share of **[*115]** the market," *United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*, "in markets with low barriers to entry, a large market share does not necessarily translate into power over the prices in a market." *DFA I, 767 F. Supp. 2d at 902* (citing *Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc., 784 F.2d 1325, 1336 (7th Cir. 1986)*).

The Cheese Spot market is an open market, although one where the buyer agrees to take delivery of an actual product (*i.e.*, cheese). In their Consolidated Class Action Complaint, Indirect Plaintiffs describe it as a "thin market," meaning it is one in which there are a small number of traders and very few transactions, making it vulnerable to monopolization. [483, ¶ 37.] Indirect Plaintiffs allege that Defendants acquired every single contract for cheddar cheese on the Cheese Spot market, paying artificially high prices for these contracts (and assuming a loss in the process) with the goal of raising the national price on milk and cheese, thus allowing them to recoup their losses on the milk futures market and in the sale of its finished dairy products. [483, ¶¶ 38-39, 48-49, 75-82.] Defendants counter by arguing that Plaintiffs' Consolidated Class Action Complaint does not contain a single allegation that DFA excluded anyone from buying or selling cheese on the Cheese Spot market. The Court disagrees with Defendants, and finds **[*116]** that Indirect Plaintiffs adequately alleged market power.[13]

VII. Failure to State a Claim: Consumer "Fraud"

In addition to the arguments addressed above, Defendants also seek to dismiss Indirect Plaintiffs' consumer-protection claims (which Defendants refer to as "consumer fraud" claims), arguing that Indirect Plaintiffs failed to allege unconscionable or deceptive conduct, and thus failed to state a claim under each relevant state's law. Defendants' argument is, for the most part, flawed.

As the Court already alluded to (see footnote 4, *supra*), three of the four state consumer-protection statutes at issue here (California, Florida, and North Carolina) proscribe not only deceptive, fraudulent, and unconscionable business practices, but also *unfair* business practices. See *Cal. Bus & Prof. Code § 17200* (proscribing any "unlawful, unfair or fraudulent business act or practice"); *Fla. Stat. § 501.204(1)* (proscribing "[u]nfair methods of competition, unconscionable acts or practices, **[*117]** and unfair or deceptive acts or practices"); *N.C. Gen. Stat. § 75-1.1* (proscribing "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce"). And the *prima facie* requirements for stating a claim under these provisions change depending on whether the plaintiff is alleging fraudulent conduct or unfair conduct. See, *e.g., In re Tobacco II Cases, 207 P.3d at 29-30* (differentiating between the "three varieties of unfair competition [under the UCL]: practices which are unlawful, unfair or fraudulent"); *Wrestlereunion, LLC v. Live Nation Television Holdings, Inc., 2008 U.S. Dist. LEXIS 61428, 2008 WL 3048859, at *3 (M.D. Fla. 2008)* (noting that claims under the Florida Act require plaintiffs to allege that defendants "engaged in unfair methods of competition, unconscionable acts or practices, *or* unfair or deceptive acts or practices" (emphasis added)); *Dalton v. Camp, 353 N.C. 647, 548 S.E.2d 704, 711 (N.C. 2001)* ("In order to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) defendant committed an unfair *or* deceptive act or practice" where "[a] practice is *unfair* if it is unethical or unscrupulous, and it is *deceptive* if it has a tendency to deceive." (emphasis added)). Here, Indirect Plaintiffs do not allege fraud or deception [see 521, at 21 ("[T]he CCAC does not allege any fraud on the part of defendants * * *.")], and thus need not plead deceptive **[*118]** or unconscionable conduct to state a claim under the consumer-protection laws of California, Florida, or North Carolina.

The outlier is the Arkansas Deceptive Trade Practices Act ("ADTPA"), which proscribes "unconscionable, false, or deceptive" business practices without reference to "unfair" business practices. See *Ark. Code § 4-88-107(a)(10)*. The ADTPA further notes that "[t]he deceptive and unconscionable trade practices listed in this section are in addition to and do not limit the types of *unfair* trade practices at common law or under *other statutes* of this state." *Id. § 4-88-107(b)* (emphasis added). Thus, claims under the ADTPA are limited to "instances of false representation, fraud, or the improper use of economic leverage in a trade transaction." *Universal Coops., Inc. v. AAC Flying Serv., Inc., 710 F.3d 790, 795-96 (8th Cir. 2013)*. The "improper use of economic leverage" prohibition is animated by the statute's proscription of "unconscionable" business practices, *id. at 795*, such that "allegations of price fixing * * * are not the kind of conduct prohibited under the[] statute[]." *In re Graphics Processing Units Antitrust Litig., 527 F. Supp. 2d 1011, 1030 (N.D. Cal. 2007)* (dismissing indirect purchasers' claims under the

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[13] Because the Court has already deemed Indirect Plaintiffs' monopolization claims dismissible on other grounds, the Court's finding regarding their ability to state a claim for monopolization is inconsequential, and the Court provides this ruling only for the sake of completeness.

ADTPA); see also *Universal Coops., 710 F.3d at 795* ("An 'unconscionable' act is an act that 'affront[s] the sense of justice, decency, or reasonableness." (citation omitted)). In other words, the Arkansas legislature has distanced **[*119]** the ADTPA from other state laws prohibiting unfair trade practices, reserving the ADTPA for fraudulent and unconscionable acts. Upon review of Indirect Plaintiffs' Consolidated Class Action Complaint, the Court agrees with Defendants that Indirect Plaintiffs failed to allege that Defendants' conduct "affronts the sense of justice, decency, or reasonableness" so as to rise to the level necessary to state a claim under the ADTPA.

Accordingly, Indirect Plaintiffs' failure to state price-fixing or monopolization claims under *Ark. Code § 4-88-107* provides an alternative ground for dismissal of those claims. And while Indirect Plaintiffs did state consumer-protection claims under California, Florida, and North Carolina law, this discussion is presented only in the interest of completeness as the Court has already dismissed those claims on other grounds.

VIII. Failure to State a Claim: Unjust Enrichment

The Court already concluded that all but two (Arkansas and Minnesota) of Plaintiffs' unjust enrichment claims are untenable in light of the Court's dismissal of the related antitrust claims on remoteness grounds, and the Court also found dismissal of all unjust enrichment claims appropriate under the filed-rate **[*120]** doctrine. The Court further noted that California law does not recognize a cause of action for unjust enrichment. See *Melchior, 131 Cal. Rptr. 2d at 357*. In addition to these grounds for dismissal, Plaintiffs fail to specify which states' laws, if any, give rise to their unjust enrichment claims, which presents another viable ground for dismissal. See, *e.g.,* *In re Refrigerant Compressors Antitrust Litig., 2013 U.S. Dist. LEXIS 50737, 2013 WL 1431756, at *23* (citing cases).

Defendants' two remaining alternative arguments for dismissal of Indirect Plaintiffs' unjust enrichment claims are less persuasive. First, Defendants argue that under Florida, Minnesota, New York, and North Carolina law, unjust enrichment is not available as an independent claim to a party with an adequate remedy at law.[14] Indirect Plaintiffs contend that they are entitled to plead in the alternative, see *Fed. R. Civ. P. 8(d)(2)*, and Defendants counter that "where the unjust enrichment claim relies upon the same factual predicates as a plaintiff's legal causes of action, it is not a true alternative theory of relief but rather is duplicative of those legal causes of action." *In re Ford Tailgate Litig., 2014 U.S. Dist. LEXIS 32287, 2014 WL 1007066, at *5 (N.D. Cal. Mar. 12, 2014)* (quoting *Licul v. Volkswagen Grp. of Am., Inc., 2013 U.S. Dist. LEXIS 171627, 2013 WL 6328734, at *7 (S.D. Fla. Dec. 5, 2013))*. While Defendants' argument shows promise, it is not a widely-accepted theory for dismissal at the motion-to-dismiss stage, and Defendants provide no support for its application under the **[*121]** states' laws at issue. Accordingly, the Court finds this argument to be premature at the pleading stage. See, *e.g.,* *In re Light Cigarettes Mktg. Sales Practices Litig., 751 F. Supp. 2d 183, 191-93 (D. Me. 2010)*.[15]

Second, Defendants argue that the antitrust statutes in Minnesota, New York, and North Carolina and the consumer-protection statutes in Arkansas and North Carolina limit a plaintiff's potential recovery to compensatory damages, making equitable relief unavailable. Although the parties' arguments lack depth and clarity on this issue, because Indirect Plaintiffs raised unjust enrichment as an independent claim (and not merely as a remedy), the Court interprets Defendants' argument as saying that Indirect Plaintiffs' unjust enrichment *claims* are barred based on the *remedies* available under certain state statutes. But as with Defendants' first argument, this argument **[*122]**

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[14] See, *e.g.,* *Bowleg v. Bowe, 502 So.2d 71, 72 (Fla. Dist. Ct. App. 1987)*; *ServiceMaster of St. Cloud v. GAB Business Servs., Inc., 544 N.W.2d 302, 305 (Minn. 1996)*; *Samiento v. World Yacht Inc., 10 N.Y.3d 70, 883 N.E.2d 990, 996, 854 N.Y.S.2d 83 (N.Y. 2008)*; *Jefferson Standard Life Ins. Co. v. Guilford Cnty., 225 N.C. 293, 34 S.E.2d 430, 434 (N.C. 1945)*.

[15] "Should plaintiffs ultimately be unable to recover under [an antitrust claim], it does not mean [that] a legal remedy was unavailable (thereby justifying an equitable remedy of unjust enrichment), but only that their claim lacks merit." *In re Ford Tailgate Litig., 2014 U.S. Dist. LEXIS 32287, 2014 WL 1007066, at *5*; see also *United States v. Bame, 721 F.3d 1025, 1030-32 (8th Cir. 2013)* (noting how Minnesota courts regularly dismiss unjust enrichment claims even where plaintiffs pursue legal and equitable claims in the alternative).

is also premature at the pleading stage, as Indirect Plaintiffs are entitled to plead in the alternative. See, *e.g., In re Chocolate Confectionary Antitrust Litig., 749 F. Supp. 2d 224, 237-42 (M.D. Pa. 2010)* (covering Minnesota, New York, and North Carolina law); see also *In re Cardizem CD Antitrust Litig., 105 F. Supp. 2d 618, 669 (E.D. Mich. 2000)* ("[C]ourts often award equitable remedies under common law claims for unjust enrichment in circumstances where claims based upon contract or other state law violations prove unsuccessful.").

IX. Schreiber Foods, Inc.

In their Consolidated Class Action Complaint, Indirect Plaintiffs (for the first time) inculpate Schreiber Foods, Inc. into their allegations, listing Schreiber as a "co-conspirator" in the price-fixing scheme. As a point of reference, Indirect Plaintiffs filed their Consolidated Class Action Complaint [483 (Feb. 25, 2014)] approximately six months before the Court granted Schreiber's motion for summary judgment [652 (Aug. 18, 2014)], dismissing Schreiber as a defendant in the Direct Purchaser action. Regardless, Indirect Plaintiffs have not sought to add Schreiber as an actual defendant in their action, and thus there is no need for the Court to address Indirect Plaintiffs' allegations against non-party Schreiber.

X. State Statutory Exemptions

Defendants argue that Indirect Plaintiffs' antitrust claims **[*123]** under New York and Kansas law are barred by express statutory exemptions. Again, the Court addresses these arguments only in the interest of completeness, having already dismissed these claims on other grounds.

A. New York Dairymen Exemption

The provision of New York's Donnelly Act that proscribes anticompetitive conduct contains an exemption for "cooperative associations, corporate or otherwise, of * * * dairymen * * * [and] to contracts, agreements or arrangements made by such associations," *N.Y. Gen. Bus. Law § 340(3)*, referred to as the "dairymen exemption." Defendants argue that they are a cooperative association of dairymen, and thus fall within the statute's exemption.

In crafting the dairymen exemption, the New York legislature "intended to duplicate Congress'[s] agricultural exemptions to the *Capper-Volstead Act* * * *, intend[ing] to exempt from the operation of the antitrust laws only legitimate activities and agreements." *Agritronics Corp. v. Nat'l Dairy Herd Ass'n, Inc., 914 F. Supp. 814, 827 (N.D.N.Y. 1996)*; see also *People v. Dairylea Coop., Inc., 114 Misc. 2d 421, 452 N.Y.S.2d 282, 286 (N.Y. Sup. Ct. 1982)* ("The exemption was intended to protect and permit dairy cooperative associations * * * to function as such without fear that doing so might be viewed as violating the statute * * * [and] was not intended to protect *carte blanche* an act otherwise criminal and outside of that limited **[*124]** area of exemption.").

In interpreting the exemption, New York's highest court deemed "[t]he language of the statutory exemption [to be] broad and unambiguous," affirming the dismissal of a complaint alleging "a violation of the Donnelly Act by means of an agreement or arrangement among dairymen's co-operatives and others involving the purchase and distribution of milk." *State v. Glen & Mohawk Milk Ass'n, Inc., 61 N.Y.2d 705, 460 N.E.2d 1091, 1093, 472 N.Y.S.2d 606 (N.Y. 1984)*. The court went on to say that this "legislative declaration, clear on its face, cannot be ignored." *Id.* Because of this exemption, "dairymen's co-operatives and those with whom they contract or agree [are] free from regulation under the Donnelly Act," and instead are subject to the "pervasive" regulatory scheme set forth in New York's Agriculture and Markets Law. *Id.*; see also *Margrove Inc. v. Upstate Milk Coop., Inc., 79 Misc. 2d 309, 357 N.Y.S.2d 392 (N.Y. Sup. Ct. 1974)*, *aff'd, sub nom. Margrove Inc. v. Wegman's Food Markets, Inc., 49 A.D.2d 669, 373 N.Y.S.2d 1014 (N.Y. App. Div. 1975)*.

While the Court finds the binding precedent from New York's highest court persuasive, the parties have not provided the Court with enough information to determine whether Defendants are, in whole or in part, members of a qualifying cooperative.[16] Moreover, the New York exemption is modeled after the federal *Capper-Volstead Act*,[17] but the parties have not provided any information about this Act or how interpretations of the Act impact **[*125]** Indirect Plaintiffs' claims here. While Defendants could ultimately prevail on this argument, the Court cannot resolve this issue at the motion-to-dismiss stage.

B. Kansas Dairymen Exemption

Similar to the New York exemption, the Kansas Restraint of Trade Act contains a dairymen exemption, stating that the Act "shall not be construed to apply to [a]ny association" organized under the state "cooperative marketing act" or "any association * * * governed by * * * the *Capper-Volstead act*." *Kan. Stat. Ann. §§ 50-163(e)(1)—(2)*.

First, Indirect Plaintiffs argue that this provision, which took effect in April 2013, does not apply retroactively to reach Defendants' 2004 through 2006 conduct. But the statute says that "*K.S.A. 2014 Supp. 50-163* * * * shall be applied retroactively to any choses in action premised on any provision of the Kansas restraint of trade **[*126]** act." *Kan. Stat. Ann. § 50-164*.

Second, Indirect Plaintiffs argue that the exemption should be read narrowly to avoid giving cooperatives a "free pass" when they engage in behavior that has nothing to do with the cooperative. Unlike its New York counterpart, however, the Kansas dairymen exemption is relatively new, and thus there is no case law interpreting the breadth of the exemption. Because of Kansas's harmonization provision, it would not be inappropriate for the Court to review federal case law interpreting the *Capper-Volstead Act* to determine the boundaries of the exemption. But again, the parties have not provided the Court with sufficient information regarding the contours of the *Capper-Volstead Act* or whether Defendants are a qualifying cooperative, making any attempt to undertake this analysis premature.

Finally, Defendants remark in a footnote that Indirect Plaintiffs failed to allege that Ms. Asmann purchased "articles imported into th[e] state" of Kansas, as required by the Kansas Restraint of Trade Act. *Kan. Stat. Ann. § 50-112*. Indirect Plaintiffs do not dispute this, but instead argue that they are entitled to discovery to determine the state of origin for Ms. Asmann's finished dairy products. Defendants disagree, arguing **[*127]** that because this is an affirmative element of the claim, Indirect Plaintiffs must allege it in their complaint. But at the pleading stage, "[s]pecific facts are not necessary; the statement need only give the defendant fair notice of what the * * * claim is and the grounds upon which it rests." *Erickson, 551 U.S. at 93*. Ms. Asmann accomplished that feat, and thus her claim is not dismissible on this ground.

XI. Motion to Intervene

Movants Timmy P. Tholp, Wayde R. Alright, Chelsey M. Penix, Amber Lambert, Lisa R. Murphy, and Toni O'Dell filed a motion to intervene [723], although without specifying whether the motion refers to the Direct Purchaser action (which has already settled) or the Indirect Purchaser action (which is now dismissed). Regardless, Movants' motion is denied.

First, Movants failed to meet the intervention standards in either *Rule 24(a)* (intervention of right) or *Rule 24(b)* (permissive intervention). To the former, Movants have no statutory right to intervention, and have not claimed an interest relating to the property or transaction that is the subject of either the direct or indirect action. To the latter, Movants have no conditional right to intervene by a federal statute, and do not share a claim or defense with

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[16] Indirect Plaintiffs admit in their complaint that DFA is a "vertically integrated cooperative of * * * raw milk producers," [483, ¶ 18], but this statement, standing alone, is insufficient to bring Defendants within the scope of the dairymen exemption.

[17] The *Capper-Volstead Act* provides protection for certain agricultural cooperatives, including dairymen, from federal ***antitrust law***. See, *e.g., Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384, 389, 88 S. Ct. 528, 19 L. Ed. 2d 621 (1967)*.

either **[*128]** the direct or indirect action. In short, Movants' motion lacks sufficient detail to apprise the Court of Movants' interest, or how it relates to this litigation.

Second, Movants fail to comply with *Federal Rule of Civil Procedure 24(c)*, which requires prospective intervenors to "state the grounds for intervention" in their motion, and to provide "a pleading that sets out the claim or defense for which intervention is sought." *Fed. R. Civ. P. 24(c)*. Movants fail on both accounts, stating no grounds (other than conclusory ones) for their intervention, and failing to attach the required pleading.

Third, to the extent that Movants were direct purchasers (which seems unlikely), their claims would be governed by the approved settlement in that action, to which Movants did not object. To the extent that Movants were indirect purchasers, their motion is moot in light of this opinion dismissing the Indirect Purchaser action.

Vague statements that potential intervenors "have a common vested interest" in the litigation or that they "will provide questions of laws [sic] and facts that are common" are insufficient to trigger intervention. [723.] Defendant Dairy Farmers of America refers to Movants as "serial filers of similar motions lacking merit," and **[*129]** cites to several cases across the country highlighting their "long and litigious history filing frivolous lawsuits in courts across the country," and other similar observations. [724 (citations omitted).] Based on the brevity and lack of substance in Movants' motion, it appears as though this may be another example of their infamous work. Regardless, their motion [723] fails to meet the criteria for intervention as laid out in the Federal Rules for Civil Procedure, and must be denied.

XII. Conclusion

The Court finds dismissal of each of Indirect Plaintiffs' claims to be appropriate on at least two separate grounds. Accordingly, and for the reasons stated herein, the Court grants Defendants' motion to dismiss Indirect Purchaser Plaintiffs' Consolidated Class Action Complaint [497]. In addition, putative Intervenors' motion to intervene [723] is denied.

Dated: June 29, 2015

/s/ Robert M. Dow, Jr.

Robert M. Dow, Jr.

United States District Judge

End of Document

InterDigital Tech. Corp. v. Pegatron Corp.

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

June 29, 2015, Decided; June 29, 2015, Filed

Case No. 15-CV-02584-LHK

Reporter
2015 U.S. Dist. LEXIS 85116 *; 2015 WL 3958257

INTERDIGITAL TECHNOLOGY CORPORATION, et al., Plaintiffs, v. PEGATRON CORPORATION, Defendant.

Subsequent History: Motion granted by *Interdigital Tech. Corp. v. Pegatron Corp., 2015 U.S. Dist. LEXIS 88806 (N.D. Cal., July 7, 2015)*

Motion granted by, Stay granted by *InterDigital Tech. Corp. v. Pegatron Corp., 2016 U.S. Dist. LEXIS 7441 (N.D. Cal., Jan. 20, 2016)*

Core Terms

injunction, anti-suit, forum selection clause, patents, provisions, preliminary injunction, parties, dispute resolution, Licensed, factors, arbitration, district court, exclusive jurisdiction, governing law, terms, temporary restraining order, instant case, enjoining, negotiate, forum selection, damages, disputes arising, argues, distribution agreement, disputes, courts, notice, obligations, mandatory, reasons

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Judges: LUCY H. KOH, United States District Judge.

Opinion by: LUCY H. KOH

Opinion

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Re: Dkt. No. 12

Before the Court is a motion for temporary restraining order and preliminary injunction filed by Plaintiffs InterDigital Technology Corporation, IPR Licensing, Inc., and InterDigital, **[*2]** Inc. (collectively, "Plaintiffs" or "InterDigital"). ECF No. 12 ("Motion"). InterDigital requests that the Court issue an anti-suit injunction prohibiting Defendant Pegatron Corporation ("Pegatron") from prosecuting or pursuing an action filed by Pegatron in Taiwan's Intellectual Property Court. *See* ECF No. 12; ECF No. 12-13 ("Proposed Order"). Having considered the submissions of the parties, the record in this case, and the relevant law, the Court hereby GRANTS InterDigital's Motion, for the reasons stated below.

I. BACKGROUND

A. Factual Background

Plaintiff InterDigital, Inc. is a Pennsylvania corporation having its principal place of business in Delaware. ECF No. 1 ("Compl.") ¶ 7. Plaintiffs InterDigital Technology Corporation and IPR Licensing, Inc. are both Delaware corporations having their principal place of business in Delaware, and each is a subsidiary of Plaintiff InterDigital, Inc. *Id.* ¶¶ 5-6; *id.*at 2 n.4. InterDigital contends it "develops fundamental wireless technologies that are at the core of mobile devices, networks, and services worldwide." *Id.* ¶ 1.

Defendant Pegatron is an electronics company based in Taipei, Taiwan "dedicated to the development and manufacture of computing devices, **[*3]** computer peripherals and components, and communications and consumer electronics." ECF No. 33 at 3. According to the Complaint, "Pegatron develops and manufactures various wireless communication devices, including certain smartphones for Apple, Inc., such as the iPhone 6." Compl. ¶ 8.

1. Patent License Agreement

In 2008, InterDigital and Pegatron signed a Patent License Agreement ("PLA").[1] ECF No. 10-2. Pursuant to the terms of the PLA, InterDigital granted Pegatron a worldwide license to a large portfolio of patents relating to wireless telecommunications technology. *See id.* The Vice President of InterDigital, Mr. Donald Boles, signed the agreement on behalf of the InterDigital entities on April 18, 2008. *Id.* at 17. The CEO and President of Pegatron, Mr. Jason Cheng, signed the agreement on behalf of Pegatron on April 30, 2008. *Id.*

The PLA contained two provisions relevant to the instant dispute: (1) **[*4]** a dispute resolution provision, and (2) a governing law and venue provision. Each is addressed in turn.

a. Dispute Resolution

Article VI of the PLA is titled "Dispute Resolution" and contains sections 5.1 and 5.2 which outline dispute resolution procedures for disputes arising under the PLA. Specifically, in the event of "a dispute arising under this Agreement," senior-level executives of each party shall meet in Wilmington, Delaware or another location to which the parties agree within sixty days after receiving written notice of the dispute. PLA at § 5.1. The parties are then to enter into "good faith" negotiations aimed at resolving the dispute. *Id.* If the parties are unable to resolve the dispute in a mutually satisfactory manner within sixty days following the meeting, then either party may submit the dispute to arbitration. *Id.* Under the arbitration provision, the arbitration is to occur in Washington, D.C., in English, before a panel of three arbitrators. *Id.* § 5.2. The parties have submitted prior disputes to arbitration pursuant to these provisions. *See, e.g., InterDigital Tech. Corp. v. Pegatron Corp.*, No. 13-MC-80087-EJD (N.D. Cal. June 24, 2013), ECF No. 9 (order confirming Arbitration Award in favor **[*5]** of InterDigital).

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[1] Much of the parties' briefing and accompanying exhibits was filed under seal. The Court will rule on the parties' administrative sealing motions by separate order. However, the facts revealed in the instant order, despite citing to documents the parties filed entirely under seal, are not sealable.

b. Governing Law and Venue

Section 6.10 of the PLA, titled "Governing Law/Venue," also provides that "[t]he validity and interpretation of this Agreement shall be governed by Delaware law, without regard to conflict of laws principles." PLA § 6.10. The section further provides that "[t]he Parties irrevocably consent to exclusive jurisdiction and venue of the state and federal courts in the San Jose Division of the United States District Court for the Northern District of California." *Id.*

2. Taiwan Proceedings

On February 3, 2015, Pegatron filed a lawsuit against InterDigital in Taiwan Intellectual Property Court. *Pegatron Corp. v. InterDigital Tech. Corp.*, 104-Min-Pu-Tze-No. 17. *See, e.g.*, ECF No. 10-6 ("Taiwan Action"). In the Taiwan Action, Pegatron alleged that the royalty rates and terms of the PLA violate the Taiwan Fair Trade Act. Specifically, Pegatron alleged that certain terms of the PLA were unlawful under Taiwanese law and identified the following obligations pursuant to the PLA as unlawful:

> [InterDigital] granting a license to Pegatron but refusing to even provide a full list of the Licensed Patents; and even if the Licensed Patents include the standard essential patents, as claimed by the defendants, **[*6]** the validity of such patents is doubtful, but [InterDigital] restricted Pegatron from challenging the patents' validity; there is no way to distinguish the standard essential patents from the non-standard essential patents; the scope and term of the Licensed Patents are unclear; [InterDigital] licensed standard essential patents with non-standard essential patents, which involving [sic] mandatory package licensing; [InterDigital] deprived Pegatron its basic right to terminate the PLA and to seek a reasonable legal remedy; and [InterDigital] refused to provide transparent transaction information.

Taiwan Action at 4. For relief, Pegatron sought to enjoin InterDigital from enforcing the terms of the PLA and, additionally, sought damages in excess of $52 million. *Id.* at 1.

On May 26, 2015, InterDigital was served with a copy of the Complaint in the Taiwan Action. ECF No. 10-13 ¶ 24. At that time, InterDigital first became aware that the Taiwan Court had already scheduled a hearing for the Taiwan Action two weeks later, on June 9, 2015. *Id.* ¶ 25. On the evening of May 26, InterDigital called the Taiwan Court, seeking an extension of the June 9 hearing. *Id.* The Taiwan Court agreed to reschedule the hearing from June **[*7]** 9, 2015 to July 7, 2015, even though InterDigital sought a longer extension.

The next day, on May 27, 2015, InterDigital sent a letter to Pegatron providing a Notice of Dispute under the PLA, demanding that Pegatron withdraw the Taiwan Action and initiate the senior-level meetings required pursuant to the dispute resolution provisions in the PLA. *Id.* ¶ 26. On June 1, 2015, Pegatron responded, refusing to withdraw the Taiwan Action and, similarly, refusing to engage in the protocol for dispute resolution outlined in the PLA. *Id.* ¶ 27. On June 5, 2015, InterDigital filed a demand for arbitration pursuant to the procedures outlined in the PLA. *Id.* ¶ 28.

B. Procedural History

On June 10, 2015, InterDigital filed its Complaint in the instant action. Compl. The gravamen of InterDigital's Complaint is that Pegatron's filing of the Taiwan Action constitutes a breach of the PLA. *See id.* For relief, InterDigital seeks (1) an anti-suit injunction, enjoining Pegatron from prosecuting the Taiwan Action, (2) specific performance requiring Pegatron to comply with the dispute resolution procedures outlined in the PLA, and (3) and order compelling arbitration of the parties' dispute pursuant to the provisions **[*8]** outlined in the PLA. *See id.*

On June 11, 2015, InterDigital filed the instant Motion seeking a temporary restraining order and the issuance of a preliminary anti-suit injunction, enjoining Pegatron from further prosecution of the Taiwan Action. ECF No. 12. Also on June 11, 2015, InterDigital filed an administrative motion to relate the instant case with either (a) the prior proceeding in this district before Judge Davila that had confirmed the award from the parties' prior arbitration or (b) a pending proceeding in this district before Judge Freeman where Asus and Asustek[2] sued InterDigital over a nearly identical license agreement. *See InterDigital Tech. Corp. v. Pegatron Corp.*, No. 13-MC-80087-EJD (N.D. Cal. June 11, 2015), ECF No. 17. On June 15, 2015, Judge Davila denied InterDigital's motion to relate the instant case to the case over which he previously presided. *See InterDigital Tech. Corp. v. Pegatron Corp.*, No. 13-MC-80087-EJD (N.D. Cal. June 15, 2015), ECF No. 19. Later that day, Judge Freeman also denied InterDigital's motion to relate the instant case to the case pending before her and involving a similar dispute between Asus, Asustek, and InterDigital. *Asus Computer Int'l* ***[*9]*** *v. InterDigital, Inc.*, No. 15-CV-1716-BLF (N.D. Cal. June 15, 2015), ECF No. 43. Accordingly, on June 15, 2015, this Court set a briefing schedule for the instant Motion. ECF No. 27. On June 22, 2015, Pegatron filed an opposition (ECF No. 33), and on June 24, 2015, InterDigital filed a reply (ECF No. 36).

II. LEGAL STANDARD

Preliminary relief is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. NRDC, Inc., 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)*. "A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Id. at 20*. The plaintiff bears the burden of proof on each element. *Klein v. San Clemente, 584 F.3d 1196, 1201 (9th Cir. 2009)*. "[T]he decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts," and "such discretion must be exercised consistent with traditional principles of equity." **[*10]** *eBay Inc. v. MercExchange, LLC, 547 U.S. 388, 394, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006)*.

However, the Ninth Circuit does not require a party to meet the "likelihood of success on the merits of the underlying claim to obtain an anti-suit injunction." *E&J Gallo Winery v. Andina Licores S.A., 446 F.3d 984, 991 (9th Cir. 2006)*. Rather, a party "need only demonstrate that the factors specific to an anti-suit injunction weigh in favor of granting the injunction." *Id.* Specifically, "a district court, in evaluating a request for an anti-suit injunction, must determine (1) whether or not the parties and the issues are the same, and whether or not the first action is dispositive of the action to be enjoined; (2) whether the foreign litigation would frustrate a policy of the forum issuing the injunction; and (3) whether the impact on comity would be tolerable." *Applied Med. Distrib. Corp. v. Surgical Co. BV, 587 F.3d 909, 913 (9th Cir. 2009)* (citing *Gallo, 446 F.3d at 991, 994)*. "The [anti-suit] injunction operates in personam: the American court enjoins the claimant, not the foreign court." *Gallo, 446 F.3d at 989*.

III. DISCUSSION

A. Anti-Suit Injunction Factors

InterDigital argues that each of the anti-suit injunction factors weighs in favor of an anti-suit injunction in this case. ECF No. 12 at 10-14. Pegatron argues that each weighs against an anti-suit injunction in this case. ECF No. 33 at 7-13. Each of the factors is addressed in turn.

1. Similarity of the issues[3]

[2] In 2008, Asustek was the parent company of Pegatron. *See InterDigital Tech. Corp. v. Pegatron Corp.*, No. 13-MC-80087-EJD (N.D. Cal. June 11, 2015), ECF No. 17 at 1.

[3] Neither party **[*11]** disputes that the parties in the instant case are identical to the parties in the Taiwan Action. *See* ECF No. 12 at 10; ECF No. 33 at 8. In the instant case, the plaintiffs are three InterDigital entities, and the defendant is Pegatron. *See*

InterDigital argues that the issues in the instant case are the same as those in the Taiwan Action. ECF No. 13 at 10-11. Specifically, InterDigital contends that Pegatron's Taiwan Action seeks (a) to enjoin InterDigital from enforcing the terms of the PLA and (b) a refund of past royalty payments made by Pegatron to InterDigital pursuant to the PLA. *Id.* Because the dispute arises under obligations imposed by the PLA, InterDigital contends the dispute should be handled by the dispute resolution mechanisms in the PLA or by this Court pursuant to the forum selection clause. *Id.* Pegatron responds that the issues are different because the Taiwan Action "presents the question of whether InterDigital's market position and conduct amount to a violation . . . under **[*12]** Taiwanese law." ECF No. 33 at 9. The Taiwan Action therefore arises under Taiwanese law, argues Pegatron, and does not arise under the PLA for purposes of the arbitration provision. *Id.* Pegatron also argues that the instant case, involving the enforcement of the venue and arbitration clauses of the PLA, is not dispositive of any issue, let alone all issues, raised in the Taiwan Action. *Id.* at 10. For the reasons explained below, this Court agrees with InterDigital.

"In cases like this where the parties are the same, whether [1] the issues are the same and [2] the first action [is] dispositive of the action to be enjoined are interrelated requirements; that is, to the extent the domestic action is capable of disposing of all the issues in the foreign action and all the issues in the foreign action fall under the forum selection clause, the issues are meaningfully 'the same.'" *Applied, 587 F.3d at 915*. The issues need not be "precisely and verbally identical," and instead "the crux of the functional inquiry . . . is to determine whether the issues are the same in the sense that all the issues in the foreign action fall under the forum selection clause and can be resolved in the local action." *Id.* The Court finds the **[*13]** Ninth Circuit's decisions in *Gallo* and *Applied* instructive. In both cases, the district court had denied an anti-suit injunction, and in both cases, the Ninth Circuit reversed the district court for an abuse of discretion.

In *Gallo*, California winemaker Gallo entered a distribution agreement with Ecuadorian alcohol distributor Andina Licores. *446 F.3d at 987*. The distribution agreement contained forum selection and choice-of-law clauses in favor of California. *Id.* Andina filed suit in Ecuador under an Ecuadorian law that was intended to protect Ecuadorians who entered into distribution agreements with foreign entities. *Id.* Gallo then filed suit in California and sought an anti-suit injunction restraining Andina from pursuing the action in Ecuador. *Id. at 987-88*. The district court denied Gallo's request for an anti-suit injunction primarily because the claims arose under different laws—one under California law and the other under Ecuadorian law. *Id. at 991*. In reversing, the Ninth Circuit determined (1) the issues were the same because both arose out of the parties' obligations under the distribution agreement, (2) the parties' agreement provided that such disputes were to be exclusively resolved in California, and (3) California courts **[*14]** could resolve any lingering issues of Ecuadorian law. *See id.* The Ninth Circuit rejected Andina's argument that the issues were not the same, holding: "First, it is not clear that Andina has claims under Ecuadorian law, as the contract contains a choice-of-law clause in favor of California. Second, to the degree that Ecuadorian law does apply, federal courts are capable of applying it to Andina's claims." *Id.*

Similarly, in *Applied*, Applied entered a distribution agreement with BV ("Surgical"), a Netherlands company. *587 F.3d at 911*. The distribution agreement contained forum selection and choice-of-law clauses in favor of California. *Id.* ("This Agreement shall be governed by and construed under the laws of the State of California. The federal and state courts within the State of California shall have exclusive jurisdiction to adjudicate any dispute arising out of this Agreement."). A dispute arose between Applied and Surgical when Applied sought to terminate the distribution agreement pursuant to the terms of the agreement. *Id. at 912*. Applied filed a declaratory judgment action in the Central District of California, while Surgical filed suit in Belgium seeking protection and compensation under Belgian law. **[*15]** *Id.* Applied sought an anti-suit injunction from the California court enjoining Surgical from pursuing relief in Belgium or any other non-California forum. *Id.* The district court denied Applied's request for an anti-suit injunction, determining that the Belgium claims were "potentially broader" than the claims under consideration by the district court. *Id. at 913*. The Ninth Circuit reversed and held that the district court action "is dispositive of the Belgian action because all of the claims in the Belgian action arise out of the Agreement, are subject to the forum selection clause, and therefore must be disposed of in the California forum if at all." *Id. at 916* (internal quotation omitted). The Ninth Circuit rejected Surgical's argument that the Belgian claims were broader than the claims at

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Compl. In the Taiwan Action, Pegatron is the plaintiff, and the same three InterDigital entities are defendants. *See* Taiwan Action at 1. The Court, therefore, focuses its analysis on the similarity of the issues.

issue in federal district court because Surgical's Belgian claims sought damages that occur only as a result of obligations imposed upon the parties by the distribution agreement. *Id. at 916-17* (finding none of Surgical's Belgian claims "could arise but for the termination of the agreement."). As discussed below, the Court finds the instant case analogous to *Gallo* and *Applied*.

a. Taiwan Action arises under the PLA

In the **[*16]** instant case, Pegatron's Taiwan Action arises solely because of the parties' obligations pursuant to the PLA. The Taiwan Action alleges that the terms of the PLA and the obligations imposed therefrom violate the antitrust laws of Taiwan. Specifically, the Taiwan Action alleges that the terms of the PLA impose the following, allegedly unlawful, obligations:

> [InterDigital] granting a license to Pegatron but refusing to even provide a full list of the Licensed Patents; and even if the Licensed Patents include the standard essential patents, as claimed by the defendants, the validity of such patents is doubtful, but [InterDigital] restricted Pegatron from challenging the patents' validity; there is no way to distinguish the standard essential patents from the non-standard essential patents; the scope and term of the Licensed Patents are unclear; [InterDigital] licensed standard essential patents with non-standard essential patents, which involving [sic] mandatory package licensing; [InterDigital] deprived Pegatron its basic right to terminate the PLA and to seek a reasonable legal remedy; and [InterDigital] refused to provide transparent transaction information.

Taiwan Action at 1, 4. In the Taiwan Action, Pegatron **[*17]** seeks (a) to enjoin InterDigital from "enforcing Article 3.1 of the [PLA] which was entered into with Pegatron in April 2008" and (b) to recover damages in excess of $52 million because Pegatron alleges to have "paid exorbitant royalties for more than 100,000,000 units of its Licensed Products" "[a]fter Pegatron entered into the PLA in 2008 and performed its obligation in accordance with the PLA until the end of 2014." *Id.* at 1-2, 5. The causes of action alleged in the Taiwan Action arise out of the parties' obligations pursuant to the PLA, refer to specific provisions of the PLA, attach as an exhibit to the complaint a copy of the PLA, and involve a dispute over the alleged illegality under Taiwanese law of various provisions of the PLA. *See generally id.* Accordingly, the Court determines that the Taiwan Action arises under the PLA.

b. The dispute resolution, governing law, and forum selection provisions of the PLA govern

The dispute resolution, governing law, and forum selection provisions outlined in the PLA govern disputes arising under the PLA, such as this one, and vest this Court with exclusive jurisdiction over disputes arising under the PLA. The dispute resolution provisions[4] of the PLA provide **[*18]** that: "In the event of a dispute arising under [the PLA]," the terms of the PLA require that the parties first attempt to negotiate the dispute. PLA § 5.1. InterDigital sought to do that here (ECF No. 10-10), and Pegatron refused (ECF No. 10-11). If negotiation fails, the dispute resolution provisions of the PLA further provide that either party may then choose to submit the dispute to binding arbitration. *Id.* § 5.2. Again, InterDigital sought to do that here. ECF No. 10-12.

Further, the forum selection clause[5] of the PLA provides that the parties have "irrevocably consent[ed] to exclusive jurisdiction and venue of the state and federal courts in the San Jose Division of the United States District Court for the Northern District of California." *Id.* § 6.10. Although the governing law provision contained within § 6.10 expressly provides that disputes about the "validity and interpretation" of the PLA are governed by Delaware law, the forum selection clause is not expressly limited to disputes about the "validity and interpretation" of the PLA. *See id.* Instead, the forum selection clause vests the federal and state courts in San Jose, **[*19]** California with "exclusive jurisdiction" over the parties. Nor is the forum selection clause expressly limited to disputes arising under

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[4] By referring to "dispute resolution provisions," the Court is referring to Sections 5.1 and 5.2 of the PLA.

[5] The forum selection clause of the PLA is contained within section 6.10 and provides: "The Parties irrevocably consent to exclusive jurisdiction and venue of the state and federal courts in the San Jose Division of the United States District Court for the Northern District of California." PLA § 6.10.

the PLA, unlike the dispute resolution provisions. Compare PLA §§ 5.1, 5.2 with § 6.10. The Court does not, and need not, decide the outer bounds of the parties' forum selection clause at this juncture because the Court's determination that the Taiwan Action "arises under" the PLA and concerns the validity and interpretation of the PLA sufficiently resolves the issue of whether the Taiwan Action was filed in violation of the dispute resolution and forum selection provisions of the PLA.

Moreover, the governing law provision[6] of the PLA provides that "[t]he validity and interpretation of [the PLA] shall be governed by Delaware law." PLA § 6.10. Here, as was the case with the Andina's foreign claims in *Gallo*, it is not clear that Pegatron even has claims under Taiwanese law, because the contract contains a choice-of-law **[*20]** clause in favor of Delaware. *See* Gallo, 446 F.3d at 991. If Pegatron does have such claims, however, either an arbitration panel or a court in San Jose is capable of applying Taiwanese law to Pegatron's claims. *See id.* Accordingly, the issues before the Taiwan Court and this Court are the same, and the parties have agreed to the exclusive jurisdiction of state and federal courts in San Jose.

c. Pegatron's remaining arguments

Pegatron offers two remaining arguments as to why the issues in the Taiwan Action are not similar to those in the instant action: (1) the term "arising under" in the arbitration provision of the PLA should be construed narrowly, and (2) the dispute resolution and forum selection provisions were drafted by, and should be construed against, InterDigital. Each is addressed in turn.

Pegatron's first argument is that the language "arising under" in the dispute resolution provisions of the PLA should be construed pursuant to federal law, which construes this term narrowly. ECF No. 33 at **[*21]** 8-9 (citing Mediterranean Enterprises, Inc. v. Ssangyong Corp., 708 F.2d 1458, 1464 (9th Cir. 1983), and Tracer Research Corp. v. National Envtl. Servs. Co., 42 F.3d 1292, 1295 (9th Cir. 1994)). The authority relied upon by Pegatron provides that the scope of mandatory arbitration provisions are governed by federal law, even if the remainder of the contract is governed by state law. When so construed, argues Pegatron, its claims under Taiwanese law are not claims "arising under" the PLA and therefore are not subject to mandatory arbitration. InterDigital responds that the interpretation of the PLA is governed by Delaware law, which gives "arising under" a broad scope. ECF No. 34 at 2-3 (citing BAYPO Ltd. P'ship v. Tech. JV, LP, 940 A.2d 20, 21, 23 (Del. Ch. 2007) (finding "arising under" language to be "broadly worded")). The Court agrees with InterDigital for the reasons explained below.

Even if Pegatron were correct[7] that "arising under" should be construed narrowly for purposes of the arbitration provision, it would not change this Court's conclusion that the forum selection clause, independently, vests this Court with "exclusive jurisdiction" over the parties' dispute, and as such, warrants an anti-suit injunction in this case. First, Pegatron's cited authorities only hold that federal law governs the interpretation of the scope of arbitration provisions. *See* Tracer, 42 F.3d at 1295; Mediterranean, 708 F.2d at 1464. Pegatron's cited authorities do not

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[6] The governing law provision of the PLA is contained within section 6.10 and provides: "The validity and interpretation of this Agreement shall be governed by Delaware law, without regard to conflict of laws principles." PLA § 6.10.

[7] The Federal Arbitration Act "creates a body of federal substantive law of arbitrability that requires a healthy regard for the federal policy favoring arbitration and preempts state law to the contrary." Farrow v. Fujitsu Am., Inc., 37 F. Supp. 3d 1115, 1119 (N.D. Cal. 2014) (citing Volt Information Sciences v. Board of Trustees,489 U.S. 468, 475-79, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989). Less clear is whether the interpretation of the arbitration provision is subject to interpretation under state or federal law. "When deciding whether the parties agreed to arbitrate a certain **[*23]** matter, courts generally apply ordinary state law principles of contract interpretation." Farrow, 37 F. Supp. 3d at 1119 (citing First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995)). Thus, in determining whether parties have agreed to arbitrate a dispute, the court applies "general state-law principles of contract interpretation, while giving due regard to the federal policy in favor of arbitration by resolving ambiguities as to the scope of arbitration in favor of arbitration." Mundi v. Union Sec. Life Ins. Co., 555 F.3d 1042, 1044 (9th Cir. 2009) (quoting Wagner v. Stratton Oakmont, Inc., 83 F.3d 1046, 1049 (9th Cir. 1996)). The Court does not, and need not, decide at this juncture whether the Taiwanese claims are subject to mandatory arbitration pursuant to the arbitration provision of the PLA.

address forum selection **[*22]** clauses. Moreover, Pegatron's argument ignores the fact that the PLA's governing law provision expressly provides that the validity and interpretation of the PLA, which includes the forum selection clause, shall be governed by Delaware law. *See* PLA § 6.10. The validity and interpretation of the PLA is exactly what Pegatron seeks to challenge in the Taiwan Action. *See* Taiwan Action. Thus, Pegatron may not have claims under Taiwanese ***antitrust law*** in light of the PLA's Delaware governing law provision. *See* PLA § 6.10. Finally, even if federal law interprets "arising under" narrowly, that term appears nowhere in the forum selection clause. *Id.* The forum selection clause is not limited to disputes "arising under" the PLA and broadly vests courts in San Jose with "exclusive jurisdiction" over the parties. *See id.*

Pegatron's second argument is that InterDigital drafted the dispute resolution provisions and that Pegatron did not believe these provisions would apply to disputes arising under Taiwanese law. *See* ECF No. 33 at 9. InterDigital responds that the PLA was heavily negotiated, not unilaterally drafted by one side, and that it was Pegatron who insisted that the courts in San Jose, California, rather than Delaware, have exclusive jurisdiction over disputes concerning the validity and interpretation of the PLA. ECF No. 36 at 4. The Court finds Pegatron's argument unpersuasive. Pegatron was neither forced to license **[*24]** InterDigital's patents, nor was Pegatron required to agree to the terms contained in the PLA. Furthermore, Pegatron insisted that the courts of San Jose, California, not Delaware, have "exclusive jurisdiction" over disputes arising under the agreement. *See* ECF No. 32-6 ¶ 14. That Pegatron was able to negotiate changes in the forum selection clause demonstrates that the PLA was the result of arms-length negotiations and was not a contract of adhesion. Moreover, Pegatron's CEO and President executed the PLA, assenting to the terms contained therein, which included the dispute resolution, governing law, and forum selection provisions. PLA at 17.

d. Summary

For the reasons stated above, the Court determines that the Taiwan Action involves a dispute arising under the PLA and, therefore, is subject to the dispute resolution and forum selection provisions vesting this Court with "exclusive jurisdiction" over such disputes. Therefore, the present action is dispositive of the Taiwan Action because all the claims in the Taiwan Action arise out of the PLA, are subject to the dispute resolution and forum selection provisions of the PLA, and therefore must be disposed of in accordance with the terms of the **[*25]** PLA—which does not permit litigating the validity of the PLA under Taiwanese ***antitrust law*** in a Taiwanese court. Thus, the first prong of the anti-suit injunction factors has been satisfied, and the Court will now turn to the next factor.

2. Frustration of this forum's policy

The second anti-suit injunction factor is "whether the foreign litigation would frustrate a policy of the forum issuing the injunction." *Applied, 587 F.3d at 913*. The Ninth Circuit has repeatedly stressed the "strong policy favoring robust forum selection clauses." *Id. at 918-19*; *Gallo, 446 F.3d at 992-93*. This is because "[f]orum selection clauses are increasingly used in international business." *Gallo, 446 F.3d at 992*. "When included in freely negotiated commercial contracts, they enhance certainty, allow parties to choose the regulation of their contract, and enable transaction costs to be reflected accurately in the transaction price." *Id.* The primacy of forum selection clauses requires this Court to enforce such provisions "absent strong reasons to set them aside." *Id.* "Although a foreign court might eventually agree that a forum selection clause controls, there is no guarantee that such a resolution would be reached in a timely fashion or at all, and this uncertainty would impair the parties' **[*26]** ability to enforce a forum selection clause." *Applied, 587 F.3d at 919*. Thus, "[a]nti-suit injunctions may be the only viable way to effectuate valid forum selection clauses." *Id.*

Pegatron argues that the Taiwan Action does not "arise under" the PLA because the Taiwan Action arises under Taiwanese law and therefore is not subject to the dispute resolution, governing law, or forum selection provisions of the PLA. ECF No. 33 at 11-12. The Ninth Circuit has previously rejected similar arguments. For example, in *Applied*, Surgical "argue[d] that the Belgian action does not frustrate California policy to enforce forum selection clauses because the Belgian claims arise out of the Belgian Act, not out of the Agreement, and therefore are not subject to the Agreement's forum selection clause." *587 F.3d at 919*. As explained above, however, this Court has determined that Pegatron's Taiwan Action arises under the PLA. Accordingly, here, as in *Applied*, "[a]ny continuation of the [foreign] action denigrates the integrity of the parties' prior written commitment that disputes concerning the Agreement would be litigated in California." *Id. at 919*. Accordingly, the Court concludes that this forum's strong policy in favor of enforcing forum selection clauses would **[*27]** be frustrated absent an anti-suit injunction.

3. Impact on comity

The third, and final, anti-suit injunction factor requires "determining 'whether the impact on comity would be tolerable.'" *Id. at 919* (quoting *Gallo, 446 F.3d at 994*).

The Court determines that an anti-suit injunction in the instant case would not have an intolerable impact on comity. In the instant case, there is no public international issue raised in this case. The Taiwan Action is a civil action between two private parties, Pegatron and InterDigital, involving a dispute concerning their obligations arising under their private agreement. The facts of this case are analogous with the facts in *Gallo* and *Applied*. "[W]here there is no public international issue raised, a foreign government is not involved in the litigation, and the litigation involves private parties concerning disputes arising out of a contract, not only would an anti-suit injunction not have an intolerable impact on comity, but allowing foreign suits to proceed in such circumstances would seriously *harm* international comity." *Applied, 587 F.3d at 921* (citing *Gallo, 446 F.3d at 994*). Here, as in *Gallo* and *Applied*, an anti-suit injunction would not have an intolerable impact on comity.

B. Remaining Preliminary Injunction Factors

The law **[*28]** in the Ninth Circuit is unclear whether a movant seeking an anti-suit injunction must only establish the presence of the three anti-suit injunction factors addressed above, or whether the movant must also establish the remaining traditional factors for a preliminary injunction. For example, in each of the Ninth Circuit's recent anti-suit injunction decisions, the Ninth Circuit *only* addressed the three anti-suit injunction factors. *See Microsoft Corp. v. Motorola, Inc., 696 F.3d 872, 881 (9th Cir. 2012)*; *Applied, 587 F.3d at 913*; *Gallo, 446 F.3d at 990-91*. In each, upon finding that the anti-suit injunction factors were satisfied, the Ninth Circuit either affirmed an anti-suit injunction or reversed the denial of an anti-suit injunction without addressing any of the remaining preliminary injunction factors. *See Microsoft, 696 F.3d at 889* (affirming issuance of anti-suit injunction); *Applied, 587 F.3d at 921* (holding that the anti-suit injunction factors were met and reversing and remanding to the district court "to order an anti-suit injunction"); *Gallo, 446 F.3d at 990-91* (holding that anti-suit injunction factors were met and reversing and remanding "to the district court with instructions to enter a preliminary injunction barring Andina from proceeding with litigation in Ecuador"). This Court is not the only court to recognize the uncertainty in the Ninth Circuit's case **[*29]** law. *See, e.g., Zynga, Inc. v. Vostu USA, Inc., 816 F. Supp. 2d 824, 828 n.4 (N.D. Cal. 2011)* ("It is arguably unclear from the Ninth Circuit case law whether the three anti-suit injunction factors replace all four *Winter* preliminary injunction factors, or whether they replace only the requirement that the movant show a likelihood of success on the merits on the underlying claim."). Moreover, courts in this district have imposed anti-suit injunctions without finding the remaining *Winter* factors to have been satisfied. *See, e.g., Gilbane Federal v. United Infrastructure Projects FZCO, No. 14-CV-3254-VC, 2014 U.S. Dist. LEXIS 135841, 2014 WL 4950011 (N.D. Cal. Sept. 24, 2014)*; *Oracle Am., Inc. v. Myriad Grp. AG, No. 10-CV-5604-SBA, 2012 U.S. Dist. LEXIS 5050, 2012 WL 146364 (N.D. Cal. Jan. 17, 2012)*. Regardless, in the instant case, the remaining preliminary injunction factors weigh in favor of an anti-suit injunction. Each is addressed in turn.

1. Irreparable harm

InterDigital argues that it will be irreparably harmed if forced to litigate the Taiwan Action because InterDigital will be (a) foreclosed from enforcing its contractual rights, (b) saddled with legal fees and potential damage to its reputation, and (c) forced to quickly litigate the Taiwan Action based on Pegatron's refusal to permit reasonable extension requests. ECF No. 13 at 14-15; ECF No. 36 at 1-2. Pegatron responds that economic injuries, such as legal fees, are not traditionally considered irreparable and that **[*30]** InterDigital's conclusory allegation that it "may" suffer reputational damages is also insufficient to establish irreparable harm. ECF No. 33 at 14-15. The Court agrees with InterDigital, for the reasons explained below.

The Court is persuaded that InterDigital would be irreparably harmed if foreclosed from enforcing a valid forum selection clause and that there is an absence of a legal remedy for such harm. As the Ninth Circuit has held: "Anti-suit injunctions *may be the only viable way* to effectuate valid forum selection clauses." *Applied, 587 F.3d at 919* (emphasis added). This is because "[a]lthough a forum court might eventually agree that a forum selection clause controls, there is no guarantee that such a resolution would be reached in a timely fashion or at all, and this uncertainty would impair the parties' ability to enforce a forum selection clause." *Id.* Were this Court to conclude otherwise, cautioned the Ninth Circuit, "[t]he potential implications for international commerce are considerable." *Id.* (quoting *Gallo, 446 F.3d at 992*). Similarly, "allowing simultaneous prosecution of the same action in a foreign forum thousands of miles away would result in 'inequitable hardship.'" *Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League, 652 F.2d 852, 855 (9th Cir. 1981)* (quoting *In re Unterweser Reederei Gmbh, 428 F.2d 888, 896 (5th Cir. 1970))*. Because the Court concludes that the inability **[*31]** to enforce a valid forum selection clause constitutes irreparable harm in this case, the Court need not consider whether InterDigital's other alleged harms, independently, constitute irreparable harm sufficient to warrant the issuance of a preliminary injunction.

2. Balance of the equities

The balance of the equities weighs in favor of InterDigital, and accordingly, in favor of an anti-suit injunction. In 2008, InterDigital negotiated and entered into a contract with Pegatron. *See generally* PLA. This contract imposed obligations upon the parties including the licensing of patents and the payments of royalties. *Id.* at §§ 2.1, 3.1. For disputes arising under the agreement, the parties expressly agreed to submit disputes arising under the agreement first to mandatory negotiation, then optional arbitration, and finally to the "exclusive jurisdiction" of the state and federal courts in San Jose, California. *Id.* at § 6.10. The parties further agreed that Delaware law shall be the "governing law" of the contract. *Id.*

Fast-forward seven years, to 2015, and Pegatron files suit in Taiwan arguing that, under Taiwanese ***antitrust law***, the terms of the PLA (to which Pegatron voluntarily agreed in 2008) are invalid **[*32]** and unenforceable, and that Pegatron is entitled to recover damages from InterDigital. *See generally* Taiwan Action. Further, Pegatron waits until May 26, 2015 to serve the Taiwanese complaint on InterDigital, even though the complaint was filed in February 2015 and a preliminary hearing was set for June 9, 2015. ECF No. 10-13 ¶¶ 24, 25. When InterDigital sought to negotiate the dispute with Pegatron, pursuant to the terms of the PLA, Pegatron refused and insisted on proceeding in the Taiwan Action, notwithstanding the provisions of the PLA requiring mandatory negotiation and vesting the San Jose courts with exclusive jurisdiction over the PLA. ECF Nos. 10-10, 10-11, 10-13 ¶ 27; PLA §§ 5.1, 5.2, 6.10.

Moreover, were the Court to impose an anti-suit injunction it would not work any hardship on Pegatron. Taiwanese law would allow Pegatron to seek a dismissal of the Taiwan Action without prejudice. See ECF No. 36-1 at ¶¶ 8-9. Therefore, Pegatron would not be required to simply default and accept an adverse determination on the merits in Taiwanese court. *See id.*

In sum, the balance of the equities weighs in InterDigital's favor, and the Court will now address the public interest factor.

3. Public interest [*33]

When an injunction will impact non-parties and has the potential to impact the public, the public interest is relevant. *See Stormans, Inc. v. Selecky, 586 F.3d 1109, 1139 (9th Cir. 2009)*. By contrast, "[w]hen the reach of an injunction is narrow, limited only to the parties, and has no impact on non-parties, the public interest will be at most a neutral factor in the analysis rather than one that favors granting or denying the preliminary injunction." *Id. at 1138-39* (quoting *Bernhardt v. L.A. Cnty., 339 F.3d 920, 931 (9th Cir. 2003))* (internal quotations marks and brackets omitted). The Court finds that, under the circumstances presented, the reach of the injunction is narrow and limited to the parties. Therefore, the public interest is at most a neutral factor.

4. Summary

For the reasons explained above, InterDigital has satisfied its burden to establish the three *Gallo* factors for an anti-suit injunction. The Court further determines that the remaining *Winter* factors support preliminary injunctive relief in this case.

C. Relief

Having determined that an anti-suit injunction is warranted in this case, the Court will now address the proper remedy.

1. Temporary Restraining Order vs. Preliminary Injunction

InterDigital originally sought an *ex parte* temporary restraining order and an order to show cause why a preliminary injunction **[*34]** should not issue. *See* ECF No. 12. Applications for a temporary restraining order may be issued without notice to the opposing party. *See* *Fed. R. Civ. P. 65(b)(1)*. Because InterDigital filed its application on June 11, 2015, and the first hearing in the Taiwan Action is scheduled for July 7, 2015, the Court declined to issue an *ex parte* TRO without providing notice to Pegatron and instead allowed Pegatron an opportunity to respond. ECF No. 27. Accordingly, the Court set a briefing schedule and set the matter for hearing on June 30, 2015. *Id.*

When an adverse party has been served with an application for a temporary restraining order, and has been provided an opportunity to respond, this Court has discretion to treat the motion for temporary restraining order as a motion for a preliminary injunction. "When the opposing party actually receives notice of the application for a restraining order, the procedure that is followed does not differ functionally from that on an application for a preliminary injunction and the proceeding is not subject to any special requirements." *See, e.g.*, Wright & Miller, *Federal Practice and Procedure* § 2951 (3d ed.). "[I]t is appropriate to treat a non-ex parte motion for a temporary restraining **[*35]** order and preliminary injunction as a motion for a preliminary injunction." *Klinke v. Bannister, No. 12-CV-00032, 2013 U.S. Dist. LEXIS 165156 at *11, 2013 WL 6120437, at *4 (D. Nev. Nov. 20, 2013)*. This is because the standards for a temporary restraining order mirror that for a preliminary injunction. *See* *Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co., Inc., 240 F.3d 832, 839 n. 7 (9th Cir. 2001)*.

In the instant case, the Court exercises its discretion to conclude that a preliminary injunction, as opposed to a temporary restraining order followed by additional briefing regarding the propriety of a preliminary injunction, is the proper course. Further factual development is unnecessary. The Court has before it the PLA, the Taiwan Action, and the parties' arguments regarding each of the preliminary injunction factors. Accordingly, the Court will grant a preliminary anit-suit injunction.

2. Bond

The Court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the Court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. *Fed. R. Civ. P. 65(c)*. Notwithstanding the seemingly mandatory language, "the district court may dispense with the filing of a bond when it concludes there is no realistic likelihood of harm to the defendant from enjoining his or her conduct." *Johnson v. Couturier, 572 F.3d 1067, 1086 (9th Cir. 2009)*.

Pegatron argues, in a **[*36]** footnote, that "Pegatron would be damaged as a result of a TRO" and that InterDigital should be required to give security "in an amount that the court considers proper to pay the costs and damages sustained by Pegatron if the TRO is later found to have wrongly issued." ECF No. 33 at 16 n.9. However, Pegatron has identified no harm it will suffer as a result of a TRO, and has neither quantified nor articulated any damages. The Court is not convinced that any damages exist for the following two reasons. First, as explained above, the governing law provision in the PLA casts doubt on whether Pegatron has any rights under Taiwanese law regarding the validity of the PLA. Second, if the Court were to order Pegatron to dismiss the Taiwan Action, Pegatron may seek a voluntary dismissal that will have no res judicata effect. *See* ECF No. 36-1. Even if this Court's order granting a preliminary anti-suit injunction was later reversed, Pegatron has identified no negative consequences to its ability to reinstitute its Taiwan Action. Accordingly, the Court finds there is no likelihood of harm to Pegatron should the preliminary injunction be later found to have issued in error. Thus, the Court will **[*37]** not impose a bond.

IV. CONCLUSION

For the foregoing reasons, it is hereby ORDERED that Plaintiffs' motion for an anti-suit injunction is GRANTED pursuant to *Federal Rule of Civil Procedure 65*. It is hereby ORDERED that Pegatron shall:

1. immediately take steps to dismiss the Taiwan Action;
2. provide Plaintiffs with written notice of each step taken to carry out this order, as well as notice of any action taken by the court in Taiwan, within twenty-four hours of such steps or notice; and
3. not, directly or indirectly, initiate any other action or proceeding that arises under the parties' PLA, except those permitted by Sections 5.1, 5.2, and 6.10 of the PLA.

IT IS SO ORDERED.

Dated: June 29, 2015

/s/ Lucy H. Koh

LUCY H. KOH

United States District Judge

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Ward v. Apple Inc.

United States Court of Appeals for the Ninth Circuit

January 16, 2015, Argued and Submitted, San Francisco California; June 29, 2015, Filed

No. 12-17805

Reporter

791 F.3d 1041 *; 2015 U.S. App. LEXIS 11065 **; 2015-2 Trade Cas. (CCH) P79,226; 91 Fed. R. Serv. 3d (Callaghan) 2031

ZACK WARD; THOMAS BUCHAR, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants, v. APPLE INC., Defendant-Appellee.

Subsequent History: Summary judgment granted, in part, summary judgment denied, in part by *Ward v. Apple Inc., 2017 U.S. Dist. LEXIS 41897, 2017 WL 1075049 (N.D. Cal., Mar. 22, 2017)*

Class certification denied by *Ward v. Apple Inc., 2018 U.S. Dist. LEXIS 26040, 2018 WL 934544 (N.D. Cal., Feb. 16, 2018)*

Prior History: [1]** Appeal from the United States District Court for the Northern District of California. D.C. No. 4:12-cv-05404-YGR. Yvonne Gonzalez Rogers, District Judge, Presiding.

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

Disposition: REVERSED AND REMANDED.

Core Terms

Apple, district court, parties, antitrust, Plaintiffs', joined, protected interest, co-conspirator, arbitration, necessary party, impaired, appellate jurisdiction, iPhone, joint tort feasor, absent party, reasons, involuntary, contends, voluntary dismissal, implicate, conspiracy, customers, unlock, tribe, compel arbitration, final decision, data services, general rule, proceedings, monopolize

LexisNexis® Headnotes

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN1[] **Appellate Jurisdiction, Final Judgment Rule**

A court of appeals has appellate jurisdiction under *28 U.S.C.S. § 1291* over an appeal from a final decision of the district court.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Adverse Determinations

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Civil Procedure > ... > Voluntary Dismissals > Court Order > Dismissal With Prejudice

Civil Procedure > Dismissal > Voluntary Dismissals > Appellate Review

Civil Procedure > Settlements > Effect of Agreements

HN2[] **Reviewability of Lower Court Decisions, Adverse Determinations**

Voluntary dismissals with prejudice that produce an adverse final judgment may be appealed. It is true that the U.S. Court of Appeals for the Ninth Circuit's decision in Seidman v. City of Beverly Hills contains broad language stating that a plaintiff may not appeal a voluntary dismissal because it is not an involuntary adverse judgment against him. However, the Ninth Circuit's decision in Concha v. London clarifies that a plaintiff may appeal from a voluntary dismissal with prejudice, at least where the plaintiff is not acting pursuant to a settlement agreement intended to terminate the litigation. In doing so, Concha specifically interprets Seidman to stand for the narrower principle that a plaintiff may not appeal from a joint stipulation to voluntary dismissal, entered unconditionally by the court pursuant to a settlement agreement. And absent a settlement, a stipulation alone does not destroy the adversity required for appellate jurisdiction.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Adverse Determinations

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Civil Procedure > ... > Voluntary Dismissals > Court Order > Dismissal With Prejudice

Civil Procedure > Dismissal > Voluntary Dismissals > Appellate Review

Civil Procedure > ... > Voluntary Dismissals > Court Order > Dismissal Without Prejudice

HN3[] **Reviewability of Lower Court Decisions, Adverse Determinations**

In construing its statutory jurisdiction, the U.S. Court of Appeals for the Ninth Circuit has consistently used the term "adverse" to refer to whether a judgment was prejudicial to a party, not whether the parties took sufficiently adverse positions. The appealability of a voluntary dismissal ordinarily depends on whether the action was dismissed with or without prejudice. The basic principle is that the plaintiff may appeal a voluntary dismissal only when it is with prejudice to his right to commence another action for the same cause or otherwise subjects him to prejudicial terms or conditions. A voluntary dismissal without prejudice is not adverse to the plaintiff's interests because the plaintiff is free to seek an adjudication of the same issue at another time in the same or another forum. By contrast, a voluntary dismissal with prejudice is adverse to the plaintiff's interests because the plaintiff submits to a judgment that serves to bar his claims forever.

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

HN4[] **Reviewability of Lower Court Decisions, Preservation for Review**

A party who fails to assert a waiver argument on appeal forfeits—and therefore implicitly waives—that argument.

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

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

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

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

HN5[] **Standards of Review, Abuse of Discretion**

A court of appeals reviews a district court's decision to dismiss for failure to join an indispensable party for abuse of discretion. However, to the extent that the district court's determination whether a party's interest is impaired involves a question of law, the court of appeals reviews de novo.

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

HN6[] **Compulsory Joinder, Necessary Parties**

Under *Fed. R. Civ. P. 19*, a "required party" must be joined as a party in an action if doing so is "feasible." *Fed. R. Civ. P. 19*. *Rule 19(a)(1)* defines "required party," and establishes two broad categories of required parties. First, under *Rule 19(a)(1)(A)*, a party is required if in that person's absence, the court cannot accord complete relief among existing parties. Second, under *Rule 19(a)(1)(B)*, a party is required if that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

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

HN7[] **Compulsory Joinder, Necessary Parties**

According to *Fed. R. Civ. P. 19*'s text, two conditions must be satisfied for a party to qualify as a "required party" under *Rule 19(a)(1)(B)*. First, the party must claim an interest relating to the subject of the action. *Fed. R. Civ. P. 19(a)(1)(B)*. Second, the party must be so situated that disposing of the action in the person's absence may have one of the two consequences enumerated in *Rule 19(a)(1)(B)(i)* and *(a)(1)(B)(ii)*. There must either be a possibility that disposing of the action in the person's absence will as a practical matter impair or impede the person's ability to protect the interest, or a possibility that doing so will leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

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

Torts > Procedural Matters > Multiple Defendants > General Overview

Torts > Procedural Matters > Commencement & Prosecution > General Overview

HN8[] **Compulsory Joinder, Necessary Parties**

Although the allegation that an entity is a joint tortfeasor with the defendant does not mean the entity must be joined in one action under *Fed. R. Civ. P. 19(a)(1)(A)*, there may be circumstances in which an alleged joint tortfeasor has particular interests that cannot be protected in a legal action unless it is joined under *Rule 19(a)(1)(B)*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Torts > Procedural Matters > Commencement & Prosecution > General Overview

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

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

Antitrust & Trade Law > Procedural Matters

HN9[] **Monopolies & Monopolization, Conspiracy to Monopolize**

It is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit. A tortfeasor with the usual "joint-and-several" liability is merely a permissive party to an action against another with like liability. Antitrust conspirators are liable for the acts of their co-conspirators. It therefore follows that a plaintiff is not required to sue all of the alleged conspirators inasmuch as antitrust co-conspirators are jointly and severally liable for all damages caused by the conspiracy. In a suit to enjoin a conspiracy not all the conspirators are necessary parties.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

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

Antitrust & Trade Law > Procedural Matters

HN10[] **Monopolies & Monopolization, Conspiracy to Monopolize**

An absent antitrust co-conspirator generally will not be a required party under *Fed. R. Civ. P. 19(a)(1)(A)*, which applies only when a party's absence prevents the court from according complete relief among existing parties. It does not follow, however, that an absent antitrust co-conspirator cannot be a required party under *Rule 19(a)(1)(B)(i)*, the purpose of which is to protect the interests of absent parties. Stated differently, an absent party's role as a joint tortfeasor does not preclude it from having an interest in the action that warrants protection. Under some circumstances, the equitable relief sought in an action may make an absent party required under *Rule 19(a)(1)(B)(i)*. All parties who may be affected by a suit to set aside a contract must be present.

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

Torts > Procedural Matters > Commencement & Prosecution > General Overview

HN11[] **Compulsory Joinder, Necessary Parties**

In any *Fed. R Civ. P. 19(a)(1)(B)* case, deciding whether an absent joint tortfeasor is a required party requires identifying the specific interest the absent party claims and determining whether the party's ability to protect that interest may be impaired despite the fact that it has not been named as a party in the action.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

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

Antitrust & Trade Law > Procedural Matters

HN12[] Monopolies & Monopolization, Conspiracy to Monopolize

In many cases, an absent antitrust co-conspirator will not have interests that warrant protection under Fed. R. Civ. P. 19(a)(1)(B)(i), even if it is alleged to have played a central role in the conspiracy, and even if resolution of the action will require the court to evaluate the absent party's conduct. Therefore, it is essential that courts identify the specific legally protected interests an absent joint tortfeasor claims, and assess how those interests may be impaired when, as a non-party, the outcome of the action will not bind the absent party in future proceedings.

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

HN13[] Compulsory Joinder, Necessary Parties

Joinder is contingent upon an initial requirement that the absent party claim a legally protected interest relating to the subject matter of the action.

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

HN14[] Compulsory Joinder, Necessary Parties

Only "legally protected" interests warrant protection under Fed. R. Civ. P. 19. A crucial premise of mandatory joinder is that the absent party possesses an interest in the pending litigation that is "legally protected." The U.S. Court of Appeals for the Ninth Circuit has offered little guidance regarding which interests warrant legal protection under Rule 19. The interest at stake need not be property in the sense of the Due Process Clause. And the court of appeals has required that the interest be more than a financial stake, and more than speculation about a future event. Within the wide boundaries set by these general principles, the court of appeals has emphasized the "practical" and "fact-specific" nature of the inquiry.

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

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

HN15[] Compulsory Joinder, Indispensable Parties

The U.S. Court of Appeals for the Ninth Circuit has been reluctant to recognize legally protected interests for purposes of Fed. R. Civ. P. 19 based solely on speculation about the occurrence of a future event. Speculation about the occurrence of a future event ordinarily does not render all parties potentially affected by that future event necessary or indispensable parties under Rule 19.

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

HN16[] Compulsory Joinder, Necessary Parties

The U.S. Court of Appeals for the Ninth Circuit is aware of no cases holding that a joint tortfeasor's reputational interests alone may make it a required party under Fed. R. Civ. P. 19(a). A joint tortfeasor's reputation generally will be adversely impacted in any case accusing it of wrongdoing. For this reason, recognizing a protected interest in business reputation would significantly erode the general rule that a plaintiff need not join all joint tortfeasors in one action. Recognizing such an interest would also conflict with the court's precedents holding that a protected interest under Rule 19 must be more than a financial stake.

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

Contracts Law > Procedural Matters

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

HN17[] **Compulsory Joinder, Indispensable Parties**

For purposes of *Fed. R. Civ. P. 19*, under some circumstances, an absent party's contract rights may give it a legally protected interest in an action. For instance, it is well established that all parties to a contract are necessary in an action to set aside the contract. Also, an absent party may be required in an action seeking equitable relief that would prevent a defendant from fulfilling "substantial" contractual obligations to the absent party. It is a fundamental principle that a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract. The U.S. Court of Appeals for the Ninth Circuit has not, however, held that an absent party is always required when the relief sought in an action merely implicates an absent party's contract rights. An interest that arises from terms in bargained contracts may be protected.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN18[] **Estoppel, Collateral Estoppel**

Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

Summary:

SUMMARY*

Antitrust/Appellate Jurisdiction

The panel reversed the district court's dismissal of an antitrust action for failure to join an alleged co-conspirator as a defendant.

Plaintiffs filed a putative class action against Apple, Inc., alleging that Apple conspired with AT&T Mobility (ATTM) to violate federal ***antitrust law*** in connection with Apple's agreement with ATTM that ATTM would be the exclusive provider of voice and data services for Apple's iPhone. The district court dismissed plaintiffs' claims under *Federal Rule of Civil Procedure 19* for failure to join ATTM as a defendant.

The panel held that it had jurisdiction under *28 U.S.C. § 1291* over plaintiffs' appeal from a final decision of the district court even though the current case, *Apple III*, had been consolidated with another case, *Apple II*, in which the district court had dismissed a voice and data aftermarket monopolization claim for failure to join ATTM as a **[**2]** party. The panel held that even though the parties in *Apple III* had stipulated to submit the *Apple II* briefs on

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

the *Rule 19* issue and had agreed that the district court should grant Apple's motion to dismiss if it decided to follow the decision in *Apple II*, the district court's judgment was adverse to plaintiffs and thus appealable.

On the merits, the panel held that the district court abused its discretion in finding that ATTM, an alleged antitrust coconspirator, was a necessary party under *Rule 19*. The panel held that although the allegation that an entity is a joint tortfeasor with the defendant does not mean the entity must be joined in one action under *Rule 19(a)(1)(A)*, there may be circumstances in which an alleged joint tortfeasor has particular interests that cannot be protected in a legal action unless it is joined under *Rule 19(a)(1)(B)*. The panel concluded that ATTM was not a required party under *Rule 19(a)(1)(A)*, but the district court abused its discretion by failing to identify ATTM's interests in this action, or address how those interests, if any, might be impaired if this action were resolved in its absence, as required by *Rule 19(a)(1)(B)*. In addition, the record did not disclose whether ATTM had an interest that was entitled to protection under **[**3]** *Rule 19*. The panel remanded the case to the district court for further proceedings.

Dissenting, Judge Wallace wrote that the court of appeals lacked statutory appellate jurisdiction because the district court's decision was not involuntary or adverse to plaintiffs. He wrote that even if the court had statutory jurisdiction, he would conclude that plaintiffs waived the *Rule 19* issue by inviting the district court to adopt the very analysis they argued against on appeal.

Counsel: Mark C. Rifkin (argued), Alexander H. Schmidt, and Michael Liskow, Wolf Haldenstein Adler Freeman & Herz LLP, New York, New York; Francis M. Gregorek and Rachele R. Rickert, Wolf Haldenstein Adler Freeman & Herz LLP, San Diego, California; Randall S. Newman, Randall S. Newman P.C., New York, New York, for Plaintiff-Appellant Zack Ward.

Adam J. Levitt, Grant & Eisenhofer P.A., Chicago, Illinois, for Plaintiff-Appellant Thomas Buchar.

Daniel M. Wall (argued) and Christopher S. Yates, Latham & Watkins LLP, San Francisco, California; J. Scott Ballenger and Roman Martinez, Latham & Watkins LLP, Washington, D.C., for Defendant-Appellee.

Judges: Before: J. Clifford Wallace, Milan D. Smith, Jr., and Michelle T. Friedland, Circuit Judges. Opinion by Judge **[**4]** Milan D. Smith, Jr.; Dissent by Judge Wallace.

Opinion by: Milan D. Smith, Jr.

Opinion

[*1043] **M. SMITH**, Circuit Judge:

Zack Ward and Thomas Buchar (Plaintiffs) filed a putative class action against Apple Inc. (Apple), alleging that Apple conspired with AT&T Mobility (ATTM) to violate federal antitrust laws. The Plaintiffs' claims relate to Apple's exclusivity agreement with ATTM that ATTM would be the exclusive provider of voice and data services for Apple's iPhone. The Plaintiffs appeal from the district court's order dismissing their claims under *Federal Rule of Civil Procedure 19* for failure to join ATTM as a defendant.

In this opinion, we consider the contours of the general rule that antitrust co-conspirators need not be joined in one action. The Plaintiffs argue that the district court's determination that ATTM was a required party under *Rule 19* runs counter to this rule. The Plaintiffs also contend that, even if ATTM could otherwise qualify as a required party, Apple has not shown that ATTM actually asserts any interests in this action, or that its interests warrant protection under *Rule 19*.

We reverse the district court's judgment, and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

This appeal is from the third of three related putative **[**5]** class actions asserting antitrust claims against Apple in connection with its exclusivity agreement (Exclusivity Agreement) with ATTM.

I. Antitrust Allegations

Apple began selling the iPhone in June of 2007. Apple entered into an agreement with ATTM that ATTM would be the exclusive provider of voice and data services for the iPhone for five years. The Plaintiffs allege that Apple installed "software **[*1044]** locks" on each iPhone it sold in order to enforce ATTM's exclusivity. These locks prevented ATTM customers who used iPhones from switching to voice and data services providers who competed with ATTM. The Plaintiffs allege that they were not informed that they would be locked into ATTM's services for five years. They further allege that the Exclusivity Agreement enabled ATTM to charge supra-competitive prices for wireless services, and that Apple shared in ATTM's revenues pursuant to the Exclusivity Agreement.

II. *Apple I*

Nine Apple customers filed putative class actions against Apple and ATTM in the Northern District of California in the summer and fall of 2007. These actions were consolidated before Judge Ware as *In re Apple AT&TM Anti-Trust Litigation*, No. 5:07-cv-05152-JW (N.D. Cal.) (*Apple* ***[**6]*** *I*). The plaintiffs in *Apple I* asserted claims under *§ 2* of the Sherman Act, *15 U.S.C. § 2*, among other claims.

In 2008 and 2009, the district court denied motions by Apple and ATTM to dismiss the plaintiffs' antitrust claims. The district court certified a class on July 8, 2010.

ATTM sought to compel arbitration pursuant to an agreement it entered into with its wireless customers. The district court denied the motion, citing the then-applicable *Discover Bank* rule. *596 F. Supp. 2d 1288, 1297-99 (N.D. Cal. 2008)* (citing *Discover Bank v. Superior Court, 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (2005)* (holding that, under some circumstances, class action waivers in consumer arbitration agreements are unconscionable)). In 2011, following the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)*, which abrogated *Discover Bank,* ATTM renewed its motion to compel arbitration. Apple also moved to compel arbitration under ATTM's agreement.

The district court granted both ATTM's and Apple's motions to compel arbitration. *826 F. Supp. 2d 1168, 1179 (N.D. Cal. 2011)*. It held that because the plaintiffs asserted claims arising out of their agreements with ATTM, which contained arbitration clauses, the plaintiffs were "equitably estopped" from refusing to arbitrate "jointly" against ATTM and Apple. *Id. at 1178-79*.

III. *Apple II*

In 2011 and 2012, two new groups of Apple customers filed class action complaints in the Northern **[**7]** District of California. These actions were consolidated by Judge Ware as *In re Apple iPhone Antitrust Litigation*, No. 4:11-cv-06714-YGR (N.D. Cal.) (*Apple II*). The consolidated complaint in *Apple II* alleged antitrust claims that were similar to the claims in *Apple I*. However, unlike in *Apple I*, ATTM was not named as a defendant in *Apple II*. Apple moved to compel arbitration on the same grounds it asserted in *Apple I*. The district court denied Apple's motion, finding that the plaintiffs were not equitably estopped from refusing to arbitrate their claims against Apple. Unlike the *Apple I* plaintiffs, the court reasoned, the *Apple II* plaintiffs had pled their claims against Apple alone, without "intertwining" them with ATTM's wireless service agreement. *874 F. Supp. 2d 889, 898-99 (N.D. Cal. 2012)*.

Apple also sought dismissal under *Rule 12(b)(7)*, arguing that ATTM was a required party under *Rule 19*. *Id. at 899*. In support of its motion, Apple submitted a declaration from ATTM's counsel from the *Apple I* litigation. The declaration stated, in pertinent part:

> ATTM is aware of this litigation . . . . ATTM has an interest in this case, since **[*1045]** the Consolidated Complaint alleges that ATTM is a monopolist and makes various allegations regarding the service ATTM provides **[**8]** to ATTM customers using iPhones . . . . However, ATTM has not intervened in this suit because, given the ruling in [*Apple I*], any such claims must be arbitrated. If ATTM were to be joined to this litigation, ATTM would move to compel arbitration . . . .

In response, the district court held that ATTM was a necessary party. The court reasoned:

> [I]n order to evaluate Plaintiffs' antitrust claims in regard to the alleged conspiracy to monopolize the alleged iPhone Voice and Data Services Aftermarket, the Court will be required to evaluate ATTM's conduct, insofar as Plaintiffs allege, *inter alia*, that ATTM unlawfully achieved market power in that Aftermarket due to the conspiracy and thereby foreclosed other companies from entering the market. . . . Such an evaluation of ATTM's conduct would necessarily implicate the interests of ATTM, which means that ATTM is a necessary party pursuant to *Rule 19(a)*.

Id. at 900 (citing *Laker Airways, Inc. v. British Airways, PLC, 182 F.3d 843, 847-48 (11th Cir. 1999))*. The district court ordered that the claim relating to monopolization of the voice and data aftermarket be dropped if ATTM was not joined. *See id. at 902 n.29*. Shortly thereafter, *Apple II* was reassigned to Judge Yvonne Gonzalez Rogers. The plaintiffs declined to join ATTM as a party in their amended complaint, **[**9]** which resulted in the dismissal of their voice and data aftermarket monopolization claim.

IV. *Apple III*

On October 19, 2012, the present Plaintiffs initiated this putative class action against Apple in *Ward v. Apple Inc.*, 4:12-cv-05404-YGR (N.D. Cal.) (*Apple III*), asserting a single claim that Apple conspired to monopolize the aftermarket for iPhone voice and data services. ATTM was not named as a defendant. The case was consolidated with *Apple II*. The parties in *Apple III* stipulated to submit the *Apple II* briefs on the *Rule 19* issue, and agreed that the district court should grant Apple's motion to dismiss under *Rule 12(b)(7)* if the court decided to follow Judge Ware's decision in *Apple II*. The district court granted the motion "for the reasons set forth in Judge Ware's July 11, 2012 Order," and entered judgment in favor of Apple. The Plaintiffs filed a timely notice of appeal.

JURISDICTION AND STANDARD OF REVIEW

HN1[] We have appellate jurisdiction under *28 U.S.C. § 1291* because this is an appeal from a final decision of the district court. We respectfully disagree with the dissent's conclusion that the judgment below was not "adverse" to the Plaintiffs, as our case law has defined that term.

The dissent contends that we "only" **[**10]** have jurisdiction over appeals from final decisions of the district court that are "involuntary and adverse to the appellant." This statement of our law is too broad. We have repeatedly recognized that ***HN2***[] voluntary dismissals with prejudice that produce an adverse final judgment may be appealed. *See Berger v. Home Depot USA, Inc., 741 F.3d 1061, 1065 (9th Cir. 2014)*; *Concha v. London, 62 F.3d 1493, 1506-09 (9th Cir. 1995)*; *Unioil, Inc. v. E.F. Hutton & Co., 809 F.2d 548, 556 (9th Cir. 1986)*; *Coursen v. A.H. Robins Co., 764 F.2d 1329, 1342*, *corrected*, *773 F.2d 1049 (9th Cir. 1985)*. It is true that our decision in *Seidman v. City of Beverly Hills, 785 F.2d 1447, 1448 (9th Cir. 1986)*, contained broad language stating that "[a] plaintiff may not appeal a voluntary dismissal because it is not an involuntary **[*1046]** adverse judgment against him." However, our decision in *Concha v. London* clarified that a plaintiff "may appeal from a voluntary dismissal with prejudice, at least where the plaintiff is not acting pursuant to a settlement agreement intended to terminate the litigation." *62 F.3d at 1507* (emphasis omitted). In doing so, *Concha* specifically interpreted *Seidman* to stand for the narrower principle that a plaintiff may not "appeal from a joint stipulation to voluntary dismissal, entered unconditionally by the court *pursuant to a settlement agreement." Id.* (emphasis added). And, as the dissent acknowledges, we held in *Berger v. Home Depot USA, Inc.* that "absent a settlement, a stipulation alone does not destroy [the] adversity" required **[**11]** for appellate jurisdiction. *741 F.3d at 1065*.

The dissent's conclusion that this judgment was not adverse to the Plaintiffs appears to be based, in part, on a definition of "adverse" that is without basis in our case law concerning statutory appellate jurisdiction. The dissent contends that a judgment is not adverse if "no adverse positions were taken by the parties" or if the issue was not "actually litigated." The dissent appears to understand "adverse" to refer to whether the proceedings were sufficiently adversarial. Of course, parties must be sufficiently adverse to one another for a justiciable controversy to exist, *see, e.g., United States v. Johnson, 319 U.S. 302, 304-05, 63 S. Ct. 1075, 87 L. Ed. 1413 (1943)*, but we do not understand the dissent to argue that this appeal is non-justiciable because it lacks sufficient adversity for Article III purposes, but rather only that we lack statutory appellate jurisdiction. ***HN3***[] In construing our statutory jurisdiction, we have consistently used the term "adverse" to refer to whether a judgment was prejudicial to a party, not whether the parties took sufficiently adverse positions. For example, in *Concha v. London* we explained that

> [u]nder *Coursen* and *Unioil*, the appealability of a voluntary dismissal ordinarily depends on whether the action was **[**12]** dismissed with or without prejudice. The basic principle we follow is that the plaintiff may appeal a voluntary dismissal only when it is with prejudice to his right to commence another action for the same cause or otherwise subjects him to prejudicial terms or conditions.

62 F.3d at 1507. We went on to explain that "[a] voluntary dismissal without prejudice is not adverse to the plaintiff's interests . . . [because] [t]he plaintiff is free to seek an adjudication of the same issue at another time in the same or another forum." *Id.* By contrast, a voluntary dismissal with prejudice is adverse to the plaintiff's interests because "the plaintiff submits to a judgment that serves to bar his claims forever." *Id.* The judgment in this case is adverse to the Plaintiffs because it bars their claims in future proceedings. The requirement of an adverse judgment is therefore not a barrier to appellate jurisdiction in this case.

Reading between the lines, the dissent appears to be concerned that the parties effectively agreed with Judge Rogers to manufacture appellate jurisdiction without presenting the *Rule 19* issue to her for an independent decision. But the record simply does not compel the conclusion that Judge Rogers **[**13]** did not make an independent decision here. The dissent infers from the record that Judge Rogers "understood that the Plaintiffs were not asking her to rule on the merits of the *Rule 19* issue, but rather were attempting only to create a vehicle for appellate review of Judge Ware's order . . . ." (emphasis omitted). However, the Amended Joint Case Management Statement clearly presented the *Rule 19* issue as a decision for Judge Rogers to make:

> **[*1047]** For the sake of efficiency, Plaintiffs have proposed submitting to the Court the prior briefing on Apple's Motion to Dismiss Plaintiffs' Consolidated Complaint in the related case, *In re Apple iPhone Antitrust Litigation* . . . . Should the Court decide to issue the same ruling in this case . . . . Plaintiffs will stand on their existing complaint and not add ATTM as a party. Therefore any such dismissal will become final and immediately appealable to the Ninth Circuit Court of Appeals.

At the subsequent case management conference, Judge Rogers stated:

> [I]t sounds like the issues that you're asking me to decide on both sides have already been decided, so I don't know why we're going through this process again. I don't know why we have another complaint that doesn't include **[**14]** as a defendant AT&T, which . . . Judge Ware told you you needed to have as a . . . party to the litigation.

The dissent interprets these comments to mean that Judge Rogers was "confused" initially about the "unusual procedure" proposed by the parties. But Judge Rogers's comments could also be interpreted to mean that she had analyzed the issue and was inclined to issue the same ruling as Judge Ware. In deciding whether to dismiss the case, Judge Rogers had the benefit of the *Apple II* briefing. By signing the order dismissing the case with prejudice "for the reasons set forth in Judge Ware's July 12, 2012 Order," Judge Rogers issued a final decision on the merits. This was sufficient to give us appellate jurisdiction to review the decision.[1]

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[1] As for the dissent's conclusion that the Plaintiffs waived the *Rule 19* issue by "inviting Judge Rogers to adopt the very analysis that they now allege on appeal was erroneous," we note that Apple has not asserted a waiver argument. *See United States v.*

In sum, because we find that the judgment below was the product of a final decision of the district court and was adverse **[**15]** to the Plaintiffs, we are satisfied that we have statutory jurisdiction.

HN5[] We review the district court's decision to dismiss for failure to join an indispensable party for abuse of discretion. *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 276 F.3d 1150, 1154 (9th Cir. 2002)*. However, "[t]o the extent that the district court's determination whether a party's interest is impaired involves a question of law, we review de novo." *Id.* (quoting *Pit River Home & Agric. Coop. Ass'n v. United States, 30 F.3d 1088, 1098 (9th Cir. 1994))*.

DISCUSSION

The Plaintiffs argue, on several grounds, that the district court abused its discretion in finding that ATTM was a necessary party under *Rule 19*. The Plaintiffs contend that the district court's decision runs counter to the general rule that joint tortfeasors need not be joined in one action. The Plaintiffs also assert that Apple has not shown that ATTM claims any interest in this action because ATTM has stated that it would seek to compel arbitration if joined, and because ATTM has no contracts with Apple that might be affected by this litigation. The Plaintiffs further argue that, even if ATTM has claimed an interest in this action, Apple has not shown that ATTM's interests are "legally protected," or that they may be impaired by resolution of this action in ATTM's absence. Therefore, the Plaintiffs contend, it was error for the **[**16]** district court to find that ATTM was a necessary party based on its alleged role in the conspiracy without first specifying which legally protected interests **[*1048]** ATTM had in the action. We address these arguments in turn.

I. Joinder of Joint Tortfeasors under Rule 19

HN6[] Under *Rule 19*, a "required party" must be joined as a party in an action if doing so is "feasible." *Fed. R. Civ. P. 19*. *Rule 19(a)(1)* defines "required party," and establishes two broad categories of required parties. First, under *Rule 19(a)(1)(A)*, a party is required if "in that person's absence, the court cannot accord complete relief among existing parties." Second, under *Rule 19(a)(1)(B)*, a party is required if:

> that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

HN7[] According to *Rule 19*'s text, two conditions must be satisfied for a party to qualify as a "required party" under *Rule 19(a)(1)(B)*. First, the party must "claim[] an interest relating to the subject of the action." *Fed. R. Civ. P. 19(a)(1)(B)*. Second, the party **[**17]** must be "so situated that disposing of the action in the person's absence" may have one of the two consequences enumerated in *Rule 19(a)(1)(B)(i)* and *(a)(1)(B)(ii)*. There must either be a possibility that disposing of the action in the person's absence will "as a practical matter impair or impede the person's ability to protect the interest," or a possibility that doing so will "leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest."

The Plaintiffs argue that the district court's decision runs counter to the longstanding principle that joint tortfeasors need not be joined in one action. For the reasons that follow, we conclude that ***HN8***[] although the allegation that an entity is a joint tortfeasor with the defendant does not mean the entity must be joined in one action under *Rule 19(a)(1)(A)*, there may be circumstances in which an alleged joint tortfeasor has particular interests that cannot be protected in a legal action unless it is joined under *Rule 19(a)(1)(B)*. We therefore need to analyze the facts of this case to determine whether ATTM is a required party in this action under *Rule 19(a)(1)(B)*.

Scott, 705 F.3d 410, 415 (9th Cir. 2012) (***HN4***[] "A party who fails to assert a waiver argument forfeits—and therefore implicitly waives—that argument.").

"It has long been the rule that ***HN9***[] it is not necessary for all joint tortfeasors **[**18]** to be named as defendants in a single lawsuit." *Temple v. Synthes Corp., 498 U.S. 5, 7, 111 S. Ct. 315, 112 L. Ed. 2d 263 (1990)* (per curiam); *see also* *Fed. R. Civ. P. 19* advisory committee's note to 1966 amend. (noting that "a tortfeasor with the usual 'joint-and-several' liability is merely a permissive party to an action against another with like liability"). Antitrust conspirators are liable for the acts of their co-conspirators. *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 253-54, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*; *Beltz Travel Serv., Inc. v. Int'l Air Transp. Ass'n, 620 F.2d 1360, 1367 (9th Cir. 1980)*. It therefore follows that a plaintiff is "not required to sue all of the alleged conspirators inasmuch as antitrust co-conspirators are jointly and severally liable for all damages caused by the conspiracy." *William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., Inc., 668 F.2d 1014, 1053 (9th Cir. 1982)*; *see also* *Lawlor v. Nat'l Screen Serv. Corp., 349 U.S. 322, 330, 75 S. Ct. 865, 99 L. Ed. 1122 (1955)* (holding that joinder of alleged antitrust co-conspirators was not mandatory "since as joint tort-feasors they were not indispensable parties"); *Georgia v. Penn. R.R., 324 U.S. 439, 463, 65 S. Ct.* **[*1049]** *716, 89 L. Ed. 1051 (1945)* ("In a suit to enjoin a conspiracy not all the conspirators are necessary parties . . . .").

For this reason, ***HN10***[] an absent antitrust co-conspirator generally will not be a required party under *Rule 19(a)(1)(A)*, which applies only when a party's absence prevents the court from "accord[ing] complete relief among existing parties." This case, for example, illustrates why according complete relief will usually be possible without joining an absent co-conspirator like ATTM. If the Plaintiffs prevail, they will be able to **[**19]** recover all of their damages from Apple alone, *see* *Socony-Vacuum, 310 U.S. at 253-54*, without naming ATTM as a party. Accordingly, ATTM is not a required party under *Rule 19(a)(1)(A)*.

It does not follow, however, that an absent antitrust co-conspirator like ATTM cannot be a required party under *Rule 19(a)(1)(B)(i)*, the purpose of which is to protect the interests of absent parties. Stated differently, an absent party's role as a joint tortfeasor does not preclude it from having an interest in the action that warrants protection. *See* *Home Buyers Warranty Corp. v. Hanna, 750 F.3d 427, 433-34 (4th Cir. 2014)*; *Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 105-06 (C.D. Cal. 1971)* (acknowledging the general rule that "antitrust co-conspirators need not be joined," but observing that "[i]n the present case, [the co-conspirator's] status as a joint tortfeasor would not as a practical matter negate its status as a contractual party, with interests that are covered by *Rule 19(a)*"), *aff'd*, *461 F.2d 1261 (9th Cir. 1972)* (per curiam). It is true that ATTM does not face any damages exposure in this action. But our cases have made it clear that, under some circumstances, the equitable relief sought in an action may make an absent party required under *Rule 19(a)(1)(B)(i)*. *See, e.g.,* *Wilbur v. Locke, 423 F.3d 1101, 1111-14 (9th Cir. 2005)* (holding that an Indian tribe was a necessary party to a suit seeking to invalidate a contract to which it was a party), *abrogated on other grounds by* *Levin v. Commerce Energy, Inc., 560 U.S. 413, 130 S. Ct. 2323, 176 L. Ed. 2d 1131 (2010)*; *Manybeads v. United States, 209 F.3d 1164, 1166 (9th Cir. 2000)*; *Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1044 (9th Cir. 1983)* ("[A]ll parties who may be affected **[**20]** by a suit to set aside a contract must be present."). For this reason, ATTM's role as an antitrust co-conspirator is not alone dispositive of whether it has interests that warrant protection under *Rule 19(a)(1)(B)(i)*. Therefore, we must analyze the particular facts here to determine whether ATTM is a required party under *Rule 19(a)(1)(B)*.

II. The District Court Erred by Failing to Specify the Interests ATTM Claimed

The Plaintiffs next contend that the district court erred by holding that ATTM was a required party without specifically identifying ATTM's interests or addressing how those interests might be impaired if the action were resolved in its absence. We agree, and conclude that the district court abused its discretion by failing to identify ATTM's interests in this action, or address how those interests, if any, might be impaired if this action were resolved in its absence, as required by *Rule 19(a)(1)(B)*.

HN11[] As with any *Rule 19(a)(1)(B)* case, deciding whether an absent joint tortfeasor is a required party requires identifying the specific interest the absent party claims and determining whether the party's ability to protect that interest may be impaired despite the fact that it has not been named as a party in the action. *Compare* *Wilbur, 423 F.3d at 1111-14* (holding that **[**21]** an absent **[*1050]** Indian tribe was a required party in an action to invalidate a contract between the state and the tribe, and finding that the state could not adequately protect the tribe's interests in the litigation), *with Cachil Dehe Band of Wintun Indians v. California, 547 F.3d 962, 970-72 (9th Cir. 2008)* (holding that absent Indian tribes were not required parties in an action asserting that the state breached a tribal-gaming compact, in part because the absent tribes' interest did not "arise[] from terms in bargained contracts" (quoting *Am. Greyhound Racing, Inc. v. Hull, 305 F.3d 1015, 1023 (9th Cir. 2002)))*.

We cannot discern whether the district court in *Apple II* applied the requirements of *Rule 19(a)(1)(B)* when it determined that ATTM was a required party. The court did not identify any specific interest ATTM claimed in the action or explain how ATTM's ability to protect that interest might be impaired by resolution of the action in its absence. Instead, the district court held that "if a plaintiff's antitrust claims require a court to evaluate the conduct of an absent party that is alleged to be an antitrust co-conspirator with a defendant, thereby substantially implicating [the] interests of that party, the absent party is necessary pursuant to *Rule 19(a)*." *In re Apple iPhone Antitrust Litig., 874 F. Supp. 2d 889, 899 (N.D. Cal. 2012)* (alteration in original) (internal quotation marks omitted). The court reasoned that **[**22]** it would be "required to evaluate ATTM's conduct," and that "[s]uch an evaluation . . . would necessarily implicate the interests of ATTM, which means that ATTM is a necessary party pursuant to *Rule 19(a)*." *Id. at 900* (citing *Laker Airways, Inc. v. British Airways, PLC, 182 F.3d 843, 847-48 (11th Cir. 1999))*. Thus, the court concluded, "because the alleged conspiracy is with ATTM to monopolize or attempt to monopolize the aftermarket for voice and data services, . . . ATTM is a necessary party." *Id. at 901*.

However, the fact that the complaint portrayed ATTM as the central player in the alleged antitrust conspiracy does not demonstrate that ATTM is a required party. Instead, whether ATTM is a required party depends on whether ATTM's interests qualify for protection under *Rule 19(a)(1)(B)(i)*. ***HN12***[] In many cases, an absent antitrust co-conspirator will not have interests that warrant protection under *Rule 19(a)(1)(B)(i)*, even if it is alleged to have played a central role in the conspiracy, and even if resolution of the action will require the court to evaluate the absent party's conduct. Therefore, it is essential that courts identify the specific legally protected interests an absent joint tortfeasor claims, and assess how those interests may be impaired when, as a non-party, the outcome of the action will not bind the absent party in **[**23]** future proceedings. *See Blonder-Tongue Lab. v. University of Illinois Found., 402 U.S. 313, 329, 91 S. Ct. 1434, 28 L. Ed. 2d 788 (1971)*. The district court abused its discretion by failing to undertake this inquiry.

III. Whether the Record Supports a Finding That ATTM Is a Required Party

Apple contends that, notwithstanding the district court's failure to specifically enumerate ATTM's interests, the record supports a finding that ATTM is a required party under *Rule 19(a)(1)(B)*. For the reasons that follow, we conclude that the record does not disclose whether ATTM had an interest in this action that was entitled to protection under *Rule 19*.

A. Whether ATTM Claims an Interest

The Plaintiffs contend that ATTM is not a required party because it has not asserted **[*1051]** any interest in this action. In *Bowen v. United States, 172 F.3d 682 (9th Cir. 1999)*, we observed that ***HN13***[] "[j]oinder is 'contingent . . . upon an initial requirement that the absent party *claim* a legally protected interest relating to the subject matter of the action,'" *id. at 689* (quoting *Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1043 (9th Cir.1983))*. As evidence that ATTM has claimed an interest in this action, Apple cites a declaration from ATTM's counsel from *Apple I*, filed in support of Apple's motion in *Apple II*.[2] The declaration states: "ATTM is aware of this litigation" and

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[2] This declaration was again submitted in support of Apple's motion to dismiss in *Apple III*, and the parties stipulated that it referred to the complaint in *Apple III*. Specifically, the parties stipulated that the "supporting documents submitted by Apple in [*Apple II]* . . . shall be deemed to refer to the *Ward* complaint and are properly before the Court in connection with Apple's motion to dismiss the *Ward* complaint."

"ATTM has an interest in these claims . . . ." The declaration does not indicate whether ATTM's counsel from *Apple* ***[**24]*** *I* was authorized to state ATTM's position in *Apple II* or *Apple III*. Therefore, it is not perfectly clear whether ATTM has, in fact, asserted an interest in this action.

We need not resolve whether the declaration satisfies *Bowen'*s requirement that ATTM claim an interest. Even if we assume that ATTM's attorney from *Apple I* was authorized to assert ATTM's interests in this litigation, Apple has not shown that the interests ATTM has purportedly claimed are legally protected under *Rule 19*.

B. Whether There is Record Evidence that ATTM Has Legally Protectable Interests under Rule 19

We turn now to Apple's contention that ATTM has a number of interests in this action that, assuming they were claimed by ATTM, qualify for protection under *Rule 19(a)(1)(B)*.

We have consistently held that ***HN14***[] only "legally protected" **[**25]** interests warrant protection under *Rule 19*. *See, e.g., Cachil Dehe Band, 547 F.3d at 970* (observing that a "crucial premise of mandatory joinder . . . is that the absent [party] possess[es] an interest in the pending litigation that is 'legally protected'"); *Wilbur, 423 F.3d at 1112*. We have offered little guidance regarding which interests warrant legal protection under *Rule 19*. We have clarified that "the interest at stake need not be 'property in the sense of the *due process clause*.'" *Cachil Dehe Band, 547 F.3d at 970* (quoting *Am. Greyhound Racing, 305 F.3d at 1023*). And we have required that the interest "be more than a financial stake, and more than speculation about a future event." *Id.* (internal quotation marks omitted). "Within the wide boundaries set by these general principles, we have emphasized the 'practical' and 'fact-specific' nature of the inquiry." *Id.*

Apple has cited several interests of ATTM it contends qualify as cognizable interests under *Rule 19*. Apple first contends that ATTM faces a risk of collateral consequences as a result of this litigation, including a risk of regulatory scrutiny and harms to its reputation. Apple also contends that ATTM has a number of contractual rights that may be impaired if this action is resolved in its absence.

1. Risk of Regulatory Scrutiny

We have not had occasion to decide whether the risk that an action **[**26]** will trigger regulatory scrutiny may give an absent antitrust co-conspirator a legally protected interest under *Rule 19(a)*. Without deciding whether such a risk might give an **[*1052]** absent party an interest under different circumstances, we hold that Apple has not shown that the risk of regulatory scrutiny ATTM faces as a result of this action gives ATTM a legally protected interest.

Apple relies heavily on the Eleventh Circuit's decision in *Laker Airways, Inc. v. British Airways PLC, 182 F.3d 843 (11th Cir. 1999)*. In *Laker Airways,* the court considered whether a private corporation appointed by the government of the United Kingdom to coordinate airlines' requests for landing and take-off times was a necessary party to an action alleging that the corporation conspired with an airline to monopolize the market for passenger air service between two cities. *Id. at 845*. The Eleventh Circuit held that the district court had not abused its discretion when it found that the coordinating corporation was a required party under *Rule 19(a)*. *Id.*

In finding that the specific circumstances of the case made the corporation's interests "more significant than those of a routine joint tortfeasor," *id. at 847-48*, the court cited the regulatory scrutiny the corporation could face as a result of the litigation. Under the **[**27]** regulations of the United Kingdom, the coordinating corporation was required to be "independent," and was to act in a "neutral, non-discriminatory and transparent way." *Id. at 846*. United Kingdom law further provided that the corporation's appointment as coordinator would be withdrawn if the corporation failed to act in an independent manner. *Id.* The court reasoned:

> [i]n order to prove its antitrust claims, [the plaintiff] would be required to show that [the defendant] acted in other "than an independent manner." Such a ruling would surely implicate the interests of [the absent corporation]

> because the United Kingdom's enabling legislation . . . requires that the Secretary of State for Transport withdraw its approval of an appointed coordinator if its behavior is not neutral.

Id. at 848.

Laker Airways is inapposite. There the relevant agency was affirmatively required to withdraw approval of the absent coordinator if its behavior was not neutral. *See id.* By contrast, there is no suggestion in this case that the collateral regulatory consequences ATTM might face as a result of this action would be any more severe, or likely to occur, than in a typical case alleging an antitrust conspiracy. If the vague **[**28]** risk of increased regulatory scrutiny in this case made ATTM a required party, absent antitrust co-conspirators would, almost always, be required parties in a broad range of antitrust cases. Such a result would eviscerate the general rule that absent antitrust co-conspirators need not be joined in one action. *See Lawlor, 349 U.S. at 329*; *Georgia v. Penn. R.R., 324 U.S. at 463*. Moreover, ***HN15***[] we have been reluctant to recognize legally protected interests based solely on "[s]peculation about the occurrence of a future event." *See Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1046 (9th Cir. 1983)* ("Speculation about the occurrence of a future event ordinarily does not render all parties potentially affected by that future event necessary or indispensable parties under *Rule 19*."); *Cachil Dehe Band, 547 F.3d at 973* (holding that absent Indian tribes' opportunity to obtain licenses under gaming compact was not a legally protected interest where the "likelihood of obtaining future licenses [was] attenuated"). In the absence of any evidence that law-enforcement or regulatory agencies are presently scrutinizing the Exclusivity Agreement, we decline to speculate whether the outcome of this case will impact agencies' enforcement decisions. For these reasons, we find that Apple has not demonstrated that the risk of regulatory scrutiny gives **[*1053]** ATTM a legally protected interest **[**29]** in this action.

2. Reputational Interests

Apple next argues that ATTM is a required party because this action may affect ATTM's business or reputational interests. This argument is similarly without merit.

HN16[] We are aware of no cases holding that a joint tortfeasor's reputational interests alone may make it a required party under *Rule 19(a)*. A joint tortfeasor's reputation generally will be adversely impacted in any case accusing it of wrongdoing. For this reason, recognizing a protected interest in business reputation would significantly erode the general rule that a plaintiff need not join all joint tortfeasors in one action. Recognizing such an interest would also conflict with our precedents holding that a protected interest under *Rule 19* "must be more than a financial stake," *Cachil Dehe Band, 547 F.3d at 970* (quoting *Makah, 910 F.2d at 558*). We conclude that ATTM's reputational interests in this action are not legally protected under *Rule 19*.

3. Contract Interests

Apple also asserts that ATTM's contract rights give it a legally protected interest in this action. For the reasons that follow, we find that Apple has not demonstrated that ATTM currently has any substantial contract rights that may be impaired by resolution of this action.

HN17[] Under some circumstances, an **[**30]** absent party's contract rights may give it a legally protected interest in an action. *See, e.g., Wilbur, 423 F.3d 1101*; *Am. Greyhound Racing, Inc. v. Hull, 305 F.3d 1015, 1022-24 (9th Cir. 2002)*; *Manybeads v. United States, 209 F.3d 1164, 1166 (9th Cir. 2000)*. For instance, it is well established that all parties to a contract are necessary in an action to set aside the contract. *See Wilbur, 423 F.3d at 1113* (citing cases). Our cases also establish that an absent party may be required in an action seeking equitable relief that would prevent a defendant from fulfilling "substantial" contractual obligations to the absent party. *See Am. Greyhound Racing, 305 F.3d at 1023* (holding that absent Indian tribes were necessary parties where "the interest of the tribes arises from terms in bargained contracts, and the interest is substantial"); *Cachil Dehe Band, 547 F.3d at 970* (interpreting *American Greyhound Racing, Inc. v. Hull* to "require[]" that the interest arising from terms in bargained contracts be "substantial" to be legally protected). *Cf. Wilbur, 423 F.3d at 1113* ("[I]t is a fundamental principle that a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract." (internal quotation marks omitted)). We have not, however, held that an absent party is always required when the relief sought in an action merely implicates an absent party's contract rights. *See Cachil Dehe Band, 547 F.3d at 970* ("[A]n interest that 'arises from **[**31]** terms in bargained contracts' *may* be protected . . . ." (emphasis added)).

Apple cites three contract interests of ATTM it contends may be impaired if the action is resolved in ATTM's absence: (1) ATTM's right to control unlock codes; (2) rights arising from ATTM's Wireless Service Agreement (WSA) with customers; and (3) ATTM's arbitration provisions in the WSA.

a. Right to Control Unlock Codes

The Plaintiffs seek a judgment "[o]rdering Apple to provide the unlock code upon request to all members of the Class . . . ." Apple contends that this injunctive relief would conflict with ATTM's purported contractual right to prevent Apple from unlocking ATTM customers' iPhones. As a **[*1054]** threshold matter, we must determine whether the record supports a finding that ATTM currently has such a right. The only possible sources of this right in the record are brief excerpts of agreements between Apple and ATTM from 2006 and 2011, and the right is not embodied therein.

We begin with the excerpt from the 2006 agreement. The limited excerpt in the record clearly states that any right of ATTM to control unlock codes was only to last during the "Term and the Wind-Down Period." As Apple's counsel conceded at oral argument, **[**32]** there is nothing in the record defining the term or wind-down period. Without a definition of the term or wind-down period, we cannot determine whether ATTM still has the right Apple claims it has. We therefore find that the excerpt of the 2006 agreement does not demonstrate that ATTM has any existing right to control unlock codes.

We next turn to the excerpt of the 2011 agreement. The first clause of this excerpt appears to condition Apple's obligation not to unlock iPhones on its use of a SIM solution not offered by AT&T's SIM suppliers. There is no evidence in the record that Apple ever employed such a solution. In the absence of such evidence, we cannot determine whether ATTM currently has a right to control unlock codes, and cannot find that injunctive relief ordering Apple to disclose unlock codes would impair ATTM's rights under its contracts with Apple.[3]

b. Interests Arising from Wireless Service Agreements with Customers

Apple **[**33]** next contends that "the District Court will . . . inevitably have to interpret the terms of ATTM's WSA with consumers, in ways that could affect and impair ATTM's rights under that contract." We reject this argument.

The district court's decision in *Apple II* undercuts Apple's contention that interpretation of ATTM's WSA is "inevitable." The district court explicitly noted that "[the] Plaintiffs have not contended that any of their claims arise from ATTM service contracts," *874 F. Supp. 2d at 899*, and declined to "reach the question of whether [the] Plaintiffs must rely upon the WSA to advance any or all of their claims," *id.* at n.21.

Moreover, even if the district court ultimately interprets these WSAs, ATTM, as a non-party, will not be bound by the district court's interpretation in subsequent proceedings. *See Blonder-Tongue Lab. v. University of Illinois Found., 402 U.S. 313, 329, 91 S. Ct. 1434, 28 L. Ed. 2d 788 (1971)* (***HN18***[] "Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to

[3] Even if ATTM has some lingering contract interests, it may be appropriate for the district court to exercise its discretion to fashion the equitable relief in a way that avoids interfering with those interests, instead of dismissing the entire action. *See Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 105-06 (C.D. Cal. 1971)*.

present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.").

Lastly, we note that there is no copy of ATTM's **[**34]** WSA in the record. It is therefore unclear what rights ATTM had under the WSA that might be affected by this action. Nor is there any evidence in the record suggesting that class members are still bound by the WSAs they signed during the class period. The complaint seeks certification of a class of consumers who "purchased wireless voice and data services for the iPhone from October 19, 2008, through **[*1055]** February 3, 2011." It is plausible that, more than four years after the last WSA in the class period was signed, many class members have entered into new WSAs with ATTM or other carriers.

In sum, the record does not disclose whether ATTM's WSAs with customers give it a legally protected interest in this action.

c. ATTM's Arbitration Agreement

Apple also contends that ATTM has an interest in this action because the district court will have to construe the arbitration provisions in the WSA. This argument is likewise without merit.

As long as ATTM is not a party, any construction of the arbitration clause will likely focus on whether Apple may use ATTM's arbitration clause for Apple's benefit. *See* *874 F. Supp. 2d at 898-99* (holding that Apple, as a non-signatory to the arbitration agreement, did not satisfy the requirements **[**35]** to invoke the doctrine of equitable estoppel, and declining to compel the plaintiffs to arbitrate their claims against Apple). ATTM does not have a legally protected interest in whether Apple may compel arbitration. Nor will the district court's construction of the arbitration clause bind ATTM, a nonparty, in future actions. *See* *Blonder-Tongue, 402 U.S. at 329*.

For the above reasons, we hold that Apple has not demonstrated that ATTM has a legally protected interest in this action.

IV. Motion to Dismiss for Failure to State a Claim

Apple also contends that dismissal is appropriate because the Plaintiffs have failed to adequately plead a claim that ATTM had monopoly power in a relevant market. We decline to decide this issue.

The parties stipulated that the district court could enter an order dismissing the case with prejudice for failure to join a necessary party. The district court entered the parties' stipulated order "grant[ing], with prejudice, Apple's motion to dismiss [the] Plaintiffs' Complaint pursuant to *Rule 12(b)(7) of the Federal Rules of Civil Procedure*." The stipulated order did not address Apple's *Rule 12(b)(6)* argument, or even acknowledge that Apple sought dismissal in *Apple III* on this ground. Because the district court in *Apple III* has not ruled on Apple's *Rule 12(b)(6)* motion, we decline **[**36]** to consider whether the Plaintiffs' complaint pleads a claim.

CONCLUSION

For the above reasons, we reverse the judgment of the district court, and remand to the district court for further proceedings.

REVERSED AND REMANDED.

Dissent by: J. Clifford Wallace

Dissent

WALLACE, Circuit Judge, dissenting:

I respectfully dissent. I would not reach the merits of this appeal because, in my view, we lack jurisdiction to do so. Even if we had jurisdiction, however, I would still decline to reach the merits because the plaintiffs waived any challenge to the errors they now allege on appeal.

I.

This case comes to us in a unique procedural posture. For context, I begin with some background on an earlier case, referenced by the majority as "*Apple II." Apple II* involved a different set of plaintiffs and a broader set of claims before Judge Ware than those in *Apple III*, which were before Judge Rogers, and are now before us on appeal.

The *Apple II* Plaintiffs were the first to raise the *Rule 19* arguments we now see in the present appeal. But Judge Ware was unpersuaded and ruled against the *Apple* ***[*1056]*** *II* Plaintiffs. The record indicates that Judge Ware's July 11 order did not address at least some of the arguments made in the *Apple II* Plaintiffs' **[**37]** opposition (and which the *Apple III* Plaintiffs raise here on appeal), including the argument that ATTM itself failed to claim an interest in the litigation, and that any claimed interest was not "cognizable" under *Rule 19*. Instead of addressing those arguments, Judge Ware's order relied heavily on the Eleventh Circuit's *Laker Airways* case in holding that ATTM was a necessary party under *Rule 19* because "the Court will be required to evaluate ATTM's conduct."

The *Apple II* Plaintiffs disagreed with Judge Ware's *Rule 19* order. They wanted to appeal from it. But given the interlocutory nature of Judge Ware's ruling, they were required to wait for a final judgment. The *Apple II* Plaintiffs did not want to wait, however. In fact, waiting would have been pointless because the *Apple II* Plaintiffs' entire litigation hinged on whether ATTM was a necessary party: if ATTM was required to be joined as a necessary party, individual arbitration was almost inevitable; but if ATTM was not required to be joined, Plaintiffs' case would likely proceed through financially feasible class-action litigation. So, Plaintiffs needed a way to (1) sever any claims that could possibly implicate ATTM (to avoid arbitration), and (2) obtain **[**38]** immediate appellate review of Judge Ware's *Rule 19* analysis for the claims that could implicate ATTM. In the words of Plaintiffs' counsel, "by keeping the [voice and data] claims together [with the apps claims], we couldn't get the appellate review of the voice and data dismissal until we finish the apps case."

Accordingly, Plaintiffs' counsel devised a strategy: a new set of Plaintiffs (*Apple III* Plaintiffs) would bring a separate action (*Apple III)* to "segregate the voice and data claims into *Apple III* and have only the apps claims left in *Apple II."* The premise behind creating the new action, rather than appealing directly from Judge Ware's ruling in *Apple II*, was to enhance the *Apple II* Plaintiffs' litigation position on appeal. This was done by excising from *Apple II* any claims that arguably implicated ATTM's interests. The *Apple III* Plaintiffs believed that by removing the voice and data claims—which arguably implicated ATTM's wireless service—from *Apple II*, "*Apple II* [could] now proceed strictly as an apps case [without implicating ATTM] and . . . *Apple III* [could] go ahead and be dismissed so that [the *Apple III* Plaintiffs could] take [Judge Ware's] *Rule 19* ruling up to the Ninth Circuit." **[**39]**

But the *Apple III* Plaintiffs encountered a problem with this strategy. Because they were not the parties aggrieved by Judge Ware's *Apple II* order, they could not appeal from it. They needed Judge Rogers to issue an adverse ruling against *them*—in *Apple III—f*rom which they could appeal. In an attempt to obtain such a ruling expeditiously (that is, without litigating the issue before Judge Rogers) both parties stipulated to import from *Apple II* all of their respective pleadings and motions, and asked Judge Rogers to rule on them as if they had been brought in the first instance in *Apple III*. Understandably confused by this rather unusual procedure, Judge Rogers told the parties that

> it sounds like the issues that you're asking me to decide . . . have already been decided, so I don't know why we're going through this process again. I don't know why we have another complaint that doesn't include as a defendant [ATTM], which . . . Judge Ware told you you needed to have as a . . . party to the litigation. And if a

> judge in these [previous] cases has ruled [on that issue] . . . then the law says you don't get a second bite at the apple . . . .[1]

[*1057] Counsel for the *Apple III* Plaintiffs responded that they had proceeded in this fashion "to limit . . . the amount of work the court has to do, [and] to streamline things." After explaining in detail the procedural history from *Apple I* and *Apple II*, counsel for the *Apple III* Plaintiffs told Judge Rogers that **[**41]** the point of the new *Apple III* litigation was to "create . . . a device" to achieve appellate review of Judge Ware's interlocutory order. That device, counsel explained, was a stipulation to dismiss the *Apple III* Plaintiffs' claims with prejudice, but based on *Judge Ware's* reasoning from the prior case, without having Judge Rogers make that determination anew as applied to them. In other words, Plaintiffs' counsel said that the *Apple III* Plaintiffs were "willing to stipulate with Apple . . . that the complaint ought to be dismissed based on Judge Ware's . . . ruling in *Apple II"* because they *assumed* "the court would issue the same ruling it issued last time, which is that [ATTM] is a necessary and indispensable party in *Apple III."*

Once Judge Rogers understood that the Plaintiffs were not asking her to rule on the merits of the *Rule 19* issue, but rather were attempting only to create a vehicle for appellate review of *Judge Ware's* order, Judge Rogers directed the parties to "come up with a plan" and to submit a stipulation that they believed would achieve their goals. Counsel for the *Apple III* Plaintiffs asked Judge Rogers if she would "prefer a form of order that essentially grants the 12(b)(7) **[**42]** motion," but Judge Rogers, having earlier emphasized that the court was "overwhelmed right now" and that she was "not interested in doing busy work," said that "[i]f the two of you can work it out so that you both have what you need in the record and all you really need is my signature," "I would like to just (indicating) . . . stamp something." She concluded, "unless there's some dispute . . . then I don't need to be involved, [except] to just put my signature."

The *Apple III* Plaintiffs later submitted a joint stipulation to dismiss their claims under *Rule 19* "[f]or the reasons set forth in Judge Ware's . . . Order" from *Apple II*. Judge Rogers—as she had promised—then signed the proposed order granting the dismissal "PURSUANT TO THE PARTIES' STIPULATION," and "for the reasons set forth in Judge Ware's . . . Order." This appeal followed.

II.

In my view, Plaintiffs' stipulation strategy produced a "final decision" that fails to invoke our statutory appellate jurisdiction because it was not involuntary or adverse to the Plaintiffs. We have statutory jurisdiction only over "appeals from . . . final decisions of the district courts," *28 U.S.C. § 1291*, that are both involuntary and adverse to the appellant. *See* *Seidman v. City of Beverly Hills, 785 F.2d 1447, 1448 (9th Cir. 1986)*; *Unioil, Inc. v. E.F. Hutton & Co., 809 F.2d 548, 555 (9th Cir. 1986)* ("To be **[**43]** appealable, an order must be adverse to the appealing party. As a general **[*1058]** rule, a plaintiff may not appeal a voluntary dismissal because it is not an involuntary adverse judgement against him."), *abrogated on other grounds by* *Townsend v. Holman Consulting Corp., 929 F.2d 1358 (9th Cir. 1990)* (en banc).

We recently stated in *Berger v. Home Depot USA, Inc., 741 F.3d 1061, 1065 (9th Cir. 2014)*, that "absent a settlement, a stipulation alone does not destroy th[e] adversity" required for appellate jurisdiction. *Id. at 1065*. *See also* *Concha v. London, 62 F.3d 1493, 1507 (9th Cir. 1995)*. Relying on *Berger* and *Concha*, the majority concludes that the parties' stipulation to dismiss their claims produced a sufficiently "adverse" judgment because it was not "pursuant to a settlement," and was "plainly adverse to the Plaintiffs' interests."

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[1] The majority apparently believes these particular **[**40]** comments do not show that Judge Rogers was confused about why Plaintiffs were bringing these issues again after Judge Ware had already ruled on them (demonstrating a concern about claim and issue preclusion). The majority thinks they "could also be interpreted to mean that she had analyzed the issue and was inclined to issue the same ruling as Judge Ware." With due respect, nothing in these statements can plausibly be construed as indicating that Judge Rogers had at this point deliberately analyzed the *Rule 19* issue, and they certainly cannot be construed as her inclination to "issue the same ruling as Judge Ware." Although our jurisdiction does not depend on what is said in the give-and-take between counsel and judge at an oral hearing, the transcript in this case, as will become apparent below, strongly suggests that Judge Rogers never in fact made an independent decision on the *Rule 19* issue.

Berger is inapposite, however, because it presupposes procedural facts that do not exist in the present case. *Berger* involved a single action in which a party argued its case to one judge, the judge considered the argument and ruled against that party, and then the two opposing parties stipulated to dismissal for the sole purpose of obtaining a final appealable judgment. *Berger* governs *that* type of case, in which an involuntary, adverse interlocutory ruling merges into a final appealable judgment, *see Balla v. Idaho State Bd. Of Corr., 869 F.2d 461, 468 (9th Cir. 1989)*, which is then entered pursuant to a stipulation. **[**44]** For example, had the *Apple II* Plaintiffs stipulated to dismissal in *their* case, in order to achieve a final appealable ruling, that stipulation would have fallen squarely within *Berger'*s holding, and there would be no "adverseness" problem. But this case—*Apple III*—is different. Here, there was never an involuntary, adverse ruling against the *Apple III* Plaintiffs because they *asked* Judge Rogers to adopt Judge Ware's reasoning against them. *See* Apple III Dkt. (4:12-cv-05404) No. 24, p. 10-11 (Plaintiffs' counsel arguing to Judge Rogers that "the complaint [in *Apple III] ought to* be dismissed based on Judge Ware's . . . ruling in *Apple II."*).

Concha is likewise inapposite. *Concha* says that a stipulated final judgment "with prejudice" is adverse to the plaintiffs' interests—i.e., it has "sufficient prejudice in a legal sense"—because it "serves to bar his claims forever." *Concha v. London, 62 F.3d 1493, 1507 (9th Cir. 1995)*. But *Concha* answered in the negative only the question whether a voluntary dismissal "without prejudice" would also be adverse to the Plaintiffs for purposes of statutory jurisdiction. It did not address the question presented in this case: whether a final decision of a district judge is involuntary and adverse to a party **[**45]** who stipulated to a particular analysis against it, and then asked the district judge to order final judgment, in order to argue on appeal that such analysis was actually incorrect.

Because the claims and parties in *Apple III* were different from those in *Apple II*, Judge Ware's order from *Apple II* did not preclude Judge Rogers from deciding the *Rule 19* issue in *Apple III*. Consequently, the *Apple III* Plaintiffs were required to argue their position independently in *Apple III* and to obtain an involuntary and adverse ruling against them in order to have an adverse decision from which to appeal. But they failed to do so. They said that they *assumed* Judge Rogers "would" rule consistently with Judge Ware, but they never in fact argued to Judge Rogers that Judge Ware's analysis in *Apple II* was wrong, or that she should rule in their favor on the *Rule 19* issue. Rather, they stipulated that Judge Rogers rule *against* them on the *Rule 19* issue for reasons with which they ostensibly disagreed.

No case in our circuit stands for the proposition that a non-party to a case can disagree with a judge's ruling then institute **[*1059]** a new action, before a new judge, alleging a narrower set of claims, in which they *urge* their judge **[**46]** to adopt the prior judge's analysis, and still have an involuntary and adverse ruling required for appellate jurisdiction when the new judge signs a stipulated final judgment. No adverseness exists in the *new* action where the issue was never actually litigated and no adverse positions were taken by the parties.

That the purpose of Plaintiffs' strategy was to fast-track appellate review does not give us license to dispense with the requirement that in every separate action, the parties must take adverse positions on an issue and give the judge an opportunity to rule independently on their claims. Otherwise, parties could manipulate our appellate jurisdiction under the guise of efficiency, in order to circumvent the general rule that the district court be the first to pass judgment by applying a legal rule to a set of claims. *Cf. Am. States Ins. Co. v. Dastar Corp., 318 F.3d 881, 885-86 (9th Cir. 2003)* ("A significant concern in assessing finality is whether the parties have attempted to manipulate our appellate jurisdiction. A party may not engage in manipulation either to create appellate jurisdiction or prevent it." (citations omitted)).

In sum, because the final judgment below was not involuntary and adverse to the *Apple III* Plaintiffs, I am persuaded that **[**47]** we lack statutory jurisdiction over this appeal.

III.

Even if we had statutory jurisdiction, I would conclude that the *Apple III* Plaintiffs waived the *Rule 19* issue by inviting Judge Rogers to adopt the very analysis that they now allege on appeal was erroneous. "'[O]ne may not complain on review of errors below for which he is responsible.'" *Deland v. Old Republic Life Ins. Co., 758 F.2d*

1331, 1336-37 (9th Cir.1985), quoting Hudson v. Wylie, 242 F.2d 435, 448 (9th Cir. 1957). *See also* Portland GE v. United States Bank Trust N.A., 218 F.3d 1085, 1089 (9th Cir. 2000).

Although the *Apple III* Plaintiffs stipulated to incorporate both parties' motions from *Apple II*, they ultimately drafted a stipulation dismissing their claims "for the reasons set forth in Judge Ware's July 11, 2012 Order," instead of first asking Judge Rogers either to revisit Judge Ware's Rule 19 analysis in *Apple II*, or to perform her own Rule 19 analysis in which she could embrace their arguments. In fact, counsel for the *Apple III* Plaintiffs invited Judge Rogers to adopt Judge Ware's alleged error, arguing that "the complaint [in *Apple III] ought to* be dismissed based on Judge Ware's . . . ruling in *Apple II."* At bottom, the *Apple III* Plaintiffs invited Judge Rogers to sign on to an analysis from a different case with the specific intent to argue on appeal that the analysis was erroneous. In doing so, the *Apple III* Plaintiffs sought improperly **[**48]** to skip over the district court to have us decide the Rule 19 issue in the first instance. They have thereby waived any challenge to the error they invited.

United States v. Apple, Inc.

United States Court of Appeals for the Second Circuit

December 15, 2014, Argued; June 30, 2015, Decided

Nos. 13-3741-cv, 13-3748-cv, 13-3783-cv, 13-3857-cv, 13-3864-cv, 13-3867-cv

Reporter

791 F.3d 290 *; 2015 U.S. App. LEXIS 11271 **; 2015-1 Trade Cas. (CCH) P79,222; 43 Media L. Rep. 1941

UNITED STATES OF AMERICA, STATE OF TEXAS, STATE OF CONNECTICUT, STATE OF ALABAMA, STATE OF ALASKA, STATE OF ARIZONA, STATE OF ARKANSAS, STATE OF COLORADO, STATE OF DELAWARE, STATE OF IDAHO, STATE OF ILLINOIS, STATE OF INDIANA, STATE OF IOWA, STATE OF KANSAS, STATE OF LOUISIANA, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, STATE OF MICHIGAN, STATE OF MISSOURI, STATE OF NEBRASKA, STATE OF NEW MEXICO, STATE OF NEW YORK, STATE OF NORTH DAKOTA, STATE OF OHIO, COMMONWEALTH OF PENNSYLVANIA, STATE OF SOUTH DAKOTA, STATE OF TENNESSEE, STATE OF UTAH, STATE OF VERMONT, COMMONWEALTH OF VIRGINIA, STATE OF WEST VIRGINIA, STATE OF WISCONSIN, COMMONWEALTH OF PUERTO RICO, AND DISTRICT OF COLUMBIA, Plaintiffs-Appellees, -v.- APPLE, INC., SIMON & SCHUSTER, INC., VERLAGSGRUPPE GEORG VON HOLTZBRINCK GMBH, HOLTZBRINCK PUBLISHERS, LLC, DBA MACMILLAN, SIMON & SCHUSTER DIGITAL SALES, INC., Defendants-Appellants, HACHETTE BOOK GROUP, INC., HARPERCOLLINS PUBLISHERS L.L.C., THE PENGUIN GROUP, A DIVISION OF PEARSON PLC, PENGUIN GROUP (USA), INC., Defendants.

Subsequent History: As corrected July 2, 2015.

US Supreme Court certiorari denied by *Apple, Inc. v. United States, 2016 U.S. LEXIS 1750 (U.S., Mar. 7, 2016)*

Prior History: Defendants Apple, Macmillan, and Simon & Schuster appeal from a judgment of the United States District Court for the Southern District of New York (Cote, J.), entered on September 5, 2013. After a bench trial, the district court concluded that Apple violated § 1 of the Sherman Antitrust Act, *15 U.S.C. § 1 et seq.*, by orchestrating a conspiracy among five major publishing companies to raise the retail prices of digital books, known as "ebooks." The court then issued an injunctive order, which, inter alia, prevents Apple from signing agreements with those five publishers that restrict its ability to set, alter, or reduce the price of ebooks, and requires Apple to apply the same terms and conditions to ebook applications sold on its devices as it does to other applications. We conclude that the district court correctly decided that Apple orchestrated a conspiracy among the publishers to raise ebook prices, that the conspiracy unreasonably restrained trade in violation of *§ 1* **[**1]** of the Sherman Act, and that the injunction is properly calibrated to protect the public from future anticompetitive harms. In addition, we reject the argument that the portion of the injunctive order preventing Apple from agreeing to restrict **[**2]** its pricing authority modifies Macmillan and Simon & Schuster's consent decrees or should be judicially estopped. Accordingly, the judgment of the district court is AFFIRMED.

United States v. Apple, Inc., 2013 U.S. Dist. LEXIS 129727 (S.D.N.Y., Sept. 5, 2013)

Core Terms

publishers, ebook, prices, conspiracy, district court, horizontal, vertical, retailers, iBookstore, rule of reason, terms, negotiations, quotation, marks, price-fixing, bestsellers, iPad, antitrust, releases, Contracts, anticompetitive, competitors, Sherman Act, consumers, per se rule, injunction, caps, Big, retail price, Defendants'

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN1[] **Standards of Review, Clearly Erroneous Review**

Because the appellate court reviews the district court's factual findings for clear error, it must assess whether its view of the evidence is plausible in light of the entire record.

Antitrust & Trade Law > Sherman Act > Claims

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

HN2[] **Sherman Act, Claims**

To hold a defendant liable for violating *§ 1* of the Sherman Act, a district court must find a combination or some form of concerted action between at least two legally distinct economic entities that constituted an unreasonable restraint of trade. *15 U.S.C.S. § 1*.

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

Civil Procedure > Trials > Bench Trials

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

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

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

Following a bench trial, the court reviews the district court's findings of fact for clear error and its conclusions of law and mixed questions de novo. *Fed. R. Civ. P. 52(a)*. The district court's evidentiary rulings and its fashioning of equitable relief are reviewed for abuse of discretion.

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

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

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

HN4[] **Price Fixing & Restraints of Trade, Vertical Restraints**

There is an important distinction between horizontal agreements to set prices, which involve coordination between competitors at the same level of a market structure, and vertical agreements on pricing, which are created between parties at different levels of a market structure. Under *§ 1* of the Sherman Act, the former are, with limited exceptions, per se unlawful, while the latter are unlawful only if an assessment of market effects, known as a rule-of-reason analysis, reveals that they unreasonably restrain trade.

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

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

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

HN5[] **Price Fixing & Restraints of Trade, Vertical Restraints**

Courts have long recognized the existence of hub-and-spoke conspiracies in which an entity at one level of the market structure, the hub, coordinates an agreement among competitors at a different level, the spokes. These arrangements consist of both vertical agreements between the hub and each spoke and a horizontal agreement among the spokes to adhere to the hub's terms, often because the spokes would not have gone along with the vertical agreements except on the understanding that the other spokes were agreeing to the same thing.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

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

HN6[] **Regulated Practices, Monopolies & Monopolization**

Section 1 of the Sherman Act bans restraints on trade effected by a contract, combination, or conspiracy. The first crucial question in a *§ 1* case is therefore whether the challenged conduct stems from independent decision or from an agreement, tacit or express.

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

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

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

Identifying the existence and nature of a conspiracy requires determining whether the evidence reasonably tends to prove that the defendant and others had a conscious commitment to a common scheme designed to achieve an unlawful objective. Parallel action is not, by itself, sufficient to prove the existence of a conspiracy; such behavior could be the result of coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties. Indeed, parallel behavior that does not result from an agreement is not unlawful even if it is anticompetitive. Accordingly, to prove an antitrust conspiracy, a plaintiff must show the existence of additional circumstances, often referred to as plus factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

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

HN8[] **Monopolies & Monopolization, Conspiracy to Monopolize**

The additional circumstances needed to prove an antitrust conspiracy can consist of direct evidence that the defendants entered into an agreement like a recorded phone call in which two competitors agreed to fix prices. But plaintiffs may also present circumstantial facts supporting the inference that a conspiracy existed. Circumstances that may raise an inference of conspiracy include a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of interfirm communications. Parallel conduct alone may support an inference of conspiracy, moreover, if it consists of complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

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

HN9[] **Monopolies & Monopolization, Conspiracy to Monopolize**

Because of the risk of condemning parallel conduct that results from independent action and not from an actual unlawful agreement, the United States Supreme Court has cautioned against drawing an inference of conspiracy from evidence that is equally consistent with independent conduct as with illegal conspiracy, or ambiguous evidence. Thus, a finding of conspiracy requires evidence that tends to exclude the possibility that the defendant was acting independently. This requirement, however, does not mean that the plaintiff must disprove all nonconspiratorial explanations for the defendants' conduct; rather, the evidence need only be sufficient to allow a reasonable fact finder to infer that the conspiratorial explanation is more likely than not.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

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

HN10[] **Monopolies & Monopolization, Conspiracy to Monopolize**

The United States Supreme Court has defined an agreement for Sherman Act *§ 1* purposes as a conscious commitment to a common scheme designed to achieve an unlawful objective.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

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

HN11[] **Monopolies & Monopolization, Conspiracy to Monopolize**

Antitrust law has never required identical motives among conspirators when their independent reasons for joining together lead to collusive action.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

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

HN12[] Monopolies & Monopolization, Conspiracy to Monopolize

Conduct resulting solely from competitors' independent business decisions, and not from any agreement, is not unlawful under § 1 of the Sherman Act, even if it is anticompetitive. But to generate a permissible inference of agreement, a plaintiff need only present sufficient evidence that such agreement was more likely than not.

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

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

HN13[] Exclusive & Reciprocal Dealing, Exclusive Dealing

Exclusive-dealing agreements between a retailer and manufacturers that are contrary to the manufacturers' individual self-interest but consistent with their collective interest support the inference of a horizontal conspiracy in which the retailer participated.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

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

HN14[] Monopolies & Monopolization, Conspiracy to Monopolize

A conspiracy may be inferred if a defendant's action would have been contrary to its self-interest in the absence of advance agreement.

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

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

HN15[] Regulated Practices, Price Fixing & Restraints of Trade

In antitrust cases, the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.

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

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

HN16[] Price Fixing & Restraints of Trade, Vertical Restraints

Vertical agreements, lawful in the abstract, can in context be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel, particularly where multiple competitors sign vertical agreements that would be against their own interests were they acting independently.

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

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

HN17[] Regulated Practices, Price Fixing & Restraints of Trade

Although the Sherman Act, by its terms, prohibits every agreement in restraint of trade, the United States Supreme Court has long recognized that Congress intended to outlaw only unreasonable restraints. Thus, to succeed on an antitrust claim, a plaintiff must prove that the common scheme designed by the conspirators constituted an unreasonable restraint of trade either per se or under the rule of reason.

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

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

HN18[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

In antitrust cases, per se and rule-of-reason analysis are two methods of determining whether a restraint is unreasonable, i.e., whether its anticompetitive effects outweigh its procompetitive effects. Because this balancing typically requires case-by-case analysis, most antitrust claims are analyzed under the rule of reason, according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition. However, some restraints have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful per se. This rule reflects a long-standing judgment that case-by-case analysis is unnecessary for certain practices that, by their nature, have a substantial potential to unreasonably restrain competition.

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

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

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

HN19[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Horizontal price-fixing conspiracies traditionally have been, and remain, the archetypal example of a per se unlawful restraint on trade. By contrast, the United States Supreme Court has clarified that vertical restraints, including those that restrict prices, should generally be subject to the rule of reason.

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

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

HN20[] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

The true test of legality under § 1 of the Sherman Act is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. By agreeing to orchestrate a horizontal price-fixing conspiracy, a conspirator commits itself to achieving that unlawful objective: namely, collusion with and among coconspirators to set prices. This type of agreement, moreover, is a restraint that would always or almost always tend to restrict competition and decrease output.

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

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

HN21[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The per se rule and the rule of reason are means of evaluating whether a restraint is unreasonable, not the reasonableness of a particular defendant's role in the scheme. Both per se rules and the rule of reason are employed to form a judgment about the competitive significance of the restraint.

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

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

HN22[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The rule of reason is unquestionably appropriate to analyze an agreement between a manufacturer and its distributors to, for instance, limit the price at which the distributors sell the manufacturer's goods or the locations at which they sell them. These vertical restrictions are widely used in our free market economy, can enhance interbrand competition, and do not inevitably have a pernicious effect on competition.

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

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

HN23[] Scope, Monopolization Offenses

Horizontal agreements with the purpose and effect of raising prices are per se unreasonable because they pose a threat to the central nervous system of the economy; that threat is just as significant when a vertical market participant organizes the conspiracy.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

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

HN24[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Vertical price restraints are to be judged by the rule of reason. Vertical price restraints are unfit for the per se rule because they can be used to encourage retailers to invest in promoting a product by ensuring that other retailers will not undercut their prices for that good. However, vertical price restraints can also be used to organize horizontal cartels to increase prices, which are, and ought to be, per se unlawful. When used for such a purpose, the vertical agreement may be useful evidence to prove the existence of a horizontal cartel.

Governments > Courts > Judicial Precedent

HN25[] **Courts, Judicial Precedent**

The United States Supreme Court does not normally overturn, or so dramatically limit, earlier authority sub silentio.

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

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

HN26[] **Scope, Monopolization Offenses**

Horizontal collusion to raise prices is the archetypal example of a per se unlawful restraint of trade. If successful, these conspiracies concentrate the power to set prices among the conspirators, including the power to control the market and to fix arbitrary and unreasonable prices. And even if unsuccessful or not aimed at complete elimination of price competition, the conspiracies pose a threat to the central nervous system of the economy by creating a dangerously attractive opportunity for competitors to enhance their power at the expense of others.

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

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

HN27[] **Scope, Monopolization Offenses**

Price-fixing cartels are condemned per se because the conduct is tempting to businessmen but very dangerous to society. The conceivable social benefits are few in principle, small in magnitude, speculative in occurrence, and always premised on the existence of price-fixing power which is likely to be exercised adversely to the public. And even if power is usually established while any defenses are not, litigation will be complicated, condemnation delayed, would be price-fixers encouraged to hope for escape, and criminal punishment less justified. Deterrence of a generally pernicious practice would be weakened.

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

HN28[] **Regulated Practices, Price Fixing & Restraints of Trade**

Per se condemnation is not limited to agreements that literally set or restrict prices. Instead, any conspiracy formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity is illegal per se, and the precise machinery employed is immaterial.

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

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

HN29[] **Regulated Practices, Price Fixing & Restraints of Trade**

Courts need not even conduct an extensive analysis of market power or a detailed market analysis to demonstrate its anticompetitive character.

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

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

HN30[] **Regulated Practices, Price Fixing & Restraints of Trade**

Any combination which tampers with price structures would be directly interfering with the free play of market forces.

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

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

HN31[] **Regulated Practices, Price Fixing & Restraints of Trade**

The key inquiry in a market power analysis is whether the defendant has the ability to raise prices without losing its business.

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

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

HN32[] **Sherman Act, Scope**

Under a prototypically robust rule-of-reason analysis, the plaintiff must demonstrate an actual adverse effect on competition in the relevant market before the burden shifts to the defendants to offer evidence of the pro-competitive effects of their agreement. The factfinder then weighs the competing evidence to determine if the effects of the challenged restraint tend to promote or destroy competition. But not every case that requires rule of reason analysis is a candidate for plenary market examination. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.

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

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

HN33[] **Sherman Act, Scope**

The United States Supreme Court has applied an abbreviated version of the rule of reason, otherwise known as quick look review, to agreements whose anticompetitive effects are easily ascertained. This quick look effectively relieves the plaintiff of its burden of providing a robust market analysis by shifting the inquiry directly to a consideration of the defendant's procompetitive justifications. When the restraint appears on its face to be one that tends to increase price, an abbreviated rule-of-reason analysis operates to shift the burden of proof rather than to cut off the inquiry, as is usually true in a per se case.

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

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

***HN34*[]** **Scope, Monopolization Offenses**

In any case in which competitors are able to increase the price level or to curtail production by agreement, it could be argued that the agreement has the effect of making the market more attractive to potential new entrants. If that potential justifies horizontal agreements among competitors imposing one kind of voluntary restraint or another on their competitive freedom, it would seem to follow that the more successful an agreement is in raising the price level, the safer it is from antitrust attack. Nothing could be more inconsistent with judicial precedent.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

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

***HN35*[]** **Regulated Practices, Monopolies & Monopolization**

Market dominance may arise as a consequence of a superior product, business acumen, or historic accident, and is not only not unlawful, it is an important element of the free market system.

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

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

***HN36*[]** **Scope, Monopolization Offenses**

That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for the protection of competition, not competitors. Because lower prices improve consumer welfare (all else being equal), below-cost pricing is unlawfully anticompetitive only if there is a dangerous probability that the firm engaging in it will later recoup its losses by raising prices to monopoly levels after driving its rivals out of the market.

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

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

***HN37*[]** **Sherman Act, Scope**

Because of the long-term threat to competition, the Sherman Act does not authorize horizontal price conspiracies as a form of marketplace vigilantism to eliminate perceived ruinous competition or other competitive evils. Indeed, the attempt to justify a conspiracy to raise prices on the basis of the potential threat that competition poses is nothing less than a frontal assault on the basic policy of the Sherman Act.

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

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

HN38[] Actual Monopolization, Claims

While merely possessing monopoly power is not itself an antitrust violation, it is a necessary element of a monopolization charge.

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

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

HN39[] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

A firm that lacks dominant market power can unilaterally choose with whom they deal without fear of antitrust liability.

Antitrust & Trade Law > Sherman Act > Claims

HN40[] Sherman Act, Claims

Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2 of the Sherman Act. Courts have been very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN41[] Expert Witnesses, Daubert Standard

The proponent of expert testimony has the burden of establishing by a preponderance of the evidence that the expert's opinion is based on sufficient facts, is the product of reliable principles and methods, and applies those principles and methods reliably to the facts at hand. *Fed. R. Evid. 702*.

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN42[] Judgments, Relief From Judgments

Fed. R. Civ. P. 60(b) establishes the grounds for seeking relief from a final judgment, order, or proceeding, including modifications of consent decrees. The rule adopts a flexible approach, enumerating specific reasons for modification while also allowing alterations for any other reason that justifies relief. *Rule 60(b)*. A party seeking an alteration under this catch-all provision bears the burden of establishing that a significant change in circumstances warrants the modification.

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Remedies > Injunctions > General Overview

HN43[] **Entry of Judgments, Consent Decrees**

A consent decree is enforced as an order, but construed largely as a contract. Its scope must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. An injunctive order against an entity that is not party to the consent decree and neither changes the terms of nor interprets the decree does not modify the contract and therefore does not require a *Fed. R. Civ. P. 60(b)* motion. Indeed, as a practical matter, injunctions often alter the options available to other parties. *Rule 60(b)* does not hold district courts issuing injunctions to a higher standard simply because the injunction may affect rights addressed in a different party's consent decree.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

HN44[] **Estoppel, Judicial Estoppel**

Judicial estoppel is invoked by a court at its discretion, and is designed to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment. While the propriety of applying estoppel depends heavily on the specific factual context before the court, we typically consider whether the party's argument is clearly inconsistent with its earlier position, whether the party succeeded in persuading a court to accept that earlier position, and whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. Relief is granted only when the impact on judicial integrity is certain.

Evidence > Types of Evidence > Testimony > General Overview

HN45[] **Types of Evidence, Testimony**

Courts need to carefully consider the contexts in which apparently contradictory statements are made to determine if there is, in fact, direct and irreconcilable contradiction.

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

HN46[] **Reviewability of Lower Court Decisions, Preservation for Review**

Issues not sufficiently argued are in general deemed waived and will not be considered on appeal.

Civil Procedure > Judicial Officers > Masters > Appointment of Masters

HN47[] **Masters, Appointment of Masters**

Reliance on a master appointed under *Fed. R. Civ. P. 53* is appropriate when a complex decree requires complex policing, particularly when a party has proved resistant or intransigent, and that both the United States Supreme Court and the court have approved such appointments. *Rule 53* advisory committee's note.

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

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

HN48[] **US Department of Justice Actions, Civil Actions**

A Government plaintiff, unlike a private plaintiff, must seek to obtain relief necessary to protect the public from further anticompetitive conduct and to redress anticompetitive harm. Thus, when the purpose to restrain trade appears from a clear violation of law, it is not necessary that all untraveled roads to that end be left open and that only the worn one be closed. The district court has large discretion to model its judgments to fit the exigencies of the particular case, and all doubts about the remedy are to be resolved in the Government's favor.

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FOR DEFENDANT-APPELLANT: GREGORY SILBERT, Yehuda L. Buchweitz, James W. Quinn, Weil, Gotshal & Manges LLP, New York, NY, for Simon & Schuster, Inc. and Simon & Schuster Digital Sales, Inc.

Judges: Before: JACOBS, LIVINGSTON, and LOHIER, Circuit Judges. Raymond J. Lohier (Circuit Judge) files a separate concurring opinion, joining in the judgment and in the majority opinion except for Part II.B.2. Dennis Jacobs (Circuit Judge) files a separate dissenting opinion.

Opinion by: DEBRA ANN LIVINGSTON

Opinion

[*296] DEBRA ANN LIVINGSTON, *Circuit Judge*:

Since the invention of the printing press, the distribution of books has involved **[**4]** a fundamentally consistent process: compose a manuscript, print and bind it into physical volumes, and then ship and sell the volumes to the public. In late 2007, Amazon.com, Inc. ("Amazon") introduced the Kindle, a portable device that carries digital copies of books, known as "ebooks." This innovation had the potential to change the centuries-old process for producing books by eliminating the need to print, bind, ship, and store them. Amazon began to popularize the new way to read, and encouraged consumers to buy the Kindle by offering desirable books — new releases and *New York Times* bestsellers — for $9.99. Publishing companies, which have traditionally stood at the center of the multi-billion dollar book-producing industry, saw Amazon's ebooks, and particularly its $9.99 pricing, as a threat to their way of doing business.

By November 2009, Apple, Inc. ("Apple") had plans to release a new tablet computer, the iPad. Executives at the company saw an opportunity to sell ebooks on the iPad by creating a virtual marketplace on the device, which came to be known as the "iBookstore." Working within a tight timeframe, Apple went directly into negotiations with six of the major publishing **[**5]** companies in the United States. In two months, it announced that five of those companies — Hachette, Harpercollins, Macmillan, Penguin, and Simon & Schuster (collectively, the "Publisher Defendants") — had agreed to sell ebooks on the iPad under arrangements whereby the publishers had the authority to set prices, and could set the prices of new releases and *New York Times* bestsellers as high as $19.99 and $14.99, respectively. Each of these agreements, by virtue of its terms, resulted in each Publisher Defendant receiving *less* per ebook sold via Apple as opposed to Amazon, even given the higher consumer prices. Just a few months after the iBookstore opened, however, every one of the Publisher Defendants had taken control over pricing from Amazon and had raised the prices on many of their ebooks, most notably new releases and bestsellers.

The United States Department of Justice ("DOJ" or "Justice Department") and 33 states and territories (collectively, "Plaintiffs") filed suit in the United States District Court for the Southern District of New York, alleging that Apple, in launching the iBookstore, had conspired with the Publisher Defendants to raise prices across the nascent ebook **[**6]** market. This agreement, they argued, violated § 1 of the Sherman Antitrust Act, *15 U.S.C. § 1 et seq.* ("Sherman Act"), and state antitrust laws. All five Publisher Defendants **[*297]** settled and signed consent decrees, which prohibited them, for a period, from restricting ebook retailers' ability to set prices. Then, after a three-week bench trial, the district court (Cote, *J.*) concluded that, in order to induce the Publisher Defendants to participate in the iBookstore and to avoid the necessity of itself competing with Amazon over the retail price of ebooks, Apple orchestrated a conspiracy among the Publisher Defendants to raise the price of ebooks — particularly new releases and *New York Times* bestsellers. *United States v. Apple Inc., 952 F. Supp. 2d 638, 647 (S.D.N.Y. 2013)*. The district court found that the agreement constituted a *per se* violation of the Sherman Act and, in the alternative, unreasonably restrained trade under the rule of reason. *See id. at 694*. On September 5, 2013, the district court entered final judgment on the liability finding and issued an injunctive order that, *inter alia*, prevents Apple from entering into agreements with the Publisher Defendants that restrict its ability to set, alter, or reduce the price of ebooks, and requires Apple to apply the same **[**7]** terms and conditions to ebook applications sold on its devices as it does to other applications.

On appeal, Apple contends that the district court's liability finding was erroneous and that the provisions of the injunction related to its pricing authority and ebook applications are not necessary to protect the public. Two of the Publisher Defendants — Macmillan and Simon & Schuster — join the appeal, arguing that the portion of the injunction related to Apple's pricing authority either unlawfully modifies their consent decrees or should be judicially estopped. We conclude that the district court's decision that Apple orchestrated a horizontal conspiracy among the Publisher Defendants to raise ebook prices is amply supported and well-reasoned, and that the agreement unreasonably restrained trade in violation of *§ 1 of the Sherman Act*. We also conclude that the district court's injunction is lawful and consistent with preventing future anticompetitive harms.

Significantly, the dissent *agrees* that Apple intentionally organized a conspiracy among the Publisher Defendants to raise ebook prices. Nonetheless, it contends that Apple was entitled to do so because the conspiracy helped it become **[**8]** an ebook retailer. In arriving at this startling conclusion — based in large measure on an argument that Apple itself did not assert — the dissent makes two fundamental errors. The first is to insist that the vertical organizer of a horizontal price-fixing conspiracy may escape application of the *per se* rule. This conclusion is based on a misreading of Supreme Court precedent, which establishes precisely the opposite. The dissent fails to apprehend that the Sherman Act outlaws *agreements* that unreasonably restrain trade and therefore requires evaluating the nature of the restraint, rather than the identity of each party who joins in to impose it, in determining whether the *per se* rule is properly invoked. Finally (and most fundamentally) the dissent's conclusion rests on an erroneous premise: that one who organizes a horizontal price-fixing conspiracy — the "supreme evil of antitrust," *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004), 124 S. Ct. 872, 157 L. Ed. 2d 823* — among those competing at a different level of the market has somehow done less damage to competition than its co-conspirators.

The dissent's second error is to assume, in effect, that Apple was entitled to enter the ebook retail market on its own terms, even if these terms could be achieved only via **[**9]** its orchestration of and entry into a price-fixing agreement with the Publisher Defendants. The dissent tells a story of **[*298]** Apple organizing this price-fixing conspiracy to rescue ebook retailers from a monopolist with insurmountable retail power. But this tale is not spun from any factual findings of the district court. And the dissent's armchair analysis wrongly treats the number of ebook retailers at any moment in the emergence of a new and transformative technology for book distribution as the *sine qua non* of competition in the market for trade ebooks.

More fundamentally, the dissent's theory — that the presence of a strong competitor justifies a horizontal price-fixing conspiracy — endorses a concept of marketplace vigilantism that is wholly foreign to the antitrust laws. By organizing a price-fixing conspiracy, Apple found an easy path to opening its iBookstore, but it did so by ensuring that market-wide ebook prices would rise to a level that it, and the Publisher Defendants, had jointly agreed upon. Plainly, competition is not served by permitting a market entrant to *eliminate price competition* as a condition of entry, and it is cold comfort to consumers that they gained a new **[**10]** ebook retailer at the expense of passing control over all ebook prices to a cartel of book publishers — publishers who, with Apple's help, collectively agreed on a new pricing model precisely to *raise* the price of ebooks and thus protect their profit margins and their very existence in the marketplace in the face of the admittedly strong headwinds created by the new technology.

Because we conclude that the district court did not err in deciding that Apple violated *§ 1 of the Sherman Act*, and because we also conclude that the district court's injunction was lawful and consistent with preventing future anticompetitive harms, we affirm.

BACKGROUND

I. Factual Background[1]

We begin not with Kindles and iPads, but with printed "trade books," which are "general interest fiction and non-fiction" books intended for a broad readership. *Apple, 952 F. Supp. 2d at 648 n.4*. In the United States, the six largest publishers of trade books, known in the publishing world as the "Big Six," are Hachette, HarperCollins, Macmillan, Penguin, Random House, and Simon & Schuster. Together, the Big Six publish many of the biggest names in fiction and non-fiction; during 2010, their titles accounted for over 90% of the *New York Times* bestsellers in the United States. *Id. at 648 n.5*.

For decades, trade book publishers operated under a fairly consistent business model. When a new book was ready for release to the public, the publisher would sell hardcover copies to retailers at a "wholesale" price and recommend resale to consumers at a markup, known as the "list" price. After the hardcover spent enough time on the shelves — often a year — publishers would release a paperback copy at lower "list" and "wholesale" prices. In

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[1] The factual background presented here is drawn from the district court's factual findings or from undisputed material in the record before the district court. ***HN1***[] Because this Court reviews the district court's factual findings for "clear error," we must assess whether "its view of the evidence is plausible in light of the entire record." *Cosme v. Henderson, 287 F.3d 152, 158 (2d Cir. 2002)*. In light of this obligation, the dissent is wrong to suggest that citations to the record are inappropriate or misleading. When a fact comes from the district court's opinion, we cite that opinion; **[**11]** when one comes from the record, we cite the joint appendix ("J.A.").

theory, devoted readers would pay the higher hardcover price to read the book when it first came out, while more casual fans would wait **[**12]** for the paperback.

[*299] A. Amazon's Kindle

On November 19, 2007, Amazon released the Kindle: a portable electronic device that allows consumers to purchase, download, and read ebooks. At the time, there was only one other ereader available in the emerging ebook market, and Amazon's Kindle quickly gained traction. In 2007, ebook revenue in North America was only $70 million, a tiny amount relative to the approximately $30 billion market for physical trade books. The market was growing, however; in 2008 ebook revenue was roughly $140 million and, by the time Barnes & Noble, Inc. (Barnes & Noble) launched its Nook ereader in November 2009, Amazon was responsible for 90% of all ebook sales. *Apple, 952 F. Supp. 2d at 648-49*.

Amazon followed a "wholesale" business model similar to the one used with print books: publishers recommended a digital list price and received a wholesale price for each ebook that Amazon sold. In exchange, Amazon could sell the publishers' ebooks on the Kindle and determine the retail price. At least early on, publishers tended to recommend a digital list price that was about 20% lower than the print list price to reflect the fact that, with an ebook, there is no cost for printing, storing, packaging, shipping, **[**13]** or returning the books.

Where Amazon departed from the publishers' traditional business model was in the sale of new releases and *New York Times* bestsellers. Rather than selling more expensive versions of these books upon initial release (as publishers encouraged by producing hardcover books before paperback copies), Amazon set the Kindle price at one, stable figure — $9.99. At this price, Amazon was selling "certain" new releases and bestsellers at a price that "roughly matched," or was slightly lower than, the wholesale price it paid to the publishers. *Apple, 952 F. Supp. 2d at 649*. David Naggar, a Vice President in charge of Amazon's Kindle content, described this as a "classic loss-leading strategy" designed to encourage consumers to adopt the Kindle by discounting new releases and *New York Times* bestsellers and selling other ebooks without the discount. J.A. 1485. The district court also referred to this as a "loss leader[]" strategy, *Apple, 952 F. Supp. 2d at 650, 657, 708*, and explained that Amazon "believed [the $9.99] pricing would have long-term benefits for its consumers," *id. at 649*. Contrary to the dissent's portrayal of the opinion, the district court did *not* find that Amazon used the $9.99 price point to "assure[] its domination" in the ebook **[**14]** market, or that its pricing strategy acted as a "barrier to entry" for other retailers. Dissenting Op. at 6-7. Indeed, in November 2009 — just a few months before Apple's launch of the iBookstore — Barnes & Noble entered the ebook retail market by launching the Nook, *Apple, 952 F. Supp. 2d at 649 n.6*, and as early as 2007 Google Inc. ("Google") had been planning to enter the market using a wholesale model, *id. at 686*.

B. The Publishers' Reactions

Despite the small number of ebook sales compared to the overall market for trade books, top executives in the Big Six saw Amazon's $9.99 pricing strategy as a threat to their established way of doing business. Those executives included: Hachette and Hachette Livre Chief Executive Officers ("CEOs") David Young and Arnaud Nourry; HarperCollins CEO Brian Murray; Macmillan CEO John Sargent; Penguin USA CEO David Shanks; Random House Chief Operating Officer Madeline McIntosh; and Simon & Schuster President and CEO Carolyn Reidy. In the short term, these members of the Big Six thought that Amazon's lower-priced **[*300]** ebooks would make it more difficult for them to sell hardcover copies of new releases, "which were often priced," as the district court noted, "at thirty dollars or more," *Apple, 952 F. Supp. 2d at 649*, as well **[**15]** as *New York Times* bestsellers. Further down the road, the publishers feared that consumers would become accustomed to the uniform $9.99 price point for these ebooks, permanently driving down the price they could charge for print versions of the books. Moreover, if Amazon became powerful enough, it could demand lower wholesale prices from the Big Six or allow authors to publish directly with Amazon, cutting out the publishers entirely. As Hachette's Young put it, the idea of the "wretched $9.99 price point becoming a de facto standard" for ebooks "sickened" him. J.A. 289.

The executives of the Big Six also recognized that their problem was a collective one. Thus, an August 2009 Penguin strategy report (concluded only a few months before Apple commenced its efforts to launch the iBookstore) noted that "[c]ompetition for the attention of readers will be most intense from digital companies whose objective may be to [cut out] traditional publishers altogether. . . . It will not be possible for any individual publisher to mount an effective response, because of both the resources necessary and the risk of retribution, so the industry needs to develop a common strategy." J.A. 287. Similarly, Reidy from **[**16]** Simon & Schuster opined in September 2009 that the publishers had "no chance of success in getting Amazon to change its pricing practices" unless they acted with a "critical mass," and expressed the "need to gather more troops and ammunition" before implementing a move against Amazon. J.A. 290 (internal quotation marks omitted).

Conveniently, the Big Six operated in a close-knit industry and had no qualms communicating about the need to act together. As the district court found (based on the Publisher Defendants' own testimony), "[o]n a fairly regular basis, roughly once a quarter, the CEOs of the [Big Six] held dinners in the private dining rooms of New York restaurants, without counsel or assistants present, in order to discuss the common challenges they faced." *Apple, 952 F. Supp. 2d at 651*. Because they "did not compete with each other on price," but over authors and agents, the publishers "felt no hesitation in freely discussing Amazon's prices with each other and their joint strategies for raising those prices." *Id.* Those strategies included eliminating the discounted wholesale price for ebooks and possibly creating an alternative ebook platform.

The most significant attack that the publishers considered and then **[**17]** undertook, however, was to withhold new and bestselling books from Amazon until the hardcover version had spent several months in stores, a practice known as "windowing." Members of the Big Six both kept one another abreast of their plans to window, and actively pushed others toward the strategy.[2] By December 2009, the *Wall Street Journal* and *New York Times* were **[*301]** reporting that four of the Big Six had announced plans to delay ebook releases until after the print release, and the two holdouts — Penguin and Random House — faced pressure from their peers.

Ultimately, however, the publishers viewed even this strategy to save their business model as self-destructive. Employees inside the publishing companies noted that windowing encouraged piracy, punished ebook consumers, and harmed long-term sales. One author wrote to Sargent in December 2009 that the "old model has to change" and that it would be better to "embrace e-books," publish them at the same time as the hardcovers, "and pray to God they both sell like crazy." J.A. 325. Sargent agreed, but expressed the hope that ebooks could eventually be sold for between $12.95 and $14.95. "The question is," he mused, "how to get there?" J.A. 325.

C. Apple's Entry into the Ebook Market

Apple is one of the world's most innovative and successful technology companies. Its hardware sells worldwide and supports major software marketplaces like iTunes and the App Store. But in 2009, Apple lacked a dedicated marketplace for ebooks or a hardware device that could offer an outstanding reading experience. The pending release of the iPad, which Apple intended to announce on January 27, 2010, promised to solve that hardware deficiency. **[**19]**

Eddy Cue, Apple's Senior Vice President of Internet Software and Services and the director of Apple's digital content stores, saw the opportunity for an ebook marketplace on the iPad. By February 2009, Cue and two colleagues — Kevin Saul and Keith Moerer — had researched the ebook market and concluded that it was poised

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[2] Citing one example, the district court referenced a fall 2009 email in which Hachette's Young informed his colleague Nourry of Simon & Schuster's windowing plans, advising "[c]ompletely confidentially, Carolyn [Reidy] has told me that they [Simon & Schuster] are delaying the new Stephen King, with his full support, but will not be announcing this until the day after Labor Day." *Apple, 952 F. Supp. 2d at 652* (first and second alterations in original) (internal quotation marks omitted). The district court went on to observe that Young, "[u]nderstanding the impropriety of this exchange of confidential information with a competitor, . . . advised Nourry that 'it would be prudent for you to double **[**18]** delete this from your email files when you return to your office.'" *Id.*

for rapid expansion in 2010 and beyond. While Amazon had an estimated 90% market share in trade ebooks, Cue believed that Apple could become a powerful player in the market in large part because consumers would be able to do many tasks on the iPad, and would not want to carry a separate Kindle for reading alone. In an email to Apple's then-CEO, Steve Jobs, he discussed the possibility of Amazon selling ebooks through an application on the iPad, but felt that "it would be very easy for [Apple] to compete with and . . . trounce Amazon by opening up our own ebook store" because "[t]he book publishers would do almost anything for [Apple] to get into the ebook business." J.A. 282.

Jobs approved Cue's plan for an ebook marketplace — which came to be known as the iBookstore — in November 2009. Although the iPad would go to market with or without the iBookstore, Apple hoped to announce **[**20]** the ebook marketplace at the January 27, 2010 iPad launch to "ensure maximum consumer exposure" and add another "dramatic component" to the event. *Apple, 952 F. Supp. 2d at 655*. This left Cue and his team only two months amidst the holiday season both to create a business model for the iBookstore and to assemble a group of publishers to participate. Cue also had personal reasons to work quickly. He knew that Jobs was seriously ill, and that, by making the iBookstore a success, he could help Jobs achieve a longstanding goal of creating a device that provides a superior reading experience.

Operating under a tight timeframe, Cue, Saul, and Moerer streamlined their efforts by focusing on the Big Six publishers. They began by arming themselves with some important information about the state of affairs within the publishing industry. In particular, they learned that the publishers feared that Amazon's pricing model **[*302]** could change their industry, that several publishers had engaged in simultaneous windowing efforts to thwart Amazon, and that the industry as a whole was in a state of turmoil. "Apple understood," as the district court put it, "that the Publishers wanted to pressure Amazon to raise the $9.99 price point for **[**21]** e-books, that the Publishers were searching for ways to do that, and that they were willing to coordinate their efforts to achieve that goal." *Id. at 656*. For its part, as the district court found, Apple was willing to sell ebooks at higher prices, but "had decided that it would not open the iBookstore if it could not make money on the store and compete effectively with Amazon." *Id.*

D. Apple's Negotiations with the Publishers

1. Initial Meetings

Apple held its first meetings with each of the Big Six between December 15 and 16. The meetings quickly confirmed Cue's suspicions about the industry. As he wrote to Jobs after speaking with three of the publishers, "[c]learly, the biggest issue is new release pricing" and "Amazon is definitely not liked much because of selling below cost for NYT Best Sellers." J.A. 326-27. Many publishers also emphasized that they were searching for a strategy to regain control over pricing. Apple informed each of the Big Six that it was negotiating with the other major publishers, that it hoped to begin selling ebooks within the next 90 days, and that it was seeking a critical mass of participants in the iBookstore and would launch only if successful in reaching this goal. **[**22]** Apple informed the publishers that it did not believe the iBookstore would succeed unless publishers agreed both not to window books and to sell ebooks at a discount relative to their physical counterparts. Apple noted that ebook prices in the iBookstore needed to be comparable to those on the Kindle, expressing the view, as Reidy recorded, that it could not "tolerate a market where the product is sold significantly more cheaply elsewhere." *Apple, 952 F. Supp. 2d at 657* (internal quotation marks omitted). Most importantly for the publishers, however, Cue's team also expressed Apple's belief that Amazon's $9.99 price point was not ingrained in consumers' minds, and that Apple could sell new releases and *New York Times* bestsellers for somewhere between $12.99 and $14.99. In return, Apple requested that the publishers decrease their wholesale prices so that the company could make a small profit on each sale.

These meetings spurred a flurry of communications reporting on the "[t]errific news[,]" as Reidy put it in an email to Leslie Moonves, her superior at parent company CBS Corporation ("CBS"), that Apple "was not interested in a low price point for digital books" and didn't want "Amazon's $9.95 [sic] to continue." *Apple, 952 F. Supp. 2d at 658* (first **[**23]** alteration in original) (internal quotation marks omitted). Significantly, these communications included numerous exchanges *between* executives at different Big Six publishers who, the district court found, "hashed over their meetings with Apple with one another." *Id.* The district court found that the frequent telephone calls among the Publisher Defendants during the period of their negotiations with Apple "represented a departure from the ordinary pattern of calls among them." *Id. at 655 n.14*.

2. The Agency Model

Meanwhile, Cue, Moerer, and Saul returned to Apple's headquarters to develop a business model for the iBookstore. Although the team was optimistic about the initial meetings, they remained concerned **[*303]** about whether the publishers would reduce wholesale prices on new releases and bestsellers by a large enough margin to allow Apple to offer competitive prices and still make a profit. One strategy that the team considered was to ask publishers for a 25% wholesale discount on all of these titles, so if a physical book sold at $12 wholesale (the going rate for the majority of *New York Times* bestsellers) Apple could purchase the ebook version for $9 and offer it on the iBookstore at a small markup. **[**24]** But Cue was aware that some publishers had increased Amazon's digital wholesale prices in 2009 in an unsuccessful effort to convince Amazon to change its pricing. *Id. at 650*; J.A. 1771. Cue felt it would be difficult to negotiate wholesale prices down far enough "for [Apple] to generally compete profitably with Amazon's below-cost pricing on the most popular e-books." J.A. 1772. As Cue saw it, Apple's most valuable bargaining chip came from the fact that the publishers were desperate "for an alternative to Amazon's pricing policies and excited about . . . the prospect that [Apple's] entry [into the ebook market] would give them leverage in their negotiations with Amazon." *Apple, 952 F. Supp. 2d at 659*.

It was at this point that Cue's team, recognizing its opportunity, abandoned the wholesale business model for a new, agency model.[3] Unlike a wholesale model, in an agency relationship the *publisher* sets the price that consumers will pay for each ebook. Then, rather than the retailer paying the publisher for each ebook that it sells, the publisher pays the retailer a fixed percentage of each sale. In essence, the retailer receives a commission for distributing the publisher's ebooks. Under the system Apple devised, publishers **[**25]** would have the freedom to set ebook prices in the iBookstore, and would keep 70% of each sale. The remaining 30% would go to Apple as a commission.

This switch to an agency model obviated Apple's concerns about negotiating wholesale prices with the Big Six while ensuring that Apple profited on every sale. It did not, however, solve all of the company's problems. Because the agency model handed the publishers control over pricing, it created the risk that the Big Six would sell ebooks in the iBookstore at far higher prices than Kindle's $9.99 offering. If the prices were too high, Apple could be left with a brand new marketplace brimming with titles, but devoid of customers.

To solve this pricing problem, Cue's team initially devised two strategies. First, they realized that they could maintain "realistic prices" by establishing price caps for different types of books. J.A. 359. Of course, these caps would need to be *higher* than Amazon's $9.99 price point, or Apple would face the same difficult price negotiations that it sought to avoid by switching **[**26]** away from the wholesale model. But at this point Apple was not content to open its iBookstore offering prices higher than the competition. For as the district court found, if the Publisher Defendants "wanted to end Amazon's $9.99 pricing," Apple similarly desired "that there be no price competition at the retail level." *Apple, 952 F. Supp. 2d at 647*.

Apple next concluded, then, as the district court found, that "[t]o ensure that the iBookstore would be competitive at higher prices, Apple . . . needed to eliminate all retail price competition." *Id. at 659*. Thus, rather than simply agreeing to price caps above Amazon's $9.99 price point, Apple created a second requirement: publishers must switch all of their other ebook **[*304]** retailers — including Amazon — to an agency pricing model. The result would be that Apple would not need to compete with Amazon on price, and publishers would be able to eliminate Amazon's $9.99 pricing. Or, as Cue would later describe the plan to executives at Simon & Schuster, Macmillan,

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[3] Notably, the possibility of an agency arrangement was first mentioned by Hachette and HarperCollins as a way "to fix Amazon pricing." J.A. 346.

and Random House, the plan "solve[d] [the] Amazon issue" by allowing the publishers to wrest control over pricing from Amazon.[4] *Id. at 661* (internal quotation marks omitted).

On January 4 and 5, Apple sent essentially identical emails to each member of the Big Six to explain its agency model proposal. Each email described the commission split between Apple and the publishers and recommended three price caps: $14.99 for hardcover books with list prices above $35; $12.99 for hardcover books with list prices below $35; and $9.99 for all other trade books. The emails also explained that, "to sell ebooks at realistic prices . . . all [other] resellers of new titles need to be in [the] agency model" as well. J.A. 360. Or, as Cue told Reidy, "all publishers" would need to move "all retailers" to an agency model. J.A. 2060.

3. The "Most-Favored-Nation" Clause

Cue's thoughts **[**28]** on the agency model continued to evolve after the emails on January 4 and 5. Most significantly, Saul — Cue's in-house counsel — devised an alternative to explicitly requiring publishers to switch other retailers to agency. This alternative involved the use of a "most-favored nation" clause ("MFN Clause" or "MFN"). In general, an MFN Clause is a contractual provision that requires one party to give the other the best terms that it makes available to any competitor. In the context of Apple's negotiations, the MFN Clause mandated that, "[i]f, for any particular New Release in hardcover format, the . . . Customer Price [in the iBookstore] at any time is or becomes higher than a customer price offered by any other reseller . . . , then [the] Publisher shall designate a new, lower Customer Price [in the iBookstore] to meet such lower [customer price]." J.A. 559. Put differently, the MFN would require the publisher to offer any ebook in Apple's iBookstore for no more than what the same ebook was offered elsewhere, such as from Amazon.

On January 11, Apple sent each of the Big Six a proposed eBook Agency Distribution Agreement (the "Contracts"). As described in the January 4 and 5 emails, these Contracts would split the proceeds **[**29]** from each ebook sale between the publisher and Apple, with the publisher receiving 70%, and would set price caps on ebooks at $14.99, $12.99, and $9.99 depending on the book's hardcover price. But unlike the initial emails, the Contracts contained MFN Clauses in place of the requirement that publishers move all other retailers to an agency model. Apple then assured each member of the Big Six that it was being offered the same terms as the others.

The Big Six understood the economic incentives that the MFN Clause created. Suppose a new hardcover release sells at a list price of $25, and a wholesale price of $12.50. With Amazon, the publishers had been receiving the wholesale price (or a **[*305]** slightly lower digital wholesale price) for every ebook copy of the volume sold on Kindle, even if Amazon ultimately sold the ebook for less than that wholesale price. Under Apple's initial agency model — with price caps but no MFN Clause — the publishers already stood to make *less* money per ebook with Apple. Because Apple capped the ebook price of a $25 hardcover at $12.99 and took 30% of that price, publishers could only expect to make $8.75 per sale. But what the publishers sacrificed in short-term revenue, they hoped to gain in long-term **[**30]** stability by acquiring more control over pricing and, accordingly, the ability to protect their hardcover sales.

The MFN Clause changed the situation by making it imperative, not merely desirable, that the publishers wrest control over pricing from ebook retailers generally. Under the MFN, if Amazon stayed at a wholesale model and continued to sell ebooks at $9.99, the publishers would be forced to sell in the iBookstore, too, at that same $9.99 price point. The result would be the worst of both worlds: *lower* short-term revenue and *no* control over pricing. The publishers recognized that, as a practical matter, this meant that the MFN Clause would force them to move Amazon to an agency relationship. As Reidy put it, her company would need to move all its other ebook retailers to

[4] Cue testified at trial that his reference to "solv[ing] the Amazon issue" denoted **[**27]** the proposal to price ebooks in the iBookstore above $9.99, and was not a reference to raising prices across the industry or wresting control over pricing from Amazon. In this and other respects, the district court found Cue's testimony to be "not credible" — a determination that, on this record, is in no manner erroneous, much less clearly so. *Id. at 661 n.19*. As the district court put it, "Apple's pitch to the Publishers was — from beginning to end — a vision for a new industry-wide price schedule." *Id.*

agency "unless we wanted to make even less money" in this growing market. *Apple, 952 F. Supp. 2d at 666* (internal quotation marks omitted). This situation also gave each of the publishers a stake in Apple's quest to have a critical mass of publishers join the iBookstore because, "[w]hile no one Publisher could effect an industry-wide shift in prices or change the public's perception of a book's value, if they moved together they could." *Id. at 665*; *see also* J.A. 1981.

Apple understood **[**31]** this dynamic as well. As the district court found, "Apple did not change its thinking" when it replaced the explicit requirement that the publishers move other retailers to an agency model with the MFN. Indeed, in the following weeks, Apple assiduously worked to make sure that the shift to agency occurred. *Apple, 952 F. Supp. 2d at 663*. But Apple also understood that, as Cue bluntly put it, "any decent MFN forces the model" away from wholesale and to agency. *Id.* (internal quotation marks omitted). Or as the district court found, "the MFN protected Apple from retail price competition as it punished a Publisher if it failed to impose agency terms on other e-tailers." *Id. at 665*.

Thus, the terms of the negotiation between Apple and the publishers became clear: Apple wanted quick and successful entry into the ebook market and to eliminate retail price competition with Amazon. In exchange, it offered the publishers an opportunity "to confront Amazon as one of an organized group . . . united in an effort to eradicate the $9.99 price point." *Id. at 664*. Both sides needed a critical mass of publishers to achieve their goals. The MFN played a pivotal role in this *quid pro quo* by "stiffen[ing] the spines of the [publishers] to ensure that they would **[**32]** demand new terms from Amazon," and protecting Apple from retail price competition. *Id. at 665*.

4. Final Negotiations

The proposed Contracts sparked intense negotiations as Cue's team raced to assemble enough publishers to announce the iBookstore by January 27. The publishers' first volley was to push back on Apple's price caps, which they recognized would become the "standard across the industry" for pricing.[5] J.A. 571. In a set **[*306]** of meetings between January 13 and 14, the majority of the Big Six expressed a general willingness to adopt an agency model, but refused to do so with the price limits Apple demanded. Cue responded by asking Jobs for permission to create a more lenient price cap system. Under this new regime, *New York Times* bestsellers could sell for $14.99 if the hardcover was listed above $30, and for $12.99 if listed below that price. As for new releases, a $12.99 cap would apply to hardcovers priced between $25 and $27.50; a $14.99 cap would apply to hardcovers selling for up to $30; and, if the hardcover sold for over $30, publishers could sell the ebook for between $16.99 and $19.99. Jobs responded that he could "live with" the pricing "as long as [the publishers] move Amazon to **[**33]** the agen[cy] model too." J.A. 499.

Cue proposed this new pricing regime to the Big Six on January 16 and, with only 11 days remaining before the iPad launch, turned up the pressure. In each email conveying the new prices, Cue reminded the publishers that, if they did not agree to the iBookstore by the 27th, other companies, including Amazon and Barnes & Noble, would certainly build their own book store apps for the iPad. Correspondence from within the publishing companies also shows that Cue promoted the proposal as the "best chance for publishers to challenge the 9.99 price point," and emphasized that Apple would "not move forward with the store [unless] 5 of the 6 [major publishers] signed the agreement." J.A. 522-23. As Cue said at trial, he attempted to "assure [the publishers] that they weren't going to be alone, so that [he] would take the fear awa[y] of the Amazon retribution that they were all afraid of." J.A. 2068 (internal quotation marks omitted). "The Apple **[**34]** team reminded the Publishers," as the district court found, "that this was a rare opportunity for them to achieve control over pricing." *Apple, 952 F. Supp. 2d at 664*.

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[5] As one HarperCollins executive put it, the "upshot" of moving to the agency model and adopting price caps was that "Apple would control price and that price would be standard across the industry." *Apple, 952 F. Supp. 2d at 670* (internal quotation marks omitted).

By January 22, two publishers — Simon & Schuster and Hachette — had verbally committed to join the iBookstore, while a third, Penguin, had agreed to Apple's terms in principle. As for the others, Cue was frustrated that they kept "chickening out" because of the "dramatic business change" that Apple was proposing. J.A. 547. To make matters worse, "[p]ress reports on January 18 and 19 alerted the publishing world and Amazon to the Publishers' negotiations with Apple," *Apple, 952 F. Supp. 2d at 670-71*, and Amazon learned from Random House that it was facing "pressure from other publishers . . . to move to [the] agency model because Apple had made it clear that unless all of the Big Six participated, they wouldn't bother with building a bookstore," J.A. 1520. Representatives from Amazon descended on New York for a set of long-scheduled meetings with the publishers. As the district court found, "[i]n separate conversations on January 20 and over the next few days, the Publisher Defendants all told Amazon that they wanted to change to an agency distribution model with Amazon." *Apple, 952 F. Supp. 2d at 672*.

Macmillan, however, **[**35]** presented an issue for Apple. The district court found that at a January 20 lunch between John Sargent and Amazon, Sargent "announced that Macmillan was planning to offer Amazon the option to choose either an agency [or wholesale] model." *Id.* But at dinner with Cue that night, according to the district court, Cue made sure that Sargent understood **[*307]** the consequences of the MFN, explaining "that Macmillan had no choice but to move Amazon to an agency model if it wanted 1 to sign an agency agreement with Apple."[6] *Id.* The next day, Sargent emailed Cue to express his continued reservations about switching Macmillan's other retailers to an agency relationship.

With the iPad launch fast approaching, Cue enlisted the help of others. Cue had received an email from Simon & Schuster's Carolyn Reidy, who had already verbally committed to Apple's terms and whom Cue would later call **[**36]** the "real leader of the book industry," moments after hearing from Sargent. J.A. 621. Cue then spoke with Reidy for twenty minutes before reaching out to Brian Murray, who, as the district court found, "was fully supportive of the requirement that all e-tailers be moved to an agency model." *Apple, 952 F. Supp. 2d at 673 n.39*. After the discussions, Cue asked Sargent to speak with both Reidy and Murray. Sargent complied, and "spoke to both Murray and Reidy by telephone for eight and fifteen minutes, respectively." *Id. at 673*. Minutes later, Sargent called the Amazon representative to inform him that Macmillan planned to sign an agreement that "required" the company to conduct business with Amazon through an agency model. *Id.* By January 23, Macmillan had verbally agreed to join the iBookstore.

Cue followed a similar strategy with Penguin. While Penguin's CEO David Shanks agreed to Apple's terms on January 22, he informed Cue that he would join the iBookstore only if four other publishers agreed to participate. By January 25, Apple had signatures from three publishers but Penguin was still noncommittal. Cue called Shanks, and the two spoke for twenty minutes. "Less than an hour [later], Shanks called Reidy to discuss Penguin's **[**37]** status in its negotiations with Apple." *Id. at 675*. Penguin signed the Contract that afternoon.

HarperCollins was the fifth, and final, publisher to agree in principle to Apple's proposal. Murray, its CEO, "remained unhappy over the size of Apple's commission and the existence of price caps." *Id. at 673 n.39*. Unable to negotiate successfully with Murray, Cue asked Jobs to contact James Murdoch, the CEO of the publisher's parent company, and "tell him we have 3 signed so there is no leap of faith here." *Id. at 675* (internal quotation marks omitted). After a series of emails, Jobs summarized Apple's position to Murdoch:

> [W]e simply don't think the ebook market can be successful with pricing higher than $12.99 or $14.99. Heck, Amazon is selling these books at $9.99, and who knows, maybe they are right and we will fail even at $12.99. But we're willing to try at the prices we've proposed. . . . As 1 I see it, [HarperCollins] has the following choices: (1) Throw in with [A]pple and see if we can all make a go of this to create a real mainstream ebooks market at $12.99 and $14.99. (2) Keep going with Amazon at $9.99. You will make a bit more money in the short term, but in the medium term Amazon will tell you they will be paying **[**38]** you 70% of $9.99. They have

[6] Although Cue denied discussing the MFN that night, the district court found this testimony not credible in light of Cue's deposition testimony and his contemporaneous email to Jobs that Sargent had "legal concerns over the price-matching." *Apple, 952 F. Supp. 2d at 672 n.38* (internal quotation marks omitted). This determination was not clearly erroneous.

> shareholders too. (3) Hold back your books from Amazon. Without a way for customers to buy your ebooks, they will steal them.

[*308] *Id. at 677*. Cue also emailed Murray to inform him that four other publishers had signed their agreements. Murray then called executives at both Hachette and Macmillan before agreeing to Apple's terms.

As the district court found, during the period in January during which Apple concluded its agreements with the Publisher Defendants, "Apple kept the Publisher Defendants apprised about who was in and how many were on board."[7] *Id. at 673*. The Publisher Defendants also kept in close communication. As the district court noted, "[i]n the critical negotiation period, over the three days between January 19 and 21, Murray, Reidy, Shanks, Young, and Sargeant called one another 34 times, with 27 calls exchanged on January 21 alone." *Id. at 674*.

By the January 27 iPad launch, five of the Big Six — Hachette, HarperCollins, Macmillan, Penguin, and Simon & Schuster — had agreed **[**39]** to participate in the iBookstore. The lone holdout, Random House, did not join because its executives believed it would fare better under a wholesale pricing model and were unwilling to make a complete switch to agency pricing. Steve Jobs announced the iBookstore as part of his presentation introducing the iPad. When asked after the presentation why someone should purchase an ebook from Apple for $14.99 as opposed to $9.99 with Amazon or Barnes & Noble, Jobs confidently replied, "[t]hat won't be the case . . . the price will be the same. . . . [P]ublishers will actually withhold their [e]books from Amazon . . . because they are not happy with the price."[8] A day later, Jobs told his biographer the publishers' position with Amazon: "[y]ou're going to sign an agency contract or we're not going to give you the books." J.A. 891 (internal quotation marks omitted).

E. Negotiations with Amazon

Jobs's boast proved to be prophetic. While the Publisher Defendants were signing Apple's Contracts, they were also informing Amazon that they planned on changing the **[**40]** terms of their agreements with it to an agency model. However, their move against Amazon began in earnest on January 28, the day after the iPad launch. That afternoon, John Sargent flew to Seattle to deliver an ultimatum on behalf of Macmillan: that Amazon would switch its ebook sales agreement with Macmillan to an agency model or suffer a seven-month delay in its receipt of Macmillan's new releases.[9] Amazon responded by removing the option to purchase Macmillan's print and ebook titles from its website.

Sargent, as the district court found, had informed Cue of his intention to confront Amazon before ever leaving for *Seattle.*[10] ***[*309]*** *Apple, 952 F. Supp. 2d at 678*. On his return, he emailed Cue to inform him about Amazon's decision to remove Macmillan ebooks from Kindle, adding a note to say that he wanted to "make sure you are in the loop." J.A. 640. Sargent also wrote a public letter to Macmillan's authors and agents, describing the Amazon negotiations. Hachette's Arnaud Nourry emailed the CEO of Macmillan's parent **[**41]** company to express his

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[7] Indeed, on the morning of January 21, Apple's initial deadline for the publishers to commit to agency, Simon & Schuster's Reidy emailed Cue to get "an update on your progress in herding us cats." J.A. 543.

[8] On January 29, Simon & Schuster's general counsel wrote to Reidy that she "[could not] believe that Jobs made [this] statement," which she considered "[i]ncredibly stupid." J.A. 638.

[9] As the district court found, "[s]even months was no random period — it was the number of months for which titles were designated New Release titles under the Apple Agreement and restrained by the Apple price caps and MFN." *Apple, 952 F. Supp. 2d at 679*.

[10] At trial, Cue claimed he had no advance knowledge of Sargent's plan to go to Seattle, but the district court found this testimony to be incredible. Sargent had emailed Cue about his trip days before the meeting took place. Moreover, on January 28, the day of the meeting, Jobs told his biographer that the Publisher Defendants "went to Amazon and said, 'You're going to sign an agency contract or we're not going to give you the books.'" *Apple*, 952 F. Supp. 2d at 678 n.47. The district court's assessment of Cue's credibility was not clearly erroneous.

"personal support" for Macmillan's actions and to "ensure [him] that [he was] not going to find [his] company alone in the battle." J.A. 643. A Penguin executive wrote to express similar support for Macmillan's position.

The district court found that while Amazon was "opposed to adoption of the agency model and did not want to cede pricing authority to the Publishers," it knew that it could not prevail in this position against five of the Big Six. Apple, 952 F. Supp. 2d at 671, 680. When Amazon told Macmillan that it would be willing to negotiate agency terms, Sargent sent Cue an email titled "URGENT!!" that read: "Hi Eddy, I am gonna need to figure out our final agency terms of sale **[**42]** tonight. Can you call me please?" J.A. 642. Cue and Sargent spoke that night and, while Cue denied at trial that the conversation concerned Macmillan's negotiations with Amazon, the district court found that "his denial was not credible."[11] Apple, 952 F. Supp. 2d at 681 n.52. By February 5, Amazon had agreed to agency terms with Macmillan.

The other publishers who had joined the iBookstore quickly followed Macmillan's lead. On February 11, Reidy wrote to the head of CBS that Simon & Schuster was beginning agency negotiations with Amazon. She informed him that she was trying to "delay" negotiations because it was "imperative . . . that the other publishers with whom Apple has announced deals push for resolution on their term changes" at the same time, "thus not leaving us out there alone." J.A. 701. Each of the Publisher Defendants then informed Amazon that they were under tight deadlines to negotiate new agency agreements, and kept one another informed about the details of their negotiations. As David Naggar, one of Amazon's negotiators, testified, **[**43]** whenever Amazon "would make a concession on an important deal point," it would "come back to us from another publisher asking for the same thing or proposing similar language." J.A. 1491.

Once again, Apple closely monitored the negotiations with Amazon. The Publisher Defendants would inform Cue when they had completed agency agreements, and his team monitored price changes on the Kindle. When Penguin languished 1 behind the others, Cue informed Jobs that Apple was "changing a bunch of Penguin titles to 9.99" in the iBookstore "because they didn't get their Amazon deal done." Apple, 952 F. Supp. 2d at 682 (internal quotation marks omitted). By March 2010, Macmillan, HarperCollins, Hachette, and Simon & Schuster had completed agency agreements with Amazon. When Penguin completed its deal in June, the company's executive proudly announced to Cue that "[t]he playing field is now level." *Id.* (internal quotation marks omitted).[12]

[*310] F. Effect on Ebook Prices

As Apple and the Publisher Defendants expected, the iBookstore price caps quickly became **[**44]** the benchmark for ebook versions of new releases and *New York Times* bestsellers. In the five months following the launch of the iBookstore, the publishers who joined the marketplace and switched Amazon to an agency model priced 85.7% of new releases on Kindle and 92.1% of new releases on the iBookstore at, or just below, the price caps. Apple, 952 F. Supp. 2d at 682. Prices for *New York Times* bestsellers took a similar leap as publishers began to sell 96.8% of their bestsellers on Kindle and 99.4% of their bestsellers on the iBookstore at, or just below, the Apple price caps. *Id.* During that same time period, Random House, which had not switched to an agency model, saw virtually no change in the prices for its new releases or *New York Times* bestsellers.

The Apple price caps also had a ripple effect on the rest of the Publisher Defendants' catalogues. Recognizing that Apple's price caps were tied to the price of hardcover books, many of these publishers increased the prices of their newly released *hardcover* books to shift the ebook version into a higher price category. Id. at 683. Furthermore, because the Publisher Defendants who switched to the agency model expected to make less money per sale than under the wholesale **[**45]** model, they also increased the prices on their ebooks that were *not* new releases or

[11] As the district court noted, Macmillan had executed its Contract with Apple a week earlier, so that "the only final agency terms still under discussion were with Amazon." Apple, 952 F. Supp. 2d at 681 n.52.

[12] Eventually, the Publisher Defendants negotiated agency agreements with Barnes & Noble, and later Google. Random House also adopted the agency model, and joined the iBookstore, in early 2011.

bestsellers to make up for the expected loss of revenue.[13] Based on data from February 2010 — just before the Publisher Defendants switched Amazon to agency pricing — to February 2011, an expert retained by the Justice Department observed that the weighted average price of the Publisher Defendants' new releases increased by 24.2%, while bestsellers increased by 40.4%, and other ebooks increased by 27.5%, for a total weighted average ebook price increase of 23.9%.[14] Indeed, even Apple's expert agreed, noting that, over a two-year period, the Publisher Defendants increased their average prices for hardcovers, new releases, and other ebooks.

Increasing prices reduced demand for the Publisher Defendants' ebooks. According to one of Plaintiffs' experts, the publishers who switched to agency **[**46]** sold 77,307 fewer ebooks over a two-week period after the switch to agency than in a comparable two-week period before the switch, which amounted to selling 12.9% fewer units. *Id. at 684*. Another expert relied on data from Random House to estimate how many ebooks the Publisher Defendants who switched Amazon to agency would have sold had they stayed with the wholesale model, and concluded that the agency switch and price increases led to 14.5% fewer sales. *Id.*

Significantly, these changes took place against the backdrop of a rapidly changing ebook market. Amazon introduced the Kindle in November 2007, just over two years before Apple launched the iPad in January 2010. During that short period, Apple estimated that the market grew from $70 million in ebook sales in 2007 to $280 million in 2009, and the company projected those figures to grow significantly in following years. Apple's expert witnesses argued that overall ebook sales continued to grow in the two years after the **[*311]** creation of the iBookstore and that the average ebook price fell during those years. But as Plaintiffs' experts pointed out, the ebook market had been expanding rapidly even before Apple's entry and average prices had been **[**47]** falling as lower-end publishers entered the market and larger numbers of old books became available in digital form. "Apple's experts did not present any analysis that attempted to control for the many changes that the e-book market was experiencing during these early years of its growth," *Apple, 952 F. Supp. 2d at 685*, nor did they estimate how the market would have grown *but for* Apple's agreement with the Publisher Defendants to switch to an agency model and raise prices. To the contrary, the undisputed fact that the Publisher Defendants raised prices on their ebooks, which accounted for roughly 50% of the trade ebook market in the first quarter of 2010, necessitated "a finding that the actions taken by Apple and the Publisher Defendants led to an increase in the price of e-books." *Id.*

Finally, in response to the dissent's claim that Apple's conduct "deconcentrat[ed] . . . the e-book retail market" and thus was "pro-competitive," Dissenting Op. at 31, it is worth noting that the district court's economic analysis and the parties' submissions at trial focused entirely on the price and sales figures for trade ebooks. This is because both parties agreed that the relevant market in this case is "the trade e-books market, not the **[**48]** e-reader market or the 'e-books system' market." *United States v. Apple, Inc., 889 F. Supp. 2d 623, 642 (S.D.N.Y. 2012)*; *Apple, 952 F. Supp. 2d at 694 n.60*. The district court did not analyze the state of competition between ebook *retailers* or determine that Amazon's pricing policy acted, as the dissent accuses, as a "barrier[] to entry" for other potential retailers. Dissenting Op. at 24, 30.

II. Procedural History

On April 11, 2012, Plaintiffs filed a pair of civil antitrust actions in the United States District Court for the Southern District of New York. The complaints alleged that Apple and the Publisher Defendants — Hachette, HarperCollins, Macmillan, Penguin, and Simon & Schuster — conspired to raise, fix, and stabilize the retail price for newly released and bestselling trade ebooks in violation of *§ 1 of the Sherman Act* and various state laws. The litigation then proceeded along two separate trajectories, one for the Publisher Defendants and the other for Apple.

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[13] The five Publisher Defendants accounted for 48.8% of all retail trade ebook sales in the United States during the first quarter of 2010.

[14] A weighted average price controls for the fact that different ebooks sell in different quantities by dividing the total price that consumers paid for ebooks by the total number of ebooks sold.

A. Publisher Defendants

Hachette, HarperCollins, and Simon & Schuster agreed to settle with DOJ by signing consent decrees on the same day that the Justice Department filed its complaint. Pursuant to the Tunney Act, *15 U.S.C. § 16 et seq.*, "at least 60 days prior to the effective date" of a consent judgment, the United States must file a "competitive **[**49]** impact statement," which includes, *inter alia*, "the nature and purpose of the proceeding," "a description of the practices or events giving rise to the alleged violation of the antitrust laws," and an explanation of the relief obtained by the consent judgment "and the anticipated effects on competition of such relief." *Id. § 16(b)*. In compliance with these requirements, DOJ issued a competitive impact statement that outlined the remedies it planned to impose on Hachette, HarperCollins, and Simon & Schuster. Two of those proposed remedies required that, for two years, the three publishers "not restrict, limit, or impede an E-book Retailer's ability to set, alter, or reduce the Retail Price of any E-book or to offer price discounts or any other form of promotions," and that they not "enter into any agreement" with retailers **[*312]** that limit such practices. J.A. 1126-27.

After the 60-day comment period, the Justice Department moved in the district court for a decision that "the entry of the judgment is in the public interest," *15 U.S.C. § 16(e)*, and for approval of the consent decree. In defense of the two-year limitations provisions, DOJ explained that the Publisher Defendants had used retail price restrictions to **[**50]** "effectuat[e] the conspiracy" and that two years was sufficient to "allow movement in the marketplace away from collusive conditions" without "alter[ing] the ultimate development of the competitive landscape in the still-evolving e-books industry." J.A. 1054-55. On September 5, 2012, the district court approved the consent decree and found the two-year ban on retail-price restrictions "wholly appropriate given the Settling Defendants' alleged abuse of such provisions . . . , the Government's recognition that such terms are not intrinsically unlawful, and the nascent state of competition in the e-books industry." J.A. 1088.

The remaining Publisher Defendants, Penguin and Macmillan, settled in quick succession. On December 18, 2012, Penguin agreed to a consent decree with essentially the same terms that Hachette, HarperCollins, and Simon & Schuster received. A few months later, in February 2013, Macmillan also agreed to settle. The terms of Macmillan's consent decree contained slight modifications. Rather than delaying the prohibition on retail discounts until the court approved the decree, DOJ required Macmillan to begin compliance within three days of signing the decree. In exchange, the Justice Department **[**51]** agreed to back-date the beginning of the limitations period to December 18, 2012 and to reduce its length from two years to 23 months, explaining that "[c]onsumers are better served by bringing more immediate retail price competition to the market" and that a "23-month cooling-off period is sufficient" to restore competition. J.A. 1162-63. The district court approved Penguin's consent decree on May 17, 2013, and Macmillan's on August 12, 2013.

B. Apple

Unlike the Publisher Defendants, Apple opted to take the case to trial. Fact and expert discovery concluded on March 22, 2013 and, after filing pretrial motions, the parties agreed to a bench trial on Apple's liability and injunctive relief, to be followed by a separate trial on damages on the state claims if the states prevailed.

On July 10, 2013, after conducting a three-week bench trial, the district court concluded that Apple had violated *§ 1 of the Sherman Act* and various state antitrust laws. In brief, the court found that Apple "orchestrat[ed]" a conspiracy among the Publisher Defendants to "eliminate retail price competition [in the e-book market] in order to raise the retail prices of e-books." *Apple, 952 F. Supp. 2d at 697*. Because this conspiracy consisted of a group of competitors **[**52]** — the Publisher Defendants — assembled by Apple to increase prices, it constituted a "horizontal price-fixing conspiracy" and was a *per se* violation of the Sherman Act. *Id. at 694*. It concluded, moreover, that even if the agreement to raise prices and eliminate retail price competition were analyzed under the rule of reason, it would still constitute an unreasonable restraint of trade in violation of *§ 1*. *Id.* In the district court's view, Plaintiffs' experts persuasively demonstrated that the agreement facilitated an "across-the board price increase in e-books sold by the Publisher Defendants" and a corresponding drop in sales. *Id.* Apple, on the other hand, failed to show that "the execution of the Agreements," as opposed to the launch of the iPad and "evolution of

[*313] digital publishing more generally" (which were independent of the Agreements), "had any pro-competitive effects." *Id.*

After the district court issued its liability decision, the parties submitted briefing on injunctive relief. The court conducted a hearing on the issue and, on September 5, 2013, issued a final injunctive order against Apple and entered final judgment. The injunctive order consists of four categories of relief: (1) "Prohibited **[**53]** Conduct," which prevents Apple from enforcing MFNs with ebook publishers, retaliating against publishers for signing agreements with other retailers, or agreeing with any of the Publisher Defendants to restrict, limit, or impede Apple's ability to set ebook retail prices; (2) "Required Conduct," which, among other things, forces Apple to modify its agency agreements with the Publisher Defendants and to treat ebook apps sold in the iTunes store like any other app sold there; (3) "Antitrust Compliance," which requires Apple to improve its internal system for preventing antitrust violations; and (4) "External Compliance Monitor[ing]," which allows the court to appoint an external monitor to ensure Apple's compliance with the injunctive order.

After the entry of the district court's injunctive order, Apple, Macmillan, and Simon & Schuster filed this appeal. The parties have not yet conducted a trial to assess the damages stemming from the state antitrust claims.

DISCUSSION

HN2[] To hold a defendant liable for violating *§ 1* of the Sherman Act, a district court must find "a combination or some form of concerted action between at least two legally distinct economic entities" that "constituted an unreasonable restraint **[**54]** of trade." *Capital Imaging Assocs. v. Mohawk Valley Med. Assocs., 996 F.2d 537, 542 (2d Cir. 1993)*; *see* *15 U.S.C. § 1*. On appeal, Apple challenges numerous aspects of the district court's *§ 1* analysis and also contends that the injunctive order that the district court imposed on the company is unlawful. Macmillan and Simon & Schuster have joined Apple's challenge to the injunction, arguing that it impermissibly interferes with their consent decrees and is barred by the doctrine of judicial estoppel. We conclude that the district court's liability determination was sound and its injunctive order lawful. We therefore affirm the judgment of the district court.

I. Standard of Review

HN3[] Following a bench trial, this Court reviews the "district court's findings of fact for clear error" and its "conclusions of law and mixed questions *de novo*." *Connors v. Conn. Gen. Life Ins. Co., 272 F.3d 127, 135 (2d Cir. 2001)*; *see* *Fed. R. Civ. P. 52(a)*. The district court's evidentiary rulings and its fashioning of equitable relief are reviewed for abuse of discretion. *See* *Zerega Ave. Realty Corp. v. Hornbeck Offshore Transp., LLC, 571 F.3d 206, 212-13 (2d Cir. 2009)* (evidentiary rulings); *Abrahamson v. Bd. of Educ. Of the Wappingers Falls Cent. Sch. Dist., 374 F.3d 66, 76 (2d Cir. 2004)* (equitable relief).

II. Apple's Liability Under § 1

This appeal requires us to address ***HN4***[] the important distinction between "horizontal" agreements to set prices, which involve coordination "between competitors at the same level of [a] market structure," and "vertical" agreements on pricing, which are created between **[**55]** parties "at different levels of [a] market structure." *Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 182 (2d Cir. 2012)* (internal quotation marks omitted). Under *§ 1* of the Sherman Act, the former are, with limited exceptions, *per se* unlawful, while the latter are unlawful only if an assessment of market effects, known as a rule-of-reason **[*314]** analysis, reveals that they unreasonably restrain trade. *See* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 893, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*.

Although this distinction is sharp in theory, determining the orientation of an agreement can be difficult as a matter of fact and turns on more than simply identifying whether the participants are at the same level of the market structure. For instance, HN5[] courts have long recognized the existence of "hub-and-spoke" conspiracies in which an entity at one level of the market structure, the "hub," coordinates an agreement among competitors at a different level, the "spokes." Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 602 F.3d 237, 255 (3d Cir. 2010); *see also* Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 932-34 (7th Cir. 2000). These arrangements consist of *both* vertical agreements between the hub and each spoke and a horizontal agreement among the spokes "to adhere to the [hub's] terms," often because the spokes "would not have gone along with [the vertical agreements] except on the understanding that the other [spokes] were agreeing to the same thing." VI Phillip E. Areeda & Herbert Hovenkamp, **[**56]** ***Antitrust Law*** ¶ 1402c (3d ed. 2010) (citing PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101 (2d Cir. 2002)); *see also* Am. Bar Ass'n, ***Antitrust Law*** *Developments* 24-26 (6th ed. 2007); XII Areeda & Hovenkamp, *supra*, ¶ 2004c.[15]

Apple characterizes its Contracts with the Publisher Defendants as a series of parallel but independent vertical agreements, a characterization that forms the basis for its two primary arguments against the district court's decision. First, Apple argues that the district court impermissibly inferred its involvement in a horizontal price-fixing conspiracy from the Contracts themselves. Because (in Apple's view) the Contracts were vertical, lawful, and in Apple's independent economic interest, the mere fact that Apple agreed to the same terms with multiple publishers cannot establish that Apple consciously organized a conspiracy among the Publisher Defendants to raise consumer-facing ebook prices — even if the *effect* of its Contracts was to raise those prices. Second, Apple argues that, even if it did orchestrate a horizontal price-fixing conspiracy, its conduct **[**57]** should not be subject to *per se* condemnation. According to Apple, proper application of the rule of reason reveals that its conduct was not unlawful.

For the reasons set forth below, we reject these arguments. On this record, the district court did not err in determining that Apple orchestrated an agreement with and among the Publisher Defendants, in characterizing this agreement as a horizontal price fixing-conspiracy, or in holding that the conspiracy unreasonably restrained trade in violation of § 1 of the Sherman Act.

A. The Conspiracy with the Publisher Defendants

HN6[] Section 1 of the Sherman Act bans restraints on trade "effected by a contract, combination, or conspiracy." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (internal quotation marks omitted). The first "crucial question in a Section 1 case is therefore whether the challenged conduct 'stem[s] from independent decision or from **[*315]** an agreement, tacit or express.'" Starr v. Sony BMG Music Entm't, 592 F.3d 314, 321 (2d Cir. 2010) (alteration in original) (quoting Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540, 74 S. Ct. 257, 98 L. Ed. 273 (1954)).

HN7[] Identifying the existence and nature of a conspiracy requires determining whether the evidence "reasonably tends to prove that the [defendant] and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984) (internal quotation marks omitted). Parallel action is not, **[**58]** by itself, sufficient to prove the existence of a conspiracy; such behavior could be the result of "coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties." Twombly, 550 U.S. at 556 n.4 (internal quotation marks omitted). Indeed, parallel behavior that does not result from an agreement is not unlawful even if it is anticompetitive. *See* In re Text Messaging Antitrust Litig., 782 F.3d 867, 873-79 (7th Cir. 2015); In re Flat Glass Antitrust Litig., 385 F.3d 350, 360-61 (3d Cir. 2004). Accordingly, to prove an antitrust conspiracy, "a plaintiff must show the existence of additional circumstances, often referred to as 'plus'

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[15] In this sense, the "hub-and-spoke" metaphor is somewhat inaccurate — the plaintiff must also prove the existence of a "rim" to the wheel in the form of an agreement among the horizontal competitors. *See* Dickson v. Microsoft Corp., 309 F.3d 193, 203-04 (4th Cir. 2002).

factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy." *Apex Oil Co. v. DiMauro, 822 F.2d 246, 253 (2d Cir. 1987)*.

HN8[] These additional circumstances can, of course, consist of "direct evidence that the defendants entered into an agreement" like "a recorded phone call in which two competitors agreed to fix prices." *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc., 709 F.3d 129, 136 (2d Cir. 2013)*. But plaintiffs may also "present circumstantial facts supporting the *inference* that a conspiracy existed." *Id.* Circumstances that may raise an inference of conspiracy include "a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence **[**59]** of a high level of interfirm communications." *Id.* (internal quotation marks omitted). Parallel conduct alone may support an inference of conspiracy, moreover, if it consists of "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason." *Id. at 137* (internal quotation marks omitted).

HN9[] Because of the risk of condemning parallel conduct that results from independent action and not from an actual unlawful agreement, the Supreme Court has cautioned against drawing an inference of conspiracy from evidence that is equally consistent with independent conduct as with illegal conspiracy — or, as the Court has called it, "ambiguous" evidence. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 597 n.21, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. Thus, a finding of conspiracy requires "evidence that tends to exclude the possibility" that the defendant was "acting independently." *Monsanto, 465 U.S. at 764*. This requirement, however, "[does] not mean that the plaintiff must disprove all nonconspiratorial explanations for the defendants' conduct"; rather, the evidence need only be sufficient "to allow a reasonable fact finder to infer that the conspiratorial explanation is more likely than not." *In re Publ'n Paper Antitrust Litig., 690 F.3d 51, 63 (2d Cir. 2012)* (quoting Phillip E. Areeda & Herbert **[**60]** Hovenkamp, *Fundamentals of* ***Antitrust Law*** § 14.03(b), at 14-25 (4th ed. 2011)); *accord* *Matsushita,* ***[*316]*** *475 U.S. at 588* (requiring that "the inference of conspiracy is reasonable in light of the competing inferences of independent action"); *In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 655-56 (7th Cir. 2002)*.

Apple portrays its Contracts with the Publisher Defendants as, at worst, "unwittingly facilitat[ing]" their joint conduct. Apple Br. at 23. All Apple did, it claims, was attempt to enter the market on profitable terms by offering contractual provisions — an agency model, the MFN Clause, and tiered price caps — which ensured the company a small profit on each ebook sale and insulated it from retail price competition. This had the *effect* of raising prices because it created an incentive for the Publisher Defendants to demand that Amazon adopt an agency model and to seize control over consumer-facing ebook prices industry-wide. But although Apple knew that its contractual terms would entice the Publisher Defendants (who wanted to do away with Amazon's $9.99 pricing) to seek control over prices from Amazon and other ebook retailers, Apple's success in capitalizing on the Publisher Defendants' preexisting incentives, it contends, does not suggest that it joined a *conspiracy* among the Publisher Defendants to raise prices. **[**61]** In sum, Apple's basic argument is that because its Contracts with the Publisher Defendants were fully consistent with its independent business interests, those agreements provide only "ambiguous" evidence of a § 1 conspiracy, and the district court therefore erred under *Matsushita* and *Monsanto* in inferring such a conspiracy.

We disagree. At the start, Apple's benign portrayal of its Contracts with the Publisher Defendants is not persuasive — not because those Contracts themselves were independently unlawful, but because, in context, they provide strong evidence that Apple consciously orchestrated a conspiracy among the Publisher Defendants. As explained below, and as the district court concluded, Apple understood that its proposed Contracts were attractive to the Publisher Defendants *only* if they collectively shifted their relationships with Amazon to an agency model — which Apple knew would result in higher consumer-facing ebook prices. In addition to these Contracts, moreover, ample additional evidence identified by the district court established both that the Publisher Defendants' shifting to an agency model with Amazon was the result of express collusion among them and that Apple consciously **[**62]** played a key role in organizing that collusion. The district court did not err in concluding that Apple was more than an innocent bystander.

Apple offered each Big Six publisher a proposed Contract that would be attractive only if the publishers acted collectively. Under Apple's proposed agency model, the publishers stood to make less money per sale than under their wholesale agreements with Amazon, but the Publisher Defendants were willing to stomach this loss because the model allowed them to sell new releases and bestsellers for more than $9.99. Because of the MFN Clause, however, each new release and bestseller sold in the iBookstore would cost only $9.99 as long as Amazon continued to sell ebooks at that price. So in order to receive the perceived benefit of Apple's proposed Contracts, the Publisher Defendants had to switch *Amazon* to an agency model as well — something no individual publisher had sufficient leverage to do on its own. Thus, each Publisher Defendant would be able to accomplish the shift to agency — and therefore have an incentive to sign Apple's proposed Contracts — *only* if it acted in tandem with its competitors. *See* Starr, 592 F.3d at 324; Flat Glass, 385 **[*317]** F.3d at 360-61; *see also* J.A. 1974 (noting that the agreements would "not fix the **[**63]** publishers' problems" if they could not move Amazon to an agency model). By the very act of signing a Contract with Apple containing an MFN Clause, then, each of the Publisher Defendants signaled a clear commitment to move against Amazon, thereby facilitating their collective action. As the district court explained, the MFNs "stiffened the spines" of the Publisher Defendants. Apple, 952 F. Supp. 2d at 665.

As a sophisticated negotiator, Apple was fully aware that its proposed Contracts would entice a critical mass of publishers only if these publishers perceived an opportunity collectively to shift Amazon to agency.[16] In fact, this was the very purpose of the MFN, which Apple's Saul devised as an elegant alternative to a provision that would have explicitly *required* the publishers to adopt an agency model with other retailers. As Cue put it, the MFN "force[d] the model" from wholesale to agency. J.A. 865. Indeed, the MFN's capacity for forcing collective action by the publishers was precisely what enabled Jobs to predict with confidence that "the price will be the same" on the iBookstore and the Kindle when he announced the launch of the iPad — the same, Jobs said, because the publishers would make Amazon "sign . . . agency contract[s]" by threatening **[**64]** to withhold their ebooks. J.A. 891. Apple was also fully aware that once the Publisher Defendants seized control over consumer-facing ebook prices, those prices would rise. It knew from the outset that the publishers hated Amazon's $9.99 price point, and it put price caps in its agreements because it specifically anticipated that once the publishers gained control over prices, they would push them higher than $9.99, higher than Apple itself deemed "realistic." Apple, 952 F. Supp. 2d at 692 (internal quotation marks omitted).

On appeal, Apple nonetheless defends the Contracts that it proposed to the publishers as an "aikido move" that shrewdly leveraged market conditions to its own advantage. **[**65]** Apple Br. at 17. "[A]ikido move" or not, the attractiveness of Apple's offer to the Publisher Defendants hinged on whether it could successfully help organize them to force Amazon to an agency model and then to use their newfound collective control to raise ebook prices. ***HN10***[] The Supreme Court has defined an agreement for Sherman Act § 1 purposes as "a conscious commitment to a common scheme designed to achieve an unlawful objective." Monsanto, 465 U.S. at 764 (internal quotation marks omitted). Plainly, this use of the promise of higher prices as a bargaining chip to induce the Publisher Defendants to participate in the iBookstore constituted a conscious commitment to the goal of raising ebook prices. ***HN11***[] "***Antitrust law*** has never required identical *motives* among conspirators" when their independent reasons for joining together lead to collusive action. Spectators' Commc'n Network Inc. v. Colonial Country Club, 253 F.3d 215, 220 (5th Cir. 2001) (emphasis added). Put differently, "independent reasons" can also be "interdependent," and the fact that Apple's conduct was in its own economic interest in **[*318]** no way undermines the inference that it entered an agreement to raise ebook prices. VI Areeda & Hovenkamp, supra, ¶ 1413a (internal quotation marks omitted).

Nor was the Publisher Defendants' joint action against Amazon a result of parallel decisionmaking. **[**66]** As we have explained, ***HN12***[] conduct resulting solely from competitors' independent business decisions — and not from any "agreement" — is not unlawful under § 1 of the Sherman Act, even if it is anticompetitive. *See* Text

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[16] Apple's argument on appeal that it did not have sufficient market power to coordinate the Publisher Defendants is beside the point. Market power may afford one means by which a company can coerce others to comply with its wishes, but brute force is not the only way to foster an agreement. Here, both Apple and the Publisher Defendants understood that Apple was in a position to "solve" the publishers' "Amazon problem" by helping them eliminate what they saw as a mortal threat to their businesses — namely, the $9.99 price point.

Messaging, 782 F.3d at 873-79. But to generate a permissible inference of agreement, a plaintiff need only present sufficient evidence that such agreement was more likely than not. On this record, the district court had ample basis to conclude that it was not equally likely that the near-simultaneous signing of Apple's Contracts by multiple publishers — which led to all of the Publisher Defendants moving against Amazon — resulted from the parties' independent decisions, as opposed to a "meeting of [the] minds." Monsanto, 465 U.S. at 765; *see Toys "R"* Us, 221 F.3d at 935-36 (holding that **HN13**[] exclusive-dealing agreements between a retailer and manufacturers that were contrary to the manufacturers' individual self-interest but consistent with their collective interest supported the inference of a horizontal conspiracy in which the retailer participated); VI Areeda & Hovenkamp, *supra*, ¶ 1425a, d (**HN14**[] "[A] conspiracy may be inferred if a defendant's action would have been contrary to its self-interest in the absence of advance agreement." *Id.* ¶ 1425a). That the Publisher Defendants were in constant **[**67]** communication regarding their negotiations with both Apple and Amazon can hardly be disputed. Indeed, Apple never seriously argues that the Publisher Defendants were not acting in concert.

Even so, Apple claims, it cannot have organized the conspiracy among the Publisher Defendants if it merely "unwittingly facilitated [their] joint conduct." Apple Br. at 23. But this argument founders — and dramatically so — on the factual findings of the district court. As the district court explained, Apple's Contracts with the publishers "must be considered in the context of the entire record." Apple, 952 F. Supp. 2d at 699. Even if Apple was unaware of the extent of the Publisher Defendants' coordination when it first approached them,[17] its subsequent communications with them as negotiations progressed show that Apple consciously played a key role in organizing their express collusion. From the outset, Cue told the publishers that Apple would launch its iBookstore only if a sufficient number of them agreed to participate and that each publisher would receive identical terms, assuring them that a critical mass of major publishers would be prepared to move against Amazon. Later on, Cue and his team kept the publishers updated **[**68]** about how many of their peers signed Apple's Contracts, and reminded them that it was offering "the best chance for publishers **[*319]** to challenge the 9.99 price point" before it became "cement[ed]" in "consumer expectations." J.A. 522. When time ran short, Apple coordinated phone calls between the publishers who had agreed and those who remained on the fence.[18] As Cue said at trial, Apple endeavored to "assure [the publishers] that they weren't going to be alone, so that [Apple] would take the fear awa[y] of the Amazon retribution that they were all afraid of." J.A. 2068.

Apple's involvement in the conspiracy continued even past the signing of its agency agreements. Before **[**70]** Sargent flew to Seattle to meet with Amazon, he told Cue. Apple stayed abreast of the Publisher Defendants' progress as they set coordinated deadlines with Amazon and shared information with one another during negotiations. Apple's communications with the Publisher Defendants thus went well beyond legitimately "exchang[ing] information" within "the normal course of business," Monsanto, 465 U.S. at 762-63 (internal quotation marks omitted), or "friendly banter among business partners," Apple Br. at 38; *see* Monsanto, 465 U.S. at 765-66

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[17] Apple endeavors to draw the district court's factfinding into doubt by asserting, erroneously, that the "bedrock of the court's entire decision" hinges on its supposed determination that Apple, knowing that the publishers had been coordinating beforehand, joined a preexisting conspiracy to raise prices at its initial meetings with the Publisher Defendants — a proposition that, it says, is unsupported by the record. The district court, however, did *not* find that Apple joined an ongoing conspiracy in late 2009, but merely observed that Apple went into its initial meetings with the understanding that the Publisher Defendants disliked, and were **[**69]** trying to fight, Amazon's $9.99 pricing, and so would be receptive to the news that Apple was open to higher prices. *See* Apple, 952 F. Supp. 2d at 703. These findings were amply supported and help explain how the agreement among Apple and the Publisher Defendants thereafter emerged.

[18] Apple takes issue with the district court's conclusion that Apple was aware of, and facilitated, communication between the Publisher Defendants. But the district court found that Cue believed Reidy was a "leader" in the publishing industry and that, on at least two occasions toward the end of the negotiating period, Cue called a recalcitrant executive, who then spoke to Reidy before agreeing to Apple's terms. *See* Apple, 952 F. Supp. 2d at 659-60; J.A. 2019-20. Reidy herself adverted to Cue's role in "herding us cats." J.A. 543. Moreover, the publishing executives frequently denied having *any* conversations about Apple during this period, despite strong documentary and phone record evidence to the contrary. The district court found that these denials lacked credibility and "strongly support[ed] a finding of consciousness of guilt." Apple, 952 F. Supp. 2d at 693 n.59. This view of the facts is not clearly erroneous.

(concluding that message about getting "the market place in order" could lead to inference of conspiracy (internal quotation marks omitted)); *see also* Starr, 592 F.3d at 324; Apex Oil, 822 F.2d at 255-57.

Apple responds to this evidence — which the experienced judge who oversaw the trial characterized repeatedly as "overwhelming" — by explaining how each piece of evidence standing alone is "ambiguous" and therefore insufficient to support an inference of conspiracy. We are not persuaded. **HN15**[] In antitrust cases, "[t]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962). Combined with the unmistakable purpose of the Contracts that Apple proposed to the publishers, and with the collective **[**71]** move against Amazon that inevitably followed the signing of those Contracts, the emails and phone records demonstrate that Apple *agreed* with the Publisher Defendants, within the meaning of the Sherman Act, to raise consumer-facing ebook prices by eliminating retail price competition. The district court did not err in rejecting Apple's argument that the evidence of its orchestration of the Publisher Defendants' conspiracy was "ambiguous."

Given the record and the district court's factual findings, we do not share Apple and its amici's concern that we will stifle productive enterprise by inferring an agreement among Apple and the Publisher Defendants on the basis of otherwise lawful contract terms, such as an agency model and MFNs. To begin with, it is well established that **HN16**[] vertical agreements, lawful in the abstract, can in context "be useful evidence for a plaintiff attempting **[*320]** to prove the existence of a horizontal cartel," Leegin, 551 U.S. at 893, particularly where multiple competitors sign vertical agreements that would be against their own interests were they acting independently, *see, e.g.,* Interstate Circuit v. United States, 306 U.S. 208, 222, 59 S. Ct. 467, 83 L. Ed. 610 (1939); Toys "R" Us, 221 F.3d at 935-36. The MFNs in Apple's Contracts created a set of economic incentives pursuant to which the Contracts **[**72]** were only attractive to the Publisher Defendants to the extent they acted collectively. That these contract terms had such an effect under the particular circumstances of this case — and therefore furnish part of the evidence of Apple's agreement with the Publisher Defendants — says nothing about their broader legality. It should be self-evident that our analysis is informed by the particular context in which Apple's contract terms were deployed. In any event, we are breaking no new ground in concluding that MFNs, though surely proper in many contexts, can be "misused to anticompetitive ends in some cases." Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic, 65 F.3d 1406, 1415 (7th Cir. 1995); *see* Starr, 592 F.3d at 324 (finding MFN evidence of conspiracy). Under the right circumstances, an MFN can "facilitate anticompetitive horizontal coordination" by "reduc[ing] [a company's] incentive to deviate from a coordinated horizontal arrangement." Jonathan B. Baker, *Vertical Restraints with Horizontal Consequences: Competitive Effects of "Most-Favored-Customer" Clauses*, 64 Antitrust L.J. 517, 520-21 (1996); *see also* Jonathan B. Baker & Judith A. Chevalier, *The Competitive Consequences of Most-Favored-Nation Provisions*, Antitrust, Spring 2013, at 20-26, *available at* http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1280&context=facsch_lawrev.[19]

In short, we have no difficulty on this record rejecting Apple's argument that the district court erred in concluding that Apple "conspir[ed] with the Publisher Defendants to eliminate retail price competition and to raise e-book prices." Apple, 952 F. Supp. 2d at 691. Having concluded that the district court correctly identified an agreement between Apple and the Publisher **[**74]** Defendants to raise consumer-facing ebook prices, we turn to Apple's and the dissent's arguments that this agreement did not violate § 1 of the Sherman Act.

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[19] Nor does our holding remotely suggest that price caps are always unlawful, **[**73]** which they are not. *See* State Oil Co. v. Khan, 522 U.S. 3, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997) (holding that vertical maximum price-fixing agreements should be analyzed under the rule of reason). Apple required price caps because it knew that once the Publisher Defendants moved on Amazon to seize control over ebook prices, they would raise them. Apple wanted to ensure that the Publisher Defendants set "realistic prices" that reflected the lower costs of producing ebooks. J.A. 359. The Publisher Defendants and Apple understood that these caps would become the "standard across the industry." J.A. 573. The price negotiations therefore reflected a common understanding that prices would rise, but a difference of opinion among the co-conspirators over *how high* they could reasonably go. *See* United States v. Andreas, 216 F.3d 645, 680 (7th Cir. 2000) ("The need to negotiate some details of the conspiracy with the cartel members . . . does not strip a defendant of the organizer role.").

B. Unreasonable Restraint of Trade

HN17[] "Although the Sherman Act, by its terms, prohibits every agreement 'in restraint of trade,' [the Supreme] Court has long recognized that Congress intended to outlaw only unreasonable restraints." *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. Thus, to succeed on an antitrust claim, a plaintiff must prove that the common scheme designed **[*321]** by the conspirators "constituted an unreasonable restraint of trade either per se or under the rule of reason." *Capital Imaging, 996 F.2d at 542*.

HN18[] In antitrust cases, "[*p*]*er se* and rule-of-reason analysis are . . . two methods of determining whether a restraint is 'unreasonable,' *i.e.*, whether its anticompetitive effects outweigh its procompetitive effects." *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*. Because this balancing typically requires case-by-case analysis, "most antitrust claims are analyzed under [the] 'rule of reason,' according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition." *Khan, 522 U.S. at 10*; *see also* *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C., 711 F.3d 68, 75 n.8 (2d Cir. 2013)*. However, some restraints "have such predictable and pernicious anticompetitive effect, and such limited potential **[**75]** for procompetitive benefit, that they are deemed unlawful *per se*." *Khan, 522 U.S. at 10*. This rule "reflect[s] a longstanding judgment" that case-by-case analysis is unnecessary for certain practices that, "by their nature[,] have a substantial potential" to unreasonably restrain competition. *FTC v. Sup. Ct. Trial Lawyers Ass'n, 493 U.S. 411, 433, 110 S. Ct. 768, 107 L. Ed. 2d 851 (1990)* (internal quotation marks omitted).

HN19[] Horizontal price-fixing conspiracies traditionally have been, and remain, the "archetypal example" of a *per se* unlawful restraint on trade. *Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647, 100 S. Ct. 1925, 64 L. Ed. 2d 580 (1980)*. By contrast, the Supreme Court in recent years has clarified that vertical restraints — including those that restrict prices — should generally be subject to the rule of reason. *See* *Leegin, 551 U.S. at 882* (holding that the rule of reason applies to vertical minimum price-fixing); *Khan, 522 U.S. at 7* (holding that the rule of reason applies to vertical maximum price-fixing).

In this case, the district court held that the agreement between Apple and the Publisher Defendants was unlawful under the *per se* rule; in the alternative, even assuming that a rule-of-reason analysis was required, the district court concluded that the agreement was still unlawful. *See* *Apple, 952 F. Supp. 2d at 694*. On appeal, we consider three primary arguments against application of the *per se* rule. First, Apple and our dissenting colleague argue **[**76]** that the *per se* rule is inappropriate in this case because Apple's Contracts with the Publisher Defendants were vertical, not horizontal. Even if the challenged agreement here was horizontal, Apple argues next, it promoted "enterprise and productivity." Finally, Apple contends that even if the agreement was horizontal, it was not, in fact, a "price-fixing" conspiracy of the kind that deserves *per se* condemnation. We address, and reject, these arguments in turn. Because the ebook industry, however, is new and at least arguably involves some new ways of doing business, I also consider, writing only for myself, Apple's rule-of-reason argument.

1. Whether the *Per Se* Rule Applies

a. Horizontal Agreement

In light of our conclusion that the district court did not err in determining that Apple organized a price-fixing conspiracy among the Publisher Defendants, Apple and the dissent's initial argument against the *per se* rule — that Apple's conduct must be subject to rule-of-reason analysis because it involved merely multiple independent, vertical agreements with the Publisher Defendants — cannot succeed.

[*322] ***HN20***[] "The true test of legality" under *§ 1* of the Sherman Act "is whether the *restraint imposed* is **[**77]** such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Bd. of Trade of City of Chi. v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683*

(1918) (emphasis added). By agreeing to orchestrate a horizontal price-fixing conspiracy, Apple committed itself to "achiev[ing] [that] unlawful objective," Monsanto, 465 U.S. at 764 (internal quotation marks omitted): namely, collusion with and among the Publisher Defendants to set ebook prices. This type of agreement, moreover, is a restraint "that would always or almost always tend to restrict competition and decrease output." Leegin, 551 U.S. at 886 (internal quotation marks omitted).

The response, raised by Apple and our dissenting colleague, that Apple engaged in "vertical conduct" that is unfit for *per se* condemnation therefore misconstrues the Sherman Act analysis. It is the type of restraint Apple agreed to impose that determines whether the *per se* rule or the rule of reason is appropriate. ***HN21***[] These rules are means of evaluating "whether [a] *restraint* is unreasonable," not the reasonableness of a particular defendant's role in the scheme. Atl. Richfield, 495 U.S. at 342 (emphasis added) (internal quotation marks omitted); *see also* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 103, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984) ("Both per se rules and the Rule of Reason are employed to form a judgment about the competitive significance **[**78]** of the restraint." (internal quotation marks omitted)).

Consistent with this principle, the Supreme Court and our Sister Circuits have held all participants in "hub-and-spoke" conspiracies liable when the objective of the conspiracy was a *per se* unreasonable restraint of trade. *See* Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6, 22 (1981) ("[C]ases in which dealers or distributors collude . . . among themselves and bring in the manufacturer to enforce their cartel, . . . can be dealt with under the conventional rules applicable to horizontal price-fixing conspiracies."). In *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, for example, the Supreme Court considered whether a prominent retailer of electronic appliances could be held liable under § 1 of the Sherman Act for fostering an agreement with and among its distributors to have those companies boycott a competing retailer. 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959). The Court characterized this arrangement as a "[g]roup boycott[]" supported by a "wide combination consisting of manufacturers, distributors and a retailer." Id. at 212-13. It then decided that, if the combination were proved at trial, holding the retailer liable would be appropriate because "[g]roup **[**79]** boycotts, or concerted refusals by traders to deal with other traders," are *per se* unreasonable restraints of trade. Id. at 212.

The Supreme Court followed a similar approach in United States v. General Motors Corp., 384 U.S. 127, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966), when it considered whether § 1 prohibited a car manufacturer, General Motors, from coordinating a group of dealerships to prevent other dealers from selling cars at discount prices. The majority called this arrangement a "classic conspiracy in restraint of trade" and refused to entertain General Motors' request to consider the company's reasons for creating the conspiracy. Id. at 140. The Court explained that "[t]here can be no doubt that the effect of **[*323]** the combination . . . here was to restrain trade and commerce within the meaning of the Sherman Act" because "[e]limination, by joint collaborative action, of discounters from access to the market is a per se violation of the Act." Id. at 145; *see, e.g.,* Toys "R" Us, 221 F.3d at 936; Denny's Marina, Inc. v. Renfro Prods., Inc., 8 F.3d 1217, 1220-21 (7th Cir. 1993); United States v. MMR Corp. (LA), 907 F.2d 489, 498 (5th Cir. 1990); *see also* Albert Foer & Randy Stutz, *Private Enforcement of* ***Antitrust Law*** *in the United States* 29 (2012).

Because the reasonableness of a restraint turns on its anticompetitive effects, and not the identity of each actor who participates in imposing it, Apple and the dissent's observation that the Supreme Court has refused to apply the *per se* rule to certain vertical agreements **[**80]** is inapposite. ***HN22***[] The rule of reason is unquestionably appropriate to analyze an agreement between a manufacturer and its distributors to, for instance, limit the price at which the distributors sell the manufacturer's goods or the locations at which they sell them. *See* Leegin, 551 U.S. at 881; Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977). These vertical restrictions "are widely used in our free market economy," can enhance interbrand competition, and do not inevitably have a "pernicious effect on competition." Cont'l T.V., 433 U.S. at 57-58 (internal quotation marks omitted). But the relevant "agreement in restraint of trade" in this case is not Apple's vertical Contracts with the Publisher Defendants (which might well, if challenged, have to be evaluated under the rule of reason); it is the horizontal agreement that Apple organized among the Publisher Defendants to raise ebook prices. As explained below, ***HN23***[] horizontal agreements with the purpose and effect of raising prices are *per se* unreasonable because they pose a "threat to the central nervous system of the economy," United States v. Socony-Vacuum Oil

Co., 310 U.S. 150, 224 n.59, 60 S. Ct. 811, 84 L. Ed. 1129 (1940); that threat is just as significant when a vertical market participant organizes the conspiracy. Indeed, as the dissent notes, the Publisher Defendants' coordination to fix prices is uncontested on appeal. *See* Dissenting **[**81]** Op. at 23. The competitive effects of that *same restraint* are no different merely because a different conspirator is the defendant.

Accordingly, when the Supreme Court has applied the rule of reason to vertical agreements, it has explicitly distinguished situations in which a vertical player organizes a horizontal cartel. For instance, in *Business Electronics Corp. v. Sharp Electronics Corp.*, the Court concluded that an agreement "between a manufacturer and a dealer to terminate" another dealer is a "vertical nonprice restraint" that should be evaluated under the rule of reason. 485 U.S. 717, 726, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988). The Court distinguished *General Motors* and *Klor's* on the grounds that "both cases involved horizontal combinations," *id. at 734*, and noted that "a facially vertical restraint imposed by a manufacturer only because it has been coerced by a 'horizontal carte[l]' . . . is in reality a horizontal restraint," *id. at 730 n.4* (alteration in original). More recently, in *NYNEX Corp. v. Discon, Inc.*, the Court ruled that "a buyer's decision to buy from one seller rather than another" is subject to analysis under the rule of reason. 525 U.S. 128, 130, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998). In arriving at this conclusion, the Court took care to distinguish, rather than overturn, *Klor's*, noting that **[**82]** *per se* liability was appropriate for the organizer of the conspiracy in that case because the agreement at **[*324]** issue was not "simply a 'vertical' agreement between supplier and customer, but [also] a 'horizontal' agreement among competitors." *Id. at 136* (citing Bus. Elecs. Corp., 485 U.S. at 734).

The Court's decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, is no different. 551 U.S. 877, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007). In *Leegin*, a leather manufacturer entered into separate agreements with each of its retailers, which required them to sell its goods at certain prices. The plaintiff — a retailer who refused to comply with the requirement — argued that these resale price maintenance agreements constituted *per se* violations of the Sherman Act. The Supreme Court disagreed, concluding that ***HN24***[] "vertical price restraints are to be judged by the rule of reason." *Id. at 882*. Its analysis was careful to distinguish between vertical restraints and horizontal ones. Vertical price restraints are unfit for the *per se* rule because they can be used to encourage retailers to invest in promoting a product by ensuring that other retailers will not undercut their prices for that good. *See id. at 890-92*. However, vertical price restraints can also be used to organize horizontal cartels to increase **[**83]** prices, which are, "and ought to be, *per se* unlawful." *Id. at 893*. When used for such a purpose, the vertical agreement may be "useful evidence . . . to prove the existence of a horizontal cartel." *Id.*; *see also* VI Areeda & Hovenkamp, *supra*, ¶ 1402c. The Court made clear that it was addressing only the lawfulness of the manufacturer's vertical agreements and not the plaintiff's claim that the manufacturer also "participated in an unlawful horizontal cartel with competing retailers." *Id. at 907-08*; *see also* PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 615 F.3d 412 (5th Cir. 2010) (considering plaintiff's "hub-and-spoke" theory on remand).

Our dissenting colleague suggests that *Leegin* also "rejected *per se* liability for hub-and-spokes agreements." Dissenting Op. at 18. This position relies on a single sentence from the opinion's analysis of how vertical resale price restraints can harm competition, which states that, if a "vertical agreement setting minimum resale prices is entered upon to facilitate" a horizontal cartel, it "would need to be held unlawful under the rule of reason." Leegin, 551 U.S. at 893. If the Supreme Court meant to overturn *General Motors* and *Klor's* — precedents that it has consistently reaffirmed — this cryptic sentence was certainly an odd way to accomplish that result. ***HN25***[] The Supreme Court "does not normally **[**84]** overturn, or so dramatically limit, earlier authority *sub silentio*." Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1, 18, 120 S. Ct. 1084, 146 L. Ed. 2d 1 (2000); *see also, e.g.,* Nestor v. Pratt & Whitney, 466 F.3d 65, 72 n.8 (2d Cir. 2006) ("It is not within our purview to anticipate whether the Supreme Court may one day overrule its existing precedent." (quoting United States v. Santiago, 268 F.3d 151, 155 n.6 (2d Cir. 2001) (internal quotation marks omitted))).

We need not worry about the possibility that Leegin covertly changed the law governing hub-and-spoke conspiracies, however, because the passage relied upon by the dissent is entirely consistent with holding the "hub" in such a conspiracy liable for the horizontal agreement that it joins. A horizontal conspiracy can use vertical agreements to facilitate coordination without the other parties to those agreements knowing about, or agreeing to, the horizontal conspiracy's goals. For example, a cartel of manufacturers could ensure compliance with a scheme to fix prices by having every member "require its dealers to adhere **[*325]** to specified resale prices." VIII Areeda & Hovenkamp, *supra*, ¶ 1606b. Because it may be difficult to distinguish such facilitating practices from procompetitive vertical resale price agreements, the quoted passage from *Leegin* notes that those "vertical agreement[s] . . . would need to be held unlawful under the rule of reason." *551 U.S. at 893*. But there is no such possibility **[**85]** for confusion in the hub-and-spoke context, where the vertical organizer has not only committed to vertical agreements, but has also agreed to participate in the horizontal conspiracy. In that situation, the court need not consider whether the vertical agreements restrained trade because all participants agreed to the horizontal restraint, which is "and ought to be, *per se* unlawful." *Id.*[20]

In short, the relevant "agreement in restraint of trade" in this case is the price-fixing conspiracy identified by the district court, not Apple's vertical contracts with the Publisher Defendants. How the law might treat Apple's vertical agreements in the absence of a finding that Apple agreed to create the horizontal restraint is irrelevant. Instead, the question is whether the vertical organizer of a horizontal conspiracy designed to raise prices has agreed to a restraint that is any less anticompetitive than its co-conspirators, and can therefore escape *per se* liability. We think not. Even in light of this conclusion, however, we must address two additional arguments that Apple raises against application of the *per se* rule.

b. "Enterprise and Productivity"

Apple seeks refuge from the *per se* rule **[**87]** by invoking a line of cases in which courts have permitted defendants to introduce procompetitive justifications for horizontal price-fixing arrangements that would ordinarily be condemned *per se* if those agreements "when adopted could reasonably have been believed to promote 'enterprise and productivity.'" Apple Br. at 50 (quoting *In re Sulfuric Acid Antitrust Litig., 703 F.3d 1004, 1011 (7th Cir. 2012))* (internal quotation mark omitted). The decisions falling in this line are narrow, and they do not support Apple's position. In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* ("*BMI*"), the defendants were corporations formed by copyright owners to negotiate "blanket licenses" allowing licensees to perform any of the licensed works for a flat fee. *441 U.S. 1, 4-6, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*. Although this scheme literally amounted to "price fixing" by the defendants' members, the Court upheld it under **[*326]** the rule of reason because blanket licenses were the only way to eliminate the "prohibitive" cost of each copyright owner's individually negotiating licenses, monitoring licensees' use of their work, and enforcing the licenses' terms. *Id. at 20-21*. In *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma ("NCAA")*, the Court relied on *BMI* in applying the rule of reason **[**88]** to (but ultimately striking down) restrictions placed by the National Collegiate Athletic Association ("NCAA") on the number of football games that its members could agree with television networks to broadcast. *468 U.S. 85, 103, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*. Many of the NCAA's restrictions on its members were "essential if the product [amateur athletics] is to be available at all," so a "fair evaluation" of the broadcast restrictions' "competitive character require[d] consideration of the NCAA's justifications for the restraints." *Id. at 101, 103*.

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[20] Since *Leegin*, the Sixth Circuit has acknowledged that plaintiffs can "establish[] a *per se* violation [of the Sherman Act] under the hub and spoke theory." *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield, 552 F.3d 430, 435 n.3 (6th Cir. 2008)*. To the extent that the Third Circuit decided otherwise in *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc., 530 F.3d 204, 225 (3d Cir. 2008)*, its more recent opinions cast doubt on that decision. In *In re Insurance Brokerage Antitrust Litigation*, for example, the court noted that "hub-and-spoke conspiracies" have "a long history in antitrust jurisprudence," and cited *Total Benefits* for the position that "[t]he critical issue for establishing a *per se* violation with the hub and spoke system is how the spokes are connected to each other." *618 F.3d 300, 327 (3d Cir. 2010)* (internal quotation marks omitted). The court also acknowledged that "[t]he anticompetitive danger inherent" in alleged horizontal collusion "is not necessarily mitigated by the fact that" a broker at **[**86]** a different level of the market structure "managed the details of each bid, nor by the likelihood that the horizontal collusion would not have occurred without the broker's involvement." *Id. at 338*. The panel in *Insurance Brokerage*, however, had no occasion to revisit *Toledo Mack* because the plaintiffs had failed to establish a horizontal agreement — the "rim" in the hub-and-spokes conspiracy. *Id. at 362*.

The Supreme Court has characterized these decisions as limited to situations where the "restraints on competition are essential if the product is to be available at all." *Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 203, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)* (quoting *NCAA, 468 U.S. at 101*) (internal quotation marks omitted). But even if read broadly, these cases, and others in this category, apply the rule of reason only when the restraint at issue was imposed in connection with some kind of potentially efficient joint venture. XI Areeda & Hovenkamp, *supra*, ¶ 1908b; *see, e.g., Sulfuric Acid, 703 F.3d at 1013* (describing joint venture formed by defendants). Put differently, a participant in a price-fixing agreement may invoke only certain, limited *kinds* of "enterprise and productivity" to receive the rule of reason's advantages. As the Supreme Court has explained — including **[**89]** in *BMI* itself, *see 441 U.S. at 8 & n.11* — the *per se* rule would lose all the benefits of being "*per se*" if conspirators could seek to justify their conduct on the basis of its purported competitive benefits in every case. Here, there was no joint venture or other similar productive relationship between any of the participants in the conspiracy that Apple joined. Apple also does not claim, nor could it, that creating an ebook retail market is possible only if the participating publishers coordinate with one another on price.

c. Price-Fixing Conspiracy

As noted, the Supreme Court has for nearly 100 years held that ***HN26***[] horizontal collusion to raise prices is the "archetypal example" of a *per se* unlawful restraint of trade. *Catalano, 446 U.S. at 647*. If successful, these conspiracies concentrate the power to set prices among the conspirators, including the "power to control the market and to fix arbitrary and unreasonable prices." *United States v. Trenton Potteries Co., 273 U.S. 392, 397, 47 S. Ct. 377, 71 L. Ed. 700 (1927)*. And even if unsuccessful or "not . . . aimed at complete elimination of price competition," the conspiracies pose a "threat to the central nervous system of the economy" by creating a dangerously attractive opportunity for competitors to enhance their power at the expense of others. *Socony-Vacuum Oil, 310 U.S. at 224 n.59 (1940)*. Thus:

> ***HN27***[] [P]rice-fixing cartels **[**90]** are condemned per se because the conduct is tempting to businessmen but very dangerous to society. The conceivable social benefits are few in principle, small in magnitude, speculative in occurrence, and always premised on the existence of price-fixing power which is likely to be exercised adversely to the public. . . . And even if **[*327]** power is usually established while any defenses are not, litigation will be complicated, condemnation delayed, would be price-fixers encouraged to hope for escape, and criminal punishment less justified. Deterrence of a generally pernicious practice would be weakened.

Trial Lawyers Ass'n, 493 U.S. at 434 n.16 (quoting 7 Philip Areeda, ***Antitrust Law*** ¶ 1509, at 412-13 (1986)).

Apple and its amici argue that the horizontal agreement among the publishers was not actually a "price-fixing" conspiracy that deserves *per se* treatment in the first place. But it is well established that ***HN28***[] *per se* condemnation is not limited to agreements that literally set or restrict prices. Instead, any conspiracy "formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . is illegal per se," and the precise "machinery employed . . . is immaterial." *Socony-Vacuum Oil, 310 U.S. at 223*; *see* ***[**91]*** *also Catalano, 446 U.S. at 647-48* (collecting cases); XII Areeda & Hovenkamp, *supra*, ¶ 2022a, d. The conspiracy among Apple and the Publisher Defendants comfortably qualifies as a horizontal price-fixing conspiracy.

As we have already explained, the Publisher Defendants' primary objective in expressly colluding to shift the entire ebook industry to an agency model (with Apple's help) was to eliminate Amazon's $9.99 pricing for new releases and bestsellers, which the publishers believed threatened their short-term ability to sell hardcovers at higher prices and the long-term consumer perception of the price of a new book. They had grown accustomed to a business in which they rarely competed with one another on price and could, at least partially, control the price of new releases and bestsellers by releasing hardcover copies before paperbacks. Amazon, and the ebook, upset that model, and reduced prices to consumers by eliminating the need to print, store, and ship physical volumes. Its $9.99 price point for new releases and bestsellers represented a small loss on a small percentage of its sales designed to encourage consumers to adopt the new technology.

Faced with downward pressure on prices but unconvinced that withholding books from Amazon **[**92]** was a viable strategy, the Publisher Defendants — their coordination orchestrated by Apple — combined forces to grab control over price. Collectively, the Publisher Defendants accounted for 48.8% of ebook sales in 2010. J.A. 1571. Once organized, they had sufficient clout to demand control over pricing, in the form of agency agreements, from Amazon and other ebook distributors. This control over pricing facilitated their ultimate goal of raising ebook prices to the price caps. *See* VIII Areeda & Hovenkamp, *supra*, ¶ 1606b ("Even when specific prices are not agreed upon, an express horizontal agreement that each manufacturer will use resale price maintenance or other distribution restraints should be illegal. Its only business function is to facilitate price coordination among manufacturers."). In other words, the Publisher Defendants took by collusion what they could not win by competition. And Apple used the publishers' frustration with Amazon's $9.99 pricing as a bargaining chip in its negotiations and structured its Contracts to coordinate their push to raise prices throughout the industry. A coordinated effort to raise prices across the relevant market was present in every chapter of this story.

This conspiracy **[**93]** to raise prices also had its intended effect. Immediately after the Publisher Defendants switched Amazon to an agency model, they increased the Kindle prices of 85.7% of their new releases **[*328]** and 96.8% of their *New York Times* bestsellers to within 1% of the Apple price caps. They also increased the prices of their other ebook offerings. Within two weeks of the move to agency, the weighted average price of the Publisher Defendants' ebooks — which accounted for just under half of all ebook sales in 2010 — had increased by 18.6%, while the prices for Random House and other publishers remained relatively stable.

This sudden increase in prices reduced ebook sales by the Publisher Defendants and proved to be durable. One analysis compared two-week periods before and after the Publisher Defendants took control over pricing and found that they sold 12.9% fewer ebooks after the switch. Another expert for Plaintiffs conducted a regression analysis, which showed that, over a six-month period following the switch, the Publisher Defendants sold 14.5% fewer ebooks than they would have had the price increases not occurred. Nonetheless, ebook prices for the Publisher Defendants over those six months, **[**94]** controlling for other factors, remained 16.8% higher than before the switch. And even Apple's expert produced a chart showing that the Publisher Defendants' prices for new releases, bestsellers, and other offerings remained elevated a full two years after they took control over pricing.

Apple points out that, in the two years following the conspiracy, prices across the ebook market as a whole fell slightly and total output increased. However, when the agreement at issue involves price fixing, the Supreme Court has consistently held that ***HN29***[] courts need not even conduct an extensive analysis of "market power" or a "detailed market analysis" to demonstrate its anticompetitive character. *FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 460, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*; *see also* *Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692-93, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*. The district court's assessment of Apple's and the Publisher Defendants' motives, coupled with the unambiguous increase in the prices of their ebooks, was sufficient to confirm that price fixing was the goal, and the result, of the conspiracy. *See* *Cal. Dental Ass'n v. FTC, 526 U.S. 756, 779-80, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)*.

Moreover, Apple's evidence regarding long-term growth and prices in the ebook industry is not inconsistent with the conclusion that the price-fixing conspiracy succeeded in actually raising prices. The popularization of ebooks fundamentally altered **[**95]** the publishing industry by eliminating many of the marginal costs associated with selling books. When Apple launched the iBookstore just two years after Amazon introduced the Kindle, the ebook market was *already* experiencing rapid growth and falling prices, and those trends were expected to continue. J.A. 1630, 1647. The district court found that the Publisher Defendants' collective move to retake control of prices — and to eliminate Amazon's $9.99 price point for new releases and *New York Times* bestsellers — tapped the brakes on those trends, causing prices to rise across their offerings and slowing their sales growth relative to other publishers.[21] No court can presume to know **[*329]** the proper price of an ebook, but the long judicial experience

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[21] Significantly, the Publisher Defendants are all major producers of new releases and *New York Times* bestsellers, and they collectively increased prices in those categories. Those prices remained high notwithstanding the influx of new publishers and low-cost ebooks, to the detriment of consumers interested in that segment of the market. *See 42nd* *Parallel N. v. E St. Denim Co., 286 F.3d 401, 405-06 (7th Cir. 2002)* (***HN31***[] "The key inquiry in a market power analysis is whether the defendant has

applying the Sherman Act has shown that ***HN30***[] "[a]ny combination which tampers with price structures . . . would be directly interfering with the free play of market forces." *Socony-Vacuum Oil, 310 U.S. at 221*; *see also* *Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 346, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*. By setting new, durable prices through collusion rather than competition, Apple and the Publisher Defendants imposed their view of proper pricing, supplanting the market's free play. This evidence, viewed in conjunction with the district court's findings as to and analysis **[**96]** of the conspiracy's history and purpose, is sufficient to support the conclusion that the agreement to raise ebook prices was a *per se* unlawful price-fixing conspiracy.

2. Rule of Reason

As explained above, neither Apple nor the dissent has presented any particularly strong reason to think that the conspiracy we have identified should be spared *per se* condemnation. My concurring colleague would therefore affirm the district court's decision on **[**97]** that basis alone. I, too, believe that *per se* condemnation is appropriate in this case and view Apple's sloganeering references to "innovation" as a distraction from the straightforward nature of the conspiracy proven at trial. Nonetheless, I am mindful of Apple's argument that the nascent ebook industry has some new and unusual features and that the *per se* rule is not fit for "business relationships where the economic impact of certain practices is not immediately obvious." *Leegin, 551 U.S. at 887* (internal quotation marks omitted); *accord* *Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 316 (2d Cir. 2008)* ("*Per se* treatment is not appropriate . . . where the economic and competitive effects of the challenged practice are unclear."); *Sulfuric Acid, 703 F.3d at 1011* ("It is a bad idea to subject a novel way of doing business . . . to per se treatment under ***antitrust law***."). I therefore assume, for the sake of argument, that it is appropriate to apply the rule of reason and to analyze the competitive effects of Apple's horizontal agreement with the Publisher Defendants.

Notably, however, the ample evidence here concerning the purpose and effects of Apple's agreement with the Publisher Defendants affects the scope of the rule-of-reason analysis called for in this case. ***HN32***[] Under a prototypically robust rule-of-reason **[**98]** analysis, the plaintiff must demonstrate an "*actual* adverse effect" on competition in the relevant market before the "burden shifts to the defendants to offer evidence of the pro-competitive effects of their agreement." *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485, 506-07 (2d Cir. 2004)* (internal quotation marks omitted). The factfinder then weighs the competing evidence "to determine if the effects of the challenged restraint tend to promote or destroy competition." *Id. at 507*. But not every case that requires rule of reason analysis "is a candidate for plenary market examination." *Cal. Dental Ass'n, 526 U.S. at 779*. "What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint." *Id. at 781*.

To that end, ***HN33***[] the Supreme Court has applied an abbreviated version of the rule **[*330]** of reason — otherwise known as "quick look" review — to agreements whose anticompetitive effects are easily ascertained. *See* *id. at 779*. This "quick look" effectively relieves the plaintiff of its burden of providing a robust market analysis, *see* *id.*, by shifting the inquiry directly to a consideration of the defendant's procompetitive justifications. *See* XI Areeda & Hovenkamp, *supra*, ¶ 1914d ("[W]hen the restraint appears 'on its face' to be one that tends to . . . increase price," an abbreviated rule-of-reason **[**99]** analysis "operates to shift the burden of proof rather than to cut off the inquiry, as is usually true in a per se case."). Thus, in *NCAA*, the Supreme Court refrained from applying the *per se* rule to the challenged television broadcast restrictions, but it did not require an "elaborate industry analysis . . . to demonstrate [their] anticompetitive character." *468 U.S. at 109* (internal quotation marks omitted). And in *Indiana Federation of Dentists*, the Court did not apply the *per se* rule to a group boycott when, in the relevant market, the economic impact was "not immediately obvious," but it nonetheless dispensed with a full analysis of the

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the ability to raise prices without losing its business." (internal quotation marks omitted)); *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co., 61 F.3d 123, 128-29 (2d Cir. 1995)*; *cf.* U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 6.1 (2010) (noting that, "[i]n differentiated product industries, some products can be very close substitutes . . . while other products are more distant substitutes").

agreement's anticompetitive character. *476 U.S. at 459*; *see also* *Major League Baseball, 542 F.3d at 317*; *United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993)*.

Here, the same evidence supporting our determination that *per se* condemnation is the correct way to dispose of this appeal also supports at most a "quick look" inquiry under the rule of reason. Contrary to the dissent's suggestion, this approach does not somehow "taint" the rule-of-reason analysis. The dissent concedes that the conscious object of Apple's signing its Contracts with the Publisher Defendants was to organize a horizontal conspiracy among them to raise consumer-facing ebook prices. *See* Dissenting **[**100]** Op. at 26 (noting that "price increases" were "the expected result" of the defendants' agreement). It is unsurprising in these circumstances that we are easily able to discern the anticompetitive effects of that horizontal conspiracy. A quick-look approach operates only to shift the rule-of-reason analysis directly to Apple's procompetitive justifications for organizing the conspiracy; I do not give those defenses any shorter shrift than I otherwise would under a more robust analysis. My rejection of Apple's defenses thus has nothing to do with my application of the quick-look approach and everything to do with how unpersuasive those defenses are.

a. Market Entry

Apple's initial argument that its agreement with the Publisher Defendants was procompetitive (an argument presented principally in an amicus brief adopted wholeheartedly by the dissent) is that by eliminating Amazon's $9.99 price point, the agreement enabled Apple and other ebook retailers to enter the market and challenge Amazon's dominance. But this defense — that higher prices enable more competitors to enter a market — is no justification for a horizontal price-fixing conspiracy. As the Supreme Court has cogently explained: **[**101]**

> ***HN34***[] [I]n any case in which competitors are able to increase the price level or to curtail production by agreement, it could be argued that the agreement has the effect of making the market more attractive to potential new entrants. If that potential justifies horizontal agreements among competitors imposing one kind of voluntary restraint or another on their competitive freedom, it would seem to follow that the more successful an agreement is in raising the price level, the safer it is from antitrust attack. **[*331]** Nothing could be more inconsistent with our cases.

Catalano, 446 U.S. at 649.

Nor does this argument become stronger when it is asserted, as here, that a horizontal cartel at one level of the market promoted market entry at another, enhancing competition. My dissenting colleague's view that "deconcentrating," Dissenting Op. at 27, Amazon's share of retail ebook sales justifies *concentrating* power over pricing in the hands of the Publisher Defendants reflects a basic misunderstanding of the nature of the competition that ***antitrust law*** protects. New entrants to a market are desirable to the extent that consumers would choose to buy their products at the price offered. When a market is concentrated and an incumbent **[**102]** firm is charging supracompetitive prices, a new entrant can benefit consumers by undercutting the incumbent's prices, thus offering better value for the same goods. Dominant firms who want to deter competition — so that they can keep charging supracompetitive prices — may erect barriers to entry to keep these new competitors out, and the dissent is quite right that these barriers are generally undesirable.

HN35[] Market dominance may, however, arise "as a consequence of a superior product, business acumen, or historic accident," and is "not only not unlawful; it is an important element of the free market system." *Trinko, 540 U.S. at 407* (internal quotation marks omitted). The ability to provide goods at particularly low prices is one way that a firm can gain such an edge in the marketplace. Competitors are, of course, entitled to challenge dominant firms by offering, among other things, superior products and lower prices. But success is not guaranteed. A dominant firm charging low prices may have proven itself more efficient than its competitors, such that a potential new entrant's inability to earn a profit would result not from any artificial "barriers to entry," but rather from the fact that, in light of the **[**103]** value proposition offered by the dominant firm, consumers would not choose to buy the new entrant's products at the price it is willing and able to offer. *See* Einer Elhauge, *United States **Antitrust Law** and Economics*

2 (2d ed. 2011) ("If a firm makes a better mousetrap, and the world beats a path to its door, it may drive out all rivals and establish a monopoly; but that is a good result, not a bad one.").

From this perspective, the dissent's contention that Apple could not have entered the ebook retail market without the price-fixing conspiracy, because it could not have profited either by charging more than Amazon or by following Amazon's pricing, is a complete non sequitur. The posited dilemma is the whole point of competition: if Apple could not turn a profit by selling new releases and bestsellers at $9.99, or if it could not make the iBookstore and iPad so attractive that consumers would pay *more* than $9.99 to buy and read those ebooks on its platform, then there was no place for its platform in the ebook retail market. Neither the district court nor Plaintiffs had an obligation to identify a "viable alternative" for Apple's profitable entry because Apple had no entitlement to **[**104]** enter the market on its preferred terms. Dissenting Op. at 35.

Although low prices that deter new entry may simply reflect the dominant firm's efficiency, it is true that below-cost pricing can, under certain circumstances, be anticompetitive. The dissent suggests that Amazon's pricing gave it an unfair advantage, so that even if Apple had priced ebooks at an efficient level (whatever that might have been), it still would not have been able to enter the market on a profitable **[*332]** basis. But Amazon was taking a risk by engaging in loss-leader pricing, losing money on some sales in order to encourage readers to adopt the Kindle. ***HN36***[] "That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*.'" *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))*. Because lower prices improve consumer welfare (all else being equal), below-cost pricing is unlawfully anticompetitive only if there is a "dangerous probability" that the firm engaging in it will later recoup its losses by raising prices to monopoly levels after driving its rivals out of the market. *Id.* If Apple and **[**105]** the Publisher Defendants thought that Amazon's conduct was anticompetitive under this standard, they could have sued under *§ 2* of Sherman Act. (Whether DOJ would have pursued its own enforcement action of unclear relevance given the availability of a private remedy.) Failing Amazon's pricing was part of the competitive landscape that competing ebook retailers had to accept.[22]

Instead, the dissent invites conduct that is strictly prohibited by Sherman Act — horizontal collusion to fix prices — to cure a perceived abuse market power. Whatever its merit in the abstract, that preference for collusion over dominance is wholly foreign to ***antitrust law***. *See* *Trinko, 540 U.S. at* (referring to collusion as the "supreme evil of antitrust"). ***HN37***[] Because of the long-term threat to competition, the Sherman Act does not authorize horizontal price conspiracies as a form of marketplace vigilantism **[**106]** to eliminate perceived "ruinous competition" or other "competitive evils." *Maricopa Cnty. Med. Soc'y, 457 U.S. at 346* (quoting *Socony-Vacuum Oil, 310 U.S. at 221*). Indeed, the attempt to justify a conspiracy to raise prices "on the basis of the potential threat that competition poses . . . is nothing less than a frontal assault on the basic policy of the Sherman Act." *Nat'l Soc'y of Prof'l Eng'rs, 435 U.S. at 695*. And it is particularly ironic that the "terms" that Apple was able to insist upon by organizing a cartel of Publisher Defendants to move against Amazon — namely, the elimination of retail price competition — accomplished the precise opposite of what new entrants to concentrated markets are ordinarily supposed to provide. In short, Apple and the dissent err first in equating a symptom (a single-retailer market) with a disease (a lack of competition), and then err again by prescribing the disease itself as the cure.

The dissent's "frontal assault" on competition law is not only wrong as a legal matter for all the reasons just given; it is also, despite its professed fidelity to the district court's view of the facts, premised on various mischaracterizations of the record. Put simply, it is far from clear that either Apple itself or other ebook retailers could not have entered the ebook retail **[**107]** market without Apple's efforts with the Publisher Defendants to eliminate price competition. As the district court noted, "[Apple] did not attempt to argue or show at trial that the price of admission to new markets must be or is participation in illegal price-fixing schemes" and did not "suggest[]

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[22] While the dissent accuses us of supposing that "competition should be genteel, lawyer-designed, and fair under sporting rules," Dissenting Op. at 5, it is the dissent's position that would have ebook consumers subsidize Apple's entry into the market by paying more for ebooks so that Apple would not have to compete on price.

[*333] that the only way it could have entered the e-book market was to agree with the Publisher Defendants to raise e-book prices." *Apple, 952 F. Supp. 2d at 708*.

The district court's statement that Apple feared "losing money if it tried or was forced to match Amazon's pricing," *Id. at 658* — the peg on which the dissent largely hangs its argument — is hardly a conclusive finding that Apple would have lost money had it entered a market that featured retail price competition. Barnes & Noble, for its part, had chosen to enter and stay in the market in the face of Amazon's pricing. Google, too, had plans to enter the ebook market before Apple launched the iBookstore. Moreover, the district court never found that Apple could not have entered the market on a wholesale model while charging *more* than Amazon for new releases and bestsellers. To fill this hole in its theory, the dissent suggests that Apple would have "impair[ed] its brand" by charging **[**108]** more than Amazon. Dissenting Op. at 34 (internal quotation marks omitted). But putting aside the fact that Apple's perception of its brand value is irrelevant — does the dissent really think it is desirable to require more efficient competitors to charge the same as their less efficient rivals solely so the latter will be spared the indignity of not charging the best price? — the district court actually found that Apple believed it would have been "unrealistic[]" to charge more than its *price caps* after switching to an agency model, *Apple, 952 F. Supp. 2d at 692*, a finding that says nothing about what Apple would have been willing to charge under a wholesale model.

The record makes clear the flaws in the dissent's argument. When Cue was still contemplating a wholesale model, his objective was not for Apple's pricing to match Amazon's precisely, but rather for that pricing to be "generally competitive." J.A. 1758. And had Apple opted to compete on both price and platform but concluded that it could not match Amazon's $9.99 pricing, some consumers might well have paid somewhat more to read new releases and bestsellers on the iPad, a revolutionary ereader boasting many more features than the Kindle.[23] The iPad was coming **[**109]** to market with or without a price-fixing conspiracy, and some iPad owners who wanted to read ebooks surely would not have wanted to buy a separate Kindle solely to benefit from Amazon's $9.99 pricing for new releases and bestsellers. (Whether Apple would have viewed its profits under that scenario as large enough to justify entry is not an antitrust concern.)

[*334] In actuality, the district court's fact-finding illustrates that Apple organized the Publisher Defendants' price-fixing conspiracy not because it was a necessary precondition to market entry, but because it was a convenient bargaining chip. Apple was operating under a looming deadline and recognized that, by aligning its interests with those of the Publisher Defendants and offering them a way to raise prices across the ebook market, it could gain quick entry into the market on extremely favorable terms, including the elimination of retail price competition from Amazon. But the offer to orchestrate a horizontal conspiracy to raise prices is not a legitimate way to sweeten a deal.

The facts also do not support the conclusion that Amazon's market position would have discouraged **[**111]** other ebook retailers from entering the market absent the price-fixing conspiracy orchestrated by Apple. Amazon popularized ebooks with the launch of the Kindle in late 2007, and enjoyed a strong market position because of its innovation. *Cf. Trinko, 540 U.S. at 407* (noting that the opportunity to gain market power "induces risk taking that produces innovation and economic growth"). Barnes & Noble was Amazon's first major competitor, and when it

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[23] A prediction that consumers would have paid more to read ebooks on the iPad than on the Kindle because of the iPad's improved reading experience or other attractive features does not somehow suggest that ebooks are "Veblen goods [or] Giffen goods." Dissenting Op. at 33 n.7. The dissent also suggests that Apple could not have depended on the iPad's hardware advantages as part of a strategy to charge more than Amazon because ***antitrust law*** would have required it to open up the iPad to a Kindle app. *Id. at 34*. But for a unilateral refusal to deal to be unlawful, the defendant must have monopoly power, which Apple plainly did not. *See, e.g., United States v. Microsoft Corp., 253 F.3d 34, 51, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (en banc) (***HN38***[ ] "While merely possessing monopoly power is not itself an antitrust violation, it is a necessary element of a monopolization charge." (citation omitted)); Elhauge, *supra*, at 268 (***HN39***[ ] "A firm that lacks dominant market **[**110]** power . . . can unilaterally choose with whom they deal without fear of antitrust liability."); *see also Trinko, 540 U.S. at 408* (***HN40***[ ] "Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate *§ 2*. We have been very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm.").

entered the market — on a wholesale model — with the introduction of the Nook in 2009, it began to erode Amazon's market share. The iPad itself also promised to introduce more competition with or without Apple's iBookstore by providing a platform for companies to build ebook marketplaces without investing in tablet development. These new entrants gave publishers more leverage to negotiate for alternative sales models or different pricing. Indeed, publishers were already in separate discussions about an agency model with Barnes & Noble before Apple offered a way to swap the rigors of competition for the comfort of collusion.

To summarize, the district court made no finding that a horizontal conspiracy to eliminate price competition in the ebook retail market was necessary **[**112]** to bring more retailers into the market to challenge Amazon, nor does the record evidence support this conclusion. More importantly, even if there *were* such evidence, the fact that a competitor's entry into the market is contingent on a horizontal conspiracy to raise prices only means (absent monopolistic conduct by the market's dominant firm, which cannot lawfully be challenged by collusion) that the competitor is inefficient, *i.e.*, that its entry will not enhance consumer welfare. For these reasons, I would reject the argument that Apple's entry into the market represented an important procompetitive benefit of the horizontal price-fixing conspiracy it orchestrated.

b. Other Justifications

Apart from its and other retailers' entry into the market, Apple points to other purported procompetitive benefits of its agreement with the Publisher Defendants, namely, eventual price decreases in the ebook industry and the various technological innovations embedded in the iPad. The district court correctly concluded that Apple failed to establish a connection between these benefits and the conspiracy among Apple and the Publisher Defendants. *Apple, 952 F. Supp. 2d at 694*; *see* *NCAA, 468 U.S. at 113-15* (concluding that the need to coordinate to produce **[**113]** intercollegiate athletics was not related to coordination on television rights); XI Areeda & Hovenkamp, *supra*, ¶ 1908b.

While it may be true that ebook prices eventually declined industry-wide, new publishers were adopting the digital format and prices were falling even before Apple's entry into the market. Apple did not introduce any admissible evidence linking **[*335]** the continued influx of new titles into the ebook market to its agreement with the Publisher Defendants.[24] Nor did it provide an explanation for how this price-fixing agreement altered the business and pricing decisions of other publishers in a procompetitive direction. The district court's refusal to give Apple credit for these trends was therefore proper.

The technological innovations embedded in the iPad are similarly unrelated to Apple's agreement with the Publisher Defendants. The iPad's backlit touchscreen, audio and video capabilities, and ability to offer consumers a number of services on a single device revolutionized tablet computing. But, as Apple's witnesses testified, the company had every intention of bringing the iPad to market with or without the iBookstore. Moreover, Apple was not the only entity that could use the iPad's new features to enhance the ebook experience—other **[**115]** retailers, or the publishers themselves, could have designed and launched ebook applications on the platform. The district court

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[24] Apple sought to introduce expert testimony from Dr. Michelle Burtis, which it believed would link continued long-term growth and price changes to its launch of the iBookstore. However, the district court excluded this testimony on the grounds that Dr. Burtis "did not offer any scientifically sound analysis of the cause for this purported price decline or seek to control for the factors that may have led to it." *Apple, 952 F. Supp. 2d at 694 n.61*. This was no abuse of discretion. *See* *Zerega Ave. Realty, 571 F.3d at 212-13*. ***HN41***[] "[T]he proponent of expert testimony has the burden of establishing **[**114]** by a preponderance of the evidence" that the expert's opinion is based on sufficient facts, is the product of reliable principles and methods, and applies those principles and methods reliably to the facts at hand. *United States v. Williams, 506 F.3d 151, 160 (2d Cir. 2007)*; *see* *Fed. R. Evid. 702*. Dr. Burtis merely compared the average ebook prices from the two years before Apple's entry into the market with the average prices two years after. She did not account for the rapid growth and change in that industry or explain the process she used to determine whether Apple's agency agreements were responsible for lower prices. *See* *Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997)*; *United States v. Dukagjini, 326 F.3d 45, 54 (2d Cir. 2003)*. The district court therefore acted well within its discretion in excluding Dr. Burtis's testimony.

was correct not to score these hardware innovations as procompetitive benefits of the agreement between Apple and the Publisher Defendants to raise prices.

Accordingly, I agree with the district court's decision that, under the rule of reason, the horizontal agreement to raise consumer-facing ebook prices that Apple orchestrated unreasonably restrained trade. But given the clear applicability of the *per se* rule in this context, the analysis here is largely offered in response to the dissent. I also confidently join with my concurring colleague in affirming the district court's conclusion that Apple committed a *per se* violation of *§ 1* of the Sherman Act.

III. The Injunctive Order

Next, Apple and two of the Publisher Defendants — Macmillan and Simon & Schuster — challenge specific portions of the district court's September 5, 2013 injunctive order. In particular, Macmillan and Simon & Schuster ask us to vacate the provision which prohibits Apple, for a period of time, from entering agreements with the Publisher Defendants that restrict its ability to set ebook prices. **[**116]** S.P.A. 205. Apple separately seeks vacatur of a provision requiring it to apply the same terms and conditions to ebook applications in its App Store as it does to other applications, and of the district court's decision to appoint a compliance monitor. We address each of the parties' arguments in turn.

[*336] A. Macmillan and Simon & Schuster

In the September 5, 2013 injunctive order, the district court mandated that "Apple shall not enter into or maintain any agreement with a Publisher Defendant that restricts, limits, or impedes Apple's ability to set, alter, or reduce the Retail Price of any E-book or to offer price discounts or any other form of promotions." S.P.A. 205. This prohibition began upon entry of the order and expires at different times for each of the Publisher Defendants. The earliest expiration date lifts the ban for agreements between Apple and Hachette beginning 24 months after entry of the injunctive order. Expiration dates for agreements with each of the other Publisher Defendants are then set in six-month intervals, with Simon & Schuster's ban expiring 36 months after entry of the final judgment and Macmillan's ban ending after 48 months.

Macmillan and Simon & Schuster **[**117]** seek vacatur of this prohibition. Both publishers are subject to separate consent decrees, which prohibit them from signing agreements with *any* ebook retailers which restrict the retailer's ability to "set, alter, or reduce" ebook prices, "or to offer price discounts." J.A. 1126; J.A. 1148. The prohibition lasts two years for Simon & Schuster and 23 months for Macmillan. According to both Publisher Defendants, the district court's injunctive order against Apple, in light of these consent decrees, is unlawful for two reasons. First, they contend that the injunctive order impermissibly *modifies* their consent decrees by extending the time during which they cannot negotiate to restrict the price at which Apple sells ebooks.[25] Second, they argue that DOJ should have been judicially estopped from seeking a prohibition on agreements limiting Apple's discounting authority that lasts longer than two years because, in the filings in support of the consent decrees, it argued that two years was a sufficient amount of time to restore competition in the ebook market. Neither objection is persuasive.

We begin with the argument that the injunctive order impermissibly amended the Publisher Defendants' consent decrees. ***HN42***[] *Federal Rule of Civil Procedure 60(b)* establishes the grounds for seeking "relief from a final judgment, order, or proceeding," *Fed. R. Civ. P. 60(b)*, including modifications of consent decrees. *Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 378-79, 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992)*; *United States v. Eastman Kodak Co., 63 F.3d 95, 101 (2d Cir. 1995)*. The rule adopts a flexible approach, enumerating specific reasons for modification while also allowing alterations for "any other reason that justifies relief." *Fed. R. Civ. P. 60(b)*. "[A] party seeking an alteration" under this catch-all provision bears the "burden of establishing that a significant change in

[25] Macmillan also contends that the injunctive order broadens the restrictions imposed by its consent decree **[**118]** because the decree allows the company to set certain limits on price discounts, which it can no longer set for ebooks sold by Apple.

circumstances warrants the modification." *United States v. Sec'y of Hous. & Urban Dev., 239 F.3d 211, 217 (2d Cir. 2001)*.

The Publisher Defendants' argument rests on the premise that the district court's injunctive order modified their consent decrees and therefore should have complied with *Rule 60(b)*'s requirements. The premise is incorrect. Macmillan's and Simon & Schuster's consent decrees prohibit them from restricting any retailer's authority to set prices. The injunctive order does not alter the terms of those decrees. Instead, it provides relief against a *different* party by limiting Apple's authority **[**119]** **[*337]** to negotiate away its ability to set prices in agreements with any of the Publisher Defendants. The fact that the order also has the effect of preventing the Publisher Defendants from restricting Apple's pricing authority does not render it "[r]elief from a final judgment, order, or proceeding" requiring a motion under *Rule 60(b)*. *Fed. R. Civ. P. 60(b)*. ***HN43***[] A consent decree is "enforced as [an] order[]," but "construed largely as [a] contract[]." *SEC v. Citigroup Global Mkts., Inc., 752 F.3d 285, 297 (2d Cir. 2014)* (internal quotation marks omitted). Its scope must be discerned within its "four corners, and not by reference to what might satisfy the purposes of one of the parties to it." *United States v. Armour & Co., 402 U.S. 673, 682, 91 S. Ct. 1752, 29 L. Ed. 2d 256 (1971)*; *see also* *Perez v. Danbury Hosp., 347 F.3d 419, 424 (2d Cir. 2003)*. An injunctive order against an entity that is not party to the consent decree and neither changes the terms of nor interprets the decree does not modify the contract and therefore does not require a *Rule 60(b)* motion. Indeed, as a practical matter, injunctions often alter the options available to other parties. *Rule 60(b)* does not hold district courts issuing injunctions to a higher standard simply because the injunction may affect rights addressed in a different party's consent decree.

Macmillan and Simon & Schuster's judicial estoppel argument fares no better. ***HN44***[] Judicial estoppel is "invoked by a court at its discretion," **[**120]** and is designed to "protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine, 532 U.S. 742, 749-50, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)* (citation omitted) (internal quotation marks omitted). While the propriety of applying estoppel depends heavily on the "specific factual context[]" before the court, we typically consider whether the party's argument is "clearly inconsistent with its earlier position," whether the party "succeeded in persuading a court to accept" that earlier position, and whether the "party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."*Id. at 750-51* (internal quotation marks omitted); *see also* *Adelphia Recovery Trust v. Goldman, Sachs & Co., 748 F.3d 110, 116 (2d Cir. 2014)*. "[R]elief is granted only when the . . . impact on judicial integrity is certain." *Republic of Ecuador v. Chevron Corp., 638 F.3d 384, 397 (2d Cir. 2011)* (internal quotation marks omitted).

We conclude that DOJ's arguments in support of the injunctive order were neither so clearly inconsistent with its earlier arguments nor so unfairly detrimental to the Publisher Defendants as to warrant judicial estoppel. In support of the consent decrees, the Justice Department argued that a two-year ban on restricting retailers' abilities to **[**121]** set prices was sufficient to "allow movement in the marketplace away from collusive conditions." J.A. 1055. It then pushed for a longer, five-year restriction on agreements specifically with Apple. While facially inconsistent, we have emphasized ***HN45***[] the need to "carefully consider the contexts in which apparently contradictory statements are made to determine if there is, in fact, direct and irreconcilable contradiction." *Rodal v. Anesthesia Grp. of Onondaga, P.C., 369 F.3d 113, 119 (2d Cir. 2004)*. And here, context is particularly important. The consent decrees ban certain agreements between the Publisher Defendants and *any* retailers. The injunctive order, on the other hand, pertained only to the Publisher Defendants' agreements with Apple. Given the extensive factfinding at **[*338]** trial about the relationship that Apple developed with the Publisher Defendants and its willingness to coordinate their conspiracy, DOJ had a basis for distinguishing the length of the restrictions in the consent decrees from those in the injunctive order. This was not a case of a party reversing courses, to the detriment of the legal system, "simply because his interests have changed." *New Hampshire, 532 U.S. at 749*.

Furthermore, the district court did not approve the Justice Department's request for a five-year ban on **[**122]** all discounting restrictions between Apple and the Publisher Defendants. Instead, the injunctive order adopts an interval-based system, which prevents Apple from agreeing to limit its pricing authority for between 24 and 48 months depending on the Publisher Defendant. The district court imposed this interval system so "there would be no point in time when Apple would be renegotiating with all of the publisher defendants at once[, and] no one point in time when [a] publisher defendant[] could be assured that it was taking the same bargaining position as its peers vis-à-vis Apple." J.A. 2376. This independent rationale for the injunctive order ensures that DOJ's argument did not produce "inconsistent results" or compromise the integrity of the judicial process. *Simon v. Safelite Glass Corp., 128 F.3d 68, 72 (2d Cir. 1997)*.

B. Apple

Apple, like Macmillan and Simon & Schuster, objects to the portion of the injunctive order preventing it from agreeing to limit its pricing authority. In addition, the company asks us to vacate another provision, which requires it to "apply the same terms and conditions to the sale or distribution of an E-book App through Apple's App Store as [it] applies to all other apps sold or distributed through [the] App Store." **[**123]** S.P.A. 207. Apple contends that neither provision is necessary to protect the public.[26] We disagree.

[*339] ***HN48***[] "A Government plaintiff, unlike a private plaintiff, must seek to obtain relief necessary to protect the public from *further* anticompetitive conduct and to redress anticompetitive harm." *F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 170, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (2004)* (emphasis added). Thus, "[w]hen the purpose **[**125]** to restrain trade appears from a clear violation of law, it is not necessary that all untraveled roads to that end be left open and that only the worn one be closed." *Int'l Salt Co. v. United States, 332 U.S. 392, 400, 68 S. Ct. 12, 92 L. Ed. 20 (1947)*, *abrogated on other grounds by* *Ill. Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)*. The district court has "large discretion to model [its] judgments to fit the exigencies of the particular case," *id.*, and "all doubts" about the remedy are to be "resolved in [the Government's] favor," *United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 334, 81 S. Ct. 1243, 6 L. Ed. 2d 318 (1961)*.

The district court was well within its discretion to restrict Apple's ability to give up its pricing authority and to require that Apple treat ebook applications the same way that it treats other applications. Apple relinquished its authority to set prices as part of its conspiracy with the Publisher Defendants. By delaying Apple's ability to renegotiate similar restrictions and arranging for the restrictions to expire at different times for each Publisher Defendant, the injunctive

[26] Apple also argues that the district court's decision to appoint a monitor to supervise the company's compliance with the injunction went beyond its powers under the Sherman Act and violated both *Federal Rule of Civil Procedure 53* and separation-of-powers principles. Apple devoted only two conclusory sentences to these three separate facial challenges to the district court's authority. We therefore deem the arguments forfeited and do not consider them. *Frank v. United States, 78 F.3d 815, 833 (2d Cir. 1996)* (***HN46***[] "Issues not sufficiently argued are in general deemed waived and will not be considered on appeal."), *vacated on other grounds*, ***521 U.S. 1114, 117 S. Ct. 2501, 138 L. Ed. 2d 1007 (1997)***; *Zhang v. Gonzales, 426 F.3d 540, 545 n.7 (2d Cir. 2005)*. We also note that, following *Rule 53*'s amendment in 2003, the Advisory Committee stated that ***HN47***[] "[r]eliance on a master" appointed under that Rule "is appropriate when a complex decree requires complex policing, particularly when a party has proved resistant or intransigent," and that both the Supreme Court and this Court have approved such appointments. *Fed. R. Civ. P. 53* advisory committee's note (2003 Amendments) (citing *Local 38 of the* *Sheet Metal Workers' Int'l Ass'n v. E.E.O.C., 478 U.S. 421, 481-82, 106 S. Ct. 3019, 92 L. Ed. 2d 344 (1986))*; *see also* *Republic of the Philippines v. N.Y. Land Co., 852 F.2d 33, 36-37 (2d Cir. 1988)* (collecting cases). In light of this background, it would be inappropriate to excuse Apple's failure to argue and for this panel **[**124]** to entertain its facial challenges to the district court's authority on the scant briefing before us.

Judge Jacobs, who sat on a separate panel of this Court that considered an as-applied challenge to the monitor's conduct, contends that "the injunction warps the role of a neutral, court-appointed referee into that of an adversary party." Dissenting Op. at 36. Whatever the merits of this argument, it is not properly before us on this appeal. Here, Apple has asserted only (and without argumentation of any sort) that appointing a monitor, *in general*, violates the Sherman Act, *Rule 53*, and separation-of-powers principles. The dissent's position eschews that broad facial challenge and instead focuses on the conduct of the monitor in this *particular* case, drawing entirely on a record not before this panel, but presented to a *separate* panel in another appeal. *See* *United States v. Apple Inc., 787 F.3d 131, 2015 U.S. App. LEXIS 8854, 2015 WL 3405534 (2d Cir. 2015)*. We do not believe it is proper to resolve this appeal with reference to arguments that Apple has failed to make.

order ensured that Apple and the Publisher Defendants would not be able to use that same strategy as part of a new conspiracy. The provision requiring ebook applications in the App Store to receive the same terms and conditions as other applications furthers that goal. The district court expressed concern that **[**126]** Apple and the Publisher Defendants may use ebook applications to circumvent the injunction's rules about Apple's pricing authority, or that Apple may impose restrictions on ebook applications to punish publishers who refused to act in concert with their competitors. For instance, the court found evidence that Random House eventually joined the iBookstore on Apple's desired terms in part because Apple prevented the company from launching an ebook application in the App Store. The district court was therefore correct to decide that these provisions of the injunctive order were "necessary to protect the public from further anticompetitive conduct." *F. Hoffmann-La Roche, 542 U.S. at 170*.

CONCLUSION

We have considered the appellants' remaining arguments and find them to be without merit. Because we conclude that Apple violated *§ 1* of the Sherman Act by orchestrating a horizontal conspiracy among the Publisher Defendants to raise ebook prices, and that the injunctive relief ordered by the district court is appropriately designed to guard against future anticompetitive conduct, the judgment of the district court is **AFFIRMED**.

Concur by: Raymond J. Lohier (In Part)

Concur

Lohier, *Circuit Judge*, concurring in part and concurring in the judgment:

I join **[**127]** in the majority opinion except for part II.B.2 relating to the application of the rule of reason. In my view, Apple's appeal rises or falls based on the application of the per se rule. That rule clearly applies to the central agreement in this case (and the only agreement alleged to be unlawful): the publishers' horizontal **[*340]** agreement to fix ebook prices. Cf. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 893, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)* (vertical agreements "may . . . be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel"). I would affirm on that basis alone.

That said, I recognize that the publisher defendants, who used Apple both as powerful leverage against Amazon and to keep each other in collusive check, may appear to be more culpable than Apple. And there is also some surface appeal to Apple's argument that the ebook market, in light of Amazon's virtually uncontested dominance, needed more competition. But more corporate bullying is not an appropriate antidote to corporate bullying. It cannot have been lawful for Apple to respond to a competitor's dominant market power by helping rival corporations (the publishers) fix prices, as the District Court found happened here. However sympathetic Apple's plight and the publishers' **[**128]** predicament may have been, I am persuaded that permitting "marketplace vigilantism," Majority Op. at 9, would do far more harm to competition than good, would be disastrous as a policy matter, and is in any event not sanctioned by the Sherman Act.

Dissent by: DENNIS JACOBS

Dissent

DENNIS JACOBS, Circuit Judge, dissenting:

I respectfully dissent.

This appeal is taken by Apple Inc. from a judgment in the United States District Court for the Southern District of New York (Cote, J.), awarding an antitrust injunction in favor of the United States, 31 states, the District of Columbia, and the Commonwealth of Puerto Rico. The plaintiffs' claims are premised on Apple's conduct as a prospective retailer of e-books. I vote to reverse.

* * *

I have no quarrel with the district court's conscientious findings of fact; I affirmatively rely on them, and cite them throughout. The 156 pages of findings track communications and interactions that happened over the 48-day course of events, detail by detail. See *United States v. Apple Inc., 952 F. Supp. 2d 638, 655-81 (S.D.N.Y. 2013)* ("Apple I"). All that is needed to decide the case, however, are the schematic facts that show the architecture of the horizontal and vertical arrangements and the dynamics of the competitive forces. They are set out in **[**129]** a nutshell in the following paragraphs, and at somewhat greater length in the Background section of this opinion.

As Apple was preparing the launch of its first iPad tablet in 2009, the company recognized that the device could support e-books, and gave consideration to including an e-book retail platform. However, Amazon had preceded Apple in the market, had established a 90 percent ascendency in sales of e-books, and was effectively excluding new entrants by offering bestsellers at a price ($9.99) that for many books was below the prices Amazon was paying publishers.

Although Apple was positioned to enter the retail market, it was unwilling to do so on terms that would incur a loss on e-book sales (as would happen if it met Amazon's below-cost price), or that would impair its brand and likely fail (as would happen if it charged more than Amazon). So, as a condition to its entry as a competing buyer for the publishers' wares, Apple insisted that the publishers agree to a distribution model that would lower that barrier to retail entry.

The new distribution model was implemented by several terms in Apple's contracts **[*341]** with publishers: agency pricing, tiered price caps, and a most-favored-nation **[**130]** clause. It is conceded that none of those terms is, standing alone, illegal. Apple also encouraged publishers to implement agency pricing in their contracts with other retailers. Although publishers were unhappy about Amazon's below-cost price for e-books (which eroded the publishers' hardcover sales) no one publisher alone could counter Amazon. In short order, five of the country's six largest publishers agreed to Apple's terms and jointly pressured Amazon to adopt agency pricing. The publishers thereby prevailed in what the district court found to be a horizontal price-fixing conspiracy. The barrier to entry thus removed, Apple entered the retail market as a formidable competitor. In the deconcentrated market, Amazon's 90 percent market share is now 60 percent.

(I acknowledge that, in adducing facts found by the district court, this opinion unavoidably casts imputations on Amazon. Fairness requires acknowledgment that Amazon has not appeared in this litigation and has not had a full opportunity to dispute the district court's findings or characterizations. Moreover, the fact of Amazon's monopoly alone would not support an inference that Amazon's behavior was in any way unlawful.)

[131]** The Department of Justice, 31 states, the District of Columbia, and the Commonwealth of Puerto Rico sued Apple and the five publishers for conspiracy in unreasonable restraint of trade, in violation of *§ 1* of the Sherman Antitrust Act, *15 U.S.C. § 1*. The publishers settled, and Apple proceeded to a bench trial. The district court ruled that Apple's conduct as a vertical enabler of the publishers' horizontal price conspiracy constituted a violation *per se* of *§ 1*, and that (in any event) Apple's conduct would also violate *§ 1* under the rule of reason. On this appeal, a majority affirms only on the ground of liability *per se*. See Op. of Judge Lohier, ante, at 1. Since I would reverse, I consider as well the rule of reason. Judge Livingston's opinion argues (for herself alone) that the judgment could be affirmed on that alternative ground.

The district court committed three decisive errors:

- The district court ruled (and the majority affirms) that a vertical enabler of a horizontal price-fixing conspiracy is in *per se* violation of the antitrust laws. However, the Supreme Court teaches that a vertical agreement designed to facilitate a horizontal cartel "would need to be held unlawful *under the rule of reason*." *Leegin*

Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 893, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007) (emphasis added). **(POINT I)**

• The district court's alternative ruling under the rule of reason was predetermined by its (erroneous) *per se* ruling. Thus the district court assessed impacts on competition without recognizing that Apple's role as a vertical player differentiated it from the publishers. The court should instead have considered Apple as a competitor on the distinct horizontal plane of retailers, where **[**132]** Apple competed with Amazon (and smaller players such as Barnes & Noble). **(POINT II)**

• Apple's conduct, assessed under the rule of reason on the horizontal plane of retail competition, was unambiguously and overwhelmingly pro-competitive. Apple was a major potential competitor in a market dominated by a 90 percent monopoly, and was justifiably unwilling to enter a market on terms that would assure a loss on sales or exact a toll on its reputation. In that connection, the district court erroneously **[*342]** deemed the monopolist's $9.99 price as categorically good for competition because it was lower than cost, and because e-book prices rose after the monopoly was broken. **(POINT III)**

A further and pervasive error (by the district court and by my colleagues on this appeal) is the implicit assumption that competition should be genteel, lawyer-designed, and fair under sporting rules, and that ***antitrust law*** is offended by gloves-off competition.

BACKGROUND

From the 2007 inception of the U.S. retail market for e-books through 2009, Amazon "dominated the e-book retail market, selling nearly 90% of all e-books." *Apple I, 952 F. Supp. 2d at 649*. It assured its domination by charging its retail customers $9.99 for new releases and bestsellers, **[**133]** below the wholesale price that Amazon was paying to publishers. *Id. at 649-50, 708*. The popular media reported that Amazon "takes a loss on the sale of the most popular e-books." *Id. at 652*. That pricing deterred potential retail competitors from entering the relevant market--"trade e-books in the United States"[1]--because an entrant "would run the risk of losing money if it tried or was forced to match Amazon's pricing to remain competitive." *Id. at 658*.

Amazon's below-cost pricing was also a threat to publishers, because at a $9.99 price point, e-books cannibalized sales of (more profitable) hardcover editions. *Id. at 649*. Although the major publishers believed Amazon's below-cost pricing was "predatory," *id. at 653*, each publisher understood that it was powerless to take on Amazon, *id. at 650*. Publishers feared that Amazon might "compete directly with publishers by negotiating directly with authors and literary agents for rights," *id. at 649*, and might "retaliate" against insubordinate publishers "by removing the 'buy buttons' on the Amazon site that allow customers to purchase books . . . or by eliminating [a publisher's] products from its site altogether," *id. at 679*. One publisher, Macmillan, suffered **[**134]** such retaliation when Amazon removed the "buy buttons" for print and e-book versions of Macmillan titles. Id.

Amazon's 90 percent market share constituted a monopoly under ***antitrust law***. See, e.g., *Am. Tobacco Co. v. United States, 328 U.S. 781, 797, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)* (characterizing as "a substantial monopoly" a market share of "over 80% of the field"); 3B Areeda & Hovenkamp, ***Antitrust Law*** ¶ 801 (3d ed. 2008). Amazon's below-cost pricing was a barrier to entry by Apple in 2009, when it contemplated entry into the e-book retail market via the iPad.[2] *Apple I, 952* ***[*343]*** *F. Supp. 2d at 654, 658*. Apple nevertheless undertook to develop an e-book

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[1] The parties did not dispute this market definition. *Apple I, 952 F. Supp. 2d at 694 n.60*.

[2] While the district court did not use the label "barrier to entry," its findings of fact made the point clearly. In finding that a new entrant to e-book retail in 2009 "would run the risk of losing money if it tried or was forced to match Amazon's pricing to **[**135]** remain competitive," *Apple I, 952 F. Supp. 2d at 658*, the district court left no doubt that the effect of Amazon's below-cost pricing regime was to "impede entry and protect existing market power"--the basic operation of a barrier to entry, 2B Areeda & Hovenkamp, supra, ¶ 420c, at 78.

retail platform in time for the iPad's launch, scheduled for January 27, 2010. *Id. at 654-55*. However, "Apple did not have to open an e-bookstore when it launched the iPad"; and it was willing to enter the market only on the condition that its e-book retail business would be profitable, such that Apple could "compete effectively with Amazon" without adopting a loss-leadership and below-cost pricing strategy. *Id. at 656-59*.

Apple opened extensive negotiations with publishers to determine how if at all it could enter the e-book retail market. *Id. at 655-57*. Apple met with the leaders of the six largest publishing houses in the United States: Hachette, HarperCollins, Macmillan, Penguin, Random House, and Simon & Schuster. *Id. at 647, 655*. At the outset, Apple understood that the publishers were unhappy with Amazon's below-cost pricing of e-books; **[**136]** so Apple knew that the publishers "were willing to coordinate their efforts" to combat the $9.99 price point. *Id. at 656*.

After some weeks, Apple and several publishers devised a new model for e-book distribution. Amazon had been paying a wholesale price for each e-book, and reselling (often at a loss) for a retail price of its choosing. Apple's distribution contracts would adopt an agency system: publishers would set the retail prices of e-books sold through Apple's platform and Apple would take a fixed-percent commission on each sale. *Id. at 659*. However, the agency model would expose Apple (or any retailer) to risk, because publishers might protect hardcover sales by setting retail prices for e-books so high that Apple would appear out of touch with consumers aware of Amazon's $9.99 price. Id. Apple's solution was twofold. First, the proposed agency contract included a most favored nation ("MFN") clause, under which publishers must price their new releases in Apple's store at or below the lowest price offered by any other e-book retailer. *Id. at 662*. The district court found that the MFN clause "effectively forced" each publisher that signed Apple's agency contract to move its other retailers onto the **[**137]** agency model. *Id. at 664*. That is because, once Apple's cost was set as a percentage of the retail price, the publishers would suffer if Apple matched Amazon's $9.99 retail price. Second, the proposed contract included maximum prices for various categories of e-books. *Id. at 661-62*. The district court found that these tiered price caps had the effect of setting anchor prices across the e-book industry. *Id. at 670*. Nonetheless, as the district court observed, these terms are *not* inherently illegal, and "entirely lawful contracts may include an MFN, price caps, or pricing tiers." *Id. at 698*.

As Apple negotiated with publishers to sign the agency contract, it told each major publisher that all signing publishers would receive the same terms. *Id. at 667*. In the end, five of the six largest publishers signed Apple's agency contract. *Id. at 673*. (Only Random House, the country's largest, did not. Id.) As the district court found, the five signatories represented "over 48% of all e-books in the United States" when they signed Apple's agency contract. *Id. at 648*. Apple unveiled its e-book retail platform--the "iBookstore"--at the first public demonstration of the iPad on January 27, 2010. *Id. at 678-79*.

After the publishers signed on to Apple's agency **[**138]** contract, they had to focus on Amazon's adoption of the agency model because otherwise (as explained above) the MFN clause would allow Apple to match Amazon's price for bestsellers, and pay the publishers no more than a percentage **[*344]** commission on $9.99. However, "the [p]ublishers feared retaliation from Amazon unless they acted in unison," *id. at 670*, and "needed reassurance that they would not be alone," *id. at 674*. An Apple executive liaised with each of the five signatory publishers, to encourage a "united front" in their negotiations with Amazon, and to keep the publishers "apprised about who was in and how many were on board." *Id. at 673*. The publishers also communicated directly with each other. *Id. at 674-77*. When Amazon realized that the five publishers were acting in concert, it acceded and signed the agency contracts. *Id. at 680-82*.

Those are the findings on which Apple was adjudged to have committed an antitrust violation. The putative violation amounted to: (a) embedding the agency model (complete with MFN clauses and price caps) in Apple's own

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The majority disputes whether there was any barrier to entry under Amazon's below-cost pricing regime, because at least one competitor attempted to join the market. See Op. of Judge Livingston, ante, at 13 (for the Court), 100. Even if that entrant had any chance of success (nobody contends that it sold a meaningful number of e-books, or made any money, or reduced Amazon's mammoth market share to less than 90 percent), that fact need not imply ease of entry because "a barrier may protect a market incumbent without completely excluding entry." 2B Areeda & Hovenkamp, supra, ¶ 420a, at 73.

contracts with publishers and (b) encouraging the publishers to coordinate horizontally in their efforts to push the industry-wide adoption of the agency model. Apple and the publishers **[**139]** shared the motive to increase the publishers' pricing power in order to deprive Amazon of its monopoly. They succeeded: as the district court noted earlier in this litigation, "Amazon's market share in e-books decreased from 90 to 60 percent in the two years following the introduction of agency pricing." *United States v. Apple, Inc., 889 F. Supp. 2d 623, 640 (S.D.N.Y. 2012)*.

*** * ***

The foregoing Background accepts and relies upon the district court's findings of fact. One cannot say the same of Judge Livingston's opinion, which supports its legal conclusions and its market analysis with novel findings made now on appeal, i.e., remand by other means. A few examples:

- The notion that Amazon's below-cost pricing was loss-leadership "designed to encourage consumers to adopt the Kindle," Op. of Judge Livingston, ante, at 13 (for the Court), is a novelty, supported by neither the fact findings nor the record. At any rate, the effect of e-book pricing outside of the relevant market is irrelevant.

- The majority asserts that Amazon's below-cost pricing was limited to only "a small loss" on only "a small percentage of its sales." Id. at 85 (for the Court). These observations are apparently drawn from a submission by Amazon, downplaying the anti-competitive effects of its **[**140]** monopoly-protective pricing. The district court did not rely on these statistics, presumably because they are misleading and self-serving: they ignore that the minority of titles comprising new releases and bestsellers naturally have an outsize impact on the industry. Accordingly, the district court found that the below-cost pricing had consequences on the market, namely that a new entrant "would run the risk of losing money if it tried or was forced to match Amazon's pricing to remain competitive." *Apple I, 952 F. Supp. 2d at 658*.

- I can find no record support for the narrative that Amazon's market share was eroding before Apple's entry, that the iPad "promised to introduce more competition with or without Apple's iBookstore," and that the publishers thereby enjoyed increased negotiating leverage. Op. of Judge Livingston, ante, at 103-04. Similarly, the assertion that Barnes & Noble disrupted Amazon's dominance in the e-book market, see id. at 103, is supported neither by the district court's findings nor by the record.

[*345] By contrast, my antitrust analysis relies on the findings made by the district court, and incorporates no others, in order (a) to avoid factual disputes with my colleagues, (b) to defer to the district **[**141]** court's thorough fact findings in arriving at my legal conclusions, and (c) to respect the limited role of appellate courts.

DISCUSSION

I

The district court's principal legal error, from which other errors flow, is its conclusion that Apple violated *§ 1* under the *per se* rule. Having found that the publishers' coordinated strategy was a horizontal price-fixing conspiracy, and that Apple had facilitated that conspiracy in its vertical relationship with the publishers, see *Apple I, 952 F. Supp. 2d at 691*, the district court drew the legal conclusion that these facts established a *per se* violation of the Sherman Act by Apple. This appeal turns on whether purely vertical participation in and facilitation of a horizontal price-fixing conspiracy gives rise to *per se* liability.

Section 1 of the Sherman Act "outlaw[s] only *unreasonable* restraints"; so a court weighing an alleged violation "presumptively applies rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful." *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)* (quoting *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997))*. The exception, liability *per se*, is reserved for those categories of behavior so definitively and universally anti-competitive that **[**142]** a court's consideration of market forces and reasonableness would be pointless. Id. Traditionally, restraints that are *per se* unlawful take the form of horizontal agreements "raising, depressing, fixing, pegging, or stabilizing the price of a commodity." *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*.

Among modern cases, the *per se* rule takes aim exclusively at *horizontal* agreements, because "competition among the manufacturers of the same [product] . . . is the primary concern of ***antitrust law***." *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 52 n.19, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*. Accordingly, the trend of ***antitrust law*** has been a steady constriction of the *per se* rule in the context of vertical relationships. See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 901, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)* (holding that vertical agreements for minimum prices are not *per se* violations); *State Oil Co., 522 U.S. at 7* (holding that vertical agreements for maximum prices are not *per se* violations); *Continental T.V., 433 U.S. at 59* (holding that vertical non-price restraints are not *per se* violations); *White Motor Co. v. United States, 372 U.S. 253, 261-64, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963)* (holding that vertical territorial restraints are not *per se* violations). The cases have "continued to temper, limit, or overrule once strict prohibitions on vertical restraints." *Leegin, 551 U.S. at 901*.

A vertical relationship that facilitates a horizontal price conspiracy does not amount to a *per se* violation. In another age, the Supreme Court treated such a hub-and-spokes conspiracy **[**143]** as a *per se* violation. See *Interstate Circuit, Inc. v. Paramount Pictures Distrib. Co., 306 U.S. 208, 226-27, 59 S. Ct. 467, 83 L. Ed. 610 (1939)*. But the *per se* rule has been in steady retreat.

The most recent and explicit signal is given in Leegin, which explains that "the **[*346]** Sherman Act's prohibition on 'restraints of trade' evolves to meet the dynamics of present economic conditions," such that "the boundaries of the doctrine of *per se* illegality should not be immovable." *551 U.S. at 899-900* (alterations omitted). Leegin held that a manufacturer did not commit a *per se* violation of *§ 1* when it agreed with several retailers on a minimum price that the retailers could charge--a holding that overruled a century-old principle articulated in *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911)*. See *Leegin, 551 U.S. at 881*. Leegin reasoned that Dr. Miles had "treated vertical agreements a manufacturer makes with its distributors as analogous to a horizontal combination among competing distributors," but that, "[i]n later cases, . . . the Court rejected the approach of reliance on rules governing horizontal restraints when defining rules applicable to vertical ones." *Leegin, 551 U.S. at 888*. Dr. Miles was held to be inconsistent with "[o]ur recent cases[,] [which] formulate antitrust principles in accordance with the appreciated differences in economic effect between vertical and horizontal agreements, differences the Dr. Miles Court **[**144]** failed to consider." Id.

Although the express holding of Leegin does not extend beyond the overruling of Dr. Miles, the Court's analysis reinforces the doctrinal shift that subjects an ever-broader category of vertical agreements to review under the rule of reason. The Court first stated the subsisting scope of *per se* liability:

> A horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, *per se* unlawful.

Leegin, 551 U.S. at 893. The Court then rejected *per se* liability for hub-and-spokes agreements, in wording that prescribes rule-of-reason review of vertical dealings that facilitate *per se* unlawful horizontal agreements (the type of agreement that the district court found Apple had undertaken):

> To the extent a vertical agreement setting minimum resale prices is entered upon to *facilitate* either type of cartel [among manufacturers or among retailers], it, too, *would need to be held unlawful under the rule of reason*.

Id. (emphasis added). After Leegin, we cannot apply the *per se* rule to a vertical facilitator of a horizontal price-fixing conspiracy; such an actor must be held liable, if at all, "under the **[**145]** rule of reason." Id.

Leegin is animated by the "appreciated differences in economic effect between vertical and horizontal agreements." *Id. at 888*. Since every challenged restraint is thus classified as either horizontal or vertical, one may draw certain reliable inferences: vertical agreements are not presumptively subject to *per se* liability; the vertical nature of the agreement is its salient feature; the influence of a vertical arrangement on a horizontal cartel (on another plane of competition) does not render the vertical arrangement *per se* unlawful.

Our only sister circuit to have considered this wording from Leegin arrived at the conclusion I draw. In *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc., 530 F.3d 204, 225 (3d Cir. 2008)*, a manufacturer used its contracts with distributors to facilitate and enforce a horizontal conspiracy (among the distributors) that was itself illegal *per se*. See *id. at 210*. The Third Circuit held that Leegin's instruction--that the vertical arrangement "would need to be held unlawful under the rule of reason"--prescribed the rule of reason as **[*347]** the proper analysis for whether the vertical conduct violated *§ 1*. See *id. at 225*.

Taking the opposite tack, the majority opinion on this appeal insists that a vertical facilitator of a horizontal conspiracy is **[**146]** liable *per se*, even after Leegin. In support of that argument, the majority cites seven cases that pre-date Leegin.[3] Op. of Judge Livingston, ante, at 73-77 (for the Court). The majority cites only one post-Leegin case that considers this question: namely, the Third Circuit's analysis of a conspiracy that involved both vertical *and* horizontal relationships, concluding that the horizontal relationships violated *§ 1* *per se* and that pursuant to Leegin the vertical relationships "would have to be analyzed under the traditional rule of reason."[4] *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 318 (3d Cir. 2010)*.

The majority's holding in this case therefore creates a circuit split, and puts us on the wrong side of it.

"[H]orizontal agreements *as a class* deserve stricter scrutiny than . . . vertical agreements," because horizontal agreements "pose the most significant dangers of competitive harm." 11 Areeda & Hovenkamp, supra, ¶ 1902a, at 232. Horizontal price conspiracies are illegal *per se* because motives of horizontal players are aligned and dominant and create irresistible temptations. See, e.g., Adam Smith, The Wealth of Nations 207 (Collier 1902) (1776) ("People **[**148]** of the same trade seldom meet together . . . , but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.").

Collusion among competitors does not describe Apple's conduct or account for its motive. Apple's conduct had no element of collusion with a horizontal rival. Its own rival in competition was (and presumably is) Amazon; and that competition takes place on a horizontal plane distinct from the plane of the horizontal conspiracy among the publishers. All Apple's energy **[*348]** --all it did that has been condemned in this case--was directed to weakening

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[3] The cases are cited by the majority in this order: *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*; *United States v. General Motors Corp., 384 U.S. 127, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966)*; Toys "R" *Us, Inc. v. FTC, 221 F.3d 928 (7th Cir. 2000)*; *Denny's Marina, Inc. v. Renfro Productions, Inc., 8 F.3d 1217 (7th Cir. 1993)*; *United States v. MMR Corp., 907 F.2d 489 (5th Cir. 1990)*; *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*; *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)*.

Just as unhelpfully, the majority cites dicta from a Sixth Circuit case affirming the dismissal of a lawsuit that alleged a hub-and-spokes conspiracy. See *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield, 552 F.3d 430 (6th Cir. 2008)*. The majority cites the case as if its holding supports the continued legitimacy of the hub-and-spokes theory after Leegin, a flawed interpretation given the Sixth Circuit's disposition on the hub-and-spokes claim. *Id. at 435* (holding that plaintiffs inadequately alleged a *horizontal* conspiracy and that, after Leegin, "all *vertical* price restraints are to be judged under the rule-of-reason standard" (emphasis added)).

[4] The Third Circuit **[**147]** analyzed a network of restraints, including a conspiracy among insurance brokers, a conspiracy among insurers, and agreements that connected the brokers and insurers. The court explained Leegin's impact this way:

> Under the Supreme Court's jurisprudence, virtually all vertical agreements now receive a traditional rule-of-reason analysis. See *Leegin, 551 U.S. 877, 127 S. Ct. 2705, 168 L. Ed. 2d 623*. In the factual context of this case, a horizontal agreement means . . . an agreement among either the brokers or the insurers in the global conspiracy. Agreements between brokers and insurers, on the other hand, are vertical and would have to be analyzed under the traditional rule of reason.

In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 318-19 (3d Cir. 2010) (internal citation and footnote omitted).

its competitive rival, and pushing it aside to make room for Apple's entry. On the only horizontal plane that matters to Apple's e-book business, Apple was in competition and never in collusion. So it does not do to deem Apple's conduct anti-competitive just because the publishers' horizontal conspiracy was found to be illegal *per se*.

"[V]ertical agreements are a customary and even indispensable part of the market system" and so do not represent the same presumptive threat to competition. 11 Areeda & Hovenkamp, supra, ¶ 1902d, at 240. Even a vertical agreement designed to decrease competition among competitors does not pose the threat to **[**149]** market competition that is posed by a horizontal agreement, for two reasons: (1) market forces (such as countervailing measures by competitors) are categorically more effective in countering anti-competitive vertical agreements, and (2) vertical agreements are so fundamental to the operation of the market that uncertainty about the legality of vertical arrangements would impose vast costs on markets. Id. at 240-41. Such market realities are driving the evolution of ***antitrust law***, which has "rejected the approach of reliance on rules governing horizontal restraints when defining rules applicable to vertical ones." *Leegin, 551 U.S. at 888*.

The present case illustrates why *per se* treatment is not given to vertical agreements that facilitate horizontal conspiracies. Assuming (as is uncontested on appeal) that the publishers violated *§ 1* *per se* through their coordination, Apple's promotion of that horizontal conspiracy was limited to vertical dealings.

The *per se* rule is inapplicable here for another independent reason: The *per se* rule does not apply to arrangements with which the courts are not already well-experienced. *Leegin, 551 U.S. at 887*. As the government conceded at oral argument, no court has previously considered a restraint of this kind. **[**150]** Several features make it sui generis: (a) a vertical relationship (b) facilitating a horizontal conspiracy (c) to overcome barriers to entry in a market dominated by a single firm (d) in an industry created by an emergent technology.

As I undertake to show in my analysis under the rule of reason, below, the restrictive market conditions Apple faced and the pro-competitive results of Apple's conduct make its vertical dealings categorically reasonable. Even if one tests that conclusion under the rule of reason, the analysis is sufficiently complex and yields such substantial pro-competitive results that *per se* liability is an abdication of the duty to distinguish reasonable restraints from those that are unreasonable.

II

Having concluded first that Apple's conduct was anti-competitive *per se*, corollary errors followed when the district court turned to the rule of reason. Once a court finds that a party acted unreasonably *per se* in a set of transactions, an epiphany is required for the court to conclude that the same party acted reasonably doing the same acts in the same role at the same time. The influence arising from the district court's *per se* accusation of wrongdoing infected all analysis **[**151]** that followed. Once Apple was deemed to have joined a conspiracy that was illegal *per se*, its goal, motive, and conduct seemingly needed (and got) no additional scrutiny--legal or moral or economic.

Having confirmed Apple's *per se* liability by conflating the horizontal plane of competition among publishers with the horizontal plane of competition among retailers, **[*349]** the district court committed the same error in its rule of reason analysis. Thus the district court (as explained below) overstated the anti-competitive nature of Apple's vertical dealings and overlooked the pro-competitive effects on retail competition--the horizontal plane on which Apple does e-book business. "The district court did not analyze the state of competition between ebook retailers," as the majority concedes. Op. of Judge Livingston, ante, at 44 (for the Court) (emphasis omitted). Exactly.

Judge Livingston's opinion succumbs to the same fallacy by declaring the majority's own *per se* analysis so overwhelming that full rule-of-reason scrutiny requires no more than a "quick look." Quick-look analysis is an appropriate tool only when "an observer with even a rudimentary understanding of economics could conclude that **[**152]** the arrangements in question would have an anticompetitive effect." *Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)*. Quick-look analysis is not a tool for cutting corners. Judge Livingston's opinion justifies quick-look analysis by referring to e-book price increases that form the majority's earlier argument for the application of the *per se* rule, see Op. of Judge Livingston, ante, at 93--price increases that, at any rate, are the expected result when monopolistic below-cost pricing dissipates.

In form and substance, Judge Livingston's analysis demonstrates that when one starts with a finding of unreasonableness *per se*, the rule of reason analysis is tainted. It is called confirmation bias. The characterization of Apple's conduct as "vigilantism" is telling. Op. of Judge Livingston, ante, at 9 (for the Court), 98. Use of that word either assumes the conclusion that the conduct is illegal, or else confuses it with self-help (which used to be a virtue).

III

On this appeal, we have reached no majority as to the rule of reason. Judge Livingston writes for herself alone that, as an alternative to the *per se* rule, she would also affirm under the rule of reason; without a second judge supporting this conclusion, it is dicta, because our **[**153]** affirmance is based on the *per se* theory adopted by two judges. Unlike my colleagues, I must address the rule of reason, because my vote to reverse depends on my conclusion that this alternative theory of liability is every bit as untenable as liability *per se*.

Analysis under the rule of reason--whether conducted in full or by an *untainted* quick look--compels the conclusion that Apple did not violate *§ 1* of the Sherman Act. The issue is decided by comparing (a) the restrictive effect of Apple's dealings with (b) the pro-competitive result of deconcentrating a market that had been dominated by a monopolist and insulated from competition through below-cost pricing.

Under the rule of reason, the initial burden rests with the plaintiffs "to demonstrate the defendants' challenged behavior had an *actual* adverse effect on competition as a whole in the relevant market." *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485, 506-07 (2d Cir. 2004)* (internal quotation marks omitted). Upon plaintiffs' showing of such an effect, "the burden shifts to the defendants to offer evidence of the pro-competitive effects of their agreement," and then "the burden shifts back to the plaintiffs to prove that any legitimate competitive benefits offered by defendants could have been achieved **[**154]** through less restrictive means." Id. The reasonableness of the restraint then boils down to whether the dominant effect of the agreement is to promote competition or restrain it. Id.

[*350] Analysis begins with an accounting of anti-competitive effects. Apple's vertical conduct consisted of negotiating the terms of its own contracts. Of course, every contract is a restraint of trade to some extent, see *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 98, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*; so this fact alone is neither here nor there.

The agency agreement that Apple signed with each publisher was innocuous: as the parties agree, each term--including the agency structure, MFN clause, and price caps--is absolutely legal. The district court so found expressly:

> The Plaintiffs do not argue, and this Court has not found, that the agency model for distribution of content, or any one of the clauses included in the Agreements, or any of the identified negotiation tactics is inherently illegal. Indeed, entirely lawful contracts may include an MFN, price caps, or pricing tiers.

Apple I, 952 F. Supp. 2d at 698. The main restraint resulting from Apple's vertical conduct was the shifting of pricing power from e-book retailers to e-book publishers. And this effect operated as a restraint only in the sense that Amazon faced **[**155]** pressure to adopt an agency model and to charge prices set by the five publishers, which of course remained in competition with each other, and with the publishers who account for the remaining 52 percent of the industry.

The district court opinion and the plaintiffs' briefs fixate on the idea that Apple ended Amazon's $9.99 price for most new releases and bestsellers, and that consumers would have preferred a lower price. But the consumer's near-term preference for low prices is not an object of ***antitrust law***. See *Brooke Grp. Ltd. v. Brown & Williamson*

Tobacco Corp., 509 U.S. 209, 237, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993). The district court charts the short-term price developments, treating the end of below-cost pricing as anti-competitive and observing with disapproval the natural tendency for prices to rise to competitive levels. The rule of reason promotes competition; it can be safely assumed that if competition sharpens, prices will take care of themselves.

As to the pro-competitive effects, the rule of reason must take account primarily of the deconcentrating of the e-book retail market. The benefit of increasing the number of firms in a market derives from the "inverse correlation between concentration and competition." Eleanor M. Fox, Economic Concentration, Efficiencies and Competition: **[**156]** Social Goals and Political Choices, in Industrial Concentration and the Market System 137, 149 (Eleanor M. Fox & James T. Halverson eds., 1979). As the district court found, Apple was weighing its entry into the retail e-book market, and the agency structure was the only way Apple would enter the market. Nobody has proposed--before *or* since Apple's entry--any "less restrictive means" by which Apple could have achieved the same competitive benefits. See *Geneva Pharms., 386 F.3d at 507* (plaintiffs' burden to prove viable and less restrictive alternative). Apple's challenged conduct broke Amazon's monopoly, immediately deconcentrated the e-book retail market, added a platform for reading e-books, and removed barriers to entry by others. And removal of a barrier to entry reduces for the long term a market's vulnerability to monopolization.[5] These effects sound in the basic **[*351]** goals of ***antitrust law***. Even if only quick-look analysis were appropriate in this case, these effects would vindicate Apple's conduct. (Judge Livingston's opinion discounts this pro-competitive effect by noting the open question whether "below-cost pricing is unlawfully anti-competitive," thereby suggesting that Apple's dismantling of the entry barrier **[**157]** could be pro-competitive only if the barrier was itself a Sherman Act violation. Op. of Judge Livingston, ante, at 97. But it is no matter whether the insuperable barrier that Apple tore down had been raised lawfully or not.)

Another pro-competitive effect is the encouragement of innovation, a hallmark and benefit of competition. Apple began retailing e-books in conjunction with its release of the iPad, a device that integrated cutting-edge functions and applications, just one of which was the capacity for users to buy and read e-books. It is impossible to know the likely course of innovation, and pro-competitive effects of innovation cannot be measured; nevertheless, the encouragement of innovation must be afforded considerable weight under the rule of reason. See generally 2B Areeda & Hovenkamp, supra, ¶ 407. Apple's business is not the technology of the clothespin.

The restraint of Apple's vertical conduct was no more than a slight offset to the competitive benefits that now pervade the relevant **[**158]** market.[6]

How else could the competitive benefits have been realized in this market? In the course of this litigation, three theories have been offered for how Apple could have entered the e-book market on less restrictive terms. Each theory misapprehends the market or the law, or both. The absence of alternative means bespeaks the reasonableness of the measures Apple took.

Theory 1: Apple could have competed with Amazon on Amazon's terms, using wholesale contracts and below-cost pricing. This was never an option. The district court found as fact that: a new entrant into the e-book retail market "would run the risk of losing money if it tried or was forced to match Amazon's pricing to remain competitive," *Apple I, 952 F. Supp. 2d at 658*; Apple was "not willing" to engage in below-cost pricing, *id. at 657*; and Apple could have avoided this money-losing price structure simply by forgoing entry to the market, see *id. at 659*. Even if Apple had been willing to adopt below-cost pricing, the result at best would have been duopoly, and the hardening of the

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[5] Generally speaking, entry barriers permit monopolization and monopoly power allows a firm to erect entry barriers. See, e.g., *Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117, 125 (2d Cir. 2007)*; *United States v. Microsoft Corp., 253 F.3d 34, 82, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (en banc); see also *Mobil Oil Corp. v. Fed. Power Comm'n, 417 U.S. 283, 302 n.23, 94 S. Ct. 2328, 41 L. Ed. 2d 72 (1974)*. Each is less likely to arise when the other is absent from a market.

[6] Amazons's below-cost prices also threatened the market for hard-copy books, see *Apple I, 952 F. Supp. 2d at 649*, and thus the royalties of authors, who may well consider that they have some role in this industry.

existing **[**159]** barrier to entry. ***Antitrust law*** disfavors a durable duopoly nearly as much as monopoly itself. See 6 Areeda & Hovenkamp, supra, ¶ 1429.

Theory 2: Apple could have entered the e-book retail market using the wholesale model and charged higher prices than Amazon's. The district court foreclosed this theory as well; it found that Apple refused to impair its brand by charging "what it considered unrealistically high prices." *Apple I, 952 F. Supp. 2d at 659*. Even if Apple had been willing to tarnish its brand by offering bad value for money, the notion that customers would actually have bought e-books from Apple at the higher price defies the law of demand. **[*352]** Higher prices may stimulate sales of certain wines and perfumes--not e-books.[7]

Nor could Apple justify higher prices for the e-books by competing on the basis of its new hardware, the iPad, because there is inter-operability among platforms. And if Apple had attempted to pursue this hardware-based competition **[**160]** by programming its iPad to run the iBookstore but to reject Amazon's Kindle application, Apple might have been exposed to an entirely different antitrust peril. See *United States v. Microsoft Corp., 253 F.3d 34, 50-80, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (en banc); Google Android, No. 40099 (Eur. Comm'n Apr. 15, 2015) (antitrust proceedings brought by European Commissioner for Competition against Google for favoring Google's own applications on mobile devices that use Google's operating system).

Theory 3: Apple could have asked the Department of Justice to act against Amazon's monopoly. Counsel for the United States actually proposed this at oral argument. At the same time, however, he conceded that the Department of Justice had already "noticed" Amazon's e-book pricing and had chosen not to challenge it because the government "regarded it as good for consumers." Any request from Apple would therefore have been futile. True, Apple could not have known that the Antitrust Division would have adopted the position that below-cost pricing is not a concern of antitrust policy: who could have guessed that the government would adopt a policy that is primitive as a matter of antitrust doctrine and illiterate as a matter of economics? Nevertheless, hindsight reveals that government **[**161]** antitrust enforcement against Amazon was not an option.

More fundamentally, litigation is not a *market* alternative. This observation has especial force in markets that are undergoing rapid technological advance, where the competitive half-life of a product is considerably more brief than the span of antitrust litigation. A requirement that potential market entrants litigate instead of enter the market on restrictive (but legal and reasonable) terms, would license monopoly for the duration.

* * *

Apple took steps to compete with a monopolist and open the market to more entrants, generating only minor competitive restraints in the process. Its conduct was eminently reasonable; no one has suggested a viable alternative. "What could be more perverse than an antitrust doctrine that discouraged new entry into highly concentrated markets?" *In re Text Messaging Antitrust Litig., 782 F.3d 867, 874 (7th Cir. 2015)*.

Application of the rule of reason easily absolves Apple of antitrust liability. That is why at oral argument the government analogized this case to a drug conspiracy, in which every player is a criminal--at every level, on every axis, whether big or small, whether new entrant or recidivist. The government found the analogy useful--and necessary--because in **[**162]** an all-criminal industry there is no justification or harbor under a rule of reason.

IV

Because I see no antitrust violation, I need not consider Apple's separate challenge to the injunction itself. My colleagues, **[*353]** for their own good reasons, do not reach that challenge either. Yet the injunction and its

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[7] In economic terms, e-books are subject to the law of demand and therefore have negative price elasticity of demand. See generally N. Gregory Mankiw, Principles of Economics 67 (6th ed. 2012). E-books are neither Veblen goods nor Giffen goods, nor do they have perfectly inelastic demand. See id. at 92-93, 453-54, 835; Laurie Simon Bagwell & B. Douglas Bernheim, Veblen Effects in a Theory of Conspicuous Consumption, 86 Am. Econ. Rev. 349 (1996).

shortcomings bear upon the institutional interest of the courts; and Apple's challenge deserves some response. In my view, the injunction warps the role of a neutral, court-appointed referee into that of an adversary party, with predictable consequences.

The monitor is an arm of the district court, and owes loyalty in that direction only. See *Fed. R. Civ. P. 53(a)*. But the injunction redirects the loyalty of the monitor to Apple's chief adversary in the litigation, the Department of Justice. Under the injunction, the DOJ recommends the monitor (Injunction ¶ VI(A)), approves the monitor's fees (id. ¶ VI(I)), and mediates disputes between the monitor and Apple (id. ¶¶ VI(E), (H)). Thus the injunction first creates a neutral fact-finding office, and then gives an adversary the ability to decide who holds the office, how much he gets paid (out of the other side's pocket), and how broadly he may reach and inquire. **[**163]** Reciprocally, the monitor is directed to inform the government if he "discovers or receives evidence that suggests" further antitrust violations, whether or not related to this litigation. (Id. ¶ VI(F).) This is a device that must misfire.

As events have happened (and were seemingly fore-ordained) the monitor has reason to look to the DOJ with gratitude and loyalty. The DOJ recommended Michael Bromwich as monitor, and the district court appointed him. *United States v. Apple Inc., __ F.3d __, 2015 U.S. App. LEXIS 8854, 2015 WL 3405534, at *2 (2d Cir. May 28, 2015)*. Without a meaningful cap on his fee, Bromwich proposed that defendant Apple compensate him at $1,265 per hour--an eye-popping rate for service as an agent of a court. *2015 U.S. App. LEXIS 8854, [WL] at *3*. (Because Bromwich lacks antitrust expertise, he proposed to add an actual antitrust lawyer to the team at $1,025 an hour. Id.) When Apple challenged that tariff as unreasonable, Bromwich explained that the injunction gave Apple no standing to object: "the fees and expenses to be paid to the monitor and his team are not set by Apple; they are set by the monitor, with approval reserved for the DOJ and the Plaintiff States." Id. (quoting Bromwich). Bromwich was right, which is telling: the injunction contemplated no role for the judge.

Once the Department of Justice selected **[**164]** him and approved his hourly fee, Bromwich drew up his own mandate. Although the injunction contemplated that the monitor would check sufficiency of an antitrust policy that Apple was to prepare in 90 days (and Apple's compliance with it), Bromwich started his inquiry immediately on his appointment; he multiplied interviews, document inspections, and discontents; he demanded to interview Apple executives without the presence of Apple's chosen counsel; and he took aim at the competitive culture of the corporation generally--a culture that is obviously aggressive, but just as obviously no business of the courts. See *2015 U.S. App. LEXIS 8854, [WL] at *2-3, *7*.

Having thus been selected by an adversary party, paid at a rate approved by the adversary party, and directed to look to the adversary party for the mediation of disputes, Bromwich was (in every respect important to a lawyer) retained and run by the adversary. Apple had an unenviable choice: it could accept scrutiny by a lawyer whose incentives were corrupted by the injunction that created his office, or attack the fee and the widening scope of inquiry, thereby sharpening the confrontations created by the mechanics of the injunction

A magistrate judge has cut Bromwich's **[**165]** hourly fee. *2015 U.S. App. LEXIS 8854, [WL]* ***[*354]*** *at *6 n.4*. And a panel of this Court has construed narrowly the scope of the monitor's inquiries. *2015 U.S. App. LEXIS 8854, [WL] at *4*. But the structural defect of the injunction remains: allowing an arm of the court to serve as agent of an adversary party. It would take strong stuff for a lawyer to transcend the worldly incentives of this injunction: unlimited work at the (now cut) rate of $1,000 an hour, paid by a solvent party that may expect retaliation for protesting, in order to perform a monitorship subject to extension by the court for reasons that will be influenced by input from the monitor himself.

An injunction that thus blurs the lines of the adversary system does no good for the reputation of the courts.

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Hannah's Boutique, Inc. v. Surdej

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

July 2, 2015, Decided; July 2, 2015, Filed

Case No. 13-cv-2564

Reporter

112 F. Supp. 3d 758 *; 2015 U.S. Dist. LEXIS 86256 **; 2015-2 Trade Cas. (CCH) P79,395

HANNAH'S BOUTIQUE, INC., an Illinois corporation, Plaintiff, v. BARBARA ANN SURDEJ, ROY SURDEJ, and JEFFREY SURDEJ d/b/a PEACHES BOUTIQUE, Defendants.

Prior History: *Hannah's Boutique v. Surdej, 2013 U.S. Dist. LEXIS 122219 (N.D. Ill., Aug. 28, 2013)*

Core Terms

Designers, dresses, market power, prom, retail, Defendants', possessed, vertical, market share, effects, Toys, anticompetitive, homecoming, horizontal, monopolization, boutiques, internet, manufacturer, rule of reason, competitors, argues, summary judgment, specialty, sales, conspiracy to monopolize, square foot, courts, antitrust claim, relevant market, opening

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Opposing Materials > Memoranda in Opposition

Civil Procedure > Judgments > Summary Judgment > Supporting Materials

HN1[] **Opposing Materials, Memoranda in Opposition**

N.D. Ill. Loc. R. 56.1 (*Local Rule 56.1*) is designed, in part, to aid the district court, which does not have the advantage of the parties' familiarity with the record and often cannot afford to spend the time combing the record to locate the relevant information, in determining whether a trial is necessary. *Local Rule 56.1(a)(3)* requires the moving party to provide a statement of material facts as to which the moving party contends there is no genuine issue. The non-moving party must file a response to the moving party's statement, and, in the case of any disagreement, cite specific references to the affidavits, parts of the record, and other supporting materials relied upon. *Local Rule 56.1(b)(3)(B)*. The nonmoving party also may submit a separate statement of additional facts that require the denial of summary judgment, including references to the affidavits, parts of the record, and other supporting materials relied upon to support those facts. *Local Rule 56.1(b)(3)(C)*.

Civil Procedure > Judgments > Summary Judgment > Opposing Materials

Civil Procedure > Judgments > Summary Judgment > Supporting Materials

HN2[] Summary Judgment, Opposing Materials

District courts have broad discretion to enforce *N.D. Ill. Loc. R. 56.1*.

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

HN3[] Entitlement as Matter of Law, Appropriateness

On a motion for summary judgment, the court views the facts in the light most favorable to the non-movant and draws all reasonable inferences in its favor.

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

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

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

HN4[] Entitlement as Matter of Law, Appropriateness

Summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*. In determining summary judgment motions, courts are required to view the facts and draw reasonable inferences in the light most favorable to the party opposing the summary judgment motion. The party seeking summary judgment has the burden of establishing that there is no genuine dispute as to any material fact. Once the moving party meets this burden, the opposing party must establish some genuine issue for trial such that a reasonable jury could return a verdict in their favor.

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Sherman Act > Scope

HN5[] Antitrust & Trade Law, Clayton Act

Section 1 of the Sherman Act provides in part that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is declared to be illegal. *15 U.S.C.S. § 1*. *Section 3 of the Clayton Act* makes it unlawful for an entity to make a sale or contract for sale of goods on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods of a competitor, where the effect may be to substantially lessen competition or tend to create a monopoly. *15 U.S.C.S. § 14*.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

HN6[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The per se rule is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason. Indeed, the rule of reason is the standard framework for analyzing an action's anticompetitive effects on the market. The U.S. Supreme Court has held, for example, that the rule of reason applies to allegations that a defendant entered into vertical agreements setting minimum resale prices.

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

Evidence > Admissibility > Circumstantial & Direct Evidence

HN7[] **Cartels & Horizontal Restraints, Sherman Act**

A plaintiff may prove a horizontal agreement by either direct or circumstantial evidence. When circumstantial evidence is used, there must be some evidence that tends to exclude the possibility that the alleged conspirators acted independently. A plaintiff does not, however, have to exclude all possibility that the alleged conspirators acted independently.

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

HN8[] **Price Fixing & Restraints of Trade, Vertical Restraints**

The typical story of a legitimate vertical transaction would have the supplier going to the retailer and asking it to be the exclusive carrier of the manufacturer's goods; in exchange for that exclusivity, the manufacturer would hope to receive more effective promotion of its goods, and the retailer would have a large enough profit margin to do the job well.

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

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN9[] **Regulated Practices, Price Fixing & Restraints of Trade**

On summary judgment, ***antitrust law*** limits the range of permissible inferences from ambiguous evidence. A plaintiff must present some evidence that "tends to exclude the possibility" that the alleged conspirators acted independently.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

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

HN10[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The U.S. Supreme Court in Leegin Creative overturned its Dr. Miles decision, and held that the rule of reason, not the per se standard, is the applicable standard by which courts should judge whether vertical price restraints are lawful.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

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

HN11[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

As the U.S. Supreme Court explained in detail in Leegin Creative, vertical restraints, including vertical agreements setting minimum resale prices, can have both pro-competitive and anti-competitive justifications. Thus, courts must evaluate them using the "rule of reason." When anticompetitive effects are shown to result from particular vertical restrictions they can be adequately policed under the rule of reason.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization

HN12[] **Regulated Practices, Monopolies & Monopolization**

A party can prove market power through two separate ways. The more conventional way is by proving relevant product and geographic markets and by showing that the defendant's share exceeds whatever threshold is important for the practice in the case. Under this method, the plaintiff must precisely establish both the relevant product and geographic dimensions of the relevant market. A plaintiff also may establish market power through direct evidence of anticompetitive effects.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization

HN13[] **Regulated Practices, Monopolies & Monopolization**

For a plaintiff to use direct evidence of anticompetitive effects to establish that defendants possessed market power, the controlling Seventh Circuit law requires the plaintiff to show both the "rough contours" of the relevant market, and that defendants possessed "substantial market share." In order for a plaintiff to establish market power using direct effects, the plaintiff must show the rough contours of a relevant market, and show that the defendant commands a substantial share of the market. As the court noted, economic analysis is virtually meaningless if it is entirely unmoored from at least a rough definition of a product and geographic market. To ensure that the direct effects analysis is meaningful, a plaintiff needs to make a minimum initial showing that the defendant possesses a substantial market share in a roughly-defined relevant market.

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

HN14[] **Regulated Practices, Price Fixing & Restraints of Trade**

A plaintiff may prove market power in one of two ways. The more conventional way is by proving relevant product and geographic markets and by showing that the defendant's share exceeds whatever threshold is important for the practice in the case. The Seventh Circuit has held that in cases alleging a violation of *§ 1 of the Sherman Act*, a 20 percent-25 percent market share or less does not constitute market power. With respect to *§ 2 of the Sherman Act*, the required market share showing is even higher. Without a showing of special market conditions or other compelling evidence of market power, the lowest possible market share legally sufficient to sustain a finding of monopolization is between 17 percent and 25 percent.

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

HN15[] **Subject Matter Jurisdiction, Supplemental Jurisdiction**

A district court may decline to exercise supplemental jurisdiction over a claim if, among other reasons, the district court has dismissed all claims over which it has original jurisdiction. *28 U.S.C.S. § 1367(c)(3)*. In addition to that statutory factor, the court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity. It is the well-established law of the Seventh Circuit, however, that the usual practice is to dismiss without prejudice state supplemental claims whenever all federal claims have been dismissed prior to trial.

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For Agnieszka Bialas, Defendant: John W. Treece, LEAD ATTORNEY, Ashley Katharine Martin, Theodore R. Scarborough, Jr., Sidley Austin LLP, Chicago, IL USA.

Judges: Hon Amy J. St. Eve, United States District Court Judge.

Opinion by: Amy J. St. Eve

Opinion

[*762] MEMORANDUM OPINION AND ORDER

AMY J. ST. EVE, District Court Judge:

Plaintiff Hannah's Boutique, Inc. ("Hannah's") filed suit against Defendants Barbara Ann Surdej, Roy Surdej, and Jeffrey Surdej d/b/a Peaches Boutique (collectively "Peaches") under *Section 2* of the Sherman Act, *15 U.S.C. § 2*, for attempted monopolization (Count I), conspiracy to monopolize (Count II), and monopolization (Count III); under *Section 1 of the Sherman Act*, *15 U.S.C. § 1*, for concerted refusal to deal (Count IV) and unreasonable restraint of trade (Count V); under *Section 3 of the Clayton Act* **[**2]** , *15 U.S.C. § 14*, for exclusive dealing (Count VI); and under the Illinois Antitrust Act for illegal monopolization and unreasonable restraint of trade (Count VII) (the "Antitrust Claims"). Hannah's also asserts a variety of non-antitrust Illinois state law claims against Peaches. Peaches has moved for summary judgment on the Antitrust Claims, arguing that Hannah's cannot show that Peaches possessed "market power," which Peaches contends is required for each of those claims. For the following reasons, the Court grants Defendants' motion.

BACKGROUND

I. *Northern District of Illinois Local Rule 56.1*

HN1[] Northern District of Illinois *Local Rule 56.1* "is designed, in part, to aid the district court, 'which does not have the advantage of the parties' familiarity with the record and often cannot afford to spend the time combing the record to locate the relevant information,' in determining whether a trial is necessary." *Delapaz v. Richardson, 634 F.3d 895, 899 (7th Cir. 2011)* (quoting *Waldridge v. Am. Hoechst Corp., 24 F.3d 918, 924 (7th Cir. 1994))*. *Local Rule 56.1(a)(3)* requires the moving party to provide "a statement of material facts as to which the moving party contends there is no genuine issue ..." *Petty v. City of Chicago, 754 F.3d 416, 420 (7th Cir. 2014)* (quoting *L.R. 56.1(a)(3)*). "The non-moving party must file a response to the moving party's statement, and, in the case of any disagreement, cite 'specific references to **[**3]** the affidavits, parts of the record, and other supporting materials relied upon.'" *Id.* (quoting *L.R. 56.1(b)(3)(B)*). The nonmoving party also may submit a separate statement of additional facts that require the denial of summary judgment, including references to the affidavits, parts of the record, and other supporting materials relied upon to support those facts. *See L.R. 56.1(b)(3)(C)*; *see also Ciomber v. Coop. Plus, Inc., 527 F.3d 635, 643-44 (7th Cir. 2008)*.

As an initial matter, Plaintiff moves to strike Defendants' Statement of Additional Undisputed Material Facts. (*See* R. 311, Pl.'s Mot. to Strike.) Plaintiff also objects to certain statements in Defendants' *Local Rule 56.1* Statement of Facts. With respect to Plaintiff's motion to strike, the Court denies it as moot as the Court does not rely on facts contained in the Defendants' Statement of Additional Undisputed Material Facts in its Opinion. To the extent the Court relies on facts contained in the Defendants' *Local Rule 56.1* Statement to which Plaintiff objects, the Court takes up Plaintiff's objections where it relies on those facts in the Opinion. *See Benuzzi v. Bd. of Educ. of City of Chicago, 647 F.3d 652, 655 (7th Cir. 2011)* (holding that ***HN2***[] district courts have broad discretion to enforce *Local Rule 56.1*).

[*763] II. Relevant Facts

As Peaches is moving for summary judgment, ***HN3***[] the Court views the facts in the light most favorable to Hannah's and draws **[**4]** all reasonable inferences in its favor.[1] *See Scott v. Harris, 550 U.S. 372, 378, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007)*. Hannah's is a specialty boutique located in Palos Park, Illinois that sells prom and homecoming dresses. (R. 270, Pl.'s Resp. to Defs.' SOF ¶ 2.) Peaches Boutique also sells prom and homecoming dresses, and is the largest specialty boutique retailer in the Chicago area. (*Id.*, Pl.'s Stmt. of Add'l Facts ¶¶ 3, 7, 16, 17.) Defendants Roy and Barbara Surdej opened Peaches in 1985, and Defendant Jeffrey Surdej is their son. (*Id.*, Pl.'s Resp. to Defs.' SOF ¶ 3.) When Defendants opened Peaches, the store was approximately 2,400 square feet. (*Id. ¶ 49*.) They have expanded the store over the years, first to 4,400 square feet, then to 8,400 square feet in 2003, and finally in 2011 to its current size of 25,000 square feet. (*Id. ¶ 53*.) Peaches' store has over 20,000 dresses in stock and advertises to its customers "that they will not find anyone else out there that carries that much stock." (*Id.*, Pl.'s Stmt. of Add'l Facts ¶ 1.) Peaches also sells dresses online through multiple websites that it controls. (*Id.*, Pl.'s Resp. to Defs.' SOF ¶¶ 73-75.) Susan Shaban opened Hannah's in May of 2009, with the intent of focusing on the sale of prom and homecoming **[**5]** dresses. (*Id.*, Pl.'s Stmt. of Add'l Facts ¶¶ 23-24.) In 2012, Hannah's moved to its current location, a 2,600 square foot store with five dressing rooms. (*Id.*, Pl.'s Resp. to Defs.' SOF ¶¶ 102-103.)

Plaintiff argues that the relevant product market for antitrust purposes consists of high-end prom and homecoming dresses manufactured by sixteen designers (the "Designers") that are sold through specialty retail boutiques.[2] (*Id.*, Pl.'s Resp. to Defs.' SOF ¶ 7.) The Designers sell their dresses to the public through a network of authorized retailers, including specialty boutiques, department stores, and internet sites, although not all of the Designers sell through department stores.[3] (*Id. ¶ 21*.) There are 42 department stores within 30 miles of Peaches, and another 12 between 30 and 50 miles of Peaches. (*Id. ¶ 118*.) In the Chicago Market,[4] there are 56 specialty retailers other than Hannah's and Peaches that sell prom dresses.[5] (*Id. ¶ 149*.) Within 30 miles of Peaches, there are 70 specialty

[1] The controlling ***antitrust law***, however, limits the Court from drawing certain inferences. *See* Analysis Section I(A)(1) below.

[2] The Designers are: Allure, Blush, House of Wu, Jasz Couture, Jovani, La Femme, Mac Duggal, Flirt (aka Maggie Sottero, Mori Lee, Party Time, Riva Designs, Scala, Sherri Hill, Tarik Ediz, Terani, and Tony Bowls. (R. 270, Pl.'s Resp. to Defs.' SOF ¶ 7.)

[3] To the extent Plaintiff disputes only a portion of a statement of fact, the Court deems the remaining portion admitted. *See N.D. Ill. L.R. 56.1(b)(3)(C)* ("All material facts set forth in the statement required of the moving party will be deemed to be admitted unless controverted by the statement of the opposing party.")

[4] Plaintiff argues that the relevant geographic market for antitrust purposes is the "Chicago Market," which it defines as encompassing area codes 630/331, 847/224, 708, 312/872, and 773. (R. 250-1, Schafer Rep. ¶ 12.)

retailers other than Hannah's and Peaches that sell prom dresses, and within 50 **[**6]** miles of Peaches, there are approximately 89. (*Id. ¶¶ 150-51*.) The 56, 70, and 89 specialty retailers have a combined retail space of 304,606 square **[*764]** feet, 323,945 square feet, and 402,713 square feet, respectively, although the parties dispute how much of that square footage is dedicated to prom and homecoming dresses. (*Id. ¶¶ 149-151*.) Consumers also purchase prom and homecoming dresses on internet websites. (*Id. ¶ 122*.)

Between 2009 and 2012, Defendants repeatedly requested to certain Designers by telephone and e-mail that they not supply their dresses to specific specialty boutiques within the Chicago Market, including Hannah's. (*Id.*, Pl.'s Resp. to Defs.' SOF ¶ 58; Pl.'s Stmt. of Add'l Facts ¶¶ 28-29, 34, 36, 38, 41, 43-46, 49-50, 102.) Several of the Designers agreed to Peaches' requests and agreed to not sell to certain of Peaches' competitors within the Chicago Market.[6] (*See Id.*, Pl.'s Resp. to Defs.' SOF ¶ 58; Pl.'s Stmt. of Add'l Facts ¶¶ 31, 45, 74, 79, 84.)

In August 2012, Peaches organized a meeting of prom and homecoming dress designers at the 2012 Atlanta Prom Market. (*Id.*, Pl.'s Stmt. of Add'l Facts ¶¶ 55-56.) Peaches invited a number of the Designers, but did not invite any other Chicago-area retail boutiques. (*Id.*, Pl.'s Resp. to Defs.' SOF ¶ 34.) At the meeting, Defendants distributed a handout titled "Prom Industry Concerns" that addressed the following **[**8]** "items of interest for discussion":

1) No opening of internet sites without a legitimate brick and mortar store ...
2) No advertising a product without purchasing the minimums ...
3) Stopping discounting on current products before 5/15 date ...
4) MSIRP-manufacturer suggested internet retail price ...
5) Counterfeiting ...
6) Manufacturers should not own retail internet websites ...

(*Id.*, Pl.'s Stmt. of Add'l Facts ¶ 61.) Under item number four, the handout stated in part, "[m]any manufacturers are starting to enforce a 2.2 markup on internet pricing." (*Id.*) Defendant Jeffrey Surdej spoke at the meeting, and his notes indicate that he discussed that Defendants are part of a "very unique industry" due to seasonality, and that he discouraged the dress designers from opening new accounts because the teenage population is decreasing and the opening of new accounts would cut into Peaches' profit margin. (*Id. ¶ 65*, Ex. 102.)

Shortly after the meeting, two Designers, Jovani and Terani, implemented a higher internet pricing policy, mandating a markup on their dresses of 2.2 times the wholesale cost. (*Id. ¶¶ 72-73*.) This was the first time that Terani implemented this higher online pricing policy. (*Id.*, **[**9]** Pl.'s Resp. to Defs.' SOF ¶ 34.) Further, in the several months following the 2012 Atlanta Prom Market meeting, Hannah's attempted to place or placed orders for prom and homecoming dresses with the following Designers, all of which were rejected or cancelled after only partial fulfillment: Allure, Jovani, House of Wu, Party Time, Riva Designs, Terani, La Femme, Mori Lee, Mac Duggal, Scala, Sherri Hill, Tarik Ediz, Jasz Couture, Mon Cheri, and Blush. (*Id. ¶77*.) Prior to September of 2012, Peaches had been able to purchase dresses from seven of the Designers: Jovani, Mon Cheri, Terani, House of Wu, Tarik Ediz, Riva Designs, and Party Time. (*Id. ¶ 54*.)

Based in part on these allegations, Hannah's filed suit against Peaches. Peaches has moved for summary judgment solely on the Antitrust Claims, arguing that Hannah's cannot show that Peaches possessed **[*765]** "market power," which Peaches contends is required for each of those claims.

SUMMARY JUDGMENT STANDARD

HN4[] Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. In determining summary

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[5] Plaintiff **[**7]** objects to several of Defendants' statements of fact based on its *Daubert* motion. The Court denied that motion, however, in its June 19, 2015 Opinion. (R. 329, Kneuper Opinion.)

[6] Plaintiff's Statement of Facts does not provide an exact number.

judgment motions, "courts are required to view **[**10]** the facts and draw reasonable inferences 'in the light most favorable to the party opposing the [summary judgment] motion.'" *Scott v. Harris, 550 U.S. at 378, 127 S.Ct. 1769* (quoting *United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962))*; *see* *Kvapil v. Chippewa County, Wis., 752 F.3d 708, 712 (7th Cir. 2014)*. "The party seeking summary judgment has the burden of establishing that there is no genuine dispute as to any material fact." *Kvapil v. Chippewa County, Wis., 752 F.3d at 712* (citing *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986))*. Once the moving party meets this burden, the opposing party "must establish some genuine issue for trial such that a reasonable jury could return a verdict in [their] favor." *United States v. King-Vassel, 728 F.3d 707, 711 (7th Cir. 2013)* (quoting *Gordon v. FedEx Freight, Inc., 674 F.3d 769, 772-73 (7th Cir. 2012))*.

ANALYSIS

I. Legal Standard

Plaintiff alleges claims under *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* and *2*, and *Section 3 of the Clayton Act*, *15 U.S.C. § 14*. As an initial matter, Defendants argue that each of these claims requires proof that Peaches possessed either monopoly power or substantial market power.[7] With respect to Plaintiff's claims under *Section 1 of the Sherman Act* and *Section 3 of the Clayton Act*, Defendants contend that because Plaintiff submits evidence of vertical rather than horizontal restraints, the "rule of reason" legal standard, which requires an initial showing that Defendants possessed market power, applies to Plaintiff's allegations. Plaintiff disagrees. It argues that the Court should instead apply either the "*per se*" or "quick look" legal standard. With respect **[**11]** to Plaintiff's *Section 2* claims, Plaintiff does not dispute that its claims for attempted monopolization and monopolization require a showing of monopoly power. It argues only that its third *Section 2* claim, conspiracy to monopolize, does not require it to show that Peaches possessed monopoly power. The Court addresses each of these issues in turn.

A. Restraints on Trade

With respect to Plaintiff's **[**12]** claims under *Section 1 of the Sherman Act* and *Section 3 of the Clayton Act* **[*766]** , Plaintiff argues that its two theories of liability both require that the Court apply either the "*per se"* or "quick look" legal standards. ***HN5***[] *Section 1 of the Sherman Act* provides in relevant part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce ... is declared to be illegal." *15 U.S.C. § 1*. *Section 3 of the Clayton Act* makes it unlawful for an entity to "make a sale or contract for sale of goods ... on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods ... of a competitor ..., where the effect ... may be to substantially lessen competition or tend to create a monopoly ..." *15 U.S.C. § 14*. Hannah's alleges that Peaches caused the Designers: 1) to agree to a group boycott of Hannah's and other retail boutique competitors of Peaches; and 2) to impose a vertical restraint on the internet retail price of the Designers' prom and homecoming dresses. The Court examines the legal standard that applies to each theory of liability.

[7] Plaintiff also alleges that Peaches' conduct constitutes illegal monopolization and unreasonable restraint of trade under the Illinois Antitrust Act, *740 ILCS 10/3*. (R. 188, Am. Compl. ¶ 262.) Plaintiff does not dispute that those sections of the Illinois Antitrust Act are based on *Sections 1* and *2* of the Sherman Act, and therefore the applicable legal standards are the same. *See* *740 ILCS 10/11* ("When the wording of this Act is identical or similar to that of a federal ***antitrust law***, the courts of this State shall use the construction of the federal law by the federal courts as a guide in construing this Act."); *Laughlin v. Evanston Hosp., 133 Ill.2d 374, 383-84, 140 Ill.Dec. 861, 550 N.E.2d 986 (1990)* (applying decisions construing *Section 1 of Sherman Act* to claim for unreasonable restraint of trade brought under the Illinois Antitrust Act); *Int'l Equip. Trading, Ltd. v. AB SCIEX, LLC, No. 13-C-1129, 2013 U.S. Dist. LEXIS 123109, 2013 WL 4599903, at *3 n.1 (Aug. 29, 2013)* (applying Sherman Act *Section 2* analysis to attempted monopolization claim brought under the Illinois Antitrust Act).

1. Group Boycott

Plaintiff's main claim is that between 2009 and 2012, Defendants repeatedly requested to the Designers that they **[**13]** not sell to specific retail boutiques in the Chicago Market, including Hannah's. (R. 270, Pl.'s Resp. to Defs.' SOF at ¶ 58; Pl.'s Stmt. of Add'l Facts at ¶¶ 28-29, 34, 36, 38, 41, 43-46, 49-50, 102.) In response to Peaches' requests, certain of the Designers agreed to Peaches' demands and agreed to not sell to its competitors within the Chicago Market. (*Id.*, Pl.'s Resp. to Defs.' SOF at ¶ 58; Pl.'s Stmt. of Add'l Facts at ¶¶ 31-33, 42, 45, 76-77, 79, 82, 84-85, 86, 88, 89-91, 94-100.) With respect to Hannah's specifically, in the months following the 2012 Atlanta Prom Market Meeting it attempted to place or placed orders for prom and homecoming dresses with the following Designers, all of which these Designers rejected or cancelled after only partial fulfillment: Allure, Jovani, House of Wu, Party Time, Riva Designs, Terani, La Femme, Mori Lee, Mac Duggal, Scala, Sherri Hill, Tarik Ediz, Jasz Couture, Mon Cheri, and Blush. (*Id.*, Pl.'s Stmt. of Add'l Facts ¶ 77.) Based on these facts, Hannah's argues that Peaches induced certain of the Designers to enter into a horizontal agreement to boycott Hannah's—*i.e.*, they agreed among each other to refuse to supply Hannah's with their prom and **[**14]** homecoming dresses. *See* *Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 730, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988)* ("[r]estraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints.")

Plaintiff argues that in analyzing Peaches' conduct the Court should apply the *per se* standard. "The *per se* rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work ... Restraints that are *per se* unlawful include horizontal agreements among competitors to fix prices, or to divide markets." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007)* (citations omitted). Group boycotts are *per se* illegal if they involve "joint efforts by a firm or firms to disadvantage competitors by either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle." *Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 936 (7th Cir. 2000)* (quoting *Northwest Wholesale Stationers, Inc., v. Pacific Stationery and Printing Co., 472 U.S. 284, 294, 105 S.Ct. 2613, 86 L.Ed.2d 202 (1985))*.

[*767] On the other hand, ***HN6***[] "the *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances **[**15]** under the rule of reason." *Leegin Creative, 551 U.S. at 886-87, 127 S.Ct. 2705* (citations omitted). Indeed, the rule of reason is "[t]he standard framework for analyzing an action's anticompetitive effects on the market." *Agnew v. NCAA, 683 F.3d 328, 335 (7th Cir. 2012)*. The Supreme Court has held, for example, that the rule of reason applies to allegations that a defendant entered into vertical agreements setting minimum resale prices. *Leegin Creative, 551 U.S. at 907, 127 S.Ct. 2705*.

In making its argument that the Court should apply the *per se* rule, Plaintiff relies heavily on *Toys "R" Us, Inc., 221 F.3d 928*. In that case, the Seventh Circuit affirmed a decision of the FTC finding that Toys "R" Us had induced at least seven of its toy manufacturer suppliers to enter into a horizontal agreement to boycott certain of Toys "R" Us's competitors. *Id. at 935-36*. The Seventh Circuit rejected Toys "R" Us's argument that it had merely entered into a series of independent vertical agreements with each of the manufacturers. *Id.* Instead, the Seventh Circuit held that Toys "R" Us had also induced a horizontal agreement among the manufacturers to limit their sales, and applied the *per se* standard to Toys "R" Us's conduct. *Id.* Here, Plaintiff analogizes the facts to the *Toys "R" Us* decision, and requests that the Court similarly find a horizontal agreement among the Designers **[**16]** and apply the *per se* standard to Defendants' actions.

HN7[] A plaintiff may prove a horizontal agreement "by either direct or circumstantial evidence." *Toys "R" Us, 221 F.3d at 934*. "When circumstantial evidence is used, there must be some evidence that 'tends to exclude the possibility' that the alleged conspirators acted independently." *Id.* (quoting *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984))*; *see also* *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)* (holding that even on summary judgment, "***antitrust law*** limits the range of permissible inferences from ambiguous evidence" in a case involving *Section 1 of* the Sherman Act). A plaintiff does not, however, have to exclude all possibility that the alleged conspirators acted independently. *Toys "R" Us, 221 F.3d at 934-35*; *In re Brand Name Prescription Drugs Antitrust Litig., 186 F.3d 781, 787 (7th Cir. 1999)*.

Here, even reviewing the evidence in the light most favorable to Plaintiff, the Court agrees with Defendants that there is simply no evidence of a horizontal agreement between the Designers (or a smaller number of the Designers) to boycott Hannah's. First, Plaintiff does not present any direct evidence that the Designers reached an agreement among themselves. Second, with respect to Plaintiff's circumstantial evidence, it submits that from 2009 through 2012, Peaches contacted many of the Designers via telephone or e-mail and requested that they not supply competing **[**17]** retail boutiques with their dresses. Some of those communications specifically reference Hannah's, although many do not. (*See* R. 270, Pl.'s Stmt. of Add'l Facts ¶¶ 28-29, 34, 36, 38, 41, 43-44, 46, 49-50.) In response to those requests, Peaches received a variety of responses. Some of the suppliers appear to not have responded at all. (*See Id.*, ¶ 34, Ex. 45) (Peaches e-mail to a number of Designers). Several responded positively, reassuring Peaches that it would be "taken care of," or that the Designer would "make a note in [its] system and inform [its] staff" of any orders **[*768]** from Hannah's. (*See Id.* ¶¶ 33, 85.) Some Designers responded explicitly that they were willing to protect Peaches' sales territory, or were willing to block Peaches' competitors, including Hannah's, from purchasing dresses. (*See e.g., Id.* ¶¶ 31, 45, 74, 79, 84.) These varying responses do not indicate that all sixteen Designers (or even a smaller subset of them) reached an agreement among each other.

Importantly, Plaintiff also does not present evidence that any of the Designers sought assurances that the other Designers also agreed to limit their sales to Peaches. In *Toys "R" Us*, for example, the Seventh Circuit **[**18]** considered such evidence central to its holding that the suppliers reached a horizontal agreement:

> If there was no evidence in the record tending to support concerted behavior, then we agree that [the controlling law] would require a ruling in [Toys "R" Us's] favor. But there is. The evidence showed that the companies wanted to diversify from [Toys "R" Us], not to become more dependent upon it; it showed that each manufacturer was afraid to curb its sales to the warehouse clubs alone, because it was afraid its rivals would cheat and gain a special advantage in that popular new market niche. The [FTC] was not required to disbelieve the testimony of the different toy company executives and [Toys "R" Us] itself to the effect that the only condition on which each toy manufacturer would agree to [Toys "R" Us's] demands was if it could be sure its competitors were doing the same thing.

Toys "R" Us, Inc., 221 F.3d at 935-36. Here, there is no such evidence. Peaches had many communications with different Designers about limiting the supply of dresses to its competitors. There is no indication though that any of the Designers sought to expand their sales beyond Peaches, and were willing to agree to exclusively supply Peaches **[**19]** only if the other Designers agreed to the same deal. Instead, the evidence shows that the Designers that were communicating with Peaches individually evaluated the decision of whether or not to grant Peaches some measure of exclusivity. *See Toys "R" Us, Inc, 221 F.3d at 937* ***HN8***[] ("[t]he typical story of a legitimate vertical transaction would have the [supplier] going to [the retailer] and asking it to be the exclusive carrier of the manufacturer's goods; in exchange for that exclusivity, the manufacturer would hope to receive more effective promotion of its goods, and [the retailer] would have a large enough profit margin to do the job well.")

Plaintiff also argues that the Designers reached a horizontal agreement during the 2012 Atlanta Prom Market Meeting. Viewing the evidence in the light most favorable to Plaintiff, Peaches organized the meeting and invited a number of the Designers, but did not invite any other Chicago-area boutiques. (R. 270, Pl.'s Resp. to Defs.' SOF ¶ 34.) Defendant Jeffrey Surdej spoke at the meeting, and his notes indicate that he spoke of how Defendants are part of a "very unique industry" due to seasonality, and that he discouraged the Designers from opening new accounts because the teenage **[**20]** population is decreasing and the opening of new accounts would cut into Peaches' profits. (R. 270, Pl.'s Stmt. of Add'l Facts ¶ 65, Ex. 102.) In the months following the meeting, a number of the Designers rejected or cancelled orders from Hannah's, seven of whom Hannah's had been able to purchase dresses from in the past. (*Id. ¶¶ 54, 77*.)

As Plaintiff acknowledges in its brief, ***HN9***[] on summary judgment "***antitrust law*** limits the range of permissible inferences from ambiguous evidence." *Matsushita, 475 U.S. at 588, 106 S.Ct. 1348*. Plaintiff must present some evidence that "tends to exclude **[*769]** the possibility" that the alleged conspirators acted independently. *Toys "R" Us, 221 F.3d at 934*. Here, there is no such evidence. First, there is no direct evidence that shows Peaches and certain of the Designers agreed to a group boycott of Hannah's at the 2012 Atlanta Prom Market Meeting. To the contrary, the available evidence does not show that the market participants even discussed Hannah's. Second, there is no evidence to exclude the possibility that the Designers acted independently in not selling to Hannah's. As discussed above, individual Designers may have been responding to Peaches' requests, but there is no indication that the Designers acted in concert **[**21]** with each other.

For these reasons, the rule of reason is the appropriate standard for evaluating any vertical agreements that may have existed between Peaches and the Designers to limit sales of the Designers' dresses to Hannah's.

2. Vertical Price Fixing

Plaintiff's second theory is that Defendants' requests caused two of the Designers to increase the minimum prices they required for prom and homecoming dresses sold on the internet to a level above their minimum prices for dresses sold in brick and mortar stores. As an initial matter, Plaintiff in its Amended Complaint overwhelmingly focuses on its first theory that Peaches induced the Designers to boycott Hannah's. Nevertheless, Plaintiff does make several allegations of price fixing with respect to internet sales, and thus the Court will address that theory here. (*See, e.g.*, R. 188, Am. Compl. ¶¶ 16, 60, 92.) Plaintiff argues that Terani and Jovani raised their minimum price for internet sales to 2.2 times the wholesale price, up from 2 times the wholesale price for sales of their dresses at brick and mortar stores. Plaintiff contends that the Court should apply the per se standard to this theory, arguing that a vertical restraint **[**22]** is *per se* illegal when it includes an agreement on price or price levels.

In support of its argument, Plaintiff cites *Business Elecs. Corp, 485 U.S. 717, 108 S. Ct. 1515, 99 L. Ed. 2d 808*. In that case, the Supreme Court held "that a vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels." *Id., 485 U.S. at 735-36, 108 S.Ct. 1515*. In reaching its holding, the Court noted that "[a]lthough vertical agreements on resale prices have been illegal *per se* since *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911)* ... the scope of *per se* illegality should be narrow in the context of vertical restraints." *Id., 485 U.S. at 724, 108 S.Ct. 1515*. Twenty years later, however, ***HN10***[] the Supreme Court in *Leegin Creative* overturned its *Dr. Miles* decision, and held that the rule of reason, not the *per se* standard, is the applicable standard by which courts should judge whether vertical price restraints are lawful. *Leegin Creative, 551 U.S. at 907, 127 S.Ct. 2705*. Thus, to the extent Plaintiff's evidence establishes vertical agreements to impose a minimum price for internet retail sales between Terani and their retailers or Jovani and their retailers, the Court must evaluate those restraints under the rule of reason, not the *per se* standard.

Plaintiff also argues that the Court should apply the *per se* standard because Terani and Jovani raised their minimum prices for internet retail sales nearly simultaneously following **[**23]** the Atlanta 2012 Prom Meeting. Plaintiff's argument appears to be that Terani and Jovani entered into a horizontal agreement with each other to raise prices. As discussed above with respect to the group boycott theory, however, there is no evidence to infer that Terani and Jovani reached an agreement **[*770]** with each other. Plaintiff's evidence shows that Peaches presented the increased minimum internet retail pricing as an "item of interest" to a number of the Designers, and two of the sixteen later responded by raising their prices. A reasonable fact finder could not infer a horizontal agreement from these facts. *See also* *Leegin Creative, 551 U.S. at 897, 127 S.Ct. 2705* ("When only a few manufacturers lacking market power adopt [resale price maintenance], there is little likelihood it is facilitating a manufacturer cartel, for a cartel then can be undercut by rival manufacturers.") Thus, the rule of reason applies.

3. Quick Look Standard

As a final matter on the applicable legal standard, the Court also agrees with Defendants that the "quick look" standard does not apply to Plaintiff's Antitrust Claims. The "quick look" standard applies where "the per se framework is inappropriate, but where 'no elaborate industry analysis is required **[**24]** to demonstrate the anticompetitive character of ... an agreement.'" *Agnew v. NCAA, 683 F.3d at 336* (quoting *NCAA v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 109, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984))*. Courts use it "when 'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets,' but there are nonetheless reasons to examine potential procompetitive justifications.'" *Id.* (quoting *California Dental Ass'n v. FTC, 526 U.S. 756, 770 119 S.Ct. 1604, 143 L.Ed.2d 935 (1999))*. In *Agnew*, the Seventh Circuit explained that the "quick look" standard applied, among other situations, "when a restraint would normally be considered illegal per se, but 'a certain degree of cooperation is necessary if the [product at issue] is to be preserved.'" *Id.* (quoting *NCAA v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. at 117, 104 S.Ct. 2948*).

The vertical agreements here are not obviously anti-competitive and courts would not normally consider them to be illegal *per se*. ***HN11***[] As the Supreme Court explained in detail in *Leegin Creative*, vertical restraints, including vertical agreements setting minimum resale prices, can have both pro-competitive and anti-competitive justifications. *Leegin Creative, 551 U.S. at 889-894, 127 S.Ct. 2705*. Thus, courts must evaluate them using the "rule of reason." *Id. at 907, 127 S.Ct. 2705*; *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 59, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977)* ("When anticompetitive effects are shown to result from particular vertical restrictions they can be adequately policed under the rule **[**25]** of reason.")

For these reasons, the Court applies the "rule of reason" standard to Plaintiff's claims under *Section 1 of the Sherman Act* and *Section 3 of the Clayton Act*.

B. Conspiracy to Monopolize

With respect to Plaintiff's *Section 2* claims, Plaintiff does not dispute that its claims for attempted monopolization and monopolization require a showing of monopoly power.[8] It argues only that its third *Section 2* claim, conspiracy to monopolize, does not require it to show that Peaches possessed monopoly power. In making its argument, Hannah's cites the Seventh Circuit's 1951 decision, *United **[*771]** States v. National City Lines, 186 F.2d 562 (7th Cir. 1951)*. In that case, the defendants challenged the sufficiency of the indictment against them following their convictions for conspiring to monopolize in a criminal antitrust case. *Id. at 564, 567-68*. They contended, among other arguments, that the indictment was insufficient because it did not charge them with the monopolization of a specific geographic market. *Id. at 567-68*. The Seventh Circuit denied their challenge, however, in part because the defendants' conduct alleged in the indictment affected "a very substantial segment of interstate commerce." *Id.* The court noted that the indictment charged the defendants with conspiracy to monopolize "all the busses, all the tires **[**26]** and tubes and all the gas, oil and grease, used by the public transportation systems of some 45 cities owned or controlled by [certain of the defendants]." *Id. at 567*. Thus, although *National City* did not require the government to show market power in order to prove a conspiracy to monopolize, the court still based its holding on the indictment containing "a charge of elimination of competition, of monopolization, as to a substantial portion of interstate commerce." *Id.*

As Defendants point out, courts in this district have criticized the holding of *National City*, and several other circuits now hold that market power is a required element of a conspiracy to monopolize claim under *Section 2*. *See Appraisers Coal. v. Appraisal Inst., 845 F.Supp. 592, 603 n.7 (N.D. Ill. 1994)* (compiling cases criticizing *National City)*; *Fraser v. Major League Soccer, LLC, 284 F.3d 47, 67 (1st Cir. 2002)* (holding that allowing a jury to "condemn" an exclusive dealing contract as a conspiracy to monopolize would "invite an end run around ... the **[**27]** case law for exclusive dealing under both *section 1* and the attempt and monopolization requirements of *section 2* [of the *Sherman Act*]"); *Dickson v. Microsoft Corp., 309 F.3d 193, 211 (4th Cir. 2002)*. To the extent

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[8] *See, e.g., Endsley v. City of Chicago, 230 F.3d 276, 282 (7th Cir. 2000)* ("The offense of monopoly under *§ 2* of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.")

National City remains good law in the Seventh Circuit, however, here Plaintiff does not raise an issue of fact as to whether any claimed conspiracy to monopolize affected a substantial amount of interstate commerce. As discussed above, there is no evidence that Peaches induced the Designers to enter into a horizontal conspiracy. Thus, to the extent they reached agreements, they were separate agreements between Peaches and the individual Designers. Assuming for the purposes of summary judgment that Plaintiff's product market is accurate and only includes the sixteen Designers, Plaintiff does not submit any evidence that any of the individual agreements substantially affected that market. Plaintiff, for example, does not show that any of the Designers themselves had market power, and it is undisputed that there are 56 other specialty retailers in the Chicago Market that sell prom dresses. (R. 270, Pl.'s Resp. to Defs.' SOF ¶ 149.) For these reasons, the Court grants Defendants' motion for summary judgment on the conspiracy to monopolize claim.

II. Market [28] Power**

As Plaintiff's *Section 2* claims for monopolization and attempted monopolization require a showing of monopoly power, and its remaining Antitrust Claims require market power under the rule of reason, the Court analyzes whether Plaintiff can make that showing.

A. Requirements for Direct Effects Evidence

HN12[] A party can prove market power through two separate ways. *Toys "R" Us, Inc., 221 F.3d at 937*. The more conventional way "is by proving relevant product and geographic markets and by showing that the defendant's share exceeds whatever threshold is important for the practice **[*772]** in the case." *Id.* Under this method, the plaintiff "must precisely establish" both the relevant product and geographic dimensions of the relevant market. *Republic Tobacco Co., 381 F.3d at 738*. A plaintiff also may establish market power through "direct evidence of anticompetitive effects." *Toys "R" Us, Inc., 221 F.3d at 937*. Here, Plaintiff only attempts to establish that Defendants possessed market power through direct evidence of anticompetitive effects. It does not try to show that Defendants had a substantial share of the relevant market. (*See* R. 250-1, Schafer Rep.)

Defendants argue that under the applicable Seventh Circuit law, for Plaintiff to use evidence of direct anti-competitive effects to establish **[**29]** that Defendants possessed market power, Plaintiff must first establish both the "rough contours of a relevant market and [] that the defendant commands a substantial share of the market." *Republic Tobacco Co., 381 F.3d at 737*. Plaintiff disagrees. It argues that the controlling law does not require Plaintiff to prove that Defendants possessed a substantial market share where direct, anti-competitive effects are present. Plaintiff does agree with Peaches, however, that it must show the "rough contours of a relevant market."

The Court agrees with Defendants that ***HN13***[] for Plaintiff to use direct evidence of anticompetitive effects to establish that Defendants possessed market power, the controlling Seventh Circuit law requires Plaintiff to show both the "rough contours" of the relevant market, and that Defendants possessed "substantial market share." In *Republic Tobacco*, the plaintiff argued that it should not have to establish the relevant geographic market because it had evidence of direct, anticompetitive effects. *Republic Tobacco, 381 F.3d at 736-37*. The Seventh Circuit disagreed. After analyzing the Supreme Court and Seventh Circuit precedent on the issue, it specifically held that in order for a plaintiff to establish market power using direct effects, the **[**30]** plaintiff must "show the rough contours of a relevant market, *and* show that the defendant commands a substantial share of the market." *Id. at 737* (emphasis added). As the court noted, "[e]conomic analysis is virtually meaningless if it is entirely unmoored from at least a rough definition of a product and geographic market." *Id.* To ensure that the direct effects analysis is meaningful, a plaintiff needs to make a minimum initial showing that the defendant possesses a substantial market share in a roughly-defined relevant market.

Plaintiff attempts to draw support for its argument from the Seventh Circuit's earlier decision in *Toys "R" Us, Inc.* In that case, the Seventh Circuit held that the Federal Trade Commission could use evidence of direct anti-competitive effects to establish that Toys 'R Us possessed market power. In reaching its decision, the court stated the following:

> [The defendant] seems to think that anticompetitive effects in a market cannot be shown unless the plaintiff, or here the Commission, first proves that it has a large market share. This, however, has things backwards. As we have explained elsewhere, the share a firm has in a properly defined relevant market is only a way of estimating **[**31]** market power, which is the ultimate consideration.

Id., 221 F.3d at 937. Plaintiff pounces on this passage to argue that the controlling law does not require it to prove that Defendants possessed a large market share. Later in the *Toys "R" Us* opinion, however, the court emphasized that the defendant "had 20% of the national wholesale market and up to 49% of some local wholesale markets." *Id. at 937*. Indeed, in **[*773]** reaching its holding, the *Republic Tobacco* court specifically relied on that passage in the *Toys "R" Us* decision. It held that the FTC was only able to use direct effects evidence because it first showed that Toys "R" Us possessed a substantial share of the market. *Republic Tobacco, 381 F.3d at 737*. Thus, Plaintiff's argument fails.

Plaintiff concedes that it cannot show that Defendants possessed a substantial share of the market because it cannot calculate Defendants' market share. Plaintiff also argues, however, that in the absence of publicly available data to calculate Peaches' market share, the Court should find that Peaches' possessed substantial market share because "[t]here is no dispute that Defendants control the largest and most substantial share of the Chicago Market for the Designers' prom and homecoming dresses." (R. 292, Pl.'s Resp., **[**32]** at 55.) With respect to the data, Defendants' expert Dr. Robert Kneuper estimated Peaches' market share using several different methods that relied on publicly available data. (*See* R. 241-1, Kneuper Rep., at 25-26, 29.) Although Plaintiff filed a *Daubert* motion challenging the methodology that Dr. Kneuper employed in reaching his market share opinions, the Court denied Plaintiff's motion. (R. 329, Kneuper Opinion.) Second, although there is not a dispute that Peaches is a large store that encompasses over 25,000 square feet and carries approximately 20,000 dresses in inventory, that does not mean that Peaches "commands a substantial share of the market" under *Republic Tobacco*. (*See* R. 270, Pl.'s Resp. to Defs.' SOF ¶ 54.) Indeed, there are 56 specialty retailers other than Hannah's and Peaches that sell prom dresses in the Chicago Market. (*Id. ¶ 149*.) Although Peaches may be a large store, that fact on its own does not establish that it has significant market share.

For these reasons, under *Republic Tobacco*, the Court cannot allow Plaintiff to present direct evidence of anti-competitive effects to meet its burden to establish that Peaches possessed market power. As Plaintiff cannot show that Peaches possessed **[**33]** market power, the Court must grant Defendants' motion for summary judgment on the Antitrust Claims.

B. Defendants' Evidence of Lack of Market Power

Additionally, Defendants submit expert evidence through Dr. Kneuper that Peaches did not possess market power. As discussed above, ***HN14***[↑] a plaintiff may prove market power in one of two ways. The more conventional way "is by proving relevant product and geographic markets and by showing that the defendant's share exceeds whatever threshold is important for the practice in the case." *Toys "R" Us, Inc., 221 F.3d at 937*. The Seventh Circuit has held that in cases alleging a violation of *Section 1 of the Sherman Act*, "a 20%-25% market share or less does not constitute market power." *Valley Liquors, Inc. v. Renfield Imps., Ltd., 822 F.2d 656, 666 (7th Cir. 1987)*. With respect to *Section 2* of the Sherman Act, the required market share showing is even higher. *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992)* ("Monopoly power under *§ 2* requires, of course, something greater than market power under *§ 1*"). "Without a showing of special market conditions or other compelling evidence of market power, the lowest possible market share legally sufficient to sustain a finding of monopolization is between 17% and 25%." *Valley Liquors, 822 F.2d at 667*.

Here, Defendants submit the expert testimony of Dr. Kneuper. As mentioned above, in his expert report he calculated **[**34]** Defendants' market share using several different data sources and methodologies. His calculation of Peaches' market share **[*774]** ranged from 2.89% to 9% based on his estimates of the number of prom and homecoming dresses sold in the market claimed by Hannah's, and from 6.32% to 7.53% based on his estimates of Peaches' share of the available retail space. (R. 241-1, Kneuper Rep., at 25-27, 29.) These market share figures are far too small for Peaches to possess market power. Dr. Kneuper also notes in his report that Peaches' lack of market power makes sense given the low barriers to entry in the market for prom and homecoming dresses, and the number of competing specialty retail boutiques. (R. 241-1, Kneuper Rep., at 9-11.) Although Plaintiff contests Dr. Kneuper's market share opinions, they are evidence that Peaches does not possess market power. As the Court struck the opinions of Plaintiff's expert Dr. Schafer on legal grounds, Plaintiff has no expert evidence to affirmatively establish that Peaches does possess market power.

III. State Law Claims

As a final matter, Plaintiff also pleads Illinois common law claims for tortious interference with contract (Count VIII), tortious interference with prospective economic advantage (Count IX), **[**35]** and civil conspiracy (Count X), as well as a claim for a violation of the Illinois Consumer Fraud and Deceptive Practices Act (Count XI). (R. 188, Am. Compl.) Plaintiff asserts that the Court has supplemental jurisdiction over these state law claims under *28 U.S.C. § 1367*, and does not argue that the Court has original subject matter jurisdiction over them. (*Id. ¶¶ 52-55*.) As the Court grants Defendants' motion for summary judgment on the Antitrust Claims, it must decide whether to exercise supplemental jurisdiction over these remaining claims. ***HN15***[] A district court "may decline to exercise supplemental jurisdiction over a claim" if, among other reasons, "the district court has dismissed all claims over which it has original jurisdiction." *28 U.S.C. § 1367(c)(3)*; *In re Repository Techs., Inc., 601 F.3d 710, 724 (7th Cir. 2010)*. In addition to that statutory factor, the court "should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity." *In re Repository Techs., Inc., 601 F.3d at 724* (quoting *City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 173, 118 S.Ct. 523, 139 L.Ed.2d 525 (1997))*. "It is the well-established law of this circuit," however, "that the usual practice is to dismiss without prejudice state supplemental claims whenever all federal claims have been dismissed prior to trial." *Harvey v. Town of Merrillville, 649 F.3d 526, 533 (7th Cir. 2011)* (quoting *Groce v. Eli Lilly & Co., 193 F.3d 496, 501 (7th Cir. 1999))*.

Here, the Court declines to exercise jurisdiction **[**36]** over the remaining non-federal claims.[9] Plaintiff's directs its four state law claims at Defendants' alleged interference with Hannah's business and for using unfair methods of competition. (*See generally* R. 188, Am. Compl. ¶¶ 267-298.) Although the Court reviews Defendants' actions towards Hannah's in finding that any agreements between Peaches and the Designers were vertical and did not include a horizontal agreement among the Designers, the Court's ruling only addresses Defendants' actions from the perspective **[*775]** of federal ***antitrust law***. Whether Plaintiff has valid business tort claims under Illinois state law for Defendants' alleged interference with its commercial relationships or for unfair competition is a different question. As Defendants themselves note in their summary judgment briefing, "If Peaches has committed a business wrong against Hannah's (which Peaches denies), Hannah's may have a business tort claim against Peaches, but it does not have an antitrust claim." (R. 260, Defs.' Memo, at 10.) For this reason, the Court dismisses Plaintiff's remaining claims without prejudice.

CONCLUSION

For the foregoing reasons, the Court grants Defendants' motion for summary judgment on Counts I — VII, dismisses Counts VIII - XI without prejudice, and dismisses Count XII with prejudice in part and without prejudice in part.

DATED: July 2, 2015

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[9] Although the parties do not discuss it, Plantiff also pleads a Count XII which seeks a declaratory **[**37]** judgment under *28 U.S.C. § 2201* that the exclusive agreements between Peaches and the Designers are illegal under the *Sherman Act* and unenforceable under Illinois law. (R. 188, Am. Compl. ¶¶ 299-305.) Given the Court's summary judgment ruling, the Court dismisses Count XII with prejudice to the extent it seeks a declaratory judgment with respect to the Antitrust Claims, and without prejudice to the extent it seeks a declaratory judgment with respect to the remaining Illinois state law claims.

ENTERED

/s/ Amy J. St. Eve

AMY J. ST. EVE

United States District Court Judge

In re Pre-Filled Propane Tank Antitrust Litig.

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

July 2, 2015, Decided; July 2, 2015, Filed

MDL NO. 2567; Master Case No. 14-02567-MD-W-GAF

Reporter

2015 U.S. Dist. LEXIS 193932 *; 2015 WL 12791756

IN RE: PRE-FILLED PROPANE TANK ANTITRUST LITIGATION. ALL ACTIONS

Prior History: *In re Pre-Filled Propane Tank Antitrust Litigation, 2015 U.S. Dist. LEXIS 185269 (W.D. Mo., Apr. 9, 2015)*

Core Terms

Purchaser, tolling, Plaintiffs', Propane, Indirect, statute of limitations, overt act, class action, limitations period, tanks, continuing violation, settlement agreement, settlement, conspiracy, fill, parties, reaffirmations, Defendants', motion to dismiss, class certification, certification, limitations, pre-filled, cause of action, adjusted, four year, allegations, Wholesale, antitrust, reasons

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For Route 49 Gas & Go, Inc., WDMO 14-4265, Surinder Kaur, Inc., WDMO 14-4265, Plaintiffs: Linda Nussbaum, LEAD ATTORNEY, PRO HAC VICE, New York, NY USA; Michael D. Shaffer, LEAD ATTORNEY, PRO HAC VICE, Philadelphia, PA USA; Peter Barile, III, LEAD ATTORNEY, New York, NY USA; Robert Eisler, LEAD ATTORNEY, PRO HAC VICE, Wilmington, DE USA; Thomas V Bender, LEAD ATTORNEY, Horn, Aylward & Bandy, LLC, Kansas City, MO USA.

For Morgan-Larson, Llc, WDMO 14-635, Plaintiff: Alex Kaplan, Richard W Hess, Stephen D. Susman, Vineet Bhatia, LEAD ATTORNEYS, PRO HAC VICE, Susman Godfrey, LLP, Houston, TX USA; Christina M Black, LEAD ATTORNEY, PRO HAC VICE, **[*8]** Philadelphia, PA USA; J. Michael Ponder, LEAD ATTORNEY, Cook, Barkett, Ponder & Wolz, LC, Cape Girardeau, MO USA; John Edward Schiltz, LEAD ATTORNEY, PRO HAC VICE, Seattle, WA USA; R Bryant McCulley, LEAD ATTORNEY, PRO HAC VICE, McCulley McCluer PLLC, Island, SC USA; Richard F. Lombardo, LEAD ATTORNEY, Shaffer Lombardo Shurin, Kansas City, MO USA; Stephen E Morrissey, LEAD ATTORNEY, PRO HAC VICE, Susman Godfrey, Seattle, WA USA; Stuart H. McCluer, LEAD ATTORNEY, PRO HAC VICE, McCulley McCluer PLLC, Oxford, MS USA.

For Ashville General Store, Inc., WDMO 14-4285, Plaintiff: Jennie Lee Anderson, LEAD ATTORNEY, PRO HAC VICE, San Francisco, CA USA; Thomas V Bender, LEAD ATTORNEY, Horn, Aylward & Bandy, LLC, Kansas City, MO USA.

For Sean Venezia, CAN 14-03141, MOW 14-968, Plaintiff: Brooks Elliott Harlow, LEAD ATTORNEY, Lukas Nace Gutierrez & Sachs, Mclean, VA USA; Robert Taylor-Manning, LEAD ATTORNEY, Mercer Island, WA USA.

For Michael S. Harvey, CAN 14-03141, MOW 14-968, Gregory Ludvigsen, CAN 14-03141, MOW 14-968, Arthur Hull, CAN 14-03141, MOW 14-968, Alan Rockwell, CAN 14-03141, MOW 14-968, Plaintiffs: Brooks Elliott Harlow, LEAD ATTORNEY, Lukas Nace Gutierrez & Sachs, Mclean, VA USA; **[*9]** Robert Taylor-Manning, LEAD ATTORNEY, Mercer Island, WA USA.

For James Halgerson, CAS 14-01913, MOW 14-970, Plaintiff: Betsy Carol Manifold, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA.

For Thomas R. Clark, CAS 14-01775, WDMO 14-969, Bryce Mander, CAS 14-01775, WDMO 14-969, Plaintiffs: Betsy Carol Manifold, LEAD ATTORNEY, Rachele R Rickert, Wolf Haldenstein Adler Freeman and Herz, San Diego, CA USA; Francis M. Gregorek, LEAD ATTORNEY, Wolf, Haldenstein, Adler, Freeman & Herz, LLP, San Diego, CA USA; Fred Taylor Isquith, LEAD ATTORNEY, Wolf, Haldenstein, Adler, Freeman & Herz, New York, NY USA.

For Arrow Hardware, Llc, PAE 14-04132, MOW 14-986, Plaintiff: Bryan L. Clobes, LEAD ATTORNEY, Cafferty Clobes Meriwether & Sprengel, LLP, Philadelphia, PA USA; Christina M Black, LEAD ATTORNEY, PRO HAC VICE, Philadelphia, PA USA; Richard F. Lombardo, LEAD ATTORNEY, Shaffer Lombardo Shurin, Kansas City, MO USA.

For Birdie's, Inc., LAE 14-01821, MOW 14-985, Plaintiff: Andrew A. Lemmon, LEAD ATTORNEY, PRO HAC VICE, Hahnville, LA USA; Gregory L. Davis, LEAD ATTORNEY, Davis & Taliaferro, LLC, Montgomery, AL USA; Irma L. Netting, LEAD ATTORNEY, PRO HAC VICE, Hahnville, LA **[*10]** USA; Thomas V Bender, LEAD ATTORNEY, Horn, Aylward & Bandy, LLC, Kansas City, MO USA.

For Alex Chernavsky, CAC 14-06781; MOW 14-967, Plaintiff: Joshua C Ezrin, LEAD ATTORNEY, Audet and Partners LLP, San Francisco, CA USA; Theodore H Chase, LEAD ATTORNEY, Audet and Partners LLP, San Francisco, CA USA; William M Audet, LEAD ATTORNEY, Audet and Partners LLP, San Francisco, CA USA.

For Lochraven Sunoco, Inc., KS 14-02336; MOW 14-971, Plaintiff: Christina M Black, LEAD ATTORNEY, PRO HAC VICE, Philadelphia, PA USA; Eric Cramer, LEAD ATTORNEY, Berger & Montague, P.C., Philadeplpha, PA USA; H Laddie Montague, Jr, LEAD ATTORNEY, Berger & Montague, PC, Philadelphia, PA USA; Richard F. Lombardo, LEAD ATTORNEY, Shaffer Lombardo Shurin, Kansas City, MO USA; Robert W. Coykendall, LEAD ATTORNEY, Morris, Laing, Evans, Brock & Kennedy, Chtd - Wichita, Wichita, KS USA; Jennifer MacNaughton, Berger & Montague, PC, Philadelphia, PA USA; Martin Twersky, Berger & Montague, PC, Philadelphia, PA USA.

For American Auto Repair, KS 14-02344; MOW 14-972, Plaintiff: Christina M Black, LEAD ATTORNEY, PRO HAC VICE, Philadelphia, PA USA; Isaac Diel, LEAD ATTORNEY, Sharp McQueen, Overland Park, KS USA; Richard F. Lombardo, **[*11]** LEAD ATTORNEY, Shaffer Lombardo Shurin, Kansas City, MO USA.

For Johnson Auto Electric, Inc., KS 14-02345; MOW 14-973, Plaintiff: Christina M Black, LEAD ATTORNEY, PRO HAC VICE, Philadelphia, PA USA; Isaac Diel, LEAD ATTORNEY, Sharp McQueen, Overland Park, KS USA; John Edward Schiltz, LEAD ATTORNEY, PRO HAC VICE, Seattle, WA USA; Richard F. Lombardo, LEAD ATTORNEY, Shaffer Lombardo Shurin, Kansas City, MO USA; Solomon B Cera, LEAD ATTORNEY, Cera LLP, San Francisco, CA USA; Thomas C Bright, LEAD ATTORNEY, Cera LLP, San Francisco, CA USA.

For Cedar Holly Investments, Llc, KS 14-02350; MOW 14-974, Plaintiff: Christina M Black, LEAD ATTORNEY, PRO HAC VICE, Philadelphia, PA USA; Jayne Arnold Goldstein, LEAD ATTORNEY, Shepherd Finkelman Miller & Shah LLP, Ft. Lauderdale, FL USA; Richard F. Lombardo, LEAD ATTORNEY, Shaffer Lombardo Shurin, Kansas City, MO USA; Robert W. Coykendall, LEAD ATTORNEY, Morris, Laing, Evans, Brock & Kennedy, Chtd - Wichita, Wichita, KS USA.

For Tuckerton Lumber Company, KS 14-02353; MOW 14-975, Plaintiff: Christina M Black, LEAD ATTORNEY, PRO HAC VICE, Philadelphia, PA USA; Isaac Diel, LEAD ATTORNEY, Sharp McQueen, Overland Park, KS USA; Richard F. Lombardo, LEAD ATTORNEY, **[*12]** Shaffer Lombardo Shurin, Kansas City, MO USA.

For Ace High Auto Repair & Propane, KS 14-02354; MOW 14-976, Plaintiff: Christina M Black, LEAD ATTORNEY, PRO HAC VICE, Philadelphia, PA USA; Isaac Diel, LEAD ATTORNEY, Sharp McQueen, Overland Park, KS USA; Richard F. Lombardo, LEAD ATTORNEY, Shaffer Lombardo Shurin, Kansas City, MO USA; Solomon B Cera, Thomas C Bright, LEAD ATTORNEYS, Cera LLP, San Francisco, CA USA.

For Cefo Enterprise Corp., KS 14-02362; MOW 14-977, Plaintiff: Alexios J. Dravillas, LEAD ATTORNEY, PRO HAC VICE, Segal McCambridge Singer & Mahoney, Ltd., Chicago, IL USA; Brian H. Eldridge, Kyle Pozan, Steven A. Hart, LEAD ATTORNEYS, Segal McCambridge Singer & Mahoney, Ltd., Chicago, IL USA; Christina M Black, LEAD ATTORNEY, PRO HAC VICE, Philadelphia, PA USA; Edward D. Robertson, III, James P. Frickleton, LEAD ATTORNEYS, Bartimus Frickleton Robertson Rader PC - Leawood, Leawood, KS USA; Heidi M. Silton, Kate M. Baxter-Kauf, W. Joseph Bruckner, LEAD ATTORNEYS, Lockridge Grindal Nauen, PLLP, Minneapolis, MN USA; Richard F. Lombardo, LEAD ATTORNEY, Shaffer Lombardo Shurin, Kansas City, MO USA.

For Jonwall, Inc., KS 14-02370; MOW 14-978, Plaintiff: Christina M Black, LEAD ATTORNEY, **[*13]** PRO HAC VICE, Philadelphia, PA USA; Daniel Gustafson, Daniel C. Hedlund, LEAD ATTORNEYS, Gustafson Gluek, PLLC, Minneapolis, MN USA; Isaac Diel, LEAD ATTORNEY, Sharp McQueen, Overland Park, KS USA; Richard F. Lombardo, LEAD ATTORNEY, Shaffer Lombardo Shurin, Kansas City, MO USA; Eric Taubel, Gustafson Gluek PPLC, Minneapolis, MN USA.

For Rc Gasoline, KS 14-02371; MOW 14-979, Plaintiff: Beth Steltzer, LEAD ATTORNEY, Barrack, Rodos & Bacine, Philadelphia, PA USA; Isaac Diel, LEAD ATTORNEY, Sharp McQueen, Overland Park, KS USA; Jeffrey B Gittleman, LEAD ATTORNEY, Barrack, Rodos & Bacine, Philadelphia, PA USA.

For Speed Stop 32, Inc., KS 14-02379; MOW 14-980, Plaintiff: Christina M Black, LEAD ATTORNEY, PRO HAC VICE, Philadelphia, PA USA; John Edward Schiltz, LEAD ATTORNEY, PRO HAC VICE, Seattle, WA USA; Robert W. Coykendall, LEAD ATTORNEY, Morris, Laing, Evans, Brock & Kennedy, Chtd - Wichita, Wichita, KS USA; Richard F. Lombardo, Shaffer Lombardo Shurin, Kansas City, MO USA.

For Zarco USA, Inc., KS 14-02381; MOW 14-981, Plaintiff: Christina M Black, LEAD ATTORNEY, PRO HAC VICE, Philadelphia, PA USA; Eric D. Barton, Tyler Hudson, LEAD ATTORNEYS, Wagstaff & Cartmell, Kansas City, MO USA; **[*14]** Richard F. Lombardo, LEAD ATTORNEY, Shaffer Lombardo Shurin, Kansas City, MO USA.

For Dunmore Oil Co., Inc., KS 14-02393; MOW 14-982, Plaintiff: Christina M Black, LEAD ATTORNEY, PRO HAC VICE, Philadelphia, PA USA; Isaac Diel, LEAD ATTORNEY, Sharp McQueen, Overland Park, KS USA; Patrick Howard, LEAD ATTORNEY, Saltz, Mongeluzzi Barrett & Bendesky, PC, Horsham, PA USA; Richard F. Lombardo, LEAD ATTORNEY, Shaffer Lombardo Shurin, Kansas City, MO USA.

For Jojo Oil Co., Inc., KS 14-02393; MOW 14-982, Plaintiff: Christina M Black, LEAD ATTORNEY, PRO HAC VICE, Philadelphia, PA USA; Isaac Diel, LEAD ATTORNEY, Sharp McQueen, Overland Park, KS USA; Richard F. Lombardo, LEAD ATTORNEY, Shaffer Lombardo Shurin, Kansas City, MO USA.

For Ekonomy Enterprises, Inc., KS 14-02432; MOW 14-983, Plaintiff: Christina M Black, LEAD ATTORNEY, PRO HAC VICE, Philadelphia, PA USA; Richard F. Lombardo, LEAD ATTORNEY, Shaffer Lombardo Shurin, Kansas City, MO USA; Robert W. Coykendall, LEAD ATTORNEY, Morris, Laing, Evans, Brock & Kennedy, Chtd - Wichita, Wichita, KS USA.

For Robert Orr, 16cv809, Missouri Western, Plaintiff Barrett J. Vahle, Norman Eli Siegel, Christopher Curtis Shank, LEAD ATTORNEYS, Stueve Siegel Hanson, **[*15]** LLP - KCMO, Kansas City, MO USA; Sean Cooper, LEAD ATTORNEY, Paul LLP, Kansas City, MO USA.

For Eric Blum, 16cv809, Missouri Western, Paul Toomey, 16cv809, Missouri Western, William Vincent, 16cv809, Missouri Western, David Mcnally, 16cv809, Missouri Western, Steven Lutrell, 16cv809, Missouri Western, Ken Cramer, 16cv809, Missouri Western, Kevin Dougherty, 16cv809, Missouri Western, James Ristow, 16cv809, Missouri Western, Daniel Kelleher, 16cv809, Missouri Western, Richard Pedrick, 16cv809, Missouri Western, Dallas May, Jr., 16cv809, Missouri Western, Tom Roberts, 16cv809, Missouri Western, John Gilbert, 16cv809, Missouri Western, Mark Stevens, 16cv809, Missouri Western, Richard Paradowski, 16cv809, Missouri Western, Hanz DE Perio, 16cv809, Missouri Western, Josh Bartholow, 16cv809, Missouri Western, Joseph M Haala, 16cv809, Missouri Western, Plaintiffs: Barrett J. Vahle, Norman Eli Siegel, LEAD ATTORNEYS, Stueve Siegel Hanson, LLP - KCMO, Kansas City, MO USA; Sean Cooper, LEAD ATTORNEY, Paul LLP, Kansas City, MO USA.

For Scott Zuehlke, 16cv809, Missouri Western, Wesley H Mccullough, 16cv809, Missouri Western, Marylou Breed, 16cv809, Missouri Western, Jerry Marshall, 16cv809, Missouri **[*16]** Western, Plaintiffs: Barrett J. Vahle, Norman Eli Siegel, LEAD ATTORNEYS, Stueve Siegel Hanson, LLP - KCMO, Kansas City, MO USA; Sean Cooper, LEAD ATTORNEY, Paul LLP, Kansas City, MO USA.

For Troy Winters, Added per Amended Complaint, Doc 198, Thomas Gane, Added per Amended Complaint, Doc 198, Gary Snow, Added per Amended Complaint, Doc 198, Allan Disbrow, Added per Amended Complaint, Doc 198, Plaintiffs: Barrett J. Vahle, LEAD ATTORNEY, Stueve Siegel Hanson, LLP - KCMO, Kansas City, MO USA; John DeStefano, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Phoenix, AZ USA.

For Nicholas Pulli, Added per Amended Complaint, Doc 198, Plaintiff: Barrett J. Vahle, Norman Eli Siegel, LEAD ATTORNEYS, Stueve Siegel Hanson, LLP - KCMO, Kansas City, MO USA; John DeStefano, LEAD ATTORNEY, Hagens Berman Sobol Shapiro LLP, Phoenix, AZ USA.

For Speed Stop 32, Inc., Yocum Oil Company, Inc., Johnson Auto Electric, Inc., Morgan-Larson, Llc, Plaintiffs: Christina M Black, LEAD ATTORNEY, Philadelphia, PA USA.

For Ferrellgas Partners, L.P., a limited partnership, Ferrellgas, L.P., a limited partnership, doing business as, Blue Rhino, Defendants: Brendan McShane, Daniel M. Wall, Jesse B. McKeithen, Niall Edmund **[*17]** Lynch, LEAD ATTORNEYS, Aaron Tuen Fai Chiu, Latham & Watkins, LLP, San Francisco, CA USA; Catesby Ann Major, Craig

S. O'Dear, Fred L. Sgroi, Tracy R Hancock, LEAD ATTORNEYS, Bryan Cave Leighton Paisner, LLP - KCMO, Kansas City, MO USA; Peter W Herzog, III, Wheeler Trigg O'Donnell LLP, St. Louis, MO USA.

For Amerigas Partners, LP, a limited partnership, doing business as, Amerigas Cylinder Exchange, Defendant: Elizabeth A.N. Haas, LEAD ATTORNEY, Milwaukee, WI USA; Jay N. Varon, LEAD ATTORNEY, Foley & Lardner, LLP, Washington, DC USA; Jeremy M. Suhr, LEAD ATTORNEY, Boulware Law LLC, Kansas City, MO USA; Joseph Daniel Lee, Stuart Neil Senator, LEAD ATTORNEYS, Ashley Kaplan, Munger, Tolles & Olson LLP, Los Angeles, CA USA; Kate Gehl, LEAD ATTORNEY, Milwaukee, WI USA; Andrew P Alexander, Graves Garrett LLC, Kansas City, MO USA; Benjamin L. Tompkins, Edward Dean Greim, Graves Garrett, LLC - KCMO, Kansas City, MO USA; Brandon J.B. Boulware, German May, PC - KCMO, Kansas City, MO USA; Kyle Mach, Munger, Tolles & Olson LLP, San Francisco, CA USA.

For Ugi Corporation, a corporation, Defendant: Elizabeth A.N. Haas, Kate Gehl, LEAD ATTORNEYS, Milwaukee, WI USA; Jay N. Varon, LEAD ATTORNEY, Foley **[*18]** & Lardner, LLP, Washington, DC USA; Jeremy M. Suhr, LEAD ATTORNEY, Boulware Law LLC, Kansas City, MO USA; Joseph Daniel Lee, LEAD ATTORNEY, Ashley Kaplan, Munger, Tolles & Olson LLP, Los Angeles, CA USA; Andrew P Alexander, Graves Garrett LLC, Kansas City, MO USA; Benjamin L. Tompkins, Edward Dean Greim, Graves Garrett, LLC - KCMO, Kansas City, MO USA; Brandon J.B. Boulware, German May, PC - KCMO, Kansas City, MO USA; Kyle Mach, Munger, Tolles & Olson LLP, San Francisco, CA USA.

For Amerigas Propane, Inc., Amerigas Propane, LP, Defendants: Elizabeth A.N. Haas, Kate Gehl, LEAD ATTORNEYS, Milwaukee, WI USA; Jay N. Varon, LEAD ATTORNEY, Foley & Lardner, LLP, Washington, DC USA; Joseph Daniel Lee, Stuart Neil Senator, LEAD ATTORNEYS, Munger, Tolles & Olson LLP, Los Angeles, CA USA; Andrew P Alexander, Graves Garrett LLC, Kansas City, MO USA; Ashley Kaplan, Munger, Tolles & Olson LLP, Los Angeles, CA USA; Benjamin L. Tompkins, Edward Dean Greim, Graves Garrett, LLC - KCMO, Kansas City, MO USA; Brandon J.B. Boulware, German May, PC - KCMO, Kansas City, MO USA; Kyle Mach, Munger, Tolles & Olson LLP, San Francisco, CA USA.

Judges: GARY A. FENNER, United States District Judge.

Opinion by: GARY A. FENNER

Opinion

ORDER

Presently **[*19]** before the Court is Defendants Ferrellgas Partners, L.P.; Ferrellgas, L.P.[1]; UGI Corporation; AmeriGas Partners, LP; AmeriGas Propane, Inc.; and AmeriGas Propane, LP's[2] (collectively "Defendants") Motion to Dismiss the Indirect Purchaser Plaintiffs' Consolidated Class Action Complaint (the "Indirect Purchaser Plaintiffs' CAC"). (Doc. # 135). Plaintiffs Mario Ortiz, Steven Tseffos, Stephen Morrison, Michael S. Harvey, Arthur Hull, Gregory Ludvigsen, Alan Rockwell, Alex Chernavsky, James Halgerson, Thomas R. Clark, Bryce Mander, and Sean Venezia (collectively the "Indirect Purchaser Plaintiffs") oppose. (Doc. # 149).

Also before the Court is Defendants' Motion to Dismiss the Direct Purchaser Plaintiffs' CAC. (Doc. # 137). Plaintiffs Hartig Drug Company, Inc.; Jason Moore's Texaco, L.L.C.; Glenville Shell LLC; AQ Investments, LLC; LJax Enterprises, Inc.; J & V Management, LLC; Butch's Central Coastal, Inc.; Zerka's Party Store, Inc.; OM Commercial Neenah Oil, Inc.; CCLAS, Inc.; Hopewell Exxon, LLC; Tuban Petroleum LLC; 33 and a Third, LLC; Tuban 610 LLC; Highway 182 LLC; West Main Street LLC; Roth's Country Corner, Inc; 1919 Airline Hwy LLC; East Airline LLC;

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[1] Ferrellgas Partners, L.P. and Ferrellgas, L.P. will be collectively referred to as "Ferrellgas." Ferrellgas does business under the name Blue Rhino. (Direct Purchaser Plaintiffs' Consolidated Class Action Complaint ("Direct Purchaser Plaintiffs' CAC") ¶ 1).

[2] AmeriGas Partners, LP; AmeriGas Propane, Inc.; and AmeriGas Propane, LP will be collectively referred to as "AmeriGas."

Gramercy Cheap Smokes LLC; Conti's **[*20]** Service Center, Inc.; Route 49 Gas & Go, Inc.; Morgan-Larson, LLC; Surinder Kaur, Inc.; Ashville General Store, Inc.; Birdie's, Inc.; Lochraven Sunoco, Inc.; Arrow Hardware, LLC; American Auto Repair; Johnson Auto Electric, Inc.; Cedar Holly Investments, LLC; CEFO Enterprise Corp.; Tuckerton Lumber Company; Ace High Auto Repair & Propane; JonWall, Inc.; RC Gasoline, Speed Stop 32; Inc., Zarco USA, Inc.; Dunmore Oil Co., Inc.; JoJo Oil Co., Inc.; Ekonomy Enterprises, Inc.; and Yocum Oil Company, Inc. (collectively the "Direct Purchaser Plaintiffs") oppose.[3] (Doc. # 148). For the reasons stated below, Defendants' Motion to Dismiss the Indirect Purchaser Plaintiffs' CAC is GRANTED in part and DENIED in part and Defendants' Motion to Dismiss the Direct Purchaser Plaintiffs' CAC is GRANTED.

DISCUSSION

I. FACTS

Defendants are the largest distributors of pre-filled propane exchange tanks. (Direct Purchaser Plaintiffs' CAC ¶ 1). Pre-filled propane exchange tanks are portable steel cylinders containing propane; they are used primarily to power outdoor grills and heaters. (*Id.* ¶ 2). The tanks come in a standard size and can be filled with up to twenty pounds of propane. (*Id.* ¶ 3). Before 2008, **[*21]** the tanks were filled with seventeen pounds of propane. (*Id.*). From 2006 to 2008 the cost of propane rose. (*Id.* ¶¶ 4-5). In 2008, Defendants reduced the fill level of the tanks from seventeen to fifteen pounds of propane per tank while maintaining the same price per tank. (*Id.* ¶ 7).

In 2009, a group of plaintiffs filed suit against Ferrellgas and AmeriGas alleging that they had acted in concert to reduce the amount of propane contained within the tanks and thus, artificially increase the price of the tanks[4]. (Case No. 09-02086-MD-W-GAF, Amended Complaint ¶¶ 1-4). The 2009 plaintiffs alleged that the actions of Ferrellgas and AmeriGas were in violation of *Section 1 of the Sherman Act* and state antitrust and consumer protection laws. (*Id.*). The named plaintiffs in *In re Propane I* were all indirect purchasers, individuals who purchased the pre-filled propane exchange tanks from companies to which Ferrellgas or AmeriGas initially sold them. (*Id.* ¶¶ 10-29). However, the Amended Complaint in *In re Propane I* defined their class as "[a]ll persons who purchased a Propane Tank sold, marketed, or distributed by any Defendant during the applicable limitations periods." (*Id.* ¶ 77).

On December **[*22]** 8, 2009, the plaintiffs moved for preliminary approval of settlement agreements which included only indirect purchasers. (*Id.*, Doc. # 37). The settlement agreements were granted final approval on October 6, 2010. (*Id.*, Doc. # 166). The settlement agreements contained a release provision. (*Id.*, Docs. ## 114, 250). The release provision in the settlement with AmeriGas released AmeriGas from "any and all liabilities, claims, rights, suits, and causes of action, of any kind whatsoever, that [the plaintiffs] may have or may have had . . . whether known or unknown . . . that could have been alleged." (*Id.*, Doc. # 114-4, p. 24). The release provision in the settlement with Ferrellgas released Ferrellgas from "any and all liabilities, claims, rights, suits, and causes of action, of any kind whatsoever, that [the plaintiffs] may have or may have had . . . whether known or unknown . . . that were or could have been sought or alleged." (*Id.*, Doc. # 250-1, p. 20).

On March 27, 2014, the Federal Trade Commission issued a complaint against Defendants alleging that Defendants had restrained price competition because of their 2008 decision to decrease the fill level of the propane tanks. (Direct Purchaser **[*23]** Plaintiffs' CAC ¶ 16). Shortly thereafter, Plaintiffs filed the present suit. (*See id.*). Plaintiffs allege that the 2008 reduction in fill level was due to improper collusion between Defendants who conspired to force Direct Purchaser Plaintiffs to accept the fill reduction and agreed not to compete with one another. (*Id.* ¶¶ 8-11). Plaintiffs allege that this was a violation of *Section 1 of the Sherman Act*. (*Id.*). Plaintiffs in

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[3] The Direct and Indirect Purchaser Plaintiffs are referred to collectively as "Plaintiffs."

[4] This 2009 action will be referred to as *In re Propane I*.

this action include both direct purchasers, those that purchased the tanks directly from Defendants for resale, and indirect purchasers. (*See* Docket Sheet).

II. LEGAL STANDARD

Under *Federal Rule of Civil Procedure 12(b)(6)*, a court may dismiss a complaint that fails to state a claim upon which relief may be granted. When considering a *Rule 12(b)(6)* motion to dismiss, a court treats all well-pleaded facts as true and grants the non-moving party all reasonable inferences from the facts. *Westcott v. City of Omaha, 901 F.2d 1486, 1488 (8th Cir. 1990)*. However, courts are "not bound to accept as true a legal conclusion couched as a factual allegation" and such "labels and conclusions" or "formulaic recitation[s] of the elements of a cause of action will not do." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))* (internal quotation marks omitted). A *Rule 12(b)(6)* motion should be granted only if the non-moving party fails to plead facts sufficient **[*24]** to state a claim "that is plausible on its face" and would entitle the party to the relief requested. *Twombly, 550 U.S. at 570*.

III. ANALYSIS

A. Release Provision

Defendants first argue that the Indirect Purchaser Plaintiffs' CAC should be dismissed because the settlement agreements in *In re Propane I* released these claims. (Doc. # 136, p. 8). "Plaintiffs in a class action may release claims that were or could have been pled in exchange for settlement relief." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 106 (2d Cir. 2005)*. "Settlement agreements . . . are viewed in light of governing contract principles." *Harris v. Brownlee, 477 F.3d 1043, 1047 (8th Cir. 2007)*. "[T]he basic rule of the law of contracts [is] that the purpose of every contract is to bind *the parties* to performance." *Pac. Trading Co. v. Mouton Rice Milling Co., 184 F.2d 141, 147 (8th Cir. 1950)* (emphasis added). "Parties to a contract are ordinarily bound by its terms; strangers are not." *Davidson v. Enstar Corp., 848 F.2d 574, 578-79 (5th Cir. 1988)*. Thus, the release provisions from the *In re Propane I* settlement agreements bind only those individuals who were parties to the settlement agreements.

The AmeriGas settlement agreement defined the settlement class as "all people who purchased or exchanged one or more of AmeriGas's pre-filled propane gas cylinders in the United States not for resale, between June 15, 2005 and November 30, 2009." (Case No. 09-02086-MD-W-GAF, Doc. # 114-4, p. 12). The Ferrellgas **[*25]** settlement agreement defined the settlement class as "all people who purchased or exchanged one or more of Ferrellgas's pre-filled propane gas cylinders in the United States not for resale, between June 15 2005 and the date of Preliminary Approval." (*Id.*, Doc. # 250-1, p. 9). The date of preliminary approval was October 13, 2011. (*Id.*, Doc. # 254). Thus, to have been a party to the *In re Propane I* AmeriGas settlement agreement, an individual must have purchased a pre-filled propane tank before November 30, 2009, and to have been a party to the Ferrellgas settlement agreement a purchase must have been made before October 13, 2011.

"When considering a motion to dismiss for failure to state a claim, a court must accept the factual allegations in the complaint as true, and may not consider evidence outside the complaint." *Penn v. Iowa State Bd. of Regents, 999 F.2d 305, 307 (8th Cir. 1993)*. The Indirect Purchasers' Plaintiffs CAC defines the class as individuals who purchased pre-filled propane tanks from AmeriGas after December 1, 2009 and from Ferrellgas after October 14, 2011. (Indirect Purchaser Plaintiffs' CAC ¶ 99). Further, the named Indirect Purchaser Plaintiffs do not allege that they made any purchases before December 1, 2009. (*Id.* ¶¶ 93-98). **[*26]** Defendants allege that this group "almost certainly includes indirect purchasers who were" parties to the *In re Propane I* settlements. (Doc. # 136, p. 9). However, Defendants point to nothing in the Indirect Purchaser Plaintiffs' CAC, or elsewhere, that indicates this is so. (*See* Docs. ## 136, 158). Accordingly, at this point the Court is unable to conclude that any members of the current case were included in the *In re Propane I* settlement agreement and thus bound by its release provision. Therefore, the Court believes it would be premature to examine the validity and scope of the release provision at this time.

B. Statute of Limitations

Defendants next assert that Plaintiffs' claims should be dismissed because they are barred by the statute of limitations. (Doc. # 138, p. 11). "[A] motion to dismiss may be granted when a claim is barred under a statute of limitations." *Varner v. Peterson Farms, 371 F.3d 1011, 1016 (8th Cir. 2004)*. Plaintiffs raise claims under *Section 1 of the Sherman Act*.[5] (Direct Purchaser Plaintiffs' CAC ¶ 134; Indirect Purchaser Plaintiffs' CAC ¶ 147). Claims under the *Sherman Act* have a four year statute of limitations. *15 U.S.C. § 15b*. "Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures **[*27]** a plaintiff's business." *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*. Plaintiffs allege that Defendants agreed to reduce the fill level in the pre-filled propane tanks no later than June of 2008 and all Defendants began selling fifteen pound tanks by August 1, 2008. (Direct Purchaser Plaintiffs' CAC ¶ 66; Indirect Purchaser Plaintiffs' CAC ¶ 60). Thus, absent any tolling theories, the statute of limitations expired on August 1, 2012, almost two years before the first claim was filed in this case.

1. Administrative Complaint Theory

Plaintiffs first allege that the FTC's March 27, 2014 filing of an administrative complaint against Defendants suspended the statute of limitations. (Doc. # 149, p. 25).

> Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws . . . the running of the statute of limitations in respect to every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter.

15 U.S.C. § 16(i). The FTC instituted a proceeding against Defendants that challenged the same conduct Plaintiffs challenge in **[*28]** this matter. (Indirect Purchaser Plaintiffs' CAC ¶ 136). The action was filed on March 27, 2014. (*Id.*). Thus, the filing of the administrative complaint moved the statute of limitations period back to March 27, 2010; four years prior to the administrative complaint. *See* *City of Detroit v. Grinnell Corp., 495 F.2d 448, 460 (2d Cir. 1974)* ("[T]he statute of limitations in private antitrust suits generally cuts off claims that arise more than four years before the inception of the government enforcement action."). However, the challenged conduct occurred in the summer of 2008. (Direct Purchaser Plaintiffs' CAC ¶ 66; Indirect Purchaser Plaintiffs' CAC ¶ 60). Thus, the challenged conduct does not fall within the adjusted limitations period. Accordingly, this theory alone does not save Plaintiffs' claims from being barred by the statute of limitations.

2. Continuing Violation Theory

Plaintiffs next argue that the statute of limitations should be tolled pursuant to the continuing violations theory. (Doc. # 148, p. 6). "Under the so-called continuing-violation theory, each overt act that is part of the violation and that injures the plaintiff . . . starts the statutory period running again." *Midwestern Mach. Co. v. Nw. Airlines, Inc., 392 F.3d 265, 269 (8th Cir. 2004)* (omission in original) (quoting *Klehr v. A.O. Smith Corp., 521 U.S. 179, 189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997))* (internal quotation marks omitted). **[*29]** "An overt act has two elements: (1) it must be a new and independent act that is not merely a reaffirmation of a previous act, and (2) it must inflict new

[5] The Indirect Purchaser Plaintiffs also raise a claim for injunctive relief under *Section 1 of the Sherman Act*. (Indirect Purchaser Plaintiffs' CAC ¶ 139). The timeliness of this claim will be addressed separately below. Additionally, the Indirect Purchaser Plaintiffs assert claims for violation of state antitrust laws. (*Id.* ¶¶ 156, 164-185).

and accumulating injury on the plaintiff. Acts that are merely 'unabated inertial consequences' of a single act do not restart the statute of limitations." *Varner, 371 F.3d at 1019* (internal citations omitted). "[T]he statute runs from the last overt act." *Varner, 371 F.3d at 1019* (quoting *Peck v. General Motors Corp., 894 F.2d 844, 849 (6th Cir. 1990))* (internal quotation marks omitted). Thus, for the continuing violations theory to apply, an overt act must have occurred after March 27, 2010, the beginning of the adjusted limitations period.

Plaintiffs first argue that each time Defendants sold the propane exchange tanks filled with only fifteen pounds of propane, an overt act was committed that satisfied the continuing violations theory. (Doc. # 148, p. 8). Plaintiffs rely primarily on *Klehr* and *In re Wholesale Grocery Products Antitrust Litigation, 752 F.3d 728 (8th Cir. 2014)* to support their contention. (*See* Doc. # 148). In *Klehr*, the Supreme Court stated that "in the case of a 'continuing violation,' say, a price—fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, 'each overt act that is part of the violation and that injures the plaintiff,' *e.g.*, each sale to the plaintiff, 'starts **[*30]** the statutory period running again.'" *521 U.S. at 189* (quoting P. Areeda & H. Hovenkamp, ***Antitrust Law*** ¶ 338b, p. 145 (rev. ed. 1995)). However, in *Klehr*, the plaintiffs alleged that the defendants had engaged in mail and wire fraud in violation of RICO and sought damages twenty years after the alleged violations occurred. *Id. at 183-84*. The plaintiffs contended that the last predicate act rule saved their claim from being barred by the statute of limitations and the Court was evaluating the rule's lawfulness. *Id. at 186*. The rule allowed a plaintiff to recover, "as long as [a defendant] committed one predicate act within the limitations period . . . not just for any added harm caused them by that late-committed act, but for all the harm caused them by all the acts that make up the total pattern." *Id. at 186-86*. In analyzing the law, the Court turned to the statute of limitations in the context of the *Clayton Act* as a useful analogy. *Id. at 188*. It was in that context that the aforementioned quote occurred. Further, the primary purpose of that language was to explain that, unlike with the last predicate act rule, "the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt **[*31]** acts outside the limitations period." *Id. at 189*. Thus, *Klehr* never ruled that each time a sale is made at a steady supra-competitive price, the overt act requirement of the continuing violations theory in the context of an alleged price fixing conspiracy is met.

This becomes even clearer when considered in conjunction with *Wholesale Grocery Products*. In *Wholesale Grocery Products*, two grocery wholesalers agreed in 2003 to divide the market leaving each with a monopoly in their territories. *752 F.3d at 730*. The plaintiffs filed their claim in 2008. *Id.* The Eighth Circuit evaluated whether the four year statute of limitations barred the plaintiffs' claim and found that the case was controlled by *Klehr. Id. at 736*. The Eighth Circuit reaffirmed the need for a "'separate new overt act'" to satisfy the continuing violation theory. *Id.* (quoting *Klehr, 521 U.S. at 189-90*). The court determined that "the anticompetitive nature of the wholesalers' agreement was not revealed until several years" later, when, during the four years preceding suit, the wholesalers increased their fees. *Id.* The Eighth Circuit stated that "a monopolist commits an overt act each time he uses unlawfully acquired market power to charge an *elevated* price." *Id.* (emphasis added). The **[*32]** Eighth Circuit reasoned that without such a rule, "two parties could agree to divide markets for the purpose of raising prices, wait four years to raise prices, then reap the profits of their illegal agreement with impunity because any antitrust claims would be time barred." *Id.* Thus, the key fact in *Wholesale Grocery Products* was that a price elevation occurred within the limitations period.

Unlike in *Wholesale Grocery Products*, the anticompetitive nature of Defendants' agreement was not revealed years later, during the limitations period. Instead, Plaintiffs allege that the anticompetitive nature of Defendants' agreement was apparent in 2008 when Defendants decreased the amount of propane in the exchange tanks without a corresponding decrease in price. (Direct Purchaser Plaintiffs' CAC ¶ 7). Further, unlike in *Wholesale Grocery Products*, there has been no allegation of a new, separate overt act during the limitations period because there has not been any allegation that Defendants further elevated the relative price of the exchange tanks by further decreasing the fill level. (*See id.*). Because no such price elevation occurred within the limitations period, the overt act requirement **[*33]** is not met.

The plaintiffs in *Insulate SB, Inc. v. Advanced Finishing Systems, Inc., Civil No. 13-2664 ADM/SER, 2014 U.S. Dist. LEXIS 31188, 2014 WL 943224 (D. Minn. Mar. 11, 2014)* attempted to use the same argument that Plaintiffs are alleging in this case. In *Insulate SB*, the plaintiffs alleged that the defendants bought out their existing competitors and conspired to exclude new competitors which allowed them to raise prices. *2014 U.S. Dist. LEXIS 31188, 2014 WL 943224, at *1*. The plaintiffs argued that their claim was not barred by the statute of limitations because, the defendants "committed an overt act each time a supra-competitive price was changed." *2014 U.S. Dist. LEXIS 31188, [WL] at *7*. In rejecting their argument, the court looked to *Klehr* and *Wholesale Grocery Products* and determined that "[w]here a defendant's continued sales under an anticompetitive arrangement merely enforce the initial, unabated arrangement, the sales do not constitute a continuing violation." *Id.* Because there were no allegations that "the initial price-fixing agreement was abated" the court determined that continuing to charge a stable supra-competitive price was insufficient to constitute an overt act. *Id.*

Plaintiffs' argument was also contemplated and rejected in *Southeast Missouri Hospital v. C.R. Bard, Inc., No. 1:07CV0031 TCM, 2008 U.S. Dist. LEXIS 65926, 2008 WL 4104534 (E.D. Mo. Aug. 27, 2008)*. In *Southeast Missouri Hospital*, the **[*34]** plaintiffs alleged that the defendants developed an anticompetitive scheme using exclusionary and market share maintenance contracts in the sale of urological catheters to prevent competition. *2008 U.S. Dist. LEXIS 65926, 2008 WL 4104534, at *1*. The plaintiffs alleged that their claims were not barred by the statute of limitations because "each sale of the urological catheters at unlawful prices and each unknowing remittance for payment [we]re continuing violations." *2008 U.S. Dist. LEXIS 65926, [WL] at *3*. The court rejected the argument and stated that "[s]ales of a product pursuant to an allegedly illegal arrangement are not new, overt acts." *Id.*

Accordingly, it is not the law that each time a sale is made at a stable supra-competitive price the overt act requirement is met. "To hold otherwise would effectively abrogate the statute of limitations in situations such as the one now at issue because each sale of a product pursuant to the underlying agreement would start the statu[t]e of limitations running anew." *Id.* This would make such a defendant indefinitely subject to suit and would undermine the policies behind the statutes of limitation which insure "the defense is [not] hampered by lost evidence, faded memories, . . . disappearing witnesses, and . . . unfair surprise." **[*35]** *Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 473, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (1975)*. Thus, each time Defendants sold the propane exchange tanks filled with only fifteen pounds of propane, an overt act was not committed that satisfied the continuing violations theory.

Plaintiffs next argue that they sufficiently alleged that Defendants committed other overt acts sufficient to satisfy the continuing violations theory. (Doc. # 148, p. 17). In their complaint, Plaintiffs alleged that "as late as 2010, [Ken] Janish[6] repeatedly dismissed concerns that Blue Rhino might undercut AmeriGas on price or fill levels with words to the effect of, 'I talked to Blue Rhino, and that's not going to happen.' AmeriGas and Blue Rhino continued to have discussions regarding pricing for contracts at least through 2010." (Direct Purchaser Plaintiffs' CAC ¶ 13). Plaintiffs further alleged that "[e]mployees from Blue Rhino and AmeriGas participated in regular calls to discuss their co-packing agreements, presenting ample opportunities for conspiratorial communications." (*Id.* ¶ 47). Plaintiffs additionally alleged that "Janish had similar conversations with employees of Blue Rhino on numerous occasions . . . until at least late 2010" and that "[t]hrough at least the end of 2010, Defendants regularly **[*36]** communicated to assure compliance with the conspiracy . . . Defendants communicated with each other to reassure each other of their compliance." (*Id.* ¶¶ 60, 92, 125).

"The typical antitrust continuing violation occurs in a price-fixing conspiracy . . . when conspirators continue to meet to fine-tune their cartel agreement." *Midwestern Mach. Co., 392 F.3d at 269*. "These meetings are overt acts that begin a new statute of limitations because they serve to further the objectives of the conspiracy." *Id.* In contrast, mere reaffirmations of a previous act are not overt acts that restart the statute of limitations. *See* *Varner, 371 F.3d at 1019*. Thus, the operative question is whether Plaintiffs sufficiently alleged that these phone calls fine-tuned or furthered the conspiracy, or whether their allegations amounted to mere reaffirmations of Defendants' previous decision to collectively reduce fill levels in their propane tanks.

In *Insulate SB*, the plaintiffs alleged that a "letter from [one defendant] to [another defendant] 'reminding them' they were not to carry the Gama product line [as agreed to under their conspiracy] was an overt act in furtherance of the

[6] Ken Janish is AmeriGas's Director of National Accounts. (Direct Purchaser Plaintiffs' CAC ¶ 9).

conspiracy that started the limitations period running anew." *2014 U.S. Dist. LEXIS 31188, 2014 WL 943224, at *7*. The court rejected this argument **[*37]** stating that the "letter merely reflected and reaffirmed the alleged prior agreement . . . and therefore did not restart the limitations period." *Id.* The court in *Insulate SB* additionally concluded that even providing further instructions on how to carry out the conspiracy amounted to a "reflection and reaffirmation of the alleged prior refusal to deal" and thus was not an overt act. *2014 U.S. Dist. LEXIS 31188, [WL] at *7 n.5*.

Like in *Insulate SB*, Plaintiffs allege that Defendants communicated to assure that each party was complying with the conspiracy. (*See* Direct Purchaser Plaintiffs' CAC ¶¶ 13, 47, 60, 92, 125). Also like in *Insulate SB*, Plaintiffs make no allegations that Defendants ever made any changes or modifications to their agreement during the limitations period. (*See id.*). Thus, these communications were mere reaffirmations of the prior agreement and are insufficient to constitute overt acts.

Plaintiffs cite to a number of cases from outside of the Eighth Circuit to support their argument that the alleged communications were overt acts. Plaintiffs cite to *United States v. Hayter Oil Co. of Greeneville, Tennessee, 51 F.3d 1265 (6th Cir. 1995)* for the proposition that "evidence of telephone calls between defendants with conspiratorial subject matter [was] sufficient to find existence of [a] continuing **[*38]** conspiracy." (Doc. # 148, p. 18 n.16). However, this Sixth Circuit case involved a criminal conspiracy action under the Sherman Act where "[p]roof of an overt act is not required." *Hayter Oil, 51 F.3d at 1270*. Thus, "the government [wa]s only required to prove that the agreement existed during the statute of limitations." *Id.* The court found only that telephone calls between the defendants were sufficient to prove that the conspiracy was still in place. *Id. at 1271*. Accordingly, *Hayter Oil* does nothing to establish that confirmation phone calls constitute overt acts.

Plaintiffs also cite to *West Penn Allegheny Health System, Inc. v. UPMC, 627 F.3d 85 (3d Cir. 2010)* for the proposition that the court "reject[ed the] argument [that the] continuing violation doctrine did not apply because injurious acts occurring during limitations were merely 'reaffirmations.'" (Doc. # 148, p. 19 n.17). However, in *West Penn*, the Third Circuit rejected the proposition that a mere reaffirmation of the injurious conduct did not meet the overt act requirement. *627 F.3d at 106*. Therefore, the court made no finding on whether the alleged acts were mere reaffirmations. *See id.* Unlike the Third Circuit, the Eighth Circuit has unequivocally held that mere reaffirmations are not overt acts. *See* *Varner, 371 F.3d at 1019*. Thus, *West Penn* does not support Plaintiffs' **[*39]** argument. Accordingly, Plaintiffs have failed to allege any overt act during the limitations period sufficient to support the continuing violations theory. Therefore, the continuing violations theory does not prevent Plaintiffs' claims from being time barred in this case.

3. American Pipe Tolling

Plaintiffs finally allege that the statute of limitations should be tolled pursuant to the tolling theory from *American Pipe & Construction Co. v. Utah, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974)*.[7] (Doc. # 148, p. 21). The Supreme Court in *American Pipe* held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *414 U.S. at 554*. "The *American Pipe* rule is designed to protect the federal procedural interest by preventing duplicative litigation from purported class members during the period that certification is pending." *Great Plains Trust Co. v. Union Pac. R.R. Co., 492 F.3d 986, 997 (8th Cir. 2007)*. The Supreme Court noted that such a tolling rule is not inconsistent with the statutes of limitation, which are meant "to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights." *Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 352, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983)*. "[T]hese ends are met when a class action is commenced. . . . [A] class complaint 'notifies **[*40]** the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the

[7] Plaintiffs however, admit that this tolling theory is inapplicable to Defendant UGI Corporation. (Doc. # 148, p. 12 n.8; Doc. # 149, p. 26 n.30). Accordingly, no tolling theory is sufficient to prevent Plaintiffs' claims against UGI Corporation from being barred by the statute of limitations. Thus, Plaintiffs claims against UGI Corporation are DISMISSED.

judgment.'" *Id. at 352-53* (quoting *Am. Pipe, 414 U.S. at 555*). The overarching question in determining whether *American Pipe* tolling applies is whether the previous "class action claims and the accompanying class description were sufficient to put each defendant on notice of the substantive . . . claims brought in [the present case] and to inform each defendant of the 'generic identities of [the present] plaintiffs." *In re Gen. Am. Life Ins. Co. Sales Practices Litig., 391 F.3d 907, 915 (8th Cir. 2004)*.

Defendants first allege that *American Pipe* tolling is inapplicable in this case because *American Pipe* tolling cannot be used to toll the statute of limitations for a subsequent class action. (Doc. # 138, p. 13). While Defendants may be correct that other circuits do not allow *American Pipe* tolling for subsequent class actions, the Eighth Circuit has applied *American Pipe* tolling in such a situation. *See Great Plains Trust, 492 F.3d at 997*. "Whether the *American Pipe* rule applies to subsequent class actions, however, depends on the reasons for the denial of certification of the predecessor action." *Id.* The Eighth Circuit in *Great Plains Trust* stated that *American Pipe* ***[*41]*** tolling would apply to subsequent class actions when "'class certification [in the previous action was] denied solely on the basis of the lead plaintiffs' deficiencies'" and when "the later action was not an attempt to relitigate the denial of certification or correct a procedural deficiency." *Id.* (quoting *Yang v. Odom, 392 F.3d 97, 111 (3d Cir. 2004)*. In *Great Plains Trust*, the prior class action was voluntarily dismissed before a certification hearing was held, thus there was no denial of certification. *Id. at 997 n.3*. The Eighth Circuit "decline[d] to determine whether this fact [wa]s material . . . [and] assume[d], for the sake of discussion, that the previous class actions warrant application of the *American Pipe* rule." *Id.*

Like in *Great Plains Trust, In re Propane I* did not involve a denial of certification, instead the settlement classes were granted certification by this Court. (Case No. 09-02086-MDW-GAF, Docs. ## 253, 289). Although the Eighth Circuit has not spoken specifically about whether *American Pipe* tolling applies in such a circumstance, this Court believes that the language of *Great Plains Trust* indicates that it should apply. Specifically, the Eighth Circuit stated that *American Pipe* tolling applies when the subsequent class **[*42]** action is not an attempt to relitigate the denial of class certification. *Great Plains Trust, 492 F.3d at 997*; *See also Berry v. Volkswagen of Am., Inc., No. 09-0484-CV-W-ODS, 2009 U.S. Dist. LEXIS 65624, *6 (W.D. Mo. July 28, 2009)* ("The tolling rule, however, cannot be used by plaintiffs to sequentially relitigate a denial of class certification."). As this Court has previously stated, the concern with the application of *American Pipe* to subsequent class actions is that plaintiffs would be allowed infinite "bites at the apple" to relitigate the same issues while "toll[ing] the statute of limitations indefinitely." *Farthing v. United Healthcare of the Midwest, Inc., No. 2:98-4262-CV-C-4-ECF, 2000 U.S. Dist. LEXIS 21995, *26 (W.D. Mo. Oct. 24, 2000)*. In this case, Plaintiffs are not seeking a second bite at the apple or attempting to relitigate certification issues that were not previously decided in their favor. Thus, this Court believes that *American Pipe* tolling applies in this type of subsequent class action.

Just because *American Pipe* tolling applies to this type of subsequent class action does not mean that all of the other requirements for *American Pipe* tolling are met in this case. Defendants allege that *American Pipe* tolling is not available to the Direct Purchaser Plaintiffs because their current claims were not asserted in *In re Propane I* ***[*43]*** . (Doc. # 138, p. 17). The theory behind *American Pipe* tolling is that the previous class action "notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs." *Am. Pipe, 414 U.S. at 555*. In his concurring opinion in *Crown, Cork & Seal*, Justice Powell reflected on this rationale and stated "[w]hen thus notified, the defendant normally is not prejudiced by tolling of the statute of limitations. It is important to make certain, however, that *American Pipe* is not abused by the assertion of claims that differ from those raised in the original class suit." *462 U.S. at 355* (Powell, J., concurring). The Supreme Court has further stated that "the tolling effect given to the timely prior filings in *American Pipe* and in *Burnett [v. New York Central R.R. Co., 380 U.S. 424, 85 S. Ct. 1050, 13 L. Ed. 2d 941 (1965)]* depended heavily on the fact that those filings involved exactly the same cause of action subsequently asserted." *Johnson, 421 U.S. at 467*.

District Courts within the Eighth Circuit have used this language to determine that *American Pipe* tolling does not apply to the assertion of claims different from those asserted in the previous action. *See Zarecor v. Morgan Keegan & Co., No. 4:11CV00824 BSM, 2013 U.S. Dist. LEXIS 152993, 2013 WL 5687618, at *2 (E.D. Ark. Oct. 15, 2013)* ("[T]olling is not extended to those circumstances **[*44]** where the later causes of action are not identical to those originally brought in the class action."); *Wells v. FedEx Ground Package Sys., Inc., No. 4:10CV2080 JCH, 2011 U.S. Dist. LEXIS 49485, 2011 WL 1769665, at *6 (E.D. Mo. May 9, 2011)* (finding that *American Pipe* tolling "does not leave[ ] a plaintiff free to raise different or peripheral claims following denial of class status.") (alteration in original) (quoting *Williams v. Boeing Co., 517 F.3d 1120, 1136 (9th Cir. 2008))* (internal quotation marks omitted); *Burns v. Ersek, 591 F. Supp. 837, 843 (D. Minn. 1984)* ("[T]he weight of authority is that [*American Pipe*] tolling applies only to causes of action raised in the first suit."). In this case, the Direct Purchaser Plaintiffs assert only one cause of action, violation of *Section 1 of the Sherman Act*, and seek compensatory and treble damages. (Direct Purchaser Plaintiffs' CAC ¶ 137). However, this cause of action was not asserted in *In re Propane I* or any of its underlying complaints. (*See* Case No. 09-02086-MD-W-GAF). Thus, *American Pipe* tolling does not apply to the Direct Purchaser Plaintiffs' claims.

Plaintiffs encourage this Court to ignore these district court cases and the language from the Supreme Court and instead look to precedent from the Sixth and Second Circuits that stand for the proposition that *American Pipe* tolling only requires that a subsequent claim could have **[*45]** been asserted in the prior action. (Doc. # 148, p. 27). However, this Court has reviewed those cases and does not find them to be persuasive in light of the statements from the Supreme Court on the issue. Further this Court finds the reasoning of the Seventh Circuit persuasive when it critiqued the ruling of the Sixth Circuit stating that it, "push[ed] *American Pipe* beyond its own rationale." *In re Copper Antitrust Litig., 436 F.3d 782, 796 (7th Cir. 2006)*. Additionally, Defendants fail to cite to any precedent within this Circuit that supports their proposition. (*See* Doc. # 148). Accordingly, the Direct Purchaser Plaintiffs have failed to establish any tolling theory sufficient to prevent their claim from being barred by the statute of limitations.

Defendants next argue that *American Pipe* tolling is insufficient to support the Indirect Purchaser Plaintiffs' claims[8] because, any *American Pipe* tolling ended on December 8, 2009, when the plaintiffs in *In re Propane I* moved for preliminary approval of their class settlement and defined the class of persons as individuals who purchased or exchanged the tanks "between August 1, 2008 and November 30, 2009." (Doc. # 136, p. 19). Thus, according to Defendants, tolling ended over three months before the adjusted **[*46]** limitations period began on March 27, 2010. (*See* Doc. # 138, p. 27). The Indirect Purchaser Plaintiffs agree that the current class of plaintiffs was excluded from the class definition in the *In re Propane I* settlement; however, they argue that for tolling purposes they were not excluded until the class settlement was granted final approval by this Court on October 6, 2010, which is within the adjusted limitations period. (Doc. # 149, p. 27). Thus, the key question is at what point *American Pipe* tolling ended.

The United States Supreme Court determined that once the statute of limitations is tolled under *American Pipe*, "it remains tolled for all members of the putative class until class certification is denied." *Crown, Cork & Seal, 462 U.S. at 354*. For cases not involving a denial of class certification, *American Pipe* tolling ends when individuals are "notified that they [a]re no longer parties to the suit and they should have realized that they were obliged to file individual suits or intervene in the class action." *Taylor v. United Parcel Serv., Inc., 554 F.3d 510, 520 (5th Cir. 2008)*. *See also* *Choquette v. City of N.Y., 839 F. Supp. 2d 692, 699 (S.D.N.Y. 2012)* ("[C]lass members are treated as parties to the class action 'until and unless they received notice thereof and chose not to continue.") **[*47]**

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[8] The Indirect Purchaser Plaintiffs' state law antitrust claims are governed by the same *American Pipe* standards as their Sherman Act claim. The Indirect Purchaser Plaintiffs' bring state law claims under the antitrust laws of Kansas, Arizona, California, the District of Columbia, Florida, Iowa, Maine, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin. (Indirect Purchaser Plaintiffs' CAC ¶¶ 156, 164-185). Many of these states have explicitly adopted *American Pipe. See e.g.* *Great Plains Trust Co., 492 F.3d at 997* ("Kansas has accordingly adopted the *American Pipe* rule."); *Albano v. Shea Homes Ltd. P'ship, 227 Ariz. 121, 254 P.3d 360, 364 (Ariz. 2011)* (en banc); *Am. Tierra Corp. v. City of W. Jordan, 840 P.2d 757, 762 (Utah 1992)*; *Lucas v. Pioneer, Inc., 256 N.W.2d 167, 180 (Iowa 1977)*; *Maestas v. Sofamor Danek Grp., Inc., No. 02A01-9804-CV-00099, 1999 Tenn. App. LEXIS 97, 1999 WL 74212, at *5 (Tenn. Ct. App. Feb. 16, 1999)*; *Lee v. Grand Rapids Bd. of Educ., 148 Mich. App. 364, 384 N.W.2d 165, 168 (Mich. Ct. App. 1986)*. Even for those states that have not explicitly adopted *American Pipe*, the Eighth Circuit has held that "the federal interest in 'the efficiency and economy of the class-action procedure' outweighs any state interest and therefore justifies tolling in diversity cases where the otherwise-applicable state law provides no relief." *In re Gen. Am. Life Ins. Co. Sales Practices Litig., 391 F.3d at 915* (quoting *Adams Pub. Sch. Dist. v. Asbestos Corp., Ltd., 7 F.3d 717, 718-19 (8th Cir. 1993))*.

(quoting *In re Worldcom Sec. Litig., 496 F.3d 245, 255 (2d Cir. 2007)* (internal quotation marks omitted); *Apsley v. Boeing Co., No. 05-1368, 2013 U.S. Dist. LEXIS 172613, 2013 WL 6440229, at *2 (D. Kan. Dec. 9, 2013)* ("The filing limitations period recommences once it is no longer reasonable for plaintiffs to rely on the class to protect their rights."); *Ganousis v. E.I. du Pont de Nemours & Co., 803 F. Supp. 149, 155 (N.D. Ill. 1992)* ("[T]he limitations clock stops ticking for the individual when the defendant is put on notice by the filing of the class action, and then it resumes ticking when the prospective plaintiff is put on notice of noncoverage in the class action."). Therefore, the appropriate inquiry is determining when the Indirect Purchaser Plaintiffs in the present case sufficiently notified that they were no longer parties to *In re Propane I*.

The Fourth Circuit has concluded that sufficient notice occurs "when a plaintiff moves for class certification by asserting an unambiguous definition of his desired class that is more narrow than is arguably dictated by his complaint." *Smith v. Pennington, 352 F.3d 884, 894 (4th Cir. 2003)*. The Tenth Circuit in *Sawtell v. E.I. du Pont de Nemours & Co., Inc., 22 F.3d 248 (10th Cir. 1994)* also determined that when a group of plaintiffs move to certify a class based on a more narrow definition than what was asserted in the complaint, *American Pipe* no longer tolls the statute of limitations. *22 F.3d at 253-54*. District courts within the Second and Seventh Circuit similarly agree. *See In re New Oriental Educ. & Tech. Grp. Sec. Litig., 293 F.R.D. 483, 487 (S.D.N.Y. 2013)* (holding that when a class is redefined "more **[*48]** narrowly than [in] the prior individual complaints, and no longer asserts claims on behalf of a portion of the consolidated class, the statute of limitations is no longer tolled under *American Pipe* for that 'abandoned' subclass"); *Ganousis, 803 F. Supp. at 155-56 (N.D. Ill. 1992)*.

The first filed complaint in *In re Propane I* defined the class as "[a]ll persons who purchased one or more of Defendants' pre-filled 20-pound capacity Propane Gas Tanks, during the applicable limitations period that contained under 17 pounds of propane." (Case No. 09-00924-CV-W-GAF, Complaint, ¶ 27). This definition could be construed to include the Indirect Purchaser Plaintiff class from this case which is defined as "[a]ll persons who, in the United States, purchased a filled propane exchange tank, and whose tank was provided by [Defendants after December 1, 2009]." (Indirect Purchaser Plaintiffs' CAC ¶ 99). However, on December 8, 2009, the plaintiffs in *In re Propane I* moved for class certification using a more narrow class definition which limited the class of plaintiffs to individuals who purchased the tanks before November 30, 2009. (Case No. 09-02086-MD-W-GAF, Doc. # 37). Thus, according to precedent from the Fourth, Tenth, Second, and Seventh Circuits, **[*49]** *American Pipe* tolling ended at that point.

Indirect Purchaser Plaintiffs urge this Court to ignore this precedent and instead look to *Choquette* a case from the same district and the same judge, Judge Koeltl, as *Oriental Education* but decided one year previously. (Doc. # 148, p. 29). In *Choquette*, the plaintiffs were members of a previous class action involving prisoners who were strip searched and subjected to nonconsensual gynecological examinations. *839 F. Supp. 2d at 694, 698*. The class that was ultimately certified and settled included their claims for unlawful strip searching but not for forced gynecological examinations. *Id. at 694-95*. The parties disagreed about when *American Pipe* tolling ended as to the claims of nonconsensual gynecological examinations. *Id. at 698*. The defendants argued that it ended when the parties in the previous action entered into a settlement agreement which failed to mention any class claims for the forced gynecological examinations, while the plaintiffs alleged that the tolling did not end until the settlement agreement was preliminarily or finally approved by the court. *Id.* Judge Koeltl ultimately determined that the proposed settlement agreement did not trigger an end to *American Pipe* tolling. *Id. at 703*.

[*50] As an initial matter, this case is more factually similar to *Oriental Education* than it is to *Choquette*. Like in *Oriental Education*, the plaintiffs in *In re Propane I* moved to certify a settlement class using a more narrow definition than was asserted in the individual complaints. (Case No. 09-02086-MD-W-GAF, Doc. # 37). No such motion was mentioned in *Choquette*. *See 839 F. Supp. 2d 692*. Further, in *Choquette*, Judge Koeltl took issue with the fact that the position advocated by the defendants would have allowed "actions by class counsel [to] trigger an end to tolling." *Id. at 701*. Instead, Judge Koeltl believed a decision from a court was needed. *Id. at 699* ("*American Pipe* tolling continues until a class certification decision of the court excludes the claims of the plaintiff."), *700-01, 703*. This Court granted the *In re Propane I* plaintiffs' Motion for Preliminary Approval of Class Settlement and approved certification of the narrowed settlement class on March 11, 2010. (Case No. 09-02086-MD-W-GAF, Doc. # 88). Thus, even if a court order is needed to end *American Pipe* tolling, such an order came from this Court almost two weeks before the beginning of the adjusted limitations period. Accordingly, *American Pipe* tolling does not save the Indirect Purchaser Plaintiffs' claims from being barred by the statute of limitations. Therefore, the Indirect Purchaser Plaintiffs have failed to establish any tolling theory sufficient to prevent their state or federal law antitrust claims from being barred by the statute of limitations.

4. Indirect Purchaser Plaintiffs' Injunctive Relief Claim

The Indirect Purchaser Plaintiffs' final remaining claim is a claim for injunctive relief under *Section 1 of the Sherman Act*. (Indirect Purchaser Plaintiffs' CAC Count I). While some circuit courts have indicated that the Sherman Act's four year statute of limitations applies to claims for injunctive relief,[9] the Eighth Circuit has analyzed a federal antitrust action for injunctive relief's timeliness under the doctrine of laches. *See Midwestern Mach., 392 F.3d at 277*. "The doctrine of laches is an equitable defense . . . . For the application of the doctrine of laches to bar a lawsuit, the plaintiff must be guilty of unreasonable and inexcusable delay that has resulted **[*51]** in prejudice to the defendant." *Goodman v. McDonnell Douglas Corp., 606 F.2d 800, 804 (8th Cir. 1979)*. The running of an analogous statute of limitation is "merely one element in the congeries of factors to be considered in determining whether the length of delay was unreasonable and whether the potential for prejudice was great." *Id. at 805*. "A court should focus upon the length of the delay, the reasons therefor, how the delay affected the defendant, and the overall fairness of permitting the assertion of the claim." *Id. at 806*. Further, "[l]aches is considered an affirmative defense, and generally the burden of persuasion on an affirmative defense rests with the defendant." *Id.* (internal citation omitted).

In this case, the analogous statute of limitations has run, which weighs against Plaintiffs. However, the Indirect Purchaser Plaintiffs missed the limitations period by only three months, which weighs in their favor. Additionally, Defendants have made only conclusory allegations that they "will be prejudiced if required to expend further time and resources defending stale claims." (Doc. # 136, p. 16). "Not all prejudice to a defendant will be recognized as supporting a defense of laches." *Goodman, 606 F.2d at 809 n.17*. "There are two kinds of prejudice which might support a defense of laches: **[*52]** (1) the delay has resulted in the loss of the evidence . . .; or (2) the defendant has changed his position in a way that would not have occurred if the plaintiff had not delayed." *Id.* (quoting *Tobacco Workers Int'l Union Local 317 v. Lorillard Corp., 448 F.2d 949, 958 (4th Cir. 1971))* (internal citations omitted)). Defendants' conclusory allegations are insufficient to establish the existence of either of these types of prejudice. Although the Indirect Purchaser Plaintiffs have not alleged any excuses or reasons to defend their delay, this Court does not believe that Defendants have met their burden to establish the existence of laches as an affirmative defense.

CONCLUSION

Defendants moved to dismiss both the Direct Purchaser Plaintiffs' and the Indirect Purchaser Plaintiffs' Consolidated Class Action Complaints. Against the Indirect Purchaser Plaintiffs, Defendants first argue that their current claims were barred by the release provisions from *In re Propane I*. However, for the release provision to apply to them, the Indirect Purchaser Plaintiffs must have been a part of the class definition in *In re Propane I* and, taking the allegations of the pleadings as true and without further evidence, it cannot be said that the Indirect Purchaser Plaintiffs in this case were parties **[*53]** in *In re Propane I*. Thus, at this point the release provision does not bar their claims.

Next, Defendants argue that Plaintiffs' claims are barred by the statute of limitations. Because of the administrative action, the adjusted limitations period in this case began on March 27, 2010. Neither of Plaintiffs' tolling theories were sufficient to meet the adjusted limitations period. Under the continuing violations theory, Plaintiffs needed to

[9] For example, the Third Circuit in *Pennsylvania Dental Association v. Med. Service Association of Pennsylvania, 815 F.2d 270 (3d Cir. 1987)* assumed that the statute of limitations applied.

establish the existence of an overt act that occurred within the adjusted limitations period. However, Plaintiffs failed to allege that a sufficient overt act occurred during the limitations period. Further, *American Pipe* tolling is insufficient to save the Direct Purchaser Plaintiffs' CAC because their current claims were not alleged in *In re Propane I. American Pipe* tolling is also insufficient to save the Indirect Purchaser Plaintiffs' state law and federal damages claims because *American Pipe* tolling expired on December 8, 2009 when the plaintiffs in *In re Propane I* moved for class certification using a more narrow class definition that limited the class of plaintiffs to individuals who purchased the tanks before November 30, 2009. Accordingly, **[*54]** for these reasons and the reasons set forth above, Defendants' Motions to Dismiss the Direct Purchaser Plaintiffs' CAC and the Indirect Purchaser Plaintiffs' Counts II-IV are GRANTED.

However, the Indirect Purchaser Plaintiffs' Count I claim for injunctive relief is governed by the doctrine of laches, not the statute of limitations. Defendants have failed to meet their burden to establish the affirmative defense of the doctrine of laches against that claim. Accordingly, for these reasons and the reasons set forth above, Defendants' Motion to Dismiss Count I of the Indirect Purchaser Plaintiffs' CAC is DENIED.

IT IS SO ORDERED.

/s/ Gary A. Fenner

GARY A. FENNER, JUDGE

United States District Court

DATED: July 2, 2015

Lupin Pharms., Inc. v. Richards

United States District Court for the District of Maryland

July 2, 2015, Decided; July 2, 2015, Filed

Civil Action No. RDB-15-1281

Reporter
2015 U.S. Dist. LEXIS 86208 *; 2015 WL 4068818

LUPIN PHARMACEUTICALS, INC., et al., Plaintiffs, v. CRAIG RICHARDS, Defendant.

Core Terms

attorney general, abstention, motion to dismiss, superior court, subpoena, preliminary injunction, district court, proceedings, abstain, patent, drugs, subject matter jurisdiction, federal court, contempt, criminal prosecution, Pharmaceuticals, requesting, antitrust, documents, demands, cases

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For Craig W. Richards, in his individual and official capacity as Attorney General of Alaska, Defendant: Clyde E Sniffen, Jr, PRO HAC VICE, Alaska Dept Law, Achorage, AK; Robert S Libman, PRO HAC VICE, David P Baltmanis, Miner, Barnhill & Galland P.C., Chicago, IL.

Judges: Richard D. Bennett, United States District Judge.

Opinion by: Richard D. Bennett

Opinion

MEMORANDUM OPINION

In this case, Plaintiffs Lupin Pharmaceuticals, Inc.[1] ("Lupin Pharmaceuticals") and Lupin, Ltd. ("Lupin India") (collectively, "the Lupin Plaintiffs") seek to enjoin Defendant Craig Richards, the Attorney General of Alaska, ("the Attorney General") from issuing a civil investigative demand ("CID") to the Lupin Plaintiffs and from applying Alaskan ***antitrust law*** to the Lupin Plaintiffs. The Attorney General has moved to dismiss this action, arguing that this Court should abstain from exercising its jurisdiction under the abstention doctrine established in *Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)*. The parties' **[*2]** submissions have been reviewed, and this Court held a hearing on June 26, 2015 on the Motion. *See* Local Rule 105.6 (D. Md. 2014). For the reasons that follow, Defendants Craig Richards' Motion to Dismiss (ECF No. 23) is GRANTED, and this case is DISMISSED.

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[1] Lupin Pharmaceuticals, Inc is a Virginia corporation with its headquarters and principal place of business located in Baltimore, Maryland. Pls.' Comp. ¶ 10. Lupin Pharmaceuticals distributes prescription medications to American customers and is a wholly owned subsidiary of co-Plaintiff Lupin, Ltd. ("Lupin India"). *Id.*

BACKGROUND

This Court accepts as true the facts alleged in plaintiff's complaint. *See* *Aziz v. Alcolac, Inc., 658 F.3d 388, 390 (4th Cir. 2011)*. This dispute arose out of issues pertaining to two drugs, Loestrin FE 24 and Effexor XR. These drugs are manufactured and sold by Warner-Chilcott and Wyeth, respectively, and those companies hold patents on the drugs. *See* Compl., ¶ 16. The Lupin Plaintiffs allege that neither Lupin Pharmaceuticals, Inc. nor Lupin, Ltd.[2] ("Lupin India") had rights to sell the drugs or approval to sell generic versions. *Id.* The Lupin Plaintiffs had filed applications with the Food & Drug Administration ("FDA") in 2006 and 2009 to sell generic versions of the respective **[*3]** drugs, but the brand manufacturers sued the Lupin Plaintiffs for declaratory judgments stating that the sale of such generics would violate their patents.[3] *Id.* at ¶ 17. The Lupin Plaintiffs settled the patent claims in 2009 and 2010 respectively. *Id.* at ¶¶ 17-18.

On February 3, 2015, pursuant to *Alaska Stats. §§45.50.592*[4] and *45.50.495*, Attorney General Richards issued separate civil investigative demands (CIDs) to Lupin Pharmaceuticals, Inc., and Lupin, Ltd., demanding production

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[2] Lupin India is incorporated in India and has its headquarters and principal place of business in Mumbai, India. Pls.' Compl. ¶ 11. Lupin India develops and manufactures branded and generic drugs in India.

[3] Specifically, the Lupin Plaintiffs alleged:

> Neither LPI nor Lupin India has ever sold Loestrin or Effexor nor have they ever obtained approval from the Food and Drug Administration ("FDA") to sell generic versions of those products. On September 30, 2006, Plaintiffs filed with the FDA an Abbreviated New Drug Application ("ANDA") seeking FDA approval of a generic version of Effexor. On March 13, 2007, Wyeth, the branded manufacturer of Effexor, sued SPI for a declaratory judgment that LPI's generic version of Effexnor would infringe Wyeth's patent. Wyeth and LPI settled the litigation on May 11, 2009.
>
> . . . On July 30, 2009, LPI filed an ANDA seeking FDA approval of a generic version of Loestrin. On September 9, 2009, Warner-Chilcott, **[*4]** the branded manufacturer of Loestrin, sued LPI for a declaratory judgment that LPI's generic version of Loestrin would infringe Warner Chilcott's patent. Warner-Chilcott and LPI settled the litigation on October 10, 2010.

Pls.' Compl. ¶¶ 17-18.

[4] *Section 45.50.592* states in full:

> (a) If the attorney general determines that a person is in possession, custody, or control of documentary evidence, wherever situated, that the attorney general believes to be relevant to an investigation authorized in AS 45.50.590, the attorney general may execute in writing and cause to be served on that person an investigative demand requiring the person to produce the documentary material, and permit inspection and copying.
>
> (b) Each demand must
>
> > (1) state the specific statute the alleged violation of which is under investigation, and the general subject matter of the investigation;
> >
> > (2) describe, with reasonable specificity so as fairly to indicate the material demanded, the documentary material to be produced;
> >
> > (3) prescribe a return date within which the documentary material is to be produced; and
> >
> > (4) identify the state employees or representatives to whom the documentary material is to be made available for inspection and copying.
>
> (c) A demand may not
>
> > (1) require the production of documentary material that would **[*6]** be privileged from disclosure if demanded by a subpoena duces tecum issued by a court of the state; or
> >
> > (2) contain a requirement that would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of the state; however, this does not limit the power of the attorney general to require production of documents located outside the state that pertain to matters affecting the state.

of three categories of documents related to the two drugs. *Id.* at ¶ 21. The CIDs state that "[t]he Attorney General seeks to determine whether the pharmaceutical manufacturers subject to [the CID] violated Alaska state law by entering into a settlement agreement that terminated ongoing patent litigation regarding the brand name drug listed herein, and thereby delaying generic entry into the marketplace," in potential violation of Alaska antitrust and consumer protection statutes. *See* Mem. Supp. Mot. Dismiss 1-2, ECF No. 23-1. The CIDs originally required production of responsive documents within sixty days. *Id.* at 2. The Lupin Plaintiffs allege that the scope of the CIDs included filings with the Federal Trade Commission ("FTC") and Department of Justice ("DOJ"), documents **[*5]** produced in the patent litigations, documents discussing the validity of the patents, and agreements between Lupin and the branded manufacturers. Pls.' Compl. ¶ 21.

Alaska law provides that the subject of a CID may within 20 days of service file a petition in Alaska Superior Court stating good cause why the CID should be modified or set aside. *Alaska Stat. §45.50.592(f)*. The Lupin Plaintiffs declined to file any petition requesting modification of the CID. It is undisputed, however, that the Lupin Plaintiffs requested to extend the time for compliance with the CIDs; the Attorney General granted those requests. Thus, the deadline to produce documents responsive to the CIDs was May 4, 2015. Pls.' Compl. ¶23.

(d) The demand may be served by the attorney general or the designee of the attorney general by

(1) delivering a copy of it to the person to be served or, if the person is not a natural person, to an officer of the person to be served;

(2) delivering a copy of it to a place of business in the state of the person to be served; or

(3) mailing by registered or certified mail a copy of it addressed to the person to be served at a place of business in the state or, if the person has no place of business in the state, to the principal office or place of business of the person.

(e) Documentary material produced pursuant to a demand, or copies of it, unless otherwise ordered by a superior court for good cause shown, may not be produced for inspection or copying by, nor may its contents be disclosed **[*7]** to, anyone other than an authorized employee of the state without the consent of the person who produced the material. However, under those reasonable terms and conditions the attorney general prescribes, copies of the documentary material shall be available for inspection and copying by the person who produced the material or an authorized representative of that person. The attorney general, or a designee, may use copies of the documentary material as the attorney general or designee considers necessary in the enforcement of AS 45.50.562-45.50.598, including presentation before a court; however, material that contains trade secrets may not be presented except with the approval of the court in which the action is pending after adequate notice to the person furnishing the material.

(f) At any time before the return date specified in the demand, or within 20 days after the demand has been served, whichever period is shorter, a petition to extend the return date for, or to modify or set aside a demand issued under (a) of this section, stating good cause, may be filed in the superior court for the judicial district where the parties reside. A petition by a person on whom a demand is served, **[*8]** stating good cause, to require the attorney general or another person to act in accordance with the requirements of (e) of this section, and all other petitions in connection with a demand, may be filed in the superior court for the judicial district in which the person on whom the demand is served resides.

(g) A person on whom a demand is served under this section shall comply with the terms of the demand unless otherwise provided by an order of court issued in response to a petition filed under (f) of this section. A person who, with intent to avoid, prevent, or obstruct compliance, in whole or in part, with an investigative demand under this section, removes from any place, conceals, withholds, or destroys, mutilates, alters, or by any other means falsifies, documentary material in the possession, custody, or control of a person that is the subject of a demand duly served on any person, or who otherwise wilfully disobeys any such demand, is guilty of a misdemeanor, and is punishable upon conviction by a fine of not more than $5,000, or by imprisonment for a term of not more than one year, or by both. Failure of the state to serve the demand properly under (d) of this section is a **[*9]** defense to prosecution under this subsection, but invalidity of the demand under (b) or (c) of this section is not a defense, and that invalidity may be tested only in an action under (f) of this section to modify or set aside the demand.

(h) Nothing in this section impairs the authority of the attorney general or a designee to lay before a grand jury of this state evidence concerning a violation of AS 45.50.562 - 45.50.596, to invoke the power of a court to compel the production of evidence before a grand jury, or to file a civil complaint or criminal information alleging a violation of AS 45.50.562 - 45.50.596.

Instead of complying with or objecting to the CIDs, the Lupin **[*10]** Plaintiffs filed the present action on the May 4 deadline, and filed the Motion for Preliminary Injunction (ECF No. 4) on the following day. The Complaint requests that this Court immediately issue a permanent injunction restraining Defendant from issuing civil investigative demands (CIDs) to Plaintiffs in connection with the Attorney General's investigation of Plaintiffs' compliance with Alaskan Antitrust laws, and from applying those state laws to Plaintiffs. Plaintiffs also request a declaratory judgment that Defendant's issuance of CIDs to Plaintiffs in connection with the Attorney General's investigation of Plaintiffs' compliance with Alaskan antitrust laws regarding the drugs was unconstitutional. The Plaintiffs also seek attorneys' fees and damages.

On May 22, 2015, the Attorney General filed a motion for extension of time to respond, noting that the assistant attorney general assigned to the case (Clyde Sniffen, Jr.) was on vacation when this case was filed and that an extension was needed to allow time for Sniffen to "return from vacation on May 27, 2015 to review the pleadings in this case, confer with Attorney General Richards, and prepare a response to the motion for preliminary **[*11]** injunction." The motion was opposed by the Plaintiffs but was granted by this Court.

On June 1, 2015, the Attorney General filed a petition in Alaska Superior Court for an order to show cause why the Lupin Plaintiffs should not be held in contempt for failure to respond to the CIDs pursuant to *Alaska Stat. § 45.50.592(g)*.[5] On June 1, 2015, the Attorney General also filed the subject Motion to Dismiss (ECF No. 23) and a Motion to Stay the Motion for Preliminary Injunction (ECF No. 24) in this Court.

This Court held a teleconference on June 3, 2015. As a result of that call, the Motion to Stay the Motion for Preliminary Injunction was granted, and this Court established a briefing schedule for the motion to dismiss. This Court held a hearing on the Motion to Dismiss on June 26, 2015.

STANDARD OF REVIEW

A motion to dismiss under *Rule 12(b)(1) of the Federal Rules of Civil Procedure* for lack of subject matter jurisdiction challenges a court's authority to hear the matter brought by a complaint. *See Davis v. Thompson, 367 F. Supp. 2d 792, 799 (D. Md. 2005)*. This challenge under *Rule 12(b)(1)* may proceed either as a facial challenge, asserting that the allegations in the complaint are insufficient to establish subject matter jurisdiction, or a factual challenge, asserting "that the jurisdictional **[*12]** allegations of the complaint [are] not true." *Kerns v. United States, 585 F.3d 187, 192 (4th Cir. 2009)* (citation omitted). With respect to a facial challenge, a court will grant a motion to dismiss for lack of subject matter jurisdiction "where a claim fails to allege facts upon which the court may base jurisdiction." *Davis, 367 F. Supp. 2d at 799*.

Where the challenge is factual, "the district court is entitled to decide disputed issues of fact with respect to subject matter jurisdiction." *Kerns, 585 F.3d at 192*. "[T]he court may look beyond the pleadings and 'the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists.'" *Khoury v. Meserve, 268 F. Supp. 2d 600, 606 (D. Md. 2003)* (citation omitted). The court "may regard the pleadings as mere evidence on the issue and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Velasco v. Gov't of Indon., 370 F.3d 392, 398 (4th Cir. 2004)*; *see also Sharafeldin v. Maryland, 94 F. Supp. 2d 680, 684-85 (D. Md. 2000)*. A plaintiff carries the burden of establishing subject matter jurisdiction. *Lovern v. Edwards, 190 F.3d 648, 654 (4th Cir. 1999)*.

ANALYSIS

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[5] The Court refers to this case as "the Alaska Proceeding."

The main issue before this Court is whether this Court should abstain from exercising its jurisdiction over this case under the doctrine of *Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)*.[6] Of course, federal courts have a "virtually unflagging" obligation to hear and decide those cases for which they have jurisdiction. *Sprint Communs., Inc. v. Jacobs, 134 S. Ct. 584, 591, 187 L. Ed. 2d 505 (2013)* **[*13]** (citing *Colorado River Water Conservation Dist. V. United States, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976))*. Certain "exceptional circumstances," however, "justify a federal court's refusal to decide a case in deference to the States." *Id.* (quoting *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 109 S. Ct. 2506, 105 L. Ed. 2d 298 (1989))*. The first case involving such an "exceptional circumstance" was *Younger*, where the United States Supreme Court held that considerations of federalism and comity required federal courts to abstain from exercising their equity jurisdiction to enjoin ongoing state criminal prosecutions. Subsequently, the Supreme Court found that such considerations also justified abstention where there were "state civil proceedings that [were] akin to criminal prosecutions" or state proceedings "that implicate[d] a State's interest in enforcing the orders and judgments of its courts." *Sprint Communs., Inc. v. Jacobs, 134 S. Ct. 584, 588, 187 L. Ed. 2d 505 (2013)*. The Supreme Court's most recent opinion addressing *Younger* abstention—*Sprint Communications, Inc. v. Jacobs*—does not purport to diverge from the Court's previous *Younger* jurisprudence; however, the Court noted that its decision was intended "to guide other federal courts" and to "clarify and affirm that *Younger* extends to the three exceptional circumstances identified in [*New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 109 S. Ct. 2506, 105 L. Ed. 2d 298 (1989)]*, but no further." *Sprint, 134 S. Ct. at 593-94* (internal quotation marks omitted).

The Attorney General asserts that the Alaska Proceeding warrants *Younger* abstention because it is both a civil enforcement proceeding akin to a criminal prosecution (i.e., the second *Younger* category) and a state proceeding that implicates the State's interest in enforcing the orders and judgments of its courts (i.e., the third *Younger* category). The Lupin Plaintiffs characterize the Alaska Proceeding as a discovery dispute that does not qualify under either the second or third **[*14]** *Younger* categories. Because this Court finds that this case clearly qualifies for the third category of *Younger* abstention, this Court need not reach the issue of whether this case also satisfies *Younger*'s second category.

A) The Alaska Proceeding Implicates the State's Interest in Enforcing the Orders and Judgments of its Courts

In *Juidice v. Vail, 430 U.S. 327, 97 S. Ct. 1211, 51 L. Ed. 2d 376 (1977)*, the Supreme Court found that abstention under *Younger* was appropriate in a federal class action suit brought by individuals who had been found in contempt by state court judges for disobeying subpoenas. The Court recognized that the same principles of federalism and comity that were emphasized in *Younger* also applied to cases involving a State's contempt process because "federal-court interference with the State's contempt process is an offense to the State's interest . . . likely to be every bit as great as it would be were [it] a criminal proceeding." *Juidice, 430 U.S. at 335-36* (internal quotation marks omitted).

The Lupin Plaintiffs attempt to distinguish this case from *Juidice* on the basis of the type of subpoena at issue. In *Juidice*, the Supreme Court was faced with contempt proceedings arising out of an individual's failure to respond to a subpoena in a civil action between **[*15]** private parties. In this case, the civil investigative demands—essentially subpoenas—are administrative in nature. Specifically, AS *§ 45.50.592* authorizes the Attorney General to issue CIDs when the Attorney General believes a party may have documentary evidence believed to be relevant to an authorized antitrust investigation. Petitions pertaining to such demands "may be filed in the superior court for the judicial district in which the person on whom the demand is served resides." AS *§ 45.50.592(f)*.

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[6] This Court recognizes that the Defendant Attorney General raised several other issues in its motion to dismiss, including arguments pertaining to failure to state a claim under *Rule 12(b)(6)* under the Dormant *Commerce Clause of the United States Constitution*, *see* *U.S. Const. art. 1, § 8, cl.3*, ripeness doctrine, absolute prosecutorial immunity, and qualified immunity. These issues were fully briefed, although the majority of the parties' papers focused on the abstention issue, and argument at the June 26, 2015 hearing was limited to the abstention issue as well. Because this Court finds that *Younger* abstention is proper, this Court does not reach these other issues raised by the parties.

The Lupin Plaintiffs acknowledge that courts have found that *Younger* abstention is appropriate in the face of similar civil investigative demands,[7] but argue that those cases were "eviscerate[d]" by the Supreme Court's opinion in *Sprint*. Pls.' Resp. at 8. The Lupin Plaintiffs argue that this case is instead analogous to *Google v. Hood, 96 F. Supp. 3d 584, 2015 U.S. Dist. LEXIS 49310, 2015 WL 1546160 (S.D. Miss. Mar. 27, 2015)*, and that *Younger* abstention does not apply. In the *Google* case, the district court found that a subpoena issued under the Mississippi Consumer Protection Act by a state's attorney general did not fit into any of the three *Younger* types of cases. In reaching that conclusion, however, the district court noted that there was no pending attempt to enforce the subpoena.[8] *2015 U.S. Dist. LEXIS 49310, [WL] at *6* ("At this time, there is no ongoing state **[*16]** criminal prosecution relating to this matter, nor are there civil proceedings involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions."). Thus, the *Google* case is immediately distinguishable because the attorney general in that case never sought to enforce the subpoena through an action in the state court. In this case, the Attorney General has already filed a proceeding in Alaska Superior Court, thereby triggering judicial oversight of the CIDs. In this respect, therefore, the Lupin Plaintiffs' argument reveals itself as a mere distinction without a difference. The subpoenas at issue in *Juidice* were not issued by a court itself; instead, they were issued by a private party's attorney acting "as an officer of the court." *430 U.S. at 329 n2*. Similarly, the CIDs in this case are issued by the Attorney General, but like in *Juidice*, can only be enforced after involving a state court. Accordingly, this Court finds that *Juidice* requires this Court to abstain under the third category of the *Younger* Doctrine.[9]

B) The Alaska Proceeding as a Parallel Action

The Lupin Plaintiffs next argue that "this Court should not abstain in favor of the show cause petition because it is not a truly parallel state proceeding that raises the constitutional questions that Plaintiffs have presented in their federal complaint."[10] Pl.'s Resp. 12-13, ECF No. 32. The Lupin Plaintiffs argue that the proceeding will be restricted to whether the Lupin Plaintiffs willfully disobeyed the CIDs and that "it appears unlikely that the Alaska superior court will decide the *defense* that the AG lacked constitutional authority to issue the CIDs to Plaintiffs." *Id.* at 13. The Lupin Plaintiffs assert that the Alaska statute only expressly allows improper service of the CID to be raised and prohibits defenses going to a CID's validity; thus, the Lupin Plaintiffs argue that **[*18]** their challenge to the Attorney General's jurisdictional authority to even issue the CIDs to the Lupin Plaintiffs is an issue that will not be reached.

The Lupin Plaintiffs' speculation about the purported inadequacy of the Alaska proceeding fails to prevent the application of *Younger* abstention in this case. The Supreme Court has explained that "the burden . . . rests on the federal plaintiff to show that state procedural law bar[s] presentation of its claims." *Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 14, 107 S. Ct. 1519, 95 L. Ed. 2d 1 (1987)* (internal quotation marks omitted). "[W]hen a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state

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[7] These cases include *Temple of the Lost Sheep, Inc. v. Abrams, 761 F. Supp. 237, 242-43 (E.D.N.Y. 1989)*, and *Cuomo v. Dreamland Amusements, Inc., 2008 U.S. Dist. LEXIS 71432, 2008 WL 4369270, at *10 (S.D.N.Y. Sept. 22, 2008)*.

[8] Notably, the district court also found that the subpoena had been issued in bad faith by the attorney general in response to **[*17]** Google's refusal to comply with certain requests made by the attorney general concerning Google's services.

[9] In light of this Court's holding with respect to the third *Younger* category, this Court sees no need to address the issue whether the Alaska Proceeding qualifies as a civil enforcement action akin to a criminal prosecution under the second *Younger* category.

[10] The Lupin Plaintiffs' argument on this point refers to three factors recognized in *Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 102 S. Ct. 2515, 73 L. Ed. 2d 116 (1982)*: (1) whether there is an ongoing state judicial proceeding; (2) whether the proceedings implicate important state interest; and (3) whether there is an adequate opportunity in the state proceedings to raise constitutional challenges. *See id. at 432*. In *Sprint*, the Supreme Court clarified that these factors were "*additional* factors appropriated considered by the federal court before invoking *Younger*" rather than "dispositive" conditions. *See 134 S. Ct. at 593*.

procedures will afford an adequate remedy, **[*19]** in the absence of unambiguous authority to the contrary." *Id. at 15*. The Lupin Plaintiffs have not cited to any case authority from Alaska that suggests constitutional or jurisdictional challenges cannot be raised in response to the show cause petition. Indeed, such limitations is unlikely because the Alaska Superior Court is the court of general jurisdiction in the State. Accordingly, while the statute is somewhat ambiguous as to the full gambit of defenses that may be raised during a show cause petition arising out of a CID, the Lupin Plaintiffs have failed to present unambiguous authority that would justify a conclusion by this Court that an Alaskan state judge would "interpret ambiguities in state procedural law to bar presentation of federal claims." *Id.*

C) The Timing of the State and Federal Actions

The Lupin Plaintiffs next argue that abstention is inappropriate because, in its view, there have been proceedings on the merits in this case, and the Attorney General did not file the Alaska Proceeding until after the Lupin Plaintiffs filed their Motion for Preliminary Injunction in this Court. Citing to *Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 238, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984)*, the Lupin Plaintiffs argue that their motion for preliminary injunction "put the merits **[*20]** of the Plaintiffs' case in play." Pl.'s Resp. at 15. However, in *Midkiff*, the district court had granted an injunction—i.e., there was a ruling on the issues raised by the parties. In this case, however, the Court has not made any substantive rulings to date; therefore, there is no basis for this Court to refuse to abstain based upon proceedings on the merits in federal court.

D) Exceptions to the *Younger* Doctrine

The Lupin Plaintiffs also argue that several of the exceptions to the *Younger* Doctrine apply to this case. Indeed, the Supreme Court has recognized a few exceptions to *Younger* abstention. These exceptions include state proceedings initiated in bad faith or for purposes of harassment. Additionally, an exception exists where a statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Younger, 401 U.S. at 53-54*.

1) The Lupin Plaintiffs' Alleged Irreparable Loss of Constitutional Claims

The Lupin Plaintiffs assert that, through this action, they seek to "vindicate their constitutional right to structure their primary conduct with some minimum assurance as to **[*21]** where that conduct will and will not render them liable to suit." Pls.' Resp. at 16 (internal marks omitted). In *Younger*, the Court alluded to the possibility of an exception for irreparable injury that is "both great and immediate." *See 401 U.S. at 46*. The Court clarified, however, that such a threat of injury to federally protected rights "must be one that cannot be eliminated by [the] defense against a single criminal prosecution," and that "the cost, anxiety, and inconvenience" of responding to a proceeding were insufficiently severe to prevent abstention. *Id.*

In this case, the concerns raised by the Lupin Plaintiffs—although undoubtedly relating to jurisdictional issues—boil down to harms arising from responding to the Alaska Proceeding itself. As discussed above, the Lupin Plaintiffs have failed to demonstrate that they have no way of vindicating their rights through the Alaska Proceeding and, thus, they have failed to show that the threatened harm constitutes an irreparable injury for purposes of *Younger*.

2) The Alleged Retaliatory Nature of the Alaskan Proceeding

The Lupin Plaintiffs argue that the Attorney General's show-cause petition is retaliatory because such a petition is warranted under **[*22]** Alaska law only when a recipient "willfully disobeys" a CID, but not when a recipient merely "challenges" a CID. *See* Mot. in Opposition, ECF No. 32. The question then becomes whether filing the present motion for injunctive relief constitutes a response to the CID under § 44.62.590(a)(2).

Plaintiffs argue that *§ 45.50.592(f)*, the provision outlining how a recipient may challenge a CID without being in contempt, could be interpreted to permit the present motion as a "response" for the purposes of § 44.62.590(a)(2). The statute reads in relevant part "a petition to extend the return date for, or to modify or set aside a demand issued under (a) of this section, stating good cause, *may be filed in the superior court for the judicial district where the parties reside*." *Alaska Stat. Ann. § 45.50.592(f)* (emphasis added). The Lupin Plaintiffs contend that because the statute does not expressly foreclose the possibility of filing a challenge to a CID in a federal district court of a different state, the present action must be construed as a valid "response," and not a refusal that would justify the Attorney General's show-cause petition. This argument is unpersuasive, as the context of the statute indicates contemplation of a "superior court," the common denomination of **[*23]** an intermediate court in Alaska, not a federal court established under Article III of the U.S. Constitution. At best, such interpretive creativity hardly reveals the show-cause petition to be "bad faith" or "retaliatory" as alleged by the Lupin Plaintiffs.

3) The Alleged Waiver of the Abstention Issue

Plaintiffs next contend that by virtue of the Attorney General's motion for an extension to respond to Plaintiffs' motion for preliminary injunction, the Attorney General waived any claim for *Younger* abstention. In support, Plaintiffs cite to *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619, 106 S. Ct. 2718, 91 L. Ed. 2d 512 (1986)*. In *Ohio Civil Rights Comm'n*, the Supreme Court held that the United States District Court for the Southern District of Ohio properly abstained under *Younger* from enjoining the Ohio Civil Rights Commission from exercising jurisdiction over a sex discrimination complaint brought by a discharged teacher. *Id.* In dicta, the Supreme Court explained that a State may "voluntarily submit to federal jurisdiction even though it might have had a tenable claim for abstention," but noted that these were cases where "the State expressly urged this Court or the District Court to proceed to an adjudication of the constitutional merits." *Id. at 626*. Requesting adjudication is hardly analogous to filing a motion **[*24]** for an extension to respond to a Complaint. Quite simply, the Attorney General did not forfeit any argument under *Younger* by merely requesting an extension of time to respond.

CONCLUSION

For the reasons stated above, Defendant Craig Richards' Motion to Dismiss (ECF No. 23) is GRANTED, and this case is DISMISSED.

A separate Order follows.

Dated: July 2, 2015

/s/ Richard D. BennettRichard D. Bennett

United States District Judge

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is this 2nd day of July, 2015, ORDERED that:

1. Defendant Craig Richards' Motion to Dismiss (ECF No. 23) is GRANTED, and this case is DISMISSED;
2. The Clerk of the Court transmit copies of this Order and accompanying Memorandum Opinion to Counsel; and
3. The Clerk of the Court CLOSE THIS CASE.

/s/ Richard D. BennettRichard D. Bennett

United States District Judge

Metro. Reg'l Info. Sys. v. Am. Home Realty Network, Inc.

United States District Court for the District of Maryland

July 6, 2015, Decided; July 6, 2015, Filed

Civil Action No. DKC 12-0954

Reporter

2015 U.S. Dist. LEXIS 103964 *; 2015 WL 4597529

METROPOLITAN REGIONAL INFORMATION SYSTEMS, INC., et al. Plaintiff, and Counterclaim Defendants v. AMERICAN HOME REALTY NETWORK, INC. Defendant, and Counterclaimant

Prior History: *Metro. Reg'l Info. Sys. v. Am. Home Realty Network, Inc., 722 F.3d 591, 2013 U.S. App. LEXIS 14445 (4th Cir. Md., 2013)*

Core Terms

seal, conspiracy, referral, NeighborCity, broker, antitrust, lawsuit, parties, summary judgment, counterclaims, motions, email, direct evidence, listings, concerted action, group boycott, Realtor, summary judgment motion, memorandum opinion, license, website, Sherman Act, documents, real estate agent, real estate, communications, brokerage, contacted, consumer, immunity

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For National Association of Realtors, Defendant: Jack R Bierig, Jessica S Rothenberg, Scott D Stein, Tacy F Flint, PRO HAC VICE, Sidley Austin LLP, Chicago, IL.

For National Association of Realtors, Counter Defendant: Brian P Morrissey, Jr, LEAD ATTORNEY, Sidley Austin LLP, Washington, DC; Jack R Bierig, Jessica S Rothenberg, Scott D Stein, **[*2]** Tacy F Flint, PRO HAC VICE, Sidley Austin LLP, Chicago, IL.

Judges: DEBORAH K. CHASANOW, United States District Judge.

Opinion by: DEBORAH K. CHASANOW

Opinion

MEMORANDUM OPINION

Presently pending and ready for resolution in this copyright infringement and antitrust case are: (1) a motion for summary judgment filed by Counterclaim Defendant the National Association of Realtors ("NAR") (ECF No. 410); and (2) three motions to seal filings in connection with the motion for summary judgment (ECF Nos. 412, 424, 430). The issues have been fully briefed and the court now rules, and no hearing is necessary. Local Rule 105.6. For the following reasons, NAR's motion for summary judgment will be granted. The three motions to seal will be denied without prejudice to renewal within fourteen (14) days.

I. Background

The factual and procedural background of this action has been extensively documented in previous opinions, thus only a brief summary of those facts relevant to the instant motion for summary judgment is necessary. (*See* ECF Nos. 34, 64, 159, 180-1, 239, 351). The Metropolitan Regional Information Systems, Inc. ("MRIS") brought a copyright infringement action against American Home Realty Network, Inc. ("AHRN") and Jonathan J. Cardella, **[*3]** AHRN's Chief Executive Officer, on March 28, 2012.[1] (ECF No. 1). MRIS offers an online fee-based "multiple listing service" (MLS) to real estate brokers and agents. Subscribers upload their real estate listings to the MRIS Database and agree to assign to MRIS the copyrights in each photograph included in those listings.

AHRN is a "San Francisco real estate brokerage referral services and technology startup that provides information to home buyers and sellers, identifying the real estate agents best suited to assist them in purchasing or selling properties in their local market on a nationwide basis." (ECF No. 167 ¶ 6). AHRN takes listing data from online database compilers like MRIS and makes it directly available to consumers on its "real estate referral" website. Specifically, AHRN owns and operates *www.neighborcity.com* ("NeighborCity"), which connects potential buyers with real estate agents based on the types of properties in which a buyer is interested. Jonathan Cardella declared:

> Although AHRN is a licensed real estate broker in the State of California, it does not actively engage in providing brokerage **[*4]** services for either the sale or purchase of any real property, and displays the property images and listing data for the sole purpose of attracting customers to use our AgentMatch services in order for AHRN to earn referral fees from third party recipient brokers.

(ECF No. 410-6 ¶ 9). Mr. Cardella described the AgentMatch service as follows:

> AHRN is compensated by matching and referring prospective customers from its website to local real estate agents and brokers most relevant to the property actively being viewed or searched on its website. AHRN does this through its website where it provides AgentMatch[,] its patent pending technology, designed to measure and publish the relative performance of the majority of U.S. professional Realtors, with respect to their peers, and uses this information *to match interested customers with the most qualified agents available to assist them, at the time of their request*. AgentMatch does this specifically by using the property criteria for the property being viewed on its website, e.g. latitude, longitude, price, bedrooms, etc. and then matches that against its database of real estate agents and their relative performance history selling similar **[*5]** homes.

(*Id.* ¶ 4) (emphasis added). If a consumer becomes interested in a property displayed on NeighborCity and requests additional information, AHRN seeks to arrange a referral of that customer to a real estate agent. (ECF No. 411-3, at 9). If the referral results in a closed transaction, AHRN seeks a thirty (30) percent referral fee. (ECF No. 411-1, at 9, Cardella, depo). MRIS claimed that AHRN had displayed on its website real estate listings containing copyrighted photographs taken from the MRIS Database.

After MRIS brought its complaint against AHRN for copyright violations, AHRN brought counterclaims against MRIS, Does # 1-25, and the National Association of Realtors ("NAR"), alleging, *inter alia*, violations of the Sherman Act, *15 U.S.C. § 1 et seq.* Ralph Holmen, Associate General Counsel of the NAR, provided the following description of NAR:

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[1] The lawsuit was dismissed against Mr. Cardella for lack of personal jurisdiction.

> NAR is the largest professional association in America, with over one million members who are involved in all aspects of the brokerage of residential and commercial real estate. NAR provides for its members a facility for professional development and exchange of information related to topics of interest to the real estate profession, such as the setting **[*6]** of ethical standards for real estate professionals, the efficient and lawful operation of a Multiple Listing Service ("MLS"), and the protection of MLS listing content.

(ECF No. 410-2 ¶ 2). In addition to NAR, there are 54 state and territorial associations, as well as approximately 1,400 local associations consisting of real estate professionals. (*Id.* ¶ 4). NAR publishes a Handbook on Multiple Listing Policy, which serves as a guide for member associations of realtors in their operation of MLSs. (*Id.* ¶ 6). The Handbook includes model rules, policies, and best practices established by NAR's Board of Directors. According to Mr. Holmen, MLSs choose whether to adopt NAR's model rules and policies. (*Id.*). MLSs that adopt and conform to all mandatory rules and policies are entitled to coverage under NAR's errors and omissions professional liability insurance policy. Additional facts will be presented in the analysis section below.

AHRN filed first amended counterclaims against MRIS and NAR, and they both moved to dismiss. After Judge Williams issued several opinions (ECF Nos. 159 & 239), and AHRN was granted leave to file second amended counterclaims (ECF No. 167),[2] counts I (Maryland unfair **[*7]** competition) and III (Sherman Act *§ 1*) against MRIS and NAR remained the only counterclaims. The remaining counterclaims against MRIS were dismissed by memorandum opinion and order issued on March 10, 2014. (ECF Nos. 351, 352, 355). On September 12, 2014, MRIS and AHRN filed a proposed permanent injunction and final order, which reflects, *inter alia*, that MRIS and AHRN have agreed to dismiss with prejudice all pending claims between them. The permanent injunction and final order was entered on September 15, 2014. (ECF No. 420). Consequently, what remains in the case are two counterclaims against NAR: (1) unfair competition in violation of Maryland law (count I); and (2) violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1* (count III).

NAR moved for summary judgment on September 5, 2014. (ECF No. 410. AHRN opposed the motion (ECF No. 422), and NAR replied (ECF No. 429). The parties also filed motions to seal filings in connection with the summary judgment motion. (ECF **[*8]** Nos. 412, 424, 430). On November 24, 2014, NAR filed a notice of supplemental authority, which, among other things, informed the court that a district court in Minnesota granted the motion for summary judgment on AHRN's antitrust counterclaim against the Regional Multiple Listing Service of Minnesota ("RMLS") (Case No. 12-0965, D.Minn.). (*See* ECF No. 432). As NAR acknowledges in the notice, however, the memorandum opinion granting summary judgment was filed under seal, and NAR indicates that it does not have it. It would be up to NAR to intervene in the case in Minnesota to try to attempt to access the sealed memorandum opinion and there is no indication that it has done so.[3]

II. Standard of Review

A motion for summary judgment will be granted only if there exists no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *See Fed.R.Civ.P. 56(a)*; *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. Once a properly supported motion for summary judgment is **[*9]** filed, the nonmoving party is required to make a sufficient showing on an essential element of that party's claim as to which that party would have the burden of proof to avoid summary judgment. *Celotex, 477 U.S. at 322-23*.

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[2] The second amended counterclaims asserted the following causes of action against MRIS and NAR: (1) unfair competition under Maryland law; (2) unfair competition under California law; and (3) violation of the *Sherman Act § 1*. (*See* ECF No. 167).

[3] NAR filed a second notice of supplemental authority on February 17, 2015, stating that AHRN had appealed the summary judgment order to the United States Court of Appeals for the Eighth Circuit, but subsequently sought to dismiss the appeal. (ECF No. 433).

Summary judgment is appropriate under *Federal Rule of Civil Procedure Rule 56(a)* when there is no genuine dispute as to any material fact, and the moving party is plainly entitled to judgment in its favor as a matter of law. In *Anderson, 477 U.S. at 249 (1986)*, the Supreme Court explained that, in considering a motion for summary judgment, the "judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id. at 248*. Thus, "the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented." *Id. at 252*.

In undertaking this inquiry, a court must view the facts and the reasonable inferences drawn therefrom "in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (*quoting* *United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962))*; *see also* *EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 405 (4th Cir. 2005)*. The mere existence **[*10]** of a "scintilla" of evidence in support of the non-moving party's case is not sufficient to preclude an order granting summary judgment. *See* *Anderson, 477 U.S. at 252*.

A "party cannot create a genuine dispute of material fact through mere speculation or compilation of inferences." *Shin v. Shalala, 166 F.Supp.2d 373, 375 (D.Md. 2001)* (citation omitted). Indeed, this court has an affirmative obligation to prevent factually unsupported claims and defenses from going to trial. *See* *Drewitt v. Pratt, 999 F.2d 774, 778-79 (4th Cir. 1993)* (*quoting* *Felty v. Graves—Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987))*.

III. Analysis

A. NAR's Motion for Summary Judgment

Count III of the second amended counterclaims alleges a violation of Section 1 of the Sherman Act, *15 U.S.C. § 1*. *Section 1* prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." "This provision has been interpreted to preclude only restraints that are 'unreasonably restrictive of competitive conditions.'" *Imaging Center, Inc. v. Western Maryland Health Systems, Inc., 158 F.App'x 413, 418 (4th Cir. 2005)* (*quoting* *Cont'l Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499, 508 (4th Cir. 2002))*. To establish a violation of *Section 1* of the Sherman Act, a plaintiff must prove two elements: (1) a contract, combination, or conspiracy; (2) that imposed an unreasonable restraint of trade.[4] *Dickson v. Microsoft Corp., 309 F.3d 193, 202 (4th Cir. 2002)*.

The Fourth Circuit elaborated on the two elements in *Imaging Center, Inc., 158 F.App'x at 418*:

> The first element requires a concerted action by two or more persons. *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc., 924 F.2d 539, 542 (4th Cir. 1991)*. This element is satisfied even where "one or more of the co-conspirators acted unwillingly, reluctantly, or only in response to coercion." *Dickson, 309 F.3d at 205* (*quoting* *MCM Partners, Inc. v. Andrews-Bartlett & Assocs., 62 F.3d 967, 973 (7th Cir. 1995))*. Trade-restraining concerted action may be inferred from conduct. *Laurel Sand & Gravel, 924 F.2d at 542*. However, when these actions could be consistent with either (1) independent conduct or a legitimate business purpose or (2) an illegal agreement, "proof must be offered that tends to exclude the first interpretation" in order to avoid summary judgment. *Id.* This is because "***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *§ 1* case." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*.

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[4] As Judge Williams stated in his earlier opinion, "the viability of AHRN's unfair competition claim under Maryland law [] relies on the **[*11]** same set of facts as the Sherman Act § 1 claim" and the parties do not dispute this point. (ECF No. 239, at 12 n.7).

> The second element of any § 1 claim requires a showing that the restraint on competition is unreasonable. *Cont'l Airlines, 277 F.3d at 508*. In order to evaluate this second element, courts use one of three methods, depending on the restraint alleged: "(1) *per se* analysis for obviously anticompetitive restraints, (2) quick[-]look analysis, for those with some procompetitive justification, and (3) the full 'rule **[*12]** of reason,' for restraints whose net impact on competition is particularly difficult to determine." *Id. at 508-09*.

The Supreme Court has long held that "certain concerted refusals to deal or group boycotts are so likely to restrict competition without any offsetting efficiency gains that they should be condemned as per se violations of *§ 1* of the Sherman Act." *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 290, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985)* (citing cases). Group boycott cases to which the Supreme Court has applied this approach typically involve joint efforts to disadvantage competitors by '"either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle."' *Id. at 294* (*quoting* L. Sullivan, Law of Antitrust 261-62 (1977)).

The parties disagree about the appropriate standard of review in antitrust cases. The Supreme Court of the United States has specified what a plaintiff must show to avoid summary judgment on a Sherman Act § 1 claim:

> To survive a motion for summary judgment . . . a plaintiff seeking damages for a violation of *§ 1* must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. Respondents . . . must show that the inference of conspiracy is reasonable **[*13]** in light of the competing inferences of independent action or collusive action that could not have harmed respondents.

Matsushita Elec. Indus. Co., 475 U.S. at 587-88. Although the court reviews the facts and all reasonable inferences in the light most favorable to the nonmoving party, ***antitrust law*** "limits the range of permissible inferences from ambiguous evidence," such that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id. at 588*. The *Matsushita* standard has been applied in cases alleging price-fixing and illegal restraints of trade such as the alleged agreement to boycott at issue here. *See, e.g., In re Titanium Dioxide Antitrust Litigation, 959 F.Supp.2d 799, 820 (D.Md. 2013)* (applying *Matsushita* standard on summary judgment to allegations of price-fixing); *Merck-Medco Managed Care, LLC v. Rite Aid Corp., 201 F.3d 436* [published in full-text format at *1999 U.S. App. LEXIS 21487], 1999 WL 691840 (4th Cir. 1999)* (unpublished table opinion) (applying *Matsushita* standard on summary judgment to group boycott allegations). "Although it is clear that the *Matsushita* standard governs whether granting summary judgment is proper, it is equally clear that the particular facts of each case determine how high a burden that standard imposes." *In Re Titanium Dioxide Antitrust Litigation, 959 F.Supp.2d at 821*. Judge Bennett's explanation of the appropriate standard of review in antitrust cases is instructive:[5]

> Plaintiffs alleging an implausible **[*14]** conspiracy face a high burden to show evidence that tends to exclude inferences of legitimate competitive behavior. By contrast, where plaintiffs allege a plausible conspiracy — one that makes economic sense — a lower "tends to exclude" standard applies. [] Accordingly, when a plausible conspiracy has been alleged, a plaintiff need not "disprove all nonconspiratorial explanations for the defendants' conduct" to prevail at summary judgment. [] Especially relevant to this case, the United States Court of Appeals for the Second Circuit has held that where "a plaintiff relies on ambiguous evidence to prove its claim, the existence of a conspiracy must be a reasonable inference that the jury could draw from that evidence; it need not be the *sole* inference." [*In re Publ'n Paper Antitrust Litig., 690 F.3d 51, 62 (2d Cir. 2012)*] (emphasis in original). When determining whether a jury could reasonably infer that there was a conspiracy, this Court must view the totality of the evidence. *See* [*In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 655-56 (7th Cir. 2002)*] (cautioning against the supposition that "if no single item of evidence presented by the plaintiff points unequivocally to conspiracy, the evidence as a whole cannot defeat summary judgment.").

In re Titanium Dioxide Antitrust Litig., 959 F.Supp.2d at 821.

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[5] *In Re Titanium Dioxide Antitrust Litigation* did not involve allegations of group **[*15]** boycott, however, as is the case here.

1. Concerted Action

The Fourth Circuit explained in *North Carolina State Bd. of Dental Examiners v. F.T.C., 717 F.3d 359, 372 (4th Cir. 2013)*:

> [T]o be concerted action, the parties must have "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 768, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*. We have indicated there must be "something more" than independent action, such as "a unity of purpose or a common design and understanding, or a meeting of the minds." *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc., 878 F.2d 801, 805-06 (4th Cir. 1989)*. Concerted action may be proven by "direct or circumstantial evidence." *Monsanto, 465 U.S. at 768*.

A party may demonstrate an agreement by direct evidence or circumstantial evidence, or a combination of the two. *West Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 99-100 (3d Cir. 2010)*; *Merck-Medco Managed Care, LLC, 1999 U.S. App. LEXIS 21487, 1999 WL 691840, at *5*; *Laurel Sand & Gravel, Inc., 924 F.2d at 542* (noting that when there is no direct evidence of antitrust activity, "[a]n agreement to restrain trade may be inferred from other conduct.").

AHRN argues that together with brokers and agents around the country, NAR engaged in a group boycott in violation of *Section 1* of the Sherman Act. As will be seen, none of the evidence — even when viewed in the aggregate - support group boycott or concerted action.

a. Litigation-Related Activity

First, in support of its group boycott theory, AHRN references litigation-related activity purportedly spearheaded by NAR, including a multitude of cease and desist letters that it received from **[*16]** MLSs around the country beginning in November 2011 around the time of the Anaheim meeting when NAR purportedly first became aware of AHRN and NeighborCity. (ECF No. 422, at 12; *see also* ECF Nos. 422-2 through 422-18, cease and desist letters). The gist of the letters is that AHRN has been reproducing and distributing copyrighted works relating to real estate listings on its website, NeighborCity.com , without authorization; the letters request that AHRN immediately remove copyrighted information from its website or risk legal action. AHRN cites multiple email exchanges between Laurie Janik and MLSs and their legal counsel regarding an appropriate course of action against AHRN. (*See* ECF No. 422, at 10-11; ECF Nos. 423-4 through 423-8; ECF No. 422-33, at 5, email from John Mosey of Northstar MLS, ("[Y]es it is Laurie [Janik] he refers to. I spoke with her last week and she is very interested in having the NAR take a lead role in a filing again [AHRN.]"). AHRN states:

> Janik was also in constant communication with MLSs and their legal counsel about AHRN. [] As she coordinated the litigation Janik took steps to prevent the coordinated actions from appearing to be an illegal group boycott. [] **[*17]** Additionally, NAR not only orchestrated this agreed upon litigation plan against AHRN, it funded it. [] NAR contributed $35,000.00 to the legal action brought by Northstar MLS in Minnesota.

(ECF No. 422, at 10-11). Ms. Janik provided deposition testimony to explain the rationale for NAR providing funding to support a lawsuit against AHRN in January 2012:[6]

> Q: How was that decision made, to make an initial commitment of $35,000?
>
> A: Well, that decision, actually, was a little irregular. The decision was made by my boss. I recommended it to him to use some funds that were left over from an industry settlement of a patent infringement case that involved patent licenses and the Association received more money than we needed to spend for the patent license for the industry because payments were received late. And, in my view, those payments had come in

[6] Laurene Janik testified that although NAR allocated certain funds to support the lawsuit instituted by MRIS, the funds were *not* actually paid from NAR to MRIS. (ECF No. 410-4, at 11). She did not know why MRIS did not accept the funds.

> from MLSs, and NAR shouldn't just put it to the bottom line; that the money came from MLSs, it was related to MLS issues, and, therefore, it should be used on [] some industry-wide issue that affected MLSs.
>
> And at this point in time, I had concluded that [] the NeighborCity concern was an industry-wide issue that affected MLSs, and it would be a **[*18]** good place to use the excess funds that had been paid by the MLSs in the CIVIX case. So I went to Dale Stinton, suggested this use of those funds to him, and he approved it.

(ECF No. 422-1, at 11-12).

NAR asserts that "the Court has already held that activity relating to incidents of litigation such as cease and desist letters [is] immune from liability." (ECF No. 411, at 37). In the June 10, 2013 opinion adjudicating NAR's and MRIS's motions to dismiss the first amended counterclaims filed by AHRN, Judge Williams held that "Counterclaim-*Defendants* are [] entitled to *Noerr-Pennington* immunity from AHRN's § 1 claims to the extent they are based on the filing of this litigation and the incidents of that litigation."[7] (ECF No. 159, at 28) (emphasis added). Later in the opinion, Judge Williams specified: "[i]t is not sufficient to allege that Counterclaim-Defendants agreed to enforce their copyrights against AHRN; MRIS and NAR are immunized from such a claim for the **[*19]** reasons discussed above." (*Id.* at 30). AHRN argues that *Noerr-Pennington* immunity protects parties from litigation based on *their* petitioning the court for redress, and that the court's prior ruling that AHRN could not assert antitrust claims against *MRIS* for having instituted this lawsuit is inapplicable to NAR, who did *not* institute a copyright infringement lawsuit. (ECF No. 422, at 24). AHRN contends that "[h]ad AHRN's claims against NAR rested on incidents of litigation *by NAR against AHRN* in an attempt to petition the government, then the Court no doubt would have stated that NAR was due *Noerr-Pennington* immunity." (*Id.*) (emphasis added).

The Fourth Circuit rejected a similar argument to the one AHRN lodges **[*20]** here in *Balt. Scrap Corp. v. David J. Joseph Co., 237 F.3d 394, 400 (4th Cir. 2001)*. Plaintiff in that case argued that "*Noerr-Pennington* protects litigants only, not third parties who covertly funded the lawsuit." *Id.* The Fourth Circuit remarked that "*PRE* is not so restrictive as to protect only the litigant from later antitrust liability."[8] *See also* *Hosp. Building Co. v. Rex Hospital, 691 F.2d 678 (4th Cir. 1982)* (non-litigants who caused a government entity to file litigation entitled to jury charge of *Noerr-Pennington* immunity). The Fourth Circuit further reasoned:

> Indeed, non-parties often provide aid to litigants, whether through financial backing, legal assistance, amicus briefs, or moral support. The fact that an amicus brief, for example, might be filed by a non-party with some anti-competitive aim does not strip from the amicus its *Noerr-Pennington* right to petition the courts. The realities often are that litigation cannot be entirely financed out of the pocket of the party bringing suit. And the costs of supporting a party's right of access to public bodies need not entail the defense of a collateral antitrust suit. To hold that only parties who have standing in their own right to receive the protection of *Noerr-Pennington* immunity is to artificially restrict that doctrine by penalizing even the lawful support **[*21]** of objectively meritorious actions. . . . *Accordingly, because the litigation was not objectively baseless, and because the source of funding this lawsuit in no way affected the legitimacy of the claims advanced, the district court correctly held that the lawsuit was not sham litigation*.

Balt. Scrap Corp., 237 F.3d at 401 (emphasis added).

Here, too, any support received by MRIS from NAR to institute the lawsuit against AHRN to protect copyrighted materials in no way affected the legitimacy of the copyright claims. In any event, regardless of the applicability of

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[7] Judge Williams later reconsidered the June 10, 2013 opinion insofar as it dismissed the claims for violations of *Section 1* of the Sherman Act and unfair competition under Maryland law as to *MRIS* because he had to rely on materials outside the four corners of the complaint in determining the application of *Noerr-Pennington* immunity. (*See* ECF No. 239, at 2). Summary judgment was granted on both counterclaims as to MRIS by memorandum opinion and order issued on March 10, 2014. (ECF Nos. 351, 352, 355).

[8] In *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)* ("PRE"), the Supreme Court of the United States fashioned a two-part sham-litigation test as an exception to *Noerr-Pennington* immunity.

Noerr-Pennington immunity to NAR, AHRN's reliance on any litigation-related activity by NAR to support the group boycott theory is misplaced. There is nothing unlawful about NAR supporting MLSs in considering legal action against AHRN, who it believed was unlawfully misappropriating information related to real estate listing on its own website without a license authorizing access to such information. As NAR argues, "[t]hat NAR communicated with representatives of MLSs about AHRN has never been in dispute. That fact does not, however, **[*22]** create a triable issue as to whether NAR orchestrated a conspiracy to boycott AHRN." (ECF No. 411, at 35); *see, e.g.,* Am. Chiropractic Ass'n v. Trigon Healthcare, Inc., 367 F.3d 212, 227 (4th Cir. 2004) ("At most, the MCAP meeting shows contact between two independent economic actors, but 'mere contacts and communications, or the mere opportunity to conspire, among antitrust defendants is insufficient evidence [of] an anticompetitive conspiracy.'" (*quoting* Cooper v. Forsyth County Hosp. Authority, Inc., 789 F.2d 278, 281 (4th Cir. 1986))).[9]

b. Direct Evidence

AHRN argues that it has raised a genuine dispute of material fact as to direct evidence of a group boycott, relying on a single conversation between Paulette Carroll, a broker, and a representative of NeighborCity. "Direct evidence is extremely rare in antitrust cases and is usually referred to as the 'smoking gun.'" Trigon Healthcare, Inc., 367 F.3d at 226. Direct evidence in the § 1 antitrust context is "explicit and requires no inferences to establish the proposition or conclusion being asserted." *Id.* The "direct evidence" AHRN offers to show group boycott is by no measure **[*24]** a "smoking gun" and is ambiguous at best. Specifically, AHRN relies on the following exchange between Ms. Carroll and Alex Gilbert, an AHRN representative, as direct evidence:

> Alex Gilbert: . . . I was actually reaching out because I wanted to discuss a broker-to-broker referral with you.
> Paulette Carroll: Yeah. Um, you know what? I've been advised not to take any from Neighborhood City.
> Alex Gilbert: Oh really? And, and why is that?
>
> Paulette Carroll: *Because of the lawsuit that's going on with Neighborhood City*.
> Alex Gilbert: Ok. And who was it that had advised you not to take out referrals?
>
> Paulette Carroll: Just out of our — *out of our office*.
> Alex Gilbert: Out of — OK. Like the national association?
> Paulette Carroll: Yeah. Mmmhmmm.
> Alex Gilbert: Oh. Alright. That's very strange. Have they sent off and mailed to you or something like that?
> Paulette Carroll: No. It's brought up in our team meeting every week.
> Alex Gilbert: Oh — every week, really?
> Paulette Carroll: Because of the lawsuit.
> . . .

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[9] AHRN contends that "[t]he letters pouring into AHRN's office in the wake of the November 2011 NAR annual meetings is evidence of NAR's discouraging local associations, boards, brokers and agents from dealing with AHRN." (ECF No. 422, at 25). NAR provides evidence, however, that even *before* the Anaheim meeting in November 2011 when NAR purportedly became aware of AHRN's website, an attorney representing an MLS in Wisconsin, and *not* NAR, sent an email to a group of MLSs (and their attorneys) informing them about the operations of NeighborCity:

> It appears that there is a website (neighborcity.com) which is displaying some of the copyrighted data of my client. A[] quick check of this site reveals that they are not limited to Wisconsin but also display some but not all other areas (Chicago [49,000 listings], Minneapolis **[*23]** [5000 listings], Detroit [726 listings], Denver [10877 listings]) in which I would strongly suspect they do not have consent to do so.
>
> My clients in Wisconsin are proceeding with the proper ways to protect ourselves and hold them accountable, but the people involved make me suspect that this is not a fly-by-night operation. Accordingly, I would like to know if any of you have had any contact or interaction with either neighborcity.com or the company American Home Realty Network, Inc. or it[s] CEO Jonathan Cardella.

(ECF No. 410-27, at 2; *see also* ECF No. 410-21 (Aug. 27, 2010 cease and desist letter); 410-22 (Mar. 22, 2011 cease and desist letter).

> Alex Gilbert: So, is the broker the one who's kind [of] been in contact with the national association and now they're just telling him not to work with us?
>
> Paulette Carroll: I'm not sure what the — *I'm not* ***[*25]*** *sure what the connection is*.
> Alex Gilbert: Gotcha, but they just kind [of] passed down the message?
> Paulette Carroll: Yup. Mmmhmmm.
> . . .
> Alex Gilbert: . . . I'm not fully apprised of what the whole lawsuit entails, but I've actually never heard anybody been advised by the national association to not take referrals from us.
> Paulette Carroll: Yeah. Yeah. So, I don't know. I mean, it's our option. It's our option in the end.
> Alex Gilbert: Uh-huh.
> Paulette Carroll: It is our option, but they've put it out there, definitely.
> Alex Gilbert: Gotcha. And . . .
> Paulette Carroll: With the lawsuit, it's conflict of interest or whatever, you know.

(ECF No. 423-13, at 2-3) (emphases added).

The above phone conversation that AHRN relies on as direct evidence of concerted action falls far short of the standard that it be "explicit and require no inferences." *See* *Golden Bridge Technology, Inc. v. Motorola, Inc., 547 F.3d 266, 271 (5th Cir. 2008)* ("Direct evidence explicitly refers to an understanding between the alleged conspirators, while circumstantial evidence requires additional inferences in order to support a conspiracy claim."). Nowhere in the call does Ms. Carroll identify an explicit agreement orchestrated by NAR to encourage brokers and/or agents not to deal with AHRN. Indeed, as **[*26]** NAR argues, the NeighborCity representative — and not Ms. Carroll — mentioned the national association — and Ms. Carroll stated that they were advised ou*t of their office* not to take referrals from AHRN. (*See* ECF No. 429, at 14). Indeed, when asked whether the national association was in contact with the broker and advised it not to work with AHRN, Ms. Carroll stated that she was "not sure what the connection is." She also stated that *the broker* had the option not to take referrals from AHRN considering the copyright infringement lawsuit. *See, e.g., Golden Bridge Technology, Inc., 547 F.3d at 272* ("Viewing the evidence favorably to GBT, the emails do reveal a common dislike for CPCH among some of the Appellees and other companies. However, common dislike is not the same as an explicit understanding to conspire, so we accordingly review GBT's claim under the stricter standard required for circumstantial evidence."); *cf.* *Tunica Web Advertising v. Tunica Casino Operators Ass'n, Inc., 496 F.3d 403, 410 (5th Cir. 2007)* (finding that email communications show conspiracy because they contain direct evidence stating that the parties entered into a "gentlemen's agreement" not to deal with another company).

Moreover, Ms. Carroll gave deposition testimony stating that NAR never advised her not to accept referrals from AHRN. Specifically, **[*27]** she stated that her husband, a real estate agent and business partner, advised her to stop working with NeighborCity. (ECF No. 410-51, at 3). She stated: "We felt it was not in our best interest to work with Neighborhood City because of a potential lawsuit. We decided that we did not want to jeopardize our career, our license or be involved in any type of legal matter." (*Id.*). Ms. Carroll stated during her deposition that she has "never had contact with NAR at any level," only with NAR's lawyers in the instant litigation. (*Id.* at 4). Ms. Carroll explained the phone call with the AHRN representative:

> A: The phone call was very off the cuff. I was busy, I wasn't expecting to have a lengthy phone call with anybody from Neighborhood City. I have -- I've answered the questions as well as I could, many of them. If you listen to the recording you can hear the little bit of chaos going on in the background. I was in an office situation. And had they asked me for a time to have a conversation with them, if it was an appropriate time if I had time for them, I would have gone to my office where it was a closed door, and I did not do that because I did not realize where this was going. *I have never had* ***[*28]*** *any conversation from NAR, I've never had any e-mails, phone calls, other than a monthly newsletter, which I never read*.
> Q: And you indicated that the only discussion you had at these team meetings about NeighborCity was after that one meeting?
>
> A: The *only discussion that I have ever had about Neighboorhood City with the other agents was after the team meeting*.

> Q: That one time?
> A: One time.

(ECF No. 410-51, at 5) (emphases added). Consistent with her deposition testimony, Ms. Carroll submitted a declaration stating that "[n]o one in my brokerage has ever told me that [NAR] advised the brokerage not to do business with AHRN. I was never instructed by NAR, NorthstarMLS, or my broker that I was not to enter into referral agreements with AHRN. The decision not to accept additional referrals from AHRN was entirely my own and based on my disapproval of AHRN's use of agent listings without permission." (ECF No. 410-52 ¶ 4).

Based on the foregoing, the telephone recording on which AHRN relies as direct evidence of concerted action is ambiguous, relies on inferences of a conspiracy orchestrated by NAR, and does not establish direct evidence of a group boycott. *See, e.g.,* *Hyland v. HomeServices of America, Inc., 771 F.3d 310, 319 (6th Cir. 2014)* ("Like the district court, **[*29]** we view Jerry McMahan's statements at the hearing as ambiguous at best and they therefore do not establish direct evidence of a conspiracy.").

c. Circumstantial Evidence

AHRN also relies on circumstantial evidence to show concerted action. To show concerted action, AHRN asserts that "NAR has encouraged regional boards of realtors to step up their efforts (1) to keep their member agents from entering into referral agreements with AHRN; [(2)] to breach or repudiate referral agreements agents have entered with AHRN; and (3) to pressure agents into demanding that their names be stricken from AHRN's list of potential referral agents." (ECF No. 167 ¶ 112). AHRN also cites an excerpt from the NAR Handbook and the Realtor Excellence Program developed by NAR as further establishing a plausible inference of a group boycott. As will be seen, none of the circumstantial evidence purporting to show concerted action establishes a plausible conspiracy and does not tend to exclude the possibility that MLSs acted independently in deciding not to deal with AHRN, motivated by their desire not to associate with a company embroiled in litigation for copyright infringement and whose business model was unappealing. **[*30]**

AHRN contends that it received formulaic letters from brokers repudiating previous agreements and requesting not be contacted by AHRN, purportedly at the behest of NAR. For instance, one such letter stated:

> It has come to my attention that American Home Realty Network, Inc. d/b/a NeighborCity ("NeighborCity") has been soliciting or may intend in the future to solicit agents of Champion Realty, Inc. to ask them to execute referral agreements that purport to bind Champion Realty, Inc. Please be advised that Champion Realty, Inc. has no interest in entering into any referral or other agreements with NeighborCity, and Champion Realty, Inc. has not authorized any of its agents to execute any such agreement with NeighborCity on its behalf.
>
> Accordingly, to the extent any agent has executed an agreement with NeighborCity that purports to bind Champion Realty, Inc., that agreement is void and of no legal effect. Alternatively, Champion Realty, Inc. hereby terminates any such agreement.

(ECF No. 422-22, at 2; *see also* ECF Nos. 422-23 through 422-25). AHRN essentially asks the court to infer concerted action at NAR's direction from, among other things, the fact that it received a plethora of similar **[*31]** correspondence from real estate professionals around the country either repudiating referral agreements or refusing to accept referrals from AHRN. AHRN does not present sufficient evidence, however, to show "that the inference of conspiracy is reasonable" in light of NAR's competing inference of independent action. *Matsushita, 475 U.S. at 588*. Moreover, parallel behavior alone is not enough to prove a conspiracy. *See* *Theatre Enterprises v. Paramount Film Distributing Corp., 346 U.S. 537, 541, 74 S. Ct. 257, 98 L. Ed. 273 (1954)* ("[T]his Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense."). NAR has produced evidence that agents and brokers acted independently in refusing to deal with AHRN and for a variety of reasons. *See, e.g.,* *Golden Bridge Technology, Inc., 547 F.3d at 271* ("Independent parallel conduct, or even conduct among competitors that is consciously parallel, does not alone establish the contract, combination, or conspiracy required by *§ 1*"); *Twombly, 550 U.S. at 554* ("[A]t the summary judgment stage a *§ 1* plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently.").

Specifically, NAR provides declarations from MLS representatives stating that they have not entered into any kind of agreement with any **[*32]** other MLS or NAR or any other party not to deal with AHRN and NAR has not instructed or encouraged them not to deal with or license data to AHRN. (*See* ECF Nos. 410-53 through 410-65). One such MLS representative declares that he "reached out directly *and only to AHRN* when [he] learned that NeighborCity was displaying FMLS listing content without authorization." (ECF No. 410-54 ¶ 8) (emphasis added). The declarations reflect that MLSs and other real estate professionals decided not to deal with AHRN for a multitude of independent reasons, including the fact that AHRN voluntarily relinquished its membership in MLSs around the country, yet continued to display MLS data on the NeighborCity website. (*See, e.g.*, ECF No. 410-56 ¶ 3 ("Around the beginning of 2011, CREN continued an audit of all IDX feeds and determined that AHRN was still displaying CREN listings, even though it was no longer a member. I continued to monitor the site and discovered th[at] AHRN was continuing to post new CREN listings even though CREN was no longer sending AHRN an IDX feed."); *see also* ECF No. 411-19 ("I have no desire to work with neighborhood city. As long as you[']r[e] stealing data from MLS[s] around the country[,] I have **[*33]** no intention of paying you for a referral, why should I? You don't pay my MLS [] that brings you the leads in the first place. Remove me from your mailing list immediately.")). Many real estate professionals chose not to deal with AHRN because they found the terms of the proposed referral agreement unacceptable. (*See* ECF No. 410-64 ¶ 6 ("On February 28, 2012, I sent Mr. Miller an email, declining AHRN's proposal for a custom license, as we found the terms proposed by AHRN to be unacceptable, particularly given the broad rights to use MLSLI's data that the proposed license would grant AHRN."); ECF No. 411-22, at 2 ("After reviewing your agreement (which is not available until you agree to accept it), I have many issues with the terms and will not allow my agents to participate."); ECF No. 411-23, at 2 ("Please remove me from your referral list. I was not able to read the terms and conditions before I signed up. I don't agree with them."); ECF No. 411-24 ("I do not pay ANYONE 30% and the property is sold! I am in business to make money not support you!") (emphasis in original)). Other MLSs found the information on the NeighborCity website misleading or inaccurate and refused to deal **[*34]** with AHRN for that reason. (*See* ECF No. 411-26, at 2 ("Remove all profiles from agents affiliated to Huntley Estates. The one you have of me specifically is GROSSLY incorrect! . . . Your site is deceitful to say the least."); ECF No. 411-27 ("I have some huge concerns over the misrepresentation, lies, and slander I've seen regarding your profile you have set up for me on neighborcity."); ECF No. 411-28 ("Your website is very out of date. You have people listed as being with my firm who are not even licensed anymore.")); *see also* ECF Nos. 411-29 through 411-31).

AHRN also references a purported conversation between a real estate agent and an AHRN representative as also evidencing a conspiracy when examined in conjunction with the other evidence cited. Specifically, AHRN relies on notes taken by an AHRN employee, Shannon Burns, which purport to reflect a telephone exchange with Kent Meister, a real estate agent from Minnesota. Her notes indicate:

> Kent Meister, an agent with Keller Williams Classic Realty in Minnesota called NeighborCity on Friday afternoon, May 3rd, 2013 asking to speak with Devon, one of the Company's Client Advocates, regarding a referral invitation sent to him on May **[*35]** 2nd for Joseph & Mimi Toto. Shannon at NeighborCity answered the call[] and Mr. Meister asked, "I'm just curious, are you guys aware of the local lawsuit against you?" Further, he said "We've been *contacted by our Board about it*, so word of caution, you're peppering our agents with these emails and I'm sure they're getting logged and will be used in a court of law against you." He asked to be removed from our system until the lawsuits are resolved. He says there are "many people in the area who are going to use this all against you." I asked if he had a question I could help him with and he said no and the conversation ended.

(ECF No. 422-27, at 2) (emphasis added). Even assuming this transcription purporting to show what Mr. Meister expressed on the call were admissible, all this transcription indicates is that a real estate agent did not want to be contacted by AHRN until the lawsuits were resolved and that *some Board* contacted his firm about AHRN's lawsuit and/or persistent communications regarding referrals. Whether the reference to *the Board* means NAR also is ambiguous, and the court cannot extrapolate as much from the above transcription. Even assuming NAR contacted Mr. Meister **[*36]** or his agency about AHRN, there is nothing unlawful about sharing information regarding the lawsuit against AHRN. *See, e.g.,* *Cooper, 789 F.2d at 281* ("Indeed, the federal courts consistently have recognized that mere contacts and communications, or the mere opportunity to conspire, among antitrust defendants is insufficient evidence from which to infer an anticompetitive conspiracy."); *see also* Consol. Metal Prods., Inc. v. Am. Petroleum Inst., 846 F.2d 284, 295 n.30 (5th Cir. 1988) (noting that "a trade association is not by its nature a 'walking conspiracy[,]' its every denial of some benefit amounting to an unreasonable restraint of trade" and that the mere exchange of information, or even consciously parallel action, is insufficient to establish a conspiracy under *§ 1*).

Any reliance by AHRN on excerpts from the NAR handbook to show group boycott also is misplaced. The portion of the NAR handbook relied upon by AHRN states:

> In states other than California, Georgia, Alabama, and Florida, whenever an association is confronted with a request or demand by an individual for access to the association's multiple listing service without membership in the association, membership associations are advised that the association should immediately advise both the state association and the Member Policy Department **[*37]** of the National Association, and the recommended procedures will be provided to the member association with any other pertinent information or assistance. It is important that the state association and National Association be advised immediately if such request or demand for access to the association MLS as described is received.

(ECF NO. 167 ¶ 117; ECF No. 423-3, at 19, NAR Handbook). As NAR argues, this provision "addresses only demands by someone who is not an MLS participant for direct access to the MLS data. It has nothing to do with whether an MLS may license data to third-parties, like AHRN, who are not members of the MLS." (ECF No. 411, at 31). Thus, this excerpt from the NAR Handbook, even when considered in conjunction with all of the other evidence that AHRN offers, does not establish a common scheme designed to achieve an unlawful objective. Indeed, it is uncontested that AHRN voluntarily surrendered its participation in various MLSs for financial reasons, losing the right to obtain MLS data. (*See* ECF No. 410-11, at 3, Cardella depo.).

Finally, AHRN contends that "[t]he course of discovery has produced evidence that suggests that NAR created a program, named the Realtor Excellence **[*38]** Program (REP), to compete directly with AHRN. Given the identical purpose of the two agent rating systems, a reasonable jury could find that the creation of REP was designed to push AHRN out of the market in furtherance of the NAR led boycott." (ECF No. 422, at 37). Through its AgentMatch software system, AHRN offers performance metrics, rankings, and statistics regarding real estate agents to match consumers to the "best agent" for their needs. (*See* ECF No. 422-31, at 4-15, Cardella depo). AHRN's evidence purporting to show that the Realtor Excellence Program, a pilot program, was created by NAR as part of the group boycott to compete with AHRN's AgentMatch program is ephemeral. AHRN relies primarily on an email from Gregg Larson, the CEO of Clareity Consulting, in which he summarized his communications with Jonathan Cardella, CEO of AHRN, and referenced the AgentMatch program:

> NeighhborCity is "going for it" — making the case that anyone should be allowed to display the listing data and their agent performance rankings *and unique consumer matching will have great value to buyers and sellers (I think this is his jewel* — Realtor.com might want to look into it — maybe license or buy **[*39]** it? I can explain more about how it works — it's the best I've heard of so far).

(ECF No. 423-4, at 3) (emphasis added). Nothing about this correspondence suggests that NAR created the Realtor Excellence Program to compete with AHRN; if anything, the email shows that Gregg Larson thought that licensing or buying AgentMatch was worth considering.

Laurene Janik provided the following deposition testimony regarding how the Realtor Excellence Program came into existence:

> A: [] Mr. Romito, if I recall correctly, called me in Chicago shortly after the Anaheim meeting because he became aware of the NAR strategic plan, which was [ap]proved, I believe, at that meeting and talked about increasing the professionalism of agents. He contacted me immediately after the meeting to talk about ways that . . . NAR could perhaps, *use his program* to help achieve that objective.
>
> Q: And what was his program?

A: His program is a survey. It originally started out 12, 13 years ago where a broker, brokerage would send out — or QSC [Quality Service Certification] would send out a paper survey to a home buyer or a home seller, whoever the brokerage represented in a particular transaction; the consumer would complete that paper **[*40]** survey; send it to QSC; QSC, then, would share the results of those surveys with the broker. And the survey told the broker how well their agent performed in that particular transaction, how satisfied the consumer was with the services provided by that broker's agent in that transaction.

It has since been put online, provided there's an e-mail address provided to QSC so that QSC can e-mail the customer satisfaction survey to the buyer or the seller, whoever it was, or both, if the brokerage represented both in the transaction; the buyers and sellers complete the survey; it goes back to QSC; and, then, QSC shares those results with the brokers.

Q: Prior to 2011, November of 2011, had you had any discussions with Mr. Romito or is this the first time you had —

A: Oh, no. I've known Larry. Larry started this company, it says, 13 years ago. . . . *And Larry made me familiar with his QSC certification when he created it*. . . . So, he had all of that bundled together. He was, at least at this point in his conversation with me, willing to unbundle it and make a deal. So if the cost had come down, it was something that I was interested in. Because, based on his statistics, it showed agent behavior **[*41]** modification; it showed increase in client satisfaction on the buy and the sell side, a jump in highly satisfied consumers; and a decrease in highly dissatisfied consumers, which, to me, meant a decrease in litigation against our members and a bump in professionalism, both areas that I was responsible for as general counsel.

(ECF No. 410-4, at 13) (emphases added). This deposition testimony suggests that the idea for REP as a pilot program had nothing to do with AHRN. Indeed, Ms. Janik further testified that in her mind, there was "[n]o connection whatsoever" between the implementation of REP and the communications she was having with various individuals regarding NeighborCity. (*Id.* at 16). She stated that NeighborCity did not come up in any of her discussions with representatives of associations or brokers or agents when discussing REP.

AHRN argues in its opposition that "REP was designed to replicate the features of AgentMatch, but was marketed through NAR and as a way for members of NAR to protect their reputation." (ECF No. 422, at 38). AHRN provides no evidentiary support for this assertion, which is wholly speculative. Aside from the single email from Gregg Larson discussed above, AHRN has **[*42]** not identified anything else on the record establishing that NAR created REP as part of the group boycott to compete directly with AgentMatch. AHRN cites emails between Ms. Janik and others showing regular communications about REP, but the emails show that NAR was taking certain steps to roll out this pilot program, not that it was designed to compete with AgentMatch. (*See* ECF Nos. 422-28 through 422-30); *see, e.g., Matsushita, 475 U.S. at 588* ("[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." (*citing Monsanto, 465 U.S. at 764*)). Indeed, in one such email, Ms. Janik informs the group of a meeting time to discuss the quality service certification program and references Larry Romito, whom she credited in her deposition as having developed the program which became of interest to NAR. (*See* ECF No. 423-16); *see, e.g., Merck-Medco, 1999 U.S. App. LEXIS 21487, 1999 WL 691840, at *15* ("We must avoid the danger of an inevitable competition chilling result that would occur should a low quantum of proof be required before a party may harness the power of the Sherman Antitrust Act against facially, legitimate, procompetitive business practices.").

Based on the foregoing, all of the evidence viewed together does not **[*43]** create a reasonable inference of concerted action and group boycott. Thus, judgment will be entered in favor of NAR on the only two remaining counterclaims for violation of *Section 1* of the Sherman Act and unfair competition under Maryland law.[10]

[10] AHRN also relies on the "group boycott" theory to show an unreasonable restraint of trade by way of a "per se" violation of *Section 1* of the Sherman Act. For the reasons explained above, it has not established a group boycott, thus its antitrust claim cannot survive summary judgment.

B. Motions to Seal

The parties filed three motions to seal concerning their filings related to the motion for summary judgment. (*See* ECF Nos. 412, 424, 430). The motions are insufficient and will be denied without prejudice to the filing of properly supported motions.

The Fourth Circuit recently reminded us that:

> It is well settled that the public and press have a qualified right of access to judicial documents and records filed in civil and criminal proceedings. *See* *Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 n. 17, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980)*; *Nixon v. Warner Communications, Inc., 435 U.S. 589, 597, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978)*; *Media Gen. Operations, Inc. v. Buchanan, 417 F.3d 424, 428 (4th Cir. 2005)*. The right of public access springs from the *First Amendment* and the common-law tradition that court proceedings are presumptively open to public scrutiny. *Va. Dep't of State Police v. Wash. Post, 386 F.3d 567, 575 (4th Cir. 2004)*. "The distinction between the rights of access afforded by the common law **[*44]** and the *First Amendment* is significant, because the common law does not afford as much substantive protection to the interests of the press and the public as does the *First Amendment*." *In re United States for an Order Pursuant to 18 U.S.C. Section 2703, 707 F.3d 283, 290 (4th Cir. 2013)* (*quoting* *Va. Dep't of State Police, 386 F.3d at 575*) (internal quotation marks omitted). The common-law presumptive right of access extends to all judicial documents and records, and the presumption can be rebutted only by showing that "countervailing interests heavily outweigh the public interests in access." *Rushford [v. New Yorker]*, 846 F.2d [249,] 253 [4th Cir. 1988]. By contrast, the *First Amendment* secures a right of access "only to particular judicial records and documents," *Stone [v. Univ. of Md. Med. Sys. Corp.]*, 855 F.2d [178,] 180 [4th Cir. 1988], and, when it applies, access may be restricted only if closure is "necessitated by a compelling government interest" and the denial of access is "narrowly tailored to serve that interest," *In re Wash. Post Co., 807 F.2d 383, 390 (4th Cir. 1986)* (*quoting* *Press—Enter. Co. v. Superior Court, 464 U.S. 501, 510, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984)* (internal quotation marks omitted)).

Doe v. Public Citizen, 749 F.3d 246, 265-66 (4th Cir. 2014). In addition, Local Rule 105.11 requires the party seeking sealing to include "(a) proposed reasons supported by specific factual representations to justify the sealing and (b) an explanation why alternatives to sealing would not provide sufficient protection."

The parties in this case were advised at least once before that "[t]he burden is on the party seeking confidential treatment **[*45]** to justify it" and that the party seeking to seal documents must justify the motion, provide redacted portions of documents that can be filed if that is possible, and consider alternatives to sealing. (*See* ECF No. 355, at 41, March 10, 2014 memorandum opinion). Nevertheless, the motions to seal contain only boilerplate recitations, citing the Protective Order and the "attorney's eyes only" designations on the applicable documents. The submissions indicate that the parties seek to seal in their entirety their memoranda in connection with the motion for summary judgment and multiple exhibits. The parties have made no attempt to redact portions of the filings as opposed to sealing the documents in their entirety. *See* *Visual Mining, Inc. v. Ziegler, No. PWG 12-3227, 2014 U.S. Dist. LEXIS 21839, 2014 WL 690905, at *5 (D.Md. Feb. 21, 2014)* (denying motion to seal when the only justification was that the documents are "confidential" under a court-approved Protective Order); *Under Armour, Inc. v. Body Armor Nutrition, LLC, No. JKB-12-1283, 2013 U.S. Dist. LEXIS 157073, 2013 WL 5375444, at *9 (D.Md. Aug. 23, 2013)* (denying motions to seal where "[t]he parties . . . provided only the barest support for the motions, usually relying on the protective order issued in th[e] case" and failed to "provide 'specific factual representations' to justify **[*46]** their argument"); *Butler v. DirectSAT USA, LLC, 876 F.Supp.2d 560, 577 n.18 (D.Md. 2012)* ("In their motion to seal, Plaintiffs state only that they seek to seal the exhibits pursuant to the confidentiality order, an explanation insufficient to satisfy the 'specific factual representations' that Local Rule 105.11 requires."). Indeed, it is not at all clear why all of the memoranda and many exhibits should be sealed in their entirety from the public.

For its part, NAR states it does not necessarily agree with all of the documents it has submitted for sealing, but has moved to seal nonetheless because of *AHRN's* confidentiality designations. (*See* ECF No. 412, at 4). In response to AHRN's motion to seal - which also erroneously relies exclusively on the confidentiality and "attorney's eyes only" designations as justifications for sealing — NAR states that it agrees with AHRN's motion only insofar as it seals to keep sealed Exhibits PP, QQ, and RR (ECF Nos. 422-28 through 422-30). Citing ECF No. 405, NAR submits that "[t]he Court already has determined that Exhibits PP, QQ, and RR contain confidential information that support sealing, having previously granted NAR's motion to seal those documents." (ECF No. 425, at 2). ECF No. 405 is a paperless order approving a motion to seal, **[*47]** but it is not clear at all why Exhibits PP, QQ, and RR need to be sealed in their entirety. Based on the foregoing, the parties may resubmit their motions to seal, justifying any sealing or proposed redactions. In the meantime, the summary judgment submissions will remain temporarily under seal. If the parties do not timely renew their motions, the sealed filings will be unsealed.

Finally, the court will not undertake to determine whether any portion of this Memorandum Opinion will be filed under seal. Accordingly, the Memorandum Opinion will be filed under seal temporarily, and the parties are directed to review it and request *jointly* within fourteen (14) days from this memorandum opinion any necessary redactions that should be made before it is released to the public docket.

IV. Conclusion

For the foregoing reasons, NAR's motion for summary judgment will be granted. The three motions to seal will be denied.

A separate order will follow.

/s/ Deborah K. Chasanow

United States District Judge

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is this 6th day of July, 2015, by the United States District Court for the District of Maryland, ORDERED that:

1. The motion for summary **[*48]** judgment filed by National Association of Realtors (ECF No. 410), BE, and the same hereby IS, GRANTED;

2. Judgment BE, and the same hereby IS, ENTERED in favor of Counterclaim Defendant National Association of Realtors and against Defendant and Counterclaim Plaintiff American Home Realty Network, Inc. on counts I (Maryland unfair competition) and count III (Sherman Act *§ 1*) of the second amended counterclaims;

3. The motions to seal filed by NAR (ECF Nos. 412 & 430) BE, and the same hereby ARE, DENIED;

4. The motion to seal filed by AHRN (ECF No. 424) BE, and the same hereby IS, DENIED;

5. The parties may renew their motions to seal within fourteen (14) days in accordance with the memorandum opinion;

6. The Clerk is directed to file this Memorandum Opinion temporarily under seal and the parties will notify the court jointly within fourteen (14) days of any requested redactions from the version to be released to the public docket; and

7. The clerk will transmit copies of the Memorandum Opinion and this Order to counsel for the parties.

/s/ Deborah K. Chasanow

United States District Judge

Grewal v. Cuneo

United States District Court for the Southern District of New York

July 7, 2015, Decided; July 7, 2015, Filed

No. 13-cv-6836 (RA)

Reporter

2015 U.S. Dist. LEXIS 87755 *; 99 Empl. Prac. Dec. (CCH) P45,353

PREETPAL GREWAL, Plaintiff, -against- JONATHAN W. CUNEO, et al., Defendant.

Subsequent History: Reconsideration denied by, Motion granted by, in part, Motion denied by, in part, Dismissed by *Grewal v. Cuneo, 2016 U.S. Dist. LEXIS 8349, 2016 WL 308803 (S.D.N.Y., Jan. 25, 2016)*

Prior History: *Grewal v. Cuneo, 2014 U.S. Dist. LEXIS 69180 (S.D.N.Y., May 20, 2014)*

Core Terms

alleges, partnership, partner, Defendants', profits, termination, cases, join, motion to dismiss, representations, expropriate, cause of action, human rights law, promises, estoppel, discriminatory, induced, personal jurisdiction, unfair competition, fiduciary, purported, unjust enrichment, work environment, quotation, state-law, exercise of personal jurisdiction, fraudulent inducement, implied covenant, fee application, state and city

Counsel: **[*1]** Preetpal Grewal, Plaintiff, Pro se, New York, NY.

For Jonathan W. Cuneo, Charles J. LaDuca, Pamela Gilbert, Joel Davidow, Michael J. Flannery, Robert J. Cynkar, Sandra Cuneo, Daniel M. Cohen, Matthew E. Miller, Cuneo Gilbert & LaDuca LLP, Defendants: Ralph Michael Smith, LEAD ATTORNEY, Bowie & Jensen, LLC, Ellicott City, MD; Charles Joseph LaDuca, Cuneo Gilbert & LaDuca, LLP, Bethesda, DC.

Elizabeth Thomas, Intervenor Plaintiff, Pro se, Tomball, TX.

Judges: Ronnie Abrams, United States District Judge.

Opinion by: Ronnie Abrams

Opinion

OPINION AND ORDER

RONNIE ABRAMS, United States District Judge:

Plaintiff Preetpal Grewal, a licensed attorney, brings this *pro se* action against her former employer, Cuneo Gilbert & LaDuca LLP ("CGL"), its three named partners, Jonathan W. Cuneo, Pamela Gilbert, and Charles J. LaDuca (collectively, the "Cuneo Defendants"), as well as nine other purported partners of the firm, Michael J. Flannery, Joel Davidow, Robert J. Cynkar, Sandra Cuneo, Daniel M. Cohen, and Matthew E. Miller (collectively, the "Flannery Defendants"). In her Second Amended Complaint, Plaintiff alleges she was improperly induced to join CGL, purportedly as a partner, that Defendants systematically denied her the opportunity **[*2]** to realize the benefits promised in her employment contract, and that she was improperly and unfairly terminated from the firm in 2012. She brings claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), *42 U.S.C. § 2000e, et seq.*, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. § 1961, et seq.*, as well as a variety of state-law contract, tort, and anti-discrimination causes of action.

Before the Court is Defendants' motion to dismiss Plaintiff's Second Amended Complaint. Defendants seek dismissal of the Flannery Defendants for lack of personal jurisdiction pursuant to *Fed. R. Civ. P. 12(b)(2)*, and dismissal of all but Plaintiff's breach of contract cause of action for failure to state a claim pursuant to *Fed R. Civ. P. 12(b)(6)*. For the reasons that follow, Defendants' motion to dismiss is granted in part and denied in part.

BACKGROUND

Plaintiff, an Indian national, alleges that Jonathan Cuneo, a named partner at CGL, contacted her on March 20, 2008, to express interest in Plaintiff joining CGL, a law firm based in the District of Columbia. Second Am. Compl. ("SAC") (Dkt. 44) ¶ 21. At the time, Plaintiff was considering opening her own law practice. *Id.* ¶ 22. Several weeks later, Cuneo and Plaintiff met in New York City, where **[*3]** they discussed in more detail the possibility of Plaintiff joining CGL. *Id.* Plaintiff alleges that at that meeting Cuneo "boasted about CGL's law practice, the nature of its activities, and how successful and profitable the firm was." *Id.* ¶ 23. Cuneo allegedly "touted how much money he and his partners were making and indicated that if Plaintiff were to join the firm she, too, would enjoy a lucrative practice." *Id.*

Cuneo further "informed Plaintiff that if she joined the firm, she would be entitled to a share in the profits of any case she worked on, with an extra share for cases that she brought into the office." *Id.* ¶ 24. Following this meeting, Plaintiff was invited to CGL's District of Columbia office to meet a second time with Cuneo as well as several of the firm's partners. *Id.* ¶¶ 25-26. On the basis of this meeting, CGL extended a formal offer for Plaintiff to join the firm "on a 'trial basis' for several months, at which time '[CGL's] standard deal kicks in.'" *Id.* ¶¶ 27-28. After Plaintiff requested further information, *id.* ¶ 29, Cuneo e-mailed Plaintiff on June 18, 2008 to explain that under the "standard deal," Plaintiff "would be compensated for [client development activities] **[*4]** hourly, plus ten percent of work [she] originate[d], plus twelve percent of [her] lodestar contribution," *id.* ¶ 30. Any amounts beyond the hourly rate for client development activities were to be considered an entitlement—and not a bonus—based on the "relative value" of Plaintiff's contribution to a case. *Id.*

Plaintiff accepted Cuneo's offer by e-mail that same day, *id.* ¶ 31, and on June 30, 2008, Plaintiff began working at CGL from its New York City office, as CGL's sole New York presence, *id.* ¶ 32. Upon starting, Plaintiff was informed "she would not in fact have to complete a trial period but rather would work full time under the 'standard deal' immediately." *Id.*

According to Plaintiff, she was treated as a partner at CGL "from the beginning of her affiliation with that firm." *Id.* ¶ 33. She alleges she "regularly attended partnership lunches . . . where issues of strategy were discussed" with the Cuneo Defendants, *id.* ¶ 34, and that CGL "regularly represented to others, including multiple courts, that Plaintiff was a partner at the firm and Plaintiff believed these representations to be true." *Id.* ¶¶ 3543. Plaintiff asserts the Flannery Defendants were similarly represented as partners, *id.* ¶¶ **[*5]** 11-16, although these Defendants, in affidavits attached to Plaintiff's Second Amended Complaint, have since disavowed their status as partners, *see id.* Ex. 11.

Plaintiff nevertheless alleges that CGL—and Jonathan Cuneo in particular—"sought to nullify the promises made under" Plaintiff's employment contract with CGL. *Id.* ¶ 44. In her Second Amended Complaint, Plaintiff recounts a litany of instances in which Cuneo first encouraged Plaintiff to develop clients and cases, only to "subvert" Plaintiff's work and "expropriate" it for himself and other members of CGL. *See id.* ¶¶ 44-98. Plaintiff alleges that Cuneo repeatedly assured her "that no one at CGL would work on another attorney's idea/lead for a case without consent of the other attorney," *id.* ¶ 59, but that Cuneo frequently gave cases and clients developed by Plaintiff to other CGL attorneys, minimized the credit she received for her work, offered to pay only a small fraction of the origination and lodestar profits to which she was entitled, and refused to use clients developed by Plaintiff despite adopting her legal theories. *Id.* ¶¶ 44-98. As is necessary, the Court will address specific allegations of expropriation and subversion **[*6]** in the Discussion, *infra*.

Plaintiff also alleges that Cuneo, in addition to subverting and expropriating her case origination efforts, "repeatedly threatened and humiliated Plaintiff on the basis of her Indian nationality." *Id.* ¶ 99. For instance, she claims that Cuneo repeatedly, and in the presence of others, "mocked and denigrated Plaintiff's accent, claiming that he 'could not understand' her . . . even though Plaintiff is a native English speaker," and told her that "'we treat you like a foreigner' and that 'we never take you seriously,'" despite never making such statements to others. *Id.* ¶¶ 100-101. At one firm meeting in the summer of 2011, Plaintiff asserts that Cuneo remarked, "'we don't take this girl seriously' and 'we just treat her as a foreigner,'" admitting openly that "'we should be ashamed of ourselves' for how the firm treated Plaintiff." *Id.* ¶ 102. Similarly, in September of 2011, after Plaintiff "told Cuneo that she felt she was often treated as a foreigner and not given proper respect for that reason," Cuneo purportedly "responded, 'I have repeatedly told you that you are treated as a foreigner and that nobody takes you seriously.'" *Id.* ¶ 103. Plaintiff alleges **[*7]** that another attorney "stopped Cuneo from making any further discriminatory comments" during this meeting, and then "instructed Plaintiff to leave the room." *Id.*

By this conduct, Plaintiff claims "Cuneo created a hostile work environment by depriving Plaintiff of her opportunities and giving her work opportunities/credit of her work to other attorneys at CGL, and deliberately leaving Plaintiff out of meetings and conferences." *Id.* ¶ 104. Plaintiff further alleges that Cuneo, "with the intent to demoralize and harass Plaintiff, deliberately and intentionally ordered repeated investigations and Plaintiff was issued numerous threats," *id.* ¶ 105, including repeated threats to "Plaintiff's status as a resident of the United States as well as standing as an attorney qualified to practice in the State of New York," *id.* ¶ 106. These threats included a conversation with Cuneo in which he "implied to Plaintiff that Cuneo himself [had] gotten [an] attorney disbarred and implied that anyone who fought with Cuneo could expect a similar fate," *id.* ¶ 108, and a purportedly improper demand to see Plaintiff's Green Card, despite CGL having "no valid reason to have this information and no legal basis **[*8]** to demand it," *id.* ¶ 110. Plaintiff also alleges that CGL launched a "bogus" investigation into expenses from a client recruitment trip to India that Plaintiff took at Cuneo's request, *id.* ¶ 107, and that Davidow at one point "threatened Plaintiff that all of the antitrust clients that Plaintiff had brought into the firm were 'the firm's clients' and that if she left and took the clients with her, she would be prosecuted for ethical violations and disbarred," *id.* ¶ 109.

Plaintiff alleges that on May 7, 2012, she received a telephone call from Gilbert, who instructed Plaintiff "not to come to her office in New York." *Id.* ¶ 112. Plaintiff was informed "her office had been sealed and office equipment confiscated, and if she came to the office she would be barred from entering." *Id.* Plaintiff was then "summoned to attend a meeting" with LaDuca and Gilbert at the office of a third-party attorney, where she was told she was under investigation for purportedly ghost-writing a brief for a *pro se* litigant, Elizabeth Thomas. *Id.* ¶¶ 114, 125-26.[1] When Plaintiff asked for further information, she was told she "had better talk with" her lawyer. *Id.* ¶ 114.

At the same meeting, Plaintiff was informed she had been placed on administrative leave, and was instructed "not to have any contact with anyone at the firm, or any of the firm's clients other than the administrator," *id.* ¶ 115, and that she could not "claim any affiliation with CGL from this point forward," *id.* ¶ 116. Plaintiff alleges she was "given no rights to explain herself and no say in the decision to terminate her affiliation with the firm." *Id.* ¶ 117. Nor, Plaintiff contends, was she "given any warning," or represented by counsel. *Id.* ¶ 118. Later that day, "Plaintiff called Gilbert to confirm that her position had been terminated. Gilbert confirmed that Plaintiff no longer had a position at the firm." *Id.* ¶ 120.

According to Plaintiff, upon her dismissal from CGL, the firm launched a "groundless" investigation of her conduct and then attempted to recoup the costs of this investigation from her. *Id.* ¶¶ 124-131. Defendants' investigation "uncovered no evidence of misconduct," as, Plaintiff alleges, even "a cursory review of the case law would have established." *Id.* ¶¶ 129-130. Plaintiff contends the investigation was "simply an **[*10]** opportunity to intimidate and frighten Plaintiff in order to induce her not to vindicate her rights, and an excuse for dismissing her from the firm on a basis that would make Plaintiff, rather than CGL, appear to be at fault." *Id.* ¶ 131.

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[1] Thomas' attempts to intervene in this action **[*9]** were denied by Magistrate Judge Pitman. Dkt. 93.

In sum, Plaintiff alleges that Defendants "illegally squeezed [her] out" of CGL after inducing her to "become a partner in their firm, for the purpose of expropriating the substantial value of her interest in the firm." *Id.* ¶ 1. She contends that "Defendants illegally threatened and intimidated [her], engaged in gross acts of discrimination, violated her rights as a partner in the firm, interfered with her opportunities to obtain other work, deprived her of her means of livelihood, and unjustly enriched themselves at her expense." *Id.* Plaintiff seeks $6,000,000 in compensatory damages, as well as punitive and treble damages, an array of injunctive and equitable relief, and an accounting to determine the value of her partnership interest in CGL. *Id.* ¶ 239.

After Defendants filed the instant motion to dismiss and for partial summary judgment, Dkt. 51, Magistrate Judge Pitman issued an order indicating that Plaintiff had withdrawn the cause of action on **[*11]** which Defendants sought summary judgment and that all remaining claims were to be assessed under the motion to dismiss standard, Dkt. 89. The Court now addresses these claims.

DISCUSSION

I. Motion to Dismiss for Lack of Personal Jurisdiction

A. Legal Standard

Defendants seek dismissal of the Flannery Defendants for lack of personal jurisdiction pursuant to *Fed. R. Civ. P. 12(b)(2)*. "When responding to a *Rule 12(b)(2)* motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing that the court has jurisdiction over the defendant." *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 171 F.3d 779, 784 (2d Cir. 1999)*. Prior to discovery, this burden is met "by pleading in good faith, legally sufficient allegations of jurisdiction," a showing that "may be established solely by allegations." *Dorchester Fin. Sec., Inc. v. Banco BRJ, S.A., 722 F.3d 81, 84-85 (2d Cir. 2013)* (citation omitted). Importantly, however, a "plaintiff must plead personal jurisdiction with respect to each claim asserted." *Hanly v. Powell Goldstein, L.L.P., 290 F. App'x 435, 437 (2d Cir. 2008)* (summary order).

Because this is a federal question case in which those defendants seeking dismissal for lack of personal jurisdiction reside outside of New York, the Court must look to New York's jurisdictional rules. *Fed. R. Civ. P. 4(k)(1)*.[2] *See also* *Daimler AG v. Bauman, 134 S. Ct. 746, 753, 187 L. Ed. 2d 624 (2014)* ("Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons."). "First, we determine whether **[*12]** the defendant is subject to jurisdiction under the law of the forum state—here, New York. Second, we consider whether the exercise of personal jurisdiction over the defendant comports with the *Due Process Clause of the United States Constitution*." *Sonera Holding B.V. v. Cukurova Holding A.S., 750 F.3d 221, 224 (2d Cir.)*, *cert. denied*, *134 S. Ct. 2888, 189 L. Ed. 2d 837 (2014)*.

B. Legal Analysis

Defendants appear to concede that jurisdiction is proper over CGL and the Cuneo Defendants, but contend that the exercise of personal jurisdiction is improper as to the Flannery Defendants.

There are two possible statutory bases for the exercise of personal jurisdiction over the Flannery Defendants under New York law: *N.Y. C.P.L.R. 301*, New York's general jurisdiction statute, and *N.Y. C.P.L.R. 302*, New York's long-arm statute. Although Defendants address—at some length—whether jurisdiction is proper under *Rule 301*, Plaintiff

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[2] As to subject matter jurisdiction, federal question jurisdiction is proper under *28 U.S.C. § 1331* on the basis of Plaintiff's Title VII and RICO claims. The parties also do not dispute that diversity jurisdiction exists pursuant to *28 U.S.C. § 1332*.

contends only that jurisdiction is proper under *Rule 302*. The Court will thus address personal jurisdiction under *Rule 302* only.

Plaintiff argues that the exercise of personal jurisdiction over the Flannery Defendants is proper under *Rule 302(a)(1)*, which provides, in relevant part:

> As to a cause **[*13]** of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent:
>
> 1. transacts any business within the state or contracts anywhere to supply goods or services in the state . . . .

Plaintiff contends that personal jurisdiction over the Flannery Defendants is proper pursuant to this subsection under two distinct theories: an agency theory and an individual—or personal—theory. Pl.'s Opp. 3-8. Both theories fail as to each of the Flannery Defendants, except for Davidow, over whom jurisdiction is proper on an individual theory.

First, there is no basis for the Court's exercise of personal jurisdiction over the Flannery Defendants on an agency theory. Plaintiff argues that the Flannery Defendants are partners of CGL by estoppel, and that because CGL and "certain of its partners are concededly subject to this Court's jurisdiction, and because partners are agents of one another, the Flannery Defendants are subject to New York jurisdiction also." *Id.* 3-5.

As an initial matter, it is unclear whether the exercise of jurisdiction over a partnership establishes jurisdiction over all of its partners **[*14]** under New York law. *Compare* *Somer & Wand, P.C. v. Rotondi, 219 A.D.2d 340, 642 N.Y.S.2d 937, 939 (N.Y. App. Div. 1996)* ("[J]urisdiction over a professional corporation does not result in personal jurisdiction over the shareholders thereof, any more than does jurisdiction over a partnership result in personal jurisdiction over its partners.") *with* *Friedson v. Lesnick, No. 91 Civ. 2133 (JSM), 1992 U.S. Dist. LEXIS 2773, 1992 WL 51543, at *2 (S.D.N.Y. Mar. 9, 1992)* ("[C]ourts have personal jurisdiction over general partners if the court has jurisdiction over the partnership itself, and the lawsuit arises out of partnership affairs.") *and* *Wichita Fed. Say. and Loan Ass'n v. Comark, 586 F. Supp. 940, 943 (S.D.N.Y. 1984)* ("New York case law establishes that non-resident general partners may properly be sued in the courts of this state as a result of forum activities of a partnership.").

Ultimately, it is unnecessary to reach this question, as Plaintiff has not properly alleged that the Flannery Defendants are partners of CGL. In affidavits submitted by the Flannery Defendants and attached to Plaintiff's Second Amended Complaint, they expressly deny that they are partners. *See* SAC Ex. 11. In response, Plaintiff does not appear to contest this assertion, arguing only that the Flannery Defendants are partners by estoppel. Pl.'s Opp. 3. Under District of Columbia law, partnership by estoppel is a statutory matter. *See* *D.C. Code § 29-603.08*.[3] *Section 29-603.08* provides as follows:

> If a person, by words or conduct, purports to be a partner, **[*15]** or consents to being represented by another as a partner, in a partnership or with one or more persons not partners, the purported partner shall be liable to a person to whom the representation is made, if that person, relying on the representation, enters into a transaction with the actual or purported partnership.

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[3] The parties have not briefed choice of law as to the preliminary question of whether the Flannery Defendants and Plaintiff were CGL partners. Ordinarily, this choice of law question is resolved by reference to the partnership agreement, which typically contains a choice-of-law provision. In the absence of such an agreement, New York law provides that "the laws of the jurisdiction that govern a foreign limited liability partnership shall determine its internal affairs and the liability of partners for debts, obligations and liabilities of, or chargeable to, the foreign limited liability partnership." *N.Y. P'ship Law § 121-1502(l)*. Because CGL is a partnership organized under District **[*16]** of Columbia law, the Court will apply District of Columbia law to those questions that concern partnership affairs. The Court will apply New York law as to Plaintiff's state-law contract and tort claims, however. In their motion papers, the parties have assumed that New York law applies, which is sufficient to resolve the choice of law question in favor of New York for these claims. *See* *Krumme v. WestPoint Stevens Inc., 238 F.3d 133, 138 (2d Cir. 2000)*.

D.C. Code § 29-603.08(a). *See also* *Geier v. Conway, Homer & Chin-Caplan, P.C., 983 F. Supp. 2d 22, 35 n.7 (D.D.C. 2013)*. Thus, an injured party asserting partnership by estoppel must, in addition to showing that the other party was actually represented as a partner, demonstrate that they relied on such representations.

Plaintiff has alleged that the Flannery Defendants were represented as CGL partners. SAC ¶¶ 11-16. She also argues, in her opposition papers, that "she relied on these representations to her detriment because she believed . . . that she and others like her would be treated with the fair dealing that partners owe to one another." Pl.'s Opp. 5. This argument is unavailing. In her Second Amended Complaint, Plaintiff alleges only that she relied on the representations of CGL and the Cuneo Defendants that she was a partner, *see, e.g.*, SAC ¶¶ 35-43, not that she relied on such representations as to the Flannery Defendants. Because Plaintiff has not alleged that she relied on representations that they were partners, the Flannery Defendants are not partners by estoppel under District of Columbia law. This **[*17]** outcome would be no different under New York partnership law, which contains a nearly identical estoppel provision. *See* *N.Y. P'ship Law § 27*.

The Flannery Defendants, as employees of CGL, were indisputably agents of the firm, and their litigation work in New York is thus imputed to CGL under the clear language of *Rule 302(a)*. But because the partnership by estoppel theory does not apply to the Flannery Defendants given that they were not partners, the jurisdictional status of CGL and the Cuneo Defendants cannot be imputed to them. Jurisdiction over the Flannery Defendants is thus proper under *Rule 302(a)* only if it can be exercised on an individual basis.

The individual theory similarly provides no ground for personal jurisdiction over the Flannery Defendants—except as to Davidow. Plaintiff sufficiently alleges that each Defendant transacted business in New York through their work litigating a number of matters in Federal and State court, SAC ¶¶ 11-16, but she has not alleged—except as to Davidow—that her causes of action arise from these transactions.

Under *Rule 302(a)*, a "claim 'arises out of a defendant's transaction of business in New York when there exists 'a substantial nexus' between the business transacted and the **[*18]** cause of action sued upon." *Agency Rent A Car Sys., Inc. v. Grand Rent A Car Corp., 98 F.3d 25, 31 (2d Cir. 1996)* (quotation omitted). Unlike with the other Flannery Defendants, Plaintiff has alleged such a substantial nexus between Davidow's work in New York and her causes of action.

Plaintiff alleges "Cuneo and CGL sought to squeeze Plaintiff out of any involvement in antitrust cases" after hiring Davidow, an expert in ***antitrust law***, in March of 2011. SAC ¶ 61. According to Plaintiff, Davidow, in his role as one of the firm's lead antitrust lawyers, "deliberately excluded Plaintiff from the conference calls and meetings" regarding the so-called Auto Parts case—even though Plaintiff first developed the theory on which CGL sued. *Id.* ¶¶ 67, 69. The Auto Parts case, moreover, is among those matters litigated by Davidow in New York. *Id.* ¶ 11. Because Plaintiff has alleged that Davidow was directly involved in excluding Plaintiff from a case on which she may have been entitled to fees, the exercise of personal jurisdiction over Davidow is proper.

Otherwise, Plaintiff fails to allege a substantial nexus between the New York work of the other Flannery Defendants and her causes of action. Her Second Amended Complaint recounts decisions undertaken by the Cuneo Defendants in **[*19]** the District of Columbia, but she has not alleged any specific facts from which the Court can impute these decisions to the Flannery Defendants individually, or establish a New York nexus. Plaintiff claims only that these Defendants worked on litigation matters and attended meetings in New York. Although some of these New York litigation matters are the subject of the current litigation, nowhere does Plaintiff allege that these individual Defendants expropriated her work or otherwise engaged in the tortious conduct on which she has sued.

Because Plaintiff has not alleged that her causes of action arose out of the individual work of the Flannery Defendants in New York, excluding Davidow, the Court cannot exercise personal jurisdiction on this basis.[4] There is

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[4] Even if the Court could exercise personal jurisdiction over these Flannery Defendants on an individual basis, Plaintiffs' claims against them fail for the same reasons they ultimately fail against Davidow. *See* Discussion, *infra* Part II.

thus no statutory basis for the exercise of personal jurisdiction over these Defendants. Defendants' *Fed. R. Civ. P. 12(b)(2)* motion is denied as to Davidow, and granted as to the remaining Flannery Defendants.

II. Motion [*20] to Dismiss for Failure to State a Claim

A. Legal Standard

To survive a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," *Fed. R. Civ. P. 8(a)(2)*, and be "plausible on its face," *Bell Atl. Corp v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. In ruling on a motion to dismiss, a Court may look at any document attached to the complaint as an exhibit, as well as the allegations of the complaint itself. *See* *Fed. R. Civ. P. 10(c)*; *Dangler v. M'tr York City Off Track Betting Corp., 193 F.3d 130, 138 (2d Cir. 1999)*. Plaintiff is *pro se*, but because she is also "an experienced attorney . . . the Court is not obligated to read [her] pleadings liberally," as would otherwise be required. *Chira v. Columbia Univ. in New York City, 289 F. Supp. 2d 477, 482 (S.D.N.Y. 2003)*.

B. Legal Analysis

In her Second Amended Complaint, Plaintiff brings thirteen separate causes of action, including federal Title VII and RICO claims, as well as a variety of state-law contract and torts claims. In her opposition papers, however, Plaintiff has indicated she no longer intends to pursue her Title VII claim, or those for infliction of emotional distress, unlawful threats, and interference with contractual relations. **[*21]** Pl.'s Opp. 14 n.7. *See also* Dkt. 89.

Remaining in this action are Plaintiff's state-law claims for breach of contract (Count One), breach of the implied covenant of good faith and fair dealing (Count Two), breach of fiduciary duty (Count Three), unjust enrichment (Count Four), fraudulent inducement (Count Six), violations of state and city human rights law (Count Eight), and unfair competition (Count Ten), as well as her RICO claims (Count Thirteen). The Court will first address whether Plaintiff's state-law claims can properly be maintained against the Cuneo Defendants, before turning to the merits of these claims. It will then address Plaintiff's RICO claims.

1. Personal Liability of the Cuneo Defendants

Defendants argue that Plaintiff cannot maintain her state-law tort and contract claims against the Cuneo Defendants,[5] as they are shielded from personal liability for such claims by *District of Columbia ("D.C.") Code § 29-603.06(c)*, which provides:

> An obligation of a partnership incurred while the partnership is a limited liability partnership, whether arising in contract, tort, or otherwise, shall be solely the debt, obligation, or other liability of the partnership. A partner shall not be personally **[*22]** liable, directly or indirectly, by way of contribution or otherwise, for such a debt, obligation, or other liability solely by reason of being or so acting as a partner.

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[5] In her Second Amended Complaint, Plaintiff asserts state-law contract claims (Counts One and Two) against CGL only. SAC 34-35. In her opposition papers, however, she indicates that the Second Amended Complaint "erroneously limits" those counts to CGL, and that she intended to assert these claims against the Cuneo Defendants as well. Pl.'s Opp. 28. It is ultimately unnecessary for the Court to address this purported error, as District of Columbia partnership law bars Plaintiff from asserting either claim against the Cuneo Defendants individually, for the reasons explained below.

Plaintiff correctly notes, however, that D.C. Code § 29-604.08(b) permits actions by a partner against the partnership or another partner, including actions to enforce any rights arising under the partnership agreement. Thus, if Plaintiff was a CGL partner, she can maintain her state-law claims against the Cuneo Defendants, but if she was not, she cannot.

Under District of Columbia law, "[a] partnership is frequently described as a contract of two or more competent persons **[*23]** to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profit *and bear the loss* in certain proportions." Georgia Cas. Co. v. Hoage, 59 F.2d 870, 872 (D.C. Cir. 1932) (emphasis added). *See also* D.C. Code § 29-604.01 (b) ("Each partner shall be entitled to an equal share of the partnership profits and *shall be chargeable with a share of the partnership losses* in proportion to the partner's share of the profits.") (emphasis added). Similarly, while a "person that receives a share of the profits of a business shall be presumed to be a partner in the business," this presumption does not apply where the profits were received as "wages or other compensation to an employee." D.C. Code § 29-602.02(c)(3).

Plaintiff has properly alleged that she shared in the profits of CGL. She asserts that her initial conversations with Jonathan Cuneo about joining CGL led her to believe she "would be entitled to a share in the profits of any case she worked on, with an extra share for cases that she brought into the office." SAC ¶ 24. The purported employment offer Cuneo sent Plaintiff by e-mail on June 18, 2008 reflects this understanding, promising Plaintiff an hourly wage for client development activities, plus "ten percent of work [she] originate[d], plus twelve **[*24]** percent of [her] lodestar contribution." *Id.* ¶ 30.

Plaintiff has not properly alleged, however, that she shared in the losses of the firm, or that she had any equity at stake such that she could plausibly bear any loss. Georgia Cas. Co., 59 F.2d at 872. *Accord* Kidz Cloz, Inc. v. Officially For Kids, Inc., 320 F. Supp. 2d 164, 171 (S.D.N.Y. 2004) ("To demonstrate the existence of a partnership, a plaintiff must prove four elements: (1) the parties' sharing of profits *and losses*; (2) the parties' joint control and management of the business; (3) the contribution by each party of property, financial resources, effort, skill, or knowledge to the business; and (4) the parties' intention to be partners.") (emphasis added); Zeising v. Kelly, 152 F. Supp. 2d 335, 348 (S.D.N.Y. 2001) (finding "the requirement that there be a provision in the agreement for the sharing of profits *and losses* . . . [a]n indispensable essential of a contract of partnership.") (quotation omitted) (alterations in original) (emphasis added); Steinbeck v. Gerosa, 4 N.Y.2d 302, 151 N.E.2d 170, 178, 175 N.Y.S.2d 1 (N.Y. 1958) ("An indispensable essential of a contract of partnership or joint venture, both under common law and statutory law, is a mutual promise or undertaking of the parties to share in the profits of the business and submit to the burden of making good the losses.") (emphasis added).[6]

Indeed, that Plaintiff was paid an hourly wage for aspects of her work suggests just the opposite: she was at least partially insulated from downside risk, such that the profits promised her in good times—even if considered an entitlement and not a bonus, *id.* ¶ 30—are best classified as profits received "as wages or other compensation to an employee." D.C. Code § 29-602.02(c)(3). *Accord* N.Y. P'ship Law § 11 ("The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment: . . . (b) As wages of an employee."). Plaintiff has thus not plausibly alleged she was a partner at CGL.

Plaintiff has also not plausibly alleged she was a CGL partner by estoppel. *See* D.C. Code § 29-603.08(a). Although she has asserted both that she was represented as a partner and that she relied on those representations, *see, e.g.* SAC ¶¶ 35-43, by its plain language, the District of Columbia's estoppel provision applies only as between a person represented as a partner and a person relying on this representation. **[*26]** *See* D.C. Code § 29-603.08(a). Here, because Plaintiff is both the purported partner and the person claiming reliance, the District of Columbia's estoppel provision cannot apply. Nor can it estop the Cuneo Defendants from claiming that Plaintiff was not a partner. The District of Columbia's estoppel provision requires that the person to whom the partnership representation is made

[6] As noted in footnote 3, *supra*, the Court applies District of Columbia law to the **[*25]** internal affairs of CGL, although, as the above citations make clear, the result would remain the same under New York law.

rely on that representation when entering "into a transaction with the . . . purported partnership." *See* *D.C. Code § 29-603.08(a)*. Plaintiff, however, has not alleged that she was led to believe she would become a partner upon joining the firm, instead claiming only that she was represented as a partner once at CGL.

Because Plaintiff has not properly alleged that she was a CGL partner, she cannot bring suit against the Cuneo Defendants individually. Her state-law claims are dismissed as to each of these three Defendants, and remain only as against CGL and, where applicable, Davidow.

2. Plaintiff's Breach of Contract Claim

In Count One of her Second Amended Complaint, Plaintiff alleges that Defendants' conduct breached her employment agreement with CGL and deprived her of the benefits of that bargain. SAC ¶¶ 140-145. Defendants concede that Plaintiff has stated **[*27]** a viable claim for breach of contract as to CGL, Defs.' Mem. 3, the only party Plaintiff names in this cause of action, *see* SAC 34.

In light of the Court's finding that the Cuneo Defendants are insulated from suit and that it lacks jurisdiction over all of the Flannery Defendants but for Davidow, Davidow is the only remaining individual Defendant against whom Plaintiff could possibly assert her breach of contract claim. Plaintiff has not named Davidow in this cause of action, however, and even if she had, because her employment contract was with CGL, *Id.* ¶ 31, and because Davidow is not a CGL partner, he was not a party to the contract and cannot be held personally liable for its breach. *See Blank v. Noumair, 239 A.D.2d 534, 658 N.Y.S.2d 88, 88 (N.Y. App. Div. 1997)*. Plaintiff's breach of contract claim is dismissed as to Davidow, and remains only as to CGL.

3. Plaintiff's Breach of the Implied Covenant of Good Faith and Fair Dealing Claim

In Count Two, Plaintiff alleges that Defendants' conduct breached the implied covenant of good faith and fair dealing. (SAC ¶¶ 146-51.) This count, as with Count One, names only CGL as a Defendant.

"In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance." *511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 773 N.E.2d 496, 500, 746 N.Y.S.2d 131 (N.Y. 2002)*. This covenant "embraces **[*28]** a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Dalton v. Educ. Testing Serv., 87 N.Y.2d 384, 663 N.E.2d 289, 291, 639 N.Y.S.2d 977 (N.Y. 1995)* (quotation omitted).

The implied covenant "does no more" than this, however; "it works only to ensure that a party with whom discretion is vested does not act arbitrarily or irrationally." *Id. at 296*. "For this to occur, a party's action must directly violate an obligation that may be presumed to have been intended by the parties." *Thyroff v. Nationwide Mut. Ins. Co., 460 F.3d 400, 407-08 (2d Cir. 2006) certified question accepted, 7 N.Y.3d 837, 857 N.E.2d 528, 824 N.Y.S.2d 207 (N.Y. 2006)* and *certified question answered*, *8 N.Y.3d 283, 864 N.E.2d 1272, 832 N.Y.S.2d 873 (N.Y. 2007)* (quotation omitted). The covenant "does not extend so far as to undermine a party's general right to act on its own interests in a way that may incidentally lessen the other party's anticipated fruits from the contract." *Id. at 408*.

Indeed, "New York law is clear that the implied covenant cannot be used to create independent obligations beyond the contract." *ARI & Co. v. Regent Int'l Corp., 273 F. Supp. 2d 518, 523 (S.D.N.Y. 2003)*. Nor does "New York law . . . recognize a separate cause of action for breach of the implied covenant . . . when it is based on the same facts as the breach of contract claim," or where "the relief sought . . . is intrinsically tied to the damages allegedly resulting from the breach of **[*29]** contract." *Goldblatt v. Englander Commc'ns, L.L.C., No. 06 Civ. 3208 (RWS), 2007 U.S. Dist. LEXIS 4278, 2007 WL 148699, at *5 (S.D.N.Y. Jan. 22, 2007)*. *See also* Nat'l Gear & Piston, Inc. v. Cummins Power Sys., LLC, 861 F. Supp. 2d 344, 365 (S.D.N.Y. 2012).

Despite the limited availability of claims for breach of the implied covenant under New York law, Plaintiff has sufficiently alleged such a claim here. As alleged, Plaintiff's implied covenant claim depends on facts distinct from those underlying her claim for breach of contract. To prove the latter, Plaintiff will need to demonstrate that the cases she originated and those to which she contributed generated actual fees, and that CGL failed to pay Plaintiff a percentage of any such fees as required pursuant to the plain terms of her employment agreement. To prove the former, Plaintiff will need to demonstrate that Defendants sought to subvert and expropriate her work, that they did so in bad faith, and that—but for this subversion and expropriation—her work would have resulted in fees. Thus, the damages stemming from Plaintiff's implied covenant claim would not be "intrinsically tied to the damages allegedly resulting from the breach of contract," *Goldblatt, 2007 U.S. Dist. LEXIS 4278, 2007 WL 148699, at *5*.

Plaintiff has sufficiently alleged multiple instances of CGL partners and other attorneys acting in less than good faith, whether by taking credit themselves for clients and cases Plaintiff brought to the firm, interfering **[*30]** with Plaintiff's ability to work on key cases, or assigning other attorneys to lead litigation initially developed by Plaintiff. SAC ¶¶ 44-98. In short, she portrays CGL as a firm designed to maximize the narrow self-interest of the three named partners, and few others. Plaintiff is correct, moreover, that in similar circumstances such conduct has amounted to a viable claim for breach of the implied covenant. *See* Pl.'s Opp. 29; *Kapsis v. American Home Mortg. Servicing Inc., 923 F. Supp. 2d 430, 452 (E.D.N.Y. 2013)* ("[The implied] covenant is violated when a party promises commissions or profits and then does not act in good faith to permit such commissions or profits to be earned, thereby depriving the other party of the benefit of the bargain.").

Plaintiff has thus stated a claim for breach of the implied covenant, and Defendants' motion to dismiss this claim is denied.

4. Plaintiff's Breach of Fiduciary Duty Claim

In Count Three, Plaintiff alleges that, as partners, "Defendants owed fiduciary obligations" to her, and that they violated these obligations by "depriving her of the opportunity to develop her career . . . while expropriating [the cases she brought to CGL] for themselves." SAC ¶¶ 152-57. Under New York law, "[b]reach of fiduciary duty is a tort that arises from a violation **[*31]** of a relationship of trust and confidence." *Vione v. Tewell, 12 Misc. 3d 973, 820 N.Y.S.2d 682, 686 (N.Y. Sup. Ct. 2006)*. "In order to succeed on a cause of action to recover damages for breach of fiduciary duty, a plaintiff must do more than make allegations of unscrupulous acts." *Robert I. Gluck, M.D., LLC v. Kenneth M. Kamler, M.D., LLC, 74 A.D.3d 1167, 904 N.Y.S.2d 151, 152 (N.Y. App. Div. 2010)*. Instead, a plaintiff "must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages directly caused by the defendant's misconduct." *Id.*

Here, Plaintiff cannot show that CGL owed her a fiduciary obligation. District of Columbia partnership law does provide for a limited fiduciary relationship between and among partners, *see* *D.C. Code § 29-604.07*, but because Plaintiff was not a CGL partner, *see* Discussion, *supra*, 14-17, no such relationship was formed. New York law is no different. *See, e.g.,* *Orderline Wholesale Distribs., Inc. v. Gibbons, Green, van Amerongen, Ltd., 675 F. Supp. 122, 128 (S.D.N.Y. 1987)* ("Since . . . plaintiffs fail to make a showing sufficient to establish the existence of an enforceable . . . partnership agreement with [defendant], they also fail to make a showing sufficient to establish the existence of a fiduciary obligation to them by [defendant].").

Instead, Plaintiff was a CGL employee, and under New York law mere "employment relationships do not create fiduciary relationships." *Rather v. CBS Corp., 68 A.D.3d 49, 886 N.Y.S.2d 121, 125 (N.Y. App. Div. 2009)*. *See also* *Mendelsohn v. Ferber, 26 Misc. 3d 190, 887 N.Y.S.2d 494, 498 (N.Y. Sup. Ct. 2009)*, *aff'd*, *73 A.D.3d 1139, 903 N.Y.S.2d 427 (N.Y. App. Div. 2010)* ("Even an employer-employee **[*32]** relationship providing for the division of profits will not give rise to a fiduciary duty on the part of the employer without an agreement to also share losses.").[7] For similar reasons, there was also no fiduciary relationship between Plaintiff and Davidow, another CGL employee, as a matter of law.

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[7] Whereas the existence of a fiduciary relationship between CGL partners is a matter of internal affairs and thus a question of District of Columbia law, the existence of a fiduciary relationship between employers and employees is a question of New York law. *See* Discussion *infra* n.3.

Because even taking Plaintiff's allegations as true, no fiduciary obligation was owed to her by CGL or Davidow, Defendants' motion to dismiss this claim is granted.

5. Plaintiff's Unjust Enrichment Claim

In Count Four, Plaintiff alleges that Defendants unjustly enriched themselves at her expense. SAC ¶¶ 158-162. "The theory of unjust enrichment lies as a quasi-contract claim. It is an obligation the law creates in the absence of any agreement." *Goldman v. Metro. Life Ins. Co., 5 N.Y.3d 561, 841 N.E.2d 742, 746, 807 N.Y.S.2d 583 (N.Y. 2005)*. *See also* *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co., 70 N.Y.2d 382, 516 N.E.2d 190, 193, 521 N.Y.S.2d 653 (N.Y. 1987)* ("The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising **[*33]** out of the same subject matter. A 'quasi contract' only applies in the absence of an express agreement.") Plaintiff contends her unjust enrichment claim is nonetheless viable, arguing that it does not merely duplicate her contract claims. Pl.'s Opp. 32. This argument is unavailing.

Here, there is a written contract—a contract that expressly concerns the terms of Plaintiff's employment relationship with CGL. Because there is a contract concerning the terms of her employment, Plaintiff is not entitled to quasi-contractual relief for injuries that arose as a consequence of her employment. Plaintiff may not bring a claim for unjust enrichment, and Defendants' motion to dismiss is granted as to this claim.

6. Plaintiff's Fraudulent Inducement Claim

In Count Six, Plaintiff alleges she was fraudulently induced to join CGL—and then to remain with the firm—by repeated promises of success, but that "Defendants never intended to provide Plaintiff with the compensation to which she was entitled." SAC ¶¶ 169-74.

"[U]nder New York law [i]t is elementary that where a contract or transaction was induced by false representations, the representations and the contract are distinct and separable . . . . Thus, fraud **[*34]** in the inducement of a written contract is not merged therein so as to preclude an action for fraud." *Stewart v. Jackson & Nash, 976 F.2d 86, 88-89 (2d Cir. 1992)* (quotation omitted). In general, promissory statements as to what will be done in the future give rise only to a claim for breach of contract, whereas false representations of present fact are what give rise to a separate claim for fraudulent inducement. *See* *id. at 89* (citing *Deerfield Commc'ns Corp. v. Chesebrough-Ponds, Inc., 68 N.Y.2d 954, 502 N.E.2d 1003, 1004, 510 N.Y.S.2d 88 (N.Y. 1986))*. There is at least one exception to this rule, however: even where representations relate "to something which was to occur in the future," they may constitute false representations of present fact if the defendant "has fraudulently and positively as with personal knowledge stated that something was to be done when he knew all the time it was not to be done and that his representations were false." *Sabo v. Delman, 3 N.Y.2d 155, 143 N.E.2d 906, 908, 164 N.Y.S.2d 714 (N.Y. 1957)*; *see also* *Deerfield, 502 N.E.2d at 1004*.

Plaintiffs bear a high burden as to fraudulent inducement claims, as they are subject to the strict pleading standards of *Fed. R. Civ. P. 9(b)*. *See* *Eaves v. Designs for Fin., Inc., 785 F. Supp. 2d 229, 246 (S.D.N.Y. 2011)*. Thus, the complaint "must specify the time, place, speaker, and content of the alleged misrepresentations, explain how the misrepresentations were fraudulent and plead those events which give rise to a strong inference that the defendant[ ] had an intent to defraud, knowledge of the **[*35]** falsity, or a reckless disregard for the truth." *Cohen v. S.A.C. Trading Corp., 711 F.3d 353, 359 (2d Cir. 2013)* (alteration in original).

Plaintiff asserts that after joining CGL, Jonathan Cuneo and other Defendants induced her to remain at the firm "for more than four years . . . by repeatedly indicating how successful the firm was, how wealthy the senior partners were, and how much money Plaintiff could expect when her cases paid off." *Id.* ¶¶ 171-72. But because Plaintiff entered into only one agreement with Defendants—her initial employment agreement—these allegations add little, except insofar as they provide context for statements made prior to her joining CGL. Later actions by Defendants could not have unlawfully induced her to join the firm.

Regarding her decision to join CGL, Plaintiff alleges that Jonathan "Cuneo boasted about CGL's law practice, the nature of its activities, and how successful and profitable the firm was. Cuneo touted how much money he and his partners were making and indicated that if Plaintiff were to join the firm she, too, would enjoy a lucrative practice." SAC ¶ 23. Cuneo, she alleges, also told her that if she joined the firm, her compensation would "exceed what she could earn at a conventional firm." *Id.* ¶ 24. **[*36]** In sum, Plaintiff claims that Cuneo and other Defendants induced her to "forego other potentially lucrative opportunities by promising that she could achieve a significantly higher income doing interesting, socially valuable work at CGL. *Id.* ¶ 170. Importantly, Plaintiff also alleges that "Defendants never intended to provide Plaintiff with the compensation to which she was entitled." *Id.* ¶ 173.

Many of these statements—those relating to CGL's profitability and the lucrativeness of Cuneo's practice, for instance—are representations of present fact and thus relevant to Plaintiff's fraudulent inducement claim. Nevertheless, as Defendants contend, they are best characterized as inactionable puffery. *See, e.g., Rombach v. Chang, 355 F.3d 164, 174-75 (2d Cir. 2004)* ("'[P]uffery' or 'misguided optimism' is not actionable as fraud."); *Cellular S. Inc. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 516 F. App'x 30, 33 (2d Cir. 2013)* (citing same and affirming dismissal) (summary order).

Cuneo's comments regarding how much money Plaintiff would make if she worked at CGL, though also relevant to Plaintiff's fraudulent inducement claim, may similarly amount to mere puffery. *Sabo, 143 N.E.2d at 908*. Even if they do not, Plaintiff's allegations, while more particularized, nevertheless do not support an inference that Cuneo never intended to deliver on these promises or that he **[*37]** had a "reckless disregard for the truth" at the time of their making. *Cohen, 711 F.3d at 359*. Plaintiff thus cannot satisfy *Fed. R. Civ. P. 9(b)*'s heightened pleading standard.

It is true that Plaintiff alleges a systematic and purposeful effort to subvert and expropriate her work recruiting clients to CGL and developing novel legal theories on which to sue. She has alleged that on multiple occasions Defendants promised her work, but then cut deals that would assign the value of this work to others, unbeknownst to her, SAC ¶4 44-57; assigned other attorneys to manage cases she developed, *id.* 44 62-65; refused to give her credit for developing actionable legal theories, *id.* 4¶ 67-90; and filed lawsuits on the basis of theories she developed shortly after her termination from CGL, *id.* ¶¶ 95-98. Plaintiff, moreover, has alleged that it was Defendants—particularly the Cuneo Defendants—who benefitted from this subversion and expropriation. *Id.* 4¶ 44-98. These allegations, taken on their own, might suggest that Defendants never intended to deliver on those promises made to Plaintiff prior to her joining CGL.

But many of Plaintiff's other allegations evince no such ill intent, particularly those regarding her initial time at CGL. On her first day of work, **[*38]** for instance, Plaintiff was informed that she "would not in fact have to complete a trial period but rather would work full time under the 'standard deal' immediately," *id.* 4 32; she was "treated as a partner at CGL from the beginning," including regularly attending "partnership lunches," *id.* ¶¶ 33-34; and she was represented as a partner, and received at least some compensation as a consequence of these representations, from the beginning of her time at the firm until her termination on May 7, 2012, *see id.* 11 35-43, 217-226. Plaintiff, moreover, remained at CGL for nearly four years and departed, not over CGL's failure to fulfill Cuneo's promises to her, but because she was terminated. These allegations at least undermine Plaintiff's contention that Cuneo never intended to deliver on his promises to her.

When considered in their totality, Plaintiff's allegations do not sufficiently bolster her otherwise conclusory contention that "Defendants never intended to provide Plaintiff with the compensation to which she was entitled," *id.* 1 173, and thus do not satisfy the strict pleading standards of *Fed. R. Civ. P. 9(b)*. Defendants' motion to dismiss this claim is granted as to CGL. It is also granted as to Davidow, as Plaintiff has not alleged **[*39]** his involvement in inducing her to join the firm.

7. Plaintiff's State and City Human Rights Law Claims

Plaintiff alleges in Count Eight that Defendants discriminated against her on the basis of national origin and race in violation of New York State Human Rights Law, *N.Y. Exec. Law § 290, et seq.*, and New York City Human Rights Law, N.Y.C. Admin. Code *N.Y.C. Admin. Code § 8-101, et seq.* SAC 11 178-81. Plaintiff claims that Defendants violated each of these statutory provisions in two ways: by discharging her from CGL on the basis of her status as a member of a protected class, and by creating a hostile work environment. *Id.*

A plaintiff claiming employment discrimination need not "allege facts establishing each element of a prima facie case of discrimination to survive a motion to dismiss," and such claims are subject only to the pleading standards of *Fed. R. Civ. P. 8*. *E.E.O.C. v. Port Auth. of New York & New Jersey, 768 F.3d 247, 254 (2d Cir. 2014)*. Courts, however, look to the elements of a prima facie case for guidance in evaluating discrimination claims.

To establish a prima facie case of employment discrimination, a plaintiff must allege: "(1) [she] is a member of a protected class; (2) [she] was qualified for the position [she] held; (3) [she] suffered an adverse employment action; and (4) the adverse action took place under circumstances **[*40]** giving rise to [an] inference of discrimination." *Reynolds v. Barrett, 685 F.3d 193, 202 (2d Cir. 2012)* (setting out the framework first established by the Supreme Court in *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973))*.[8]

Similarly, to establish a hostile work environment claim, a plaintiff "must show that the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Raspardo v. Carlone, 770 F.3d 97, 114 (2d Cir. 2014)* (quotation omitted) (citing *Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993))*. Because "[i]solated instances of harassment ordinarily do not rise to this level," a plaintiff must "demonstrate either that a single incident was extraordinarily severe, or that a series of incidents were sufficiently continuous and concerted to have altered the conditions of her working environment." *Cruz v. Coach Stores, Inc., 202 F.3d 560, 570 (2d Cir. 2000)*. This is a totality of the circumstances inquiry. *Raspardo, 770 F.3d at 114*.

Defendants first argue that Plaintiff's claims under State and City Human Rights Law are **[*41]** statutorily precluded, as CGL at no time had more than four employees in New York State or New York City, as is required for an employer to fall within the ambit of these laws. Defs.' Mem. 25 (citing *N.Y. Exec. Law § 292(5)*; *N.Y.C. Admin. Code §8-102(5)*). Neither of the provisions cited by Defendants indicate that they are limited to employees within New York State or New York City, however, nor have Defendants identified any cases that stand for this proposition. Because Plaintiff has clearly alleged that she worked at CGL in New York and that CGL employed more than four employees in its interstate operations, CGL is subject to State and City Human Rights Law. Similarly, because Plaintiff has not properly alleged that she was a partner of CGL, the Court rejects Defendants' contention that Plaintiff cannot avail herself of the protection of these laws. *See* Defs.' Mem. 24. Nevertheless, Plaintiff has not met her burden as to her claim of discriminatory termination under State or City Human Rights Law.

As to her State Human Rights Law claims, Plaintiff has alleged she was a member of a protected class, that she was qualified for the position she held, and that she suffered an adverse employment action, namely, her termination **[*42]** from CGL. She has not properly alleged, however, that her termination took place under circumstances giving rise to an inference of discrimination. Her allegations, if true, suggest that Jonathan Cuneo made reprehensibly discriminatory comments related to Plaintiff's national origin, but not that discrimination played a role in her termination. Rather, as to her termination, her Second Amended Complaint mentions only that she was terminated for alleged misconduct in connection with her representation of a *pro se* litigant. SAC ¶¶ 112-31.

Plaintiff's claim of discriminatory termination is also barred under New York City Human Rights Law. Although New York City Human Rights Law is to be "construed liberally for the accomplishment of [its] uniquely broad and remedial purposes," *N.Y.C. Admin. Code §8-130*, a plaintiff must still allege that a defendant's "conduct is caused at least in part by discriminatory or retaliatory motives." *Mihalik, 715 F.3d at 113*. Because Plaintiff has not in any way linked her termination to Cuneo's discriminatory comments, she cannot satisfy even this more liberal pleading standard.

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[8] "[C]ourts in this Circuit analyze discrimination claims brought under Title VII, [and] the New York Human Rights Law . . . in the same manner." *Tappe v. Alliance Capital Mgmt., L.P., 198 F. Supp. 2d 368, 372 (S.D.N.Y. 2001)*. Since a 2005 statutory revision, however, "courts must analyze [New York City Human Rights Law] claims separately and independently from any federal and state law claims." *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc., 715 F.3d 102, 109 (2d Cir. 2013)*.

Plaintiff has, however, met her burden as to her hostile work environment claim under both State and City Human **[*43]** Rights Law. She alleges that Cuneo "repeatedly" insulted and harassed her on the basis of her national origin. SAC ¶¶ 99-104. The frequency with which these comments were made and the context in which they were delivered—in large, firm-wide meetings—support an inference that they were calculated to shame and embarrass Plaintiff, and that they altered the conditions of her work environment. The purported hostility of Plaintiff's work environment is exacerbated by CGL's alleged efforts to subvert and expropriate her work, as well as the many threats Plaintiff claims she received—including a June 27, 2012 request for her Green Card that Plaintiff claims was without "legal basis" or "valid reason." *Id.* ¶ 110.

Defendants' motion is granted as to Plaintiff's discriminatory termination claims, but denied as to Plaintiff's hostile work environment claims. Both claims are dismissed as to Davidow, however, as Plaintiff has not alleged that he made any discriminatory comments on the basis of national origin, or that any of his threats toward Plaintiff were motivated by such bias.

8. Plaintiff's Unfair Competition Claims

In Count Ten, Plaintiff alleges that Defendants unfairly competed with her by **[*44]** routinely expropriating her "hardwork/ideas/leads" for themselves, or by giving them to other CGL attorneys; by "deliberately and intentionally" filing cases on the basis of legal theories developed by Plaintiff after dismissing her from the firm; by doing so despite assurances that "no one [would] use her ideas/leads without her consent"; and by improperly keeping Plaintiff's e-mail account open, "with intent to contact potential clients and unfairly compete" after her termination. SAC ¶¶ 187-198.

"The essence of an unfair competition claim under New York law is that the defendant has misappropriated the labors and expenditures of another." *Saratoga Vichy Spring Co. v. Lehman, 625 F.2d 1037, 1044 (2d Cir. 1980)*. *See also Dior v. Milton, 9 Misc. 2d 425, 155 N.Y.S.2d 443, 451 (N.Y. Sup. Ct.) aff'd, 2 A.D.2d 878, 156 N.Y.S.2d 996 (N.Y. App. Div. 1956)* ("The general principle . . . is that commercial unfairness will be restrained when it appears that there has been a misappropriation, for the commercial advantage of one person, of a benefit or property right belonging to another.") "Central to this notion is some element of bad faith." *Saratoga Vichy Spring Co., 625 F.2d at 1044*. Courts also require that the commercial advantage or property that is misappropriated belong exclusively to the plaintiff. *See Bongo Apparel, Inc. v. Iconix Brand Grp., Inc., 18 Misc. 3d 1108(A), 856 N.Y.S.2d 22 (N.Y. Sup. Ct. 2008)*; *Miller v. Walters, 46 Misc. 3d 417, 997 N.Y.S.2d 237, 246 (N.Y. Sup. Ct. 2014)* (dismissing unfair competition claim where plaintiff sports management firm could not allege that misappropriated **[*45]** client was its property).

It is not clear, however, that the doctrine of unfair competition applies in the circumstances alleged here. Although the parties to an unfair competition claim need not be in direct competition with one another, *Dior, 155 N.Y.S.2d at 454*, Plaintiff has not cited any cases in which a viable claim has arisen between two agents of a single partnership, nor has the Court identified any such cases. Instead, the tort appears to be limited to conflicts between distinct commercial entities—two separate businesses in direct or indirect competition with one another. *See id.* (collecting cases). Even if it were possible to state a claim for unfair competition between two agents of a partnership, moreover, Plaintiff has not satisfied her burden here.

Plaintiff's Second Amended Complaint does allege considerable bad faith by CGL in the pervasive efforts by Jonathan Cuneo and other Defendants to subvert and expropriate Plaintiff's work. *See* SAC ¶¶ 44-98. She has also alleged that it was Defendants—particularly the Cuneo Defendants—who benefitted from this subversion and expropriation. *Id.* ¶¶ 44-98. Nevertheless, Plaintiff has not plausibly alleged that the clients and theories she brought to the **[*46]** firm were her property, and certainly not that these clients and theories were her *exclusive* property. Plaintiff's employment contract entitled her only to a percentage of those profits generated by the cases she originated or to which she otherwise contributed. The profits were to accrue to CGL and then be distributed to Plaintiff according to the precise terms of her employment agreement. In other words, Plaintiff was entitled—at most—to a contingent property interest in a fixed percentage of partnership profits. Thus, while CGL may have failed to pay Plaintiff the share of partnership profits to which she was entitled, it did not misappropriate property that was exclusively hers.

Defendants' motion to dismiss is thus granted as to Plaintiff's claim for unfair competition.

9. The RICO Claims

Lastly, in Count Thirteen, Plaintiff alleges that the Cuneo Defendans violated the RICO statute, and conspired to do the same. *See* 18 U.S.C. §§ 1962(a), (b) and (c), and 2. They did so, she alleges, by "falsely represent[ing] in numerous courts around the country that attorneys associated with CGL were 'partners' when the RICO Defendants and the involved attorneys knew that they were not in fact partners or members of CGL." SAC ¶ 216. **[*47]** Plaintiff also claims that the Cuneo Defendants invested the income they received from this scheme back into CGL, and that they "acquired and maintained an interest in CGL." *Id.* ¶ 235.

Plaintiff's RICO allegations fail to state a claim upon which relief can be granted. Defendants' motion to dismiss is therefore granted as to these claims.

Congress has provided a private right of action to "[a]ny person injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964. "To establish a RICO claim, a plaintiff must show: (1) a violation of the RICO statute, 18 U.S.C. § 1962; (2) an injury to business or property; and (3) that the injury was caused by the violation of Section 1962." De Falco v. Bernas, 244 F.3d 286, 305 (2d Cir. 2001) (quotation omitted). At bottom, however, all RICO claims—whether premised on a violation of Section 1962(a), (b), or (c)—require a showing that each defendant was engaged in a "pattern of racketeering activity." *See* Cruz v. FXDirectDealer, LLC, 720 F.3d 115, 120 (2d Cir. 2013) (reciting elements of a Section 1962(c) claim); Ouaknine v. MacFarlane, 897 F.2d 75, 83 (2d Cir. 1990) (reciting elements of a Section 1962(a) claim); Wood v. Inc. Vill. of Patchogue of New York, 311 F. Supp. 2d 344, 355 (E.D.N.Y. 2004) (reciting elements of a Section 1962(b) claim).

"Racketeering activity" encompasses a variety of state and federal offenses, enumerated in 18 U.S.C. § 1961(1), while a "pattern" of such activity requires at least two such predicate acts or offenses, 18 U.S.C. § 1961(5). Here, Plaintiff alleges that each of the Cuneo Defendants committed **[*48]** the following predicate acts in connection with the filing of fee applications in seven different federal court actions: obstruction of justice in violation of 18 U.S.C. § 1503; wire fraud in violation of 18 U.S.C. § 1341; and mail fraud in violation of 18 U.S.C. § 1333. Specifically, Plaintiff alleges certain CGL attorneys were represented as partners in fee applications submitted by the Cuneo Defendants, even though these attorneys were not actually partners. SAC ¶¶ 211-238. Plaintiff's allegations are insufficient.

To make out violations of the mail and wire fraud statutes, a plaintiff must allege: "(1) the existence of a scheme to defraud, (2) defendants' knowing participation in such a scheme, and (3) the use of wire or mail communications in interstate commerce in furtherance of that scheme." MLSMK Invs. Co. v. JP Morgan Chase & Co., 737 F. Supp. 2d 137, 142 (S.D.N.Y. 2010), *aff'd in part*, 431 F. App'x 17 (2d Cir. 2011), and *aff'd*, 651 F.3d 268 (2d Cir. 2011). The elements of a scheme to defraud, in turn, are: "(1) the existence of a scheme to defraud; (2) fraudulent intent on the part of the defendant; and (3) the materiality of the representations." Boritzer v. Calloway, No. 10 CIV. 6264 (JPO), 2013 U.S. Dist. LEXIS 11119, 2013 WL 311013, at *6 (S.D.N.Y. Jan. 24, 2013). Similarly, a plaintiff alleging obstruction of justice must allege, in part, "that the defendant acted with the wrongful intent or improper purpose to influence the judicial or grand jury proceeding, whether or **[*49]** not the defendant is successful in doing so—that is, that the defendant corruptly intended to impede the administration of that judicial proceeding." United States v. Quattrone, 441 F.3d 153, 170 (2d Cir. 2006) (quotation omitted).

Allegations of mail and wire fraud are subject to heightened pleading standards. *See* Fed. R. Civ. P. 9(b); Cruz, 720 F.3d at 120 n.2. Plaintiff has not met this standard. She has not properly alleged fraudulent intent on behalf of the Cuneo Defendants, nor has she properly alleged the "scheme to defraud" prerequisite to violations of the mail and wire fraud statutes, or the wrongful intent prerequisite to obstruction of justice.

Taken in its entirety, Plaintiff's Second Amended Complaint alleges only that CGL, like many firms, was comprised of what modern lawyers would refer to as equity partners—partners as defined under state partnership law—and non-equity partners, who possess the skills and qualifications necessary to command high billing rates, but who are not "partners" under state partnership law. *See, e.g.,* *In re GSC Grp., Inc., 502 B.R. 673, 735 n. 227 (Bankr. S.D.N.Y. 2013)* ("[T]wenty-first century law firms include equity partners, non-equity partners, contract partners, shareholders, associates, contract associates, counsel, of counsel, senior counsel, and the list goes on."). The Court simply cannot infer intent to defraud—or **[*50]** corrupt intent to impede judicial administration—from the disjuncture between the Flannery Defendants' disavowal of their status as partners, *see* SAC Ex. 11, and the fee applications filed by the Cuneo Defendants indicating that Plaintiff and the Flannery Defendants were partners.

In any event, Plaintiff has not properly alleged that she was injured by Defendants' purported racketeering conduct. *See* *28 U.S.C. § 1964(c)* (requiring personal injury to "business or property" as a prerequisite to a proper civil RICO action). *See also* *Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)* ("[P]laintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation."). Thus, Plaintiff's allegation that the courts approving Defendants' fee applications were injured is insufficient. And although Plaintiff has also asserted that, "[a]s a result of" these fee applications, Defendants "expropriated for themselves fees and other economic benefits properly belonging" to her, SAC ¶ 231, these injuries were not proximately caused by Defendants' alleged violations of the RICO statute. *See* *Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 462, 126 S. Ct. 1991, 164 L. Ed. 2d 720 (2006)*. ("[A] claim is cognizable under *§ 1964(c)* only if the defendant's alleged violation proximately caused the plaintiff's **[*51]** injury."); *Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)*.

Here, the economic benefits to which Plaintiff was entitled under her employment contract did not turn on her classification in fee applications; Defendants could just as easily have expropriated those benefits had they classified her as an associate or counsel. Thus, although her classification as partner may have enabled the Defendants to garner fees higher than they may otherwise have been entitled to, Plaintiff has not alleged the direct relationship between Defendants' fee applications and her conduct that RICO's proximate causation requirement demands. *Anza, 547 U.S. at 461* ("When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries.").

Because Plaintiff has not plausibly alleged that Defendants engaged in the racketeering activity prerequisite to any violation of the RICO statute, or that she was harmed within the meaning of this statute, her RICO claims are dismissed. As Plaintiff's RICO claims were the sole remaining claims pending against the Cuneo Defendants, these Defendants are now dismissed from this action.

CONCLUSION

For the reasons stated, Defendants' motion to dismiss **[*52]** is granted in part and denied in part, as follows:

- Plaintiff's RICO claims are dismissed, as are her state-law claims for breach of fiduciary duty, unjust enrichment, unfair competition, fraudulent inducement, and discriminatory termination under State and City Human Rights Law.
- Plaintiff's breach of contract, breach of the implied covenant, and hostile work environment claims under State and City Human Rights Law survive.
- Because none of these remaining claims are properly asserted against Davidow, however, he is dismissed from this action, as are the Cuneo Defendants, and the remaining Flannery Defendants.

The Clerk of Court is requested to close the motion pending at Dkt. 51, and to terminate all parties from the case but for Cuneo Gilbert & LaDuca LLP. The Court will hold a status conference in this matter on Thursday, July 30, 2015 at 10:00 a.m. No later than July 23, 2015, the parties shall submit to the Court a revised case management plan and a joint letter as to the status of discovery.

SO ORDERED.

Dated: July 7, 2015

New York, New York

/s/ Ronnie Abrams

Ronnie Abrams

United States District Judge

Kohn v. FirstHealth of the Carolinas, Inc.

Court of Appeals of North Carolina

April 22, 2015, Heard in the Court of Appeals; July 7, 2015, Filed

No. COA14-1210

Reporter

2015 N.C. App. LEXIS 533 *; 242 N.C. App. 252; 775 S.E.2d 926; 2015 WL 4081778

HARVEY D. KOHN, M.D., Plaintiff, v. FIRSTHEALTH OF THE CAROLINAS, INC., d/b/a Moore Regional Hospital, Defendant.

Notice: THIS IS AN UNPUBLISHED OPINION. PLEASE REFER TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE SOUTH EASTERN REPORTER.

PUBLISHED IN TABLE FORMAT IN THE NORTH CAROLINA COURT OF APPEALS REPORTS.

Subsequent History: Review denied by *Kohn v. Firsthealth of the Carolinas, Inc., 368 N.C. 357, 776 S.E.2d 855, 2015 N.C. LEXIS 965 (N.C., Sept. 24, 2015)*

Prior History: **[*1]** Moore County, No. 13 CVS 1147.

Kohn v. Firsthealth of the Carolinas, Inc., 229 N.C. App. 19, 747 S.E.2d 395, 2013 N.C. App. LEXIS 898 (N.C. Ct. App., 2013)

Disposition: AFFIRMED.

Core Terms

staff privileges, monopolization, accredited, motion to dismiss, residency, staff, trial court, bylaws, arbitrary and capricious, argues, residency program, summary judgment, public utility, national origin, privileges, ethnicity, training, res judicata, determinations, capricious, quotation, specialty

Counsel: Smith, James, Rowlett & Cohen, LLP, by Norman B. Smith, for Plaintiff.

Smith Moore Leatherwood LLP, by Samuel O. Southern, William R. Forstner, and Matthew Nis Leerberg, for Defendant.

Judges: STEPHENS, Judge. Judges STEELMAN and MCCULLOUGH concur. Judge Steelman concurred in this opinion prior to 30 June 2015.

Opinion by: STEPHENS

Opinion

Appeal by Plaintiff from order entered 30 June 2014 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 22 April 2015.

STEPHENS, Judge.

Plaintiff Harvey D. Kohn, M.D., ("Dr. Kohn") appeals from the trial court's order granting summary judgment to Defendant FirstHealth of the Carolinas, Inc., ("FirstHealth") on Dr. Kohn's claim that FirstHealth acted arbitrarily and capriciously in denying his application for staff privileges at Moore Regional Hospital. Dr. Kohn also argues that the trial court erred in granting FirstHealth's motion to dismiss his claims for monopolization, attempted monopolization, and discrimination on the basis of national origin and ethnicity. After thorough review, we hold that the trial court did not err and we consequently affirm its orders.

I. Facts and Procedural History

Dr. Kohn is a medical **[*2]** doctor specializing in obstetrics and gynecology ("OB/GYN"). He is a native of Canada, and he earned his medical degree from the University of Toronto Faculty of Medicine in 1972 before completing his internship and residency in OB/GYN at McMaster University in Hamilton, Ontario in 1977 and becoming a Fellow of the Royal College of Surgeons of Canada in 1978. Dr. Kohn has been continually licensed by the North Carolina State Medical Board since 31 July 1993, and he obtained his board certification from the American Board of Obstetrics and Gynecology in 2006. Dr. Kohn is an official visiting clinician at the University of North Carolina Memorial Hospital and currently holds staff privileges at Scotland Memorial Hospital in Laurinburg. Many of Dr. Kohn's patients reside in Moore County and other nearby communities, and Defendant FirstHealth's Moore Regional Hospital, which is the only secondary care hospital with full surgical specialty facilities in Moore County, is their hospital of choice.

In 1999, Dr. Kohn applied for staff privileges at Moore Regional Hospital. However, in a letter dated 3 November 1999, FirstHealth notified Dr. Kohn that it could not accept his application because **[*3]** the pre-application screening it conducted revealed that Dr. Kohn did not satisfy the provision in FirstHealth's Medical Staff Bylaws that requires all members of its medical staff to have successfully completed "a residency program in the planned practice specialty, approved by the Accreditation Council for Graduate Medical Education (ACGME)."[1] The ACGME was established in 1981 and is a "private professional organization with the responsibility for ensuring the quality of approximately 8,400 accredited residency and fellowship programs in 121 specialty and subspecialty areas of medicine" in the United States and Puerto Rico. Prior to 1981, the ACGME performed essentially the same function but was known as the Liaison Committee for Graduate Medical Education ("LCGME").[2] The Joint Commission for

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[1] We note here that there is some conflict between the record in the present case and the procedural history given in this Court's prior opinion addressing Dr. Kohn's earlier lawsuit against FirstHealth. As discussed *infra*, in *Kohn v. FirstHealth of the Carolinas, Inc., 229 N.C. App. 19, 747 S.E.2d 395 (2013)* ("*Kohn I*"), we rejected Dr. Kohn's argument that the trial court had erred in dismissing his claim that FirstHealth violated our State's public utility doctrine in denying his application for staff privilges. Our opinion in that case stated that FirstHealth "did not accept [Dr. Kohn's 1999 application for staff privileges] because he lacked certification by the American Board of Obstetrics and Gynecology." *Id. at 20, 747 S.E.2d at 396*. In the present case, although Dr. Kohn reiterates this claim, the only evidence in the record to support it is his own deposition testimony that after FirstHealth returned his 1999 application, an unidentified female employee in the hospital's medical staff office told him that the reason for his rejection was his lack of board certification. On the other hand, the record in this case does include a copy of the 3 November 1999 letter **[*5]** that FirstHealth sent Dr. Kohn which makes no reference whatsoever to board certification but instead explicitly states that his application was denied because his McMaster University residency was not accredited by the ACGME.

[2] According to FirstHealth's Medical Staff Services and Regulatory Director Jeanenne Watters, FirstHealth recognizes LCGME approval as the functional equivalent to ACGME approval, and thus "[f]or physicians who completed residency training prior to 1981 [when LCGME was renamed ACGME], our office confirms whether residency training was approved by the same body." Watters conducted a review of every physician who completed their residency before 31 December 1981 and joined Moore Regional Hospital's medical staff after the ACGME requirement was adopted in 1995. Watters found that there were a total of

Accreditation of Hospitals requires that each hospital's bylaws include qualifications for appointment to its medical staff, and for approximately 20 years, FirstHealth has relied on its ACGME requirement for granting staff privileges because, according to Moore Regional Hospital's Chief Medical Officer John F. Krahnert, Jr., it provides "an objective, neutral, and uniform measure of a physician's **[*4]** education and training and serves an important quality-assurance process by helping to ensure safe and effective patient care."

On 16 November 2010, Dr. Kohn resubmitted his hospital staff privileges application to FirstHealth. Upon receiving it, FirstHealth's Medical Staff Coordinator Fay C. Meginnis contacted McMaster University and confirmed that its **[*6]** OB/GYN residency program is not accredited by the ACGME but is instead certified by the Royal College of Canada. On 9 December 2010, Meginnis sent Dr. Kohn a letter stating that his staff privileges application had been denied because he did not "meet the minimum qualifications as stipulated in the Medical Staff Bylaws of having completed a residency program in the planned practice specialty, approved by the [ACGME]." On 11 January 2011, Dr. Kohn sent a letter protesting the denial of his application, arguing that his McMaster University residency program was equivalent to a residency approved by the ACGME, and that his residency program had been "recognized" by the ACGME so FirstHealth should consider it sufficient to satisfy its bylaws. In a letter dated 25 January 2011, Watters informed Dr. Kohn that FirstHealth interpreted the word "approved" in its bylaws to mean "accredited," rather than merely "recognized." Watters subsequently confirmed with the ACGME that it "does not accredit[,] nor has it ever accredited" McMaster University's OB/GYN residency program because "[t]he ACGME solely accredits residency programs within the United States and Puerto Rico." Additional complaints Dr. **[*7]** Kohn filed with FirstHealth led to a review of the decision to deny his application by the hospital's Credentials Committee and its Medical Executive Committee, which both agreed that Dr. Kohn did not meet the minimum standards set forth in the Medical Staff Bylaws. Moreover, the hospital's Medical Staff Bylaws Committee, Medical Executive Committee, and Board of Trustees each considered whether to amend the Medical Staff Bylaws but ultimately declined to do so.

On 19 January 2012, Dr. Kohn and two of his patients filed a complaint against FirstHealth in Moore County Superior Court asserting six causes of action, including monopolization, attempted monopolization, violation of North Carolina's public utility doctrine, combination in restraint of trade, violation of NAFTA, and arbitrary and capricious conduct. When the trial court granted FirstHealth's motion to dismiss Dr. Kohn's claims under NAFTA and North Carolina's public utility doctrine by written order entered 27 July 2012, Dr. Kohn voluntarily dismissed all remaining claims and appealed the dismissal of his public utility claim to this Court. In *Kohn I*, we affirmed the trial court's decision, reasoning that even taking Dr. Kohn's **[*8]** allegations as true, "nothing in either our General Statutes or the decisions of our Courts support[s] classifying [FirstHealth] as a public utility." 229 N.C. App. at 22, 747 S.E.2d at 397.

On 27 September 2013, Dr. Kohn filed a second complaint in Moore County Superior Court in which he reasserted his claims against FirstHealth for monopolization, attempted monopolization, and arbitrary and capricious conduct, and also added a new claim for discrimination based on national origin and ethnicity. On 18 November 2013, FirstHealth answered and moved to dismiss Dr. Kohn's second complaint. By order entered 11 February 2014, the trial court granted this motion as to the claims for monopolization, attempted monopolization, and discrimination, but denied FirstHealth's motion to dismiss Dr. Kohn's claim for arbitrary and capricious conduct. The parties filed cross-motions for summary judgment on the arbitrary and capricious conduct claim and, after a hearing held on 23 June 2014, the trial court entered an order on 30 June 2014 granting FirstHealth's motion for summary judgment and denying Dr. Kohn's motion. On 14 July 2014, Dr. Kohn gave notice of appeal to this Court. On 12 February 2015, FirstHealth filed a motion to dismiss Dr. Kohn's **[*9]** appeal as moot, which we address *infra*.

II. Analysis

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seven such physicians, each of whom "completed a residency training program approved by the ACGME, even if that was prior to the 1981 name change."

A. Arbitrary and capricious conduct

(1) FirstHealth's motion to dismiss

Before reaching the substance of Dr. Kohn's claims, we must first address FirstHealth's motion to dismiss this appeal as moot. Specifically, FirstHealth contends that Dr. Kohn has already received the only relief he is entitled to under North Carolina law. We disagree.

Section 131E-85 of our General Statues provides that

> [t]he granting or denial of privileges to practice in hospitals to physicians . . . and the scope and delineation of such privileges shall be determined by the governing body of the hospital on a non-discriminatory basis. Such determinations shall be based upon the applicant's education, training, experience, demonstrated competence and ability, and judgment and character of the applicant, and the reasonable objectives and regulations of the hospital, including, but not limited to appropriate utilization of hospital facilities, in which privileges are sought. Nothing in this Part shall be deemed to mandate hospitals to grant or deny to any such individuals or others privileges to practice in hospitals, or to offer or provide any type of care.

N.C. Gen. Stat. § 131E-85(a) (2013).

This Court has recognized that "the **[*10]** operation of a hospital, whether publicly or privately owned, is subject to State regulation." *Claycomb v. HCA-Raleigh Cmty. Hosp., 76 N.C. App. 382, 385, 333 S.E.2d 333, 335 (1985)*, *disc. review denied*, *315 N.C. 586, 341 S.E.2d 23 (1986)*. However, "the State's involvement in the operation of a hospital should extend only to the point of insuring that the community's medical needs are met." *Id. at 385, 333 S.E.2d at 335-36*. Thus, we held in *Claycomb* that because "the right to enjoy staff privileges is not absolute, but is subject to the standards and objectives set by the hospital's governing body," section 131E-85 allows for judicial review on the narrow question of whether the hospital's decision to deny staff privileges was reasonable. *Id. at 385, 333 S.E.2d at 336*; *see also* *Cameron v. New Hanover Memorial Hosp., Inc., 58 N.C. App. 414, 449, 293 S.E.2d 901, 922* (recognizing that "[n]o court should substitute its [judgment] for that of the [h]ospital [b]oard . . . which is charged with the responsibility of providing a competent staff of doctors . . . so long as staff selections are administered with fairness, geared by a rationale compatible with hospital responsibility, and unencumbered with irrelevant considerations") (citation omitted), *appeal dismissed and disc. review denied*, *307 N.C. 127, 297 S.E.2d 399 (1982)*. Accordingly, this Court's review of whether a denial of staff privileges was arbitrary, capricious or discriminatory is based on our determination of whether the hospital's decision "was: (1) not reasonably **[*11]** related to the operation of the hospital; (2) not rationally compatible with the hospital's responsibility; or (3) based on irrelevant considerations." *Claycomb, 76 N.C. App. at 386, 333 S.E.2d at 336*. If a reviewing court determines that a hospital's decision to deny an application for staff privileges was unreasonable, section 131E-85 entitles the applicant "to have his application for staff privileges reviewed and a decision, granting or denying him staff privileges, based on the other criteria provided in the statute such as his education, training, experience, demonstrated competence and . . . character." *Id.* (citation and internal quotation marks omitted).

In support of its motion to dismiss Dr. Kohn's appeal as moot, FirstHealth argues that it has already reviewed Dr. Kohn's application and rejected it twice due to his not having completed a residency accredited by the ACGME—which, as the statute requires, relates to his "education, training, [and] experience." Thus, FirstHealth contends that even if this Court were to determine that the denial of Dr. Kohn's staff privileges application was arbitrary and capricious, the terms of section 131E-85 make clear that the appropriate remedy would be for FirstHealth to review Dr. Kohn's application again, which **[*12]** FirstHealth implies would not impact the ultimate result here because FirstHealth has no intention of amending its bylaws or making an exception to them for Dr. Kohn's benefit. In short, FirstHealth argues that there is simply nothing this Court could order that would have any practical effect on Dr. Kohn's application for staff privileges, therefore rendering this appeal moot. This argument fundamentally misapprehends the function of judicial review under section 131E-85 and is wholly devoid of merit. Put simply, if this Court were to determine that FirstHealth used its ACGME-accredited residency requirement to arbitrarily and capriciously deny staff privileges to Dr. Kohn, then Dr. Kohn would be entitled to have FirstHealth reassess his application based on the terms of the statute, rather than on the basis of a requirement that this Court would have already declared unreasonable. Consequently, FirstHealth's motion to dismiss is denied.

(2) Dr. Kohn's appeal

Dr. Kohn argues first that the trial court erred in granting FirstHealth's motion for summary judgment because the denial of his application for staff privileges based on his lack of a residency accredited by the ACGME constituted arbitrary and **[*13]** capricious conduct in violation of *section 131E-85*. We disagree.

We review *de novo* a trial court's decision to grant or deny a motion for summary judgment, focusing on

> whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

Hyatt v. Mini Storage on Green, 236 N.C. App. 278, 281, 763 S.E.2d 166, 169 (2014) (citations and internal quotation marks omitted).

Dr. Kohn offers several related arguments in support of his position and their primary thrust is that FirstHealth's requirement that applicants complete a residency accredited by the ACGME is not reasonably related to the operation of the hospital and is instead based on irrelevant considerations. However, many of Dr. Kohn's arguments revolve around misstatements of fact, or law, or both, and we do not find any of them persuasive.

On the one hand, Dr. Kohn relies heavily on this Court's prior decision in *Cameron*. There, we reviewed claims by two podiatrists that the defendant hospital's decision **[*14]** to deny their applications for full staff privileges based on their inability to satisfy the requirements in the hospital's bylaws that applicants complete a one-year residency and be Fellows in the American College of Foot Surgeons, as well as board-eligible pursuant to certification from the American Board of Podiatric Surgery, was arbitrary and capricious. *58 N.C. App. at 448, 293 S.E.2d at 921*. Dr. Kohn contends that *Cameron* established that "a requirement of certification by any particular society as a mandatory prerequisite for the right of a duly licensed physician to practice his profession in a public hospital is illegal, arbitrary, capricious and beyond the jurisdiction of the governing body of the hospital." *Id. at 450, 293 S.E.2d at 922* (citation omitted). Thus, Dr. Kohn argues that FirstHealth's use of the ACGME as the basis for granting or denying staff privileges flatly violates our existing case law and ignores the *Cameron* Court's recognition that "specialty board certification or eligibility is an excellent benchmark to serve as the basis for [staff] privilege delineation." *Id. at 449-50, 293 S.E.2d at 922* (citation, internal quotation marks, and ellipsis omitted). However, Dr. Kohn's argument is fatally undermined by the fact that it utilizes selective quotations **[*15]** out of context in order to wholly mischaracterize *Cameron*'s reasoning and result. Indeed, while the quoted language Dr. Kohn emphasizes comes from a portion of the opinion that surveyed approaches adopted by other courts in different states, his argument ignores the fact that we ultimately ruled in favor of the defendant hospital based on our holding that "[i]t is not arbitrary, capricious, and discriminatory to [deny staff privileges to physicians who] have been unable to comply with the standards properly established by the [hospital]." *Id. at 452, 293 S.E.2d at 923*. This argument is without merit.

Dr. Kohn also argues that FirstHealth's ACGME-based standard is being unfairly applied to him. Specifically, Dr. Kohn complains that FirstHealth has previously made exceptions to its residency requirement but has refused to do so in his case because its accreditation committee is chaired by the head of an OB/GYN practice that competes against Dr. Kohn for patients in Moore County. In support of this argument, Dr. Kohn cites *Cowan v. Gibson, 392 S.W.2d 307 (Mo. 1965)*, *receded from by* *Egan v. St. Anthony's Med. Ctr., 244 S.W.3d 169 (Mo. 2008)*, which he contends establishes that a physician's rights are violated when he is denied staff privileges by a committee dominated by a competitor. Here again, Dr. Kohn's argument **[*16]** relies on distortions of the legal authority he cites. First, Dr. Kohn makes no mention of the fact that, until recently, *Cowan*'s holding was widely construed to stand for the proposition that, under Missouri law, "there may be no judicial review of the staffing decisions of private hospitals," *see Egan, 244 S.W.3d at 169*. Moreover, although Missouri's Supreme Court did hold that the plaintiff doctor in *Cowan* whose staff privileges were revoked due to what he alleged was a conspiracy could state a cause of action for relief, the Court made clear that the action would not be against the hospital itself but instead against individual physicians on its medical staff who, acting in their own personal professional capacities and "outside the operation and government of the hospital," undertook deliberate acts to interfere with the plaintiff's business and livelihood for their own financial gain. *392 S.W.2d at 309*. Dr. Kohn makes no similar allegations, and our review of the record compels our conclusion that *Cowan* is inapposite to the present facts.

While Dr. Kohn complains that FirstHealth has previously made exceptions and granted staff privileges to several other physicians who completed their residencies prior to 1981 when **[*17]** the ACGME was formally established, his argument overlooks the fact that in all but two of those cases, the applicant had completed a residency accredited by the ACGME's predecessor organization, the LCGME. Further, while Dr. Kohn appears to be correct in claiming that FirstHealth granted staff privileges on two occasions to physicians whose residencies were neither ACGME- nor LCGME-accredited, the record indicates that these actions resulted from inadvertent oversights that occurred in the mid-1990s and that since then, FirstHealth has consistently applied its ACGME-based requirement to all applicants for staff privileges. Finally, despite his protests that his application was rejected due to a conflict of interest with the chair of FirstHealth's accreditation committee, Dr. Kohn cites no evidence or authority to support the notion that FirstHealth's bylaws provide any degree of discretion in applying the ACGME requirement. Indeed, as already noted, the record indicates the ACGME requirement has been consistently applied to every applicant for staff privileges since before Dr. Kohn first applied for privileges in 1999.

Dr. Kohn argues further that FirstHealth's decision to deny him **[*18]** staff privileges was arbitrary and capricious because his Canadian residency is functionally equivalent to a residency accredited by the ACGME, and because many prominent American hospitals regularly grant staff privileges to Canadian-trained physicians. This argument fails because it ignores both the plain language of *section 131E-85* and the broad deference this Court affords to hospital boards in making staff privileges determinations. As our decisions in *Cameron* and *Claycomb* made clear, *section 131E-85* requires that such decisions be (1) reasonably related to the hospital's operation; (2) rationally compatible with the hospital's responsibility; and (3) not based on irrelevant considerations. We are not persuaded by Dr. Kohn's insistence that FirstHealth is basing its determinations on irrelevant considerations because a requirement that residencies be accredited by the ACGME effectively bars physicians not trained in the U.S. or Puerto Rico from obtaining staff privileges. The plain language of *section 131E-85* provides that "education, training, [and] experience" are relevant considerations in these determinations, and our review of the record confirms that the ACGME functions as an objective measure of those statutorily **[*19]** enumerated criteria that FirstHealth relies on to assure its hospital is staffed with well-trained, high-quality physicians. The gravamen of Dr. Kohn's complaint is that he would prefer that FirstHealth apply a different standard to his application, but that is not what our law requires. Therefore, because FirstHealth's residency requirement is reasonably related to the hospital's operation, rationally compatible with the hospital's responsibilities, and consistently applied based on considerations made relevant by the plain language of *section 131E-85*, we hold that the trial court did not err in granting FirstHealth's motion for summary judgment.

B. Monopolization and attempted monopolization

Dr. Kohn argues next that the trial court erred in granting FirstHealth's motion to dismiss his second complaint's claims for monopolization and attempted monopolization. We disagree.

When considering a motion to dismiss under *Rule 12(b)(6) of the Rules of Civil Procedure*,

> [t]he question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. The court must construe the complaint liberally and should **[*20]** not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would

> entitle him to relief. This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.

Leary v. N.C. Forest Prods., Inc., 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (citations and internal quotation marks omitted), *affirmed*, *357 N.C. 567, 597 S.E.2d 673 (2003)*.

Here, Dr. Kohn argues that his complaint stated a valid claim for violation of *section 75-2.1 of our General Statutes*, which makes it unlawful "for any person to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of trade or commerce in the State of North Carolina." *N.C. Gen. Stat. § 75-2.1* (2013). Specifically, in both of his complaints, Dr. Kohn has contended that FirstHealth

> has a monopoly on the provision of surgical care and other care requiring hospitalizations that extends to the entirety of Moore County, North Carolina, and beyond, on the basis of the essential facility doctrine, in that its hospital has a natural monopoly and its hospital facilities are essential for the practice of physicians and surgeons who perform medical procedures that are required to be performed **[*21]** in hospitals.

In his appellant brief, Dr. Kohn suggests that the essential facility doctrine creates an automatic and absolute duty that prohibits FirstHealth from denying admission to competitors of its existing staff members on a discriminatory basis. In support of this argument, Dr. Kohn relies heavily on an ***antitrust law*** treatise and also cites the United States Supreme Court's prior holdings in *United States v. Terminal R.R. Ass'n of St. Louis, 224 U.S. 383, 32 S. Ct. 507, 56 L.Ed. 810 (1912)* and *Associated Press v. United States, 326 U.S. 1, 65 S. Ct. 1416, 89 L.Ed. 2013 (1945)*.

However, this argument is without merit insofar as it fails to cite any controlling or relevant authority to support Dr. Kohn's claim that the essential facility doctrine applies in this case or even exists as a distinct legal concept under North Carolina law. Indeed, Dr. Kohn appears to borrow the term "essential facility" from Chapter 62 of our General Statutes, which governs public utilities. *See* *N.C. Gen. Stat. § 62-110(f1)* (2013). However, this Court's prior holding in *Kohn I* made absolutely clear that FirstHealth is not a public utility. *See* *229 N.C. App. at 21, 747 S.E.2d at 397*. Consequently, the essential facility doctrine cannot apply to the present facts. We therefore hold that the trial court did not err in dismissing Dr. Kohn's claims for monopolization and attempted monopolization.

C. Discrimination on the basis of national origin and ethnicity

Finally, Dr. Kohn argues **[*22]** that the trial court erred in granting FirstHealth's motion to dismiss his second complaint's claim for discrimination on the basis of national origin and ethnicity. We disagree.

It is well established under North Carolina law that the doctrine of *res judicata* precludes a litigant from bringing a second lawsuit in order to re-litigate issues "that were or should have been adjudicated in the prior action." *Whitacre P'ship v. Biosignia, Inc., 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004)* (citation omitted). The doctrine applies when there is: "(1) a final judgment on the merits in an earlier suit, (2) an identity of the causes of action in both the earlier and the later suit, and (3) an identity of the parties or their privies in the two suits." *Moody v. Able Outdoor, Inc., 169 N.C. App. 80, 84, 609 S.E.2d 259, 262 (2005)*. Under *res judicata*, "all matters, either fact or law, that were or should have been adjudicated in the prior action are deemed concluded." *Thomas M. McInnis & Assocs., Inc. v. Hall, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986)* (citations omitted). "[S]ubsequent actions which attempt to proceed by asserting a new legal theory or by seeking a different remedy are prohibited under the principles of *res judicata,"* *Bockweg v. Anderson, 333 N.C. 486, 494, 428 S.E.2d 157, 163 (1993)*, because "the judgment in the former action or proceeding is conclusive in the latter not only as to all matters actually litigated and determined, but also as to all matters which could properly have been litigated **[*23]** and determined in the former action or proceeding." *Fickley v. Greystone Enters., Inc., 140 N.C. App. 258, 260, 536 S.E.2d 331, 333 (2000)* (citation omitted). Therefore, "[a] party is required to bring forth the whole case at one time and will not be permitted to split the claim or divide the grounds for recovery[.]" *Rodgers Builders, Inc. v. McQueen, 76 N.C. App. 16, 23, 331 S.E.2d 726, 730 (1985)*, *disc. review denied*, *315 N.C. 590, 341 S.E.2d 29 (1986)*.

In the present case, we easily conclude that all three of the elements required to trigger the application of *res judicata* are satisfied. As to the first element, our opinion in *Kohn I* constituted a final judgment on the merits of Dr. Kohn's claim against FirstHealth under the public utility doctrine, as well as his claim for violation of NAFTA, which Dr. Kohn did not appeal after the trial court dismissed it with prejudice. As to the third element, there is an identity of parties here because both Dr. Kohn's first complaint and his present lawsuit were brought against FirstHealth.[3] The second element is also satisfied, given that Dr. Kohn's claim for discrimination on the basis of national origin and ethnicity was not included in his first action but arises from the same facts and circumstances—*i.e.*, FirstHealth's denial of his application for staff privileges—that all the claims in his first action were predicated upon. Thus, unlike **[*24]** his claims for monopolization, attempted monopolization, and arbitrary and capricious conduct, which were brought in Dr. Kohn's first action against FirstHealth but were voluntarily dismissed before the case reached a final judgment on the merits, Dr. Kohn's claim for discrimination in the present case is barred by *res judicata. See, e.g., Rodgers Builders, Inc., 76 N.C. App. at 23, 331 S.E.2d at 730*. Accordingly, we hold that the trial court did not err in granting FirstHealth's motion to dismiss Dr. Kohn's claim for discrimination on the basis of national origin and ethnicity.

AFFIRMED.

Judges STEELMAN and MCCULLOUGH concur.

Report per Rule 30(e).

Judge Steelman concurred in this opinion prior to 30 June 2015.

End of Document

[3] We note that although *Kohn I* also involved claims by two of Dr. Kohn's patients who do not appear as parties in this case, for purposes of *res judicata*, "[i]t is not necessary that precisely the same parties were plaintiffs and defendants in the two suits; provided the same subject in controversy, between two or more of the parties has been directly in issue in the former suit." *Green v. Dixon, 137 N.C. App. 305, 309, 528 S.E.2d 51, 55* (citation and internal quotation marks omitted), *affirmed per curiam*, *352 N.C. 666, 535 S.E.2d 356 (2000)*.

HM Compounding Servs. v. Express Scripts, Inc.

United States District Court for the Eastern District of Missouri, Eastern Division

July 9, 2015, Decided; July 9, 2015, Filed

No. 4:14-CV-1858 JAR

Reporter

2015 U.S. Dist. LEXIS 89062 *; 2015-2 Trade Cas. (CCH) P79,248; 2015 WL 4162762

HM COMPOUNDING SERVICES, INC, and HMX SERVICES, LLC, Plaintiffs, v. EXPRESS SCRIPTS, INC., Defendant.

Subsequent History: Motion granted by, Stay granted by *HM Compounding Servs., LLC v. Express Scripts, Inc., 2015 U.S. Dist. LEXIS 155738 (E.D. Mo., Nov. 18, 2015)*

Motion denied by *HM Compounding Servs., LLC v. Express Scripts, Inc., 2016 U.S. Dist. LEXIS 33740 (E.D. Mo., Mar. 16, 2016)*

Reconsideration denied by, Without prejudice, Motion granted by, in part, Motion denied by *HM Compounding Servs., LLC v. Express Scripts, Inc., 2016 U.S. Dist. LEXIS 60167 (E.D. Mo., May 6, 2016)*

Partial summary judgment denied by, Motion granted by, in part, Motion denied by, in part *HM Compounding Servs., LLC v. Express Scripts, Inc., 2017 U.S. Dist. LEXIS 15098 (E.D. Mo., Feb. 3, 2017)*

Later proceeding at *HM Compounding Servs., LLC v. Express Scripts, Inc., 2017 U.S. Dist. LEXIS 128374 (E.D. Mo., Aug. 14, 2017)*

Later proceeding at *HM Compounding Servs., LLC v. Express Scripts, Inc., 2018 U.S. Dist. LEXIS 69662 (E.D. Mo., Feb. 21, 2018)*

Motion granted by, in part, Motion denied by, in part *HM Compounding Servs., LLC v. Express Scripts, Inc., 2018 U.S. Dist. LEXIS 69164 (E.D. Mo., Apr. 25, 2018)*

Motion granted by, Motion granted by, in part, Motion denied by, in part, Request granted, in part, Request denied by, in part *Hm Compounding Servs. v. Express Scripts, Inc., 2018 U.S. Dist. LEXIS 183810 (E.D. Mo., Oct. 26, 2018)*

Partial summary judgment denied by, Summary judgment granted by, Motion granted by *HM Compounding Servs., LLC v. Express Scripts, Inc., 2018 U.S. Dist. LEXIS 191545 (E.D. Mo., Nov. 8, 2018)*

Costs and fees proceeding at, Motion granted by, in part *Hm Compounding Servs. v. Express Scripts, Inc., 2018 U.S. Dist. LEXIS 196667 (E.D. Mo., Nov. 19, 2018)*

Prior History: *Paduano v. Express Scripts, Inc., 55 F. Supp. 3d 400, 2014 U.S. Dist. LEXIS 151932 (E.D.N.Y., Oct. 27, 2014)*

Core Terms

compound, alleges, pharmacy, patients, medications, Provider, argues, discovery, parties, prescription drug, co-conspirators, termination, plans, reimbursed, relevant market, prescription, scheduling, anticompetitive, antitrust, motion to dismiss, benefits, prescribed, quotation, marks, district court, conspiracy, expectancy, consumers, terms, Sherman Act

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Judges: JOHN A. ROSS, UNITED STATES DISTRICT JUDGE.

Opinion by: JOHN A. ROSS

Opinion

MEMORANDUM AND ORDER

This matter is before the Court on the following motions: Defendant Express Scripts' Motion to Dismiss Plaintiffs' First Amended Complaint ("FAC") (Doc. No. 129); Defendant Express Scripts' Motion to Dissolve the Temporary Restraining Order (Doc. No. 153); Defendant Express Scripts' Motion for Temporary Stay of Discovery and Protective Order (Doc. No. 157); and Plaintiffs' Motion for Civil Contempt. (Doc. No. 169) The motions are fully briefed and ready for disposition. The Court held a hearing on the motions on April 22, 2015.

I. Background

Plaintiff HM Compounding Services, LLC, is an independent compounding pharmacy that provides customized medications to patients. Plaintiff HMX Services, LLC, is HM Compounding Services, LLC's New Jersey affiliated pharmacy. (Plaintiffs are collectively referred to herein as "HMC"). Defendant Express Scripts, Inc. ("ESI") is a prescription benefit manager ("PBM"). PBMs administer the prescription pharmaceutical portion of health care benefit programs, which are typically purchased by a **[*3]** plan sponsor. The parties' relationship is governed by a Pharmacy Provider Agreement entered into by and between ESI and Wholesale Alliance, LLC d/b/a Third Party Station on behalf of HMC (the "Provider Agreement"), pursuant to which HMC agreed to provide certain pharmacy services to ESI members in exchange for ESI's agreement to compensate HMC for those pharmacy services.

By letter dated July 22, 2014, HMC informed ESI it had become aware that ESI was directly notifying providers that they were not to continue prescribing compounded medications even if it was in the patient's best interest to receive them. Seven days later, on July 31, 2014, ESI sent HMC a "notice of immediate termination" of the Provider Agreement, effective September 1, 2014, based on alleged misrepresentations made by HMC to ESI regarding "waiver/reduction" of patients' copayments. By letter dated August 1, 2014, ESI responded to HMC's July 22, 2014 letter. In that letter, ESI did not deny making such statements to prescribing physicians; rather, it took the position that ESI "has a legal right to communicate with providers regarding benefit coverage issues." (FAC, Doc. No. 126 at ¶ 110)

HMC brought this action on **[*4]** September 10, 2014 in the Supreme Court of the State of New York, County of Nassau.[1] On September 11, 2014, the New York State Court entered a temporary restraining order (the "State Court TRO") ordering ESI to "reinstate in full force and effect nunc pro tunc" "the Network Pharmacy Agreement dated September 5, 2012, entered into by and between HMC and Wholesale Alliance TPS, LLC d/b/a/ Third Party Station on behalf of Third Party Payer ESI" (see Doc. No. 23-2 at 4 ¶ (e)), and enjoining ESI from, among other things, "refusing to process and pay claims for payment submitted by HMC for compounded medications prescribed by physicians for their patients who have prescription drug benefits administered by [ESI]." (Id. at 3 ¶ (b))

The next day ESI removed the case to the United States District Court for the Eastern District of New York. The parties consented to extend the State Court TRO until a determination of pending motions to transfer venue. On October 3, 2014, the New York District Court vacated the State Court TRO and entered a second temporary restraining order (the **[*5]** "Federal Court TRO") enjoining Express Scripts from "refusing to process and/or pay claims submitted by [HMC] for the payment of prescriptions dated on or after September 11, 2014, or for the refill of an existing refillable prescription after September 11, 2014, for compounded medications prescribed by licensed physicians for their patients, which had heretofore been covered by their insurance." (Doc. No. 70 at 3 ¶ (b)) The District Court further ordered upon agreement of the parties that the TRO remain in full force and effect until a hearing on the preliminary injunction. (Id. at 4)

On October 27, 2014, the New York District Court severed HMC's claims against ESI and transferred them to this Court. (Doc. No. 108 at 54) The New York Court ruled that that part of the Federal TRO applicable to HMC is extended until such time as the respective arbitrator hears and determines any application for injunctive relief and that any requests to revisit the terms should be directed to the appropriate arbitrator, or, with respect to ESI, the federal district court in Missouri. (Id. at 59)

On December 1, 2014, HMC filed its FAC asserting eleven causes of action against ESI:

i) a violation of the Sherman Act, *15 U.S.C. § 1*;

ii) **[*6]** a violation of New York ***Antitrust Law***, New York General Business Law § 340.1 (Donnelly Act);

iii) a claim for benefits under *ERISA § 502(a)(1)(B)*, *29 U.S.C. § 1132(a)(1)(B)*;

iv) a claim for injunctive relief under *ERISA § 502(a)(3)*, *29 U.S.C. § 1132(a)(3)*;

v) a claim for deceptive trade practices, in violation of *New York General Business Law § 349*;

vi) a claim for violation of New Jersey's "Any Willing Provider" Laws, *N.J.S.A. §§ 17B:26-2.1i*, *17B:27-46.1i*;
vii) a claim for breach of contract;
viii) a claim for breach of the implied covenant of good faith and fair dealing;
ix) a claim for tortious interference with a business expectancy;
x) a claim for declaratory relief; and
xi) a claim for preliminary and permanent injunction.

II. Discussion

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[1] The procedural history of the case is set out in the transferring court's October 27, 2014 Memorandum of Decision and Order in *Paduano v. Express Scripts, Inc., 55 F. Supp. 3d 400 (E.D.N.Y. 2014)*.

A. Motion to dismiss

ESI moves to dismiss the FAC for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)*. In considering a motion to dismiss under *Rule 12(b)(6)*, the Court must assume all the facts alleged in the complaint are true, and liberally construe the complaint in the light most favorable to the plaintiff. *Foster v. Deutsche Bank Nat'l Trust Co., 2012 U.S. Dist. LEXIS 153267, 2012 WL 5285887, at *2 (E.D. Mo. Oct. 25, 2012)* (citing *Eckert v. Titan Tire Corp., 514 F.3d 801, 806 (8th Cir. 2008))*. The allegations must be sufficient "to raise a right to relief above the speculative level," however, and the motion to dismiss must be granted if the complaint does not contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Thus, a dismissal under *Rule 12(b)(6)* should be granted "only in the unusual case in which a plaintiff includes allegations **[*7]** that show, on the face of the complaint, that there is some insuperable bar to relief." *Strand v. Diversified Collection Serv., Inc., 380 F.3d 316, 317 (8th Cir. 2004)* (quoting *Frey v. Herculaneum, 44 F.3d 667, 671 (8th Cir. 1995)* (internal quotation marks omitted)).

1. Antitrust claims[2] (Counts I-II)

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade." *15 U.S.C. § 1*.[3] Not every agreement that restrains competition violates the Sherman Act. See *Craftsmen Limousine, Inc. v. Ford Motor Co., 491 F.3d 380, 386 (8th Cir. 2007)*. Rather, the Sherman Act prohibits "only those practices that impose an unreasonable restraint on competition." Id. (quoting *Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 342-43, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)* (internal quotation marks omitted).

To establish a claim under *Section 1* of the Sherman Act, a plaintiff must demonstrate "(1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a *per se* rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce." *Reg'l Multiple Listing Serv. of Minnesota, Inc. v. Am. Home Realty Network, Inc., 9 F. Supp. 3d 1032, 1039 (D. Minn. 2014)* (quoting *Insignia Sys., Inc. v. News Am. Mktg. In-Store, Inc., 661 F. Supp. 2d 1039, 1062 (D. Minn. 2009)* (internal quotation marks omitted)). Courts are generally hesitant to dismiss antitrust actions before the parties have had an opportunity for discovery, "because the proof of illegal conduct lies largely in the hands of the alleged antitrust conspirators." *Double D Spotting Serv., Inc. v. Supervalu, Inc., 136 F.3d 554, 560 (8th Cir. 1998)* (citing *Huelsman v. Civic Ctr. Corp., 873 F.2d 1171, 1174 (8th Cir.1989))*. Nevertheless, "[t]he essential elements of a private antitrust claim must be alleged in more than vague and conclusory terms to prevent dismissal of the complaint on a defendant's *Rule 12(b)(6)* motion." *Id. at 558* (quoting *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F.2d 802, 805 (6th Cir. 1988)* (internal quotation marks omitted).

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[2] The Court notes similar claims under *sections 1* and *2* of the Sherman Act have been filed in federal district courts by independent pharmacies against various PBMs, including Medco, Caremark and ESI. See *N. Jackson Pharmacy v. Express Scripts Inc., 345 F. Supp. 2d 1279 (N.D. Ala. 2004)*; *N. Jackson Pharmacy, Inc. v. Medco Health Solutions, Inc., 345 F. Supp. 2d 1279, 2004 WL 3372978 (N.D. Ala. 2004)*; *N. Jackson Pharmacy, Inc. v. Caremark RX, Inc., 385 F. Supp. 2d 740 (N.D. Ill. 2005)*; Mike's Med. Ctr. Pharmacy v. Medco Health Solutions, Inc., No. 3:05-5108 (N.D. Cal.); Brady Enters., Inc. v. Medco Health Solutions, Inc., 2003 WL 23902806 (E.D. Pa. 2003); *Bellevue Drug Co. v. Advance PCS, 333 F. Supp. 2d 318 (E.D. Pa. 2004)*. The Judicial Panel on Multidistrict Litigation consolidated these cases and transferred them to the Eastern District of Pennsylvania in 2006. See *In re Pharm. Benefit Managers Antitrust Litig., 452 F. Supp. 2d 1352 (J.P.M.L. 2006)*.

[3] The Donnelly Act, N.Y. Gen. Bus. L. § 340, is modeled on the Sherman Act and generally construed in accordance with federal precedent. See *Menkes v. St. Lawrence Seaway Pilots' Ass'n, 269 Fed. Appx. 54, 55 n.3 (2d Cir. 2008)* (citing cases). The Court will therefore evaluate HMC's claims under the Sherman Act and the Donnelly Act together. **[*8]**

Here, HMC alleges ESI conspired "to end all coverage for compound prescription medications, and eliminate HMC and other independent compounding pharmacies as competitors in the Relevant Market" (FAC at ¶¶ 48, 124), and that this conduct constitutes both a per se and rule of reason claim under the Sherman Act. (Id. at ¶¶ 126-27)

Most antitrust claims are evaluated under **[*9]** the rule of reason. *Craftsmen Limousine, 491 F.3d at 387*; *Minnesota Ass'n of Nurse Anesthetists v. Unity Hosp., 208 F.3d 655, 659 (8th Cir. 2000)*. Under this approach, an antitrust plaintiff must show an anticompetitive effect on the relevant market. *Flegel v. Christian Hosp., Northeast-Northwest, 4 F.3d 682, 688 (8th Cir. 1993)*. Under the *per se* rule, certain types of restraints are so inherently anticompetitive that they are illegal per se, without inquiry into the reasonableness of the restraint or the harm caused. *Double D Spotting Serv., 136 F.3d at 558* (citing *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984))*. Per se treatment is applied only when the adverse impact on competition is "obvious and substantial." *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of Rhode Island, 239 F. Supp. 2d 180, 189 (D.R.I. 2003)*. ESI argues the per se rule should not be applied to HMC's antitrust claims because the conduct asserted, i.e., refusal to deal and/or boycott, is not the type with "immediately obvious" economic impacts. (Doc. No. 130 at 8-9)

A group boycott is "a narrow category of per se violation, limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor." *Minn. Nurse Anesthetists, 208 F.3d at 659* (quoting *FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 458, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986))*. HMC alleges the agreement to boycott HMC is a horizontal agreement between ESI and its co-conspirators, CVS Caremark Corporation ("CVS"), Optum Rx ("ORx") and Prime Therapeutics, LLC ("Prime") (collectively referred to as the co-conspirators)[4], all of which are PBMs and operate at the same level of the market. (FAC at **[*10]** ¶¶ 16-22, 124) In addition, ESI, CVSC, and Prime own and operate specialty pharmacies that compete with HMC and ESI and each of the co-conspirators operate mail-order pharmacies that also compete with HMC. (Id. at ¶¶ 13-19) Because PBMs manage 95 percent of all prescription drugs covered by insurance, and because ESI and the co-conspirators exercise control over more than 80 percent of the PBM market, HMC argues these firms occupy a dominant position in the prescription drug benefit market. ESI and the co-conspirators have used that power to preclude HMC from obtaining access to reimbursements from health plans and insurance for prescription medications—a supply necessary for HMC to compete. (Id. at ¶¶ 22, 115, 126(b)) Without access to insurance plans for prescription medications, HMC alleges that it and other independent compounding pharmacies will be driven out of business. (Id. at ¶ 115) HMC further alleges on information and belief that ESI and its co-conspirators' boycott is intended to channel patients to their own competing pharmacies and has resulted in anticompetitive effects in the market, including decreased output of prescription drugs, reduced consumer choice, and a decline **[*11]** in the quality of prescription drugs available to patients. (Id. at ¶ 121)

Although the question whether HMC's allegations "comprise a per se claim is normally a question of legal characterization that can often be resolved ... on a motion to dismiss or for summary judgment[,]" see *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 61 (1st Cir. 2004)*, the Court will not dismiss HMC's pro se claim at this time. See *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 104 n. 26, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)* ("Indeed, there is often no bright line separating per se from rule of reason analysis. Per se rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct."). Even if HMC fails to establish a per se violation of the Sherman Act, the question remains whether the allegedly unreasonable restraint of trade comports with the rule of reason, discussed below.

ESI raises three specific challenges to HMC's antitrust claims: (1) HMC fails to allege an unlawful agreement or conspiracy between ESI and its co-conspirators; (2) HMC fails to adequately plead injury to competition in a relevant market; and (3) HMC has not alleged **[*12]** an antitrust injury sufficient for standing. The Court will address each of these in turn.

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[4] HMC alleges ESI conspired with CVS, ORx and Prime, as well as "other individuals and entities, known and unknown," not named in the complaint. (FAC at ¶¶ 16-18, 20)

Contract, combination or conspiracy

In order to allege a conspiracy under *§ 1* of the Sherman Act, HMC must show there was concerted, as opposed to unilateral, action. *Willman v. Heartland Hosp. E., 34 F.3d 605, 610 (8th Cir. 1994)*. "The antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that [the defendant] and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)* (internal citation and quotation marks omitted). Mere allegations of parallel conduct will not suffice. *Twombly, 550 U.S. at 556-67* ("Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement[.]").

In support of its motion, ESI argues HMC has not alleged a plausible agreement or conspiracy among ESI and its purported co-conspirators. (Doc. No. 130 at 6-8) Citing Twombly, ESI contends HMC has alleged "merely parallel conduct" that could just as well be independent action. HMC responds **[*13]** that read as a whole, the FAC alleges more than enough factual matters to suggest an agreement was made to satisfy Twombly's pleading standard. (Doc. No. 142 at 5-9) The Court agrees.

Here, HMC alleges ESI and each of the co-conspirators are active members of the Pharmaceutical Care Management Association ("PCMA"), the national association that "represent[s] America's pharmacy benefit managers (PBMs)." (FAC at ¶ 56) The PCMA "facilitates communication and collaboration among leaders in the PBM industry to shape the industry's direction and explore collaborative solutions to industry issues." (Id. at ¶ 58) (internal quotation marks omitted). Executives from ESI and each of the co-conspirators serve on the PCMA's Board of Directors, and regularly met in 2013 to discuss the PBM industry and explore collaborative "solutions" to industry "issues." (Id. at ¶¶ 57-59) Membership and participation in a trade group facilitates collusion. See *Evergreen Partnering Grp. v. Pactiv Corp., 720 F.3d 33, 49 (1st Cir. 2013)*; *In re Text Messaging Antitrust Litig., 630 F.3d 622, 628 (7th Cir. 2010)*.

HMC further alleges ESI is the nation's largest PBM; CVS and ORx are the second and third largest respectively. (FAC at ¶¶ 13, 16-17) PBMs manage 95 percent of all prescription drugs covered by insurance, and ESI and the co-conspirators dominate the PBM market with **[*14]** a market share of over 80 percent. (Id. at 22) The highly concentrated nature of the PBM industry also supports an inference of conspiracy. See *Evergreen Partnering Grp., 720 F.3d at 48* (complaint adequately alleged Section 1 boycott violation with allegations that five defendants controlled 90 percent of the market and participation of at least one defendant was necessary for plaintiff to enter the market); *In re Text Messaging Antitrust Litig., 630 F.3d at 628* ("[T]he complaint in this case alleges that the four defendants sell 90 percent of U.S. text messaging services, and it would not be difficult for such a small group to agree on prices and to be able to detect 'cheating' (underselling the agreed price by a member of the group) . . . ."). See also *Starr v. Sony BMG Music Entm't, 592 F.3d 314, 323-24 (2d Cir. 2010)* (citing 7 Phillip E. Areeda and Hebert Hovenkamp, ***Antitrust Law*** at § 1431a (2d ed. 2003) (allegation that "defendants control over 80%" of the market supported inference of conspiracy); *Todd v. Exxon Corp., 275 F.3d 191, 208 (2d Cir. 2001)* ("Generally speaking, the possibility of anticompetitive collusive practices is most realistic in concentrated industries.").

In this context, HMC alleges that in 2013, ESI and its co-conspirators joined together to study the market for compound prescriptions and collectively determine how to exclude compound medicines in 2014. (FAC at ¶ 60) In 2014, ESI and the co-conspirators **[*15]** are alleged to have sent letters to prescribing physicians containing false and misleading information regarding compound medications and contacted prescribing physicians by telephone to impliedly threaten them with retaliation if they continued to prescribe compound medicines. (Id. at ¶¶ 68-69) Similar letters were sent to patients advising them that compound medications are not FDA-approved. (Id. at ¶¶ 71-72, 76) HMC further alleges ESI and the co-conspirators each required prior authorizations from physicians for compound medications that exceeded a threshold dollar amount, intentionally set to be an amount too low to cover most, if not all, compound medication claims, and then each adjusted that threshold amount to ensure that compound medication claims would categorically be denied. (Id. at ¶¶ 83-84)

Then, CVS and ESI announced new policies regarding copayments allegedly aimed at excluding compound medications within days of each other in late May and early June of 2014. (Id. at ¶¶ 87-88, 91) For example, on May 30, 2014, CVS announced that compounders must include at least two scientifically valid studies in peer-reviewed journals supporting the clinical efficacy of the additional **[*16]** ingredients, despite the lack of peer-reviewed medical literature on compound preparation and individual ingredients. (Id. at ¶ 88) On or about June 3, 2014, ESI launched its "Compound Management Solution" and a formal campaign to inform providers that it would not pay claims for compound medications. HMC alleges ESI's "Solution" will eliminate the prior authorization option for compound medications and instead "automatically reject" any claim for such medications. In addition, effective September 15, 2014, ESI eliminated coverage for 1,000 compound ingredients. (Id. at ¶¶ 90-91) Likewise, ORx informed HMC that URAC accreditation was required to provide network compounding services, despite the fact that URAC does not have an accreditation program for compounding pharmacies. (Id. at ¶ 95) These policy changes, made at or around the same time by multiple competitors, are also indicative of conspiracy. See *In re Text Messaging Antitrust Litig., 630 F.3d at 628* ("[C]omplex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason would support a plausible inference of conspiracy.") (citing *Twombly, 550 U.S. at 557 n. 4*) (internal quotation marks omitted)).

Further, CVS suspended HMC **[*17]** on June 30, 2014 — five days after ORx terminated HMC and within one month of ESI's issuance of its notice of termination to HMC. (FAC at ¶ 107-110) The timing of, and similarity between, ESI and the co-conspirators' actions following their PCMA meeting in 2013, provides a plausible relationship between the PCMA meeting and these actions.

For these reasons, the Court finds HMC has sufficiently alleged a preceding agreement to engage in concerted action. See *Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 184 (2d Cir. 2012)* ("[T]o present a plausible claim at the pleading stage, the plaintiff need not show that its allegations suggesting an agreement are more likely than not true or that they rule out the possibility of independent action, as would be required at later litigation stages such as a defense motion for summary judgment[.]").

Injury to competition in a relevant market

It is HMC's burden to define the relevant market. *Double D Spotting Serv., 136 F.3d at 560*. "The definition of the relevant market has two components—a product market and a geographic market." Id. (quoting *Bathke v. Casey's Gen. Stores, Inc., 64 F.3d 340, 345 (8th Cir. 1995)* (internal quotation marks omitted)). "The relevant product market includes all reasonably interchangeable products." Id. (citing *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997))*. The geographic market is defined by considering the "commercial realities" faced by **[*18]** consumers. Id. (citing *Bathke, 64 F.3d at 345*). "It includes the geographic area in which consumers can practically seek alternative sources of the product, and it can be defined as the market area in which the seller operates." Id. (quoting *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)* (internal quotation marks omitted)).

HMC alleges the relevant service market affected by ESI and the co-conspirator's conduct is "pharmacy services that are reimbursed by insurance, including, but not limited to, the compounding, filling, and dispensing of prescription medications." (FAC at ¶ 52) The relevant product market "is prescription drugs that are reimbursed by insurance, including, but not limited to, compounded prescription drugs" (Id.), and the relevant geographic market for activity that affects HMC is the Eastern United States, including, but not limited to, New York and New Jersey. (Id. at ¶ 53) HMC further alleges the conduct of ESI and the co-conspirators has had the effect of "unreasonably restraining, suppressing, and eliminating competition in the provision of pharmacy services and the dispensation of prescription drugs covered by insurance in all markets in which HMC did and could operate in interstate commerce." (Id. at ¶ 54)

ESI argues HMC's proposed **[*19]** relevant market fails to adequately account for comparable substitutes in the marketplace. (Doc. No. 130 at 10-11) Specifically, HMC limits the market to "prescription drugs that are reimbursed by insurance," when the reality of the marketplace is that some consumers are insured, some are not, and different consumers' insurance coverage differs depending on their health plans. (Id. at 11) ESI further argues that in an attempt to give the appearance of broader harm to the market, HMC aligns itself with unnamed "other independent compounding pharmacies." As a result, the boundaries of the relevant product market cannot be determined. (Id.)

In response, HMC argues there are material distinctions between insured and uninsured patients, including quantity and ability to pay. In other words, there are not enough uninsured patients capable of purchasing prescription medications to constitute an interchangeable source of demand. (Doc. No. 142 at 14-15) Indeed, in Stop & Shop, the court acknowledged the number of retail customers whose purchases of prescription drugs are not reimbursed by insurance "could be so small a group that foreclosure of a large percentage of reimbursed customers would still be **[*20]** fatal," but stated this would have to be proved. *373 F.3d at 67*.

There is no requirement that market definition be pled with specificity. *Cost Mgmt. Servs., Inc. v. Washington Natural Gas Co., 99 F.3d 937, 950 (9th Cir. 1996)*. An antitrust complaint therefore survives a *Rule 12(b)(6)* motion unless it is apparent from the face of the complaint that the alleged market suffers a fatal legal defect. And since the validity of the relevant market is typically a factual element rather than a legal element, alleged markets may survive scrutiny under *Rule 12(b)(6)* subject to factual testing on summary judgment or at trial. See *High Technology Careers v. San Jose Mercury News, 996 F.2d 987, 990 (9th Cir. 1993)* (holding that the market definition depends on "a factual inquiry into the commercial realities faced by consumers") (internal quotation marks omitted)). Accordingly, granting all factual inferences in HMC's favor, the Court finds HMC has sufficiently pled a relevant market.

ESI also argues HMC has not adequately pled facts explaining how ESI's allegedly anticompetitive conduct actually restrained trade or harmed consumers. In other words, HMC has not pled a market injury — only injury to itself. (Doc. No. 130 at 9-10)

The FAC alleges the conduct of ESI and the co-conspirators has had a "substantial and continuing anticompetitive effect on the Relevant Market" in the following ways:

> a) eliminating **[*21]** compounding pharmacy services and compound medications from the Relevant Market;
> b) substantially decreasing the output and/or supply of pharmaceutical services and prescription drugs in the Relevant Market;
> c) depriving patients of meaningful choice in and access to pharmaceutical services and prescription drugs in the Relevant Market;
> d) depriving patients of medically-necessary pharmaceutical services and prescription drugs in the Relevant Market;
> e) reducing or eliminating the prescription of compound medications by physicians in the Relevant Market;
> f) diverting patients away from Plaintiff HMC and other independent compounding pharmacies to Defendant ESI and the Co-conspirators' various mail-order and specialty pharmacies that are in competition with Plaintiff HMC and other independent compounding pharmacies in the Relevant Market, including, but not limited to, Accredo, Freedom Fertility Pharmacy, and Express Scripts Pharmacy, among others; and
> g) hindering innovation, price-competition, and patient choice in the delivery of pharmaceutical services and prescription drugs in the Relevant Market by imposing and maintaining high barriers to entry and participation therein.

(FAC at ¶127) **[*22]**

Allegations of anti-competitive effects sufficient to state a claim under *§ 1* of the Sherman Act include the elimination of a market competitor, a decrease in output, reduced consumer choice, and a decline in the quality of goods. See *Full Draw Prods. v. Easton Sports, Inc., 182 F.3d 745, 755 (10th Cir. 1999)* (identifying "the elimination of a competitor" as the "anticompetitive effect of the boycott" in a group boycott claim under *Section 1*); *Reg'l Multiple Listing Serv. of Minnesota, Inc. v. Am. Home Realty Network, Inc., 960 F. Supp. 2d 958, 985 (D. Minn. 2013)* ("Significant anti-competitive effects may include . . . a decrease in output, or a decline in quality.") (internal quotation marks omitted)). See also N. Jackson Pharmacy v. Express Scripts, where the court found allegations that defendants' "practices harms consumers . . . by eliminating independent pharmacists nationwide"; "defendants' anticompetitive conduct is done with the purpose and specific intent to expand . . . their stranglehold on the market of insurance reimbursed prescription drug sales"; defendants' "practices will ultimately drive independent pharmacists out of business," which will "harm competition in the marketplace," all adequately alleged anti-competitive effects under the Federal Rules' "simplified pleading standard." *345 F. Supp. 2d at 1291* (internal quotation marks omitted).

Antitrust injury

Finally, to have standing to assert **[*23]** a private damages action under federal antitrust laws, a plaintiff must allege it has suffered an antitrust injury. *Lovett v. Gen. Motors Corp., 975 F.2d 518, 520 (8th Cir. 1992)* (citations omitted). An antitrust injury is "a loss that Congress intended to prevent with the antitrust laws and that flows from the unlawfulness of the defendant's acts." Id. (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*.

In its amended complaint, HMC alleges that "[a]s a direct and proximate result of Defendant ESI and the Co-conspirators' concerted conduct, ... HMC has been and will continue to be irreparably injured and financially damaged in its business and property in that, among other things, ... HMC has suffered and will continue to suffer significant lost revenue and net profits from the substantial decrease in reimbursements from compound medicines covered by health insurance policies and plans. In addition, [HMC] has not received reimbursements for thousands of prescriptions already filled and submitted to Defendant ESI." (FAC at ¶ 128) ESI asserts this is insufficient to establish an antitrust injury required for standing. ESI argues that reimbursements for covered medications were a benefit of membership in its pharmacy provider network and that its termination of the provider agreement — not **[*24]** any alleged anticompetitive conduct — is the proximate cause of HMC's claimed injuries. (Doc. No. 130 at 13-14)

Relying on *Doctor's Hosp. of Jefferson, Inc. v. Se. Med. Alliance, Inc., 123 F.3d 301 (5th Cir. 1997)*, HMC responds that its alleged injury — financial loss caused by its exclusion from the market by group boycott — is precisely the type of injury the antitrust laws were intended to prevent. (Doc. No. 142 at 16) In Doctor's Hosp., a hospital which had been replaced by a health care plan as a provider sued the plan and the replacement hospital, alleging violations of federal and state antitrust laws. The court held the hospital established antitrust standing because standing did not require a showing of injury to competition in the marketplace. *Id. at 304-06*.

ESI replies that while injury to competition is not an element of antitrust injury in the Fifth Circuit, in the Eighth Circuit, "the requisite antitrust injury must reflect the anticompetitive effect either of the violation or of the anticompetitive acts made possible by the violation." See *In re Canadian Import Antitrust Litig., 470 F.3d 785, 791 (8th Cir. 2006)*; *Steele v. City of Bemidji, 257 F.3d 902, 906 (8th Cir. 2001)*. (Doc. No. 146 at 10) The Eighth Circuit went on to state, however, that "we also consider the causal connection between the alleged antitrust violation and harm to the plaintiff [and] the directness or indirectness of the asserted **[*25]** injury ..." *Canadian Import, 470 F.3d at 791*. Thus for purposes of a motion to dismiss, HMC has sufficiently pled an antitrust injury by asserting that ESI excluded it as a competitor from the marketplace.

In sum, after construing the allegations in the light most favorable to HMC, the Court finds HMC's amended complaint adequately alleges violations of Sherman Act. The Court likewise concludes HMC has adequately alleged claims against ESI under New York ***antitrust law***. Accordingly, ESI's motion to dismiss HMC's antitrust claims will be denied.

2. ERISA claims (Counts III-IV)

HMC asserts claims as an ERISA beneficiary for benefits under *ERISA § 502(a)(1)(B)*, *29 U.S.C. § 1132(a)(1)(B)* and for injunctive relief under *ERISA § 502(a)(3)*, *29 U.S.C. § 1132(a)(3)*. (FAC at ¶¶ 141-167) In relevant part, ERISA allows a plan participant or beneficiary to file a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." *§ 1132(a)(1)(B)*. An insured may seek an injunction or other appropriate equitable relief to enforce ERISA or the plan's provisions. See *§ 1132(a)(3)*.

ESI argues these claims should be dismissed because HMC fails to allege any terms of any ERISA plans requiring approval of payment for compound **[*26]** medications, citing *Midwest Special Surgery, P.C. v. Anthem Ins. Co., 2010 U.S. Dist. LEXIS 16403, 2010 WL 716105 (E.D. Mo. Feb. 24, 2010)*. (Doc. No. 130 at 16-18) ESI further argues that even if the health plans are ERISA plans, HMC does not have standing to assert an ERISA claim because it is neither a "participant" nor a "beneficiary" under any ERISA plan at issue, citing *Pascock Valley Hosp. v. Local 464A UFCW Welfare Reimbursement Plan, 388 F.3d 393, 400 (3d Cir. 2004)*; *Dallas Cnty. Hosp. Dist. v. Assocs. Health & Welfare Plan, 293 F.3d 282, 289 (5th Cir. 2002)*. (Id. at 20) Finally, ESI argues it is not a named plan administrator and thus not a proper ERISA defendant. (Id. at 18 n.7)

HMC responds that its claims are based on ESI's violation of ERISA claim procedures and thus does not require citation to specific plan provisions. (Doc. No. 142 at 18-20) To state a claim for violation of ERISA claim procedures, a beneficiary need only plead facts showing an ERISA administrator denied benefits in violation of the procedures set forth in *§ 1133* and 29 C.F.R. 2560.501(1)(g) governing notification of an adverse benefit determination. (Id. at 18) In addition, HMC asserts it has standing as an ERISA "beneficiary" because its patients, who are ERISA Plan participants, or the ERISA Plans themselves, designated HMC to receive benefits under the ERISA plans. (Doc. No. 142 at 21)

To establish the application of ERISA claim procedures, HMC alleges ESI "administers and manages the prescription drug benefit components" of various **[*27]** "employer and employee-organization sponsored plans that provide participants with medical benefits" and "group health plans." HMC alleges on information and belief that these plans are Employee Welfare Benefit Plans under ERISA and/or are covered by ERISA claims procedures under the Affordable Care Act, *42 U.S.C. § 300gg-19(a)(2)(A)* ("the ERISA plans"). (FAC at ¶ 142) HMC further alleges, on information and belief, that it was and is an ERISA "beneficiary" because it has the right to directly receive the benefits of its patients who are participants in the ERISA plans pursuant to the terms of those plans. (Id. at ¶ 143) Lastly, HMC alleges, on information and belief, that ESI was the plan and/or claims administrator for the prescription drug components of the ERISA Plans, either because the plan documents designated ESI as such or because ESI in fact exercised its discretion in adjudicating individual claims for prescription drug benefits under the ERISA Plans. (Id. at ¶ 147)

Allegations made "upon information and belief" may state a claim after Iqbal and Twombly; however, the claim must still be based on factual content that makes liability plausible. See *Klohs v. Wells Fargo Bank, N.A., 901 F. Supp. 2d 1253, 1259 n. 2 (D. Haw. 2012)*. Here, HMC fails to state any factual allegations which **[*28]** would clarify the grounds on which its ERISA claims are based. HMC has not identified any ERISA plan(s) or plan term(s) entitling it to payment for compound medications. See *Midwest Special Surgery, P.C. v. Anthem Ins. Cos., 2010 U.S. Dist. LEXIS 16403, 2010 WL 716105, at *3 (E.D. Mo. Feb. 24, 2010)*, where the court found plaintiff failed to allege a specific plan term conferring a benefit when the complaint sought general "reimbursement for medical services provided to Defendants' plan participants under numerous health plans which qualify as employee welfare benefit plans as defined by ERISA." *2010 U.S. Dist. LEXIS 16403, [WL] at *2*.

Further, HMC has not alleged sufficient facts regarding an assignment of benefits from either the participants or the applicable ERISA Plans to create derivative standing. HMC alleges ESI reimbursed it directly for the prescriptions it filled for patients who were ERISA Plan participants (see FAC at ¶ 144), and contends this direct payment was only possible because either the participants or the applicable ERISA Plans designated it to receive such payments in place of the plan participants themselves. (Doc. No. 142 at 21) Cf. *In re Wellpoint, Inc. Out-Of-Network "UCR" Rates Litig., 865 F. Supp. 2d 1002, 1042 (C.D. Cal. 2011)* (where the court found provider plaintiffs had ERISA standing based on allegations that "[t]o facilitate direct payments from insurers, Dr. Henry's patients **[*29]** sign a form assigning their health benefits to him before treatment[,]" and that "Dr. Peck ... obtained assignments from his patients, through which he was paid directly by WellPoint for Providing Healthcare to its insureds.") (internal quotation marks omitted).

Because HMC fails to state any factual allegations which would clarify the grounds on which its ERISA claims are based, these claims will be dismissed without prejudice.

3. New York Deceptive Trade Practices Act (Count V)

New York's General Business Law § 349 is a consumer protection statute making deceptive acts or practices in the conduct of business unlawful. To state a claim under § 349, a plaintiff must allege: (1) the act or practice was consumer-oriented; (2) the act or practice was misleading in a material way; and (3) the plaintiff was injured as a result. *Pelman ex rel. Pelman v. McDonald's Corp., 396 F. Supp. 2d 439, 444 (S.D.N.Y. 2005)* (internal citations omitted). Further, where there is a simultaneous claim for breach of contract, a plaintiff must plead losses "independent of the loss caused by the alleged breach of contract." *Spagnola v. Chubb Corp., 574 F.3d 64, 74 (2d Cir. 2009)*.

ESI argues this claim must be dismissed because HMC does not plead materially misleading conduct or significant public harm. (Doc. No. 130 at 21-24) After drawing all reasonable inferences in HMC's favor, the Court **[*30]** finds HMC has presented a sufficient factual basis to state a claim for violation of GBL § 349.

First, HMC sufficiently alleges the act or practice was consumer-oriented. HMC alleges ESI and its co-conspirators contacted patients directly by letter to inform them that their compound medicines would no longer be covered by their prescription benefit policies and included misleading statements about those medications in those letters, namely that such medications were not FDA-approved for a specific condition. (FAC at ¶¶ 70-71, 73-78) Second, HMC sufficiently alleges this action was misleading in a material respect in that ESI misled patients and doctors into believing that compound drugs are unsafe and not medically necessary or appropriate treatments, while omitting the fact that compound drugs are specifically exempt from the FDA approval process and appropriate when prescribed a doctor. (Id.) Finally, HMC alleges it has suffered injury including, "inter alia, payments for prescription drugs that should be covered under patients' health insurance policies and/or plans." (Id. at ¶ 174) HMC has also pled ESI's violation of § GBL 349 "deprived patients — including New York residents/consumers **[*31]** — of access to medically necessary compound medications," a loss independent of the loss caused by the alleged breach of contract. Accordingly, ESI's motion to dismiss this claim will be denied.

4. New Jersey "Any Willing Provider" Laws (Count VI)

Generally, any willing provider ("AWP") laws provide a legal recourse to excluded providers and provide people with more selection and freedom to choose their health provider. *Am. Drug Stores, Inc. v. Harvard Pilgrim Health Care, Inc., 973 F. Supp. 60, 62 (D. Mass. 1997)* (citing William J. Bahr, Comment, Although Offering More Freedom to Choose, "Any Willing Provider" Legislation is the Wrong Choice, *45 U. Kan. L. Rev. 557, 570 (1997)*).

In 1994, New Jersey enacted an AWP law which provides that a pharmacy cannot be excluded from an HMO if it "accepts the terms" of the HMO. "[N]o pharmacy or pharmacist shall be denied the right to participate as a preferred provider or as a contracting provider under the same terms and conditions currently applicable to all other preferred or contracting providers . . . provided the pharmacy or pharmacist is registered . . . and accepts the terms and conditions of the policy." See *N.J.S.A. §§ 17B:26-2.1i*, *17B:27-46.1i*.

HMC alleges ESI's improper termination of HMC from its networks without cause, and the provisions of the Agreement providing for such termination without cause, **[*32]** violate New Jersey's AWP law. (FAC at ¶¶ 178, 183) ESI argues this claim should be dismissed because the law does not give rise to a private right of action. (Doc. No. 130 at 24-26)

The precedent concerning AWP laws is limited. However, in *Trilogy Health Care, LLC v. Medco Health Solutions, Inc., 2013 U.S. Dist. LEXIS 129385, 2013 WL 4832708, at *2 (D.N.J. Sept. 10, 2013)*, the court was not persuaded by a pharmacy's argument that a pharmacy benefits manager's discretion to terminate it under a Provider Agreement was limited by AWP laws in the various states in which the pharmacy was licensed. The court in Trilogy went on to find the pharmacy had not offered "even a colorable argument" that a particular AWP statute gives rise to a private right of action against a PBM rather than an insurer. Id. Accordingly, the Court will dismiss this claim.

5. Breach of contract (Count VII)

To state a claim for breach of contract, a plaintiff must plead the traditional elements of formation, performance, breach and damages. See *Gen. Mills Operations, LLC v. Five Star Custom Foods, Ltd., 789 F. Supp. 2d 1148, 1155 (D. Minn. 2011)*. Here, HMC alleges ESI breached the Provider Agreement by terminating it without cause and failing to provide it with proper notice or opportunity to cure pursuant to Appendix A of the Provider Manual. (FAC at ¶¶ 186-189) HMC further alleges that as a result of ESI's termination without cause, proper notice **[*33]** or opportunity to cure, HMC has suffered damages, including "lost revenue and net profits from the substantial decrease in reimbursements for compound prescription medications covered by health insurance policies and/or plans, the inability to locate alternative revenue sources to replace (or partially replace) the substantial revenue lost from ESI's improper termination of the Agreement, and inability to recover reimbursements for thousands of prescriptions already filled and submitted to [ ] ESI." (Id. at ¶ 190)

ESI argues this claim should be dismissed because it rests on a provision of the Provider Agreement not at issue in this dispute. Specifically, HMC is taking the position that ESI breached a provision of the Provider Agreement, which, according to HMC's allegations, does not apply to ESI's termination of HMC because the Agreement allows for termination without cause on 30 days' notice, which ESI provided. (Doc. No. 130 at 27; Doc. No. 146 at 15) The Court is not reviewing the merits of the claim at this stage of the proceedings. These are matters to be determined by the evidence. The Court finds Count VII is sufficiently pled.

6. Breach of the implied covenant of good faith [*34] and fair dealing (Count VIII)

Related to the breach of contract claim is the claim that ESI breached the implied covenants of good faith and fair dealing. (See FAC at ¶ 193) ESI argues this claim must be dismissed because like the claim for breach of contract, HMC fails to identify an operative provision in the Provider Agreement. (Doc. No. 130 at 28-29) Again, the Court is not reviewing the merits of the claim at this stage of the proceedings. The Court finds Count VIII is sufficiently pled.

7. Tortious interference with a business expectancy (Count IX)

To state a claim for tortious interference with a business expectancy under Missouri law, the following elements must be pled and proved: "(1) a contract or valid business expectancy, (2) defendant's knowledge of the contract or relationship, (3) an intentional interference by the defendant inducing or causing a breach of the contract or relationship, (4) absence of justification and (5) damages." *Wash Solutions, Inc. v. PDQ Manuf., Inc., 395 F.3d 888, 895 (8th Cir. 2005)* (citing Serv. Vending Co. v. Wal—Mart Stores, Inc., *93 S.W.3d 764, 769 (Mo. Ct. App. 2002))*.[5] "In general, conduct lacks justification when a defendant has employed 'improper means' to further the defendant's interests to the detriment of the plaintiff." *Ozark Emp't Specialists, Inc. v. Beeman, 80 S.W.3d 882, 896 (Mo. Ct. App. 2002)* (citation omitted). Improper means are those **[*35]** that are independently wrongful, such as threats, misrepresentation of fact, restraint of trade, "or any other wrongful act recognized by statute or the common law." *Nitro Distrib., Inc. v. Alticor, Inc., 565 F.3d 417, 428 (8th Cir. 2009)* (citing *Nazeri v. Missouri Valley College, 860 S.W.2d 303, 317 (Mo. 1993))*. Conversely, no liability arises if the defendant had an unqualified legal right to do the act complained of. Id.

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[5] ESI concedes "the requisite elements" of a tortious interference claim are "substantively identical" under Missouri, New York, and New Jersey Law (See Doc. No. 30 at 29, n.12). HMC does not waive its right to later move for application of New York or New Jersey law. (See Doc. No. 142 at 31 n. 24)

HMC alleges ESI intentionally interfered with its business expectancy in the "continued sale of compound medications to patients in the Eastern United States," by, inter alia, coercing physicians to stop prescribing compound medicines, attempting to induce patients to cease purchasing compound medicines, and precluding HMC from filling prescriptions for its patients covered by insurance. (FAC at ¶¶ 198 (a)-(f), 199) As a result, HMC alleges it has suffered and will continue to suffer significant damages, including lost revenue and profits caused by the decrease in reimbursements for compound medications covered **[*36]** by health insurance policies and/or plans. (Id. at ¶ 201) ESI moves to dismiss this count on the grounds that HMC has not sufficiently alleged facts regarding its business expectancy or ESI's "improper means." (Doc. No. 130 at 29-30)

To prevail on a tortious interference with business expectancy claim, the business expectancy must be valid or reasonable and cannot be too indefinite or remote. *Ozark, 80 S.W.3d at 893* (citing *Bell v. May Dep't Stores Co., 6 S.W.3d 871, 876 (Mo. banc 1999))*. Here, HMC alleges a business expectancy in the continued sale of compound medications to patients in the Eastern United States, including but not limited to, New York and New Jersey. (FAC at ¶ 196; see also id. at ¶¶ 10-12, 23-33 (describing HMC's business and sale of compounded medications to patients)). HMC also alleges ESI used improper means, specifically, threats, misleading letters, and improper termination of HMC, to interfere with its expectancy, resulting in a substantial decrease in revenues and net profits. (FAC at ¶¶ 115-116, 201) The Court finds this count is sufficiently pled.

8. Declaratory judgment (Count X)

HMC seeks a judgment declaring that any termination without cause provisions contained in the Provider Agreement between HMC and ESI are severable from the remainder **[*37]** of the Agreement and void as unconscionable with respect to HMC's termination. (FAC at ¶ 208) ESI argues there is no contract in existence because the Provider Agreement was terminated and thus no controversy ripe for determination. (Doc. No. 130 at 31-32) HMC responds that the validity of the without cause provisions is ripe because ESI has announced its intention to rely on them to limit HMC's damages to the 30-day notice period contained therein. (Doc. No. 142 at 33-34) In reply, ESI argues HMC's argument demonstrates it has an adequate remedy at law. (Doc. No. 146 at 18)

The Declaratory Judgment Act provides that any federal court, "[i]n a case of actual controversy within its jurisdiction ... may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." *28 U.S.C. § 2201(a)*. The phrase "case of actual controversy" refers to the type of "cases" and "controversies" justiciable under Article III. See *MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 126, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007)*. Courts have acknowledged the difficulty in setting out a precise test for determining whether there is such a controversy. "Basically, the question in each case is whether the facts alleged, under all the circumstances, **[*38]** show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maytag Corp. v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., 687 F.3d 1076, 1081 (8th Cir. 2012)* (citing *Maryland Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 273, 61 S. Ct. 510, 85 L. Ed. 826, (1941))*.

Courts have considerable discretion in determining whether or not a declaratory judgment action should be entertained. *Medimmune, 549 U.S. at 136*. If a petition for declaratory relief contains facts supporting its allegations and those facts demonstrate a justiciable controversy, the petition is sufficient and cannot be dismissed. Clearly, HMC is a party whose rights are affected by an Agreement which sets out, among other things, the terms for claims reimbursement — the sole foundation of the parties' business relationship. As such, HMC is entitled to a declaration of those rights under that Agreement, whether ESI's attempt to terminate it was valid and effectual or not. The legal consequences and rights ensuing from the termination, if valid, or the attempt to terminate it, if invalid, must be determined, and may be declared. See *Hyatt Int'l Corp. v. Coco, 302 F.3d 707, 712 (7th Cir. 2002)* (relevant Article III considerations include whether the contractual dispute is real, in the sense that it is not factually hypothetical; whether it can be immediately resolved by a judicial **[*39]** declaration of the parties' contractual rights and duties; and whether "the declaration of rights is a bona fide necessity for the natural defendant/declaratory judgment plaintiff to carry on with its business.").

9. Injunctive relief (Count XI)

Lastly, ESI argues that dismissal of HMC's substantive counts renders its claim for preliminary and permanent injunctive relief moot. (Doc. No. 130 at 32-33) Because the majority of HMC's alleged claims are sufficient to withstand a motion to dismiss, ESI's motion to dismiss HMC's injunctive relief claim will be denied.

Conclusion

In sum, HMC's complaint satisfies the requirements of *Rule 12(b)(6)* with respect to Counts I and II (antitrust claims), Count V (deceptive trade practices), Count VII (breach of contract), Count VIII (breach of the implied covenant of good faith and fair dealing), Count IX (tortious interference with a business expectancy), Count X (declaratory relief), and Count XI (injunctive relief). The complaint fails to allege claims under Counts III and IV (ERISA claims) and those counts will, therefore, be dismissed without prejudice. Count VI (violation of AWP law) will be dismissed on the grounds that the statute does not give rise to a **[*40]** private right of action against a PBM.

B. Motion to dissolve TRO

ESI moves for an order dissolving the Federal TRO as it relates to HMC. As discussed above, the State Court TRO entered on September 11, 2014 ordered ESI to "reinstate in full force and effect nunc pro tunc" "the Network Pharmacy Agreement dated September 5, 2012, entered into by and between HMC and Wholesale Alliance TPS, LLC d/b/a/ Third Party Station on behalf of Third Party Payer ESI" (see Doc. No. 23-2 at 4 ¶ (e)), and enjoined ESI from, among other things, "refusing to process and pay claims for payment submitted by HMC for compounded medications prescribed by physicians for their patients who have prescription drug benefits administered by [ESI]." (Id. at 3 ¶ (b)) Following removal to the New York District Court, the parties consented to extend the State Court TRO until a determination of pending motions to transfer venue.

On October 3, 2014, the New York District Court vacated the State Court TRO and entered the Federal Court TRO enjoining Express Scripts from "refusing to process and/or pay claims submitted by [HMC] for the payment of prescriptions dated on or after September 11, 2014, or for the refill of an existing refillable **[*41]** prescription after September 11, 2014, for compounded medications prescribed by licensed physicians for their patients, which had heretofore been covered by their insurance." (Doc. No. 70 at 3 ¶ (b)) The District Court further ordered upon agreement of the parties that the TRO remain in full force and effect until a hearing on the preliminary injunction. (Id. at 4) On October 27, 2014, the transferring court instructed that, with respect to ESI, "[a]ny requests to revisit the terms [of the Federal TRO] should be directed to the ... federal district court in Missouri."

In support of its motion to dissolve, ESI argues the Federal TRO has extended beyond the 14 days prescribed in *Rule 65(b)(2)* and must, therefore, be treated as a preliminary injunction. (Doc. No. 154 at 2) ESI further argues HMC cannot meet its burden of showing that continued injunctive relief is warranted, noting that HMC has assigned a specific dollar amount to each reimbursement claim it contends ESI has denied. Because these damages can be remedied if HMC prevails on the merits of its breach of contract claim, HMC has an adequate remedy at law and cannot demonstrate irreparable harm. (Id. at 5-6)

The TRO, by its express terms and by agreement of the **[*42]** parties, is to remain in full force and effect until a hearing on the preliminary injunction, a situation clearly contemplated by *Rule 65*. See *Rule 65(b)(2)* ("The order expires at the time after entry — not to exceed 14 days — that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension."). Moreover, a hearing on a motion to dissolve a TRO "cannot be considered to be a hearing on a preliminary injunction," where neither the parties nor the court "treated the ... hearing as a hearing on an application for a preliminary injunction," the plaintiffs "made no attempt at that time to present their case for a preliminary injunction[,]" and "[t]he court itself did not indicate that it was undertaking a hearing on a preliminary injunction." *Granny Goose Foods, Inc. v. Bhd. of*

Teamsters and Auto Truck Drivers Local No. 70, 415 U.S. 423, 442, 94 S. Ct. 1113, 39 L. Ed. 2d 435 (1974). Finding no changed circumstances, the motion to dissolve the TRO will be denied.

C. Motion for temporary stay of discovery and protective order

ESI moved for an order staying all discovery in this action pending the Court's ruling on its motion to dismiss and for protective order precluding HMC's Rule 30(b)(6) deposition in its entirety. The Court resolved this motion in its ruling on HMC's motion to **[*43]** compel Rule 30(b)(6) deposition. HMC served a Rule 30(b)(6) notice of deposition on ESI calling for the production of a corporate representative to testify regarding ESI's compliance with the TRO issued by the New York District Court. (Doc. No. 149) The Court granted HMC's motion to compel in part and directed HMC to clarify the topics to be covered in the deposition. (Doc. No. 168) The Court also deferred entering a scheduling order in this case, effectively staying discovery. (Id.) Only after a scheduling order has been entered by this Court may discovery proceed. See *Fed.R.Civ.P. 26(d)*. Accordingly, ESI's motion for temporary stay of discovery and protective order will be denied as moot.

D. Motion for civil contempt

HMC's motion for contempt is based on an alleged violation of the Federal TRO, specifically paragraph (b), which enjoins ESI:

> From refusing to process and/or pay claims submitted by ... HMC for the payment of prescriptions dated on or after September 11, 2014, or for the refill of an existing refillable prescription after September 11, 2014, for compounded medications prescribed by licensed physicians for their patients, which had heretofore been covered by their insurance.

(Doc. No. 70 at ¶ (b)) HMC argues that since the entry **[*44]** of the TRO, ESI has refused to process and/or pay a single claim submitted by the New Jersey Pharmacy on or after September 11, 2014 — a direct violation of the TRO. (Doc. No. 169 at ¶¶ 4-5) In response, ESI argues it has paid all valid claims submitted through HMC's in-network pharmacy, i.e., claims submitted to ESI pursuant to the terms of the contract between its affiliate Medco Health Solutions and HMC's Brooklyn, New York pharmacy. (Doc. No. 174 at 11-12)

"The party moving for contempt sanctions bears the burden of proving facts warranting a civil contempt order by clear and convincing evidence." Chicago Truck Drivers v. Bhd. Labor Leasing, 207 F.3d 500, 504 (8th Cir. 2000). That burden is met if the party is able to demonstrate: "(1) that a court order was in effect; (2) that the order required certain conduct by the respondent; and (3) that the respondent failed to comply with the court's order." Piggly Wiggly Clarksville, Inc. v. Mrs. Baird's Bakeries, 177 F.3d 380, 382 (5th Cir. 1999). "A contempt order must be based on a party's failure to comply with a 'clear and specific' underlying order." Chaganti & Assocs., P.C. v. Nowotny, 470 F.3d 1215, 1223 (8th Cir. 2006) (quoting Int'l Bhd. of Elec. Workers, Local Union No. 545 v. Hope Elec. Corp., 293 F.3d 409, 418 (8th Cir. 2002)). However, "[i]f the acts done are clearly in contravention of the court's decree, the intention is of no consequence. The absence of willfulness does not relieve an individual from civil contempt[.]" N.L.R.B. v. Ralph Printing & Lithographing Co., 433 F.2d 1058, 1062 (8th Cir. 1970).

The parties have widely disparate views of **[*45]** what the New York District Court meant when it enjoined ESI from refusing to process and/or pay claims submitted by HMC for compounded medications if those claims were covered by a patient's insurance prior to September 11, 2014. ESI contends it terminated its contract with HMC effective September 1, 2014, and was not required to reinstate that contract in order to maintain the status quo. (Doc. No. 174 at 1-2) HMC argues the plain terms of the Federal TRO require ESI to reimburse claims submitted by HMC irrespective of the existence of a contract. (Doc. No. 171 at 7) Both in briefing and at the hearing, there was much discussion about off the record conversations with the New York District Court judge seeking clarification of the TRO as it applied to ESI.

Given the lack of clarity around the intent of the Federal TRO, the Court cannot conclude there was a clear violation of the order sufficient to warrant a finding of contempt. See Imageware, Inc. v. U.S. West Communs., 219 F.3d 793, *797 (8th Cir. 2000)* ("No one should be held in contempt for violating an ambiguous order . . . A contempt should be clear and certain."); *Chicago Truck Drivers v. Bhd. Labor Leasing, 207 F.3d 500, 504 (8th Cir.2000)* ("The party moving for contempt sanctions bears the burden of proving facts warranting a civil contempt order by clear and convincing **[*46]** evidence."). Based on the facts presented and under the law, HMC's motion for contempt will be denied.

Accordingly,

IT IS HEREBY ORDERED that Defendant Express Scripts' Motion to Dismiss Plaintiffs' First Amended Complaint [129] is **GRANTED** in part. Counts III, IV and VI are dismissed. In all other respects the motion is **DENIED. IT IS FURTHER ORDERED** that Defendant Express Scripts' Motion to Dissolve the Temporary Restraining Order [153] is **DENIED**.

IT IS FURTHER ORDERED that Defendant Express Scripts' Motion for Temporary Stay of Discovery and Protective Order [157] is **DENIED** as moot.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Civil Contempt [169] is **DENIED**.

IT IS FURTHER ORDERED that a *Rule 16* conference will be set by separate order.

Dated this 9th day of July, 2015.

/s/ John A. Ross

JOHN A. ROSS

UNITED STATES DISTRICT JUDGE

ORDER SETTING *RULE 16* CONFERENCE

IT IS HEREBY ORDERED that:

1. **Scheduling Conference**: The Scheduling Conference pursuant to *Fed.R.Civ.P. 16* is set for **Wednesday, August 12, 2015 at 10:00 a.m. in my chambers**. At the scheduling conference counsel will be expected to discuss in detail all matters covered by *Fed.R.Civ.P. 16*, as well as all matters set forth in their joint proposed scheduling plan described in paragraph **[*47]** 3, and a firm and realistic trial setting will be established at or shortly after the conference.

2. **Meeting of Counsel**: Prior to the date for submission of the joint proposed scheduling plan set forth in paragraph 3 below, counsel for the parties shall meet to discuss the following:

• the nature and basis of the parties' claims and defenses,

• the possibilities for a prompt settlement or resolution of the case,

• the formulation of a discovery plan,

• any issues relating to preserving discoverable information,

• any issues relating to disclosure or discovery of electronically stored information, including—

(i) the form or forms in which it should be produced,

(ii) the topics for such discovery and the time period for which such discovery will be sought,

(iii) the various sources of such information within a party's control that should be searched for electronically stored information,

(iv) whether the information is reasonably accessible to the party that has it, in terms of the burden and cost of retrieving and reviewing the information,

(v) the parties must ensure that their clients preserve electronic discovery materials prior to the Rule 16 Conference, and

(vi) counsel shall address at the **[*48]** Rule 16 Conference potential electronic discovery and whether a specific agreement or order must be entered on that issue.

• any issues relating to claims of privilege or of protection as trial-preparation material, including - if the parties agree on a procedure to assert such claims after production - whether to ask the Court to include their agreement in an order, and

• other topics listed below or in *Fed.R.Civ.P. 16* and *26(f)*.

Counsel will be asked to report orally on the matters discussed at this meeting when they appear before the undersigned for the scheduling conference, and will specifically be asked to report on the potential for settlement; whether settlement demands or offers have been exchanged, without revealing the content of any offers or demands; and, suitability for Alternative Dispute Resolution. This meeting is expected to result in the parties reaching agreement on the form and content of a joint proposed scheduling plan as described in paragraph 3 below.

Only one proposed scheduling plan may be submitted in any case, and it must be signed by counsel for all parties. It will be the responsibility of counsel for the plaintiff to actually submit the joint proposed scheduling plan to the **[*49]** Court. If the parties cannot agree as to any matter required to be contained in the joint plan, the disagreement must be set out clearly in the joint proposal, and the Court will resolve the dispute at or shortly after the scheduling conference.

3. **Joint Proposed Scheduling Plan**: No later than **August 5, 2015**, counsel shall file with the Clerk of the Court a joint proposed scheduling plan. **All dates required to be set forth in the plan shall be within the ranges set forth below for the applicable track**:

Track 1: Expedited	**Track 2: Standard**	**Track 3: Complex**
***Disposition w/i 12 mos of filing**	***Disposition w/i 18 mos of filing**	***Disposition w/i 24 mos of filing**
***120 days for discovery**	***180-240 days from R16 Conf. for discovery/ dispositive motions**	***240-360 days from R16 Conf for discovery/ dispositive motions**

The parties' joint proposed scheduling plan shall include:

(a) whether the Track Assignment is appropriate; **NOTE: This case has been assigned to Track 2: (Standard).**

(b) dates for joinder of additional parties or amendment of pleadings;

(c) a discovery plan including:

(i) any agreed-upon provisions for disclosure or discovery of electronically stored information,

(ii) any agreements the parties reach for **[*50]** asserting claims of privilege or of protection as trial-preparation material after production,

(iii) a date or dates by which the parties will disclose information and exchange documents pursuant to *Fed.R.Civ.P. 26(a)(1)*,

(iv) whether discovery should be conducted in phases or limited to certain issues,

(v) dates by which each party shall disclose its expert witnesses' identities and reports, and dates by which each party shall make its expert witnesses available for deposition, giving consideration to whether serial or simultaneous disclosure is appropriate in the case,

(vi) whether the presumptive limits of ten (10) depositions per side as set forth in *Fed.R.Civ.P. 30(a)(2)(A)*, and twenty-five (25) interrogatories per party as set forth in *Fed.R.Civ.P. 33(a)*, should apply in this case, and if not, the reasons for the variance from the rules,

(vii) whether any physical or mental examinations of parties will be requested pursuant to *Fed.R.Civ.P. 35*, and if so, by what date that request will be made and the date the examination will be completed,

(viii) a date by which all discovery will be completed **(see applicable track range, Section 3. above)**;

(ix) any other matters pertinent to the completion of discovery in this case,

(d) the parties' positions concerning the referral **[*51]** of the action to mediation or early neutral evaluation, and when such a referral would be most productive;

(e) dates for the filing of any dispositive motions **(see applicable track range, Section 3. above)**;

(f) the earliest date by which this case should reasonably be expected to be ready for trial **(see applicable track range, Section 3. above)**;

(g) an estimate of the length of time expected to try the case to verdict; and

(h) any other matters counsel deem appropriate for inclusion in the Joint Scheduling Plan.

4. **Disclosure of Corporate Interests**: All non-governmental corporate parties are reminded to comply with Disclosure of Corporate Interests by filing a Certificate of Interest with the Court pursuant to *E.D.Mo. L.R. 2.09*.

5. **Pro Se Parties**: If any party appears in this action pro se, such party shall meet with all other parties or counsel, participate in the preparation and filing of a joint proposed scheduling plan, and appear for the scheduling conference, all in the same manner as otherwise required by this order.

/s/ John A. Ross

JOHN A. ROSS

UNITED STATES DISTRICT JUDGE

Dated this 9th day of July, 2015

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LexisNexis

In re Niaspan Antitrust Litig.

United States District Court for the Eastern District of Pennsylvania

July 9, 2015, Filed

MDL NO. 2460; MASTER FILE NO. 13-MD-2460

Reporter
2015 U.S. Dist. LEXIS 92534 *

IN RE: NIASPAN ANTITRUST LITIGATION. THIS DOCUMENT RELATES TO: ALL ACTIONS

Prior History: *In re Niaspan Antitrust Litig., 42 F. Supp. 3d 735, 2014 U.S. Dist. LEXIS 124818 (E.D. Pa., Sept. 5, 2014)*

Core Terms

discovery request, defendants', discovery, Purchaser, overcharge, anti trust law, state law, disputes, damages, progeny, ascertainability, bypass

Counsel: **[*1]** For IN RE: NIASPAN ANTITRUST LITIGATION: DAVID F. SORENSEN, LEAD ATTORNEY, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA; JEFFREY L. KODROFF, LEAD ATTORNEY, SPECTOR ROSEMAN KODROFF & WILLIS, P.C., PHILADELPHIA, PA; PAUL H. SAINT-ANTOINE, LEAD ATTORNEY, DRINKER, BIDDLE & REATH LLP, PHILADELPHIA, PA.

Judges: Hon. Jan E. DuBois, J.

Opinion by: Jan E. DuBois

Opinion

ORDER

AND NOW, this 9th day of July, 2015, upon consideration of a letter/brief filed by defendants (Document No. 158, filed February 6, 2015), in which they seek the Court's assistance in resolving a series of discovery disputes with Direct Purchaser Plaintiffs ("DPPs") and End-Payor Plaintiffs ("EPPs");[1] a letter/brief in opposition to defendants' discovery requests filed by Direct Purchaser Plaintiffs and End-Payor Plaintiffs (Document No. 161, filed February 13, 2015); a supplemental letter/brief filed by defendants (Document No. 228, filed June 18, 2015); a supplemental letter/brief filed by Retailer Plaintiffs (Document No. 230, filed June 25, 2015); a supplemental letter/brief filed by Direct Purchaser Plaintiffs (Document No. 231, filed June 25, 2015); and a second supplemental letter/brief filed by defendants (Document No. 232, filed July 6, 2015), following **[*2]** oral argument on June 4, 2015, **IT IS ORDERED** that defendants' discovery requests are **GRANTED IN PART AND DENIED IN PART**, as follows:

A. Defendants' Requests for Discovery from Direct Purchaser Plaintiffs

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[1] The discovery disputes presently before the Court arise out of the objections of Direct Purchaser Plaintiffs and End-Payor Plaintiffs to certain of the Requests for Production ("RFP") served on them by defendants on November 21, 2014.

1. Defendants' request that DPPs respond to RFP Nos. 1 and 6-11 by producing information concerning their sales, revenues, and profits arising out of their resale of Niaspan is **DENIED**.

Defendants contend that the discovery requested in RFP Nos. 1 and 6-11 is relevant to the question of damages,[2] and is needed in order to calculate the extent of "generic bypass"[3] in this case. The premise of defendants' argument is that the amount of damages sustained by DPPs must be offset by the amount of any purchases of Niaspan that would not have been made in a "but for" world in which generic competition existed. In response, DPPs argue that defendants' request for discovery should be denied because the information sought is improper "downstream discovery" that is irrelevant **[*3]** as a matter of law under *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 489, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*, and its progeny.[4] The Court agrees.

In *In re Skelaxin (Metaxalone) Antitrust Litig.*, a similar pay-for-delay case, Judge Curtis L. Collier rejected the same generic bypass theory relied upon by defendants as a basis for their **[*4]** discovery request. *No. 12-MD-2343, 2014 U.S. Dist. LEXIS 66707, 2014 WL 2002887, at *5 (E.D. Tenn. May 15, 2014)*. In doing so, Judge Collier stated the following:

> Defendant ignores the fundamental import of Hanover Shoe and its progeny: a direct purchaser may recover the full amount of the overcharge, even if he is otherwise benefitted, because the antitrust injury occurs and is complete when the defendant sells at the illegally high price. . . . That is, the focus of the antitrust laws is limited to the anticompetitive sale. When Defendant sold the [drug at issue] to the wholesalers at an allegedly anticompetitive price, the injury was complete. The jury need not hear any more. True, to calculate damages the jury must consider what the cost of the drug would have been in the absence of an antitrust violation. But Hanover Shoe and *Illinois Brick [v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)]* make clear that courts and juries will not be forced down the rabbit hole of hypothetical issues antitrust violators may raise to minimize their liability.

(internal quotation marks omitted) (citations omitted).

Other courts that have considered the issue have reached the same conclusion. See, e.g., *In re Prograf Antitrust Litig., No. 11-2242, 2014 U.S. Dist. LEXIS 180899, 2014 WL 7641156, at *4 (D. Mass. Dec. 23, 2014)* ("[R]educing damages to plaintiff wholesalers under a bypass defense is inconsistent with Hanover Shoe . . . .") (citations omitted); **[*5]** *In re Relafen Antitrust Litig., 346 F. Supp. 2d 349, 369 (D. Mass. 2004)* ("Hanover Shoe precludes not only the 'passing on' defense, but also the subtle variation asserted here, which might be termed the 'otherwise benefiting' defense. . . . [N]ational wholesalers could seek to recover the 'full amount of the overcharge' — that is, the overcharges paid on all purchases of Relafen, including bypassed units.") (emphasis added).

This Court agrees with those courts that have rejected the generic bypass theory relied upon by defendants as inconsistent with *Hanover Shoe* and its progeny. Thus, the Court concludes that the information sought by

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[2] The Court previously ruled at defendants' request that, before class certification briefing was complete, discovery into the merits could proceed only insofar as it related to class certification. At oral argument, however, the parties agreed that discovery could proceed on all issues.

[3] "Generic bypass refers to the situation whereby direct purchasers may lose sales volume because end purchasers often buy generics directly from the generic manufacturer and 'cut out the middle man' or 'bypass' the wholesaler." *In re Wellbutrin XL Antitrust Litig., No. 08-2431, 2011 U.S. Dist. LEXIS 90075, 2011 WL 3563385, at *15 (E.D. Pa. Aug. 11, 2011)*.

[4] In *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*, the Supreme Court of the United States held that "a party may recover for an antitrust overcharge whether or not the party experienced a net loss or a net gain (i.e., by passing on the overcharge to other parties)." *In re Wellbutrin Sr Direct Purchaser Antitrust Litig., No. 04-5525, 2008 U.S. Dist. LEXIS 36719, 2008 WL 1946848, at *6 (E.D. Pa. May 2, 2008)*. That is, under federal ***antitrust law***, a defendant "cannot assert as a defense against direct purchasers that the alleged victims 'passed-on' the overcharge to the indirect purchasers with whom they transacted." *In re Auto. Refinishing Paint Antitrust Litig., No. MDL 1426, 2006 U.S. Dist. LEXIS 34129, 2006 WL 1479819, at *8 (E.D. Pa. May 26, 2006)*.

defendants regarding DPPs' sales, profits, and revenues is not relevant under *Federal Rule of Civil Procedure 26(b)(1)*. Defendants' discovery request relating to RFP Nos. 1 and 6-11 is therefore denied.

B. Defendants' Requests for Discovery from End-Payor Plaintiffs

2. Defendants' request that EPPs respond to RFP Nos. 12-20 by producing information concerning the effect of pharmaceutical prices on their profits, insurance premiums, or contribution rates is **DENIED WITHOUT PREJUDICE**.

Defendants argue that the discovery requested in RFP Nos. 12-20 is relevant to the issue of whether EPPs "are limited by relevant state laws to recovering their actual damages, as opposed to the **[*6]** artificial 'overcharge' measure of damages that is permitted for direct purchasers under federal ***antitrust law***." (Defs.' Letter/Brief, Document No. 158, at 6) (emphasis deleted). In response, EPPs assert that "all of the relevant state laws in this case follow federal ***antitrust law***," and thus that the information sought by defendants is irrelevant under Hanover Shoe and its progeny because an EPP, like a DPP, may recover the full amount of the alleged overcharge on every unit of Niaspan it purchased regardless of whether that overcharge was offset by some other factor. (Pls.' Letter/Brief, Document No. 161, at 6 n.21.)

The parties did not brief these issues, and the Court declines to embark upon an analysis of each of the relevant state laws to determine whether they foreclose the discovery requested by defendants at this stage of the proceedings. To the extent that EPPs are correct in their assertion that the state laws involved in this case follow federal ***antitrust law***, the discovery requested is irrelevant under Hanover Shoe and its progeny for the same reasons discussed above with respect to defendants' request for downstream discovery from DPPs. The Court does not rule on the propriety **[*7]** of the requested discovery in the event that applicable state law does not follow federal ***antitrust law***. Accordingly, defendants' discovery request relating to RFP Nos. 12-20 is denied without prejudice;

3. Defendants' request that EPPs respond to RFP No. 2 by producing information regarding rebates received in connection with their purchases of Niaspan is **DENIED WITHOUT PREJUDICE**.

Defendants contend that rebate information is relevant to determining the net price that EPPs paid for Niaspan, and to support, inter alia, an argument at class certification that many members of the EPP class did not suffer any actual economic injury. EPPs oppose defendants' discovery request on the ground that the net price paid for Niaspan is irrelevant in view of the fact that "[a]ntitrust impact is not . . . proven by reference to a purchaser's net damages," but rather "occurs the moment the purchaser incurs an overcharge, whether or not that injury is later offset." (Pls.' Letter/Brief, Document No. 161, at 7) (citation and internal quotation marks omitted).

As above, the resolution of this question depends upon whether the relevant state laws follow federal ***antitrust law***. If they do, the requested discovery is **[*8]** irrelevant under Hanover Shoe and its progeny because an EPP would be able to recover the full amount of the alleged overcharge on its purchases of Niaspan regardless of whether the price paid at the point of sale was subsequently offset by a rebate. For the same reasons stated previously, the Court declines to rule on the propriety of the requested discovery in the event that applicable state law does not follow federal ***antitrust law***. Accordingly, defendants' discovery request relating to RFP No. 2 is denied without prejudice; and

4. Defendants' request that EPPs respond to RFP No. 23 by producing documents in their possession which discuss or analyze the role of pharmacy benefit managers ("PBMs") is **GRANTED**. To the extent they have not already done so,[5] EPPs shall produce the requested discovery within twenty (20) days of this Order.

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[5] In their letter/brief, End-Payor Plaintiffs report that they "have already produced their PBM contracts, which include the terms and conditions governing 'the role' of their PBMs," and further state that they will produce all documents responsive to defendants' RFP No. 23 which refer to Niaspan or niacin. (Pls.' Letter/Brief, Document No. 161, at 9.) To **[*9]** the extent that a dispute remains about what PBM information End-Payor Plaintiffs possess, the Court directs that the parties meet and confer in an effort to reach agreement.

Defendants assert that information relating to PBMs is relevant to arguments they intend to make at class certification relating to the ascertainability of the putative EPP class. See *Vista Healthplan, Inc. v. Cephalon, Inc., No. 06-1833, 2015 U.S. Dist. LEXIS 74846, 2015 WL 3623005, at *5 (E.D. Pa. June 10, 2015)* ("The United States Court of Appeals for the Third Circuit has recently identified ascertainability as an important prerequisite for class treatment.") (citing *Byrd v. Aaron's Inc., 784 F.3d 154 (3d Cir. 2015)*, as amended (Apr. 28, 2015)). In response, EPPs argue that the requested discovery is irrelevant because, unlike in other pay-for-delay cases, there are no ascertainability problems in this case in view of the fact that the proposed class definition expressly excludes PBMs that do not undertake risk and do not act as insurers, e.g., PBMs with capitation agreements.

The Court agrees with defendants that discovery relating to PBMs is relevant, at the very least, to the issue of ascertainability — an issue that is properly addressed at the class certification stage, not in the context of the discovery disputes presently before the Court. The relevance of the discovery requested **[*10]** by defendants is underscored by recent decisions of courts in other pay-for delay cases in which PBMs factored into the analysis of whether the ascertainability requirement had been satisfied. See *In re Wellbutrin XL Antitrust Litig., No. 08 2433, 308 F.R.D. 134, 2015 U.S. Dist. LEXIS 84444, 2015 WL 3970858, at *14-18 (E.D. Pa. June 30, 2015)*; *Vista Healthplan, Inc. v. Cephalon, Inc., No. 06-1833, 2015 U.S. Dist. LEXIS 74846, 2015 WL 3623005, at *9 (E.D. Pa. June 10, 2015)*; *In re Skelaxin (Metaxalone) Antitrust Litig., 299 F.R.D. 555, 568-69 (E.D. Tenn. 2014)*, reconsideration denied, *No. 12-MD-2343, 2014 U.S. Dist. LEXIS 58359, 2014 WL 1623705 (E.D. Tenn. Apr. 23, 2014)*. As EPPs have not raised any other objections to this discovery, and the Court concludes that none of the limitations on discovery imposed by *Rule 26(b)(2)(C)* apply,[6] defendants' discovery request relating to RFP No. 23 is granted.

IT IS FURTHER [*11] ORDERED that the parties shall meet and confer in an effort to resolve any remaining discovery disputes, including disputes over ESI search terms and custodians, and shall jointly report to the Court, on or before August 3, 2015, with respect to a resolution of any such issues.

IT IS FURTHER ORDERED that, upon consideration of a letter from plaintiffs (Document No. 224, filed June 15, 2015), and a letter from defendants (Document No. 225, filed June 15, 2015), the Court noting several disputes between the parties over a proposed schedule governing further proceedings in this case, the parties shall meet and confer and submit to the Court for approval, on or before August 3, 2015, a joint proposed scheduling order that, inter alia:

1. Sets interim deadlines for the production of the Kos computer tapes;
2. Provides for a thirty (30) day gap between the close of fact discovery and the service of expert reports;
3. Does not combine class certification and summary judgment briefing; and
4. Does not set a trial date. A trial date will be set in due course.

IT IS FURTHER ORDERED that a telephone status conference with liaison counsel is **SCHEDULED** for Thursday, August 6, 2015, at 4:30 P.M. The purpose **[*12]** of the telephone conference is to address the status of any unresolved discovery disputes or scheduling issues referenced in the above required joint reports, and any other issues ripe for discussion which shall be summarized in a joint report submitted to the Court on or before August 3, 2015.

Liaison counsel for Abbvie defendants shall initiate the telephone status conference. Any other attorneys who have appeared in the case may participate in the conference.

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[6] ***Rule 26(b)(2)(C)*** provides that:

> On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

BY THE COURT:

/s/ Hon. Jan E. DuBois

DuBOIS, JAN E., J.

Evergreen Partnering Grp., Inc. v. Pactiv Corp.

United States District Court for the District of Massachusetts

July 10, 2015, Decided; July 10, 2015, Filed

CIVIL ACTION NO. 11-10807-RGS

Reporter

116 F. Supp. 3d 1 *; 2015 U.S. Dist. LEXIS 89839 **; 2015-2 Trade Cas. (CCH) P79,240

EVERGREEN PARTNERING GROUP, INC. v. PACTIV CORPORATION; DOLCO PACKING a TECKNI-PLEX COMPANY, a corporation; SOLO CUP COMPANY, a corporation; DART CONTAINER CORPORATION; and AMERICAN CHEMISTRY COUNCIL, an association

Subsequent History: Affirmed by *Evergreen Partnering Grp., Inc. v. Pactiv Corp., 2016 U.S. App. LEXIS 14000 (1st Cir. Mass., Aug. 2, 2016)*

Prior History: *Evergreen Partnering Group, Inc. v. Pactiv Corp., 2014 U.S. Dist. LEXIS 6234 (D. Mass., Jan. 17, 2014)*

Core Terms

recycling, resin, Plastics, polystyrene, converters, products, business model, producer, task force, conspiracy, trays, defendants', antitrust, royalty, Schools, alleges, pounds, summary judgment, environmental, partner, food, conference call, manufacture, tested, bid, negotiations, viable, lunch, collected, nonmoving

LexisNexis® Headnotes

Evidence > ... > Lay Witnesses > Opinion Testimony > Personal Perceptions

Evidence > Weight & Sufficiency

HN1[] **Opinion Testimony, Personal Perceptions**

Under the Federal Rules of Evidence, a business owner is generally permitted to offer an opinion as to his business's value or its future profitability. The admissibility of the opinion and the weight it is to be given are, however, separate issues.

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

HN2[] **Summary Judgment, Entitlement as Matter of Law**

Summary judgment acts to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required. It is appropriate when the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*. In this context, "genuine" means that the evidence is such that a reasonable jury could resolve the point in favor of the nonmoving party.

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

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

HN3[] **Burdens of Proof, Movant Persuasion & Proof**

To succeed on a motion for summary judgment, the moving party must show that there is an absence of evidence to support the nonmoving party's position. If this is accomplished, the burden then shifts to the nonmoving party to establish the existence of an issue of fact that could affect the outcome of the litigation and from which a reasonable jury could find for the nonmoving party. The nonmoving party must adduce specific, provable facts demonstrating that there is a triable issue. The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Evidence > Inferences & Presumptions > Inferences

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

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

HN4[] **Sherman Act, Claims**

As a general rule, on summary judgment the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. But the rule is different in an antitrust context. ***Antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, case. In particular, conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment, a plaintiff seeking damages for a violation of *§ 1* must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.

Antitrust & Trade Law > Sherman Act > Claims

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

HN5[] **Sherman Act, Claims**

In order to demonstrate a factual basis for an assertion that there was a combination or conspiracy, in restraint of trade or commerce that involved the defendants, under *15 U.S.C.S. § 1*, the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the defendants had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Civil Procedure > Judgments > Summary Judgment > Opposing Materials

Evidence > Authentication

Civil Procedure > Judgments > Summary Judgment > Supporting Materials

HN6[] **Summary Judgment, Opposing Materials**

Documents supporting or opposing summary judgment must be properly authenticated.

Antitrust & Trade Law > Regulated Practices

HN7[] **Antitrust & Trade Law, Regulated Practices**

The antitrust laws do not require a company to compete with other actors in its market. A company is perfectly free under the antitrust laws to concentrate on its own chosen niche, leaving the broader market for others to exploit.

Antitrust & Trade Law > Regulated Practices

HN8[] **Antitrust & Trade Law, Regulated Practices**

Conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.

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For Solo Cup Company, a corporation, Defendant: Ralph C. Mayrell, LEAD ATTORNEY, PRO HAC VICE, Vinson & Elkins LLP, Washington, DC; John M. Faust, Law Office of John M. Faust, PLLC, Washington, DC; Sean M. Becker, Yousri H. Omar, Vinson & Elkins LLP, Houston, TX; William **[**2]** E. Lawler, PRO HAC VICE, Vinson & Elkins, LLP, Washington, DC.

For Dolco Packaging, a Tekni-Plex Company a corporation, Defendant: Jennifer Mikels, Duane Morris LLP, Boston, MA; Kristy S. Morgan, Edwards Wildman Palmer LLP - MA, Boston, MA; Steven M. Cowley, Duane Morris LLP, Boston, MA.

For Dart Container, corporation, Defendant: Ralph C. Mayrell, LEAD ATTORNEY, PRO HAC VICE, Vinson & Elkins LLP, Washington, DC; John M. Faust, Law Office of John M. Faust, PLLC, Washington, DC; Sean M. Becker, Vinson & Elkins LLP, Houston, TX; William E. Lawler, PRO HAC VICE, Vinson & Elkins, LLP, Washington, DC; Yousri H. Omar, Vinson & Elkins LLP, Houston, TX.

For American Chemistry Council Incorporated, an association, Defendant: Benjamin M. McGovern, Ralph T. Lepore, III, LEAD ATTORNEYS, Michael T. Maroney, Holland & Knight, LLP, Boston, MA; Scott A. Moore, Holland & Knight (B), Boston, MA.

Judges: Richard G. Stearns, UNITED STATES DISTRICT JUDGE.

Opinion by: Richard G. Stearns

Opinion

[*3] MEMORANDUM AND ORDER ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

STEARNS, J.

In this antitrust case, plaintiff Evergreen Partnering Group, Inc., seeks to prove that its business failed because of a conspiracy orchestrated by the defendant polystyrene **[**3]** converters and their trade association, the American Chemistry Council. This court granted a motion to dismiss Evergreen's Complaint on June 7, 2012. *Evergreen Partnering Grp., Inc. v. Pactiv Corp., 865 F. Supp. 2d 133 (D. Mass. 2012)*. The First Circuit reversed and remanded the case. *Evergreen Partnering Grp., Inc. v. Pactiv Corp., 720 F.3d 33 (1st Cir. 2013)*.[1] Discovery now complete, before the court are defendants' motions for summary judgment.[2]

BACKGROUND[3]

Evergreen was the brainchild of Michael Forrest. He envisioned a profitable business **[*4]** model based on the conversion of polystyrene lunch trays into raw, food-grade resin, which could be used in the manufacture of "green" polystyrene products.[4] To succeed, the model required a partnership between Evergreen and at least one established polystyrene converter.

Evergreen's Founding

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[1] More specifically, the First Circuit reversed this court's dismissal of Evergreen's Sherman Act claim, and ordered that discovery be taken. The Court of Appeals also remanded a claim brought under the Massachusetts Unfair Trade Practices Act, Mass. Gen. Laws ch. 93A, for further consideration. This court dismissed the Chapter 93A claim on January 28, 2014 (Dkt #174).

[2] Also before the court are motions filed by defendants to strike: (1) the report and testimony of plaintiff's expert, Francesca Scarito (Dkt #218); and (2) portions of the affidavit of Michael Forrest, certain exhibits, various deposition excerpts, and portions of Evergreen's statement of material facts (Dkt #248). These motions will be discussed where relevant in this memorandum.

[3] Three statements of undisputed material facts have been submitted by the parties. The first was filed jointly by defendants (DSOF, Dkt #239). The second **[**4]** was filed by Evergreen and is not, strictly speaking, a response to the DSOF; rather, it states additional facts that Evergreen proffers as having a material bearing on the litigation (ESOF, Dkt #241). Finally, the defendants have filed a joint response to Evergreen's filing (RSOF, Dkt #250). The pertinent Local Rule provides that "[m]aterial facts of record set forth in the statement required to be served by the moving party will be deemed for purposes of the motion to be admitted by opposing parties unless controverted by the statement required to be served by opposing parties." *D. Mass. L.R. 56.1*.

[4] Polystyrene is a polymer plastic formed from styrene, a liquefied hydrocarbon (petroleum). Often confused with Styrofoam, a Dow Chemical Company brand of insulation, polystyrene's principal commercial use is in the manufacture of food containers and protective **[**5]** packaging. Because it is biodegradation resistant, it is an environmentally controversial packaging medium. "Green" polystyrene is, in the industry's phrase, simply "Post-Consumer Recycled Content." It has the same chemical composition as polystyrene in its processed form and has no greater degradability. There is no formal industry or regulatory standard governing the percentage of recycled content a polystyrene product must contain to be labeled "green."

In the early 1990s, Nova Chemicals began an experimental program in the Boston Public Schools (BPS), collecting polystyrene waste and converting it into recycled resin. DSOF ¶ 8; ESOF ¶¶ 7-8; Defs.' Ex. 41 at 10779 (*TAP in Action* article, no date). Nova used the recycled resin itself or sold it to manufacturers of non-food related products. DSOF ¶ 8. Forrest arranged with Nova to purchase its excess recycled resin. *Id.* ¶ 9; Defs.' Ex. A at 48-49 (Forrest Dep.). By 2000, Nova had lost interest in the experiment and made a gift of the recycling equipment to BPS. DSOF ¶ 10. Nova also gave Forrest an exclusive license to purchase the recycled resin produced by BPS with the gifted equipment. *Id.;* ESOF ¶ 9; Defs.' Ex. **[**6]** A at 45 (Forrest Dep.).

Evergreen was incorporated by Forrest in 2000. Forrest Aff. ¶ 9.[5] Evergreen's mission was to develop new product lines using the BPS resin, while promoting recycling in other school districts.[6] In 2001, Evergreen received a "Non-Objection" letter from the Food and Drug Administration (FDA) sanctioning the use of "food-grade" recycled resin harvested through "controlled source collection." Defs.' Ex. 5 (FDA Non-Objection letter). From 2003 to 2005, Evergreen paid Commodore Plastics to manufacture food trays from the BPS recycled resin, which it then sold **[*5]** back to BPS.[7] DSOF ¶ 16; ESOF ¶ 10; Defs.' Ex. A at 77-78 (Forrest Dep.). The recycling program was later expanded to public schools in Providence, Rhode Island. DSOF ¶ 17; Defs.' Ex. A at 75 (Forrest Dep.).

Evergreen's Business Model

The experience in Boston and Providence led Forrest to reimagine his business on a national scale. The national business model envisioned three revenue streams for Evergreen. First, the institution contributing polystyrene waste would pay Evergreen **[**8]** an "environmental fee" for recycling the waste lunch trays.[8] Second, the polystyrene converter would pay for the recycled resin Evergreen produced. And third, the converter would pay a commission or royalty to Evergreen on every sale of a product containing Evergreen's resin.[9] DSOF ¶ 13; Defs.' Ex. A at 56 (Forrest Dep.). According to Evergreen's expert witness, Francesca Scarito, without all three of these revenue streams, "[Evergreen] could not generate sufficient cash to meet ongoing capital requirements or scale the business." Scarito Rep. (Dkt #221, Ex. B) at 3.

Although not explicitly stated by Evergreen, there were other contingencies that also had to be met for the business model to succeed. First, school districts had to agree to the model, which required a pairing of waste haulage costs with supply contracts. Second, because Evergreen did not have the capacity or ability to manufacture and distribute

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[5] Defendants move to strike those portions of Forrest's affidavit that express an opinion as to the viability of Evergreen's business model, arguing that such statements are inadmissible as Forrest has not been qualified to offer an expert opinion on the polystyrene market. ***HN1***[] Under the Federal Rules of Evidence, a business owner is generally permitted to offer an opinion as to his business' value or its future profitability. **[**7]** *See* *Fed. R. Evid. 701* (advisory committee notes) ("[M]ost courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert.") (citing as an example, *Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153 (3d Cir. 1993))*. The admissibility of the opinion and the weight it is to be given are, however, separate issues.

[6] At the time he incorporated Evergreen, Forrest believed that it was only a matter of time until "the market would require that PS [polystyrene] food service products contain recycled content or be banned from the marketplace." Forrest Aff. ¶ 13. The only school system that came to require recycled content in food service products was BPS. Other school systems that considered the requirement rejected it because of the cost. *See, e.g.*, Defs.' Ex. G at 39 (Coury Dep.).

[7] Evergreen sold the trays to a distributor, Eastern Bag, which in turn sold them to BPS.

[8] Although Evergreen does not explicitly state why schools would be willing to pay this fee, the supposition is that the school would rebate the savings gained through lower drayage fees because of the diversion of some of the waste to Evergreen.

[9] In 2003, Evergreen attempted unsuccessfully to obtain a method patent for aspects of its business model. Defs.' Ex. 833 (Feb. 3, 2005 Patent Application Publication No. US 2005/0027555 A1 (showing a provisional application date of July 30, 2003)). The patent was rejected for a final time in 2011. Defs.' Ex. A at 1734 (Forrest Dep.). Prior to the final rejection, Forrest kept the application **[**9]** alive for purposes of this lawsuit. Defs.' Ex. 40 (July 11, 2011 e-mail from George McCormack to Forrest).

a final polystyrene product, it would have to successfully partner with one or more of the established polystyrene converters. That in turn depended on the ability of Evergreen to produce recycled resin at a price competitive with that of virgin resin.[10] DSOF ¶ 15. Finally, the converter would have to agree to pay a commission or royalty to Evergreen on the sale of "green" polystyrene products containing Evergreen's resin.

Early attempts to put together deals

Between 2002 and 2005, Evergreen attempted to partner with several established converters in order to fund the expansion of its business. In particular, Forrest solicited the aluminum giants, Alcoa and Reynolds, both of which had a small presence in the polystyrene foodservice products market. DSOF ¶¶ 21-22. Neither company expressed an interest in Evergreen's business model. In 2005, Forrest approached two small polystyrene converters, Fabri-Kal and Placon. They **[*6]** too declined to partner with Evergreen. DSOF ¶¶ 24-25.

In 2005, there were five polystyrene converters with a national market presence: Pactiv Corporation, Dolco Packing, Solo Cup Company, and Dart Container Corporation (collectively the producer defendants), and Genpak, LLC (which settled with Evergreen after the Court of Appeals issued its decision, Dkt #207). Forrest Aff. ¶ 15. Insofar as Forrest was concerned, Evergreen's ultimate success depended on its **[**11]** ability to partner with one of these "big five" polystyrene producers. *Id.* ¶ 14. However, Forrest came to believe by early 2005 that the big five were implacably opposed to recycling. He reports being told by Sodexo, "a food service facility management and procurement group," that Dart and Pactiv in particular had zero interest in producing a "green" polystyrene line using Evergreen's recycled resin. *Id.* ¶ 17.

In 2005, Evergreen came up with sufficient financing to open a facility in Norcross, Georgia, to recycle food trays collected from the Gwinnett County School System (Gwinnett Schools). *Id.* ¶ 20; ESOF ¶ 20.[11] Simultaneous with the opening of the Norcross facility, Evergreen agreed with Sysco, a distributor of food service polystyrene, to jointly produce "green" polystyrene food containers (among other items) to be marketed as part of Sysco's projected "Earth Plus" product line. Forrest Aff. ¶ 21; Pl.'s Ex. 1034 (Aug. 23, 2005 letter from Maurice Malone of Sysco to Forrest).

In July of 2005, Forrest pitched the Sysco venture to Norm Patterson, the General Manager of the Midwest Division of Dolco.[12] Forrest Aff. ¶ 22; DSOF ¶ 185. Forrest, Patterson, and a Sysco representative met in November of 2005 and made progress towards reaching an agreement. Forrest Aff. ¶ 23. According to Forrest, Sysco believed that a deal might result in sales of upwards of $50 million in "green" polystyrene products. *Id.* Despite the promising start, Forrest says that he was later told by Patterson that the heads of Dolco and Dart had opposed the recycling effort at a meeting of the Plastics Food Packaging Group (Plastics Group). *Id.* ¶ 24. Patterson also allegedly said that Dolco was unwilling to compete with Pactiv. *Id.*

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[10] Scarito, Evergreen's expert, posited that Evergreen's resin could turn a profit at a price point of $0.60 per pound, assuming that the other contingencies were also met. Scarito Rep. at 3. The expert report does not take into account fluctuations in the world price of oil. (The price of polystyrene moves in tandem with the oil market, **[**10]** that is, the lower the price of oil, the cheaper virgin resin is to manufacture). It is undisputed that Evergreen was never able to produce recycled resin at a price lower than $2.00 per pound. DSOF ¶ 35; Defs.' Ex. I at 384 (LoRe Dep.).

[11] The BPS facility was owned and operated by BPS, with Evergreen having the exclusive right to purchase the recycled resin. The Georgia facility was the first recycling plant actually owned and operated by Evergreen. **[**12]** DSOF ¶ 27.

[12] At about the same time, Evergreen obtained a commitment from Patterson for the purchase of $75,000 worth of Evergreen recycled resin at $0.45 per pound. DSOF ¶¶ 196-197; Defs.' Exs. 651 (July 13, 2005 e-mail from Forrest to Patterson) and 652 (Aug. 9, 2005 e-mail from Patterson to Forrest). Dolco never actually received the resin. DSOF ¶ 198; Defs.' Ex. 653 (Evergreen invoices).

Despite Patterson's misgivings, in early December of 2005, Dolco extended a formal **[**13]** offer to Sysco.[13] DSOF ¶ 206; Defs.' Ex. 657 (Dec. 6, 2005 Dolco proposal to Sysco). However, no final agreement was ever forged. According to Forrest, "it became clear that Patterson would not do a 'green' foam deal with Sysco, although Patterson was eager to purchase recycled resin made by [Evergreen]." Forrest Aff. ¶ 26. Dolco places the blame for the collapse of the deal on Sysco, stating that Sysco had backed away from producing a **[*7]** line of recycled content products.[14] DSOF ¶ 213.

Although Evergreen's Norcross facility had begun processing polystyrene trays from the Gwinnett Schools in 2005, **[**14]** [15] it was not able to convert the recovered resin into usable pellets until 2006 when Dolco agreed to sell it an extruder. DSOF ¶ 29; Defs.' Ex. B at 365-366 (Patterson Dep.). In November of that year, Forrest contacted Genpak's president, Jim Reilly, with a proposal that Genpak manufacture a product for Sysco's proposed Earth Plus line using Evergreen's recycled resin. Forrest Aff. ¶ 31. According to Forrest, Reilly (like Patterson before him), expressed initial interest in partnering with Evergreen, as well as a willingness to pay Evergreen the stipulated royalty. *Id.* However, no firm commitment or further negotiations among Evergreen, Genpak, and Sysco followed.

In January of 2007, Evergreen and Genpak began negotiations over a deal to produce lunch trays for the Gwinnett Schools.[16] *Id.* ¶ 34. (The trays had previously been manufactured by Pactiv. DSOF **[**15]** ¶ 32; Pl.'s Ex. 906 at 439 (Coury Dep.)). Genpak submitted a bid for a tray made with virgin resin and another for a tray incorporating Evergreen's recycled resin. Forrest alleges that Reilly sought to pull the rug out from under the deal by withdrawing Genpak's bid at the last minute.[17] Forrest Aff. ¶ 34. Despite the attempt, Genpak and Evergreen won the bidding.[18]

The Plastics Group

The Plastics Group had been established by the ACC to act as the industry's spokesperson in countering negative publicity **[*8]** about the environmental impact of polystyrene. DSOF ¶¶ 347-348; Defs.' Ex. M at 15-19 (Levy Dep.).

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[13] The proposal incorporated the most controversial aspect of Evergreen's business model, that is, Dolco offered to pay Evergreen a royalty for the use of its recycled resin. Forrest Aff. ¶ 23; DSOF ¶ 207; Defs.' Ex. 658 (Nov. 30, 2005 e-mail from Patterson to Forrest).

[14] Patterson reported that Sysco had hit a "bump in the road" in unveiling an environmental line of polystyrene containers. Namely, Sysco had backed away from "green activities" because of a controversy about a misleading claim that it had made regarding the content of one its products. DSOF ¶ 213; Defs.' Ex. B at 105-107 (Patterson Dep.).

[15] Before its demise, the Norcross facility also processed polystyrene waste collected from the Pasco County Schools, Florida, and occasional loads from the DeKalb County Schools, Rockdale Schools, and Newton County Schools, all in Georgia. DSOF ¶ 31. The facility also processed some waste from Publix, a large, Southern-based grocery chain. *Id.*

[16] As with the aborted Dolco deal, the proposal included an agreement by Genpak to pay Evergreen a royalty for the use of Evergreen's recycled resin in the lunch trays. Pl.'s Ex. 1029 (January 17, 2007 e-mail exchange between Reilly and Forrest); Pl.'s Ex. 1036 (no date e-mail from Jeff [LNU] to Reilly and Tim O'Connor of Genpak).

[17] Forrest alleges that Reilly's conduct was "directly correlated to the March 6/7, 2007 group meeting," although he offers no particulars about the alleged meeting. Forrest Aff. ¶ 34. Evergreen's own exhibits indicate that the attempted bid retraction in fact occurred a month later in mid-April 2007. Pl.'s Ex. 1035 (April 16, 2007 e-mail chain between Forrest and unidentified individuals at Southeastern Paper Group).

[18] The Evergreen/Genpak bid was identical in price to Pactiv's bid. DSOF ¶ 32; Defs.' Ex. G **[**16]** at 235 (Coury Dep.). The Gwinnett Schools, however, refused to accede to Evergreen's demands that it require all trays purchased contain recycled content, and that it rebate any savings on waste haulage to Evergreen. DSOF ¶ 33; Pl.'s Ex. 906 at 445 (Coury Dep.). Ultimately, apart from BPS, none of the schools that Evergreen approached was willing to require that purchased trays contain recycled content. DSOF P 34 (citing refusals by the Atlanta Public Schools, Cobb County Public Schools, DeKalb County Public Schools, New York Public Schools and Orange County Public Schools). Similarly, Evergreen was unable to extract an environmental fee (one of its three essential revenue streams) from any school. *Id.;* Defs.' Ex. 39 (Aug. 1, 2009 e-mail from Scarito to Forrest).

It described itself as being "dedicated to educating the public about the importance and benefits of plastic foodservice packaging." DSOF ¶ 348. Its day-to-day activities were overseen by **[**17]** Senior Director Michael Levy and focused on lobbying against efforts to ban polystyrene products. *Id.* ¶¶ 348-349. One of the talking points in these lobbying efforts was polystyrene's recycling potential. *Id.* ¶ 350. The Plastics Group stated a willingness to engage with recyclers in the effort to defeat the polystyrene prohibitionists, so long as any entity it enlisted for this purpose "was actually recycling." DSOF ¶ 369; Defs.' Ex. M at 95-96 (Levy Dep.).

In May of 2007, the Plastics Group formed a subgroup called the Recycling Task Force (Task Force). Forrest Aff. ¶ 38; DSOF ¶ 353. The Task Force was composed of four of the national converters, Pactiv, Solo, Dolco, and Genpak, with Dow Chemical Company as a fifth member.[19] *See* Pl.'s Ex. 1014 (July 10, 2007 [Plastics Group] Recycling Task Force Update). According to defendants, the Task Force was created because "political pressure to enact polystyrene bans was on the upswing in places like California." Joint Defs.' Mem. at 17. The mission of the Task Force was "specifically to identify and report back to the [Plastics Group] on examples of viable polystyrene recyclers that could be helpful in the effort to defeat proposed bans." *Id.* ***[**18]***

Shortly before the Task Force was created, Reilly suggested that Evergreen seek financial support from the members of the Plastics Group to open a recycling facility in California. Forrest Aff. ¶ 35. On March 28, 2007, Forrest made a presentation to the Plastics Group describing in detail Evergreen's business model. DSOF ¶ 371; Defs.' Ex. A at 1395 (Forrest Dep.). On May 21, 2007, Forrest submitted a formal proposal to the Plastics Group. Defs.' Ex. 212 (May 21, 2007 Evergreen proposal to Plastics Group). It laid out two options, both of which depended on a financial subsidy. The first — and leanest — alternative required a $500,000 payment upfront to Evergreen by the Plastics Group and a promise that its members would pay "green commissions [to Evergreen] from environmentally friendly products [produced] by the member converters." *Id.* at 4. The second option required Plastic Group members to "provide the upfront capital to set up the recycling facilities" (in exchange for dropping the royalty payments provision). *Id.* This latter option contemplated a down payment of $500,000, and over time, the infusion of $2.6 million in additional funds **[**19]** into the California facility. *Id.* at 5. Forrest revised the proposal on May 30, 2007, to include a third option that called for a $500,000 initial subsidy and a commitment that each converter purchase a set amount of resin from Evergreen over the life of the plant. DSOF ¶¶ 384-385; Defs.' Ex. 214 (May 30, 2007 e-mail from Levy to Plastics Group senior executives).

On May 31, 2007, the Plastics Group met in a conference call to discuss Forrest's various proposals. Levy opined that Forrest's request that the Plastics Group subsidize his business model rendered the proposals "non-starters." DSOF ¶ 386; Defs.' Ex. 200 at ¶ 29 (Levy Decl.). The members of the Group concurred. Levy conveyed the Plastic Group's negative reaction to Forrest, who responded with another proposal that proved as heavily dependent on subsidies as the earlier ones. DSOF ¶¶ 387-388; Defs.' Ex. 215 (June 15, **[*9]** 2007 e-mail from Forrest to Levy). On June 20, 2007, the Task Force held a conference call to discuss Forrest's latest proposal. DSOF ¶ 389. The members proved no more amenable, prompting Levy to inform Forrest that the Plastics Group was unwilling to go forward with any one of his alternative proposals. DSOF ¶ 390; Defs.' **[**20]** Ex. 217 (June 20, 2007 letter from Levy to Forrest).

Packaging Development Resources

Around this time, Evergreen became aware of a potential competitor, Packaging Development Resources (PDR). Tom Preston and Tom Cantwell, the founders of PDR, had, in 2005, approached Forrest offering to assist Evergreen's efforts to expand its fledgling recycling business to other city school systems. The discussions ended without any agreement. Forrest Aff. ¶ 18; DSOF ¶ 26. Preston and Cantwell believed that Evergreen's business model would not work outside of Boston and Providence because, in most localities, schools "were constrained by law to select the cheapest product for each type of product they purchased," and could not pay Evergreen a premium for recycled content. DSOF ¶ 26. Nor were they permitted to offset the price for products containing recycled resin with projected savings on waste haulage. *Id.* Preston and Cantwell proposed as an alternative that

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[19] Dart, for some reason, was not named to the Task Force.

Evergreen simply sell its recycled content resin directly to converters for general use (which would have eliminated the revenue stream that Evergreen hoped to derive from royalties paid on finished "green" products). Although Forrest rejected **[**21]** this pared-down strategy, it became the business model for PDR. DSOF ¶ 26 and 65.

PDR was incorporated in California in 2006. DSOF ¶ 57. Preston and Cantwell compared PDR's business model to that of the national resin producers, stating that, like them, PDR did not tax its customers with "any type of license fee or royalty, or payback of a certain amount of sales." DSOF ¶ 65; Defs.' Ex. E at 195 (Preston Dep.); Defs.' Ex. L at 173-174 (Cantwell Dep.). PDR in short order won contracts in California with the San Diego, Long Beach, Burbank, Torrance, Chula Vista, Orange, and San Ysidro school systems to collect and recycle their polystyrene waste during the 2006-2007 school year. DSOF ¶ 69.

On May 21, 2007, an industry publication, *Plastics News*, published an article praising PDR for its successes in diverting polystyrene school lunch trays from landfills by recycling their resin content. Forrest Aff. ¶ 43; Defs.' Ex. 219 (May 21, 2007, *Plastics News*, "PDR Finds Uses for Difficult to Recycle PS"); *see also* DSOF ¶¶ 400-406. Forrest stated that he was "shocked" by the article because he was unaware of any prior industry recognition of PDR, and that prior to the article, Evergreen had been **[**22]** acknowledged as operating the only going facility producing food-grade recycled resin. Forrest Aff. ¶ 44.

Forrest decided to conduct his own investigation of PDR. He paid a visit to the site of PDR's facility in Santa Ana, California, where he claims to have spoken with truck drivers delivering trays collected from the San Diego schools. *Id.* ¶ 45.[20] The drivers told him that the trays were not being recycled by PDR, but were instead being dumped into landfills. *Id.* Forrest relayed his findings to Levy, who made a site visit of his own on June 18, 2007. *Id.* ¶ 46. Levy found the PDR facility locked with no one present. Defs.' Ex. 221 (June 18, 2007 memo to file from Levy). Levy reported the results of his **[*10]** visit to the Task Force. *Id.* Despite his and Levy's "findings," Forrest alleges that the Plastics Group continued to promote PDR at Evergreen's expense and assisted PDR in landing accounts with additional school districts in California, Philadelphia, and New York City. Forrest Aff. ¶ 48.

Activities post the May 31, 2007 Plastics Group meeting

Later that same **[**23]** year, in August of 2007, Dolco and Genpak entered into a funding agreement with Evergreen under which each advanced Evergreen $75,000 and committed to sustained purchases of recycled resin from Evergreen's Georgia facility. DSOF ¶¶ 29 and 120; Defs.' Ex. 43 (July 27, 2007 Dolco-Genpak-[Evergreen] funding agreement). Between 2006 and 2008, Dolco purchased 250,000 pounds of Evergreen's resin. Forrest Aff. ¶ 28. Similarly, between 2007 and 2008, Genpak purchased 300,000 pounds. *Id.* ¶ 36. During this same period, Pactiv tested a sample of Evergreen's resin and began negotiating a contract, but could not come to terms with Evergreen's demand for a royalty or licensing fee on all sales of Pactiv's finished "green" products using Evergreen's resin.[21] DSOF ¶¶ 137-149.

Between May and November of 2008, Forrest entered into negotiations with Solo. Evergreen provided 20,000 pounds of recycled resin to Solo for testing. Forrest Aff. ¶ 51. Forrest alleges that Solo's president later informed

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[20] None of the drivers are listed by name, nor are dates given when the alleged interviews took place, or whether anyone else was present.

[21] Demonstrating the value that Forrest placed on the royalty component of Evergreen's business model, he estimates that every $10 million in "green" sales would have resulted in $400,000 in royalty payments to Evergreen. Forrest Aff. ¶ 29. Pactiv, for its part, had told Forrest that, "[g]iven [the] narrow margins on this product [school lunch trays]," it would be "unable to absorb any additional costs," which "would have to be passed on **[**24]** to the school district." Defs.' Ex. 835 (May 28, 2008, e-mail from Terry Coyne of Pactiv to Forrest). Because of the narrow margins on lunch trays, neither Solo nor Dart manufactured them. DSOF ¶¶ 247 and 297.

him that Solo had been told by an unnamed person, presumably someone from the Plastics Group, not to do business with Evergreen. *Id.*[22]

PDR was also actively soliciting business from Plastics Group members during this same time period. Dart entered into a letter of intent with PDR in December of 2007 to purchase PDR's recycled resin. DSOF ¶ 75. Dart, however, rescinded the contract with PDR in June of 2008, after determining that PDR's resin did **[**25]** not meet its quality standards. *Id.* ¶ 76. In August of 2008, PDR entered into "a loan and materials purchase agreement with Pactiv," under which Pactiv extended PDR a loan of $415,000, in exchange for a right of first refusal to purchase PDR's resin. *Id.* ¶¶ 78-79 and 135. PDR underwent a "stewardship" program with Pactiv to bring its resin into compliance with Pactiv's quality standards. *Id.* ¶ 80. PDR sold "tens of thousands of pounds of resin to Pactiv," and by October of 2008, PDR was producing 15,000 pounds of recycled resin a month. *Id.* ¶ 81. Pactiv was able to produce products containing high percentages of PDR resin, some with a recycled content approaching 100%. *Id.* ¶ 82. Solo also purchased 1,000 pounds of PDR resin for quality testing, but by the time the testing was complete, PDR was no longer in business. *Id.* ¶¶ 256-258.

Despite the dealings with PDR, the Plastics Group continued to promote Evergreen as a recycler, inviting it to make a **[*11]** presentation at a Group executive session on March 19, 2008. *Id.* ¶¶ 421-424. In April of 2008, it recommended Evergreen to Dolco as a recycling partner in New York.[23] *Id.* ¶ 425. In October of 2008, Levy sent Evergreen a letter of recommendation **[**26]** at Forrest's request "recognizing the success of [Evergreen's] closed-loop recycling system for polystyrene in New England and the Atlantic Coast Region." DSOF ¶ 432; Defs.' Ex. 232 (Oct. 7, 2008 letter from Levy to Forrest).

Failure of Evergreen and PDR

In 2008, Evergreen and Genpak lost the Gwinnett Schools lunch tray account to Pactiv. Evergreen blames Genpak for submitting a bid above market (while Pactiv's bid was below market). Opp'n at 29; DSOF ¶ 129. As a result, Evergreen was forced to close the Norcross facility in May of 2008. DSOF ¶ 53. Although it opened a smaller facility in Lawrenceville, Georgia, by November of 2008 this facility was also no longer economically viable. *Id.* Despite Evergreen's loss of any actual production capacity, in February of 2009, Genpak's President Reilly wrote to Evergreen with the assurance that: "At Genpak we understand [Evergreen's] need to make ["Green Products"] a revenue stream and are willing to pay this additional fee." Forrest Aff. ¶ 32. The following month, Pactiv presented Evergreen with a letter **[**27]** of intent to purchase a minimum of 300,000 pounds of its recycled resin yearly, although Evergreen never signed the letter. DSOF ¶ 142; Defs.' Ex. 840 (March 28, 2008 letter from Terry Coyne of Pactiv to Forrest).

PDR was also forced out of business in the first quarter of 2009 as virgin resin prices continued to plummet (to $0.50 per pound as of October 2008)[24] while the production costs of PDR's recycled resin were many multiples higher ($8.10 per pound as of October 2008), a price well above what any converter was willing to pay. DSOF ¶¶ 85-88.[25]

Procedural Background

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[22] Like Pactiv, Solo contends that it was unable to come to terms with Evergreen because it found Evergreen's proposed pricing "confusing," and that based on the price of Evergreen's resin alone, before any royalty or commission was paid, Solo would face a 5% increase in its production costs. DSOF ¶¶ 265, 270-274, 277 and 289.

[23] At least one member (Dart), recommended Evergreen to a client, Publix, when the grocery chain was seeking a polystyrene recycler. DSOF ¶ 332.

[24] The world price of oil dropped precipitously in the second half of 2008. DSOF ¶ 84.

[25] It will be recalled that Evergreen was never able to produce recycled resin at a cost of less than $2 per pound. *See* n.10, *supra*.

Evergreen filed suit in the federal district court on May 9, 2011, alleging violations of the antitrust laws. On June 7, 2013, this court granted defendants' motions to dismiss, after determining that the factual allegations contained in the Complaint did not "possess enough heft" to amount to "a plausible entitlement to relief" under the holding of *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. *Evergreen, 865 F. Supp. 2d at 138*.

In reversing this court's dismissal, the First Circuit did not **[**28]** suggest a misapplication of the ***antitrust law***. Rather, the First Circuit faulted the court's decision for importing summary judgment standards into the pleading stage. In sum, the First Circuit found that the facts alleged in the Complaint, viewed holistically in Evergreen's favor, made out a potential claim of an antitrust violation.

More specifically, the First Circuit identified the following facts, that when "taken together" provided "a sufficient basis to plausibly contextualize the agreement necessary for pleading a *§ 1* [Sherman Act] claim." *Evergreen, 720 F.3d at 47*. The First Circuit focused on the allegation that **[*12]** a meeting of the Plastics Group, said to have taken place in 2005 or 2006, established the "locus of agreement" among its members. *Id.* Moreover, the participation of all of the named defendants in the Plastics Group allegedly served to facilitate anticompetitive scheming. *Id. at 47 and 49*. The First Circuit also dwelt on allegations that two of the major polystyrene producers — Pactiv and Dart — made no secret of their antipathy to recycling, and together paid the bulk of the dues collected by the Plastics Group. This dues dominance, the First Circuit speculated, might have enabled Pactiv and Dart to **[**29]** exert undue pressure on the weaker members of the Group. *Id. at 47*. The First Circuit found further support for this inference in the defendants' alleged "parallel conduct" following the "locus of agreement" meeting, which culminated in a "global failure" to embrace Evergreen's business model. According to the First Circuit's reading of the Complaint: "Dolco abruptly withdrew its interest in producing for Evergreen's closed-loop system after the meeting," while Genpak, Pactiv, and Solo refused to work with Evergreen despite being asked by their distributors to do so; Pactiv induced Sodexo to cancel its contract with Evergreen; Pactiv, Dart, and ACC instructed their customers that recycling was not feasible; and the Plastics Group and its members connived to deny Evergreen funds for expansion into California. *Id. at 47-48*. The First Circuit found particularly persuasive Evergreen's allegation that the Plastics Group had promoted a "sham" competitor, that is, PDR, at Evergreen's expense. *Id. at 48*. Finally, the First Circuit pointed to allegations that the defendants were undermining their own economic self-interest by refusing to embrace Evergreen's business model. *Id. at 50*.

The First Circuit faulted this court's opinion **[**30]** for drawing impermissible inferences in the defendants' favor. In particular, it held that the district court "either credited as true or inferred the truth of defendants' bases for rejecting dealings with Evergreen," including the assertions: "that while several of the producer defendants tested or purchased Evergreen's resin, they 'found the results disappointing for various and often different reasons'"; "that partnering with Evergreen would have 'significantly increased [defendants'] costs'"; "that Evergreen's [recycled resin] was, in fact, more expensive than virgin resin"; "that Evergreen's business plan stood to raise costs for the producer defendants and their consumers"; "that [Evergreen's plan] required the producer defendants to expand beyond their established market niches and disrupt a profitable status quo"; and finally, "that it would have undermined the producer defendants' existing and even more profitable environmentally conscious products." *Id. at 42 and 50* (internal citations removed). As the discussion below will demonstrate, all of the district court's inferences were borne out during discovery.

DISCUSSION

HN2[] Summary judgment "acts 'to pierce the boilerplate of the pleadings **[**31]** and assay the parties' proof in order to determine whether trial is actually required.'" *Rodriguez-Pinto v. Tirado-Delgado, 982 F.2d 34, 38 (1st Cir. 1993)* (internal citation removed). It is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. "In this context, 'genuine' means that the evidence is such that a reasonable jury could resolve the point in favor of the nonmoving party." *Rodriguez-Pinto, 982 F.2d at 38* (internal quotation marks and citation removed). ***HN3***[] "To succeed, the moving party must show that **[*13]** there is an absence of evidence to support the nonmoving party's position." *Rogers v. Fair, 902 F.2d 140, 143 (1st Cir. 1990)*. If this is accomplished, the burden then "shifts to the nonmoving party to establish the existence of an issue of fact that could affect the outcome of the litigation and from which a reasonable jury could find for the [nonmoving party]." *Id.* The nonmoving party "must adduce specific, provable facts demonstrating that there is a triable issue." *Id.* (internal quotation marks and citation omitted); *see also* *Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)*. "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue **[**32]** of *material* fact." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* (emphases in original).

HN4[] As a general rule, on summary judgment "'the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1985)*, quoting *United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962)*. But the rule is different in an antitrust context. "[A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a *§ 1* [Sherman Act] case." *Id. at 588*. In particular, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy . . . To survive a motion for summary judgment . . . a plaintiff seeking damages for a violation of *§ 1* must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Id.*, citing *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)* (internal citations removed).

Combination or Conspiracy

The challenge now faced by Evergreen is to demonstrate a factual basis for its assertion that there was a "combination . . . or conspiracy, in restraint of trade or commerce" that involved the producer defendants. *15 U.S.C. § 1*. ***HN5***[] In order to do so, "the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the [defendants] 'had **[**33]** a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Monsanto, 465 U.S. at 764* (citations removed); *cf.* *Am. Tobacco Co. v. United States, 328 U.S. 781, 810, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)* (the plaintiff must present evidence that proves "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.").

It is on this crucial first element that Evergreen falters. In its attempt summon the specter of a conspiracy, Evergreen surmises: (1) that three of the defendants refused over time to deal with it out of fear of retribution by the fourth (Pactiv); (2) that the defendants took a unified position, instigated by Pactiv and Dart, against recycling in general and Evergreen's approach to recycling polystyrene waste in particular; and (3) that defendants promoted PDR as a competitor to Evergreen when they knew full well that PDR's business plan could not compete with Evergreen's superior business model. Opp'n at 3.

Refusals to deal with Evergreen

Evergreen suggests that the conspiracy sprung to life from the moment it **[*14]** sought to enter the national polystyrene market, that is, in 2005.[26] In attempting to marshal support for this theory, Evergreen cites the history of

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[26] Defendants argue that a number of Evergreen's allegations fail on statute of limitations grounds. The Sherman Act has a four-year statute of limitations. *15 U.S.C. § 15b*. This limitation period begins to run "when a defendant commits an act that injures a plaintiff's business," *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*, although "each overt act that is part of the violation and that injures the plaintiff . . . starts the statutory period running again." *Klehr v. A.O. Smith Corp., 521 U.S. 179, 189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)* (internal quotation marks and citation removed). This becomes relevant only if a combination or conspiracy in fact formed in 2005. Because I find that there was no illegal combination, there is no need to determine whether later alleged overt acts may have retriggered the limitations period.

its failed business negotiations between 2005 and 2007. These, **[**34]** according to Evergreen, demonstrate a unity of opposition to recycling among Plastics Group members.[27] None of this survives scrutiny.

Evergreen **[**35]** first contends that its attempt to enter a joint venture with Dolco and Sysco in 2005 collapsed under pressure exerted by Pactiv. Evergreen argues that from the outset, Pactiv opposed recycling as a threat to the converters' economic interests.[28] In its Complaint, Evergreen alleges that a meeting took place "in or around late 2005 or early 2006," and that at the meeting, "John McGrath of Pactiv announced to the members of [the Plastics Group] that recycling polystyrene products was not an option in the industry's battle with polystyrene's critics. A representative from Dart agreed." Sec. Am. Compl. ¶ 39. Unable to produce any evidence that such a meeting in fact occurred "in or around late 2005 or early 2006," Evergreen now dates the opening manifesto of the anti-recycling campaign to a March 18, 2005 conference call that included the defendants. *See* DSOF ¶¶ 359-361 (only two Plastics Group meetings took place in the period between late 2005 and the early spring of 2006; McGrath was not present at either; and the minutes do not reflect any discussion of recycling at either meeting). The only evidence pertaining to this March 18, 2005 conference call is an unattributed draft of notes **[**36]** entitled "CA Strategy Call — PS Foodservice Bans." Pl.'s Ex. 1025.[29] According **[*15]** to the notes, the call was joined by representatives of Pactiv, Dart, and Dolco, as well as a lawyer from ACC. *Id.* at 1. Evergreen relies on the notes to support not only the proposition that the defendants shared an antipathy to recycling, but that they also resolved among themselves to choke off any tentative movement by the polystyrene industry in a "green" direction, with Dart and Pactiv acting as enforcers should any of the smaller defendants dare to break ranks.

The notes do not bear the load that Evergreen assigns them. Although the notes record comments that can be taken as critical of the costs of recycling,[30] there is nothing in the notes that lends itself to a plausible inference that the anonymous note taker witnessed the formation of a conspiracy targeting Evergreen. At most, the notes reflect **[**38]** a reluctance, as one speaker phrased it, "to pick up [the] tab to subsidize [a] costly limited [polystyrene] foodservice recycling program."[31] *Id.* at 1.

It was shortly after this conference call, in the fall of 2005, that Forrest approached Patterson of Dolco about working with Sysco to develop a "green" product line. Forrest alleges that the prospective deal fell through because "it became clear that Patterson would not do a 'green' foam deal with Sysco, although Patterson was eager to

[27] Evergreen focuses on the failure of its prospective business partners to agree to pay it a royalty or commission for the use of its recycled resin (the third essential revenue stream contemplated by its business model). As will become apparent, several of the defendants were willing to consider partnering with Evergreen, but not on the terms Evergreen demanded.

[28] For example, Forrest alleges in his affidavit that Sodexo told him that Pactiv and Dart refused its invitation to produce a green product line with Evergreen's resin in 2005. Forrest Aff. ¶ 17. There is no supporting evidence other than Forrest's say-so.

[29] Defendants argue that the notes should be stricken because they are explicitly labeled as a draft and contain multiple levels of hearsay. Def. Mem. Mot. to Strike at 6 and 12. Only one witness was asked about these notes at deposition, namely an executive of Dow Chemical (not a defendant) whose name appears on the notes as an attendee. He testified that he could not recall either having participated in **[**37]** the conference call or having ever seen the notes themselves. DSOF ¶ 115. Defendants cite to *Livingstone Flomeh-Mawutor v. Banknorth, N.A., 350 F. Supp. 2d 314 (D. Mass. 2014)*, where the court refused to consider a draft copy of a letter on summary judgment because it was "not on letterhead, [was] unsigned and was not authenticated." *Id. at 320*. Evergreen in response argues that the minutes are "a party opponents' [sic] business record, produced by the ACC, containing its admissions regarding the core matters at issue and is not hearsay." Opp'n to Mot. to Strike, at 8 (citing *Fed. R. Evid. 801(d)(2)*). To establish the notes as the admission of an opposing party, Evergreen at a minimum would be required to authenticate them, which it has failed to do. *See* *Carmona v. Toledo, 215 F.3d 124, 131 (1st Cir. 2000)* ("The law is well-established that ***HN6***[] '[d]ocuments supporting or opposing summary judgment must be properly authenticated.'") (citation omitted). In sum, the notes deserve little or no weight in the conspiracy calculus.

[30] Jim Lammers of Dart reportedly asked, "[D]o we get a sense from our opponents that we can 'win out' without having to offer [polystyrene] foodservice recycling as an answer[?]." Pl.'s Ex. 1025 at 1.

[31] It is true that one speaker suggested that support of a litter reduction campaign might defuse some of the public hostility towards polystyrene products, although it is something of a stretch to detect the stirrings of a conspiracy in this rather common-sense recommendation.

purchase recycled resin made by [Evergreen]."[32] Forrest **[*16]** Aff. ¶ 26. Dolco counters that Sysco had its own reasons for backing away from "green activities," and Evergreen has produced no evidence to the contrary. DSOF ¶ 213. (It will be recalled that less than a month **[**39]** after Patterson's statements were allegedly made Dolco put an offer on the table that acceded to every term that Evergreen had demanded).

Evergreen next points to its successful deal with Genpak in 2007 and its communications with Genpak's president, Jim Reilly, as proof of concerted opposition to recycling on the part of the producer defendants. Evergreen alleges that Genpak's attempt in March of that year to withdraw its bid on the lunch tray account with the Gwinnett Schools was the result of pressure from Pactiv.[33] If so, the gambit failed. Genpak's bid was not withdrawn and Genpak and Evergreen won the account over the other bidders, including Pactiv.[34] It was within this same time frame that Reilly urged Evergreen to submit a proposal to obtain funding from the Plastics Group. Evergreen's argument, as I understand it, is that Reilly's invitation to Forrest to seek funding from the Plastics Group reveals a subliminal unwillingness on his part to enter into a deal with Evergreen without the blessing of the Plastics Group.[35] This gloss crosses the border that demarcates the realm of permissible inference from the world of rank speculation.

Requiring unified action

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[32] Evergreen attempts to explain the collapse of the deal by pointing to statements made by Patterson immediately after the meeting between Evergreen, Patterson, and Sysco in November of 2005. Forrest Aff. ¶ 24 (Patterson "said words to the effect 'f****g McGrath [referring to the head of Dolco] stood up in front of these — the [Plastics Group] meeting . . . and he said that — that they're not going to recycle and that Dart got up right behind him and said 'We're not going to recycle either.' Patterson then said 'I am not going to compete with Pactiv. You understand that?'"). Defendants argue that this paragraph of Forrest's affidavit should be stricken because it involves multiple levels of hearsay and is contradicted by Forrest's prior testimony. Defs.' Mem. Mot. to Strike, at 4-8. Evergreen responds with the same argument it made with respect to the unauthenticated notes, that Patterson's statements are an admission by a party opponent and are offered not to prove that there was a meeting at which the statements were made, but rather to prove "Patterson's **[**40]** state of mind at the time about the unified action and fear of retribution." Opp'n to Mot. to Strike, at 12. Patterson denies having ever heard such a statement. DSOF ¶ 112. That denial aside, Evergreen's explanation makes little evidentiary sense. In the first place, Patterson is not an employee with a senior enough position in Dolco's corporate hierarchy to bind his employer. Second, Evergreen's assertion that it is not relying on the statements for their truth is either nonsensical or disingenuous. If Evergreen is not attempting to use the statements to prove that a concerted decision was taken by the leaders of Dolco and Dart to oppose recycling, and that the alleged decision explains Patterson's reluctance to go forward with the Sysco deal, then there is no reason for them to be offered at all. Moreover, Patterson's state of mind is irrelevant to the question of whether the alleged combination or conspiracy actually existed. That aside, a statement by some unidentified person at Dolco that the company did not want to recycle or compete in Pactiv's sector of the market does not prove a conspiracy. ***HN7***[] The antitrust laws do not require a company to compete with other actors in its market. **[**41]** A company is perfectly free under the antitrust laws to concentrate on its own chosen niche, leaving the broader market for others to exploit.

[33] In support of its assertion that Genpak attempted **[**42]** to pull the bid, Evergreen points to an April 16, 2007 anonymous e-mail that states: "Michael has communicated that Jim Reilly retracted this price. Due to pressures from Kevin Kelly. We need discuss." Pl.'s Ex. 1035 (April 16, 2007 e-mail chain between Forrest and unidentified individuals at Southeastern Paper Group). The sender and recipient of the e-mail are, however, unidentified. Moreover, as apparent from the reference to "Michael," Forrest himself was the source of the allegation that Genpak had attempted to retract its bid. The email, in other words, proves little, if anything with respect to the existence of a conspiracy.

[34] Evergreen adds that yet another unidentified person at Pactiv made a "nasty" phone call to an official at the Gwinnett Schools saying that he would do "whatever is necessary to get that bid back." Pl.'s Ex. 911 at 61 (Laskowski Dep.). It is clear from the deposition testimony cited by Evergreen, however, that this conversation occurred in 2008 when Gwinnett Schools was soliciting bids on a new contract. *Id.* at 60. The court sees no connection between this later anonymous conversation and the 2007 Genpak deal.

[35] Reilly, by contrast, testified that he made the suggestion **[**43]** because he felt Genpak could not provide the depth of financial support that Evergreen required to remain economically viable. Defs.' Ex. K at 171-173 (Reilly Dep.).

Having failed to provide factual support for its allegation that Dolco and Genpak refused to deal with it (or dealt with it reluctantly) because of fear of retribution from Pactiv, Evergreen fares no better in attempting to prove that the defendants undertook at a Plastics Group or Task Force meeting to organize opposition to Evergreen's recycling efforts.

Evergreen argues that both the decision to create the Task Force and the discussion of Evergreen's proposals at the May 31, 2007 meeting were part of a process to "determine which of the two food grade recyclers, [Evergreen] or PDR, the group would support as 'viable' or 'not viable'/'pick winners and losers.'"[36] Opp'n at **[*17]** 3. According to Evergreen, the meeting amounted to an effort by defendants "as a unified group, . . . to control the way and manner that Recyclers such as [Evergreen] could do business." Opp'n at 24. In other words, Evergreen, having failed to identify a meeting in 2005 or 2006 giving birth to a conspiracy, now proffers the May 31, **[**44]** 2007 meeting as an alternative cradle for the plot.[37]

Evergreen does not, however, offer any plausible evidence that defendants, through the Task Force or the larger Plastics Group, were attempting to suppress Evergreen. While Evergreen asserts that McGrath (the president of Pactiv) all but admitted in his deposition to the conspiratorial nature of the May 31, 2007 meeting, the most that McGrath said on the subject was that "the task force formed so we could identify potential solutions to propose to the State of California to help them understand that polystyrene could be recycled." Pl.'s Ex. 905 at 66 (McGrath Dep.).[38] He later added that the goal was to identify "recycling opportunities that were available to develop . . . [i]n the near term." *Id.* at 77-78. In this context, Evergreen's proposal that it establish a recycling facility in California (with the Plastic Group's money and purchasing commitments) was thought not to be viable, at least in the short-term.[39] Similarly, in arguing that the Plastics Group met "to pick winners and losers," Evergreen cites deposition testimony of Tony Kingsbury of Dow Chemical, but the **[**46]** full context makes clear **[*18]** that Kingsbury was saying quite the opposite of the spin that Evergreen gives:

Q. Did you give everybody a fair shot —

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[36] Defendants note that, even assuming that this meeting of the Plastics Group culminated in a determination that Evergreen was not an attractive option for its members, as a matter of law, trade associations are free to "evaluate competitors and make non-binding recommendations to their members," without violating the antitrust laws. Defs.' Joint Reply at 8. *See* *Consol. Metal Prods., Inc. v. Am. Petroleum Inst., 846 F.2d 284 (5th Cir. 1988)*; *Massachusetts Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 937 F. Supp. 435 (E.D. Pa. 1996)*, *aff'd*, *107 F.3d 1026 (3d Cir. 1997)*.

[37] There is some confusion in the briefing between the Plastics Group and the Task Force. *Compare* Opp'n at 24 *with* Opp'n at 25. According to McGrath, the Task Force was created on May 31, 2007, during the conference call that considered Evergreen's proposals. Pl.'s Ex. 905 at 71-73 (McGrath Dep.). The Plastics Group had a broader membership than just polystyrene converters. *Id.* at 79. It was the Plastics Group that both considered Evergreen's proposals and formed the Task Force. *Id.* at 80. Evergreen's brief states that the Plastics Group, and not the Task Force, promoted PDR as a competitor. *See, e.g.*, Opp'n at 25. This being said, Evergreen's Complaint limits the membership in the alleged conspiracy to the producer defendants that made up the Task Force (Pactiv, Solo, and Dolco), **[**45]** plus one defendant that was not part of this smaller group (Dart) while excluding the fifth member of the Task Force (Dow Chemical).

[38] The evidence cited by Evergreen confirms that the Plastic Group's deliberations were focused on a strategy for dealing with the threat of a polystyrene ban in California. Pl.'s Ex. 1013 (June 6, 2007 Levy memo) (Task Force was formed "to help develop RFPs (requests for proposals) for qualified **[**47]** bidders for a California [polystyrene] foodservice program").

[39] "The members were then looking at being asked to fund a process that was really not commercial in its existing form and certainly not in the State of California, was being asked to evaluate that and commit — if I recall, the number was something like 3.1 million, with an M, million dollars — to put this thing in and to hope that (a) it would come on line quickly, (b) it would work, (c) that would be the necessary resistance, if you will, where the rest of the State of California would say, okay, now there's this recycling plant here and that's going to solve all of the recycling woes in the State of California, so the judgment of the members was that that's not a viable option." Pl.'s Ex. 905 at 74 (McGrath Dep.). McGrath later clarified that Evergreen's proposal was "[n]ot a viable solution for the State of California at the time [because] we were trying to reduce and discourage municipalities from banning polystyrene foam." *Id.* at 81.

A. Absolutely.

Q. — for their proposals —

A. Absolutely.

Q. — and their submissions?

A. Absolutely. We wanted to pick a winner. Everybody wants to pick the winning horse.

Q. When you did make a decision and discussed different avenues to support or assist when you were on the [Plastics Group], was there any discussion that individual manufacturers couldn't support Option A or Option B on their own?

A. That would have been an inappropriate discussion. I mean, you know, free enterprise says anybody can do whatever they want.

Pl.'s Ex. 907 at 120 (Kingsbury Dep.).[40] In sum, the evidence does not even faintly support the allegation that the May 31, 2007 conference call served as the launching pad for a conspiracy to drive Evergreen out of the polystyrene recycling business.

Group Promotion of Competitor PDR

Evergreen argues that the conspiracy hatched during the May 31, 2007 conference call took further tangible form in efforts by the Plastics Group to actively promote PDR at Evergreen's expense. No evidence, however, is offered to back up this assertion.[41] Evergreen argues that attempts were made by the Plastics Group to help PDR secure accounts in Los Angeles, New York City, and Philadelphia, as well as with the Disney interests, although the only supporting document that Evergreen offers is a memorandum reflecting a conversation in which Tom Preston at PDR *conveyed to* the Plastic Group's Mike Levy a self-promotional account of PDR's successes in courting these potential clients. Pl.'s Ex. 1039 (Sept. 16, 2008 Levy memo to file).[42] The record, by contrast, portrays an effort by the Plastics Group to promote *both* Evergreen and PDR to the extent that it believed the interests of its members were thereby served.[43] It is telling, and Evergreen offers no evidence to the contrary, that PDR never received so much as a dollar in **[*19]** financial assistance from the Plastics Group. DSOF ¶ 61.

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[40] Kingsbury later confirmed that the Plastics Group "was happy to identify more than one winner who could be pointed to as a viable recycler in efforts to lobby against municipal bans." Def. Ex. C at 123-24 **[**48]** (Kingsbury Dep.).

[41] Evergreen does not identify the defendants or persons who participated **[**49]** in the alleged campaign to promote PDR. Defendants maintain, and Evergreen does not deny, that neither Dolco nor Solo had any involvement with PDR. DSOF ¶¶ 244 and 259.

[42] Evergreen points to PDR's limited success in New York as an example of a tangible benefit that PDR received from the backing of the Plastics Group. The agreement between PDR and the New York City public schools ultimately consisted of little more than a pilot project to establish the feasibility of PDR's proposed recycling program. DSOF ¶ 70. Moreover, the critical fact is that Evergreen was never in the competition for the New York contract because its business model was a nonstarter in New York (or California) for the simple reason that public schools in these states "were not permitted to tie together their potential [Evergreen]-related savings on trash hauling contracts to justify paying more for [Evergreen] school lunch tray purchases, or to specify that they would only purchase recycled trays." *Id.* ¶ 26.

[43] Both Evergreen and PDR were invited to make presentations to the Plastics Group, both were identified by the Group as recyclers that "members should seek out to explore possible business opportunities," and both **[**50]** were the subjects of complimentary articles in *Plastics News*. DSOF ¶¶ 362, 370-71, 392-393, 400-04, 411, 421-23.

In an attempt at rebuttal, Evergreen argues that the Plastic Group's vocal support of PDR was innately suspicious. In this regard, Evergreen cites Forrest's opinion, based on his "investigation" of PDR's recycling facility in California, that PDR was not a functioning entity.[44] Forrest Aff. ¶ 45. Evergreen also points to Levy's site visit on June 18, 2007, and his subsequent report to the Task Force, as further evidence that the Plastics Group knew (or should have known) that PDR was not a viable alternative to Evergreen.[45] *Id.* This proves too much and too little. At most it suggests that Levy had reason to suspect that PDR was not up and running by the day of his site visit. At the least, it suggests that any concerns that Levy had were eventually allayed, as he continued to promote both Evergreen and PDR as players in the California recycling campaign. Evergreen next cites the deposition of Joseph Doyle, Vice President and General Counsel of Pactiv, who testified that he reviewed the financials compiled by PDR between the summer of 2007 and the summer of 2009, and did not find **[**51]** any records of resin sales. Pl.'s Ex. 913 at 54 (Doyle Dep.). Pactiv presented evidence, however, that it was actively involved in assisting PDR in improving its production standards, including loaning PDR $415,000, hardly what one would expect had Doyle determined PDR to be a "sham." DSOF ¶¶ 78, 80 and 135. Pactiv and PDR entered into a confidentiality agreement in March of 2007 and entered into a purchase agreement in 2008. *Id.* ¶¶ 78-79.[46]

[*20] *Subsequent lack of unified action*

While events occurring between 2005 and May 31, 2007, fail to sustain even the faintest suggestion of a conspiracy, what followed is fatal to Evergreen's claims.[47] In August of 2007, Dolco and Genpak entered into a

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[44] Evergreen also cites for support two e-mails sent from Michael Forrest to Michael Levy and Larry [LNU] warning of "red flags" associated with PDR. Pl.'s Ex. 1037 (May 3, 2007 e-mail from Forrest to Larry [LNU] and June 3, 2007 e-mail from Forrest to Levy). This self-referential "evidence" is puzzling as it consists of nothing more than Forrest's opinion that PDR was not everything it was cracked up to be — hardly a surprising assessment by one competitor of another. Evergreen's own exhibits include an e-mail from Levy assessing PDR in April 2007 as being "beyond the 'pilot' stage." Although this e-mail indicates that PDR was still establishing itself as a business, nothing in it suggests that Levy believed it to be a "sham," as Evergreen asserts. **[**52]** Pl.'s Ex. 1006 (April 2007 e-mail chain between Mike Levy and Jane Adams).

[45] Levy's initial assessment was the cautionary warning that if "[the PDR] facility is not recycling [polystyrene] and is landfilling the trays, [the Plastics Group] will need to prepare for negative media . . . and work to minimize any industry damage." Defs.' Ex. 221 (June 18, 2007 memo to file from Levy). There is no evidence offered by Evergreen that the landfilling accusation was ever verified by Levy or by any independent source.

[46] Beyond failing to prove that defendants thought PDR was a sham, Evergreen has failed to offer any convincing evidence that PDR was in fact a sham. PDR had 18 employees at its peak operation. DSOF ¶ 58. It had investors, including a bank loan of $850,000. *Id.* ¶ 60. It rented an 11,000 square foot facility and owned the equipment needed to recycle polystyrene. *Id.* ¶ 68. PDR was producing 15,000 pounds per month by October of 2008, and it was of such a high quality that items containing 100% recycled resin could be made from it. *Id.* ¶¶ 81-82. In 2008, Evergreen by contrast had the equipment to produce no more than 115 to 150 pounds of resin an hour, for a yearly production capacity of **[**53]** under 300,000 pounds. *Id.* ¶ 36. Defendants contend that Evergreen's resin was repeatedly found inferior, including a high rate of impurities, *id.* ¶¶ 37 and 42-43; odor problems, *id.* ¶¶ 38 and 51; too much moisture, *id.* ¶ 39; high levels of bacterial contamination, *id.* ¶ 40; and melt flow ranges that often made it unusable. *Id.* ¶ 41. At the time Evergreen made its May 31, 2007 proposal to the Plastics Group, it "had not even secured a location for a recycling facility in California, much less obtained permits and licenses or begun construction." *Id.* ¶ 119. Evergreen also has no answer to defendants' contention that Evergreen itself suggested that its resin be blended at a mixture of no more than 10% recycled resin to 90% virgin resin. Defendants question whether this is a sufficiently high content to justify making a "green" environmental claim about the final product. *See, e.g., id.* ¶¶ 199 and 262.

[47] The First Circuit found that at the motion to dismiss stage, this court "improperly weighted defendants' alleged inconsistent responses to Evergreen when it weighed the parties' respective accounts regarding the plausibility of a conspiracy. In fact, 'there is nothing implausible about coconspirators' starting out in a disagreement as to how to deal conspiratorially with their common problem.'" *Evergreen, 720 F.3d at 51*, quoting *Anderson News, LLC v. Am. Media, Inc., 680 F.3d 162, 191 (2d Cir. 2012)*. The factual record now demonstrates that these inconsistent responses amounted to more than the defendants starting out in disagreement. Rather, the defendants' inconsistent responses to Evergreen permeated the entire period of the alleged

funding agreement to provide financing for **[**54]** and to purchase resin from Evergreen's Georgia facility. *Id.* ¶¶ 29 and 120. Both companies continued to buy resin from Evergreen through 2008. *Id.* Pactiv tested Evergreen's resin and discussed the terms of a long-term contract, though the negotiations never bore fruit because of Pactiv's refused to pay Evergreen a commission or royalties over and above the price of the resin itself. *Id.* ¶¶ 137-149. Solo also tested Evergreen's resin and discussed business terms, but like Pactiv refused to pay the premiums that Evergreen demanded. *Id.* ¶¶ 262-291. All the while, the Plastics Group promoted Evergreen as a recycler, inviting it to make a presentation at a Group executive session on March 19, 2008, afterwards recommending Evergreen to Dolco as its choice of a recycler in New York, and providing a laudatory letter from Levy at Forrest's request "recognizing the success of [Evergreen's] closed-loop recycling system for polystyrene in New England and the Atlantic Coast Region." *Id.* ¶¶ 421-425 and 432; Def. Ex. 232 (Oct. 7, 2008 letter from Levy to Forrest). These facts belie any claim of a refusal to deal with Evergreen. The most that can be said is that defendants, in the long-term, were **[**55]** unable to swallow the demands of Evergreen's business model. Nothing in the antitrust laws compels a business to act irrationally by agreeing to an unprofitable scheme that threatens its bottom line.

Permissible Parallel Conduct

While the facts fail to demonstrate "that the [defendants] 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Monsanto, 465 U.S. at 764* (citations removed), there is also considerable **[**56]** evidence supporting defendants' position that their responses to Evergreen are illustrative of lawful independent parallel action. *See* *White v. R.M. Packer Co., 635 F.3d 571, 577 (1st Cir. 2011)* (***HN8***[] "[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.") (internal quotation marks and citation removed).

The hard truth is that Evergreen's recycled resin was more expensive than its virgin counterpart (and became even more expensive as the price of oil began to drop in 2008). *See, e.g.*, DSOF ¶¶ 35, 85 and 277. Evergreen's own expert opined that **[*21]** Evergreen could not survive on the proceeds of recycled resin sales alone, and that in order for Evergreen's business model to succeed the marketplace would have to be willing to pay an "environmental fee," as well as a royalty on the sale of all of a converter's products containing Evergreen's resin. Scarito Rep. at 2-3. Evergreen never succeeded in persuading a single customer (or potential customer) to pay the environmental fee. DSOF ¶ 34; Defs.' Ex. 39 (Aug. 1, 2009 e-mail from Scarito to Forrest). On the issue of royalties, while some defendants were willing to entertain the idea, they were either unable (in the earlier cases of Dolco **[**57]** and Genpak) or unwilling (in the later case of Pactiv and Solo)[48] to enter deals structured with all of the additional unprofitable components that Evergreen insisted upon.[49]

Ultimately, discovery has demonstrated that Evergreen's business model failed because it could not thrive, or even survive, in a competitive capitalist economy. ***Antitrust law*** is simply not the appropriate vehicle for forcing environmental choices on a recalcitrant market, if indeed recycled polystyrene can be deemed an "environmental choice."[50]

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conspiracy demonstrates that the alleged coconspirators failed to ever reach an agreement, assuming such an attempt was made.

[48] Although Dart, at its own request, tested Evergreen resin, it was never approached by Evergreen with any proposed deal and thus never entered into a discussion of a contract. DSOF ¶¶ 333, 335 and 337.

[49] It is worth noting that other companies that are not alleged to have been part of any conspiracy also rejected deals with Evergreen because the terms of its business model made no economic sense. *See* DSOF ¶ 49 (Dow Chemical), ¶ 50 (Ineos-Nova, Darnel, Wincup), ¶ 51 (Cascades) and ¶ 52 (Wal-Mart).

[50] Defendants further argue that Evergreen has also failed to prove that the alleged combination was "in restraint of trade or commerce . . ." *15 U.S.C. § 1*. Antitrust claims ordinarily require a multi-part **[**58]** showing: that the alleged agreement involved the exercise of power in a relevant economic market, that this exercise had anti-competitive consequences, and that these detriments outweighed any efficiencies or other economic benefits. This is the so-called "Rule of Reason" calculus. *See, e.g.,* *E. Food Servs. v. Pontifical Catholic Univ. Servs. Ass'n, 357 F.3d 1, 5 (1st Cir. 2004)*; *Fraser v. Major League Soccer, LLC, 284*

ORDER

For the foregoing reasons the defendants' Motions for Summary Judgment are ALLOWED. The clerk will enter judgment for all defendants and close the case.

SO ORDERED. **[**59]**

/s/ Richard G. Stearns

UNITED STATES DISTRICT JUDGE

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F.3d 47, 59 (1st Cir. 2002). This calculus is bypassed if the collusive arrangement falls instead within one of several categories (*e.g.*, naked horizontal price fixing) in which liability attaches without need for proof of power, intent or impact. *E. Food Servs., 357 F.3d at 4 & n.1*. This is the so-called "*per se"* test. Evergreen alleges that it is a competitor with the four corporate defendants and attempts to shoehorn its claim into a "category of agreements sometimes labeled per se, namely, concerted refusals to deal or group boycotts." *E. Food Servs., 357 F.3d at 4*; *see also Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 465-467, 61 S. Ct. 703, 85 L. Ed. 949, 32 F.T.C. 1856 (1941)*. The defendants argue that Evergreen was merely a supplier, not a competitor, and that this court's analysis must adhere to the "Rule of Reason" analysis. Because I find that there was no combination, there is no reason to decide the issue.

English & Sons, Inc. v. Straw Hat Rests., Inc.

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

July 11, 2015, Decided; July 11, 2015, Filed

No. 3:15-cv-01382-LB

Reporter

2015 U.S. Dist. LEXIS 90766 *; 2015 WL 4239072

ENGLISH & SONS, INC, et. al, Plaintiffs/Counter-Defendants, v. STRAW HAT RESTAURANTS INC, et al., Defendants/Counter-Claimants.

Subsequent History: Motion denied by, Partial summary judgment granted by, Motion granted by *English & Sons, Inc. v. Straw Hat Rests., Inc., 2016 U.S. Dist. LEXIS 44803 (N.D. Cal., Apr. 1, 2016)*

Core Terms

Cooperative, Restaurants, counter-defendants, marks, counter-claimants, Membership, license, Holdings, trademarks, Pizza, franchise, Bylaws, trademark infringement, dilution, famous, pizza restaurant, non-compete, ownership, notice, allegations, election, deny a motion, dissolve, parties, entity, license agreement, motion to dismiss, unfair, false designation, advertising

Counsel: [*1] For English & Sons, Inc., Pizza Pierates, LLC, Formatts Enterprise, LLC, Mehrok Food, Inc., Mostafa Sehhat, Olga Sehhat, Straw Hat Cooperative Corporation, Straw Hat IP Holdings, LLC, Plaintiffs, Counter-defendants: Peter Clark Lagarias, Esq., LEAD ATTORNEY, Lagarias & Napell LLP, San Rafael, CA.

For Grace+Grace LLP, Creditor: Michael Kirk Grace, LEAD ATTORNEY, Grace and Grace LLP, Pasadena, CA.

For Straw Hat Restaurants, Inc., Clark Rupp, Randy Wise, Allen Strege, Defendants: Todd Andrew Roberts, LEAD ATTORNEY, Enrique Marinez, Nicole Suzanne Healy, Ropers Majeski Kohn & Bentley, Redwood City, CA.

For Jeffrey Eason, Sal Listek, Deborah Morris, Defendants: Enrique Marinez, Nicole Suzanne Healy, Todd Andrew Roberts, Ropers Majeski Kohn & Bentley, Redwood City, CA.

For Straw Hat Restaurants, Inc., Straw Hat Cooperative Corporation, Straw Hat Restaurants, Inc., Counter-claimants: Todd Andrew Roberts, LEAD ATTORNEY, Ropers Majeski Kohn & Bentley, Redwood City, CA.

For Straw Hat Cooperative Corporation, Straw Hat Restaurants, Inc., Counter-claimants: Enrique Marinez, Todd Andrew Roberts, Ropers, Majeski, Kohn & Bentley, Redwood City, CA; Nicole Suzanne Healy, Wilson Sonsini Goodrich & Rosati, **[*2]** Palo Alto, CA.

Judges: LAUREL BEELER, United States Magistrate Judge.

Opinion by: LAUREL BEELER

Opinion

AMENDED ORDER GRANTING IN PART AND DENYING IN PART COUNTER-DEFENDANTS' MOTION TO DISMISS

[Re: ECF No. 17]

INTRODUCTION

This case involves the Straw Hat Pizza® restaurants. (Third Amended Complaint ("TAC"), ECF No. 1-14, ¶ 7.)[1] The plaintiffs/counter-defendants include the six remaining members of Straw Hat Cooperative Corporation, a not-for-profit California consumer cooperative, and they operate their Straw Hat Pizza restaurants as Cooperative members. (*Id.*) The other 31 former members of Straw Hat Cooperative now operate their Straw Hat Pizza restaurants as franchisees of the defendant/counter-claimant Straw Hat Restaurants, Inc. (*Id.* ¶¶ 7, 53.) The parties dispute who has the right to control Straw Hat Cooperative and its trademarks and assets. The lawsuit started in 2011 in state court, and the pleadings now are a third amended complaint ("TAC") and a third amended counter-complaint ("TACC"). (*Id.*; TACC, ECF No. 15.) The TACC challenges (among other things) the plaintiffs/counter-defendants' transfer of the Straw Hat marks to Straw Hat IP Holdings.

The plaintiffs/counter-defendants move to dismiss five counterclaims: (3) breach of a noncompete clause in their membership contracts; (6) trademark infringement for wrongful transfer of the marks to Straw Hat IP Holdings, in violation of the Lanham Act, *15 U.S.C. § 1114(1)(a)*; (8) trademark infringement by false representation of ownership and false registration with the U.S. Patent and Trademark Office, in violation of *§ 1125(a)(1)(A)*; (10) dilution of the trademark by the competing claim of ownership, in violation of *§ 1125(c)*; and (12) unfair competition, in violation of *California Business & Professions Code § 17200*. (Motion, ECF No. 17.)

The court finds the motion suitable for determination without oral argument under Civil Local Rule 7-1(b), dismisses claim 3 with leave to amend, and otherwise denies the motion to dismiss.

STATEMENT

I. THE PARTIES

Straw Hat Cooperative is both a named plaintiff and a named defendant/counter-claimant. That is because the plaintiffs/counter-defendants and the defendants/counter-claimants each claim that they are the rightful board of directors of Straw Hat Cooperative and are entitled to control its assets (including its trademarks and other IP). This is the central issue **[*4]** for the claims that the plaintiffs/counter-defendants move to dismiss. The next two sections describe the parties.

A. The Plaintiffs/Counter-Defendants

The plaintiffs/counter-defendants and the counter-claims against them are as follows:

Name	Party (P, Counter-D)	Named in Counter-Claims
Cole and Donna English	Counter-Ds	3, 6, 8, 10, 12
English & Sons, Inc.	P, Counter-D	3, 6, 8, 10, 12
Pizza Pierates, LLC	P, Counter-D	3, 6, 8, 10, 12
Formatts Enterprise, LLC	P, Counter-D	3, 6, 8, 10, 12
Mehrok Foods, Inc.	P, Counter-D	3, 6, 8, 10, 12
Mostafa Sehhat	P, Counter-D	3, 6, 8, 10, 12
Olga Sehhat	P, Counter-D	3, 6, 8, 10, 12
Straw Hat IP Holdings	P, Counter-D	6, 8, 10, 12

[1] Record citations are to documents in the Electronic Case File ("ECF"); **[*3]** pinpoint citations are to the ECF-generated page numbers at the tops of the documents.

Name	Party (P, Counter-D)	Named in Counter-Claims
Straw Hat Cooperative	P, D, Counter-Claimant	no

Except Straw Hat IP Holdings, the plaintiffs/counter-defendants are Cooperative members:

- Cole and Donna English are shareholders of Straw Hats Restaurants, Inc. and shareholders of English & Sons, which is a member of Straw Hat Cooperative and operates two Straw Hat restaurants in Williams and Yuba City, California.. (TAC ¶ 2; TACC ¶ 7.) They applied for permission in 2009 to operate a third restaurant in Live Oak, but Straw Hat Cooperative denied their application. (TACC ¶ 48.) They opened and operated it **[*5]** anyway from May 2010 to May 2013. (*Id.*) In August 2014, Cole was elected to the board of Straw Hat Restaurants. (TACC ¶ 20.) He is the managing director of Straw Hat IP Holdings, which was formed in May or June 2012. (TACC ¶17.)
- Until November 2012, Pizza Pierates was a member of Straw Hat Cooperative and operated a Straw Hat restaurant in Discovery Bay, California. (TACC ¶ 8 .)
- Formatts Enterprise is a member of Straw Hat Cooperative and operates a Straw Hat restaurant in Redmond, Oregon. (TACC ¶ 9.)
- Mehrok Foods, Inc. was a member of Straw Hat Cooperative and operated a now-closed Straw Hat Pizza restaurant in Stockton, California. (TACC ¶ 10.)
- Mostafa and Olga Sehhat share a membership in Straw Hat Cooperative and operate a Straw Hat Restaurant in Rancho Cordova, California. (TACC ¶ 11.)

B. The Defendants/Counter-Claimants

They are as follows. (*See* TAC ¶¶ 9-16; TACC ¶¶ 5-6, 16, 18.)

Name	Party (D, Counter-C)	Role
Straw Hat Restaurants, Inc.	D, Counter-Claimant	Franchiser of Pizza Hat restaurants
Deborah Morris	D	Board Director of Straw Hat Cooperative
Jeffrey Eason	D	Board Director of Straw Hat Cooperative
Sal Listek	D	Board Director of Straw Hat Cooperative
Clark Rupp	D	Board Director of Straw **[*6]** Hat Cooperative
Randy Wise	D	Board Director of Straw Hat Cooperative
Allen Strege	D	CEO of Straw Hat Cooperative
Straw Hat Cooperative	D, Counter-Claimant	Cooperative Corporation

II. THE STRAW HAT ENTITIES AND THE INITIAL COMPLAINT

From 1981 until 2008, members of Straw Hat Cooperative owned and operated all Straw Hat restaurants. (TACC ¶ 13.) In 2006, Straw Hat Cooperative's Board of Directors authorized the formation of Straw Hat Restaurants. (TAC ¶ 39.) In 2008, Straw Hat Restaurants "was organized to expand and enhance the Straw Hat brand" primarily by franchising the Straw Hat restaurants to individuals and entities. (TACC ¶13.) From 2008 until 2011, Straw Hat Cooperative and Straw Hat Restaurants operated a dual system: Straw Hat Cooperative members operated their restaurants under Straw Hat Cooperative's Amended Bylaws and their Member Agreements, and Straw Hat Restaurants' franchisees operated their restaurants under their franchise agreements. (*Id.* ¶ 14)

In May 2011, the Straw Hat Cooperative Board "proposed a ballot measure to windup and dissolve the cooperative corporation and to permit members to obtain shares in [Straw Hat Restaurants] as [] franchises on favorable terms." (TACC ¶¶ **[*7]** 15, 49.) On May 1, 2011, all Cooperative members (including the plaintiffs/counter-defendants) received a ballot to vote "for," "against," or "abstain" as to the following proposition:

> Motion to voluntarily wind up and dissolve SHCC [Straw Hat Cooperative], to authorize and direct the Officers and Directors of SHCC to file a certificate evidencing the election to wind up and dissolve, as required by *Section 12631 of the California Corporations Code*, and to take such further action as may be necessary or convenient to windup and dissolve SHCC including the disposal of certain assets and interests of SHCC by doing all of the following:
> (A) Transferring all intellectual property rights of SHCC including ownership of all trademarks, copyrights and trade secrets to Straw Hat Restaurants, Inc. ("SHRI") in exchange for payment of debt or for fair value; and
> (B) Offering SHCC members the choice of the following options:
>> (i) Receiving the distributions the member would be entitled to receive upon the dissolution of SHCC under the Bylaws and California law; or
>>
>> (ii) Assigning the member's membership in SHCC to SHRI and offering those members who choose to assign their membership to SHRI and who choose to enter into a franchise agreement with SHRI **[*8]** the following in lieu of the distributions those members would be entitled to receive upon the dissolution of SHCC under the Bylaws and California law:
>>> (a) a guaranteed 1.75% in perpetuity combined royalty and advertising/marketing fee for each franchised business, even if the franchised business is sold.
>>> (b) a guaranteed 1.75% in perpetuity combined royalty and advertising/marketing fee and a franchise fee of $5,000/location on up to two (2) additional franchised businesses, provided that the former SHCC member is the owner of 100% of the interest in such businesses and owns them for a minimum of five (5) years or assigns to their children.

(TACC ¶ 50.)

On June 15, 2011, 23 Cooperative members voted to wind up and dissolve Straw Hat Cooperative, and 15 voted against it. (*Id.* ¶ 51.) This quorum complied with the bylaws. (*Id.*)

Subsequently, only English & Sons, Pizza Pierates, Formatts, Mehrok and the Sehhats did not sign franchise agreements and continued to operate their restaurants under their Straw Hat Cooperative Membership Agreements. (TAC ¶¶ 7, 53.) On October 19, 2011, they filed this lawsuit in state court challenging the dissolution of Straw Hat Cooperative. (TACC ¶ 53; *see* ECF **[*9]** No 1-1.)

III. THE 2012 BOARD MEETINGS AND THE TRANSFER OF IP

On April 5, 2012, the Straw Hat Cooperative (but not its individual members) "received a request for a special meeting from" plaintiffs/counter-defendants Cole English and Nick Harrison to address (1) removal of the board of directors, (2) election of a new board, (3) rescission of the voluntary election to windup and dissolve Straw Hat Cooperative, and (4) amendment of the bylaws to eliminate the appointment of two alternate directors to serve as directors upon the resignation, death, or removal of any director. (TACC ¶ 54.) "In response, on April 20, 2012," and in compliance with the Cooperative's bylaws, Straw Hat Cooperative sent a Notice of Special Meeting to all Straw Hat Cooperative Members setting a meeting on July 5, 2012 at 9 a.m. at Straw Hat Cooperative's headquarters to address (1) the composition of the board of directors, (2) the voluntary election to wind up and dissolve Straw Hat Cooperative and replace it with Straw Hat Restaurants, and (3) the amendment of the bylaws. (*Id.* ¶ 55.)

"[O]n May 8, 2012, the [Straw Hat Cooperative] (but not its members) received a Notice of Special Meeting dated May 7, 2012, and signed **[*10]** by Cole English and Nick Harrison" setting a meeting for May 17, 2012 to address (1) the notice of the May 7, 2012 meeting, (2) the removal of the board, (3) the election of a new board consisting of Cole English, Nick Harrison, Randy Matthews, Gary Mehrok, and Olga Sehhat, (4) recission of the election to wind up and dissolve Straw Hat Cooperative, and (5) to revise the bylaws to eliminate the alternate directors. (*Id.* ¶ 57.)

The plaintiffs/counter-defendants held their meeting on May 17, 2012. (*See* Opposition, ECF No. 21 at 7 (citations omitted).) The counter-complaint alleges this about the meeting:

> Based upon information and belief, the SHCC Counter-Defendants, without valid or lawful notice to any other SHCC members, gathered at the office of Pizza Pierates and conducted a purported meeting of SHCC members. Only the dissident SHCC Counter-Defendants were permitted to vote despite the fact that none was in good standing or eligible to vote. Even though other non-delinquent members of SHCC who were in good standing were present, having informally learned about the meeting, they were not allowed to participate in the vote. The SHCC Counter-Defendants, over objection, held a vote without **[*11]** a quorum, without proper notice, and unilaterally acted upon their agenda. Not only was the purported meeting a nullity in light of SHCC's Notice of Special Meeting set for July 5, 2012 and because the purported meeting did not comply with SHCC's Bylaws, but all of the supposed voting members were then in arrears and thus not in good standing and ineligible to vote. After the vote, SHCC Counter-Defendants, through their own hired attorney, knowingly and falsely claimed that they were the Directors of SHCC, with Cole English as the acting President of SHCC, and that individuals other than the Plaintiffs were not authorized to act on behalf of SHCC.

(TACC ¶ 60.)

At the meeting, then, the plaintiffs/counter-defendants "removed" the Cooperative board directors (and named defendants) Deborah Morris, Jeffrey Eason, Sal Listek, Clark Rupp, and Randy Wise, and "elected" Cole English, Nick Harrison, Randy Matthews, Gary Mehrok, and Olga Sehhat as the new board of directors. (TAC ¶ 55.)

In May or June 2012, the "Counter-Defendants formed [Straw Hat IP Holdings] . . . with Cole English as the managing member, for the inequitable and unjust purpose of transferring [Straw Hat Cooperative's] intellectual **[*12]** property, including the Straw Hat trademarks . . . to [Straw Hat IP Holdings] for no consideration." (TACC ¶¶ 17, 61.) The plaintiffs/counter-defendants "attempted and purported to transfer a minimum of . . . seven (7) Marks owned by [Straw Hat Cooperative] and licensed to [Straw Hat Restaurants], to [Straw Hat IP Holdings] without adequate consideration." (TACC ¶ 62.) "In purporting to transfer Marks with serial numbers 78967523, 76378122, 76376553,763170773, 73214150, 73144985 and 73142974 SHIPH, Counter-Defendants and each of them have sought to deprive other persons and entities operating Straw Hat Pizza Restaurants of the full use and value of the Marks and business benefits thereof." (TACC ¶ 63.)

After the May 2012 election, the defendants/counter-claimants moved for a preliminary injunction in state court to prohibit the plaintiffs/counter-defendants from taking any action as the Cooperative's board of directors. The state court granted it on August 29, 2012, finding that the plaintiffs had not produced evidence to contradict CEO Allen Strege's declaration that there were 37 Cooperative members: "Plaintiffs allege that many of these members are no longer members . . . but they **[*13]** have produced no evidence . . . to prove this allegation." (ECF No. 1-3 at 2-3, 7.) On January 7, 2015, the state court dissolved the injunction, finding that the plaintiffs had introduced new material facts supporting their contention that only six Straw Hat Cooperative members remained at the time the May 17, 2012 meeting took place. (ECF No. 1-13 at 5-6.)

IV. OTHER ALLEGATIONS ABOUT THE INTELLECTUAL PROPERTY

Straw Hat Cooperative and Straw Hat Restaurants "have spent substantial time, money, and effort in developing consumer recognition and awareness of the Straw Hat Pizza mark" and "have spent significant amounts of money on print and internet advertising in order to inform consumers of the Straw Hat pizza mark." (TACC ¶ 34.) "Through extensive use of the Straw Hat Pizza mark, [they] have built up and developed significant goodwill in their entire product line . . . [and] have advertised the Straw Hat Pizza mark in a wide array of media. . . . (*Id.*) They are the exclusive owners of the Straw Hat Pizza registered marks and trade and service marks historically used by them in association with Straw Hat Restaurants. (*Id.*, listing marks.)

V. BYLAWS, LICENSING AGREEMENT, AND MEMBERSHIP [*14] AGREEMENTS

The parties cite three documents that implicate their legal obligations: the Straw Hat Cooperative's bylaws, the licensing agreement about the use of the marks, and the membership agreements for Cooperative members.

A. Straw Hat Cooperative's Bylaws

The 2008 Straw Hat Cooperative Amended Bylaws are Exhibit A to the TACC. (*See* ECF No. 15-1.) The parties identify the following relevant sections.

> Article II, Section 1: Eligibility. A Membership may only be owned by a person who owns and operates a restaurant under the name "Straw Hat." . . . Each Membership shall have the right to vote as set forth in section 2 of this Article II, for the election of directors and on disposition of substantially all the assets of the corporation and on the merger or dissolution of the corporation.
>
> Article II, Section 3: Voting Rights. . . .Members who are not in good standing shall not be entitled to vote on any matter.
>
> Article II, Section 6. Good Standing. Any Member in arrears in the payment of obligations under the Agreement for more than thirty (30) days after their due date shall not be in good standing and shall not be entitled to vote his Membership.
>
> Article III, Section 1. Powers. Subject to the limitations of the Articles of these Bylaws and of the Consumer Cooperative Corporation **[*15]** Law relating to action required to be approved by the Members or by a majority of the Members, the activities and affairs of the Corporation shall be conducted and all corporate powers shall be exercised by or under the direction of the Board. The Board may delegate the management of activities of the corporation to any person or persons or committees however composed, provided that the activities and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the Board.
>
> Article VII, Section 3: Sale or Conversion of Existing Restaurants: A Member may sell, transfer or convert a restaurant into a Franchise. If the Member chooses to convert the store into Franchise, then such action will cause that Member to lose that share of the Corporation associated with that restaurant.
>
> Article VIII, Section 1: Purpose of the Corporation. "The primary purpose of this Corporation shall be and shall remain the provision of benefits for its Members and the preservation and promotion of the name and goodwill associated with Straw Hat.

(ECF No. 15-1 at 2-3, 6, 14-5.)

B. The Licensing Agreement

Under its "Bylaws and a separate System License Agreement dated October 27," 2008,[2] Straw Hat Cooperative licensed to Straw **[*16]** Hat Restaurants the "use of the following intellectual property and other assets of the Corporation that the Board of Directors deem necessary and appropriate for use by [Straw Hat Restaurants] in performing its services of the Corporation, including, but not limited to, the following: the Corporation's logo, trademarks, other intellectual property, systems, processes, and procedures." (TACC ¶ 39.) (The plaintiffs/counter-defendants allege that they, as the new Straw Hat Cooperative Board, terminated the System License Agreement for cause in May 2012. (TAC ¶ ¶ 9, 44.)) The Agreement has the following sections.

1. LICENSE GRANT

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[2] The TACC lists the date as October 27, 2011, but the date on the agreement is October 7, 2008. (TACC ¶ 39; Agreement, ECF No. 21-4.)

> A. LICENSOR [Straw Hat Cooperative] hereby grants to LICENSEE [Straw Hat Restaurants] for the term of this Agreement, as recited in Schedule A[3] attached hereto, the exclusive right and license, except as provided in Schedule A, to use, sell, distribute, franchise and advertise the System and all Licensed Products (derived therefrom) in the Territory. The license includes, but is not limited to, a license under any and all patents, trademarks **[*17]** and copyrights and any applications therefore which have been filed or may be filed in the future with respect to the System.
>
> * * *

2. TERM OF THE [LICENSING] AGREEMENT

> This Agreement and the provisions hereof, except as otherwise provided, shall be in full force and effect commencing on the date of execution by both parties and shall extend perpetually, unless terminated under one of the provisions herein.
>
> * * *

14. INFRINGEMENTS

> A. LICENSEE shall have the right, in its discretion, to institute and prosecute lawsuits against third persons for infringement of the rights licensed in this Agreement.

(System License Agreement, ECF No. 21-4 at 2-3, 7.) The agreement provides for payment of an annual fee of $50,000, and it sets forth a scheme governing IP whereby the licensor Straw Hat Cooperative retains the IP, the licensee Straw Hat Restaurants can enhance the IP and have IP ownership of those enhancements, and Straw Hats Cooperative must license in a new agreement any use of the enhancements. (*Id.* at 3-5.) It has termination provisions. (*Id.* at 6.)

C. Membership Agreements [*18]

The Membership Agreements for Cooperative members authorize the members to use the marks. (TACC ¶ 40 and Ex. B, Membership Agreement, ECF No. 15-2.) Each Cooperative member "has agreed and acknowledged" that Straw Hat Cooperative "has the exclusive rights to own, control, and license the use of the Marks." (TACC ¶ 43.) Each member agreed that with regard to the Marks,

> You will not contest, or help anyone else contest, Our ownership of them; You have no individual right to them, or to any goodwill associated with them, now or in the future. You will not use any of Our Registered Marks together with any other word or symbol without Our prior written consent; and will not use them in any Business other than the Restaurant. You will not use the Marks as part of any URL, domain name, locator, link, metatag, search engine technique, email address, or otherwise on the Internet except as We license You.

(*Id.*, quoting Membership Agreement, Article VI, § D, ¶ 1, ECF No. 15-2 at 11-12.) The Agreement provides that members can "'use Our Registered Marks only to Operate the Restaurant.'" (TACC ¶ 46, quoting Membership Agreement, Article VI, § C, ¶ 1, ECF No. 15-2 at 10.)

The Membership Agreement requires Cooperative members to pay Straw Hat Cooperative administrative **[*19]** fees (2%) and a marketing fee (.75%); a failure to pay fees results in delinquency and a loss of voting rights. (TACC ¶ 45; Membership Agreement, Article VII, ECF No. 15-1 at 15-17.)

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[3] Schedule A allowed Straw Hat Cooperative members to operate their existing restaurants. (*See* Reply, ECF No. 22 at 11, quoting Schedule A.)

The Membership Agreement also has a covenant not to compete:

> You, and the Personal Guarantors will not, during the term of this Agreement, on Your own account or as an employee, agent, consultant, partner, officer, director, or shareholder of any other person, firm, entity, partnership, limited liability company, or corporation, own, operate, lease, franchise, conduct, engage in, be connected with, have any interest in, or assist any person or entity engaged in any business involving the production, service, or sale of pizza products, or any other related business that is competitive with or similar to a Straw Hat Pizza restaurant or outlet, except with Our prior written consent.

(TACC ¶ 44; Membership Agreement, Article VI, § G, ECF No. 15-2 at 14-15.)

VI. OTHER RELEVANT PROCEDURAL HISTORY

As described in Section II, the plaintiffs filed their lawsuit in October 2011, after a majority of members voted to wind up and dissolve Straw Hat Cooperative. (TACC ¶ 53.) The lawsuit involved several rounds of complaints and counter-complaints, and in 2015 — after the plaintiffs/counter-defendants **[*20]** added a claim of trademark infringement of the Straw Hat mark in violation of *15 U.S.C. § 1114(1)(a)* — the defendants/counter-claimants removed the case to federal court. (3/25/15 Notice of Removal, ECF No. 1.) The parties consented to magistrate-judge jurisdiction. (ECF Nos. 10, 11.) The operative complaints are the TAC and the TACC.

A. The Third Amended Complaint

The plaintiffs sued Straw Hat Restaurants and Straw Hats Cooperative (and its CEO Allen Strege and the five Cooperative board directors), asking for declaratory relief declaring their rights regarding the Straw Hat Cooperative (in claim 6) and alleging six additional claims (claims 1 through 5 and 7): (1) breach of fiduciary duty by the five directors during the transition to the franchise business model; (2) a right to inspect Straw Hat Cooperative's records; (3) a right to inspect Straw Hat Restaurant's records; (4) conversion (on the ground that rebates belong to Straw Hat Cooperative and not to Straw Hat Restaurant, Inc.); (5) a similar restitution claim titled "Money Had and Received"; and (7) trademark infringement in violation of *15 U.S.C. § 1114(a)*, because "Defendants are deceiving the public by offering their products and restaurant services under the Straw **[*21]** Hat Pizza trademarks, which are counterfeits "of those registered to and owned by Straw Hat" IP Holdings. (TAC, ECF No. 1-14, ¶¶ 91, 93.)

B. The Third Amended Counter-Complaint

The TACC has the following claims:

#	**Claim**	**Defendants**
1	Breach of Fiduciary Duty as Straw Hat Restaurants Board Member	Cole English
2	Aiding and Abetting claim 1	All but Cole English
3	Breach of the Covenant Not to Compete	All but Straw Hat IP
4	Breach of Membership Agreement by not paying financial obligations, voting while delinquent, and using IP	All but Straw Hat IP
5	Breach of Membership Agreements (Live Oak restaurant)	Cole and Donna Engli
6	Trademark Infringement by transfer to Straw Hat IP Holdings	All
7	Trademark Infringement (Live Oak restaurant)	Cole and Donna Engli
8	False Designation of Marks by claiming ownership and registering them with the	All

#	Claim	Defendants
	USPTO	
9	False Designation of Marks (Live Oak restaurant)	Cole and Donna Engli
10	Trademark Dilution by the competing claim of ownership	All
11	Trademark Dilution (Live Oak Restaurant)	Cole and Donna Engli
12	UCL, Cal. Bus. & Prof Code § 17200	All
13	UCL (Live Oak restaurant)	Cole and Donna Engli
14	Unjust Enrichment	All
15	Unjust Enrichment (Live Oak restaurant)	Cole and Donna Engli
16	Declaratory **[*22]** Relief For May 17, 2012 Vote	All
17	Declaratory Relief that true Board is Eason, Listek, Morris, Rupp, and Wise	All
18	Declaratory Relief that June 15, 2011 dissolution was legitimate	All
19	Declaratory Relief for ownership of IP	All
20	Declaratory Relief that Nick Harrison and Pizza Pierates are no longer members of Straw Hat Cooperative	All
21	Intentional Interference with Prospective Economic Advantage	All
22	Disgorgement and Constructive Trust	All
23	Conversion of assets through Straw Hat IP Holdings	All

(TACC, ECF No. 15, at 18-37.)

The plaintiffs/counter-defendants move to dismiss claims 3, 6, 8, 10, and 12. (Motion, ECF No. 17.) These claims were in the first amended counter-complaint ("FACC") and second amended counter-complaint ("SACC"). (Opposition, ECF No. 21 at 9-10.) The state court rejected the plaintiffs/counter-defendants' arguments to dismiss the claims for all claims except claim 3 (then cause of action 20 in the FACC); it overruled their demurrer to the FACC except that it sustained the demurrer for claim 3 (cause of action 20) with leave to amend. (*Id.*))

ANALYSIS

I. PRIOR STATE COURT RULINGS

The counter-claimants first argue that the court should not overturn the state court's rulings on the same **[*23]** arguments. (Opposition, ECF No. 21 at 11.) The TACC supersedes the prior complaint and "renders it without legal effect." *Lacey v. Maricopa Cnty., 693 F.3d 896, 927 (9th Cir. 2012)* (en banc); *see Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992)* (same). In this situation, federal courts have permitted defendants to challenge the entire amended complaint, including those claims that the courts previously found sufficient. *See O'Connor v. Uber Techs., Inc., 58 F. Supp. 3d 989, 995-96 (N.D. Cal. Sept. 4, 2014)* (collecting cases). Applying federal procedural rules, the court addresses the arguments in the motion.

II. MOTION TO DISMISS

A. Legal Standard

Federal Rule of Civil Procedure 8(a)(2) requires only a "short and plain statement of the claim showing that the plaintiff is entitled to relief . . . [to] give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 554, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A court may dismiss a complaint under *Federal Rule of Civil Procedure 12(b)(6)* when it does not contain enough facts to state a claim to relief that is plausible on its face. *See id. at 570*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*."The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly, 550 U.S. at 557*.)."While a complaint **[*24]** attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555* (citations and parentheticals omitted).

In considering a motion to dismiss, a court must accept all of the non-moving party's allegations as true and construe them in the light most favorable to the non-moving party. *See id. at 550*; *Erickson v. Pardus, 551 U.S. 89, 93-94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)*; *Vasquez v. Los Angeles County, 487 F.3d 1246, 1249 (9th Cir. 2007)*. Courts may consider documents attached to the complaint without converting the motion into a summary-judgment motion. *See Parks School of Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995)*; *Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005)*. Courts may also consider a matter that is properly the subject of judicial notice, such as matters of public record. *See Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001)*.[4]

If a court dismisses the complaint, it must grant leave to amend even if no request to **[*25]** amend is made "unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith, 203 F3.d 1122, 1127 (9th Cir. 2000)* (quotation omitted).

B. The Claims

1. Claim 3: Breach of the Covenant Not to Compete

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[4] The court grants the defendants/counter-claimants' request to take judicial notice of state-court records to show the procedural history. (ECF No. 21-9 at 5.) Because they are public records, the court may take judicial notice of the undisputed facts in them. *See Hotel Employees & Rest. Employees Local 2 v. Vista Inn Mgmt. Co., 393 F. Supp. 2d 972, 978 (N.D. Cal. 2005)*; *Fed. R. Evid. 201(b)*; see *also Fontenot v. Wells Fargo Bank, N.A., 198 Cal. App. 4th 256, 264-67, 129 Cal. Rptr. 3d 467 (2011)*.

In Claim 3, the counter-claimants claim that by transferring IP to Straw Hat IP Holdings, the counter-defendants breached a non-compete clause in their membership agreements. (TACC ¶¶ 80-83.) The counter-defendants argue that this does not state a claim because the non-compete clause prohibits only competing by the equivalent of selling pizzas, not the transfer of IP. (Motion, ECF No. 17 at 12-13.) The court agrees that the counter-claimants do not state a claim.

Claim 3 incorporates by reference the facts summarized in the Statement, *supra*, and has these additional paragraphs:

> 81. As a term of their Membership Agreements, the [Straw Hat Cooperative] Counter-Defendants including each of the members of [Straw Hat IP Holdings] who are also members of [Straw Hat Cooperative], agreed not to engage in conduct or business competitive with Straw Hat business operations.
>
> 82. The [Straw Hat Cooperative] Counter-Defendants' formation of [Straw Hat IP Holdings], and **[*26]** efforts to usurp the Straw Hat proprietary information and intellectual property including the Marks associated with the brand and their value from other operators of Straw Hat Pizza establishments is in direct contravention of this contract term and their acknowledgment in entering into the contract that the exclusive right to own, control and license use of the Marks remained with [Straw Hat Cooperative], or at its election.

This is the non-compete clause:

> You, and the Personal Guarantors will not, during the term of this Agreement, on Your own account or as an employee, agent, consultant, partner, officer, director, or shareholder of any other person, firm, entity, partnership, limited liability company, or corporation, own, operate, lease, franchise, conduct, engage in, be connected with, have any interest in, or assist any person or entity engaged in any business involving the production, service, or sale of pizza products, or any other related business that is competitive with or similar to a Straw Hat Pizza restaurant or outlet, except with Our prior written consent.

(TACC ¶ 44 and Membership Agreement, Article VI, § G, ECF No. 15-2 at 14-15.).

The counter-defendants argue that the counter-claimants do not state **[*27]** a claim. (Motion, ECF No. 17 at 12.) Stripped of extra words, they assert, the non-compete clause says, "You . . . will not . . . be connected with . . . any related business that is competitive with or similar to a Straw Hat Pizza restaurant . . . except with Our prior written consent." (*Id.*) The TACC does not allege that Straw Hat IP Holdings is a "business that is competitive with or similar to a Straw Hat Pizza restaurant." (*Id.* at 16-17.) And transferring the marks is not "competition with a Straw Hat restaurant" in the way selling pizzas is. (Reply, ECF No. 22 at 9.) Thus, "the text of the non-compete covenant cannot be reasonably construed to apply to transfer of the trademarks as though it were competition with a Straw Hat restaurant." (*Id.*)

The court agrees: the counter-claimants do not state a claim. The non-compete clause is about conduct that is "competitive with or similar to" a Straw Hat Pizza restaurant. The transfer of IP may be an unauthorized transaction that forms the basis for other claims in the TACC. (*See, e.g.*, TACC claim 4.) But the unauthorized transaction is not plausibly a violation of the non-compete clause's prohibition against competing with Straw Hat pizza restaurants. **[*28]**

The counter-claimants nonetheless argue that forming an entity that is branded "Straw Hat" for "the improper purpose" of diverting and converting the Straw Hat Cooperative's IP assets *is* competing for the right to control and manage the IP. (Opposition, ECF No. 21 at 12-13.) They allege as relevant the counter-defendants' acknowledgment in the membership agreements that only Straw Hat Cooperative could control the Marks. (TACC ¶ 82.) This does not change the conclusion that the assignment of the IP is not obviously a violation of the non-compete clause's prohibition against competing with Straw Hat Pizza restaurants.

The counter-claimants note that controlling the IP covers more than the marks; it includes menus, recipes, signage, and other elements that make up the Straw Hat system. (Opposition, ECF No. 21 at 13.) Diverting these, they assert, violates the covenant not to compete. (*Id.*) It might be that diverting IP gives the counter-defendants some business outcome that violates the non-compete clause because the conduct is "competitive . . . with a Straw Hat Pizza restaurant. . . ." (Membership Agreement, Article VI, § G.) That theory is not alleged, and the court thinks that the facts in paragraphs 1 through 79 **[*29]** of the TACC (incorporated by reference in claim 3) do not give "fair notice" of a claim that rests on this theory. *See* Twombly, 550 U.S. at 555. The court dismisses claim 3 with leave to amend.

The counter-defendants also argue that the non-compete clause violates *California Business and Professions Code § 16600*. (Motion, ECF No. 17 at 13.) The counter-claimants respond that their intent is to prevent misappropriation of IP, not prevent operation of a lawful business, and thus the claim does not implicate *section 16600*. (Opposition, ECF No. 21 at 13.) The court does not need to decide the issue because it holds that the non-compete clause does not reach the transfer of the IP.

2. Claim 6: Trademark Infringement by the Transfer of Marks to Straw Hat IP Holdings

In claim 6, the counter-claimants claim that by transferring the Straw Hat Marks to Straw Hat IP Holdings, the counter-defendants committed trademark infringement in violation of the Lanham Act, *15 U.S.C. § 1114(1)(a)*. (TACC ¶¶ 99-103.) The counter-defendants argue that the counter-claimants do not state a claim because they do not allege any commercial use of the trademarks other than licensed use for the Straw Hat Restaurants. (Motion, ECF No. 17 at 14-15.)[5] The court denies the motion to dismiss claim 6 because the counter-claimants **[*30]** plausibly alleged commercial use and the potential for confusion.

15 U.S.C. § 1114(1)(a) provides:

> (1) Any person who shall, without the consent of the registrant —
> (a) use in commerce any reproduction, counterfeit, copy or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; []
> * * *
> shall be liable in a civil action by the registrant for the remedies hereinafter provided.

15 U.S.C. § 1114(1)(a).

The elements of trademark infringement are (1) a protectible ownership interest in a trademark, and (2) the defendant's use of the mark creates a likelihood of consumer confusion. *See* *Network Automation, Inc. v. Advanced Sys. Concepts, Inc., 638 F.3d 1137, 1144 (9th Cir. 2011)*. "The core element of trademark infringement is the likelihood of confusion, *i.e.*, whether the similarity of the marks is likely to confuse customers about the source of the products." *Abercrombie & Fitch Co. v. Moose Creek, Inc., 486 F.3d 629, 633 (9th Cir. 2007)*. In determining whether there is a likelihood of confusion, a court weighs the following factors: (1) the **[*31]** strength of the mark; (2) the proximity of the goods; (3) the similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) type of goods and the degree of care likely to be exercised by the purchaser; (7) the defendant's intent in selecting the mark; and (8) likelihood of expansion of the product lines. *See* *AMF Inc. v. Sleekcraft Boats, 599 F.2d 341, 348-49 (9th Cir. 1979)*.

The counter-defendants argue that the counter-claimants do not allege any commercial use of the marks "without the consent of the registrant." (Motion, ECF No. 17 at 14.) The only use of the mark in commerce is in connection with the operation of the restaurants, and that use is allowed by the membership agreements. (*Id.* at 14-15.) They assert that by definition, the licensed use of the mark cannot cause confusion or deception. (*Id.* at 15.) Moreover, they argue, the transfer to Straw Hat IP Holdings is not "use in commerce;" the allegation is only that the name "Straw Hat" appears in the entity name, and there is no allegation that Straw Hat IP Holdings engages in commercial activity that could cause consumer confusion. (Reply, ECF No. 22 at 9-10.) They conclude that the transfer may be illegal, but that conduct is addressed by other claims and does not amount to trademark **[*32]** infringement. (Motion, ECF No. 17 at 15.)

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[5] Cole and Donna English used the trademarks in the unapproved Live Oaks restaurant, but that is conduct addressed in claim 5. (*See* Motion, ECF No. 17 at 14 n.6 (making this point).)

The counter-defendants' point is that this claim is about a transfer of IP to an entity that does not engage in any commercial activity, is not visible to the public, and therefore cannot create consumer confusion. But the counter-claimants allege more than this and thus plausibly state a claim. Claim 6 incorporates by reference the fact chronology summarized in the Statement, *supra*. (TACC ¶ 98.) That chronology establishes the core dispute in this case: who owns the marks, who can license them, and who can use them. The parties each allege that they have these rights, and they charge other with trademark infringement based on wrongful use of the marks in violation of *§ 1114(1)(a)*. For example, claim 7 in the TAC charges that the defendants/counter-claimants are deceiving the public by using the marks at Straw Hat restaurants, thus creating a likelihood of consumer confusion and deceiving the public. (TAC ¶¶ 91, 94-97.) Claim 6 in the TACC (when read in the context of the fact allegations) similarly claims trademark infringement by all plaintiffs/counter-defendants by unlawfully converting the marks, exceeding permissible use of the marks, and unlawfully claiming rights **[*33]** to control use of them. (TACC ¶¶ 46, 66, 101; *see* Opposition, ECF No. 21 at 15.) The TAC and the TACC both allege that this constitutes use of a counterfeit mark. (TAC ¶ 91; TACC ¶ 102.) In essence, both parties argue, "you do not control the marks but we do," and both argue that the others' actions have a financial impact and create customer confusion. Moreover, the plaintiffs/counter-defendants claim ownership of the marks to control (or prevent) use of them by the defendants/counter-defendants in their business. Indeed, they seek to vindicate that commercial interest by this lawsuit.

Considering these facts, the counter-claimants plausibly state a claim. They need not plead all evidence in support of their claims, and they need not plead "detailed factual allegations." *See* *Twombly, 550 U.S. at 555*. They need only state a plausible claim and give "fair notice" of what the claim is and the grounds upon which it rests." *Id.* The court denies the motion to dismiss claim 6.

The counter-defendants also argue that the TACC does not allege sufficiently that Straw Hat Restaurants is the registrant of the marks and as a result, Straw Hat Restaurants lacks standing to bring claim 6. (Motion, ECF No. 17 at 15-16.) The **[*34]** TACC sufficiently alleges facts about Straw Hat Restaurant's protectible ownership interest in the marks. *See supra* Statement. For example, the TACC alleges that Straw Hat Restaurants is the exclusive licensee with the right to prosecute lawsuits for infringement. (TACC ¶ 39; *see* Statement, *supra*, quoting License Agreement, ECF No. 21-4 at 2.) The counter-defendants' citation to Schedule A of the License Agreement does not change this conclusion. (Reply, ECF No. 22 at 11.) Schedule A allows the counter-defendants to maintain their restaurants. It does not eliminate Straw Restaurants' claim of an otherwise exclusive license or its standing to sue for trademark infringement.

3. Claim 8: False Designation of Origin

In claim 8, the counter-claimants claim that by falsely claiming that they own the marks and by registering them with the U.S. Patent and Trademark Office, the counter-defendants falsely designated the origin of the marks, in violation of *15 U.S.C. § 1125(a)(1)(A)*. (TACC ¶ 110.) The counter-defendants again argue that the counter-claimants do not state a claim because they do not allege any commercial use other than licensed use at Cooperative members' Straw Hat restaurants. (Motion, ECF No. 17 at 17.) The court denies **[*35]** the motion to dismiss claim 8, again because the counter-claimants plausibly alleged commercial use and the potential for confusion.

15 U.S.C. § 1125(a)(1) provides:

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—
>
> > (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
> >
> > * * *

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

To establish a claim for false designation of origin under *Section 1125(a)(1)(A)*, a plaintiff must prove that the defendant (1) used in commerce (2) any word, false designation of origin, false or misleading description, or representation of fact, which (3) is likely to cause confusion or mistake, or to deceive, as to sponsorship, affiliation, **[*36]** or the origin of the goods or services in question. *See Freecycle Network, Inc. v. Oey, 505 F.3d 898, 902 (9th Cir. 2007)Summit Tech. v. High—Line Med. Instruments, Co., 933 F. Supp. 918, 928-29 (C.D. Cal.1996)*; *see also Brookfield Communications, Inc. v. West Coast Entm't Corp., 174 F.3d 1036, 1047 n.8 (9th Cir.1999)* (noting that infringement and false designation of origin claims are often identical, except that false designation of origin claims protect both registered and unregistered trademarks and can protect a wider range of practices, such as false advertising). "[L]ikelihood of confusion is determined by evaluating a variety of factors including the type of trademark at issue; similarity of design; similarity of product; identity of retail outlets and purchasers; identity of advertising media utilized; defendant's intent; and actual confusion." *Roto-Rooter Corp. v. O'Neal, 513 F.2d 44, 45 (5th Cir. 1975)*(footnotes omitted).

The counter-defendants reiterate their argument that the TACC alleges only licensed use of the marks by their restaurants, and that claim cannot constitute confusion. (Motion, ECF No. 17 at 17.) Otherwise, they assert, the TACC does not contain any factual allegations about any of the *Roto-Rooter* factors. (*Id.*) The court disagrees. **[*37]** As discussed in the previous section, the case is about who owns the marks and is entitled to use or license them. The parties each claim that the others' actions constitute use "in a manner likely to confuse the public about the origin of the goods." *Int'l Order of Job's Daughters v. Lindeburg, 633 F.2d at 917*. Given the detailed allegations in the complaint, the counter-claimants have given "fair notice" of the claim and the "grounds upon which it rests." *Twombly, 550 U.S. at 555*. The court denies the motion to dismiss claim 8.

4. Claim 10: Trademark Dilution

In claim 10, the counter-claimants claim that the counter-defendants' unlawful claim of ownership of the marks is trademark dilution in violation of *15 U.S.C. § 1125(c)*. (TACC ¶¶ 117-122.) The counter-defendants again argue that the counter-claimants do not state a claim because they do not allege any commercial use other than licensed use, and that cannot be dilution. (Motion, ECF No. 17 at 18-19.) The court denies the motion to dismiss claim 10 on the ground that the counter-claimants adequately alleged use beyond licensed use.

15 U.S.C. § 1125(c) prohibits dilution by blurring and dilution by tarnishment:

(1) Injunctive relief

Subject to the principles of equity, the owner of a famous mark that is distinctive, inherently or through acquired distinctiveness, **[*38]** shall be entitled to an injunction against another person who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.

(2) Definitions

* * *

(B) For purposes of paragraph (1), "dilution by blurring" is association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark. In determining whether a mark or trade name is likely to cause dilution by blurring, the court may consider all relevant factors, including the following:

(i) The degree of similarity between the mark or trade name and the famous mark.

(ii) The degree of inherent or acquired distinctiveness of the famous mark.

(iii) The extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark.

(iv) The degree of recognition of the famous mark.

(v) Whether the user of the mark or trade name intended to create an association with the famous mark.

(vi) Any actual association between the mark or **[*39]** trade name and the famous mark.

(C) For purposes of paragraph (1), "dilution by tarnishment" is association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark.

In denying the motion to dismiss claim 6, the court found that the counter-claimants plausibly alleged use that exceeded permissible use. That conclusion applies here too. The counter-defendants nonetheless argue that the plain language of the Membership Agreements establishes that they are entitled to use the marks. (Reply, ECF No. 22 at 12.) The court disagrees. These are issues of fact to be illuminated through discovery. The court denies the motion to dismiss claim 10.

5. Claim 12: Unfair Competition

In claim 12, the counter-claimants claim that the counter-defendants' actions are unlawful, unfair and fraudulent business acts or practices that violate California's Unfair Competition Law ("UCL"), *Cal. Bus. & Prof. Code § 17200*. (TACC ¶¶ 128-130.) The court denies the counter-defendants' motion to dismiss claim 12.

The UCL prohibits any "unlawful, unfair or fraudulent business act or practice." *Cal. Bus. & Prof. Code § 17200*. "[Because*] section 17200* is [written] in the disjunctive, it establishes three separate types of unfair competition. The statute **[*40]** prohibits practices that are either 'unfair' or 'unlawful,' or 'fraudulent.'" *Pastoria v. Nationwide Ins., 112 Cal. App. 4th 1490, 1496, 6 Cal. Rptr. 3d 148 (2003)*; *see also* *Cel—Tech Communications, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*.

The UCL incorporates other laws and treats violations of those laws as unlawful business practices independently actionable under state law. *Chabner v. United Omaha Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000)*. Violation of almost any federal, state, or local law may serve as the basis for a UCL claim. *Saunders v. Superior Court, 27 Cal. App. 4th 832, 838-39, 33 Cal. Rptr. 2d 438 (1994)*. In addition, a business practice may be "unfair or fraudulent in violation of the UCL even if the practice does not violate any law." *Olszewski v. Scripps Health, 30 Cal. 4th 798, 827, 135 Cal. Rptr. 2d 1, 69 P.3d 927 (2003)*.

a. "Unlawful" claim

The court previously found that the counter-claimants plausibly alleged the Lanham Act claims. These are predicate claims that support a claim under the "unlawful" prong of the UCL. *Finuliar v. BAC Home Loans Servicing, L.P., No. 3:11-cv-02629-JCS, 2011 U.S. Dist. LEXIS 107324, 2011 WL 4405659, at *9 (N.D. Cal. Sep. 21, 2011)* (citing *People v. McKale, 25 Cal.3d 626, 635, 159 Cal. Rptr. 811, 602 P.2d 731 (1979))*.

b. "Fraudulent" claim

In denying the motion to dismiss claims 6, 8, and 10, the court necessarily found that the counterclaimants alleged with sufficient particularity that the public (as opposed to a corporate competitor) likely would be deceived or confused by the similarity of the marks. *See* *Capella Photonics, Inc. v. Cisco Systems, Inc., No.3:14-cv-03348-EMC, 77 F. Supp. 3d 850, 2014 U.S. Dist. LEXIS 177382, 2014 WL 8097683, at *11 (N.D. Cal., Dec. 23, 2014)* (under the UCL, "a corporate-competitor 'is not entitled to the protection of [the fraudulent] prong **[*41]** of *§ 17200* because it is not a member of the public or a consumer entitled to such protection"); *Finuliar, 2011 U.S. Dist. LEXIS 107324, 2011 WL 4405659, at *10* ("to state a claim under the UCL based on fraudulent conduct, [a p]laintiff must allege, with particularity, facts sufficient to establish that the public would likely be deceived by Defendants' conduct.")

c. "Unfair" claim

This case involves business competitors. Thus, to state an "unfair" claim under the UCL, the alleged unfairness must "be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." *Cel—Tech Communications, Inc. v. L.A. Cellular Tel. Co., 20 Cal.4th 163, 186-187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. In business-competitor claims, "the word 'unfair' . . . means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition. *Levitt v. Yelp! Inc., 765 F.3d 1123, 1136 (9th Cir. 2014)*. The Ninth Circuit has held that Lanham Act claims are "substantially congruent" to state claims of unfair competition. *See* *Cleary v. NewsCorp., 30 F.3d 1255, 1262-63 (9th Cir. 1994)* (citations omitted). The counter-claimants state an "unfair" claim.

CONCLUSION

The court grants in part and denies in part the plaintiffs/counter-defendants' motion to dismiss. The court dismisses claim 3 without **[*42]** prejudice and denies the motion to dismiss claims 6, 8, 10, and 12. The defendants/counter-claimants must file any amended complaint by July 27, 2015. This disposes of ECF No. 17.

IT IS SO ORDERED.

Dated: July 15, 2015

/s/ Laurel Beeler

LAUREL BEELER

United States Magistrate Judge

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United Food & Commer. Workers Local 1776 v. Teikoku Pharma United States, Inc.

United States District Court for the Northern District of California

July 17, 2015, Decided; July 17, 2015, Filed

Case No. 14-md-02521-WHO

Reporter

2015 U.S. Dist. LEXIS 94220 *; 2015-2 Trade Cas. (CCH) P79,239; 2015 WL 4397396

UNITED FOOD AND COMMERCIAL WORKERS LOCAL 1776 & PARTICIPATING EMPLOYERS HEALTH AND WELFARE FUND, et al., Plaintiffs, v. TEIKOKU PHARMA USA, INC., et al., Defendants.

Prior History: *In re Lidoderm Antitrust Litig., 11 F. Supp. 3d 1344, 2014 U.S. Dist. LEXIS 46615 (J.P.M.L., Apr. 3, 2014)*

Core Terms

purchasers, wholesalers, antitrust claim, non-assignment, antitrust, indirect, motion to dismiss, assigned, injunctive relief, defendants', quotations, anti trust law, partial assignment, Clayton Act, Settlement, violations, rights, cases, opt, Sherman Act, provisions, assignee, damages, class action, allegations, clauses, invalid, partial, parties

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For Painters District Council No.30 Health & Welfare Fund, on behalf of itself and all others similarly situated, Plaintiff: William J. O'Brien, LEAD ATTORNEY, Attorney at Law, Los Angeles, CA; Daniel C. Girard, Girard Gibbs LLP, San Francisco, CA; David S. Nalven, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Marvin Alan Miller, Miller Law LLC, Chicago, IL.

For PHILADELPHIA FEDERATION OF TEACHERS HEALTH & WELFARE FUND, on behalf of itself and all others similarly situated, Plaintiff: STEWART L. COHEN, LEAD ATTORNEY, COHEN TAUBER SPIEVACK & WAGNER LLP, NEW YORK, NY; Daniel C. Girard, Girard Gibbs LLP, San Francisco, CA; David S. Nalven, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Jacob A. Goldberg, PRO HAC VICE, Faruqi & Faruqi, LLP, Huntingdon Valley, PA; MICHAEL COREN, COHEN PLACITELLA & ROTH, PHILADELPHIA, PA; Michael D. Donovan, Donovan Searles, LLC, Philadelphia, PA; Noah I. Axler, Donovan Searles and Axler, Philadelphia, PA.

For INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL 22 HEALTH & WELFARE FUND, on behalf of itself and all others similarly situated, Plaintiff: Krishna Brian Narine, LEAD ATTORNEY, Meredith Narine, Philadelphia, PA; Daniel **[*12]** C. Girard, Girard Gibbs LLP, San Francisco, CA; David S. Nalven, Hagens Berman Sobol Shapiro LLP, Cambridge, MA.

For TEAMSTERS UNION LOCAL 115 HEALTH & WELFARE FUND, on behalf of itself and all others similarly situated, Plaintiff: MINDEE J. REUBEN, Robert Samuel Kitchenoff, LEAD ATTORNEYS, WEINSTEIN KITCHENOFF & ASHER LLC, PHILADELPHIA, PA; Daniel C. Girard, Girard Gibbs LLP, San Francisco, CA; David S. Nalven, Hagens Berman Sobol Shapiro LLP, Cambridge, MA.

For IRENE KAMPANIS, on behalf of herself and all others similarly situated, Plaintiff: Robert William Sink, LEAD ATTORNEY, Law Offices of Robert W. Sink, Philadelphia, PA; Christina H Sharp, Girard Gibbs LLP, San Francisco, CA; Daniel C. Girard, Girard Gibbs LLP, San Francisco, CA; David S. Nalven, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Joseph C Kohn, Kohn, Swift and Graf, P.C., Philadelphia, PA; William E. Hoese, Kohn Swift & Graf PC, Philadelphia, PA.

For Welfare Plan of the International Union of Operation Engineers Locals 137, 137A, 137B, 137C, 137R, on behalf of itself and all others similarly situated, Plaintiff: Brian O. O'Mara, LEAD ATTORNEY, David W. Mitchell, Robbins Geller Rudman & Dowd LLP, San Diego, CA; Christina **[*13]** H Sharp, LEAD ATTORNEY, Daniel C. Girard, Girard Gibbs LLP, San Francisco, CA; Frank R. Schirripa, Michael A. Rose, LEAD ATTORNEYS, Hach Rose Schirripa & Cheverie, LLP, New York, NY; Gregory S. Asciolla, LEAD ATTORNEY, Labaton Sucharow LLP, New York, NY; J. Douglas Richards, Sharon K. Robertson, LEAD ATTORNEYS, Cohen, Milstein, Sellers and Toll PLLC, New York, NY; James Gerard Stranch, III, LEAD ATTORNEY, Branstetter, Stranch & Jennings, Nashville, TN; James Gerard Stranch, IV, LEAD ATTORNEY, Branstetter Stranch & Jennings, Nashville, TN; Jeffrey L. Kodroff, LEAD ATTORNEY, Spector Roseman & Kodroff & Willis, P.C., Philadelphia, PA; Meghan Boone, LEAD ATTORNEY, Cohen, Milstein, Sellers & Toll PLLC, Washington, DC; Renae Diane Steiner, Vincent J. Esades, LEAD ATTORNEYS, Heins Mills & Olson, P.L.C., Minneapolis, MN; Robert Samuel Kitchenoff, LEAD ATTORNEY, Weinstein Kitchenoff and Asher LLC, Philadelphia, PA; Robert William Sink, LEAD ATTORNEY, Law Offices of Robert W. Sink, Philadelphia, PA; Andrew Michael Purdy, Joseph Saveri Law Firm, San Francisco, CA; David S. Nalven, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Deborah R. Willig, Willig Williams & Davidson, Philadelphia, PA; **[*14]** Domenico Minerva, Peter G.A. Safirstein, Morgan & Morgan, New York, NY; Douglas R. Plymale, James R. Dugan, II, The Dugan Law Firm, New Orleans, LA; Elizabeth Gentry Arthur, Hilliard Shadowen LLP, Austin, TX; Garrett D. Blanchfield, Jr., Reinhardt Wendorf & Blanchfield, St. Paul, MN; Jacob A. Goldberg, PRO HAC VICE, Faruqi & Faruqi, LLP, Huntingdon Valley, PA; Jayne Arnold Goldstein, PRO HAC VICE, Pomerantz LLP, Weston, FL; John Andrew Ioannou, PRO HAC VICE, New York State Attorney General's Office, Antitrust Bureau, New York, NY; Joseph C Kohn, Kohn, Swift and Graf, P.C., Philadelphia, PA; Joseph R. Saveri, Ryan James McEwan, Joseph Saveri Law Firm, Inc., San Francisco, CA; Joshua P. Davis, University of San Francisco School of Law, San Francisco, CA; Justin Nicholas Boley, Kenneth A. Wexler, PRO HAC VICE, Wexler Wallace LLP, Chicago, IL; Krishna Brian Narine, Meredith Narine, Philadelphia, PA; Lee Albert, Glancy Prongay & Murray LLP, New York, NY; Lori A. Fanning, PRO HAC VICE, Marvin Alan Miller, Miller Law LLC, Chicago, IL; Michael Morris Buchman, PRO HAC VICE, Motley Rice LLC, New York, NY; Michael P. Thorton, Thornton Naumes LLP, Boston, MA; Natalie Finkelman Bennett, Shepherd, **[*15]** Finkelman, Miller & Shah, LLP, Media, PA; Noah I. Axler, Donovan Axler LLC, Philadelphia, PA; Ralph B. Kalfayan, Krause Kalfayan Benink & Slavens, San Diego, CA; Stephen E. Connolly, Connolly Wells & Gray LLP, King of Prussia, PA; Stephen C. Richman, Markowitz & Richman, Philadelphia, PA; Steve D. Shadowen, Hilliard & Shadowen LLP, Mechanicsburg, PA; William E. Hoese, Kohn Swift & Graf PC, Philadelphia, PA; William H. London, Freed Kanner London & Millen LLC, Bannockburn, IL.

For Allied Services Division Welfare Fund, on behalf of itself and all others similarly situated, Plaintiff: Brian O. O'Mara, LEAD ATTORNEY, David W. Mitchell, Robbins Geller Rudman & Dowd LLP, San Diego, CA; Christina H Sharp, LEAD ATTORNEY, Daniel C. Girard, Girard Gibbs LLP, San Francisco, CA; Dianne M. Nast, LEAD ATTORNEY, NastLaw LLC, Philadelphia, PA; Gregory S. Asciolla, LEAD ATTORNEY, Labaton Sucharow LLP, New York, NY; J. Douglas Richards, Sharon K. Robertson, Vincent J. Esades, LEAD ATTORNEYs, Cohen, Milstein, Sellers and Toll PLLC, New York, NY; Renae Diane Steiner, LEAD ATTORNEY, Heins Mills & Olson, P.L.C., Minneapolis, MN; Robert Samuel Kitchenoff, LEAD ATTORNEY, Weinstein Kitchenoff and Asher LLC, **[*16]** Philadelphia, PA; Robert William Sink, LEAD ATTORNEY, Law Offices of Robert W. Sink, Philadelphia, PA; Andrew Michael Purdy, Joseph Saveri Law Firm, San Francisco, CA; David Baylis Franco, Douglas R. Plymale, James R. Dugan, II, The Dugan Law Firm, APLC, New Orleans, LA; David S. Nalven, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Deborah R. Willig, Willig Williams & Davidson, Philadelphia, PA; Domenico Minerva, Peter G.A. Safirstein, Morgan & Morgan, New York, NY; Elizabeth Gentry Arthur, Hilliard Shadowen LLP, Austin, TX; Garrett D. Blanchfield, Jr., Reinhardt Wendorf & Blanchfield, St. Paul, MN; Jacob A. Goldberg, PRO HAC VICE, Faruqi & Faruqi, LLP, Huntingdon Valley, PA; Jayne Arnold Goldstein, PRO HAC VICE, Pomerantz LLP, Weston, FL; John Andrew Ioannou, PRO HAC VICE, New York State Attorney General's Office, New York, NY; Joseph C Kohn, Kohn, Swift and Graf, P.C., Philadelphia, PA; Joseph R. Saveri, Ryan James McEwan, Joseph Saveri Law Firm, Inc., San Francisco, CA; Joshua P. Davis, University of San Francisco School of Law, San Francisco, CA; Krishna Brian Narine, Meredith Narine, Philadelphia, PA; Lee Albert, Glancy Prongay & Murray LLP, New York, NY; Lori A. Fanning, PRO **[*17]** HAC VICE, Miller Law LLC, Chicago, IL; Marvin Alan Miller, Miller Law LLC, Chicago, IL; Michael Morris Buchman, PRO HAC VICE, Motley Rice LLC, New York, NY; Michael P. Thorton, Thornton Naumes LLP, Boston, MA; Natalie Finkelman Bennett, Shepherd, Finkelman, Miller & Shah, LLP, Media, PA; Noah I. Axler, Donovan Axler LLC, Philadelphia, PA; Ralph B. Kalfayan, Krause Kalfayan Benink & Slavens, San Diego, CA; Stephen E. Connolly, Connolly Wells & Gray LLP, King of Prussia, PA; Stephen C. Richman, Markowitz & Richman, Philadelphia, PA; Steve D. Shadowen, Hilliard & Shadowen LLP, Mechanicsburg, PA; William E. Hoese, Kohn Swift & Graf PC, Philadelphia, PA; William H. London, Freed Kanner London & Millen LLC, Bannockburn, IL.

For TWIN CITY IRON WORKERS, HEALTH AND WELFARE FUND, on behalf of itself and all others similarly situated, Plaintiff: Jeffrey L. Kodroff, LEAD ATTORNEY, Spector Roseman & Kodroff & Willis,P.C., Philadelphia, PA; Daniel C. Girard, Girard Gibbs LLP, San Francisco, CA; David S. Nalven, Hagens Berman Sobol Shapiro LLP, Cambridge, MA.

For Cesar Castillo, Inc., Plaintiff: Linda Phyllis Nussbaum, Bradley J Demuth, Nussbaum Law Group, P.C., New York, NY; Brent William Landau, **[*18]** Hausfeld LLP, Philadelphia, PA; Charles F. Barrett, Charles Barrett, P.C., Linda P. Nussbaum, PRO HAC VICE, Supreme Court, State of New York, Brooklyn, NY; Nashville, TN; Juan R. Rivera Font, Juan R. Rivera Font LLC, Guaynabo, PR; Thomas M. Sobol, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; David S. Nalven, Hagens Berman Sobol Shapiro LLP, Cambridge, MA.

For American Sales Company, LLC, on behalf of itself and all others similarly, situated, Plaintiff: David S. Nalven, LEAD ATTORNEY, Thomas M. Sobol, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; John Radice, LEAD ATTORNEY, Radice Law Firm, Long Beach, NJ; Charles F. Barrett, Charles Barrett, P.C., Nashville, TN; Donna M Evans, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Cambridge, MA.

For Government Employees Health, Association, Inc, Plaintiff: Todd Anthony Seaver, LEAD ATTORNEY, Berman DeValerio, San Francisco, CA; Barbara J. Hart, Lowey Dannenberg Cohen & Hart PC, White Plains, NY; David S. Nalven, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Noelle Ruggiero, Peter St. Phillip, Lowey Dannenberg Cohen and Hart P.C., White Plains, NY; Uriel Rabinovitz, Lowey Dannenberg Cohen and Hart PC, White Plains, NY.

For Iron Workers **[*19]** District Council of New England Welfare Fund, on Behalf of Itself and All Others Similarly Situated, Plaintiff: Brian O. O'Mara, LEAD ATTORNEY, David W. Mitchell, Robbins Geller Rudman & Dowd LLP, San Diego, CA; Christina H Sharp, Girard Gibbs LLP, San Francisco, CA; Gregory S. Asciolla, LEAD ATTORNEY, Labaton Sucharow LLP, New York, NY; J. Douglas Richards, Sharon K. Robertson, LEAD ATTORNEYS, Cohen, Milstein, Sellers and Toll PLLC, New York, NY; Jeffrey L. Kodroff, LEAD ATTORNEY, Spector Roseman & Kodroff & Willis, P.C., Philadelphia, PA; Renae Diane Steiner, Vincent J. Esades, LEAD ATTORNEYS, Heins Mills & Olson, P.L.C., Minneapolis, MN; Robert Samuel Kitchenoff, LEAD ATTORNEY, Weinstein Kitchenoff and Asher LLC, Philadelphia, PA; Robert William Sink, LEAD ATTORNEY, Law Offices of Robert W. Sink, Philadelphia, PA; Andrew Michael Purdy, Joseph Saveri Law Firm, San Francisco, CA; Daniel C. Girard, Girard Gibbs LLP, San Francisco, CA; David S. Nalven, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Deborah R. Willig, Willig Williams & Davidson, Philadelphia, PA; Domenico Minerva, Peter G.A. Safirstein, Morgan & Morgan, New York, NY; Douglas R. Plymale, The Dugan Law Firm, New Orleans, **[*20]** LA; Elizabeth Gentry Arthur, Hilliard Shadowen LLP, Austin, TX; Garrett D. Blanchfield, Jr., Reinhardt Wendorf & Blanchfield, St. Paul, MN; Jacob A. Goldberg, PRO HAC VICE, Faruqi & Faruqi, LLP, Huntingdon Valley, PA; James R. Dugan, II, The Dugan Law Firm, New Orleans, LA; Jayne Arnold Goldstein, PRO HAC VICE, Pomerantz LLP, Weston, FL; John Andrew Ioannou, PRO HAC VICE, New York State Attorney General's Office, Antitrust Bureau, New York, NY; Joseph C Kohn, Kohn, Swift and Graf, P.C., Philadelphia, PA; Joseph R. Saveri, Joseph Saveri Law Firm, Inc., San Francisco, CA; Joshua P. Davis, University of San Francisco School of Law, San Francisco, CA; Krishna Brian Narine, Meredith Narine, Philadelphia, PA; Lee Albert, Glancy Prongay & Murray LLP, New York, NY; Lori A. Fanning, PRO HAC VICE, Marvin Alan Miller, Miller Law LLC, Chicago, IL; Michael Morris Buchman, PRO HAC VICE, Motley Rice LLC, Providence, RI; Michael P. Thorton, Thornton Naumes LLP, Boston, MA; Natalie Finkelman Bennett, Shepherd, Finkelman, Miller & Shah, LLP, Media, PA; Noah I. Axler, Donovan Axler LLC, Philadelphia, PA; Ralph B. Kalfayan, Krause Kalfayan Benink & Slavens, San Diego, CA; Ryan James McEwan, Joseph Saveri **[*21]** Law Firm, Inc., San Francisco, CA; Stephen E. Connolly, Connolly Wells & Gray LLP, King of Prussia, PA; Stephen C. Richman, Markowitz & Richman, Philadelphia, PA; Steve D. Shadowen, Hilliard & Shadowen LLP, Mechanicsburg, PA; William E. Hoese, Kohn Swift & Graf PC, Philadelphia, PA; William H. London, Freed Kanner London & Millen LLC, Bannockburn, IL.

For International Union of Operating Engineers Local 49 Health and Welfare Fund, Plaintiff: Brian O. O'Mara, LEAD ATTORNEY, David W. Mitchell, Robbins Geller Rudman & Dowd LLP, San Diego, CA; Christina H Sharp, LEAD ATTORNEY, Girard Gibbs LLP, San Francisco, CA; David Richard Woodward, LEAD ATTORNEY, Heins Mills and Olson, P.L.C., Minneapolis, MN; Gregory S. Asciolla, LEAD ATTORNEY, Labaton Sucharow LLP, New York, NY; Heidi M Silton, LEAD ATTORNEY, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; J. Douglas Richards, Sharon K. Robertson, LEAD ATTORNEYS, Cohen, Milstein, Sellers and Toll PLLC, New York, NY; Jeffrey L. Kodroff, LEAD ATTORNEY, Spector Roseman & Kodroff & Willis, P.C., Philadelphia, PA; Karen Hanson Riebel, LEAD ATTORNEY, Lockridge Grindal Nauen, Minneapolis, MN; Kristen G. Marttila, LEAD ATTORNEY, Lockridge Grindal Nauen **[*22]** PLLP, Mpls, MN; Renae Diane Steiner, Vincent J. Esades, LEAD ATTORNEYS, Heins Mills & Olson, P.L.C., Minneapolis, MN; Robert William Sink, LEAD ATTORNEYS, Law Offices of Robert W. Sink, Philadelphia, PA; Andrew Michael Purdy, Joseph Saveri Law Firm, San Francisco, CA; David S. Nalven, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Deborah R. Willig, Willig Williams & Davidson, Philadelphia, PA; Domenico Minerva, Peter G.A. Safirstein, Morgan & Morgan, New York, NY; Douglas R. Plymale, The Dugan Law Firm, New Orleans, LA; Elizabeth Gentry Arthur, Hilliard Shadowen LLP, Austin, TX; Garrett D. Blanchfield, Jr., Reinhardt Wendorf & Blanchfield, St. Paul, MN; Jacob A. Goldberg, PRO HAC VICE, Faruqi & Faruqi, LLP, Huntingdon Valley, PA; James R. Dugan, II, The Dugan Law Firm, New Orleans, LA; Jayne Arnold Goldstein, PRO HAC VICE, Pomerantz LLP, Weston, FL; John Andrew Ioannou, PRO HAC VICE, New York State Attorney General's Office, Antitrust Bureau, New York, NY; Joseph C Kohn, Kohn, Swift and Graf, P.C., Philadelphia, PA; Joseph R. Saveri, Joseph Saveri Law Firm, Inc., San Francisco, CA; Joshua P. Davis, University of San Francisco School of Law, San Francisco, CA; Krishna Brian Narine, **[*23]** Meredith Narine, Philadelphia, PA; Lee Albert, Glancy Prongay & Murray LLP, New York, NY; Lori A. Fanning, PRO HAC VICE, Marvin Alan Miller, Miller Law LLC, Chicago, IL; Michael Morris Buchman, PRO HAC VICE, Motley Rice LLC, Providence, RI; Michael P. Thorton, Thornton Naumes LLP, Boston, MA; Natalie Finkelman Bennett, Shepherd, Finkelman, Miller & Shah, LLP, Media, PA; Noah I. Axler, Donovan Axler LLC, Philadelphia, PA; Ralph B. Kalfayan, Krause Kalfayan Benink & Slavens, San Diego, CA; Ryan James McEwan, Joseph Saveri Law Firm, Inc., San Francisco, CA; Stephen E. Connolly, Connolly Wells & Gray LLP, King of Prussia, PA; Stephen C. Richman, Markowitz & Richman, Philadelphia, PA; Steve D. Shadowen, Hilliard & Shadowen LLP, Mechanicsburg, PA; William E. Hoese, Kohn Swift & Graf PC, Philadelphia, PA; William H. London, Freed Kanner London & Millen LLC, Bannockburn, IL; Daniel C. Girard, Girard Gibbs LLP, San Francisco, CA.

For International Union of Operating Engineers Local 132 Health and Welfare Fund, Plaintiff: Brian O. O'Mara, LEAD ATTORNEY, David W. Mitchell, Robbins Geller Rudman & Dowd LLP, San Diego, CA; Christina H Sharp, LEAD ATTORNEY, Girard Gibbs LLP, San Francisco, CA; Gregory **[*24]** S. Asciolla, LEAD ATTORNEY, Labaton

Sucharow LLP, New York, NY; J. Douglas Richards, Sharon K. Robertson, LEAD ATTORNEYS, Cohen, Milstein, Sellers and Toll PLLC, New York, NY; Jeffrey L. Kodroff, LEAD ATTORNEY, Spector Roseman & Kodroff & Willis, P.C., Philadelphia, PA; Renae Diane Steiner, Vincent J. Esades, LEAD ATTORNEYS, Heins Mills & Olson, P.L.C., Minneapolis, MN; Robert Samuel Kitchenoff, LEAD ATTORNEY, Weinstein Kitchenoff and Asher LLC, Philadelphia, PA; Robert William Sink, LEAD ATTORNEYS, Law Offices of Robert W. Sink, Philadelphia, PA; Andrew Michael Purdy, Joseph Saveri Law Firm, San Francisco, CA; David S. Nalven, Hagens Berman Sobol Shapiro LLP, Cambridge, MA; Deborah R. Willig, Willig Williams & Davidson, Philadelphia, PA; Domenico Minerva, Peter G.A. Safirstein, Morgan & Morgan, New York, NY; Elizabeth Gentry Arthur, Hilliard Shadowen LLP, Austin, TX; Garrett D. Blanchfield, Jr., Reinhardt Wendorf & Blanchfield, St. Paul, MN; Jacob A. Goldberg, PRO HAC VICE, Faruqi & Faruqi, LLP, Huntingdon Valley, PA; James R. Dugan, II, The Dugan Law Firm, New Orleans, LA; Jayne Arnold Goldstein, PRO HAC VICE, Pomerantz LLP, Weston, FL; John Andrew Ioannou, PRO HAC VICE, New York **[*25]** State Attorney General's Office, Antitrust Bureau, New York, NY; Joseph C Kohn, Kohn, Swift and Graf, P.C., Philadelphia, PA; Joseph R. Saveri, Joseph Saveri Law Firm, Inc., San Francisco, CA; Joshua P. Davis, University of San Francisco School of Law, San Francisco, CA; Krishna Brian Narine, Meredith Narine, Philadelphia, PA; Lee Albert, Glancy Prongay & Murray LLP, New York, NY; Lori A. Fanning, PRO HAC VICE, Marvin Alan Miller, Miller Law LLC, Chicago, IL; Michael Morris Buchman, PRO HAC VICE, Motley Rice LLC, Providence, RI; Michael P. Thorton, Thornton Naumes LLP, Boston, MA; Natalie Finkelman Bennett, Shepherd, Finkelman, Miller & Shah, LLP, Media, PA; Noah I. Axler, Donovan Axler LLC, Philadelphia, PA; Ralph B. Kalfayan, Krause Kalfayan Benink & Slavens, San Diego, CA; Ryan James McEwan, Joseph Saveri Law Firm, Inc., San Francisco, CA; Stephen E. Connolly, Connolly Wells & Gray LLP, King of Prussia, PA; Stephen C. Richman, Markowitz & Richman, Philadelphia, PA; Steve D. Shadowen, Hilliard & Shadowen LLP, Mechanicsburg, PA; William E. Hoese, Kohn Swift & Graf PC, Philadelphia, PA; William H. London, Freed Kanner London & Millen LLC, Bannockburn, IL; Daniel C. Girard, Girard Gibbs **[*26]** LLP, San Francisco, CA.

For End-Payor Plaintiffs', Plaintiff: Christina H Sharp, Daniel C. Girard, Girard Gibbs LLP, San Francisco, CA.

For Walgreen Co, The Kroger Co., Safeway Inc., HEB Grocery Company LP, ALBERTSONS LLC, Plaintiffs: Anna Theresa Neill, Scott Eliot Perwin, LEAD ATTORNEYS, Kenny Nachwalter, P.A., Miami, FL.

For Rite Aid Corporation, Rite Aid Hdqtrs. Corp., Plaintiffs: Eric L Bloom, Hangley Aronchick Segal Pudlin Schiller, Harrisburg, PA; Monica L. Rebuck, Hangley Aronchick Segal & Pudlin, Harrisburg, PA.

For Teikoku Pharma USA, Inc., Teikoku Seiyaku Co., Ltd., Defendants: David S. Elkins, LEAD ATTORNEY, Squire Patton Boggs (US) LLP, Palo Alto, CA; Joseph Anthony Meckes, Nathan Lane, III, Noriyuki Shimoda, LEAD ATTORNEYS, Rafael Matias Langer-Osuna, Squire Patton Boggs (US) LLP, San Francisco, CA; Amy L. Brown, PRO HAC VICE, Squire Sanders, Washington, DC; Steven C. Sunshine, PRO HAC VICE, Skadden Arps Slate Meagher and Flom LLP, Washington, DC.

For Endo Pharmaceuticals, Inc, Defendant: Brigid M. Carpenter, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC (Nash), Nashville, TN; Daniel B. Asimow, LEAD ATTORNEY, Arnold & Porter LLP, San Francisco, CA; John **[*27]** A. Tarantino, LEAD ATTORNEY, Adler Pollock & Sheehan P.C., Providence, RI; David S. Elkins, Squire Patton Boggs (US) LLP, Palo Alto, CA; Emily H. Wood, Arnold & Porter LLP, San Francisco, CA; Jonathan L Stern, Steven G Reade, PRO HAC VICE, Arnold Porter LLP, Washington, DC; MAHNU V. DAVAR, ARNOLD & PORTER LLP, WASHINGTON, DC; Ryan Z. Watts, Arnold and Porter LLP, Washington, DC; Steven C. Sunshine, PRO HAC VICE, Skadden Arps Slate Meagher and Flom LLP, Washington, DC.

For Watson Pharmaceuticals, Inc., Watson Laboratories, Inc., Actavis Plc., Anda, Inc, ANDA Pharmaceuticals, Inc., Valmed Pharmaceuticals, Inc., Defendants: James Patrick Schaefer, LEAD ATTORNEY, Skadden Arps Slate Meagher & Flom LLP, Palo Alto, CA; Daniel B. Asimow, Arnold & Porter LLP, San Francisco, CA; David S. Elkins, Squire Patton Boggs (US) LLP, Palo Alto, CA; Karen Hoffman Lent, PRO HAC VICE, Skadden Arps Slate Meagher Flom LLP, New York, NY; Sean M Tepe, Steven C. Sunshine, PRO HAC VICE, Skadden, Arps, Slate, Meagher and Flom LLP, Washington, DC.

For All Parties: Daniel C. Girard, LEAD ATTORNEY, Christina H Sharp, Girard Gibbs LLP, San Francisco, CA; David S. Nalven, Hagens Berman Sobol Shapiro LLP, Cambridge, MA. **[*28]**

Judges: WILLIAM H. ORRICK, United States District Judge.

Opinion by: WILLIAM H. ORRICK

Opinion

ORDER ON DEFENDANTS' JOINT MOTION TO DISMISS OR STAY PLAINTIFFS' AMENDED COMPLAINT

Re: Dkt. Nos. 183, 184, 188, 190, 203, 204

A group of indirect purchaser plaintiffs composed of retail establishments (collectively, "Walgreen Plaintiffs") brought a First Amended Complaint against defendants Endo Pharmaceuticals Inc., Teikoku Pharma USA, Teikoku Seiyaku Co., Watson Pharmaceuticals, Inc., Actavis, plc, formerly known as Watson Pharmaceuticals, Inc., and Watson Laboratories, Inc. (collectively "defendants") in this multidistrict antitrust litigation relating to a settlement agreement entered into by defendants that resolved a patent dispute over the drug Lidoderm (the "Lidoderm Settlement"). Defendants move to dismiss, arguing that (i) the Walgreen Plaintiffs lack statutory standing as indirect purchasers of Lidoderm, (ii) the assignments of claims from Lidoderm wholesalers are invalid and fail for lack of Article III standing, and (iii) any valid assignments of claims should be joined with those of the group of direct purchaser plaintiffs.

The Walgreen Plaintiffs do not have standing to bring claims on their own behalf as indirect **[*29]** purchasers and have not adequately pleaded that they are entitled to injunctive relief. That portion of their claims is STRUCK. The remainder of defendants' motion is DENIED. The assignments of the right to bring antitrust claims are valid and the partial assignment of claims does not require me to dismiss or stay the Walgreen Plaintiffs' claims at this stage of the litigation.

BACKGROUND

The facts relating to the underlying suit are recited in my prior orders and incorporated by reference. *See*, e.g., Dkt. No. 117. The Lidoderm Settlement allegedly violated federal antitrust laws, in part because defendants agreed to delay the release of a generic equivalent of Lidoderm into the market. FAC ¶¶ 146-171 (Dkt. No. 166).

On April 22, 2015, the Walgreen Plaintiffs filed an Amended Complaint ("FAC") against defendants. The FAC asserts that: (i) the Lidoderm Settlement is an unreasonable restraint on trade that violates *Section 1* of the Sherman Act, *see* FAC ¶¶ 146-152; (ii) by entering into the Lidoderm Settlement, defendants conspired to expand monopoly power by intentionally forestalling the introduction of generic Lidoderm in violation of *Section 2* of the Sherman Act, *see id.* ¶¶ 153-160; (iii) defendant Endo **[*30]** exercised monopoly power over the relevant market by intentionally excluding competitors and charging artificially high prices for Lidoderm, *see id.* ¶¶ 161-166; and (iv) defendant Endo attempted to monopolize the relevant market by entering into the Lidoderm Settlement with the other defendants, *see id.* ¶¶ 167-171.

On May 8, 2015, defendants collectively moved to dismiss the Walgreen Plaintiffs' FAC for lack of Article III and statutory standing. Mot. (Dkt. No. 183). I heard argument on July 8, 2015.

LEGAL STANDARDS

I. *RULE 12(b)(1)*

Defendants move to dismiss for lack of standing under Article III and *Federal Rule of Civil Procedure 12(b)(1)*. The burden of proving standing rests with the party invoking federal subject matter jurisdiction. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*.

"*Rule 12(b)(1)* jurisdictional attacks can be either facial or factual." *White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000)*. A factual attack "disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004)*. When a factual attack is raised, the plaintiff must support the jurisdictional allegations with "competent proof[] under the same evidentiary standard that governs in the summary judgment context." *Leite v. Crane Co., 749 F.3d 1117, 1121 (9th Cir. 2014)* (internal citations omitted). "If the moving party converts the motion to dismiss into a factual motion by presenting affidavits **[*31]** and other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004)* (internal quotations omitted).

Here, defendants bring a factual attack because they challenge the validity of the wholesalers' assignments of their claims to the Walgreen Plaintiffs. *See* Mot. 4. Accordingly, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Doe v. Holy See*, *557 F.3d 1066, 1073 (9th Cir. 2009)* (internal quotations omitted).

II. *RULE 12(b)(6)*

Defendants also challenge the Walgreen Plaintiffs' standing under the Sherman Act by moving to dismiss for failure to state a claim pursuant to *Rule 12(b)(6)*. *See* Mot. 4. A *Rule 12(b)(6)* motion "tests the legal sufficiency of a claim." *Conservation Force v. Salazar, 646 F.3d 1240, 1241-42 (9th Cir. 2011)* (internal quotations omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (internal quotations omitted). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw **[*32]** the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The court should dismiss "if there is a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Salazar, 646 F.3d at 1242*.

In the private antitrust context, plaintiffs must establish "antitrust standing" to survive a motion to dismiss. *Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 987 (9th Cir. 2000)*; *Los Gatos Mercantile, Inc. v. E.I. DuPont De Nemours & Co., No. 13-CV-01180-BLF, 2014 U.S. Dist. LEXIS 133540, 2014 WL 4774611, at *5 (N.D. Cal. Sept. 22, 2014)*. "To determine whether [antitrust standing] is met, the court must evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *Knevelbaard, 232 F.3d at 987* (internal quotations omitted). "[A] showing of antitrust injury is necessary, but not always sufficient, to establish standing under *§ 4*." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051, 1055 (9th Cir. 1999)* (internal quotations omitted).

DISCUSSION

I. THE WALGREEN PLAINTIFFS' CLAIMS BROUGHT ON THEIR OWN BEHALF

Defendants argue that as indirect purchasers of Lidoderm, the Walgreen Plaintiffs lack standing under *section 4* of the Clayton Act. Mot. 5-6. The Walgreen Plaintiffs do not contend that they are entitled to treble damages under *Section 4* as indirect purchasers. Oppo. 9-10. Instead, they assert standing as indirect purchasers under *section 16* of the Clayton Act, requesting injunctive **[*33]** relief for violations of *sections 1* and *2* of the Sherman Act. *Id.*

Section 4 of the Clayton Act provides a private right of action for those injured as a result of antitrust violations and entitles them to treble damages. 15 U.S.C. § 15; *see also* In re Lithium Ion Batteries Antitrust Litig., No. 13-MD-2420 YGR, 2014 U.S. Dist. LEXIS 141358, 2014 WL 4955377, at *5 (N.D. Cal. Oct. 2, 2014). Only direct purchasers, and not indirect purchasers, may bring claims under section 4. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 744-47, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977); *see also* Del. Valley Surgical Supply Inc. v. Johnson & Johnson, 523 F.3d 1116, 1120-21 (9th Cir. 2008) ("[A] bright line rule emerged from *Illinois Brick*: only direct purchasers have standing under § 4 of the Clayton Act to seek damages for antitrust violations.").

Section 16 of the Clayton Act provides a private right of action for injunctive relief based upon violations of ***antitrust law***. It states that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by violation of the antitrust laws . . ." 15 U.S.C. § 26. In order to obtain injunctive relief, a plaintiff "must allege facts showing that the remedy she seeks is needed to prevent a threatened antitrust injury, meaning an injury of the type the antitrust laws were intended to prevent — *i.e.*, an injury to competition." Somers v. Apple, Inc. 729 F.3d 953, 967 (9th Cir. 2013) (internal quotations omitted).

Unlike section 4, under section 16 "indirect purchasers are not barred from bringing an **[*34]** antitrust claim for injunctive relief against manufacturers." Lucas Automotive Engineering, Inc. v. Bridgestone/Firestone, Inc., 140 F.3d 1228, 1235 (9th Cir. 1998); *see also* Sundance Land Corp. v. Community First Federal Savings & Loan Association, 840 F.2d 653, 661 (9th Cir. 1988) ("The standing requirements under section 16 of the Clayton Act are 'less stringent' than those under section 4. Parties who cannot recover damages may nevertheless obtain injunctive relief.") (internal citations omitted). Therefore, the Walgreen Plaintiffs would not be barred from bringing claims for injunctive relief as indirect purchasers.

That said, the Walgreen Plaintiffs have failed to show a "threatened loss or injury cognizable in equity proximately resulting from the alleged antitrust violation." Sundance Land, 840 F.2d at 661 (internal quotations omitted). Defendants' anticompetitive conduct ended on September 15, 2013, when generic drug competitors were able to enter the market. FAC ¶¶ 122, 135. There are no other allegations of anticompetitive conduct that would be subject to an injunction or that designate conduct to be enjoined; the FAC only mentions injunctive relief in the demand for judgment in a cursory manner. The Walgreen Plaintiffs argue that they have demonstrated "monetary harm" that will continue in the future, *see* Oppo. 9, and argued at the hearing that harm is ongoing because it takes time for prices to reach an equilibrium. These facts **[*35]** were not alleged in the FAC. The Walgreen Plaintiffs also argue that the injunctive relief is a prayer for damages and should not be resolved on a motion to dismiss, but provide no support for this argument.[1]

In short, the Walgreen Plaintiffs have alleged past injuries that they suffered, but have not stated with sufficient particularity any ongoing or future harm caused by the alleged Sherman Act violations. *See* San Diego Cnty. Gun Rights Comm. v. Reno, 98 F.3d 1121, 1126 (9th Cir. 1996) ("it is insufficient for [plaintiffs] to demonstrate only a past injury"); Kamakahi v. Am. Soc'y for Reprod. Med., 305 F.R.D. 164, 195 (N.D. Cal. 2015), *leave to appeal denied* (May 12, 2015). Therefore, to the extent that the Walgreen Plaintiffs bring claims under the Sherman Act on their own behalf, such claims are STRUCK with leave to amend.

II. PLAINTIFFS' ASSIGNMENTS OF THE WHOLESALERS' CLAIMS ARE VALID

Because the Walgreen Plaintiffs may not bring claims under section 4 of the Clayton Act as indirect purchasers, they must establish standing based upon the assignments of antitrust claims from the direct purchaser wholesalers that entered into a distribution service agreement **[*36]** ("DSA") with defendant Endo.[2] *See* FAC ¶¶ 8-12. The

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[1] In fact, courts may strike prayers for relief in resolving a motion to dismiss. *See*, e.g., Lang v. Cnty. of Sonoma, No. C12-0983 TEH, 2012 U.S. Dist. LEXIS 142746, 2012 WL 4674527, at *6 (N.D. Cal. Oct. 2, 2012); Grohal v. Stauffer Chem. Co., 385 F. Supp. 1267, 1269 (N.D. Cal. 1974).

Walgreen Plaintiffs have obtained assignments of the wholesalers' claims against Lidoderm arising from the direct purchases. *Id.* The DSAs contain non-assignment clauses that (generally) prohibit the wholesalers from assigning their claims against Endo. Defendants point to these non-assignment clauses to argue that the assignments of the wholesaler's rights under the DSAs to the Walgreen Plaintiffs are invalid and that the Walgreen Plaintiffs lack standing. Mot. 8-10.

The DSAs govern Endo's sale of Lidoderm to the wholesalers, and include general provisions for product distribution, inventory management services, and distribution channel information, among other services. *See*, e.g., Dkt. No. 188-1. Each DSA contains essentially **[*37]** the same non-assignment clause: neither party to the DSA is permitted to assign "this Agreement" or any of its "duties or responsibilities" without the other party's consent. *See* Dkt. Nos. 188-1, 188-2, 188-3, 188-4; Mot. 8. In addition, the DSAs all contain language requiring that each party "comply with all applicable federal, state, and local laws involving the purchase, handling, sale, marketing and distribution of Products purchased under the Agreement." *See* Dkt. No. 188-1 at 9.

Defendants' argument rests primarily on *In re Ditropan XL Antitrust Litigation, No. M:06-CV-01761-JSW, 2007 U.S. Dist. LEXIS 78423, 2007 WL 2978329 (N.D. Cal. Oct. 11, 2007)*. In that case, the Hon. Jeffrey S. White addressed various antitrust claims brought by a plaintiff who, as here, was the purported assignee of a direct purchaser wholesaler. Judge White found that the assignment of rights to the plaintiff under a Distribution Performance Agreement between the drug manufacturer defendant and the wholesaler was invalid due to a non-assignment clause. *2007 U.S. Dist. LEXIS 78423, [WL] at *2*. He determined that because the distribution agreement discussed price control protection, it could "not be construed accurately as merely an inventory replenishment agreement." *Id.* Because it encompassed antitrust claims, he dismissed **[*38]** the complaint for lack of standing. Defendants argue that this case raises precisely the same issue and urge me to adopt the same analysis. Mot. 9.

I decline that invitation. First, I note that the reasoning that defendants rely on in *Ditropan XL* is dicta, because the court concluded that the plaintiff lacked standing on other grounds. *See* *2007 U.S. Dist. LEXIS 78423, 2007 WL 2978329, at *2* (plaintiff lacked standing because the assignment occurred *after* the plaintiff filed its amended complaint). Second, other courts that have recently addressed similar questions relating to the validity of assignment of antitrust claims have come to different conclusions.

In *In re TFT-LCD (Flat Panel) Antitrust Litigation*, the plaintiff brought antitrust claims that were assigned to it by vendors, but that the defendants argued were invalid due to non-assignment clauses in agreements that they had with the vendors.[3] *Nos. M 07-1827 SI, C 11-00711 SI, 2011 U.S. Dist. LEXIS 88723, 2011 WL 3475408, at *3-4 (N.D. Cal. Aug. 9, 2011)*. The Hon. Susan Illston found that the non-assignment clause's bar on the unilateral assignment of "rights and obligations" under the agreement had no bearing on the assignment of legal claims arising from those rights and obligations. *Id.* The court cited the *RESTATEMENT (SECOND) OF CONTRACTS § 322* (AM. LAW INST. 1981), which states that: "Unless the **[*39]** circumstances indicate the contrary, a contract term prohibiting assignment of 'the contract' bars only the delegation to an assignee of the performance by the assignor of a duty or condition." *2011 U.S. Dist. LEXIS 88723, [WL] at *3*. Observing no such circumstances, the court concluded that "litigation over antitrust claims cannot be seen as a 'right or duty' contemplated by the contract." *2011 U.S. Dist. LEXIS 88723, [WL] at *4*. Thus, the non-assignment clause did not provide a basis for dismissing the plaintiff's claims. *2011 U.S. Dist. LEXIS 88723, [WL] at *3-4*; *accord* *In re TFT-LCD (Flat Panel)*

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[2] Defendants request that I take judicial notice of the DSAs and the Agreements for Assignment of Claims between Endo and the wholesalers, and between the wholesalers and the Walgreen Plaintiffs, respectively. Dkt. Nos. 184, 204. These agreements are incorporated into the FAC by reference and plaintiffs do not dispute their authenticity. *See* *Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005)*. To the extent that I rely on these documents, defendants' requests are GRANTED.

[3] The language of the non-assignment clauses in the *Flat Panel* cases was similar to the relevant provisions in this case. *Compare* *2011 U.S. Dist. LEXIS 88723, 2011 WL 3475408, at *4* ("[n]either party will assign their rights or delegate or subcontract their duties under this Agreement to third parties or Affiliates") *with* Dkt. No. 188-1 at 13 ("[n]either Party may assign this Agreement or delegate any of its respective duties or responsibilities [under] this Agreement without prior written consent . . .").

Antitrust Litig., Nos. M 07-1827 SI, C 10-3517 SI, 2011 U.S. Dist. LEXIS 105152, 2011 WL 4345316, at *3 (N.D. Cal. Sept. 15, 2011) (adopting the same analysis).

Defendants urge me to disregard the *Flat Panel* decisions and follow *Ditropan XL* here. Mot. 10. They do so first by distinguishing the facts of **[*40]** a case upon which the *Flat Panel* decisions relied: Lutheran Medical Center v. Contractors, Laborers, Teamsters & Engineers Health & Welfare Plan, 25 F.3d 616 (8th Cir. 1994) *abrogated on other grounds,* Martin v. Arkansas Blue Cross & Blue Shield, 299 F.3d 966 (2002) (en banc).

Lutheran Medical involved the assignment of an employee's rights under a health plan, which prohibited employees from assigning their rights or benefits under the plan. 25 F.3d at 619. While it did not involve antitrust claims or distribution agreements, this factual distinction is largely irrelevant. The *Lutheran Medical* court concluded that notwithstanding language that prohibited the assignment of "rights or benefits," the assignees were not prevented from bringing causes of action arising after the denial of benefits. *Id.* Because the employees assigned their causes of action, not the right to receive benefits under the plan, the assignment was valid. *Id.*

As Judge Illston recognized in the *Flat Panel* cases, the reasoning of *Lutheran Medical* applies to contexts in which a vendor assigns antitrust claims. *See* 2011 U.S. Dist. LEXIS 88723, 2011 WL 3475408, at *4 ("litigation over antitrust claims cannot be seen as a 'right or duty' contemplated by the contract"). Other courts have come to similar conclusions. *See*, e.g., Meijer, Inc. v. Barr Pharmaceuticals, Inc., 572 F. Supp. 2d 38, 64 (D.D.C. 2008) (finding that a non-assignment clause barring the assignment of "this Agreement" could not "be read to prevent the assignment of the parties' **[*41]** statutorily-based antitrust claims.") (internal citations omitted); Health Alliance Network, Inc. v. Cont'l Cas. Co., 354 F. Supp. 2d 411, 417 n.8 (S.D.N.Y. 2005) ("a non-assignment clause does not prohibit assignment of a right to damages for breach of the whole contract or a right arising out of due performance").

Even if the DSAs are construed to prohibit the assignment of the right to bring antitrust claims, the violation of this provision would not render the assignment of a cause of action, instead of the "duty or condition," invalid. While the legal compliance provisions of the DSAs arguably prevent signatories from assigning their duties to comply with applicable law to third parties, a duty is not equivalent to a right arising from a breach of that duty. *See* TransWorld Airlines, Inc. v. Am. Coupon Exch., Inc., 913 F.2d 676, 685 (9th Cir. 1990) (explaining that contractual rights "must be distinguished from *duties*"). Even after the wholesalers assigned their rights to sue for antitrust violations to the Walgreen Plaintiffs, the duty of legal compliance remained with the original parties to the DSAs.

Defendants argue that like *Ditropan XL* and unlike the *Flat Panel* cases, the duty of legal compliance outlined in the DSAs encompasses antitrust laws and demonstrates the parties' intent to prevent the assignment of legal claims. Reply 7-8. The court in *Flat* ***[*42]*** *Panel* acknowledged that there are some "circumstances [that] indicate that the parties intended the anti-assignment provisions to cover territory beyond the rights and obligations set forth in the sales contracts." 2011 U.S. Dist. LEXIS 88723, 2011 WL 3475408, at *4 (internal quotation marks and modifications omitted). But here the non-assignment provisions do not clearly prevent the wholesalers from assigning claims arising out of ***antitrust law***. Davidowitz v. Delta Dental Plan of Cal., Inc., 946 F.2d 1476, 1478 (9th Cir. 1991) ("As a general rule of law, *where the parties' intent is clear*, courts will enforce non-assignment provisions.") (emphasis added).

The existence of a boilerplate duty to abide by "applicable law" does not manifest the requisite intent to expand the scope of the non-assignment clauses beyond their ordinary language. *See* Flat Panel, 2011 U.S. Dist. LEXIS 88723, 2011 WL 3475408, at *4; 2011 U.S. Dist. LEXIS 105152, 2011 WL 4345316, at *3; *see also* TransWorld Airlines, 913 F.2d at 685 ("an explicit contractual provision forbidding assignment of a right created by that contract is ordinarily enforceable *according to its terms*") (emphasis added). The DSAs do not specifically mention ***antitrust law*** or the assignment of legal claims. As in Flat Panel and Meijer, the non-assignment clause is limited to "this Agreement," and does not cover unrelated claims arising from ***antitrust law***.

Flat Panel*,* Lutheran Medical, and Meijer are well-reasoned and factually **[*43]** analogous to this case, notwithstanding defendants' attempts to distinguish them. The DSAs' non-assignment clauses are limited to the assignment of duties and obligations under the DSAs themselves and do not include causes of action sounding in antitrust arising from those agreements. Therefore, the wholesalers' assignments of antitrust claims to the Walgreen Plaintiffs are valid and the FAC does not fail under *Rule 12(b)(1)*.

Defendants also challenge the FAC's allegations that the individual plaintiff Walgreen Co. is "contractually entitled to a second assignment from . . . another pharmaceutical wholesaler, which during the relevant period purchased Lidoderm directly from Endo for resale to Walgreen." FAC ¶ 8; Mot. 11. Because all Walgreen Plaintiffs have standing under the assignments, this argument is inapposite. *See* *In re SLM Corp. Sec. Litig., 258 F.R.D. 112, 115 (S.D.N.Y. 2009)* ("To the extent courts allow assignment of a claim after litigation commences, the plaintiff generally has Article III standing on at least one other claim at the time the action was filed."). The issue of Walgreen's future assignment may become relevant in determining damages, but need not be considered at this stage. *See* FAC ¶ 8 (Walgreen "intends to include purchases made through **[*44]** ABDC in its damage claim when it obtains that assignment.").

III. **GRANTING A STAY PENDING CLASS CERTIFICATION IS IMPROPER**

Defendants argue that *Rule 19 of the Federal Rules of Civil Procedure* requires the Walgreen Plaintiffs to pursue any legitimately assigned claims as part of the putative class action brought by the Direct Purchaser Plaintiffs ("DPPs") in this litigation, and request a stay in anticipation of that group's Rule 23 motion. Mot. 12. They further assert that because the Walgreen Plaintiffs only have partial assignments from the wholesalers, allowing their action to continue separately from those of the DPPs would "complicate the administration of the litigation, and impermissibly force Defendants to face a multiplicity of suits rather than a single claim." *Id.* The Walgreen Plaintiffs respond that this multidistrict litigation sufficiently consolidates the cases to alleviate any of the concerns raised by defendants, and contend that any denial of their rights to opt out of any such class violates *Rule 23* and raises serious due process concerns. Oppo. 11.

Defendants rely heavily on *In re Fine Paper Litigation State of Washington, 632 F.2d 1081, 1091 (3d Cir. 1980)* and *Bailey Lumber & Supply Co. v. Georgia-Pac. Corp., No. 1:08CV1394 LG-JMR, 2009 U.S. Dist. LEXIS 131486, 2009 WL 2872307, at *1 (S.D. Miss. Aug. 10, 2009)*. In *Fine Paper*, the court held that a partial assignee in an antitrust class action **[*45]** was precluded from opting out of a class post-certification. In doing so, the court stated that partial assignment of claims did not pose any problems identified in *Illinois Brick*; namely, that indirect purchasers would bring claims and expose defendants to double liability, or that there would be "insurmountable problems of proof and procedure in typical antitrust cases." *632 F.2d at 1090*. Instead, *Fine Paper* found that the partial assignments created potential complications associated with permitting a partial assignee to opt out of a class, including defendants' uncertainty regarding outstanding liability following settlement with assignors, protection from "additional litigation," and *Rule 19*'s compulsory joinder provisions. *Id. at 1090-91*.

In *Bailey Lumber*, the court addressed two sets of partial assignments of antitrust claims. The first involved claims with "no prior history," while the second involved claims assigned from a party who had opted out of a prior class action bringing the same claims. *2009 U.S. Dist. LEXIS 131486, 2009 WL 2872307, at *7*. The court held that the plaintiff could not bring the second set of claims because it "was not entitled to opt out of the class action and bring [the claims] in this suit without the Defendants' consent." *Id.* Notably, **[*46]** it held that the plaintiff *could* bring the first set of claims. *Id.*

At this stage of the litigation, there is no basis to dismiss or stay the case due to the concerns raised in *Bailey Lumber* or *Fine Paper*. Unlike here, in those cases the partial assignee attempted to opt out of a class that had already been certified, and the assignors were members of that class. *See* *Fine Paper, 632 F.2d at 1089*. Moreover, all relevant cases, claims, and parties are joined in this multidistrict litigation lawsuit, removing many of the problems discussed in those cases. I see no reason why this case cannot be managed in a way to avoid the problems in administration and multiplicity of suits cited by the defendants.

Finally, *Bailey Lumber* and *Fine Paper* stand for the principle that antitrust plaintiffs with partially assigned claims may not opt of a class due to concerns that they will circumvent joinder rules or interfere with the rights of the defendant to be free of excessive and repeated suits growing out of same basic facts. They do not stand for the proposition that partially assigned claims must be dismissed or stayed in actions such as this, where there is no "prior history" of litigation of these claims in a different court. **[*47]**

The current status of this litigation makes a decision to dismiss or stay those claims premature. Although the DPPs have filed a class action complaint, Dkt. No. 70, that group has not yet moved for class certification. And interestingly, none of the *wholesalers* from whom the Walgreen Plaintiffs have been assigned claims are named in the DPP complaint. *See id.* Although defendants raise the issue of partial assignments, it remains unclear whether the wholesalers that assigned their claims to the Walgreen Plaintiffs have reserved for themselves any portion of their right to sue defendants. Thus, defendants' argument is not persuasive. The motion to dismiss or stay the partial assignment claims is DENIED.

CONCLUSION

For the foregoing reasons, I STRIKE the Walgreen Plaintiffs' claims insofar as they are brought as indirect purchasers, with leave to amend, and DENY the remainder of defendants' motion to dismiss.

IT IS SO ORDERED.

Dated: July 17, 2015

/s/ William H. Orrick

WILLIAM H. ORRICK

United States District Judge

LexisNexis

Neale v. Volvo Cars of N. Am., LLC

United States Court of Appeals for the Third Circuit

June 2, 2015, Argued; July 22, 2015, Filed

No. 14-1540

Reporter

794 F.3d 353 *; 2015 U.S. App. LEXIS 12629 **; 92 Fed. R. Serv. 3d (Callaghan) 202

JOANNE NEALE, Individually and on behalf of all others similarly situated; KERI HAY, Individually and on behalf of all others similarly situated; DAVID TAFT; JEFFREY KRUGER; KAREN COLLOPY; KELLY MCGARY; SVEIN A. BERG; GREGORY P. BURNS v. VOLVO CARS OF NORTH AMERICA, LLC; VOLVO CAR CORPORATION, Appellants

Subsequent History: Motion granted by, in part, Motion denied by, in part *Neale v. Volvo Cars of N. Am., 2016 U.S. Dist. LEXIS 185597 (D.N.J., Apr. 20, 2016)*

Prior History: [1]** On Appeal from the United States District Court for the District of New Jersey. District Court No. 2-10-cv-04407. District Judge: The Honorable Dennis M. Cavanaugh.

Neale v. Volvo Cars of N. Am., LLC, 2013 U.S. Dist. LEXIS 43235 (D.N.J., Mar. 26, 2013)

Core Terms

district court, predominance, class action, class member, class certification, certification, questions, damages, parties, cases, named plaintiff, representative action, federal court, antitrust, class representative, Plaintiffs', settlement, statewide, defenses, entities, rigorous, lessees, former owner, class claim, certify, unnamed, marks, member of the class, class treatment, quotation

LexisNexis® Headnotes

Civil Procedure > Special Proceedings > Class Actions > Class Action Fairness Act

HN1[] **Class Actions, Class Action Fairness Act**

The Class Action Fairness Act confers on district courts original jurisdiction where: (1) the amount in controversy exceeds $5,000,000, as aggregated across all individual claims; (2) there are minimally diverse parties; and (3) the class consists of at least 100 or more members. *28 U.S.C.S. § 1332(d)(2)*, *(5)(B)*, *(6)*.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN2[] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

Although the parties do not dispute jurisdiction, courts must nevertheless satisfy themselves that federal subject matter jurisdiction exists in the first instance.

Civil Procedure > Special Proceedings > Class Actions > Class Action Fairness Act

HN3[] Class Actions, Class Action Fairness Act

In order to determine whether the Class Action Fairness Act, *28 U.S.C.S. § 1332(d)(2)*, jurisdictional requirements are satisfied, a court evaluates allegations in the complaint.

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

Civil Procedure > Special Proceedings > Class Actions > Class Action Fairness Act

HN4[] Amount in Controversy, Challenges

Where the defendant did not contest a complaint's jurisdictional facts under the Class Action Fairness Act, *28 U.S.C.S. § 1332(d)(2)*, appellate courts ask whether it is clear to a legal certainty that the plaintiff cannot recover the amount claimed.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN5[] Standards of Review, Abuse of Discretion

Appellate courts review a class certification order for abuse of discretion, which occurs if the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact.

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

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

HN6[] Standards of Review, De Novo Review

Appellate courts review de novo a legal standard applied by a district court.

Constitutional Law > ... > Case or Controversy > Standing > General Overview

HN7[] Case or Controversy, Standing

Appellate courts have an obligation to assure themselves of litigants' standing under U.S. Const. art. III.

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

Constitutional Law > ... > Case or Controversy > Standing > General Overview

HN8[] Standards of Review, De Novo Review

Appellate courts exercise plenary review over a threshold question of law, such as that presented by a U.S. Const. art. III. standing challenge.

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

Constitutional Law > ... > Case or Controversy > Standing > General Overview

HN9[] Standing, Elements

U.S. Const. art. III governs constitutional standing and limits jurisdiction to actual "cases or controversies." U.S. Const. art. III, § 2. Article III requires a plaintiff to demonstrate (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision. Constitutional standing ensures that litigants are truly adverse to one another and are not merely suitors in the courts of the United States. In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches. A concrete dispute informs the court of the consequences of its decisions and prevents the anti-majoritarian federal judiciary from usurping the policy-making functions of the popularly elected branches.

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

HN10[] Standing, Elements

The requisite injury-in-fact for U.S. Const. art. III standing is an invasion of a legally protected interest. That injury must be particularized, and concrete in both a qualitative and temporal sense. That injury must also be actual or imminent, not conjectural or hypothetical. A risk of future injury may support standing if the threatened harm is certainly impending, or there is a substantial risk that the harm will occur.

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Evidence > Burdens of Proof > Allocation

HN11[] Case or Controversy, Standing

Standing requires that the party seeking to invoke federal jurisdiction demonstrate standing for each claim he seeks to press. Thus, courts do not exercise jurisdiction over one claim simply because it arose from the same nucleus of operative fact as another claim. Standing is not a mere pleading requirement but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.

Civil Procedure > ... > Class Actions > Class Members > Absent Members

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Civil Procedure > ... > Class Actions > Class Members > Named Members

HN12[] Class Members, Absent Members

In the context of a class action, U.S. Const. art. III must be satisfied by at least one named plaintiff. If none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class. The U.S. Supreme Court has yet to comment on what Article III requires of putative, unnamed class members during a *Fed. R. Civ. P. 23* motion for class certification.

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN13[] Special Proceedings, Class Actions

Considerations under *Fed. R. Civ. P. 23* are themselves procedural rules, and thus rarely can be antecedent to the question of whether a federal court has jurisdiction to hear a claim at all. *Rule 23* is, therefore, fundamentally a procedural device: it cannot ordinarily be construed to extend or limit the jurisdiction and venue of federal courts.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Governments > Courts > Authority to Adjudicate

HN14[] Subject Matter Jurisdiction, Jurisdiction Over Actions

Because a federal court has a bedrock obligation to examine both its own subject matter jurisdiction and that of the district courts, it is improper to resolve contested questions of law when its jurisdiction is in doubt.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Governments > Courts > Authority to Adjudicate

HN15[] Subject Matter Jurisdiction, Jurisdiction Over Actions

For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.

Civil Procedure > ... > Class Actions > Class Members > Absent Members

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Civil Procedure > ... > Class Actions > Class Members > Named Members

HN16[] Class Members, Absent Members

Unnamed, putative class members need not establish U.S. Const. art. III standing. Instead, the "cases or controversies" requirement is satisfied so long as a class representative has standing, whether in the context of a settlement or litigation class.

Civil Procedure > Special Proceedings > Class Actions > General Overview

HN17[] **Special Proceedings, Class Actions**

The class action device treats individuals falling within a class definition as members of a group rather than as legally distinct persons.

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

HN18[] **Justiciability, Standing**

Standing must be personal to and satisfied by those who seek to invoke the power of federal courts.

Civil Procedure > ... > Class Actions > Class Members > Named Members

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

HN19[] **Class Members, Named Members**

A class action is a representative action brought by a named plaintiff or plaintiffs. Named plaintiffs are the individuals who seek to invoke the court's jurisdiction and they are held accountable for satisfying jurisdiction. Thus, a class action is permissible so long as at least one named plaintiff has standing. Requiring individual standing of all class members would eviscerate the representative nature of the class action. It would also fail to recognize that the certified class is treated as a legally distinct entity even though the outcome of such an action is binding on the class.

Civil Procedure > ... > Class Actions > Class Members > Named Members

Constitutional Law > ... > Case or Controversy > Mootness > General Overview

Civil Procedure > ... > Justiciability > Mootness > Real Controversy Requirement

HN20[] **Class Members, Named Members**

In *Sosna v. Iowa, 419 U.S. 393, 95 S. Ct. 553, 42 L. Ed. 2d 532 (1975)*, the U.S. Supreme Court held a class action is not dismissed as moot if the named plaintiff had a live controversy when the suit was filed, a properly certified class action was pending, and there are members of the class whose claims are not moot. The Court did not require that all members have live claims and, instead, focused on there needing to be a "controversy" between at least a named defendant and a member of the class.

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Constitutional Law > ... > Case or Controversy > Standing > Third Party Standing

HN21[] **Standing, Third Party Standing**

Associational standing occurs whereby an organization may assert the rights of its members, provided: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. In the associational standing context, the test ensures there is an actual case and controversy without inquiring into the standing of every member of an organization.

Civil Procedure > ... > Class Actions > Class Members > Absent Members

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

HN22[] **Class Members, Absent Members**

The U.S. Court of Appeals for the Second and Eighth Circuits purportedly require absent class members to have U.S. Const. art. III standing. The U.S. Court of Appeals for the Ninth and D.C. Circuits potentially do too. The U.S. Court of Appeals for the Third Circuit is not persuaded.

Civil Procedure > Special Proceedings > Class Actions > General Overview

HN23[] **Special Proceedings, Class Actions**

Class actions are exceptions to the rule that litigation is usually conducted by and on behalf of the individual named parties only.

Civil Procedure > ... > Justiciability > Ripeness > General Overview

Constitutional Law > ... > Case or Controversy > Mootness > General Overview

Civil Procedure > ... > Class Actions > Class Members > Named Members

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

HN24[] **Justiciability, Ripeness**

Class representatives need to present a justiciable claim. A plaintiff who lacks the personalized, redressable injury required for standing to assert claims on his own behalf would also lack standing to assert similar claims on behalf of a class. At all times during the course of a class action, there must be a live "case or controversy" for U.S. Const. art. III purposes.

Civil Procedure > ... > Class Actions > Class Members > Named Members

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

HN25[] **Class Members, Named Members**

Class representatives must meet U.S. Const. art. III standing requirements the moment a complaint is filed.

Civil Procedure > ... > Class Actions > Class Members > Absent Members

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN26[] **Class Members, Absent Members**

For a *Fed. R. Civ. P. 23(b)(2)* class, certification is appropriate even if the defendant's action or inaction has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class. Technically speaking, those *Rule 23(b)(2)* class members may not have suffered a legal injury and, at best, may only have standing in light of a threatened future injury.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Class Members > Named Members

HN27[] **Class Actions, Prerequisites for Class Action**

A class representative must be part of the class and possess the same interest and suffer the same injury as the class members. These "interests" or "injuries" are tested by the requirements of *Fed. R. Civ. P. 23*. These separate requirements establish the propriety of granting class-wide relief.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Civil Procedure > ... > Class Actions > Class Members > Named Members

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

Civil Procedure > ... > Justiciability > Standing > General Overview

HN28[] **Prerequisites for Class Action, Adequacy of Representation**

The question whether a class representative may be allowed to present claims on behalf of others who have similar, but not identical, interests depends not on standing, but on an assessment of typicality and adequacy of representation.

Civil Procedure > ... > Class Actions > Class Members > Named Members

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

HN29[] **Class Members, Named Members**

So long as a named class representative has standing, a class action presents a valid "case or controversy" under U.S. Const. art. III.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN30[] Class Actions, Certification of Classes

In Wachtel v. Guardian Life Insurance Co. of America, 453 F.3d 179, (3d Cir. 2006), the court held that Fed. R. Civ. P. 23(c)(1)(B) requires district courts to include in class certification orders a clear and complete summary of those claims, issues, or defenses subject to class treatment. The court rejected the practice of issuing memorandum opinions discussing the allegations in the complaint, the facts of the case, and some combination of the substantive requirements for class certification found in Rule 23(a) and (b) that then go on to treat the parameters of the class itself much more clearly and deliberately than the class claims, issues, or defenses. The court stated that Rule 23(c) requires more specific and more deliberate treatment of the class issues, claims, and defenses than the practice described above. Thus a class-certification order or an incorporated opinion must include (1) a readily discernible, clear, and precise statement of the parameters defining the class or classes to be certified, and (2) a readily discernible, clear, and complete list of the claims, issues or defenses to be treated on a class basis.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

HN31[] Class Actions, Certification of Classes

Although a motion for class certification presents a discretionary question for a district court, the court must clearly articulate its reasons, in part, so appellate courts can adequately review the certification decision on appeal under Fed. R. Civ. P. 23(f).

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Evidence > Burdens of Proof > Preponderance of Evidence

HN32[] Class Actions, Certification of Classes

The party proposing class-action certification bears the burden of affirmatively demonstrating by a preponderance of the evidence her compliance with the requirements of Fed. R. Civ. P. 23. A district court must rigorously analyze the evidence used to establish class certification in order to ensure compliance with Rule 23(a) and at least one of the subsections of Rule 23(b). This rigorous analysis may require a district court to address, at least in part, the merits of a plaintiff's underlying claim because class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN33[] Prerequisites for Class Action, Predominance

Before certifying a Fed. R. Civ. P. 23(b)(3) class, a district court must evaluate whether, inter alia, questions of law or fact common to class members predominate over any questions affecting only individual members. Fed. R. Civ. P. 23(b)(3). This predominance test asks whether common issues of law or fact in the case predominate over non-common, individualized issues of law or fact. Predominance begins, of course, with the elements of the underlying cause of action. To assess predominance, a court at the certification stage must examine each element of a legal claim through the prism of Rule 23(b)(3). Each element of a legal claim is relevant to assessing predominance. That is because the nature of the evidence that will suffice to resolve a question determines whether the question is common or individual and that means that a district court must formulate some prediction as to how specific issues will play out.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN34[] Prerequisites for Class Action, Predominance

The presence of individual questions does not per se rule out a finding of predominance. If issues common to the class overwhelm individual issues, predominance should be satisfied. Predominance involves a qualitative assessment of common versus individualized questions; predominance is not determined simply by counting noses: that is, determining whether there are more common issues or more individual issues. Further, predominance does not require that common questions will be answered, on the merits, in favor of the class. What the rule does require is that common questions predominate over any questions affecting only individual class members. Fed. R. Civ. P. 23(b)(3).

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN35[] Class Actions, Certification of Classes

Comcast Corp. v. Behrend, 133 S. Ct. 1426, 185 L. Ed. 2d 515, 2013 U.S. LEXIS 2544 (2013), held that an antitrust litigation class could not be certified because the plaintiffs' damages model did not demonstrate the theory of antitrust impact that the district court accepted for class-action treatment.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN36[] Class Actions, Certification of Classes

Every question of class certification will depend on the nature of the claims and evidence presented by the plaintiffs. A trial court must consider carefully all relevant evidence and make a definitive determination that the requirements of Fed. R. Civ. P. 23 have been met before certifying a class.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN37[] Prerequisites for Class Action, Predominance

Recognition that individual damages calculations do not preclude class certification under Fed. R. Civ. P. 23(b)(3) is well nigh universal. It is a misreading of Comcast Corp. v. Behrend, 133 S. Ct. 1426, 185 L. Ed. 2d 515, 2013 U.S.

LEXIS 2544 (2013), to interpret it as precluding certification under Rule 23(b)(3) in any case where the class members' damages are not susceptible to a formula for class wide measurement.

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Judges: Before: SMITH, CHAGARES, and HARDIMAN, Circuit Judges.

Opinion by: SMITH

Opinion

[*356] SMITH, *Circuit Judge*.

This appeal involves a putative class action brought by consumers from six states alleging that Appellants-Defendants Volvo Cars of North America, LLC and Volvo Car Corporation (collectively "Volvo") sold certain vehicles with defective sunroof drainage systems. Volvo challenges the grant of class certification by the U.S. District Court for the District of New Jersey. For the **[**2]** reasons that follow, we will vacate the District Court's order and remand for further proceedings.

I.

Plaintiffs-Appellees Joanne Neale, Keri Hay, Kelly McGary, Svein Berg, Gregory Burns, David Taft, Jeffrey Kruger, and Karen Collopy (collectively "Plaintiffs") filed suit on behalf of themselves and a nationwide class of current and former Volvo vehicle owners and lessees. Plaintiffs allege that a uniform design defect exists in the sunroof drainage systems in the following vehicles sold and leased to consumers by Volvo: S40, S60, S80, and V70 (model years 2004 to present); XC90 (model years 2003 to present); and V50 **[*357]** (model years 2005 to present) (the "Class Vehicles").

On August 7, 2012, Plaintiffs proposed a nationwide class consisting of "[a]ll persons or entities in the United States who are current or former owners and/or lessees of a Class Vehicle (the 'Nationwide Class')." Supplemental Appendix ("SA") 19; Joint Appendix ("JA") 140. In the alternative, Plaintiffs also proposed the following statewide classes:

> All persons or entities in Massachusetts who are current or former owners and/or lessees of a Class Vehicle (the "Massachusetts Class").
>
> All persons or entities in Florida who are **[**3]** current or former owners and/or lessees of a Class Vehicle (the "Florida Class").
>
> All persons or entities in Hawaii who are current or former owners and/or lessees of a Class Vehicle (the "Hawaii Class").
>
> All persons or entities in New Jersey who are current or former owners and/or lessees of a Class Vehicle (the "New Jersey Class").
>
> All persons or entities in California who are current or former owners and/or lessees of a Class Vehicle (the "California Class").

All persons or entities in Maryland who are current or former owners and/or lessees of a Class Vehicle (the "Maryland Class").

SA 20; *see also* JA 140-41 (Pls.' Second Am. Compl. listing all classes except for the Maryland Class). Volvo filed a brief in opposition to the proposed classes and separate motions for summary judgment against the individual class representatives.

On March 26, 2013, the District Court denied Plaintiffs' motion to certify a nationwide class, granted Plaintiffs' motion to certify six statewide classes, and denied Volvo's motions for summary judgment. After the Supreme Court's decision in *Comcast Corp. v. Behrend, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)*, Volvo moved for reconsideration of the District Court's order granting class certification, which the District Court also **[**4]** denied. Volvo filed this timely appeal.

II.

The District Court had jurisdiction over this case pursuant to *28 U.S.C. §§ 1332(d)(2)* and *(d)(6)* and supplemental jurisdiction over the state law claims pursuant to *28 U.S.C. § 1367*.[1] We have jurisdiction **[*358]** pursuant to U.S.C. *§ 1292(e)* and *Rule 23(f) of the Federal Rules of Civil Procedure*.

HN5[] "We review a class certification order for abuse of discretion, which occurs if the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *Grandalski v. Quest Diagnostics Inc., 767 F.3d 175, 179 (3d Cir. 2014)* (quoting *Hayes v. Wal-Mart Stores, Inc., 725*

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[1] Plaintiffs asserted federal jurisdiction under the Class Action Fairness Act of 2005 ("CAFA"). ***Pub. L. No. 109-2, 119 Stat. 4*** (codified in scattered sections of 28 U.S.C.). ***HN1***[] CAFA confers on district courts original jurisdiction where: (1) the amount in controversy exceeds $5,000,000, as aggregated across all individual claims; (2) there are minimally diverse parties; and (3) the class consists of at least 100 or more members. *28 U.S.C. § 1332(d)(2)*, *(5)(B)*, *(6)*; *Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345, 1348, 185 L. Ed. 2d 439 (2013)*.

HN2[] Although the parties do not dispute CAFA jurisdiction, "[w]e must nevertheless satisfy ourselves that federal subject matter jurisdiction exists in the first instance." *Kaufman v. Allstate N.J. Ins. Co., 561 F.3d 144, 151 (3d Cir. 2009)*. ***HN3***[] "In order to determine whether the CAFA jurisdictional requirements are satisfied, a court evaluates allegations in the complaint." *Judon v. Travelers Prop. Cas. Co. of Am., 773 F.3d 495, 500 (3d Cir. 2014)*. Plaintiffs contend that there were over 100 class members because there were "tens of thousands" of Class Vehicles sold in the United States. JA 107, 141-42, Second Am. Compl. ¶¶ 5, 127. As to the amount in controversy, Plaintiffs allege that class members "suffered **[**5]** economic damages including but not limited to costly repairs, loss of vehicle use, substantial loss in value and resale value of the vehicles, and other related damages," JA 148, ¶ 148, that they are seeking punitive damages and attorney's fees and costs, and that this exceeds $5,000,000. Finally, because one plaintiff and one defendant are citizens of different states, Plaintiffs contend that there is minimal diversity. Volvo answered that the jurisdictional allegations stated "a legal conclusion to which no response [was] necessary," but to the extent "a response is deemed required, Volvo admits the allegations in this paragraph." JA 170, Am. Answer ¶ 5.

HN4[] Because Volvo did not contest these jurisdictional facts, we ask "whether it is clear to a legal certainty that the plaintiff cannot recover the amount claimed." *Judon, 773 F.3d at 505*. As in *Frederico v. Home Depot*, we have an idea of each class representative's damages but not the total number of class members. *507 F.3d 188, 199 (3d Cir. 2007)*. Using class representative Gregory Burns as an example, he was charged $252.82 to repair his damaged vehicle. As a citizen of New Jersey, he can seek punitive damages of up to five times the compensatory damages, *N.J. Stat. Ann. § 2A:15-5.14(b)*. Thus, an estimate of his total **[**6]** damages amounts to $1,516.92. A median recovery range for attorney's fees is approximately 30 percent, which would be $455.08 for Burns' claim. Burns' damages plus attorney's fees would equal $1,972. The $5,000,000 CAFA amount-in-controversy requirement divided by $1,972 equals approximately 2,536 class members. Because 2,536 is well under the number of Class Vehicles identified in the Second Amended Complaint ("tens of thousands"), we are satisfied that the "legal certainty test is met: as it does not appear to a *legal certainty* that [Plaintiffs] cannot recover the jurisdictional amount, the case need not be remanded and we may proceed to the substantive merits of this appeal." *See Frederico, 507 F.3d at 199*.

F.3d 349, 354 (3d Cir. 2013)) (internal quotation marks omitted).***HN6***[] We review de novo a legal standard applied by a district court. *Carrera v. Bayer Corp., 727 F.3d 300, 305 (3d Cir. 2013)*.

III.

Volvo argues on appeal that: (1) putative members of the class have not suffered an injury and therefore lack Article III standing; (2) the District Court failed **[**7]** to identify the class claims and defenses in its certification order; (3) the District Court erred in its analysis of the *Rule 23(b)(3)* predominance requirement; and (4) the Supreme Court's decision in *Comcast Corp. v. Behrend* means that Plaintiffs must have class-wide proof of damages in order for the class to be certified. We address each issue in turn.

A.

Volvo argues that all putative class members must have Article III standing. We begin with this argument because ***HN7***[] "[w]e have 'an obligation to assure ourselves' of litigants' standing under Article III." *DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 340, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006)* (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000))*; *see also In re Deepwater Horizon, 739 F.3d 790, 798 (5th Cir. 2014)*. ***HN8***[] We exercise plenary review over a threshold question of law, such as that presented by an Article III standing challenge. *McNair v. Synapse Grp. Inc., 672 F.3d 213, 222 n.9 (3d Cir. 2012)*.

1.

HN9[] Article III governs constitutional standing and limits our jurisdiction to actual "cases or controversies." *U.S. Const. art. III, § 2*. Article III requires a plaintiff **[*359]** to demonstrate "(1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341, 189 L. Ed. 2d 246 (2014)* (alterations in original) (quoting *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1991))*. Constitutional standing ensures that litigants are truly adverse to one another and are not merely "suitors in the courts of **[**8]** the United States." *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 476, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982)*; *Warth v. Seldin, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)* ("In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."). "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146, 185 L. Ed. 2d 264 (2013)*; *see also* William A. Fletcher, *The Structure of Standing*, *98 Yale L.J. 221, 222 (1988)* (explaining that a concrete dispute "informs the court of the consequences of its decisions" and prevents "the anti-majoritarian federal judiciary from usurping the policy-making functions of the popularly elected branches").

The case before us concerns the injury-in-fact requirement. ***HN10***[] The requisite injury-in-fact is an "invasion of a legally protected interest." *Lujan, 504 U.S. at 560*. That injury must be "particularized," *id.*, and "concrete in both a qualitative and temporal sense," *Whitmore v. Arkansas, 495 U.S. 149, 155, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990)*. That injury must also be "actual or imminent, not conjectural or hypothetical." *Lujan, 504 U.S. at 560* (quoting *Whitmore, 495 U.S. at 155*) (internal quotation marks omitted). A risk of future injury may support standing if the threatened harm is "certainly impending," or there is a "'substantial risk'" that the harm will occur. *Clapper, 133 S. Ct. at 1148, 1150 n.5* (quoting *Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 153, 130 S. Ct. 2743, 177 L. Ed. 2d 461 (2010))*.

HN11[] Standing requires **[**9]** that the party seeking to invoke federal jurisdiction "demonstrate standing for each claim he seeks to press." *DaimlerChrysler, 547 U.S. at 352*. Thus, we do not exercise jurisdiction over one claim simply because it arose "from the same 'nucleus of operative fact'" as another claim. *Id.* Accordingly,

> [S]tanding is not a "mere pleading requiremen[t] but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation."

Ala. Legis. Black Caucus v. Alabama, 135 S. Ct. 1257, 1276, 191 L. Ed. 2d 314 (2015) (alteration in original) (quoting *Lujan, 504 U.S. at 561*).

HN12[] In the context of a class action, Article III must be satisfied "by at least one named plaintiff." *McNair, 672 F.3d at 223*; *see also* *O'Shea v. Littleton, 414 U.S. 488, 494, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974)* ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class."). The Supreme Court has yet **[*360]** to comment on what Article III requires of putative, unnamed class members during a *Rule 23* motion for class certification.[2]

In *Amchem Products, Inc. v. Windsor*, the Supreme Court declined to address the argument that asbestos exposure-only class members had no standing to pursue their class claims and instead began its analysis with *Rule 23*. *521 U.S. 591, 612-13, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*. The Supreme Court agreed with our analysis that the settlement class's standing issues "'would not exist but for the [class-action] certification'" and that those issues were dispositive "because their resolution [was] logically antecedent to the existence of any Article III issues." *Id. at 612* (first alteration in original) (quoting *Georgine v. Amchem Prods., Inc., 83 F.3d 610, 623 (3d Cir. 1996)*); *see also* *Ortiz v. Fibreboard Corp., 527 U.S. 815, 831, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)* (reasoning that the question of whether certification of a settlement class under *Rule 23(b)(1)(B)* on a limited fund rationale presented, as in *Amchem*, an issue of "statutory standing" that "should be treated first").

Yet *HN13*[] considerations under *Rule 23* are themselves procedural rules, and thus rarely can be antecedent to the **[**11]** question of whether a federal court has jurisdiction to hear a claim at all. *See* *28 U.S.C. § 2072(a)*, *(b)* (authorizing the Supreme Court to prescribe "general rules of practice and procedure," but providing that those rules "shall not abridge, enlarge or modify any substantive right"); *Fed. R. Civ. P. 82* (stating that the Federal Rules of Civil Procedure "do not extend or limit the jurisdiction of the district courts"); 1 William B. Rubenstein, *Newberg on Class Actions* § 1:1 (5th ed. 2012) ("*Rule 23* is, therefore, fundamentally a *procedural* device: it cannot ordinarily be construed to extend or limit the jurisdiction and venue of federal courts."). What is more, the Supreme Court has recently explained that "statutory standing" is "misleading, since 'the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction.'" *Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1387 n.4, 188 L. Ed. 2d 392 (2014)* (quoting *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 642-43, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002)*). *HN14*[] Because a federal court has a "bedrock obligation to examine both [its] own subject matter jurisdiction and that of the district courts," *Pub. Interest Research Grp. of N.J., Inc. v. Magnesium Elektron, Inc., 123 F.3d 111, 117 & n.5 (3d Cir. 1997)*, it is improper to "resolve contested questions of law when its jurisdiction is in doubt." *Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)*.

The Supreme Court has candidly recognized the tension in its standing precedent: "We need not mince words when we say that the concept **[**12]** of 'Art. III standing' has not been defined with complete consistency in all of

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[2] The Supreme Court granted the petition for certiorari in ***Tyson Foods, Inc. v. Bouaphakeo, No. 14-1146, 135 S. Ct. 2806, 192 L. Ed. 2d 846, 2015 U.S. LEXIS 3860, 2015 WL 1278593, at *1 (U.S. June 8, 2015)***. The second question presented is: "Whether a class action may be certified **[**10]** or 12 maintained under *Rule 23(b)(3)*, or a collective action certified or maintained under the Fair Labor Standards Act, when the class contains hundreds of members who were not injured and have no legal right to any damages." Pet. for Writ of Cert, *Tyson Foods, Inc. v. Bouaphakeo*, 2015 WL 1285369, at *i (Mar. 19, 2015). The Supreme Court may, therefore, answer this question during its October 2015 term.

the various cases decided by this Court." *Valley Forge Christian Coll., 454 U.S. at 475*. One could say that *Amchem* stands for the proposition **[*361]** that when a federal court would deny a class certification motion, that court need not reach the question of jurisdiction. *See* *521 U.S. at 612-13*. Yet that logic could result in a federal court, in many cases, reaching *Rule 23* questions before assuring itself of jurisdiction. Even more problematic for this application of *Amchem* is the extensive discussion in *Steel Co. v. Citizens for a Better Environment* that read cases that "ha[d] diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question" in a very limited manner. *523 U.S. at 101*. The Supreme Court reasoned that ***HN15***[] "[f]or a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." *Id. at 101-02*. And because determining the answer to a *Rule 23* certification motion involves "rigorous analysis" that may overlap with merits-based questions, *Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551-52, 180 L. Ed. 2d 374 (2011)*, a federal court's analysis will rarely be an obvious, foregone conclusion. Indeed, *Amchem* cautioned that "[i]f certification issues **[**13]** were genuinely in doubt . . . the jurisdictional issues would loom larger." *521 U.S. at 613 n.15*.

In this case, certification issues are genuinely in doubt. And because we will remand this matter to the District Court as described herein, that court may well be presented with the very same arguments regarding standing. For these reasons, we address Volvo's standing argument.

2.

In *In re Prudential Insurance Co. America Sales Practice Litigation Agent Actions*, we addressed the applicability of Article III to a putative class. The case involved a settlement class alleging improper sales and marketing practices by the life insurer Prudential. *148 F.3d 283, 290-92 (3d Cir. 1998)*. We held that once Article III standing "is determined vis-a-vis the named parties . . . there remains no further separate class standing requirement in the constitutional sense." *Id. at 306-07* (quoting 1 William B. Rubenstein, *Newberg on Class Actions* § 2.05 (3d ed. 1992)) (citing *In re Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. 450, 505-06 (D.N.J. 1997)* and *Allee v. Medrano, 416 U.S. 802, 828, 94 S. Ct. 2191, 40 L. Ed. 2d 566 (1974))*.[3] We further explained that "absentee class members are not required to make a similar showing, because once the named parties have demonstrated they are properly before the court, 'the issue [becomes] one of compliance with the provisions of *Rule 23*, not one of Article III standing.'" *Id. at 307* (alteration in original) (quoting **[**14]** *Goodman v. Lukens Steel Co., 777 F.2d 113, 122 (3d* ***[*362]*** *Cir. 1985)*, *aff'd*, *482 U.S. 656, 107 S. Ct. 2617, 96 L. Ed. 2d 572 (1987))*; *see also* *Hayes, 725 F.3d at 361 & n.11-12* (explaining that at the class certification stage when a named plaintiff's Article III standing is in question, a district court must determine whether that named plaintiff "falls within the amended class definition and sustained an injury"). Because *In re Prudential* involved a settlement class, we did not have occasion expressly to address whether unnamed class members in a litigation class must have Article III standing.[4]

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[3] The latest version of *Newberg on Class Actions* provides that "[a] class action can be maintained by one class representative with proper standing," and cites to *Rule 23(a)* as authority. 2 William B. Rubenstein, *Newberg on Class Actions* § 2:8 (5th ed. 2012); *id.* § 2:1 ("Once threshold individual standing by the class representative is met, a proper party to raise a particular issue is before the court; there is no further, separate 'class action standing' requirement."); *see also* 5 Jerold S. Solovy et al., *Moore's Federal Practice - Civil § 23.63* (3d ed. 1997) ("The named plaintiff in a class action must meet all the jurisdictional requirements to bring an individual suit asserting the same claims, including standing."); 1 *McLaughlin on Class Actions* § 4:28 (11th ed. **[**15]** 2014) ("In the class action context, including cases seeking prospective injunctive relief, as an Article III justiciability matter only the named plaintiff must demonstrate standing to assert the claims (including injury in fact), not the absent class members. Individual class members do not need to submit evidence of personal standing." (footnotes omitted)).

[4] Volvo also asks us to treat the certification of a settlement class in *In re Prudential* as distinguishable from that of a litigation class. Nothing in *In re Prudential*, however, limited its reach to that of absent *settlement* class members. *See* *148 F.3d at 306-07*. Nor has our application of *In re Prudential* been limited solely to settlement classes. *See* *McCray v. Fidelity Nat'l Title Ins. Co., 682 F.3d 229, 243 & n.13 (3d Cir. 2012)* ("In the context of class actions, Article III standing 'is determined vis-a-vis the named parties.'" (quoting *In re Prudential, 148 F.3d at 306*)). Indeed, *Rule 23*'s rigors are not relaxed as to a settlement class; we simply do not weigh issues of trial management as they are irrelevant in such a situation. *Sullivan v. DB Investments, Inc. (Sullivan II), 667 F.3d 273, 303 (3d Cir. 2011)* (en banc) ("[A] district court '[c]onfronted with a request for settlement-only class

We now squarely hold that ***HN16***[] unnamed, putative class members need not establish Article III standing. Instead, the "cases or controversies" requirement is satisfied so long as a class representative has standing, whether in the context of a settlement or litigation class. This rule is compelled by *In re Prudential* and buttressed by a historical review of representative actions.

It is well-established that "history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider." *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc., 554 U.S. 269, 274, 128 S. Ct. 2531, 171 L. Ed. 2d 424 (2008)*. "[G]roup litigation has a remarkably deep history" dating back to medieval times. Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, *39 Ariz. L. Rev. 687, 687 (1997)*; Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* 21 (1987) (explaining that representative group litigation in medieval times was attributable to "societ[ies] pervasively organized in groups," such as "villages, parishes, [and] guilds"). As societies evolved, so did the characteristics and treatment of group litigation. One example is the English Chancery practice **[**17]** of the "necessary parties" rule of the seventeenth and eighteenth centuries, which "required that any person with an interest in the object of a suit be joined as a party." Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, *146 U. Pa. L. Rev. 1849, 1858 (1998)*. The necessary parties rule had several exceptions, including the "impossibility exception," which covered "situations in which interested parties were so numerous that it was practically impossible to join them all." *Id. at 1860*; *see also* *Ortiz, 527 U.S. at 832-33*. The impossibility exception permitted representative suits, such as "bills of peace involving a common benefit to or burden upon the members of the group, . . . cases involving a group having creditor claims against a debtor or legatee claims against an estate, and cases involving unincorporated associations." Hazard, Jr. et al., *146 U. Pa. L. Rev. at 1861*; **[*363]** *see also* W. S. Holdsworth, *The History of the Treatment of Choses in Action by the Common Law*, 33 Harv. L. Rev. 997, 1003 (1920) (discussing the gradual and partial allowance of personal rights of action to be asserted by representatives). Such representative actions, including the most widely-recognized bill of peace, were post-medieval developments in the long history of representative litigation. **[**18]** Yeazell, *From Medieval Group Litigation to the Modern Class Action*, at 24-25.

The history of representative actions under English law and how they crossed the pond to nineteenth-century America is marked by complexity. Yeazell, *From Medieval Group Litigation to the Modern Class Action*, at 213-37. Scholars mostly agree that representative actions under the law of this country can be traced back at least as far as Justice Joseph Story's *Commentaries on Equity Pleadings. Id.* at 216-20; Hazard, Jr. et al., *146 U. Pa. L. Rev. at 1878* (citing Joseph Story, *Commentaries on Equity Pleadings*, §§ 94-97, at 93-98 (2d ed. 1840)). In *Smith v. Swormstedt*, the Supreme Court recognized an exception discussed by Justice Story to the well-established rule that litigation is typically conducted on behalf of named parties. *Smith v. Swormstedt, 57 U.S. (16 How.) 288, 298, 14 L. Ed. 942 (1853)*. The Court explained:

> [W]here the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest.

Id. There was no mention of *Article III, § 2*—the Supreme Court focused on the *propriety* of the representative action itself and not whether there was truly a controversy (in the constitutional sense) between the feuding northern and southern wings of the Methodist Episcopal Church. *Id. at 303* ("The legal and equitable rights **[**19]** and liabilities of all being before the court by representation, . . . there can be very little danger but that the interest of all will be properly protected and maintained.").

Before the enactment of *Rule 23* in 1937, federal courts were not consistent in their application of the equity rules governing representative actions. *See* Equity Rule 38 (1912); Equity Rule 48 (1842); *Smith, 57 U.S. (16 How.) at 298* (failing to reference and contradicting the then-governing Equity Rule 48); *Trustees v. Greenough, 105 U.S. 527, 533, 26 L. Ed. 1157 (1881)* (making no reference to the basis for a representative suit but recognizing the ability of a plaintiff to utilize a common fund to pay attorney's fees); Hazard, Jr. et al., *146 U. Pa. L. Rev. at 1902-10*

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certification' need not inquire whether the case 'would present intractable management problems.'" (second alteration in original) (quoting *Amchem, 521 U.S. at 620*)). Given that standing **[**16]** is a threshold jurisdictional question, there is no reason to alter its application for a litigation class.

(summarizing cases); Yeazell, *From Medieval Group Litigation to the Modern Class Action*, at 219 (The legitimacy of representative actions "could scarcely be questioned once an authority so eminent as Story had recognized it, though his confusion was reflected in the cases."). Yet during this time period it was never suggested that putative class members were required to have standing or that representative actions could not present a proper case or controversy.

In 1937, the Supreme Court promulgated the first version of *Rule 23* along with the Federal Rules of Civil Procedure, which took effect in 1938. *See* John G. Harkins, Jr., *Federal Rule 23—The Early Years*, *39 Ariz. L. Rev. 705, 705-09 (1997)*. *Rule 23* was drastically **[**20]** revised in 1966. Although the 1938 version of *Rule 23* was meant to "encourage more frequent use of class actions," Charles A. Wright, *Class Actions*, 47 F.R.D. 169, 170 (1970), in 1966 the Advisory Committee reworked *Rule 23* and "sought to catalogue in 'functional' **[*364]** terms 'those recurrent life patterns which call for mass litigation through representative parties,'" *Ortiz, 527 U.S. at 833* (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. Indus. & Com. L. Rev. 497, 497 (1969)).

A review of the foregoing history reveals that ***HN17***[] the class action device treats individuals falling within a class definition as members of a group rather than as legally distinct persons. *Sosna v. Iowa, 419 U.S. 393, 399, 95 S. Ct. 553, 42 L. Ed. 2d 532 (1975)* (reasoning that the "class of unnamed persons described in the certification *acquired a legal status separate from* the interest asserted by the [plaintiff]" (emphasis added)); *see also* Hazard, Jr. et al., *146 U. Pa. L. Rev. at 1852-53* (analyzing the group treatment of members of a class as it relates to the doctrine of res judicata). Indeed, in *In re Prudential* we reasoned that the Supreme Court's decision in *Allee v. Medrano* was instructive in providing that ***HN18***[] "standing must be personal to and satisfied by 'those who seek to invoke the power of federal courts.'" *In re Prudential, 148 F.3d at 306* (citing to *Allee, 416 U.S. at 828* (quoting *O'Shea, 414 U.S. at 493*)).

Herein lies the key:***HN19***[] a class action is a *representative* action brought by a named plaintiff **[**21]** or plaintiffs. Named plaintiffs are the individuals who seek to invoke the court's jurisdiction and they are held accountable for satisfying jurisdiction. *See* *Ortiz, 527 U.S. at 832*. Thus, a class action is permissible so long as at least one named plaintiff has standing. *See* *Horne v. Flores, 557 U.S. 433, 446, 129 S. Ct. 2579, 174 L. Ed. 2d 406 & n.2 (2009)*; *Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264, 97 S. Ct. 555, 50 L. Ed. 2d 450 & n.9 (1977)* ("[W]e have at least one individual plaintiff who has demonstrated standing . . . . Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit."); *Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 40 n.20, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976)* (class action does not eliminate a class representative's burden of establishing standing). Requiring individual standing of all class members would eviscerate the representative nature of the class action. It would also fail to recognize that the certified class is treated as a legally distinct entity even though the outcome of such an action is binding on the class. *See* *Fed. R. Civ. P. 23(c)(3)*.

What Volvo asks of this Court is arguably in conflict with Supreme Court precedent permitting a representative action to persist despite a named plaintiff's claim becoming moot after certification. In the context of the doctrine of mootness, the Supreme Court has already recognized the representative nature of the class. For example **[**22]** ***HN20***[] in *Sosna v. Iowa*, the Supreme Court held a class action is not dismissed as moot if the named plaintiff had a live controversy when the suit was filed, a properly certified class action was pending, and there are members of the class whose claims are not moot. *419 U.S. at 399, 402-03*. The Court did not require that *all* members have live claims and, instead, focused on there needing to be a "controversy" between *at least* "a named defendant and a member of the class." *Id. at 402*; *see also* *Franks v. Bowman Transp. Co., 424 U.S. 747, 755, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (1976)* (a properly certified class action "'clearly presented' the District Court and the Court of Appeals 'with a case or controversy in every sense contemplated by Art. III of the Constitution'" (quoting *Sosna, 419 U.S. at 398*)); *Holmes v. Pension Plan of Bethlehem Steel Corp., 213 F.3d 124, 135 (3d Cir. 2000)* ("So long **[*365]** as a class representative has a live claim at the time he moves for class certification, neither a pending motion nor a certified class action need be dismissed if his individual claim subsequently becomes moot.").

The Supreme Court has also permitted representative standing of sorts in a variety of other contexts. *Horne, 557 U.S. at 446* ("Because the superintendent clearly has standing to challenge the lower courts' decisions, we need not consider whether the Legislators also have standing to do so."); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 52 n.2, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006)* (declining to decide whether the individually named plaintiffs had **[**23]** standing because "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement"). A particularly apt example of this includes ***HN21***[] associational standing, whereby an organization may assert the rights of its members, provided: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wa. State Apple Adver. Comm'n, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)*. As to the first prong of the organizational standing test, the Supreme Court in *Hunt* required only that "*some* Washington apple growers" had suffered injuries. *Id.* (emphasis added); *see also* *Laidlaw, 528 U.S. at 181-83* (reasoning that affidavits from *some* organization members were sufficient to establish that the association's "members would otherwise have standing to sue in their own right"). The clear import of that requirement is that in the associational standing context, the test ensures there is an actual case and controversy without inquiring into the standing of every member of an organization. Along this same line, the Supreme Court openly recognizes the ability **[**24]** of a State to bring suit in a *parens patriae* action. *See* *Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982)* (permitting a State to bring suit on behalf of its citizens where the State expresses a quasi-sovereign interest). The focus in a *parens patriae* action is on the State, "independent of the benefits that might accrue to any particular individual." *Id. at 608*.

Volvo urges this Court to adopt the approach taken by some of our sister courts that require all class members to possess standing. ***HN22***[] The Second and Eighth Circuits purportedly require absent class members to have Article III standing. The Ninth and D.C. Circuits potentially do too. We are not persuaded.

In *Denney v. Deutsche Bank AG, 443 F.3d 253 (2d Cir. 2006)*, the Second Circuit affirmed the district court's certification of a *Rule 23(b)(3)* class in a suit against professional tax advisors for improper and fraudulent tax counseling. *Id. at 259*. Two class objectors challenged certification on the grounds that the class contained members who had not yet been assessed tax penalties and therefore lacked Article III or statutory standing. *Id.* As to the standing challenge, the Court explained that "[w]e do not require that each member of a class submit evidence of personal standing. At the same time, no class may be certified that contains members lacking Article **[**25]** III standing. The class must therefore be defined in such a way that anyone within it would have standing." *Id. at 263-64* (citations omitted). The Second Circuit has not expanded upon this declaration.

[*366] The Eighth Circuit in *Avritt v. Reliastar Life Insurance Co.* held that a California law that permitted a single injured plaintiff to bring a class action on behalf of a group of uninjured individuals was "inconsistent with the doctrine of standing as applied by federal courts." *615 F.3d 1023, 1034 (8th Cir. 2010)*. Yet the Court explained that "federal courts 'do not require that each member of a class submit evidence of personal standing.'" *Id.* (quoting *Denney, 443 F.3d at 263-64*). Reconciling this tension, the Court reasoned that "[a] class 'must therefore be *defined* in such a way that anyone within it would have standing.'" *Id.* (emphasis added) (quoting *Denney, 443 F.3d at 264*). More recently in *Halvorson v. Auto-Owners Insurance Co.*, the Court referenced these same general principles and explained that the lack of an individualized injury would impact *predominance* and mean that "individual questions necessary to determine breach of contract and bad faith" would include "individual inquiries" that would "predominate over" whether the defendant's processes were reasonable. *718 F.3d 773, 779 (8th Cir. 2013)*. **[**26]** It is, thus, not clear to us whether the Eighth Circuit's standing analysis rests on Article III or *Rule 23*.

The D.C. Circuit has similarly discussed predominance as requiring that plaintiffs "show that they can prove, through common evidence, that *all* class members were in fact injured by [an] alleged conspiracy." *In re Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 252, 406 U.S. App. D.C. 371 (D.C. Cir. 2013)* (emphasis added) (reasoning that "common evidence [must] show all class members suffered *some* injury" but not saying that this was required pursuant to Article III). And the Ninth Circuit in *Mazza v. American Honda Motor Co., Inc.* quoted the rule discussed in *Denney*. *666 F.3d 581, 594-95 (9th Cir. 2012)*. But it did so within the context of a predominance challenge and without detailed discussion. *Id.* Further, the *Mazza* court did not expressly overrule the Ninth Circuit's previous declaration that "our law keys on the representative party, not all of the class members." Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1020-21 (9th Cir. 2011) (analyzing a defendant's Article III injury-in-fact argument while evaluating the district court's predominance ruling).

We decline Volvo's invitation to impose a requirement that all class members possess standing. **HN23**[] Class actions are "exception[s] to the rule that litigation is usually conducted by and on behalf of the individual named parties only." Byrd v. Aaron's Inc., 784 F.3d 154, 163 (3d Cir. 2015) (quoting Comcast, 133 S. Ct. at 1432) (internal **[**27]** quotation marks omitted), *as amended* (Apr. 28, 2015). A Rule 23(b)(3) class "is an 'adventuresome innovation' of the 1966 amendments" to Rule 23, Wal-Mart, 131 S. Ct. at 2558 (quoting Amchem, 521 U.S. at 614), that allows named plaintiffs to bring suit when the procedural protections of Rule 23 are satisfied. The goal is to permit a class action that "would achieve economies of time, effort, and expense, and promote uniformity of decision *as to persons similarly situated*, without sacrificing procedural fairness or bringing about other undesirable results." Rule 23(b)(3), 1966 Amendment advisory committee note (emphasis added).

Before even getting to the point of class certification, however, **HN24**[] class representatives need to present a justiciable claim. As we explained in *Holmes v. Pension Plan of Bethlehem Steel Corp.*, "a plaintiff who lacks the personalized, redressable injury required for standing to assert claims on his own behalf would also lack standing to assert similar claims on behalf of a class." 213 F.3d at 135; *see also* Davis v. Fed. Election Comm'n, 554 U.S. 724, 734, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008) **[*367]** ("While the proof required to establish standing increases as the suit proceeds, the standing inquiry remains focused on whether *the party invoking jurisdiction* had the requisite stake in the outcome when the suit was filed." (emphasis added) (citing Lujan, 504 U.S. at 561)). Combined with **[**28]** the Supreme Court's guidance on mootness as applied to a class, we know that at all times during the course of a class action, there must be a live "case or controversy" for Article III purposes. *See* Sosna, 419 U.S. at 399, 402-03; Franks, 424 U.S. at 755.

Quite simply, requiring Article III standing of absent class members is inconsistent with the nature of an action under Rule 23.[5] When a Rule 23(b)(3) class-action complaint is filed, the unnamed class members are generally unknown. As the Seventh Circuit aptly explained:

> [A] class will often include persons who have not been injured by the defendant's conduct; indeed this is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown.

Kohen v. Pac. Inv. Mgmt. Co. LLC, 571 F.3d 672, 677 (7th Cir. 2009). Only after discovery (which may be limited by a district court at its discretion to issues related solely to class certification), will the court have before it specific facts bearing on the class and the relevant claims. Indeed, class discovery may itself focus on named representatives such that facts bearing on the Article III requirements for putative, unnamed class members never come to light. And after class certification, at least for a (b)(3) class, **[**29]** the class members cannot be identified until the opt-out period pursuant to Rule 23(c)(2)(B) has expired. In light of this, we do not expect a plaintiff to be "able to identify all class members at class certification." Byrd, 784 F.3d at 163. Yet **HN25**[] class representatives must meet Article III standing requirements the moment a complaint is filed. Lewis v. Casey, 518 U.S. 343, 358, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996); Lujan, 504 U.S. at 561.

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[5] Similar reasoning has been used by our sister circuits that have also concluded that unnamed class members need not establish Article III standing. *See, e.g.,* In re Nexium Antitrust Litig., 777 F.3d 9, 25, 30-31 (1st Cir. 2015) (concluding "that the presence of a de minimis number of uninjured class members is permissible at class certification" and would not defeat commonality or predominance); Stearns, 655 F.3d at 1020-21 ("'In a class action, standing is satisfied if at least one named plaintiff meets the requirements [of Article III]. . . . Thus, we consider only whether at least one named plaintiff satisfies the standing requirements.'" (quoting Bates v. United Parcel Serv., Inc., 511 F.3d 974, 985 (9th Cir. 2007) (en banc))); DG ex rel. Stricklin v. Devaughn, 594 F.3d 1188, 1198 (10th Cir. 2010) ("Rule 23's certification requirements neither require all class members to suffer harm or threat of immediate harm nor Named Plaintiffs to prove class members have suffered such harm."); Mims v. Stewart Title Guar. Co., 590 F.3d 298, 308 (5th Cir. 2009) ("Class certification is not precluded simply because a class may include persons who have not been injured by the defendant's conduct."). **[**30]**

Volvo's proposed requirement is likewise inconsistent with a *Rule 23(b)(2)* action. ***HN26***[] For a *Rule 23(b)(2)* class, "certification is appropriate even if the defendant's action or inaction 'has taken effect or is threatened only as to one or a few members of the class, provided it is based on *grounds* which have general application to the class.'" *Devaughn, 594 F.3d at 1201* (quoting *Fed. R. Civ. P. 23(b)(2)*, 1966 Amendment advisory committee note). Technically speaking, those (b)(2) class members may not have suffered a legal injury and, at best, may only have standing in light of **[*368]** a threatened future injury. *See* *Clapper, 133 S. Ct. at 1148, 1150 n.5*.

Additionally, a properly formulated *Rule 23* class should not raise standing issues. This point goes to the very purpose of the class action device—to save "the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under *Rule 23*." *Califano v. Yamasaki, 442 U.S. 682, 701, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979)*. For those economies to work, it is axiomatic that ***HN27***[] "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 156, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)* (quoting *E. Tex. Motor Freight Sys. Inc. v. Rodriguez, 431 U.S. 395, 403, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977)* (internal quotation marks omitted)). These "interests" or "injuries" are tested by the requirements of *Rule 23*. These separate requirements establish the propriety of **[**31]** granting class-wide relief. *See* *Lewis, 518 U.S. at 395* (Souter, Ginsburg, Breyer, JJ., concurring in part, dissenting in part, and concurring in the judgment) ("More specifically, the propriety of awarding classwide relief (in this case, affecting the entire prison system) does not require a demonstration that some or all of the unnamed class could themselves satisfy the standing requirements for named plaintiffs.").

Volvo's arguments related to the differences between claims among the separate statewide classes, which confuse distinct Rule 23 requirements, demonstrate that Volvo may have legitimate Rule 23 challenges.[6] Rather than shoehorn these questions into an Article III analysis, we will continue to employ *Rule 23* to ensure that classes are properly certified. In this case, certification requires the District Court to determine what differing factual and legal circumstances might mean for the class: Can the named plaintiffs adequately represent the class if they owned or leased vehicles that did not suffer water damage pursuant *Fed. R. Civ. P. 23(a)(4)*? Are the claims of the representatives typical of the class pursuant to *Fed. R. Civ. P. 23(a)(3)*? And do any relevant distinctions affect the commonality and predominance analyses pursuant to *Fed. R. Civ. P. 23(a)(2)* and *(b)(3)*? *See* 7AA Charles A. **[**32]** Wright et al., Fed. Prac. & Proc. Civ. § 1785.1 (3d ed. 2014) (***HN28***[] "[T]he question whether [a class representative] may be allowed to present claims on behalf of others who have similar, but not identical, interests depends not on standing, but on an assessment of typicality and adequacy of representation.").

Focusing on certification questions is not only necessary to the rigorous analysis we demand in class certification decisions, it is also buttressed by a close analysis of the "circuit split" on this issue. Many courts are in fact dealing with Article III standing questions *within* the confines of *Rule 23*, which raises serious doubts as to whether they really mean to impose **[**33]** Article III standing as separate and distinct analyses in these cases. *See* *In re Nexium Antitrust Litig., 777 F.3d at 25, 30-31* (discussing uninjured class members in terms of the class definition, ascertainability, commonality, and predominance); *In re* ***[*369]*** *Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d at 252* (predominance); *Stearns, 655 F.3d at 1020-21* (predominance); *Avritt, 615 F.3d at 1034* (class definition); *Kohen, 571 F.3d at 677* (summarizing cases on class definition); *Denney, 443 F.3d at 264* (class definition).

In sum, ***HN29***[] so long as a named class representative has standing, a class action presents a valid "case or controversy" under Article III.

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[6] Volvo's standing argument dispatches a profusion of class-action buzzwords including overbreadth, class definition, commonality, ascertainability, as well as citation to the injury-in-fact required to establish Article III standing, the Rules Enabling Act's dictate that federal rules may not "abridge, enlarge or modify any substantive right," *28 U.S.C. § 2072(b)*, and a defendant's "due process right to raise individual challenges and defenses to claims," *Carrera, 727 F.3d at 307*. Volvo Br. 34-41. At oral argument, it became apparent that Volvo was focused on the issue of standing.

B.

Although Volvo's standing argument fails, we will nevertheless remand. Volvo mentions in a footnote that the District Court's certification order "did not specifically identify the claims certified, as required by *Wachtel v. Guardian Life Insurance Co. of America, 453 F.3d 179, 184 (3d Cir. 2006)*." Volvo Br. 4 n.2. We agree that this is a problem requiring remand. The District Court's class certification opinion rejected Plaintiffs' proposal of a nationwide class and the application of New Jersey law to all Plaintiffs' claims. And although the District Court directed that "the law of the state of each subclass should be applied to the subclass's claims," JA 77, the District Court did not identify which claims would be subject to class treatment. Volvo noted this lack of specificity and it assumed that the District Court meant **[**34]** "to certify all claims alleged in the [Second Amended Complaint] when it granted the alternative motion to certify six statewide classes." Volvo Br. 4 n.2. Plaintiffs argue that the District Court was sufficiently specific, citing to the District Court's commonality analysis (which also did not identify specific state-law claims subject to class treatment), the District Court's general reference to disputes of fact that justified denying Volvo's motions for summary judgment, and the class certification order that defined the classes and class representatives.

HN30[] In *Wachtel* we held that "*Rule 23(c)(1)(B)* requires district courts to include in class certification orders a clear and complete summary of those claims, issues, or defenses subject to class treatment." *453 F.3d at 184*. We rejected the practice of issuing "memorandum opinions discussing the allegations in the complaint, the facts of the case, and some combination of the substantive requirements for class certification found in *Rule 23(a)* and *(b)*" that then go on to "treat the parameters of the class itself much more clearly and deliberately than the class claims, issues, or defenses." *Id.* We stated that *Rule 23(c)* "requires more specific and more deliberate treatment of the class **[**35]** issues, claims, and defenses than the practice described above." *Id. at 185*. Thus a class-certification order or an incorporated opinion "must include (1) a readily discernible, clear, and precise statement of the parameters defining the class or classes to be certified, and (2) a readily discernible, clear, and complete list of the claims, issues or defenses to be treated on a class basis." *Id. at 187-88*.

HN31[] Although a motion for class certification presents a discretionary question for a district court, the court "must clearly articulate its reasons, in part, so we can adequately review the certification decision on appeal under *Rule 23(f)*." *Beck v. Maximus, Inc., 457 F.3d 291, 297 (3d Cir. 2006)* (remanding because of difficulty discerning the district court's analysis on typicality and adequacy). For example, in *Marcus v. BMW of North America, LLC*, we rejected the district court's certification order and accompanying opinion because although the opinion did address "Marcus's claims and the issues presented," there was no "'readily discernible, clear, and complete list'" of the claims and issues **[*370]** subject to class treatment. *687 F.3d 583, 592 (3d Cir. 2012)* (quoting *Wachtel, 453 F.3d at 187*). We are not required to comb through the District Court's opinion and layers of briefing in order to "cobble together the various statements **[**36]** . . . and reach a general inference as to some categories of issues that the District Court believes are appropriate for class treatment." *See Wachtel, 453 F.3d at 189*.

Here Plaintiffs' proposed classes and claims in the Second Amended Complaint were different from those in the motion for class certification. Plaintiffs also conceded at oral argument that they intended for the Class Vehicles to include only those which actually have a sunroof. This lack of clarity, combined with the District Court's failure to address in detail or list the precise claims subject to class treatment, means that we would be required to engage in some level of guesswork were we to try to piece together the class claims. We will not attempt to do so. We will vacate and remand to the District Court so that it can provide a complete list of the class claims, defenses and issues for each of the six statewide classes in accordance with what *Wachtel* requires.

C.

Volvo disputes whether Plaintiffs satisfied *Rule 23(b)(3)*'s predominance requirement. Volvo argues that the District Court erred by certifying six statewide classes without analyzing those classes' claims and whether those claims were subject to common proof. Although precise analysis of the **[**37]** predominance question is "best conducted with the benefit of a clear initial definition of the claims, issues, and defenses to be treated on a class basis," *see* Wachtel, 453 F.3d at 181 n.1, the District Court erred in making a fundamental assumption about predominance. That assumption was that our decision in *Sullivan v. DB Investments, Inc.* (*Sullivan II*) governed the outcome of this case.

HN32[] "[T]he party proposing class-action certification bears the burden of affirmatively demonstrating by a preponderance of the evidence her compliance with the requirements of Rule 23." Byrd, 784 F.3d at 163. A district court must rigorously analyze the evidence used to establish class certification in order to ensure compliance with Rule 23(a) and at least one of the subsections of Rule 23(b). Comcast, 133 S. Ct. at 1432. This rigorous analysis may require a district court to address, at least in part, the merits of a plaintiff's underlying claim because "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* (quoting Wal-Mart, 131 S. Ct. at 2552) (internal quotation marks omitted).

HN33[] Before certifying a Rule 23(b)(3) class, a district court must evaluate whether, *inter alia*, "questions of law or fact common to class members predominate over any questions **[**38]** affecting only individual members." Fed. R. Civ. P. 23(b)(3). This predominance test asks whether common issues of law or fact in the case predominate over non-common, individualized issues of law or fact. *See* Marcus, 687 F.3d at 604. Predominance "begins, of course, with the elements of the underlying cause of action." Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 131 S. Ct. 2179, 2184, 180 L. Ed. 2d 24 (2011); *see also* Wal-Mart, 131 S. Ct. at 2552 (analyzing commonality in light of the elements of the plaintiff's Title VII discrimination claims); Marcus, 687 F.3d at 600 ("To assess predominance, a court at the certification stage must examine each element of a legal claim 'through the prism' of Rule 23(b)(3)." (quoting In re DVI, Inc. Sec. Litig., 639 F.3d 623, 630 (3d Cir. 2011))); **[*371]** Malack v. BDO Seidman, LLP, 617 F.3d 743, 746 (3d Cir. 2010) (explaining that each element of a legal claim is relevant to assessing predominance). That is "[b]ecause the nature of the evidence that will suffice to resolve a question determines whether the question is common or individual" and that means that "a district court must formulate some prediction as to how specific issues will play out." In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008) (quoting Blades v. Monsanto Co., 400 F.3d 562, 566 (8th Cir. 2005) and In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 20 (1st Cir. 2008)) (internal quotation marks omitted), *as amended* (Jan. 16, 2009); *see also* Amgen Inc. v. Conn. Ret. Plans and Trust Funds, 133 S. Ct. 1184, 1191-92, 185 L. Ed. 2d 308 (2013) (beginning the Rule 23 analysis with the elements of a private securities-fraud action under § 10(b) of the Securities Exchange Act of 1934).

HN34[] "[T]he presence of individual questions does not *per se* rule out a finding of predominance." In re Prudential, 148 F.3d at 315. If issues common to the class **[**39]** overwhelm individual issues, predominance should be satisfied. Amgen, 133 S. Ct. at 1196 (explaining that predominance involves a qualitative assessment of common versus individualized questions); Butler v. Sears, Roebuck and Co., 727 F.3d 796, 801 (7th Cir. 2013) (explaining that predominance is not determined "simply by counting noses: that is, determining whether there are more common issues or more individual issues"). Further, predominance does not require that common "questions will be answered, on the merits, in favor of the class." Amgen, 133 S. Ct. at 1191. "What the rule does require is that common questions '*predominate* over any questions affecting only individual [class] members.'" Id. at 1196 (alteration in original) (quoting Fed. R. Civ. P. 23(b)(3)).

The District Court's predominance analysis relied on *Sullivan II* for the proposition that "for consumer fraud claims, the predominance inquiry focuses on whether the defendant's conduct was common to all class members, which predominates over minor individual differences between plaintiffs." JA 83 (citing Sullivan II, 667 F.3d at 297-98). Because "[a]ll of the claims asserted by Plaintiffs in the [Second Amended Complaint] are based upon defectively designed sound traps contained in the sunroof drainage systems in Class Vehicles designed and/or manufactured by Defendants, and Defendant[s'] uniform omissions **[**40]** about the same," the District Court concluded that predominance was satisfied. *Id.* In doing so, the District Court made no distinction between the six statewide classes or the relevant claims brought by those putative classes.[7]

[*372] Volvo argues that the District Court's reliance on *Sullivan II* was in error because that decision involved a settlement class. One cannot read *Sullivan II* as a wholesale departure from precedent that requires a district court to evaluate predominance in light of the claims asserted and relevant evidence. *See* Rodriguez v. Nat'l City Bank, 726 F.3d 372, 379 (3d Cir. 2013) (*Sullivan II* did not "lessen[] the burden required to demonstrate that putative class members share a common question of law or fact."). Indeed, *Sullivan II* cited to *In re Hydrogen Peroxide Antitrust Litigation* for the proposition that "an examination of the elements of plaintiffs' claim is *sometimes necessary* . . . to determine whether the requirements of Rule 23—namely, that the elements of the claim can be proved 'through evidence common to the class rather than individual to its members'—are met." 667 F.3d at 306 (emphasis added) (quoting Hydrogen Peroxide, 552 F.3d at 311-12). *Sullivan II* thus applied the *Hydrogen Peroxide* test to fit the circumstances of that particular case. Id. at 302-04. In *Sullivan II*, looking at the class claims was "particularly unwarranted in the settlement **[**42]** context since a district court need not 'envision the form that a trial' would take, nor consider 'the available evidence and the method or methods by which plaintiffs propose to use the evidence to prove' the disputed element at trial." *Id.* (quoting Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 167 (3d Cir. 2001) and Hydrogen Peroxide, 552 F.3d at 312). Sullivan II is not sufficiently analogous to the case at bar, nor did it obviate the need to evaluate the claims and evidence asserted in order to evaluate predominance for a litigation class.[8] *See* Halliburton, 131 S. Ct. at 2184; Hydrogen Peroxide, 552 F.3d at 311. The District Court erred, therefore, by failing to analyze predominance in the context of Plaintiffs' actual claims.

Plaintiffs make several arguments in support of the District Court's opinion, none of which are persuasive. Plaintiffs first argue that the District **[**43]** Court considered over 1,000 pages of briefing on the motions for summary judgment, and that therefore, the District Court must have considered the individual elements of the various state-law claims. Yet relying on such briefing alone hardly amounts to the "rigorous consideration of all the evidence and arguments offered by the parties" required by Rule 23. *See* Hydrogen Peroxide, 552 F.3d at 321. Quite simply, what Plaintiffs ask us to do is speculate as to what the District Court must have intended. We cannot just assume the District Court conducted the appropriate analysis under Rule 23. "Rigorous analysis" requires more of the District Court than that, and we would be abdicating our role as a reviewing court were we to engage in the speculation Plaintiffs ask for.

Plaintiffs also argue that Volvo's specific examples related to the statewide classes do not defeat predominance. Like the common law claims raised by the plaintiffs in Marcus, 687 F.3d at 600-05, Plaintiffs assert class claims based on breach of express warranty (Count 2), breach of the implied warranty of merchantability (Count 3), and breach of the duty of good **[*373]** faith and fair dealing (Count 5). In addition, Plaintiffs assert claims based on the

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[7] The District Court also said the predominance requirement was "readily met" "as discussed *supra.*" JA 83. The only relevant previous discussion was the District Court's evaluation of commonality. The District Court stated that the common questions included whether: (1) "the sunroof drainage systems in the Class Vehicles are defective"; (2) "Defendants knew of the defect but failed to disclose it to the Class"; and (3) "the maintenance instructions were inadequate and/or uniformly deficient." JA 78. Rejecting Volvo's commonality challenge, the District Court stated that the "issue is whether the design of the sunroof drainage system was defective, not whether the existence of the alleged defect resulted in a clogged drain tube causing water to spill into the vehicle." JA 79.

The District Court's commonality analysis was of limited import for the question of predominance. We have previously noted that the Rule 23(b)(3) predominance requirement incorporates the Rule 23(a)(2) commonality requirement. **[**41]** In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 528 (3d Cir. 2004). The inverse of this proposition, that the commonality requirement satisfies predominance, is not true because the "predominance criterion is far more demanding." Amchem, 521 U.S. at 624.

[8] Volvo also argues that even if *Sullivan II* applies to Plaintiffs' consumer fraud claims, the District Court ignored the predominance inquiry for the common law fraud, breach of implied warranty, breach of express warranty, and breach of the implied covenant of good faith and fair dealing claims. For the reasons explained above, *Sullivan II* does not obviate the need for Plaintiffs to establish by a preponderance of the evidence that the predominance requirement is satisfied.

New Jersey Consumer Fraud Act ("NJCFA"), as was **[**44]** the case in *Marcus, 687 F.3d at 605-11*, as well as state-specific consumer fraud claims under Massachusetts, New Jersey, Florida, California, and Hawaii law.

Volvo points to, as examples of why the District Court erred in not evaluating the elements of each asserted claim, the following potential predominance problems: (1) individualized proof is needed to establish a causal relationship between the unlawful conduct and ascertainable loss as required under New Jersey and Massachusetts law; (2) the California claims require a plaintiff to establish a duty to disclose an alleged defect, proof of which would vary based on whether a vehicle contained a yaw sensor and whether such disclosure would be material; (3) the implied warranty claims cannot satisfy predominance for reasons similar to those we addressed in *Marcus* relating to causation; (4) claims for a violation of an express warranty require that the warranty be in place when a plaintiff experienced a water leak, which is only established by individualized proof; and (5) uniform evidence cannot be used to establish predominance as to both new and used owners of Class Vehicles because the applicable warranties between the groups may vary.

Evaluating these arguments **[**45]** in the detail that is required goes beyond what was briefed before the District Court, beyond the District Court's reasoning in its certification opinion, and beyond the briefing the panel has received from the parties. We will not engage in an analysis of predominance in the first instance, and will therefore remand these questions to the District Court. Consistent with *Marcus, 687 F.3d at 600-11*, the District Court should evaluate the relevant claims (grouping them where logical and appropriate) and rule on the predominance question in light of the claims asserted and the available evidence.[9]

D.

Volvo's final argument is that the District Court erred in denying the motion to **[*374]** reconsider the class certification decision in light of *Comcast*. Because *Comcast* was distinguishable and the "damages issue [in this case was] much more straightforward," JA 91, the District Court declined to revisit its ruling, *see id.* at 90-92.

Comcast is inapposite to the case before us.***HN35***[] *Comcast* held that an antitrust litigation class could not be certified because the plaintiffs' damages model did not demonstrate the theory of antitrust impact that the district court accepted for class-action treatment. *133 S. Ct. at 1433*. Because the antitrust claim was so limited, the Supreme Court explained:

> It follows that a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of *Rule 23(b)(3)*.

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[9] In *Marcus*, a New Jersey class asserted four claims against BMW and Bridgestone relating to the NJCFA, breach of the implied warranty of merchantability, breach of contract, and breach of the implied covenant of good faith and fair dealing. *687 F.3d at 600*. Like the trial court, we analyzed Marcus's common law claims together and noted the shared elements between the claims. *Id. at 600* & n.8. Despite concluding that Marcus supplied sufficient evidence to establish predominance as to a defect in the Bridgestone run-flat tires, we concluded that the individualized evidence required to prove proximate causation meant that the common law claims **[**46]** could not be tried on a class-wide basis. *Id. at 605*. We explained that Marcus's damages allegations "beg the question of what caused class members' tires to go flat and need replacement." *Id. at 604*.

As to Marcus's claim under the NJCFA, we noted that the statute required a plaintiff to establish ascertainable loss. *Id. at 605-06*. We explained that "ascertainable loss" based on "the cost of replacing [a] tire" could not meet the predominance requirement and went on to analyze loss based on "the value of the product [a class member] expected to purchase minus the value of the product they actually purchased." *Id. at 606*. We explained that under that theory of "ascertainable loss," a court could not apply a "presumption of causation" without considering both "the defendants' course of conduct . . . [and] also that of the plaintiffs." *Id. at 606-10*. Specifically, we held that the district court needed to have found "(1) that the alleged defects were not knowable to a significant number of potential class members before they purchased or leased their BMWs, or (2) that, even if the defects were knowable, that class members were nonetheless relatively uniform in their decisionmaking." *Id. at 611*. We directed the district court to conduct **[**47]** this analysis in the first instance. *Id.*

> Calculations need not be exact, *see* Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563, 51 S. Ct. 248, 75 L. Ed. 544 (1931), but at the class-certification stage (as at trial), any model supporting a "plaintiff's damages case must be consistent with its liability case, particularly **[**48]** with respect to the alleged anticompetitive effect of the violation." ABA Section of ***Antitrust Law***, Proving Antitrust Damages: Legal and Economic Issues 57, 62 (2d ed. 2010); *see, e.g.,* Image Tech. Servs. v. Eastman Kodak Co., 125 F.3d 1195, 1224 [9th Cir. 1997]. And for purposes of Rule 23, courts must conduct a "'rigorous analysis'" to determine whether that is so. *Wal-Mart*, [131 S. Ct. at 2551-52].

Id. Comcast went on to analyze the evidence of damages resulting from antitrust impact, and noted that the expert testimony "assumed the validity of all four theories of antitrust impact initially advanced by [the plaintiffs]." Id. at 1434. Because the evidence could not translate the relevant "'*legal theory of the harmful event* into an analysis of the economic impact *of that event,"*' the Court determined that common questions could not predominate over individual ones. Id. at 1435 (quoting Federal Judicial Center, *Reference Manual on Scientific Evidence* 432 (3d ed. 2011)).

Volvo relies on *Comcast* for the proposition that Plaintiffs must show that "'damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3).'" Volvo Br. 44 (quoting Comcast, 133 S. Ct. at 1433). In so doing, Volvo selectively quotes from *Comcast* as though the Court were creating a broad-based rule applicable to Rule 23(b)(3). Yet the Supreme Court specifically **[**49]** noted that it was not breaking any new ground by stating at the beginning of its opinion: "This case thus turns on the straightforward application of class-certification principles." Comcast, 133 S. Ct. at 1433. A close reading of the text above makes it clear that the predominance analysis was specific to the antitrust claim at issue. That is eminently sensible. ***HN36***[] Every question of class certification will depend on the nature of the claims and evidence presented by the plaintiffs. What we know for sure is that whatever "*Comcast*'s ramifications for antitrust damages models or proving antitrust impact," a trial court must "'consider carefully all relevant evidence and make a definitive determination that the requirements of Rule 23 have been met before certifying a class.'" In re Blood Reagents Antitrust Litig., 783 F.3d 183, 186-87 (3d Cir. 2015) (quoting Hydrogen Peroxide, 552 F.3d at 320).

Our reading of *Comcast* is consistent with decisions by several of our sister courts.[10] That is because ***HN37***[] "[r]ecognition **[*375]** that individual damages calculations do not preclude class certification under Rule 23(b)(3) is

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[10] *See, e.g.,* Roach v. T.L. Cannon Corp., 778 F.3d 401, 402 (2d Cir. 2015) ("We hold that *Comcast* does not mandate that certification pursuant to Rule 23(b)(3) requires a finding that damages are capable of measurement on a classwide basis."); In re Nexium Antitrust Litig., 777 F.3d at 23 ("*Comcast* did not require that plaintiffs show that all members of the putative class had suffered injury at the class certification stage—simply that at class certification, the damages calculation must reflect the liability theory."); In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838, 860 (6th Cir. 2013) (explaining that *Comcast* did not impact the ability of a trial court to certify a liability class and then later consider class damages under Fed. R. Civ. P. 23(c)(4)), *cert. denied sub nom.* **Whirlpool Corp. v. Glazer, 134 S. Ct. 1277, 188 L. Ed. 2d 298 (2014)**; Butler, 727 F.3d at 800-01 (emphasizing that *Comcast* focused on "the requirement of predominance and on its having to be satisfied by proof presented at the class certification stage rather than deferred to later stages of the litigation" (citing Comcast, 133 S. Ct. at 1432-33)); Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc., 725 F.3d 1213, 1220 (10th Cir. 2013) (vacating and remanding a district court's certification decision to more fully consider the predominance requirement, but noting that **[**51]** even after *Comcast* "there are ways to preserve the class action model in the face of individualized damages"); Leyva v. Medline Indus. Inc., 716 F.3d 510, 514 (9th Cir. 2013) (interpreting *Comcast* as requiring that "the plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability" and that rule is satisfied where "damages will be calculated based on the wages each employee lost due to Medline's unlawful practices").

The D.C. Circuit has interpreted *Comcast* as requiring proof of class-wide damages in the context of an antitrust class, explaining: "It is now indisputably the role of the district court to scrutinize the evidence before granting certification, even when doing so 'requires inquiry into the merits of the claim.'" In re Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d at 253 (quoting Comcast, 133 S. Ct. at 1433). The Court went on to summarize that the specific proffered expert models were essential to the plaintiffs' evidence of class-wide injury, concluding "[n]o damages model, no predominance, no class certification." *Id.* One could read this analysis out of context as saying that all classes require a damages model; however, like *Comcast*, the analysis as to class-wide damages was specific to that antitrust claim.

well nigh universal." *Comcast, 133 S. Ct. at 1437* (Ginsburg, J. & Breyer, J., dissenting) (citing 2 William B. Rubenstein, *Newberg on Class Actions* § 4:54 (5th ed. 2012)). Had the District Court ruled as Volvo requested, denying certification on that basis alone would have amounted to **[**50]** an abuse of discretion. *See Roach, 778 F.3d at 409*. In sum, and as explained by the Fifth Circuit, it is "a misreading of *Comcast"* to interpret it as "preclud[ing] certification under *Rule 23(b)(3)* in any case where the class members' damages are not susceptible to a formula for classwide measurement." *In re Deepwater Horizon, 739 F.3d at 815 & n.104*.

IV.

The difficult questions raised in this appeal are **[**52]** resolved by a return to the basics of *Rule 23*. We will vacate and remand the District Court's class certification decision to allow the District Court to define the class membership, claims, and defenses, and so that it may rigorously analyze predominance in the first instance.

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VFM Leonardo Inc. v. Ice Portal, Inc.

United States District Court for the Southern District of Florida, Miami Division

July 23, 2015, Decided; July 23, 2015, Entered on Docket

CASE NO.: 14-24709-CIV-ALTONAGA

Reporter

2015 U.S. Dist. LEXIS 192993 *; 2015 WL 11216727

VFM LEONARDO INC., Petitioner, v. ICE PORTAL, INC., Respondent.

Prior History: Ice Portal, Inc. v. VFM Leonardo, Inc., 2009 U.S. Dist. LEXIS 136128 (S.D. Fla., Apr. 8, 2009)

Core Terms

arbitration, parties, settlement agreement, attorney's fees, email, arbitration agreement, communications, prevailing party, final award, Counterclaim, alteration, fees and costs, entitlement, new agreement, modified, costs, modification, partial, Vacate, fee award, antitrust

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Judges: CECILIA M. ALTONAGA, UNITED STATES DISTRICT JUDGE.

Opinion by: CECILIA M. ALTONAGA

Opinion

ORDER

THIS CAUSE came before the Court upon Respondent, Ice Portal, Inc.'s ("ICE['s]") Motion to Vacate or Correct Arbitral Award of Attorneys' Fees and Costs ("Motion") [ECF No. 40], filed June 2, 2015. The relief ICE seeks is evident from the title of the Motion, although to be precise, ICE does not challenge the amount or reasonableness of the fee award[1] but rather the Award's finding regarding entitlement. Petitioner, VFM Leonardo Inc. ("VFML"), filed its Response in Opposition . . . ("Response") [ECF No. 42] on June 5, 2015; and ICE filed its Reply . . . [ECF No. 46] on June 19, 2015. The parties have also supplied voluminous exhibits, many of **[*2]** them duplicative, appearing at docket entry numbers 41, 42, and 43.

The essence of the present dispute concerns ICE's assertion VFML and ICE entered into a new agreement, following an earlier settlement agreement between the parties which entitled the prevailing party in any three-arbitrator panel arbitration to recover attorneys' fees. Under this new agreement, ICE maintains, VFML gave up the

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[1] The fee award totals $673,282.83.

right to recover fees in exchange for arbitrating its "non-settlement-agreement" claims in Miami and before retired state circuit judge Herbert Stettin ("Judge Stettin"). VFML denies any new agreement was entered into or that the settlement agreement only provided for fees where arbitration was conducted before a three-arbitrator Chicago panel. Rather, VFML asserts the parties merely modified the settlement agreement through email communications as to location and identity of the single arbitrator in order to lessen expenses. Because the Court agrees with VFML that ICE does not satisfy its high burden in seeking vacatur of Judge Stettin's fee award, and because Judge Stettin's conclusion the parties did not reach a new agreement whereby VFML relinquished its rights to prevailing-party attorney's **[*3]** fees is amply supported by the record, the Motion is denied.

I. BACKGROUND

Petitioner VFML filed this action on December 12, 2014, seeking confirmation and enforcement of a partial final arbitration award in its favor against ICE and a partial judgment in conformity with the partial final award. (*See* Petition . . . [ECF No. 1]). Interestingly enough, the parties had earlier entered into the referenced settlement agreement in a prior dispute, *Ice Portal, Inc. v. VFM Leonardo Inc.*, Case No. 09-61424-Civ-Altonaga,[2] over which the undersigned presided. (*See id.*; October 2010 Settlement Agreement [ECF No. 1-3]). The settlement followed a mediation conference the parties had before Judge Stettin and Judge Stettin's efforts to facilitate a resolution thereafter. (*See* Settlement Agreement 1).

Paragraph 23 of the Settlement Agreement states:

> 23. **ARBITRATION**. Any controversy or claim (in law or in equity) between ICE and VFM whatsoever, including any future dispute of any kind between ICE and VFM, any allegation that either Party's conduct violates any statute, rule or law, any controversy or claim arising out of or relating to this Agreement or any alleged breach hereof, any issues pertaining **[*4]** to the arbitrability of any controversy or claim, and any claim that this Agreement or any part hereof is invalid, illegal, or otherwise voidable or void, shall be submitted to binding arbitration. The arbitration panel shall have the power and authority to determine whether any particular claim or matter is subject to arbitration. Said arbitration shall be administered by the American Arbitration Association ("AAA") in accordance with the AAA Commercial Arbitration Rules (except as set forth in this Agreement). Judgment upon any award rendered may be entered in any court having jurisdiction thereof. The Parties agree that for any controversy or claim arising out of or relating to this Agreement or any alleged breach hereof, Judge Herbert Stettin shall be the sole arbitrator and the arbitration shall take place in Miami, Florida. For any other controversy or claim (or in the event Stettin is not available or is unwilling to serve as to the foregoing type of dispute), including, but not limited to, any claim under any antitrust laws or for tortious interference, the parties will select three arbitrators (and have communications with each of the arbitrators) strictly in accordance with **[*5]** the AAA Commercial Arbitration Rules, including R-17 and R-18(a), and all three arbitrators shall be neutrals who must be free from any conflict of interest and with whom there shall be no *ex parte* communication except as allowed by those rules. The arbitration before a three-member arbitration panel shall take place in Chicago, Illinois, unless agreed to in writing otherwise. No arbitrator in the three-member panel shall reside in the state of Florida or have resided there for any substantial part of the last ten (10) years. In the event the controversy or claim involves any allegation of any violation of ***antitrust law***, each arbitrator must have served as counsel, judge, or arbitrator in at least two antitrust cases within the preceding ten (10) years. *In any arbitration pursuant to this paragraph, the prevailing party shall be entitled to an award of its reasonable attorneys' fees, expert fees and costs that it incurred in connection therewith*. Moreover, punitive damages shall not be awarded by the arbitration panel upon a party prevailing on any claim or counterclaim regardless of whether such otherwise would have been available by statute or common law had the case been litigated **[*6]** in a court of law.

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[2] That case also included a separate suit the Court consolidated, identified under case number 09-60230-Civ-Altonaga, involving the same parties and overlapping facts and disputes between these parties. (*See* Order [ECF No. 16] in 09-61424-Civ-Altonaga).

(*Id.* ¶ 23 (emphases added)).[3] The Agreement further states, "No part or provision of this Agreement may be changed, modified, waived, discharged or terminated except by an instrument in writing signed by the Party against whom enforcement of such change, modification, waiver, discharge or termination is sought." (*Id.* ¶ 25).

Following their settlement, the parties had yet another dispute (their third?) regarding ICE's interference with VFML's business relationships with two of VFML's clients. VFML initiated an arbitration proceeding against ICE before the American Arbitration Association ("AAA") pursuant to paragraph 23 of the Settlement Agreement. Several email communications between counsel for the parties ensued, whereby, upon suggestion by VFML, "ICE Portal agree[d] to Judge Stettin as the sole arbitrator in the dispute recently initiated by VFML before the AAA (including any counterclaims by ICE Portal), with the arbitration to occur in Miami, Florida." (Resp. Ex. C [ECF No. 42-3], Dec. 13, 2013 10:52 AM email (alteration added)). ICE's counsel further wrote, "Please let me know how you suggest we inform the AAA of our agreement." (*Id.*). After some additional communications **[*7]** between counsel for the parties, VFML's attorney confirmed, "[G]iven your representation below, VFML agrees to proceed with Judge Stettin and let's set up a call soon. However, in the event that ICE later attempts to assert by amendment or otherwise antitrust claims against VFML in this arbitration, VFML shall have the right to apply and enforce the arbitration provision in the 2010 Settlement Agreement as stated, including the criteria for and number of arbitrators and venue." (*Id.*, Dec. 18, 2013 5:45 PM email (alteration added)).

Counsel for VFML sent counsel for ICE a copy of his communication to the AAA regarding the parties' selection of Mr. Stettin, which letter to the AAA stated, "We write in reference to the arbitration encaptioned *VFM Leonardo Inc. v. ICE Portal, Inc.*, Case No. 50 117 T 01179 13. The parties hereby notify you that they have agreed to the appointment of Judge Herbert Stettin as the sole arbitrator in this matter." (Resp. Ex. E [ECF No. 42-5]). VFML's earlier, December 9, 2013 Statement of Claim ("Arbitration Claim") [ECF No. 42-2] submitted to the AAA, states it is brought pursuant to paragraph 23 of the 2010 Settlement Agreement. (*See* Arbitration Claim ¶¶ 4-5). **[*8]** In its December 30, 2013 "Answering Statement" [ECF No. 42-6], ICE similarly relies on paragraph 23 to seek its own attorneys' fees should it prevail in the arbitration. (*See* Answering Statement ¶ 12, 6). ICE also filed a Counterclaim against VFML on January 3, 2014. The parties provided Judge Stettin a Joint Pretrial Stipulation [ECF No. 42-7] on June 13, 2014, wherein they agreed the basis of the AAA's jurisdiction was paragraph 23 of the Settlement Agreement. (*See* Joint Pretrial Stip. 9).

Judge Stettin conducted a hearing in June 2014 and on October 22, 2014, and issued a Partial Final Award [ECF No. 42-8] in favor of VFML on its tortious interference claims and on ICE's Counterclaim. On November 12, 2014, VFML submitted a Verified Motion for Fees and Costs [ECF No. 42-9] as the prevailing party to the arbitration. ICE responded with a Verified Response in Opposition [ECF No. 42-10], raising for the first time the novel contention paragraph 23 did not govern the VFML Arbitration Claim on the basis the parties had entered into a new arbitration agreement through their email communications selecting Judge Stettin as arbitrator that did not provide for the recovery of attorneys' fees **[*9]** by the prevailing party. To be clear, ICE was now making the argument VFML was not entitled to fees on its Arbitration Claim, but it was entitled to fees for having defended ICE's Counterclaim which, according to ICE, did arise from paragraph 23. VFML filed a Verified Reply [ECF No. 42-11], and ICE filed a Verified Surreply [ECF No. 42-12] before Judge Stettin.

Judge Stettin conducted a lengthy hearing on VFML's fees and costs' request on January 16, 2015. (*See* Transcript [ECF No. 42-13]). ICE had ample opportunity to present its arguments and its rather extraordinary position regarding the parties' so-called new "agreement." At the hearing, counsel for VFML reminded Judge Stettin that early in the proceedings before him, a status conference was held wherein the parties explained they had an arbitration agreement from the settlement agreement he had mediated, and the parties were simply substituting Judge Stettin (in place of three arbitrators) and holding the arbitration in Miami (as opposed to Chicago), but if ICE

[3] Paragraph 17 of the Settlement Agreement, titled "Prevailing Party," also contains an attorneys' fee provision: "In the event a dispute arises regarding the performance or satisfaction of any of the rights or obligations created by or arising from the terms of this Agreement, and such dispute is arbitrated or litigated to a conclusion, the Party prevailing in such arbitration or litigation shall be entitled to recover from the losing Party its reasonable attorneys' fees, expert fees and costs." (Settlement Agreement ¶ 17 [ECF No. 41-7]).

filed any antitrust counterclaims, it would necessitate a different arbitration in Chicago. (*Id.* 31:7-15). At the fee hearing, Judge Stettin also clearly understood the **[*10]** issue ICE was presenting in its effort to forestall a fee award against it: "The issue, as I see it, is whether or not the agreement between these lawyers was to modify the existing agreement in respect of those two items only. . . . A one-person arbitration in Miami, or was it in fact a brand new agreement which was complete in itself." (*Id.* 37:5-12 (alteration added)). The parties explicitly agreed Judge Stettin could decide the question of entitlement to fees without taking any testimony from the lawyers who had exchanged the email communications. (*See id.* 48:25-49:13; 67:4-12).[4]

Judge Stettin entered a well-reasoned Final Award [ECF No. 42-15] in VFML's favor on March 25, 2015. In addressing the questions of VFML's entitlement to attorneys' fees and ICE's argument a new agreement was reached through counsels' email communications, he wrote:

> My review reflects that those emails concern only an understanding limited to the selection of the undersigned as the sole Arbitrator in this matter and to hold the hearing in Miami, Florida. They neither refer to a new arbitration agreement nor to abandonment of the prevailing party's right to attorneys' fees, expert fees and costs incurred in **[*11]** the arbitration. . . .
> I find that the email exchange simply modified the Settlement Agreement and did not change the right to prevailing party fees and costs.
> There is no credible evidence which suggests that the parties[] intended to make a new arbitration agreement. The changes agreed upon constitute only a modification of Paragraph 23 for the convenience of the parties and to reduce expenses. It was not a new agreement. . . .
> * * *
> I find that the emails between the attorneys for the parties in December, 2013, modifying the Settlement Agreement are a written instrument signed by the parties as required by Paragraph 23 of the same. . . .
>
> And of course the parties treated the modification as part of Paragraph 23. For example, in its Answering Statement, Respondent requested its attorneys' fees and costs <u>in connection with its defense against Claimant's causes of action</u>, separate and apart from Respondent's later-filed counterclaim which sought fees as part of its own claims for affirmative relief.
>
> In the Surreply to the Fee Motion and at the January 16, 2015 hearing, Respondent argued that because its defense against Claimant's causes of action was grounded upon a breach of the Settlement **[*12]** Agreement, hence properly subject to Paragraph 23 (including the prevailing party fee provision), it did not waive its position that a new arbitration agreement had been entered by its request in its Answering Statement for an award of fees and costs. This does not convince me of Respondent's waiver of the defense that a new Arbitration Agreement was in effect.
>
> The parties' filings subsequent to the Answering Statement consistently reflect they proceeded under Paragraph 23. In the Joint Pre-Trial Stipulation, the parties identified Paragraph 23 as the sole basis for my jurisdiction over this matter. Although the parties reserved the right to brief the issue of entitlement to fees in that Stipulation, Respondent's arguments against Claimant's entitlement to fees, based upon a new arbitration agreement, are in direct contradiction to the statement of jurisdiction to which Respondent agreed. In the Joint Pre-Trial Statement, Respondent was on notice that Claimant was proceeding under Paragraph 23 in requesting its fees and costs if it prevailed in this Arbitration. Respondent did not raise an objection to this until its post-trial Opposition to Claimant's fee request. As such, I find Respondent **[*13]** is estopped from claiming otherwise. Claimant's reliance on Respondent's conduct and the prejudice which would result is shown in several ways. If Respondent had timely raised the issue of the existence of a new arbitration agreement without a prevailing party fee provision, Claimant could have sought to withdraw this Arbitration and re-file its claim before a three-member panel in Chicago. Claimant could also have pursued a claim for punitive damages against Respondent; a claim which is waived by Paragraph 23. Claimant could also have argued in this case that its claim under the *Florida Deceptive and Unfair Trade Practices Act* ("FDUPTA") [sic] was not duplicative

[4] Counsel for ICE has since submitted a June 2, 2015 Declaration [ECF No. 41-2] containing his statements.

> of its tortious interference claims since that statute provides an independent basis for the award of prevailing party fees and costs. The October 22, 2014, Partial Final Award denied such relief on the ground the FDUPTA [sic] claim was duplicative of the claim brought under the Settlement Agreement.
>
> Additionally, the claims and defenses before me in this matter were based on the same core set of facts. I find they were inextricably intertwined such that recovery of all fees and costs incurred in the arbitration as a whole **[*14]** is appropriate without the need to parse out which fees and costs were incurred in connection with each individual claim. . . .

(*Id.* 3-6 (some alterations added; underlined text in original)).

As stated, ICE challenges Judge Stettin's fee award regarding entitlement. ICE argues Judge Stettin "committed error by relying on the fees and costs provision contained in the Pre-Dispute Arbitration Agreement, where those provisions were supplanted by the Post-Dispute Arbitration Agreement. . . . [T]he Pre-Dispute Arbitration Agreement required a three-arbitrator panel in Chicago and does not apply to the underlying Arbitration. . . . [T]hat agreement cannot be used to support the Arbitrator's ruling or to supply him with authority to award fees and costs." (Mot. 2 (alterations added)). According to ICE, Judge Stettin "(i) exceeded his powers, making the Final Award subject to vacatur pursuant to *9 U.S.C. § 10(a)(4)*, and (ii) awarded relief upon a matter not properly submitted to him," rendering the Final Award subject to correction under *9 U.S.C. section 11(b)*. (*Id*).

VFML asserts Judge Stettin did not exceed his powers. Indeed, VFML emphasizes ICE's Motion to Vacate is based on the exact arguments regarding the so-called new agreement that ICE **[*15]** presented to and the arbitgrator rejected. (*See* Resp. 8). Furthermore, VFML notes three independent reasons support the arbitrator's conclusion regarding VFML's entitlement to fees: ICE committed waiver as to, and was estopped from arguing against, entitlement based on ICE's conduct throughout the arbitration, including its failure to raise objection to VFML's consistent position its Arbitration Claim was subject to paragraph 23; VFML's claims and defenses were based on the same core set of facts as, and inextricably intertwined with, ICE's multimillion-dollar Counterclaim; and ICE's concession VFML was entitled to fees and costs on its defense against the Counterclaim entitled VFML to the entirety of its fees and costs under Florida law. (*See id.* 9). Last, VFML asserts the very case law ICE relies on in its Motion supports Judge Stettin's ruling. (*See id.* 10).

II. ANALYSIS

Judicial review of arbitral awards is extremely limited. *Funair Corp. v. Raytheon Co., Nos. 04-22327-CIV, 04-22875-CIV, 2005 U.S. Dist. LEXIS 47509, 2005 WL 6718593, at *3 (S.D. Fla. May 19, 2005)* (citation omitted). Courts must "give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances." *First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995)*. The "exceedingly narrow grounds upon which an award can be **[*16]** vacated, modified, or corrected" are found in *9 U.S.C. sections 10(a)* and *11*. *Southern Communs. Servs. v. Thomas, 720 F.3d 1352, 1357 & 1358 (11th Cir. 2013)* (*Sections 10* and *11* "provide the FAA's exclusive grounds for expedited vacatur and modification." (quoting *Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 584, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008)*); *see also* *White Springs Agr. Chems., Inc. v. Glawson Invest. Corp., 660 F.3d 1277, 1280 (11th Cir. 2011)* ('[T]hese sections are the exclusive means for upsetting an arbitration award . . ." (alterations added)). To be clear, "a panel's incorrect legal conclusion is not grounds for vacating or modifying the award." *White Springs Agr. Chems., Inc., 660 F.3d at 1280*.

In support of its position, ICE relies on *subsection 10(a)(4)*: "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." *9 U.S.C. § 10(a)(4)*. ICE also relies on *section 11(b)*: "Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted." *9 U.S.C. § 11(b)*.

"'[T]he sole question' a court should ask under the exacting standards of *§ 10(a)(4)* 'is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong.'" *So. Communs. Servs., Inc., 720 F.3d at 1359* (alteration added; quoting *Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 133 S.Ct. 2064, 2068, 186 L. Ed. 2d 113 (2013))*. Where the arbitrator "'even arguably'" interpreted the contract, "a court must end its inquiry and deny a *§ 10(a)* motion for vacatur." *Id.* (quoting *Sutter, 133 S.Ct. at 2068*); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 671, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010)* ("It is only when an arbitrator **[*17]** strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice that his decision may be unenforceable" under *subsection 10(a)(4)*. (alterations, internal quotation marks, and citations omitted)); *see also* *DIRECTV, LLC v. Arndt, 546 F. App'x 836, 839-40 (11th Cir. 2013)* ("Because the parties bargained for the arbitrator's construction of their agreement, an arbitral decision even arguably construing or applying the contract must stand, regardless of a court's view of its (de)merits." (internal quotation marks and citation omitted; alteration in original)).

As to *section 11(b)*, the issue of attorneys' fees in particular is considered to have been submitted to arbitration where the arbitrator "'plainly believed'" the issue was submitted for his decision. *White Springs Agr. Chems., Inc., 660 F.3d at 1281* (citing *Executone Info. Sys., Inc. v. Davis, 26 F.3d 1314, 1321-22 (5th Cir. 1994)* (noting arbitrator's plain belief of submission was relevant to determining whether issue had in fact been submitted)). Particularly relevant for purposes of the issues raised in this case is the Eleventh Circuit's discussion in *White Springs Agricultural Chemicals, Inc.*:

> Upon review of the record, we conclude that the issue of attorneys' fees was submitted to arbitration. First, it is evident from the final award that the arbitration panel "plainly **[*18]** believed" the issue was submitted for their decision. . . . More importantly, the panel received briefing and allowed argument on the issue of attorneys' fees that established White Springs's legal position. White Springs was thus able to — and did — contest the submission of that issue to the panel before the final award.

Id. at 1281 (alteration added; internal citation omitted).

It is abundantly clear the parties asked Judge Stettin to determine whether the Settlement Agreement governed the arbitration in full and afforded the prevailing party the right to recover attorneys' fees. The parties asked Judge Stettin, in other words, to resolve the question of VFML's entitlement to fees. More than ICE's disagreement with Judge Stettin's well-supported interpretation of paragraph 23 of the Settlement Agreement and the parties' email communications, which served to amend the Agreement through the written instrument required by paragraph 25, must be shown in order to vacate, modify, or "correct" the award of fees to VFML.

The Court cannot help but be perplexed by what appears to be a contrived, eleventh-hour excuse interposed by ICE before the arbitrator in seeking to avoid the imposition of a fee award **[*19]** against it. While the Court is not permitted to consider whether the arbitrator got it right or got it wrong, but simply to inquire whether he "even arguably" interpreted the parties' agreement, here, Judge Stettin got it abundantly right. The Court would come down in exactly the same way Judge Stettin did if it were asked to interpret the Settlement Agreement and the parties' counsels' subsequent email communications. There is no credible evidence — none — suggesting the parties came to a meeting of the minds whereby VFML gave up its right to seek the recovery of its attorney's fees in exchange for arbitrating the interrelated disputes more quickly and inexpensively before one arbitrator and in Miami than before a three-arbitrator panel outside the state. There is no credible evidence — none — that the parties reached a new and different agreement through the written email communications ICE's counsel now seeks to recast in a totally different light. Those emails were merely a modification of paragraph 23, not a totally new agreement as ICE posits for the first time after it has lost the arbitration.

ICE's actions, up until the entry of the partial final award against it, confirmed **[*20]** the existence of an amended paragraph 23. While ICE's December email communications referenced counsels' "agreement," that understanding pertained to the modification as to the number of arbitrators and location of the arbitration. As further evidence of the parties' meeting of the minds regarding the amendment worked out on December 18, 2013, ICE sought its own attorneys' fees in its December 30, 2013 Answering Statement — independent of the January 3, 2014 Counterclaim it would much later take the position was the only aspect of the parties' arbitration covered by paragraph 23. ICE continued to be possessed of the same understanding shared by VFML when, on June 13, 2014, it stipulated with VFML in the Joint Pretrial Stipulation the basis of the AAA's jurisdiction was paragraph 23 of the Settlement Agreement.

Paragraph 23 is the only arbitration agreement between the parties, and the parties early agreed it was the only source of Judge Stettin's power to adjudicate their claims, including the recovery of attorneys' fees claimed by each. Furthermore, as noted by VFML, the AAA Commercial Arbitration Rules applied to the proceedings before Judge Stettin, including the rule he has the **[*21]** power to rule on his jurisdiction, "including any objections with respect to the existence, scope, or validity of the arbitration agreement[.]" AAA COMM. ARB. RULE 7(a). The arbitrator did not exceed his powers or so imperfectly execute them such that a final award was not made. *See* *9 U.S.C. § 10(a)(4)*. Similarly, the arbitrator did not enter an award on a matter not submitted to him. *See id.* *§ 11(b)*.

For the foregoing reasons, it is

ORDERED AND ADJUDGED that the Motion to Vacate or Correct Arbitral Award of Attorneys' Fees and Costs **[ECF No. 40]** is **DENIED**.

DONE AND ORDERED in Chambers at Miami, Florida this 23rd day of July, 2015.

/s/ Cecilia M. Altonaga

CECILIA M. ALTONAGA

UNITED STATES DISTRICT JUDGE

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In re Pool Prods. Distrib. Mkt. Antitrust Litig.

United States District Court for the Eastern District of Louisiana

July 27, 2015, Decided; July 27, 2015, Filed

MDL No. 2328 SECTION: R(2)

Reporter
2015 U.S. Dist. LEXIS 97578 *; 2015 WL 4528880

IN RE: POOL PRODUCTS DISTRIBUTION MARKET ANTITRUST LITIGATION

Subsequent History: Settled by, Class certification granted by *In re Pool Prods. Distrib. Mkt. Antitrust Litig., 2015 U.S. Dist. LEXIS 107197 (E.D. La., Aug. 13, 2015)*

Prior History: *In re Pool Prods. Distrib. Mkt. Antitrust Litig., 2015 U.S. Dist. LEXIS 71038 (E.D. La., June 2, 2015)*

Core Terms

settlement, Pool, cy pres, notice, class member, percent, expenses, Consumers, antitrust, attorney's fees, class action, settlement fund, parties, Products, cases, factors, awards, Manufacturer, benchmark, damages, distributions, costs, courts, funds, defendants', estimated, class certification, claimants, discovery, fee award

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Judges: SARAH S. VANCE, UNITED STATES DISTRICT JUDGE. MAG. JUDGE WILKINSON.

Opinion by: SARAH S. VANCE

Opinion

THIS DOCUMENT RELATES TO ALL INDIRECT-PURCHASER PLAINTIFF CASES

ORDER AND REASONS

Indirect-Purchaser Plaintiffs (IPPs), together with Hayward Industries, Inc. (Hayward) and Zodiac Pool Systems, Inc. (Zodiac), move the Court to grant final approval of a class action settlement between IPPs and Hayward and a class action settlement between IPPs and Zodiac.[1] In addition, Class Counsel for IPPs move the Court to approve the deduction of common benefit litigation expenses and class administration expenses from the fund, and to approve their request for attorneys' fees.[2] The Court has considered all of the evidence submitted at the fairness hearing held on May 14, 2015, as well as the parties' legal memoranda and supplemental submissions. For the reasons stated more fully below, the Court finds the settlement of this class action to be fair, reasonable, and adequate, and the Court awards attorneys' fees and expenses as provided in this order.

I. Background

A. Factual Background

This is an antitrust case that direct-purchaser plaintiffs (DPPs) and indirect-purchaser plaintiffs (IPPs) filed **[*4]** against Pool and Manufacturer Defendants. Pool is the country's largest distributor of products used for the construction and maintenance of swimming pools (Pool Products).[3] Manufacturer Defendants are the three largest manufacturers of Pool Products in the United States: Hayward, Zodiac, and Pentair Water Pool and Spa, Inc. (Pentair).[4] As defined in IPPs' Third Amended Class Action Complaint (Complaint), Pool Products are the equipment, products, parts or materials, and chemicals used for the construction, renovation, maintenance, repair, and service of residential and commercial swimming pools. Pool Products include pumps, filters, covers, drains, fittings, rails, diving boards, and chemicals, among other goods. Pool buys Pool Products from manufacturers, including the three Manufacturer Defendants, and in turn sells them to DPPs, which include pool builders, pool retail stores, and pool service and repair companies (collectively referred to as "Dealers" in the Complaint).[5] IPPs are pool owners who indirectly purchased Pool Products manufactured by the Manufacturer Defendants and distributed

[1] R. Doc. 622.

[2] R. Doc. 623.

[3] R. Doc. 290, ¶ 44.

[4] *Id.* ¶ 22.

[5] *Id.* ¶ 31.

by Pool. The IPPs named in the Complaint and their states of citizenship are: Jean Bove (CA), **[*5]** Kevin Kistler (AZ), Peter Mougey (FL), and Ryan Williams (MO).

IPPs allege violations of state laws on behalf of classes of individuals and entities who purchased Pool Products not for resale in California, Arizona, Florida, and Missouri. IPPs allege Pool conspired with each of the Manufacturer Defendants to restrict the supply of Pool Products to Pool's rival distributors. They allege that defendants' conduct resulted in higher prices, reduced output, and reduced customer choice for Pool Products sold indirectly to IPPs. They allege that the conduct of Pool and the Manufacturing Defendants violated various antitrust and consumer protection laws of California, Arizona, Florida, and Missouri. IPPs further allege that any price increases Pool charged were passed on by Pool Dealers to indirect consumers who own residential or commercial swimming pools, such as IPPs. IPPs claim to have suffered damages from defendants' conduct in the form of passed-on overcharges they paid for Pool Products as a result of defendants' conduct and claim that the overcharges are "identifiable and traceable" through the manufacturer, distributor, dealer (retailer), or service **[*6]** company to the ultimate consumer, such as IPPs in Arizona, California, Florida, and Missouri.

B. Procedural History

On November 21, 2011, the Federal Trade Commission (FTC) announced that it conducted an investigation into unfair methods of competition by Pool and entered a consent decree with Pool resolving the matter. Shortly after the FTC's announcement, several direct purchaser plaintiffs filed suit in this district and several others. On April 17, 2012, the Judicial Panel on Multidistrict Litigation consolidated the suits for pretrial purposes in this Court.[6] On May 17, 2012, IPPs filed their initial consolidated class action complaint in the multidistrict litigation in this Court.

On September 5, 2012, IPPs filed their Second Amended Class Action Complaint.[7] That Complaint alleged that Pool's and the Manufacturer Defendants' conduct violated various antitrust and deceptive trade practices laws of California, Arizona, Florida, and Missouri. Specifically, IPPs alleged violations of California's ***antitrust law***, the Cartwright Act, *Cal. Bus. & Prof. Code § 16720, et seq.*; the Unfair Competition Law, *Cal. Bus. & Prof. Code §§ 17200, et seq.*; the state antitrust provisions of *Ariz. Rev. Stat. §§ 44-1401, et seq.*; the consumer protection provisions of the Florida Deceptive **[*7]** and Unfair Trade Practices Act, *Fl. Stat. §§ 501.201, et seq.*, including *§ 501.204*; and the consumer protection provisions of the Missouri Merchandising Practices Act, *Mo. Rev. Stat. §§ 407.010, et seq.*[8] IPPs based their claims on allegations of the same underlying conduct that DPPs alleged in their Sherman Act claims. Specifically, IPPs alleged that Pool pursued a deliberate strategy to restrain trade and monopolize the Pool Product Distribution Market through acquiring competitors and foreclosing actual and potential competition by conditioning access to its distribution network on manufacturers' promises not to supply Pool's rivals. IPPs also alleged that the Manufacturer Defendants agreed with Pool to eliminate existing distribution competitors and prevent new entrants from obtaining the products necessary to compete. IPPs alleged that they were injured because defendants' conduct caused them to pay higher prices for Pool Products than they would have otherwise paid absent defendants' illegal practices. Finally, IPPs alleged that defendants fraudulently concealed their illegal conduct until November 2011 when the Federal Trade Commission investigation and related consent decree made public the nature of Pool's anticompetitive conduct.

On May 24, 2013, the Court dismissed IPPs' claims under the California Unfair Competition Law, Florida Deceptive and Unfair Trade Practices Act, and Missouri Merchandising Practices Act that were based on the theory that defendants engaged in fraud or misrepresentation. The Court dismissed IPPs' illegal group boycott claim under the

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[6] R. Doc. 1.

[7] **[*8]** R. Doc. 149.

[8] *Id.* at 2.

Cartwright Act because IPPs failed to allege a horizontal agreement.[9] The Court also dismissed IPPs' claim that defendants fraudulently concealed their illegal conduct.[10]

The Court allowed IPPs to go forward with their California Unfair Competition Law and rule of reason Cartwright Act claims involving three vertical conspiracies (one between Pool and each Manufacturer Defendant), to the extent that the claims were predicated on a national market.[11] The Court also allowed IPPs to go forward with their Arizona Antitrust Act claims of three vertical conspiracies, to the extent that the claims were predicated on a national market, and their Arizona Antitrust Act claim of attempted monopolization against Pool.[12] The Court also found that IPPs stated a claim under the Florida Deceptive and Unfair Trade Practices Act based on their allegations **[*9]** of attempted monopolization (by Pool) and three vertical conspiracies (one between Pool and each Manufacturer Defendant), to the extent that the claims were predicated on a national market.[13] In addition, the Court found that IPPs stated a claim under the Missouri Merchandising Practices Act (MMPA) based on their allegations of defendants' alleged anticompetitive agreements to exclude Pool's rivals and Pool's alleged attempted monopolization, to the extent that the claims were predicated on a national market.[14] IPPs then filed their Third Amended Class Action Complaint, which omitted the claims the Court dismissed.

C. Settlement Agreement Background

1. Hayward Settlement Negotiations

Negotiations leading to the Hayward settlement agreement took place over the course of a year. Class Counsel for IPPs and counsel for Hayward mediated this action before the Honorable Layn Phillips, a former federal district judge and a respected mediator of antitrust disputes. Settlement negotiations included two full-day, in-person mediation sessions. The first took place July 22, 2013, and the second occurred nine months later on March 20, 2014. After these sessions, counsel continued to engage in settlement **[*10]** discussions in teleconference calls facilitated by Judge Phillips. The parties came to an agreement on March 31, 2014, and finalized the terms and signed the agreement on May 16, 2014.

2. Zodiac Settlement Negotiations

Negotiations leading to the Zodiac settlement agreement also took place over the course of a year. Class Counsel for IPPs and counsel for Zodiac mediated this action before Judge Phillips. Settlement negotiations for the Zodiac settlement included three full-day, in-person mediation sessions. These sessions occurred on July 22, 2013; March 20, 2014; and October 1, 2014. After these sessions, counsel continued with extensive telephone settlement discussions, including discussions mediated by Judge Phillips. The parties finalized and executed the agreement on November 4, 2014.

After the parties finalized both settlements, IPPs suggested combining the Hayward settlement with the Zodiac settlement for purposes of administration and providing notice to the class.

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[9] R. Doc. 250 at 19-20.

[10] *Id.* at 37-38.

[11] *Id.* at 21-22.

[12] *Id.* at 25-26.

[13] *Id.* at 29-30.

[14] *Id.* at 35.

3. Preliminary Fairness Determination

The Court held a preliminary fairness and settlement class certification hearing on August 14, 2014. On August 22, 2014, the Court appointed Richard C. Stanley as Special Master, **[*11]** in accordance with *Rule 53 of the Federal Rules of Civil Procedure*, to assist in implementing any subsequent settlements.[15] The Court preliminarily approved the IPP-Hayward settlement and the IPP-Zodiac settlement on December 31, 2014.[16] The terms of the two settlement agreements, with the exception of the settlement amounts, are substantively the same. In addition, the Court certified identical settlement classes for both settlements.[17]

Consistent with the agreements, the Court appointed plaintiffs Kevin Kistler, Jean Bove, Peter Mougey, and Ryan Williams (collectively "Named Plaintiffs") as Class Representatives of the Settlement Class. The Court appointed Thomas J.H. Brill (Law Office of Thomas H. Brill) as Lead Counsel for the Class, and Gainsburgh, Benjamin, David, Meunier & Warshauer, L.L.C.; Edgar Law Firm LLC, Sharp McQueen PA; and Brady & Associates as Co-Counsel for the Settlement Class, finding that the appointments satisfied the prerequisites of *Rule 23(g)*.[18] The Court also approved Angeion Group as the Claims Administrator for the settlement and First NBC Bank as escrow agent.[19] The Court further approved the proposed notice and claim forms, as well as deadlines for submitting claims forms, opting out, **[*12]** and filing objections.

The Court held a fairness hearing on May 14, 2015, to determine whether the settlement is fair and to determine an award of attorneys' fees and expenses. Following the fairness hearing, the parties filed a supplemental joint memorandum alerting the Court to the potential for a *cy pres* distribution of any unclaimed settlement funds. On July 10, 2015, the Court informed the parties that the proposed recipients of *cy pres* funds failed to meet applicable criteria for *cy pres* awards.[20] On July 16, 2015, the parties identified new proposed beneficiaries for any potential *cy pres* distribution.[21]

D. The Settlement Class

The Court certified the following settlement class for both settlements:

> All individuals residing or entities operating in Arizona, California, Florida or Missouri, who or which, between January 1, 2008 and July 16, 2013, purchased indirectly from PoolCorp (and not for resale) Pool Products in Arizona, California, Florida or Missouri manufactured by Hayward, Pentair, or Zodiac. Excluded from the Settlement Class are (1) individuals residing or entities operating in Missouri, who or which did not purchase Pool Products primarily for **[*13]** personal, family, or household purposes, and (2) Defendants and their subsidiaries, or affiliates, whether or not named as a Defendant in this Action, and governmental entities or agencies.[22]

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[15] R. Doc. 467.

[16] R. Docs. 551 & 552.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] R. Doc. 660.

[21] R. Doc. 661.

[22] R. Doc. 500-3 ¶ 5 (Hayward settlement agreement addendum); R. Doc. 500-4 ¶ 5 (Zodiac settlement agreement).

Also excluded from the class are any putative class members who excluded themselves by filing a timely, valid request for exclusion. The parties stipulated that certification of the Settlement Class is for settlement purposes only, and they retain all of their respective objections, arguments, and defenses regarding class certification in the event that settlement is not finalized.

E. The Settlement Agreements

Hayward has paid $1.5 million and Zodiac has paid $500,000 into an Escrow Account pending the Court's final approval of the settlements. Interest from the account accrues to the benefit of the settlement class.

The Agreements provide that the settlement amounts are "all-in" figures, meaning that $1.5 million is the total amount Hayward will pay and $500,000 is the total amount Zodiac will pay in exchange for the released claims.[23] Accordingly, the settlement amounts shall be used to pay: (1) **[*14]** the notice and administration costs; (2) attorneys' fees and litigation expenses; (3) incentive awards; (4) class member benefits; and (5) any remaining administration expenses and any other costs of any kind associated with the resolution of the action.[24]

Hayward and Zodiac also agreed to assist plaintiffs' counsel with document authentication and to continue to answer plaintiffs' questions about transactional data previously produced by Hayward and Zodiac during discovery.[25]

The Agreements provide that they are intended to forever and completely release Hayward and Zodiac from all "Released Claims," which are defined as:

> claims, demands, actions, suits, proceedings, causes of action, damages, liabilities, costs, expenses, penalties and attorneys' fees, of any nature whatsoever, whether class, individual, or otherwise in nature (whether or not any person or entity has objected to the settlement or makes a claim upon or participates in the Settlement Fund), whether directly, representatively, **[*15]** derivatively or in any other capacity that Releasors, or each of them, ever had, now has, or hereafter can, shall, or may have on account of, related to, or in any way arising out of, any and all known and unknown, foreseen and unforeseen, suspected and unsuspected injuries, damages, and the consequences thereof in any way arising out of or relating to the Action, which were asserted or that could have been asserted, in complaints filed in the Action by the Settling Plaintiffs, including, without limitation, any claims arising under any federal or state antitrust, unjust enrichment, unfair competition, or trade practice statutory or common law, or consumer protection law.[26]

Releasors waive any rights or benefits conferred by *Section 1542* of the Ca1ifornia Civil Code, which states: "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."[27] Releasors also waive rights or benefits available under any law of any state or territory of the United States or District of Columbia, or by principle of common law, which **[*16]** is similar, comparable, or equivalent to *Section 1542 of the California Civil Code*, including but not limited to *Section 20-7-11 of the South Dakota Codified Laws*.

F. Notice

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[23] R. Doc. 500-2 ¶¶ 19 & 22 (Hayward settlement agreement); R. Doc. 500-4 ¶¶ 19 & 22 (Zodiac settlement agreement).

[24] R. Doc. 500-2 ¶¶ 19 & 22; R. Doc. 500-4 ¶¶ 19 & 22.

[25] R. Doc. 500-2 ¶ 31; R. Doc. 500-4 ¶ 31.

[26] R. Doc. 500-2 ¶ 17; R. Doc. 500-4 ¶ 17.

[27] R. Doc. 500-2 ¶ 18; R. Doc. 500-4 ¶ 18.

Federal Rule of Civil Procedure 23(c)(3) governs the notice requirements for class certification. Specifically, the notice must state:

(i) the nature of the action;
(ii) the definition of the class certified;
(iii) the class claims, issues, or defenses;
(iv) that a class member may enter an appearance through an attorney if the member so desires;
(v) that the court will exclude from the class any member who requests exclusion;
(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under *Rule 23(c)(3)*.

Fed. R. Civ. P. 23(c)(3)(B). The notice here gave the class information about the terms of the settlements, the date of the final fairness hearing and deadlines for opting out of or objecting to the settlement, and methods for contacting Class Counsel and Angeion. The notice also informed the class that Class Counsel intended to seek up to one-third of the settlement in attorneys' fees and/or for reimbursement of expenses. The Court found in its preliminary approval order that the proposed notice met the requirements of *Rule 23(c)(3)*. The Court also found that the proposed **[*17]** plan for disseminating the notice was the best notice practicable in accordance with *Rule 23(c)(2)(B)* and that it met the requirements of Due Process.

Class Counsel has provided evidence that the notice was disseminated as planned. Angeion sent email notice to 214,263 individuals and entities, using email addresses gleaned from Hayward's and Zodiac's warranty and rebate databases.[28] The email lists did not include all class members, because many affected class members may have never registered their warranties or submitted a rebate request. Thus, to reach unknown class members, Angeion implemented a three-part, paid notice campaign.

First, Angeion published short-form notice of the settlement in major newspapers in the four states included in the class. The affidavit from Angeion's Executive Vice President includes a chart documenting the particular newspapers and dates of publication. Second, Angeion executed an internet banner advertisement campaign and a Facebook and Google advertisement campaign. Third, Angeion issued a national press release about the settlement.

In addition to the notice campaign, Angeion has established an information website about **[*18]** the settlement. As of March 2015, the website had received approximately 28,000 views. Angeion also established a toll-free number to permit class members to listen to FAQs and request long-form notice.

Hayward and Zodiac have notified the appropriate state and federal officials as required by the Class Action Fairness Act. *See* *28 U.S.C. § 1715*. The Act requires notice to be given no later than ten days after a proposed settlement of a class action is filed in court. *Id.* *§ 1715(b)*. And, under *section 1715(d)*, a court may not grant final approval of a settlement until ninety days after the appropriate officials have been served with notice.

Here, Zodiac served notice on the necessary State and Federal officials on November 26, 2014, two days after filing its proposed settlement in court.[29] Hayward, however, did not serve notice until February 6, 2015--months after filing its proposed settlement.[30] Thus, it did not comply with the Act's requirement of prompt notice. Nonetheless, more than ninety days have passed since both Hayward and Zodiac served notice on the appropriate officials, and no officials have raised complaints or concerns. Therefore, the Court finds that the notice satisfies the Act, because the appropriate state and **[*19]** federal officials have had "sufficient notice and opportunity to be heard" about the settlements. *In re Processed Egg Prods. Antitrust Litig., 284 F.R.D. 249, 258 n.12 (E.D. Pa. 2012)* (collecting cases).

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[28] R. Doc. 622-2 (declaration of Steven Weisbrot).

[29] R. Doc. 560.

[30] R. Doc. 598.

In sum, after reviewing evidence of the Claims Administrator's actual dissemination of the notice, and the notice provided to state and federal officials under the Class Action Fairness Act, the Court confirms that the notice complies with the requirements of Rule 23 and Due Process, and with the Act.

G. Plan of Allocation and Claims Process

The Agreements provide that settlement funds will be used to pay attorneys' fees and expenses approved by the Court, all settlement administration expenses, costs for notice, and any other costs associated with the settlement. Plaintiffs combined notice and administration for the Hayward and Zodiac settlements to save on costs. IPPs project that after deducting estimated settlement administration expenses ($210,000), and their requested fees and expenses award ($666,666.67), there will be $1,123,333.33 left for the benefit of the class.[31]

The Court also appointed a Special Master for the IPP settlement,[32] and tasked the Special Master with formulating and recommending an allocation protocol that would **[*20]** apportion the settlement proceeds--net of claims administration expenses, attorneys' fees and costs--to Class Members who submit valid claims from each of the four states involved (CA, AZ, MO, and FL). The Special Master recommended a claims procedure that gives claimants the option to recover under a "Standardized Recovery Model" or an "Itemized Recovery Model," depending on the types of documentation they have available. Consumers without extensive documentation will recover standard amounts for items purchased in particular categories of Pool Products. Consumers with extensive records can submit itemized claims based on their actual purchase prices. In any event, consumers will be able to recover only up to the alleged 4.97 percent overcharge on their eligible Pool Products purchases. After all claims are processed, if the aggregate eligible recovery exceeds the net settlement amount, then eligible claims will be reduced *pro rata.* If the aggregate eligible recovery is less than the net settlement amount, the Special Master recommends that the remaining funds be allocated to a *cy pres* fund, to be distributed at the Court's discretion.

The Special Master later issued **[*21]** a supplemental report, in which he recommended that the two settlements be treated as a single fund of $2,000,000 for the purposes of allocation and distribution. The Special Master's supplemental report also recommended awarding an incentive payment of $2000 to each of the four Named Plaintiffs, who have each served the class by reviewing the complaints, submitting to a multi-hour deposition, preparing for the deposition, and gathering and submitting documents to Class Counsel.

H. Opt-outs, Objections, and Claims

The deadline for opting out of the settlements was April 9, 2015. That deadline has passed, and no class members requested exclusion. Nor did any class members object to the settlement.

The claims filing deadline is December 11, 2015. As of May 22, 2015, Angeion had received 1435 claims. The average purchase price amount claimed is $2,577.07. IPPs anticipate that the full amount available for the class will not be claimed and that funds will be left over for a *cy pres* award.

Class Counsel estimates that there are approximately 500,000 class members nationwide, meaning that the claims submitted so far represent approximately 0.3 percent of the class. Class Counsel also represent **[*22]** that, had Steven Weisbrot of Angeion been called to testify at the fairness hearing, he would have testified that this claims rate is consistent with his experience in other consumer and end-user class settlements. In addition, at the fairness hearing, IPPs informed the Court that they have reached a settlement with Pentair. Thus, the class will be "re-noticed" in the coming months, which Class Counsel predicts will lead to an increase in claims.

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[31] R. Doc. 623-1 at 4.

[32] *See* R. Doc. 467.

II. *Cy Pres* Distribution

Because a *cy pres* award of unclaimed settlement funds is likely, the Court will first analyze whether the parties proposed *cy pres* distribution is appropriate. *See* Dennis v. Kellogg Co., 697 F.3d 858, 865 (9th Cir. 2012) ("In addition to asking whether the *class settlement*, taken as a whole, is fair, reasonable, and adequate to all concerned, we must also determine whether the *distribution* of the approved class settlement complies with our standards governing *cy pres* awards." (internal citations and quotation marks omitted)).

A. Legal Standard

In class actions, federal courts apply the equitable doctrine of *cy pres* to put undistributed or unclaimed settlement funds to their next best compensatory use, "*e.g.*, for the aggregate, indirect, prospective benefit of the class." Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468, 474 (5th Cir. 2011) (quoting **[*23]** In re Airline Ticket Comm'n Antitrust Litig., 307 F.3d 679, 682 (8th Cir. 2002)); *see also* Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 436 (2d Cir. 2007)(internal quotation marks omitted).

The Fifth Circuit requires that two conditions be met before finding that a *cy pres* distribution is appropriate. First, it must be infeasible to make further settlement distributions to class members. Klier, 658 F.3d at 475 (citing Am. Law Inst., Principles of the Law of Aggregation Litigation § 3.07 (2010); William B. Rubenstein, *et al.*, Newberg on Class Actions § 10.17 (4th ed. 2002)). It is infeasible to make further distributions when (1) remaining class members cannot be identified or chose not to participate, (2) the claim amounts are too small to make individual distributions economically viable, and/or (3) the class members' damages claims are fully satisfied by the initial distribution. *Id.*; Am. Law Inst., *supra* § 3.07.

Second, the unclaimed funds must "be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated." Klier, 658 F.3d at 474 (quoting In re Airline Ticket Comm'n, 307 F.3d at 682); *see also* In re Lease Oil Antitrust Litig. (No. II), MDL No. 1206, 2007 U.S. Dist. LEXIS 91467, 2007 WL 4377835, at *21 (S.D. Tex. Dec. 12, 2007) ("In applying *cy pres* principles, it is appropriate for a court to consider (1) the objectives of the underlying statute(s), (2) the nature of the underlying suit, (3) the interests of the class members, and (4) the geographic scope **[*24]** of the case." (internal citations omitted)). Stated differently, there must be a nexus between the harm that the plaintiffs suffered and the benefit the *cy pres* distribution is expected to provide. *See* Rubenstein, *supra* § 12.33. Only when, after thorough investigation and analysis, the court cannot identify a recipient whose interests reasonably approximate those of the class may a court approve a *cy pres* award to a recipient with more tangential connections. *See id.*; *see also* Diamond Chem. Co., Inc. v. Akzo Nobel Chems. B.V., Nos. 01-2118 (CKK), 02-1018 (CKK), 2007 U.S. Dist. LEXIS 49406, 2007 WL 2007447, at *2 (D.D.C. July 10, 2007) ("[T]he doctrine of *cy pres* and the courts' broad equitable powers now permit the use of funds for other public interest purposes by educational, charitable, and other public service organizations." (internal quotation marks omitted)).

B. Discussion

The Court finds the proposed *cy pres* distribution in this case to be appropriate based on the unclaimed settlement funds likely to remain at the claims filing deadline and the nexus between the interests of the class members and the proposed beneficiaries.

First, the Court estimates the amount of the settlement funds likely to remain undistributed at the end of the claims filing deadline of December 11, 2015. Out of a potential class **[*25]** of approximately 500,000 members, only 1435 claimants have filed claims as of May 2015. With approximately six months left in the claims filing period, Class Counsel predict an increase in claims in coming months because the class will be "re-noticed" in connection with IPPs' settlement with Pentair. For the purposes of calculating any potential *cy pres* award, the Court conservatively estimates that only 25 percent more, or 358 additional claims, will be filed by December 2015.

Multiplying the estimated total of 1793 claims by the average purchase price amount claimed of $2,577.07, the claims filed are likely to total approximately $4,620,686.51 in overcharged purchases. Applying the 4.97 percent overcharge to the total purchase price amount, the total amount claimants would be entitled to recover under the settlement agreements is approximately $229,648.12. This amount would fully satisfy IPPs' claims. Subtracting this estimate of total damages, the notice and administration costs ($210,000), and the named plaintiffs' incentive awards ($8000 total) from the total amount of the settlement fund ($2,000,000), leaves approximately $1,552,351.88, exclusive of attorneys' fees and costs, **[*26]** to be distributed *cy pres.* Relying on the current claims information and the estimated projection for the remaining claims period, the Court concludes that it will likely be infeasible to make further distributions of unclaimed funds to the settlement class because the plaintiffs who file claims will be fully compensated by the initial distribution. *See* *Klier, 658 F.3d at 475*; Am. Law Inst., *supra* § 3.07; *see also* *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach, Litig., 851 F. Supp. 2d 1040, 1067 n.18 (S.D. Tex. 2012)* (explaining that awarding claimants settlement funds above the amount of their claim provides them with a "huge windfall").

In an effort to distribute the unclaimed funds for a purpose "as near as possible to the legitimate objectives underlying the lawsuit," the parties propose three organizations as potential *cy pres* recipients: the American Antitrust Institute, Consumers Union, and the Institute for Consumer Antitrust Studies at Loyola University of Chicago.[33] The American Antitrust Institute is a non-profit education, research, and advocacy organization that works to increase the role of competition in the market and to challenge economic abuses. Consumers Union is the policy and action division of the non-profit organization Consumer Reports. Consumers Union seeks to protect consumers by advocating and promoting **[*27]** consumer protection laws. Loyola University's Institute for Consumer Antitrust Studies is a non-partisan academic center designed to explore the impact of antitrust enforcement on the individual consumer and to shape policy issues. Loyola's Institute fulfills its mission by sponsoring symposia, academic colloquia, student fellowships, and the world's first online masters program in global competition law.

Courts have used the *cy pres* doctrine to disburse unclaimed settlement funds to a wide range of "educational, charitable, and other public service organizations." *See, e.g.,* *In re Infant Formula Multidistrict Litig., No. 4:91-CV-00878, 2005 U.S. Dist. LEXIS 32957, 2005 WL 2211312, at *2 (N.D. Fla. Sept. 8, 2005)* (quoting *In re Motorsports Merch. Antitrust Litig., 160 F. Supp. 2d 1392, 1394 (N.D. Ga. 2001))*. In consumer antitrust cases such as this one, courts traditionally award *cy pres* distributions to organizations dedicated to protecting consumers. For example, in *In re Publication Paper Antitrust Litigation*, the court explained, "[b]ecause the plaintiffs' claims here are based on antitrust injury, the next best use for the settlement funds is to disburse those funds to charitable institutions designed to guard against antitrust injury and protect consumers." *No. 3-:04 MD 1631 (SRU), 2009 U.S. Dist. LEXIS 66654, 2009 WL 2351724, at *2 (D. Conn. July 30, 2009)*. The court awarded *cy pres* distributions in varying amounts to the American **[*28]** Antitrust Institute, Public Justice, Class Action, Preservation Project, and Consumer Watchdog. *Id.* Similarly, following a class action settlement in an illegal tying arrangement dispute, the Eastern District of New York awarded *cy pres* distributions to the American Antitrust Institute, Consumers Union, and U.S. Public Interest Research Group. *In re Visa Check/MasterMoney Antitrust Litig., No. 96-cv-5238(JG), 2011 U.S. Dist. LEXIS 122680, 2011 WL 5029841, at *9 (E.D.N.Y. Oct. 24, 2011)*.

Here, IPPs allege that the Manufacturer Defendants abused their economic power by unlawfully conspiring with Pool to increase prices for Pool Products in various states. IPPs assert that they were injured because defendants' conduct caused them to pay higher prices for Pool Products than they would have otherwise paid absent defendants' illegal practices. Considering the objectives underlying the lawsuit and the interests of the class and those similarly situated, the Court finds that Consumers Union and Loyola's Institute for Consumer Antitrust Studies are appropriate *cy pres* beneficiaries for the work to benefit consumers. Each organization is dedicated to a worthy cause that will serve the interests of the consumer class members. Consumers Union is dedicated to protecting consumers. **[*29]** Its mission statement, available online, provides, "We stand firmly behind the principle that consumer products must be safe, effective, reliable, and *fairly priced*." Consumers Union,

[33] R. Doc. 661.

https://consumersunion.org/about/mission/ (last visited July 19, 2015) (emphasis added). Additionally, Loyola's Institute for Consumer Antitrust Studies touts itself as "the only academic organization of its kind" dedicated to exploring the impact that antitrust and consumer protection laws have on the individual consumer. Loyola University Chicago School of Law, http://www.luc.edu/law/centers/antitrust/mission.html (last visited July 19, 2015). These organizations can put any *cy pres* award to good use, resulting in an aggregate, indirect, prospective benefit to the IPP class. *See* Klier, 658 F.3d at 474 (quoting In re Airline Ticket Comm'n, 307 F.3d at 682.). Therefore, if settlement funds remain after distribution to the class members, the Court will award any unclaimed funds in the following amounts: 50 percent to Consumers Union and 50 percent to Loyola University's Institute for Consumer Antitrust Studies.

III. Fairness Determination

A. Legal Standard: Fair, Adequate, and Reasonable

A class action may not be dismissed or compromised without the Court's approval and notification to all class members. Fed. R. Civ. P. 23(e). Before the Court approves a settlement, the Court must find **[*30]** that the proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(1)(C); Newby v. Enron Corp., 394 F.3d 296, 301 (5th Cir. 2004).

The Court must "ensure that the settlement is in the interests of the class, does not unfairly impinge on the rights and interests of dissenters, and does not merely mantle oppression." Ayers v. Thompson, 358 F.3d 356, 368-69 (5th Cir. 2004) (quoting Reed v. Gen. Motors Corp., 703 F.2d 170, 172 (5th Cir. 1983)). Because the parties' interests are aligned in favor of settlement, the Court must take independent steps to ensure fairness in the absence of adversarial proceedings. *See* Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 279-80 (7th Cir. 2002) (noting that the class action context "requires district judges to exercise the highest degree of vigilance in scrutinizing proposed settlements"); *see also* Manual for Complex Litigation (Fourth) § 21.61 (2004). The Court's duty of vigilance does not, however, authorize it to try the case in the settlement hearings. Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977).

The Fifth Circuit has identified six factors that courts should consider in assessing whether a settlement is fair, adequate, and reasonable: (1) evidence that the settlement was obtained by fraud or collusion; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the factual and legal obstacles to plaintiffs prevailing on the merits; (5) the range of possible **[*31]** recovery and certainty of damages; and (6) the opinions of class counsel, class representatives, and absent class members. *See* Newby, 394 F.3d at 301; Ayers, 358 F.3d at 369; Reed, 703 F.2d at 172.

B. Discussion

1. Settlement Obtained by Fraud or Collusion

There is no evidence that any fraud or collusion infected the process by which the parties arrived at the settlement agreements. For both the Hayward and the Zodiac settlements, the parties reached an agreement only after multiple formal sessions of arm's length mediation with Judge Phillips.

Next, the terms of the agreements do not signal fraud or collusion. In its preliminary approval order, the Court reviewed the "Released Claims" provision in each Settlement and found the provisions reasonable. Both Agreements provide, in identical language, that they are intended to forever and completely release Hayward and Zodiac from all "Released Claims," which are defined as:

> claims, demands, actions, suits, proceedings, causes of action, damages, liabilities, costs, expenses, penalties and attorneys' fees, of any nature whatsoever, whether class, individual, or otherwise in nature (whether or not any person or entity has objected to the settlement or makes a claim upon or participates in the Settlement Fund), **[*32]** whether directly, representatively, derivatively or in any other capacity that Releasors, or each of them, ever had, now has, or hereafter can, shall, or may have on account of, related to, or in any way arising out of, any and all known and unknown, foreseen and unforeseen, suspected and unsuspected injuries, damages, and the consequences thereof in any way arising out of or relating to the Action, which were asserted or that could have been asserted, in complaints filed in the Action by the Settling Plaintiffs, including, without limitation, any claims arising under any federal or state antitrust, unjust enrichment, unfair competition, or trade practice statutory or common law, or consumer protection law.[34]

Regarding unknown claims, the Agreements further specify that these releases constitute a waiver of class members' rights under *Section 1542 of the California Civil Code*, which provides for a release against unknown claims, and "any other rights or benefits available under any law of any state or territory of the United States or District of Columbia, or by principle of common law, which is similar, comparable, or equivalent to *§ 1542 of the California Civil Code*, including but not limited to *Section 20-7-11 of the South Dakota Codified Laws*."[35]

The Court finds that these releases are not impermissibly broad. Courts have consistently approved releases in class action settlements that discharge unknown claims relating to the factual issues in the complaint. *See* *DeHoyos v. Allstate Corp., 240 F.R.D. 269, 311-12 (W.D. Tex. 2007)* (finding that release of unknown claims was not impermissibly broad); *In re Corrugated Container Antitrust Litig., 643 F.2d 195, 221 (5th Cir. 1981)* ("[A] court may release not only those claims alleged in the complaint and before the court, but also claims which could have been alleged by reason of or in connection with any matter or fact set forth or referred to in the complaint."). As the Fifth Circuit explains, courts are required to enforce such broad provisions because they "contribute significantly to the public policy of encouraging the settlement of differences and compromise of disputes in which the execution and exchange of releases is the common and legally accepted means of consummation." *Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295, 1312 (5th Cir. 1983)*. Thus, the Court finds the provisions to be reasonable.

As the Court also noted in its preliminary approval order, the settlement does not give preferential treatment to the named class representatives or any segment of the class. The special master has recommended a modest incentive award of $2000 for each Named Plaintiff, **[*34]** to compensate them for the assistance they have provided to Class Counsel in developing the facts in the case. In addition, to the extent that class members' claims exceed the net settlement fund, the special master recommends that each claimant be compensated *pro rata* according to the claimant's calculated loss under the allocation plan. The Court found this suggested allocation plan to be fair and unbiased.

That class members received notice of the allocation plan and have not objected to it buttresses the Court's conclusion. Class members received notice that the attorneys would request up to one-third of the settlement and that notice and administration expenses would come out of the settlement. They also had access, via the settlement website, to the special master's reports, which set forth in greater detail the proposed plan for allocating the net settlement fund among claimants. No class member has objected to the fairness of the settlement, the allocation plan, or the attorneys' request for one-third of the settlement.

Because the Court finds no indication that the settlement is fraudulent or collusive, or that it unfairly discriminates among class members, this factor favors **[*35]** approving the settlement.

2. Complexity, Expense, and Likely Duration of the Litigation

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[34] R. Doc. 500-2 at ¶ 17; R. Doc. 500-4 at ¶ 17.

[35] R. Doc. 500-2 at **[*33]** ¶ 18; R. Doc. 500-4 at ¶ 18.

Under this factor, the Court considers whether settling now avoids the risks and burdens of potentially protracted litigation. *Ayers, 358 F.3d at 369*. The settlements eliminate the need for IPPs to litigate their claims against Hayward and Zodiac, which will save substantial time and expense. Moreover, this partial settlement allows IPPs to mitigate some of the risk inherent in continuing in litigation against the remaining defendants. It guarantees at least some recovery for class members, regardless of how IPPs' claims against the remaining defendants may be resolved.

The complexity of this litigation also favors settlement. As the ongoing motions practice involving the non-settling defendants indicates, this case involves complex issues of proof in connection with both IPPs' substantive claims and their motion for class certification. If the Court grants IPPs' motion for class certification, the parties will still likely have to withstand an interlocutory appeal of the Court's class certification order. A trial in this matter would be lengthy and would require numerous attorneys, paralegals, and witnesses. This case **[*36]** also requires expert testimony to establish market definition, causation, damages (including, for IPPs, pass-through). After trial, the parties could still expect years of appeals. Therefore, the complexity and likely duration of this case weigh in favor of finding that partial resolution by settlement is a reasonable option for all parties involved.

3. Stage of the Proceedings

This factor asks whether the parties have obtained sufficient information "to evaluate the merits of the competing positions." *Ayers, 358 F.3d at 369*. The question is not whether the parties have completed a particular amount of discovery, but whether the parties have obtained sufficient information about the strengths and weaknesses of their respective cases to make a reasoned judgment about the desirability of settling the case on the terms proposed or continuing to litigate it. *In re Educ. Testing Serv. Praxis Praxis Principles of Learning & Teaching, Grades 7-12 Litig., 447 F. Supp. 2d 612, 620-21 (E.D. La. 2006)* (citing *In re Train Derailment Near Amite, La., MDL No. 1531, 2006 U.S. Dist. LEXIS 32839, 2006 WL 1561470, at *22 (E.D. La. May 24, 2006))*. If the settlement proponents have taken affirmative steps to gather data on the claims at issue, and the terms of the settlement are not patently unfair, the Court may rely on counsel's judgment that the information gathered was enough to support a settlement. *In re Corrugated Container, 643 F.2d at 211* **[*37]** .

Here, settlement occurred after two years of litigation and extensive fact discovery. Counsel participated in or attended over eighty fact witness depositions and reviewed over four million documents. Expert discovery had already begun. And IPPs defended against a complicated motion to dismiss. Because of the advanced stage of the litigation, counsel for all parties were familiar with the factual and legal issues in the case. Therefore, the Court is satisfied that the parties were sufficiently informed to assess the strengths and weaknesses of their positions and to make a reasoned evaluation of whether and on what terms to settle. This factor favors settlement.

4. The Obstacles to Prevailing on the Merits

As the Court summarized in its preliminary fairness order, IPPs face obstacles to prevailing on the merits of their claim, which IPPs acknowledge in their motion for final approval of these settlements.

First, IPPs' claims are subject to complex problems of proof. Regarding liability, no claim is subject to a theory of *per se* illegality, which makes proof of anticompetitive conduct more difficult. Further, reports from the non-settling defendants' experts indicate that IPPs will face **[*38]** proof challenges on the issues of impact and damages, including pass-through.

Second, class certification in this case is disputed. The non-settling defendants oppose IPPs' pending motion for certification of a litigation class. They challenge, among other things, IPPs' ability to demonstrate commonality and predominance under Rule 23.

Finally, the parties are presently engaged in a heated dispute over expert testimony. The Court is currently considering motions to exclude not only IPPs' economic expert, but also DPPs' economic expert, upon whose analysis IPPs' substantive claims and bid for class certification depend.

Moreover, even if IPPs survive summary judgment and receive class certification, the certification decision will be subject to interlocutory appeal. In sum, considering the risks IPPs face in surviving summary judgment, attaining class certification, and prevailing at trial and on appeal, the probability of success factor favors approving the settlement.

5. Range of Possible Recovery

The Court "must establish the range of possible damages that could be recovered at trial, and, then, by evaluating the likelihood of prevailing at trial and other relevant factors, determine whether **[*39]** the settlement is pegged at a point in the range that is fair." *In re Corrugated Container, 643 F.2d at 213*. In particular, "[p]roof difficulties" are "permissible factors" for a court to consider when evaluating the fairness of a settlement. *In re Chicken Antitrust Litig. Am. Poultry, 669 F.2d 228, 240 (5th Cir. 1982)*.

The Court considers whether the $2 million total settlement fund is pegged at a fair point in the range of potential recovery, taking into account the risks present in this particular litigation. IPPs' expert suggests that estimated damages for class members during the class period are $23,951,893.[36] Although at first glance the settlement figure appears small in comparison to the universe of potential damages, plaintiffs' projected damages reflect a *best* case scenario for plaintiffs' actual damages. This damages estimate does not reflect the substantial risks of nonrecovery or diminished recovery plaintiffs face in this litigation, as discussed above. Indeed, the lower boundary of IPPs' range of possible recovery is zero. The $2 million figure provides prompt and certain recovery of at least some of IPPs' alleged losses.

In addition, IPPs noted at the hearing that some of the proof challenges that they face on showing impact are potentially more relevant to their claims **[*40]** against the Manufacturer Defendants. Plaintiffs generally regard the claims against Pool to be the stronger claims. IPPs further note that, while this settlement amounts to approximately 8.5 percent of IPPs' best case projection for actual damages, that percentage will increase if additional settlements (such as the recently reached settlement with Pentair) are added to the pot. *Cf. Newby, 394 F.3d at 303* (observing that the "numerator" and "denominator" of partial settlements change as additional partial settlements are added to the overall settlement amount).

The Court must also consider the effect of the proposed *cy pres* distribution. With class settlements, the Court's primary concern is assuring the claimants will receive some monetary benefit from the settlement. *See In re Katrina Canal Breaches Litig., 628 F.3d 185, 196 (5th Cir. 2010)*. The more likely the claimants are to receive full compensation for their damages, the better. *In re Heartland Payment Sys., 851 F. Supp. 2d at 1067 n.18* (noting that once claimants have been paid, *cy pres* distributions are a reasonable and fair means to avoid awarding a small number of claimants a windfall of remaining funds). Here, no *cy pres* distribution will be made until after class members have had ample time to file their claims. Thus, the *cy pres* distribution will not divert settlement **[*41]** funds that class members would otherwise be entitled to recover. *See id. at 1067-68*. Indeed, based on the current claims information, it appears highly likely that all plaintiffs who file claims will recover the full distribution to which they are entitled under the terms of the settlement agreement.

The class will also receive a non-monetary benefit as part of the settlement. Both Hayward and Zodiac have agreed to cooperate with IPPs to answer questions about their transactional data and to assist with authenticating records. This cooperation will assist IPPs as they proceed against the non-settling defendants.

[36] R. Doc. 500-1 at 27 n.10.

After evaluating the range of possible recovery in light of the risks of non-recovery, the Court concludes that the $2 million total settlement fund is pegged at a fair point in the range. Thus, this factor weighs in favor of settlement.

6. Opinions of Class Counsel, Class Representatives, and Absent Class Members

The opinions of the affected parties are generally favorable towards the settlement. The Court is entitled to rely on the judgment of experienced counsel in its evaluation of the merits of a class action settlement. *Cotton, 559 F.2d at 1330*. Here, Settlement Class Counsel have expressed their approval **[*42]** of the settlement after over two years of litigation and extensive fact discovery, as discussed above.

Further, no objections have been filed, and no class members have asked to opt out of the settlement. Although the Court is careful not too infer too much from an absence of objectors and opt-outs, the lack of objectors and opt-outs suggests class-wide support for the proposed settlement. *See, e.g., In re Cardizem CD Antitrust Litig., 218 F.R.D. 508, 527 (E.D. Mich. 2003)* (explaining that a small number of opt-outs and objections can be viewed as indicative of the fairness of the settlement); *In re Excess Value Ins. Coverage Litig., No. M-21-84RMB, MDL-1339, 2004 U.S. Dist. LEXIS 14822, 2004 WL 1724980, at *11 (S.D.N.Y. 2004)* (reasoning that small number of objectors suggests support for settlement). In addition, 1435 claim forms had been received by May 2015 -- seven months before the December 11, 2015, deadline.

In sum, because all factors weigh in favor of settlement, the Court finds the settlement to be fair, reasonable and adequate under *Rule 23(e)(1)(C) of the Federal Rules of Civil Procedure*.

IV. Attorneys' Fees and Costs

A. Request

In the notice sent to the class, Class Counsel indicated that they would seek up to one-third of the settlement total for attorneys' fees and/or for reimbursement of expenses. Consistent with that notice, Class Counsel now request a fee award of $346,666.67 **[*43]** and a $320,000 reserve for litigation expenses. Together, these amounts are equivalent to one-third of the total settlement fund.

The requested litigation expense fund comprises $276,716.70 in shared and held expenses already incurred by Class Counsel as of January 31, 2015, and $43,283.30 to be set aside for future litigation expenses. The expenses already incurred have been reported by Class Counsel in accordance with a court-approved protocol and approved by the court-appointed accountant, Philip A. Garrett. Any future expenses will also be vetted by Mr. Garrett before being paid from the fund.

Class Counsel have also expended more than 5000 hours in attorney and staff time on this litigation. All of these hours have been reported to Mr. Garrett, and he found them to be appropriate common benefit work. The requested fee award is equivalent to 17.3 percent of the total settlement fund.

Class Counsel's fee and expense request also sets forth a plan for allocating the requested award among the firms that have worked on the case. At the hearing, Class Counsel represented that all of the firms that have worked on the case are represented in the allocation plan. Further, all of the firms **[*44]** agree with the plan.

In its preliminary fairness determination, the Court concluded that a total attorney award (including both fees and expenses) not exceeding one-third of the fund was consistent with other awards approved in this circuit and within the limit of what the Court deems reasonable. The Court now makes a more detailed inquiry into Class Counsel's request.

B. Class Benefit

The Court begins by assessing the monetary value of the settlements for the purpose of calculating attorneys' fees. Notably, a substantial portion of the settlement funds (approximately $1,552,351.88 based on current claims information and the Court's estimates of future claims) will likely be distributed *cy pres.* Courts take different approaches in valuing *cy pres* awards when it comes to determining attorneys' fees. Some courts consider a *cy pres* award to be sufficiently beneficial to class members to warrant awarding attorneys' fees on the basis of the entire settlement fund, regardless of the amount actually claimed by the class. *See, e.g.,* *Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 437-38 (2d Cir. 2007)*. Other courts hold that *cy pres* distributions should not be considered beneficial to the class and therefore should not be included as part of the common fund on **[*45]** which an award of attorneys' fees is based. *See, e.g.,* *Pearson v. NBTY, Inc., 772 F.3d 778, 781 (7th Cir. 2014)* ("The judge excluded . . . the *cy pres* award of $1.13 million in calculating the benefit to the class, for the obvious reason that the recipient of that award was not a member of the class . . . ."). Still other courts take a "middle" approach, discounting the *cy pres* award's monetary value to account for the indirect benefit provided to the class. *See, e.g.,* *In re Heartland Payment Sys., 851 F. Supp. 2d at 1077*.

The Court finds that the "middle" approach is most appropriate in this case. Courts generally consider the benefit to the class to be the most important consideration when awarding attorneys' fees in class action cases. *See, e.g.,* *In re AT&T Corp., 455 F.3d 160, 165-66 (3d Cir. 2006)* ("[W]hat is important is that the district court evaluate what class counsel actually did and how it benefitted the class."); *Strong v. Bellsouth Telecomm., Inc., 137 F.3d 844, 851 (5th Cir. 1998)* (affirming the district court's refusal to award attorneys' fees, beyond what counsel had already collected in related cases, in light of the non-monetary benefit to the class). Importantly, the Fifth Circuit recognizes that *cy pres* awards provide *some* indirect benefit to the class. *See* *Klier, 658 F.3d at 474*. Because the *cy pres* benefit is only indirect, though, it is "inappropriate to value *cy pres* on a dollar-for-dollar basis." *In re Heartland Payment Sys., 851 F. Supp. 2d at 1077*; *see also* Am. **[*46]** Law Inst., Principles of the Law of Aggregate Litigation § 3.13 cmt. (a) ("Because *cy pres* payments . . . only indirectly benefit the class, the court need not give such payments the same full value for purposes of setting attorneys' fees as would be given to direct recoveries by the class.").

Recognizing that the potential *cy pres* distribution in this case confers some "aggregate, indirect, prospective benefit [to] the class[,]" *see* *Klier, 658 F.3d at 474* (quoting *In re Airline Ticket Comm'n, 307 F.3d at 682*), the Court discounts the potential *cy pres* payment by 50 percent to best value the benefit to the IPP class members. *See* *In re Heartland Payment Sys., 851 F. Supp. 2d at 1077*. Therefore, for purposes of calculating reasonable attorneys' fees, the indirect benefit that the *cy pres* distribution confers on the class members is valued at approximately $791,699.46. Adding this amount to the approximate value of actual claims filed ($229,648.12), plus the $8,000 in incentive awards to the Named Plaintiffs, brings the value of the settlement fund to approximately $1,029,347.58.

In valuing the settlement for purposes of attorneys' fees, the Court also finds that the notice and administrative costs provided a benefit to the class. Without sufficient notice and successful administration, class members would be **[*47]** unaware of their claims and unable to collect the monetary awards to which they are entitled under the settlement agreements. *See* *Waters v. Int'l Precious Metals Corp., 190 F.3d 1291, 1294 (11th Cir. 1999)* ("[Class members'] right to share the harvest of the lawsuit upon proof of their identity, *whether or not they exercise it*, is a benefit in the fund created by the efforts of the class representatives and their counsel."). Accordingly, the Court finds that the notice and administration costs are entitled to their full value of $210,000. Thus, the total monetary value of the settlement on which to calculate reasonable attorneys' fees is $1,239,347.58.

C. Legal Standard

The court must independently analyze the reasonableness of the attorneys' fees proposed in the settlement agreement. Here, the proposed fees amount to 17 percent of the total settlement fund and 27.9 percent of the settlement value as determined by the Court after discounting the *cy pres* award. *See* *Strong, 137 F.3d at 849-50*;

see also Fed. R. Civ. P. 23(e). In a common fund settlement, in which the plaintiffs' attorneys are paid out of settlement proceeds, the interests of the attorneys conflict with those of the class. Put simply, the more money the attorneys get, the less the class gets. The Fifth Circuit has established twelve factors **[*48]** to consider in calculating reasonable fees and costs. *Johnson v. Ga. Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974)*. In common fund cases, district courts typically use either the percentage method or the lodestar method to calculate attorney's fees. The Fifth Circuit endorses the use of the percentage method, cross-checked with the *Johnson* factors. *See* Union Asset Mgmt. Holding A.G. v. Dell, Inc., 669 F.3d 632, 644 (5th Cir. 2012). The Court adopts that approach here.

A different standard applies to the expenses requested by Class Counsel. Typically, class action counsel who create a common fund for the benefit of the class (as counsel have done here), are entitled to reimbursement of reasonable litigation expenses from that fund. *See* *In re Heartland Payment Sys., 851 F. Supp. 2d at 1089*; *City of Omaha Police & Fire Ret. Sys. v. LHC Grp., No. 6:12-1609, 2015 U.S. Dist. LEXIS 26050, 2015 WL 965696, at *11 (W.D. La. Mar. 3, 2015)*. And, in the non-class context, the Fifth Circuit has disapproved the application of the *Johnson* factors to reduce expenses across-the-board. It explained:

> Fees may be increased above the lodestar; the cost of suit may not be. . . . [T]here appears to be no correlation between the Johnson factors and out-of-pocket expenses. While expenses incurred extravagantly or unnecessarily should be disallowed, this should be done on an item-by-item basis.

Copper Liquor, Inc. v. Adolph Coors Co., 684 F.2d 1087, 1101 (5th Cir. 1982), *overruled in part on other grounds by* *Int'l Woodworkers of Am., AFL-CIO & its Local No. 5-376 v. Champion Int'l Corp., 790 F.2d 1174 (5th Cir. 1986)* **[*49]** , and *J.T. Gibbons, Inc. v. Crawford Fitting Co., 790 F.2d 1193 (5th Cir. 1986)*. This makes sense: unlike fees, expense reimbursements are not a reward. They must be awarded simply to return counsel to the position they were in before the litigation began.

Finally, the Court must assess whether the total amount awarded to the attorneys, whether in fees or expenses, is fair to the class. As the Fifth Circuit holds, a district court abuses its discretion when it approves a settlement from which expenses may be sought without having any estimate as to what those expenses may be. *See* *In re Katrina, 628 F.3d at 195*. The Court must ensure that expenses will not "cannibalize the entire . . . settlement," and that money will remain for the class after administrative and litigation expenses have been deducted from the fund. *Id. at 196*. Thus, after assessing whether the fees and expenses requested are independently reasonable, the Court will ensure that the overall sum requested is fair, adequate, and reasonable for the class.

D. Fees Request

The Court assesses the fees requested by Class Counsel according to the percentage method, cross-checked with the *Johnson* factors. *See* Union Asset Mgmt., 669 F.3d at 644.

1. Benchmark Percentage

The Court begins by establishing a "benchmark" percentage, which it will then adjust for the **[*50]** particular circumstances of the case. *See, e.g.,* *Camden I Condo. Ass'n v. Dunkle, 946 F.2d 768, 774-75 (11th Cir. 1991)* (citing *Paul, Johnson, Alston & Hunt v. Graulty, 886 F.2d 268, 272 (9th Cir. 1989)*); *In re Catfish Antitrust Litig., 939 F.Supp. 493, 501 (N.D. Miss. 1996)*; *see also* Manual for Complex Litigation (Fourth) § 14.122 (2004). In determining the benchmark, the Court will consider fee awards in similar cases, which the Court notes is the last of the *Johnson* factors. To adjust the benchmark to the facts of this case, the Court will use the remaining *Johnson* factors, to the extent that they are applicable here.

The Manual for Complex Litigation states that a fee of 25 percent of a common fund "represents a typical benchmark." Manual, *supra*, § 14.121. The Ninth Circuit and Eleventh Circuit have adopted a benchmark of 25 percent in common fund cases. *See Staton v. Boeing Co., 327 F.3d 938, 968 (9th Cir. 2003)*; *Camden I Condo., 946 F.2d at 774-75*.

Further, data on fee awards in class action settlements is available in several academic analyses of class action data. *See* Theodore Eisenberg and Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Legal Stud. 27 (2004); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards, 7 J. Empirical Legal Stud. 811 (2010)*. The Eisenberg and Miller study examines (1) data based on published decisions from "all state and federal class actions with reported fee decisions between 1993 and 2002, inclusive, in which the fee and class recovery could be determined with reasonable confidence"; and (2) information reported on more than 600 common fund cases from 1993 and 2002 in *Class Action Reports* ***[*51]*** *(CAR)*. Eisenberg & Miller, *supra*, at 28.

The study finds a "strong correlation between the fee amount and the client recovery." *Id.* at 52. The study further indicates that a scaling effect exists, for "[a]s client recovery increases, the fee percent decreases." *Id.* at 54. The authors of the study suggest that the results can assist courts in determining fee awards:

> [B]ecause our study finds an overwhelming correlation between class recovery and attorney fees, the court can conduct a simple initial inquiry that looks only at these two variables in any case where the size of the class recovery can be estimated. The court need only compare the request in a given case with average awards in cases of similar magnitude. If the request is relatively close to average awards in cases with similar characteristics, the court may feel a degree of confidence in approving the award. If the request is significantly higher than amounts awarded in past cases, the court should inquire further.

Id. at 72. Eisenberg and Miller divided the cases into ten ranges of recovery (deciles) and then gave the mean and median fee percent, as well as the standard deviation, for each decile. *Id.* at 73.

The Court finds the study's data on the average percentage **[*52]** fee awarded in the recovery range comparable to this case useful in arriving at a benchmark percentage fee.[37] The Court's discounted value of the settlement of approximately $1.2 million falls within the less than 10 percent decile of client recovery, which includes recoveries less than $1.4 million. *Id.* at 73. Based on the *Class Action Reports (CAR)* data set, the mean fee percent for nonsecurities cases in this decile was 30.9 percent, with a standard deviation of 8.2 percent. *Id.* The data set generated from published decisions shows a mean fee percent for cases in this decile of 29.5 percent, with a standard deviation of 5.9 percent. *Id.* An average of the mean fee percentages of the two data sets would be 30.2 percent.

The Fitzpatrick study gives a slightly lower figure, with a mean fee percent of 28.7 percent, with a standard deviation of 6.2 percent, for settlements between $750,000 and $1.75 million. *Fitzpatrick, supra, at 839*. The Fitzpatrick study also indicates that the mean fee **[*53]** percentage for antitrust cases is 25.4 percent. *Id. at 835*.

Based on this data, the Court will use an initial benchmark of 27 percent, which is roughly the average of the two data sets in the Fitzpatrick study involving settlement funds of this size and settlements in antitrust litigation. The 27 percent benchmark is slightly lower than the 30.2 percent average in the Eisenberg and Miller study, but the Court notes that Eisenberg and Miller's percentages are significantly higher than the standard 25 percent benchmark adopted by the Ninth and Eleventh Circuits. Ultimately, whether the Court uses the percentages in Eisenberg and Miller or Fitzpatrick does not impact the result here because plaintiffs' fee request would be reasonable under either scenario. Therefore, the Court finds 27 percent to be an appropriate benchmark. The Court will next determine whether the benchmark should be adjusted based on the particular circumstances of this case. In doing so, the Court will consider the other *Johnson* factors.

2. Johnson Factors

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[37] Eisenberg and Miller suggest that a fee request within one standard deviation of the mean is presumptively reasonable, and that one falling between one and two standard deviations from the mean may require further justification. *Id.* at 74.

The twelve *Johnson* factors are: (1) the time and labor required; (2) the novelty and difficulty of the question; (3) the skill requisite to perform the legal service; (4) **[*54]** the preclusion of other employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the residuals obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of professional relationship with the client; and (12) awards in similar cases. *Von Clark v. Butler, 916 F.2d 255, 258 n.3 (5th Cir. 1990)*.

The *Johnson* factors are intended to ensure "a reasonable fee." *488 F.2d at 720*. Because not all of the *Johnson* factors are always applicable, the Court will consider only the factors relevant to this case. *See In re Harrah's Entm't, Inc. Sec. Litig., No. 95-3925, 1998 U.S. Dist. LEXIS 18774, 1998 WL 832574, at *4 (E.D. La. Nov. 25 1998)* (citing *Uselton v. Commercial Lovelace Motor Freight, Inc., 9 F.3d 849, 854 (10th Cir. 1993))*.

Time and labor required

The Court finds that the amount of time and labor required in this case warrants an adjustment of the benchmark percentage. IPPs reached a settlement with Hayward only after completing fact discovery. IPPs' participation in fact discovery included participating in or attending the depositions of over eighty fact witnesses and reviewing approximately four million documents. IPPs also worked to secure an expert to support their proof of liability and damages. Moreover, they reached these settlements **[*55]** only after successfully defending against a motion to dismiss. The magnitude of the work required in connection with discovery, the motion to dismiss, negotiating the settlement, preliminary approval of the settlement, and the fairness hearing merits an increase in the benchmark percentage.

Novelty and difficulty of the question and skill required to perform the legal service

"An antitrust class action is arguably the most complex action to prosecute." *In re Linerboard Antitrust Litig., 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003)*. Here, IPPs have had to analyze and argue, among other things, the difficult issue of indirect-purchaser standing under the laws of four different states. The Court does not doubt that handling this difficult case required considerable skill and experience. Given the inherent difficulty involved in antitrust class actions and the proof challenges presented by this case, as well as accounting for counsel's skill and expertise, the Court finds that an increase in the benchmark percentage is merited.

The customary fee

The Court has discussed, *supra*, the typical fees in antitrust cases involving comparable awards. Because the benchmark percentage is about average for cases of this kind, the Court finds that this factor does not warrant an adjustment. **[*56]**

Whether the fee is fixed or contingent

Consideration of this factor is designed to "demonstrat[e] the attorney's fee expectations when he accepted the case." *Johnson, 488 F.2d at 718*. This factor considers the financial risks a contingency fee arrangement places on counsel. *See In re Enron Corp. Sec. Derivative & ERISA Litig., 586 F. Supp. 2d 732, 791 (S.D. Tex. 2008)*. Class counsel undertook this case on a contingency basis and have thus far received no payment. But because the Court's benchmark is comparable to a reasonable contingency fee award, the Court finds that consideration of this factor does not justify an increase to the fee award.

Time limitations imposed by the client or the circumstances

Under this factor, the Court is to give a premium for "priority work that delays the lawyer's other legal work." *Johnson, 488 F.2d at 718*. The Court finds that no facts in this case suggest that this factor justifies an adjustment in the benchmark fee.

Amount involved and the results obtained

Counsel obtained a fair settlement for the plaintiff class. *See* Part II, *supra*. This is not a case in which the class receives only illusory benefits in the form of coupons or discounts. Instead, counsel has secured a cash settlement that allows class members to recover their alleged losses, thus mitigating some of the risk inherent in continuing with litigation against **[*57]** the remaining defendants.

Yet only a relatively small portion of the settlement funds will actually be distributed to class members, with charitable and educational organizations receiving the remaining funds in the form of *cy pres* distributions. Because the Court has already discounted the monetary value of the settlements to account for benefits actually delivered to the class, this factor is neutral.

The experience, reputation, and ability of the attorneys

The Court is satisfied that the experience and reputation of the attorneys involved are of the highest quality. But as the Court has accounted for counsel's experience and skill in the *Johnson* factor considering the skill necessary to litigate the case, a further increase in the percentage is not warranted.

Undesirability of the case

The Court finds that although this is not the type of unpopular case that might stigmatize the lawyer who takes it, *see Johnson, 488 F.2d at 719*, there are some aspects of this case that made it undesirable. The risk of nonrecovery, discussed *supra*, is significant. Further, the relatively small size of the individual claims made undertaking expensive litigation on a contingent fee an unattractive proposition. Class certification **[*58]** would change this dynamic, but, here, there remains a serious risk that a class will not be certified. Accordingly, the Court finds that the risks inherent in this case warrant an increase in the fee award.

The nature and length of the professional relationship

There is no evidence of any special or lengthy professional relationship between class counsel and the class members. The relationship did not antedate the litigation, nor will it likely continue beyond the closure of this case. The Court finds that consideration of this factor does not warrant an increase in the fee award.

In sum, three of the *Johnson* factors merit an increase in the fee award. The Court finds that these factors warrant an increase in the fee award to 30 percent. Applying 30 percent to the settlement fund's actual monetary value of $1,239,347.58 to the class, as determined in Part IV.B. *supra*, an appropriate attorney fee award is $371,804.27. Class Counsel's requested fee award is $346,666.67. Therefore, the Court easily concludes that Class Counsel's request is reasonable.

E. Expense Request

Class action counsel who create a common fund for the benefit of the class, are entitled to reimbursement of reasonable litigation expenses **[*59]** from that fund. *See In re Heartland Payment Sys., 851 F. Supp. 2d at 1089*. Here, the expenses incurred are reasonable. IPPs reached a settlement with Hayward and Zodiac only after completing fact discovery, including the depositions of over eighty fact witnesses, and the review of over four million documents. This sort of work requires not only attorney hours but also money--for discovery vendors, travel, copying, and so on. All of the expenses that Class Counsel seek from the fund fall within the categories pre-approved by Pretrial Order No. 9, and Mr. Garrett reviewed and approved all of them. Thus, the Court concludes that the expenses are reasonable and eligible for reimbursement.

F. Fairness to Class

Class Counsel have requested reasonable attorneys' fees and expenses. At the same time, a fair portion of the settlement must be reserved for the benefit of the class. All together, the fees and expenses requested by Class Counsel amount to one-third of the total settlement fund. They also project that settlement administration expenses will amount to approximately $210,000, which the Court considers beneficial to the class. This would leave $1,123,333.33 left for distribution to class members. The Court concludes that the one-third sum **[*60]** sought by Class Counsel strikes a fair balance between the attorneys' right to recover reasonable fees and expenses, and the class's right to the benefit of a fair portion of the settlement. Thus, the Court approves Class Counsel's request for $346,666.67 in fees and $320,000 for a litigation expenses reserve.

G. Apportionment of Fees

Class Counsel propose a method for allocating the requested award among the firms that have worked on the case. Class Counsel represent that all of the firms that have worked on the case are represented in and agree with the proposed allocation plan. In the Fifth Circuit, attorneys may apportion fees among themselves without substantial involvement by the Court, so long as counsel develop a plan agreeable to all attorneys involved. *See Longden v. Sunderman, 979 F.2d 1095, 1101 (5th Cir. 1992)* (citing *In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 216, 223 (2d Cir. 1987))*; *see also Turner v. Murphy Oil USA, Inc., 472 F. Supp. 2d 830, 869-70 (E.D. La. 2007)*. Here, counsel are in agreement about the plan.

Counsel explains the proposed allocation plan in some detail in their motion. The Court has reviewed the plan. The plan sets out the number of hours spent by each firm, along with a description of the types of work done by each firm. All of these hours have been reported to Mr. Garrett, and he has agreed that they represent appropriate common benefit work. **[*61]** The plan also lists the amount of money each firm has fronted for expenses, either in the form of held costs or assessments. At the hearing, Class Counsel and Mr. Garrett confirmed that all of these expenses have already been vetted by Mr. Garrett and approved as appropriate common benefit expenses. Overall, the Court finds that the proposed allocation plan takes into account the work done and the expenses covered by each firm so far and arrives at a fair division of the requested award. Moreover, all of the firms are in agreement about the plan. Therefore, the Court approves the proposed allocation of common benefit attorneys' fees and expenses as set forth in IPPs' motion. The Court retains jurisdiction for the purposes of supervising the allocation.

V. Conclusion

For the foregoing reasons, the Court grants IPPs' Final Approval of the Settlements Between Indirect Purchaser Plaintiffs and Hayward Industries, Inc., and Between Indirect Purchaser Plaintiffs and Zodiac Pool Systems, Inc. The Court also orders that Class Counsel be awarded fees and expenses as set forth in this order.

New Orleans, Louisiana, this 27th day of July, 2015.

/s/ Sarah S. Vance

SARAH S. VANCE

UNITED STATES DISTRICT **[*62]** JUDGE
